GRAY'S INN STUDENT LAW JOURNAL

VOLUME 12

Association of Gray's Inn Students

LONDON • September 2020

Editorial Board 2019-2020

Contents

In *ex p Smedley 1985 QB 657* Sir John Donaldson MR said "It [...] behoves the courts to be ever sensitive to the paramount need to refrain from trespassing upon the province of Parliament or, so far as this can be avoided, even appearing to do so." Have the Courts always followed that advice?

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1. Introduction

The comments of Sir John Donaldson MR in *Smedley* on the relationship between the Courts and Parliament have enjoyed a quiet popularity in the past thirty years, having been favourably cited by in several High Court and Court of Appeal judgments.[1] Indeed, Donaldson MR's advice sits comfortably within the established UK constitutional principles popularised by A.V. Dicey and given recent support by the Supreme Court, notably in *Miller and Another v Secretary of State for Exiting the European Union*.[2] However, notwithstanding its easy applicability in legal settings, Donaldson MR's advice appears incongruous when read alongside recent commentaries on the shifting relationship between the Courts and Parliament. Admittedly, such commentaries incorporate a broad spectrum of opinion, from the opprobrious remarks of Lord Sumption on the encroachment of law into political matters,[3] to academic debates over the effect of the Human Rights Act 1998 (HRA) on the sovereignty of Parliament.[4] In any event, with Courts willing to be both 'expansive and [...] self-limiting depending on the nature of the task in hand', there are

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[1] See *R (Wheeler) v Office of the Prime Minister* [2008] EWHC 1409 [47]; *R v Secretary of State for Health and Others, Ex p Imperial Tobacco Ltd and Others* [2002] QB 161, 176, 184 and 189; *Regina v Secretary of State for Foreign and Commonwealth Affairs, Ex parte Rees-Mogg* [1994] QB 552, 561; and *R. (Bradley and Others) v Secretary of State for Work and Pensions* [2009] QB 114 [63].

[2] [2017] UKSC 5 [42-43].

[3] Jonathan Sumption, 'Judicial and Political Decision-Making: The Uncertain Boundary' [2011] JR 16, 301; and Jonathan Sumption, Trials of the State: Law and the Decline of Politics (Profile Books 2019).

[4] For an introduction to which, see Alison L. Young, 'Is Dialogue Working Under The Human Rights Act 1998?' [2011] PL 4, 773.

serious questions as to whether Donaldson MR's advice in *Smedley* has always been followed.[5]

The juxtaposition between the popularity of Donaldson MR's *obiter* and the flexibility of the Courts is the focus of this essay. It aims to assess the hold of Donaldson MR's advice on Courts in England and Wales since *Smedley*. This essay is structured in two parts. The first focuses on *Smedley*, locating it within a fuller context to properly appreciate Donaldson MR's influences and the subsequent favourable treatment that his advice has received. The second section of his essay then turns to address whether the relationship between Parliament and the Courts has in fact shifted over the past three decades, focussing on the recent intervention by Lord Sumption. This essay seeks to show that Donaldson MR's advice in *Smedley* has not always been followed and that the Courts, though respectful of the separation of powers, have slowly begun to demonstrate a greater willingness to become involved in Parliamentary matters.

2. ***Smedley* and its interpretation.**

Donaldson MR's advice in *Smedley* is best understood in the particular context of the case. Here, a British taxpayer sought to challenge the lawfulness of a draft Order in Council (a statutory instrument) that was laid by the UK Treasury to both Houses of Parliament. The Order was to the effect that supplementary payments to the European Economic Community's budget were to be paid from the Treasury; once the draft Order was approved by both Houses, the Treasury could make the payments. This course of action required no statutory legislation, and Mr Smedley argued that a mere draft Order was not enough to satisfy the relevant provisions of the European Communities Act 1972 (ECA). His claim was unsuccessful at the first instance, where Mr Justice Woolf (as he then was) found that the provisions of the ECA were satisfied. Mr Smedley's case was taken to the Court of Appeal but met the same fate as in the High Court. In the Court of Appeal, Donaldson MR ruled, through a straightforward exercise in statutory construction, that the Order in Council as drafted by the Treasury was *intra vires* when read alongside the ECA.[6] Slade LJ applied his own reading of the ECA to reach a similar conclusion (with Lloyd LJ in agreement).[7] Accordingly, the appeal was dismissed.

Notwithstanding the decision of the Court of Appeal in *Smedley*, both Donaldson MR and Slade LJ expressed some reservation about the exercise the Court was engaged upon, for the proposed Order in Council had yet to be decided by Parliament (it was merely a draft).[8]

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[5] Lord Woolf, Sir Jeffrey Jowell QC, Andrew Le Sueur, Catherine Donnelly and Ivan Hare QC, De Smith's Judicial Review (8th Edition, Sweet & Maxwell 2018) [5-069].
[6] *Smedley*, 669.
[7] *Ibid*., 674.
[8] *Smedley*, 669.

However, the Court took the view that it was nevertheless competent to rule on the contents of the draft Order: following the ruling in *Rex. v. Electricity Commissioners, Ex parte London Electricity Joint Committee Co. (1920) Ltd*,[9] Donaldson MR determined that it was not inappropriate, as counsel for the Treasury argued, for the Court to give its opinion on a matter yet to have fully materialised – in the case of a draft Order, for example, the Court's view may be of utility to Parliament in checking how the Order would be interpreted by judges. Indeed, for practical reasons, both Donaldson MR and Slade LJ held that it would be of little use simply dismissing Mr Smedley's application as premature for him to re-submit it once the Order had been passed (by which point the funds authorised by the Order would have passed to the European Economic Community). That an Order in Council is a piece of secondary legislation amenable to some degree of judicial control also weighed on the Court's decision to decide on the draft Order.[10]

The Court of Appeal's decision to judge the lawfulness of the not-yet-approved Order in Council provides the context in which Donaldson MR made his comments on the relationship between Parliament and the Courts. Hence his emphasis on the responsibility of the Courts not to trespass on the province of Parliament and the importance of the separation of powers (subject, of course, to the qualification that Parliament is sovereign). Hence also why Donaldson MR made a point of expressing how it would be a 'breach of […] constitutional conventions' were the Court of Appeal (or any Court) to 'express a view, let alone take any action, concerning this decision to lay this draft Order in Council before Parliament or concerning the wisdom or otherwise of Parliament approving that draft' (and how, conversely, it should not be the case that Parliament should cease debating the draft Order simply because it is being determined by the Courts).[11] The demarcation between the Courts and Parliament was to continue, according to Donaldson MR, even if in *Smedley* the Courts and Parliament were looking at the same issue albeit with different intentions and with due respect to one another's respective role.

Donaldson MR's nuanced, respectful approach to Parliament has, as intimated above, garnered a modest popularity over the years. It proved particularly helpful to the Court of Appeal in *Ex parte Rees-Mogg*, where Lloyd LJ made a point of emphasising that the Court was not challenging (nor being seen to challenge) the legality of Parliamentary affairs; rather, the Court was 'concerned, and concerned solely, with the legality of government actions and

[9] [1924] 1 K.B. 171.

[10] Smedley, 666-667.
[11] Ibid., 666.

intentions' in seeking to ratify the Maastricht Treaty.[12] Donaldson MR's advice in *Smedley* has also been of utility to Courts called upon to examine political matters.[13] It was relied upon by the High Court in the case of *Wheeler*, where the Claimant requested that Parliament be ordered to introduce a referendum on the Treaty of Lisbon 2007 on the grounds that to do otherwise would violate the Claimant's legitimate expectation. Delivering the opinion of the Court, Mr. Justice Richards referenced the comments of Donaldson MR before finding that to order the Prime Minister and Foreign Secretary to introduce legislation would be to order them to act in their role as MPs, which would 'plainly be to trespass impermissibly on the province of Parliament.'[14]

Similarly, Donaldson MR's advice was invoked by the Court of Appeal in *Regina v Secretary of State for Health and Others, Ex p. Imperial Tobacco Ltd and Others*.[15] Here, the Court of Appeal overturned an earlier interim injunction granted by the High Court on behalf of a group of tobacco companies, who successfully argued that the government's intention to introduce an EU Directive banning tobacco advertising and sponsorship was invalid whilst a legal challenge against the Directive was underway in the European Court of Justice. Donaldson MR's comments in *Smedley* were briefly referenced by Lord Woolf MR in his judgment, but it is in the finding of Ward LJ that *Smedley* is invoked most clearly. This occurred twice. The first was when Ward LJ stated that it would be inappropriate to make an order to pre-empt the government from placing legislation before Parliament, for this would not respect the latter's ambition to legislate in a particular area of law.[16] In addition, in *Imperial Tobacco* Ward LJ appeared to take Donaldson MR's comments one stage further, finding that the granting of an interim order would be too much of an interference with the government's political decision to implement the Directive on public health grounds, rather than delay the Directive's introduction pending the decision of the European Court of Justice.[17]

The finding of Ward LJ in *Imperial Tobacco* illustrates an important element of how Donaldson MR's advice has been followed by the Courts, for there is a clear distinction between examining the legality of secondary legislation (as in *Smedley*) and challenging primary legislation passed by Parliament.[18] The Courts have routinely invoked *Smedley* to express their

[12] Regina v The Secretary of State for Foreign and Commonwealth Affairs, Ex parte Rees-Mogg [1994] QB 552, 561.
[13] Hamilton v Al Fayed [2001] 1 AC 395 (HL), 398.
[14] *Wheeler* [47-49].
[15] [2002] QB 161.
[16] *Ibid*., 189.
[17] *Ibid*., 184.
[18] *Bank Mallet v Her Majesty's Treasury (No 2)* [2014] AC 700 (SC), 785.

aversion to prohibiting governments from introducing primary legislation or otherwise preventing Parliament from discussing, amending and voting on laws proposed by the executive.[19] Indeed, in *R (Chester) v Secretary of State for Justice*, the Court of Appeal relied upon Donaldson MR's advice to reject a submission that the Courts could issue advisory opinions on proposed statutory legislation that would, it was claimed, be subordinate to the HRA (to issue an opinion in such circumstances would have been a 'step too far', according to Laws LJ).[20] As Stephen Tromans QC et al have explained, as a 'general constitutional rule', of which Donaldson MR's advice in *Smedley* encapsulates, Courts 'cannot question the legitimacy of an Act of Parliament, require a Bill to be laid before Parliament or forbid an MP from introducing a Bill or defer or delay a Bill.'[21] Although this is not to suggest that the Courts will absolve themselves from scrutiny of policy decisions or determining whether matters fall within the law, the principle of the separation of powers mandates that the Courts excuse themselves, in the words of Donaldson MR, from trespassing on the province of Parliament. As Mustill LJ remarked in *Ex parte Fire Brigades Union*, whilst the courts sometimes have to step in to rectify a misuse of executive power, the boundaries between Parliament the Courts remain and 'are of crucial significance to our private and public lives […] the courts should I believe make sure that they are not overstepped.'[22]

3. A shifting relationship between Parliament and the Courts?

These authorities would therefore suggest that the advice of Donaldson MR in *Smedley* has been followed, that Courts always respect the province of Parliament and support the separation of powers. Yet this argument appears questionable when the focus is turned away from the interpretation of *Smedley* to broader debates about the relationship between Parliament and the Courts. Consider the recent intervention of Lord Sumption, for example. Speaking in 2011 prior to his elevation to the Supreme Court, Lord Sumption chastised UK Courts for encroaching too far into political matters, both through their application of the European Convention on Human Rights but also through their creative application of common law to judicial review applications. He expressed concern that judges were slowly expanding what they regarded as fundamental

[19] As in *R (UNISON) v The Secretary of State for Health* [2010] EWHC 2655 (Admin) [11].

[20] *R (Chester) v Justice Secretary* [2011] 1 WLR 1436, 1448.
[21] Stephen Tromans QC, Justine Thornton and Daniel Stedman Jones, 'Environmental Judicial Review' (*Thomson Reuters Practical Law*, 10 May 2019) <http://www.39essex.com/docs/articles/tromans_and_thornton.pdf> accessed 22 September 2019. For other limits to the Courts' role in judicial review claims, see *De Smith's Judicial Review* [1-035 to 1-037].
[22] *Regina v Secretary of State for the Home Department, Ex Parte Fire Brigades Union and Others* [1995] 2 AC 513, 567-568.

rights (e.g., '…right to fish in tidal waters, the right of political pressure groups to advertise on radio or television…'), the removal of which Courts would not countenance without explicit provision in statute. The effect, according to Lord Sumption, was that Courts have moved 'towards a concept of fundamental law trumping even Parliamentary legislation.'[23] Indeed, Lord Sumption complained that judicial decisions on discretionary powers are often exercises in determining what judges think Parliament ought to have done.[24] He also criticised a tendency by the Courts to regard Parliament as subservient to the executive, singling out a judgment by Lord Steyn in which it was suggested that governments with large majorities were a problem (as Lord Sumption remarked, 'I cannot be the only person who feels uncomfortable about the implicit suggestion that it is the function of the judiciary to correct the outcome of general elections').[25]

The judgments Lord Sumption delivered following his elevation to the Supreme Court in 2012 remain consonant with his extra-judicial comments: he continued to defer to the role of Parliament on various matters – finding, for example, that it had the power to exclude the Investigatory Powers Tribunal from judicial review,[26] and declining to rule in favour of assisted suicide under Article 8 of the European Convention on Human Rights on the grounds that it was a matter for MPs to decide.[27] His recent contributions to the BBC's series of Reith Lectures, delivered after he retired from the Supreme Court in 2018, continue in a similar vein.[28] That his comments have triggered rebuttals and challenges is of no surprise, not least given the significance attached to human rights legislation by lawyers, campaigners and some politicians. Indeed, it is hard not to be struck by the merits of Helena Kennedy QC's point that Lord Sumption places too great a faith in parliamentary democracy, that his willingness to avoid all forms of judicial activism risks surrendering important legal and constitutional principles to a Parliament only imperfectly representative of UK society.[29] Likewise, there is much to be said for Nicholas Reed Langen's argument that for the Courts to push important legal matters onto Parliament

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[23] Sumption, 'Judicial and Political Decision-Making', 304-305.

[24] *Ibid*., 307.
[25] *Ibid*., 311-312. Lord Steyn's judgment was made in *Jackson v Attorney General* [2006] 1 AC 262; I return to this below.
[26] *R (Privacy International) v Investigatory Powers Tribunal and Others* [2019] UKSC 22 [207-211].
[27] *R (Nicklinson and Lamb) v Ministry of Justice, R (AM) v Director of Public Prosecutions* [2014] UKSC 38 [230-235].
[28] See Sumption, *Trials of the State*.
[29] Helena Kennedy and Jonathan Sumption, 'Helena Kennedy vs Jonathan Sumption: Are Our Human Rights Laws Working?' (*Prospect*, 12 July 2019) <https://www.prospectmagazine.co.uk/magazine/helena-kennedy-vs- jonathan-sumption-are-our-human-rights-laws-working> accessed 23 September 2019.

(e.g., assisted suicide) fails to provide much by way of a resolution, and it is pretty extraordinary for a former Supreme Court Justice to suggest breaking the law rather than reforming it (as Lord Sumption did in his first Reith Lecture in respect of the law on assisted suicide).[30]

Nevertheless, however one feels about Lord Sumption's remarks, in the debate that has followed his contribution to the Reith Lectures, it appears to be impliedly accepted that he is correct to claim that the Courts have trespassed onto the province of Parliament (for good or ill) over the past couple of decades. Indeed, the willingness of the Courts to trespass on Parliamentary matters is made explicit in the judgment of Lord Steyn in *Jackson*. Here, in a case about the use of the Parliament Act to pass legislation, Lord Steyn made extraordinary *obiter* remarks about how Courts should be willing to override Parliament if the latter chose to undermine statutes of constitutional significance such as the Scotland Act 1998 or the HRA. An attempt to abolish judicial review or the 'ordinary role of the Courts' should, Lord Steyn also remarked, be considered by the Supreme Court to determine whether there are 'constitutional fundamental[s]' that 'even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish.'[31]

Admittedly, Lord Steyn's willingness to overrule Parliament marks him out as something of an outlier. Nevertheless, there is further evidence to support Lord Sumption's point that the Courts are becoming more willing to trespass onto Parliamentary matters, albeit gradually and with great delicacy. For example, note the way in which the Supreme Court has sought to interpret the non-justiciable 'proceedings' of Parliament in narrower and narrower ways (thereby opening up new elements of Parliamentary procedure for it to judge upon).[32] The case of *Owens v Owens* may also be read as a gentle nudge, from the Supreme Court to Parliament, that the law on divorce required reform, not least the concluding if under-stated paragraph of Lord Wilson's majority opinion ('Parliament may wish to consider whether to replace a law which denies to Mrs Owens any present entitlement to a divorce in the above circumstances').[33] Yet is

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[30] Nicholas Reed Langen, 'Jonathan Sumption's Reith Lectures: Law's Expanding Empire' (*The Justice Gap*, 28 May 2019) <https://www.thejusticegap.com/jonathan-sumptions-reith-lectures-laws-expanding-empire/>accessed 23 September 2019.
[31] *Jackson* [100-102]. On the elevation of certain statutes to the status of 'constitutional', see also the judgment of Laws LJ in *Thoburn v Sunderland City Council, Hunt v London Borough of Hackney, Harman and Others v Cornwall County Council, Collins v London Borough of Sutton* [2002] EWHC 195 Admin [62-67].
[32] See *R v Chaytor* [2010] UKSC 52; *Miller v The Prime Minister* [62-69].
[33] *Owens v Owens* [2018] UKSC 41 [45].

perhaps the judgments in *Nicklinson* that offer one of the clearest illustrations of the new trend for the Supreme Court to tread onto the province of Parliament. In *Nicklinson*, which concerned assisted suicide and Article 8 of the European Convention, whilst the Supreme Court declined to declare the Suicide Act 1961 as incompatible with the Convention, determining the matter one for Parliament, two of the Justices dissented to argue that the Convention was breached (Lady Hale and Lord Kerr). Most tellingly, however, even those in the majority expressed the view that a failure to act by Parliament could warrant future intervention. For instance, Lord Neuberger commented that there was a 'real prospect' that a further application for a declaration of incompatibility may be successfully made in the future should the issue not be 'satisfactorily addressed' by Parliament.[34] A not dissimilar point was made by Lords Mance and Wilson, with the latter remarking that 'whilst the conclusion of [fresh] proceedings can in no way be prejudged, there is a real prospect of their success' should Parliament's response prove insufficient.[35]

Cases like *Nicklinson* speak to what academics have identified as the evolving relationship between the Courts and Parliament since the introduction of the HRA, a relationship that is less deferential and more dialogic than it formerly was. Granted, the Courts still defer to the Executive in matters it regards as beyond its field of competence (e.g., issues of national security),[36] and it is a fair to say that some Courts (e.g., the Supreme Court) may not always approach Parliament in the same way that the High Court or Court of Appeal will. But it is also clear that, broadly speaking, the Courts have become emboldened in the last thirty years to encroach more willingly onto Parliamentary matters, albeit with tact and in such a way as to avoid judicial monologue.[37] This new dialogue, whilst not always perfectly balanced,[38] does recognise and facilitate judicial input (e.g., through declarations of incompatibility), even if the latter is subject to the supremacy of Parliament.[39] It also has the effect of rendering Donaldson MR's advice in *Smedley* somewhat *passé*, for, in as much as broad conclusions can be drawn from

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[34] *Nicklinson*, [118].
[35] *Ibid*., [191 and 202].
[36] On this, see Chris Monaghan, 'Judicial Discretion, Parliament and Executive Accountability in the Twenty- First Century: *R (Lord Carlile of Berriew and Others) v Secretary of State for the Home Department*' [2013] *JR* 18, 388.
[37] On how the HRA served as a locus for debates about Parliament and the Courts in *Nicklinson*, see Mark Elliott, 'The Right to Die: Deference, Dialogue and the Division of Constitutional Authority' (*Public Law for Everyone*, 26 June 2014) <https://publiclawforeveryone.com/2014/06/26/the-right-to-die-deference-dialogue-and-constitutional-authority/> accessed 26 September 2019.
[38] See Young, 'Is Dialogue Working Under the Human Rights Act?'.
[39] Fergal F. Davis, 'Parliamentary Supremacy and the Reinvigoration of Institutional Dialogue in the UK' [2014] PA 67, 137.

the diversity of judgments from the English and Welsh Courts over the past thirty years, the general trend has been for Courts to show a greater willingness to trespass on the province of Parliament, albeit with due respect to the separation of powers and to parliamentary sovereignty.

A recent decision by the Supreme Court would suggest that this trend does not appear to be slowing down. In *R (on the application of Miller) v The Prime Minister, Cherry and Others v The Advocate General for Scotland*,[40] the Supreme Court unanimously held that the Prime Minister gave unlawful advice to Her Majesty on the prorogation of Parliament – a very prominent political matter, and one which the High Court had previously refused to entertain. The Supreme Court took a different view, however. That it made its finding is quite remarkable, as is also that it was praised by Lord Sumption (in a brief column in *The Times*, he argued that the Court rightly put the issue of Brexit back to Parliament, where he hoped compromise would prevail and radical polarisation avoided).[41] But what is more interesting for present purposes is *how* the Supreme Court reached its judgment, for a reading of it shows judges willing to trespass on the province of Parliament yet present this as a normal, almost mundane function of the Courts (in the words of Mark Elliott, the judgment was both 'rooted in orthodoxy *and* path-breaking').[42]

For example, the judgment is replete with references to the importance of the separation of powers and for the need for the Courts to respect the operation of Parliament. Yet the Justices mobilise this point to justify their intervention in a political matter and a stretching of the concept of Parliamentary sovereignty to prohibit unreasonable checks on Parliamentary accountability: as Lady Hale and Lord Reed state in the majority opinion, the Court is only performing its legal function by determining the legality of the Executive's actions, and it cannot 'shirk that responsibility' merely because the matter in question is political.[43] In any case, the

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[40] [2019] UKSC 41.

[41] See Lord Sumption, 'Supreme Court Rule Is The Natural Result of Boris Johnson's Constitutional Vandalism' (*The Times*, 24 September 2019) <https://www.thetimes.co.uk/article/supreme-court-ruling-is-the-natural-result- of-boris-johnson-s-constitutional-vandalism> accessed 29 September 2019. C.f., Sumption's comments on how Courts are an inappropriate means of solving political disagreements ('…law […] is a poor instrument for achieving accommodation between the opposing interests and sentiments of the population at large') in Sumption, 'Judicial and Political Decision-Making', 312 and *passim*.

[42] The italics are Elliott's own. Mark Elliott, 'The Supreme Court's Judgement in Cherry/Miller (No 2): A New Approach to Constitutional Adjudication?' (*Public Law For Everyone*, 24 September 2019) <https://publiclawforeveryone.com/2019/09/24/the-supreme-courts-judgment-in-cherry-miller-no-2-a-new- approach-to-constitutional-adjudication/> accessed 29 September 2019.

[43] *Miller v The Prime Minister* [34 and 39].

Justices point out, all constitutional issues are political but that has not stopped theCourts from ruling on them.[44] That Parliament voted as recently as 2011 to leave the power to prorogue untouched is mentioned but only briefly in the Court's judgment.[45] Rather, it effects something of a sleight-of-hand by stressing the normality of what the Court is doing in reviewing the power of the Executive, in giving effect to the separation of powers and in upholding the sovereignty of Parliament:

> *…by ensuring that the Government does not use the power of prorogation unlawfully with the effect of preventing Parliament from carrying out its proper functions, the court will be giving effect to the separation of powers […] An unlimited power of prorogation would therefore be incompatible with the legal principle of Parliamentary sovereignty*.[46]

The Supreme Court's judgment in *Miller v The Prime Minister* accords with the trend identified above, of growing encroachment onto Parliament by the Courts, undertaken slowly and with due reference to the importance of the separation of powers and the supremacy of Parliament. Whether this trend will intensify or be halted in the future remains to be seen: at the time of writing, following the decision in *Miller v The Prime Minister*, there are already calls for judges to be politically appointed, for the powers of the Supreme Court to be curbed and for the sovereignty of Parliament to be restated.[47] That such proposals have been articulated by those politicians who have lost the most from the Supreme Court's decision does not detract from the new political context in which Court judgments will be read. It has already been suggested by one academic that the unwritten British constitution is ill-equipped to handle Brexit.[48] It remains to be seen what effect (if any) Brexit will have on the trend for Courts to become more involved in Parliamentary matters.

4. Conclusion

Positing *Miller v The Prime Minister* at the end of this essay is not to suggest that the former marks the culmination of the trend of Courts being more willing to trespass on the provinceof

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[44] *Ibid*. [31].
[45] The reference to the 2011 legislation can be found at *ibid*. [5].
[46] *Ibid*. [34 and 42].
[47] See the comments of the Attorney General, Geoffrey Cox QC, in *Hansard* HC, vol. 664, col. 665-666 (25 September 2019).; and the Prime Minister's comments in Edward Malnick, 'Boris Johnson Interview: 'Surrender Act? More Like The Abject Capitulation Act'' (*The Sunday Telegraph*, 29 September 2019) <https://www.telegraph.co.uk/politics/2019/09/28/boris-johnson-interview-surrender-act-like-abject- capitulation/> accessed 29 September 2019.
[48] See Sionaidh Douglas-Scott, 'Brexit, Article 50 and the Contested British Constitution' [2016] MLR 79, 1019.

Parliament. Rather, this essay advocates for a reading of *Miller v The Prime Minister* that locates it within a broader but gradual evolution in the relationship between Parliament and theCourts. The advice of Donaldson MR in *Smedley* appears increasingly of its day when reviewed against the decisions of the Courts over the past thirty years. Granted, *Smedley* still has a modest hold over the Courts, with Donaldson MR's comments still invoked in cases where the judges are asked to tread too heavily on the distinction between Parliament and the Courts. Yet when read from the perspective of 2019, Donaldson MR's advice appears overly cautious (not least the suggestion that the Courts should not just refrain from trespassing on Parliament but be sure not to be *seen* to be trespassing). Courts are far less concerned about appearing to trespass on the province of Parliament: indeed, the provisions of the HRA allow for judges to declare Acts of Parliament as incompatible with the European Convention on Human Rights. Yet this essay has shown that Courts are also now much more willing to trespass on Parliamentary matters, particularly when judges feel that matters of constitutional importance are in jeopardy.

Intellectual Property Issues Relating to Transfer of 3D Print Files

Dr Richard Twycross-Lewis*

1. Introduction

Three-dimensional (3D) printing, also known as additive manufacturing, is a method of printing functional and non-functional 3D objects from digital files.[1] As a technology, 3D printing is not new.[2] The advent of low cost, domestic 3D printers, in conjunction with the increased use across a range of industries has led to of the application of 3D printing both at home[3] and in multi-scale manufacturing of a variety of engineering outputs across a range of industries that has become ubiquitous in every-day life.[4] Given the pace of technological change and nature of digital technology, the transfer of data from one user to another has implications for infringement of intellectual property (IP) rights.[5]

The issue of IP rights infringement and transfer of digital files was first highlighted in 2001 during the Napster case[6] where the question of whether copyright infringement occurred by downloading files from a file sharing service. This case essentially acted as a precursor to IP right protection in 3D printer files as websites have, recently, given access to files containing templates for download to computer for 3D printing.[7] The aim of this dissertation is to critically evaluate IP issues, particularly infringement of copyright relating to the transfer of files by drawing on case

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[1] <https://www.theengineer.co.uk/issues/24-may-2010/the-rise-of-additive-manufacturing/> accessed 28 November 2017.

[2] US Patent 4,041,476.

[3] Michael Weinburg, *What's the deal with copyright and 3D printing. Institute for Emerging Innovation* (2013) <https://www.publicknowledge.org/files/What's%20the%20Deal%20with%20Copyright_%20Final%20version2.pdf> accessed 28 November 2017.

[4] Diusha Mendis, *'The Clone Wars: episode 1 – the rise of 3D printing and its implications for intellectual property law - learning lessons from the past?'* [2013] EIPR 155.

[5] E. Barraclough, 'A five-step strategy for the 2D revolution' [Nov. 2011] Managing Intellectual Property 24, 24.

[6] *A&M Records v Napster Inc.* [2001] ECL Rep. 1(2), 6-7.

[7] Marx Mimmler, '3D printing, the internet and patent law – A history repeating?' (*IX Congresso Internet, Derecho y Politico,* 2013). <http://edcp.uoc.edu/symposia/lang/es/idp2013/programme/mimler/> Big Data: Retos y Oportunidades. Barcelona 25 – 26 de Junio, 2013.

law from cases concerning infringement of IP where there has been some sort of file or data transfer. Part 2 will cover a brief outline of the technology and type of data file used for transfer. Part 3 will discuss copyright and design law in the context of infringement of literary and artistic works with respect to technical files. Part 4 will look at the relationship between transfer and infringement of copyright and design in artistic and literary works; copyright and transmission of data and infringement through ownership.

2. 3D printer technology

2.1. Brief overview of 3D printer technology

3D printing is a process of creating physical objects from 3D digital files that have been created in Computer Aided Design (CAD) software[8]. As a process of manufacturing 3D objects, applications range from the food industry, biomedicine, prosthetics and orthotics, and more recently is now being used in to manufacture devices for use in the International Space Station.[9] 3D printing is the lay term for 'additive manufacturing' and is defined as "the process of joining materials to make objects from 3D model data, as opposed to subtractive manufacturing methodologies".[10] Data stored as 3D printer data files (3DPFs) can be generated by CAD software, photographs or 3D modelling software such as finite element analysis files with the final physical objects not limited to single piece objects but includes objects with moving parts.[11] Once the 3DPF is accessed by the computer, the physical object is manufactured by accumulation of material sprayed in layers. The material is powder coated, and the powder selectively binds during ink-jet printing. Any powder that has not bound to the 3D printed object during the additive process is removed, the remaining form thereby forming the 3D object.[12]

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[8] <https://www.autodesk.co.uk/solutions/3d-printing?referrer=%2Fsolutions%2F3d-printing> accessed 19 December 2017.
[9] Elena Magriñá. '3D printing regulation: should governments intervene' (2014) <http://inlinepolicy.com/2014/3d-printing-regulation-to-intervene-or-not-to-intervene/> accessed 4 February 2018.
[10] ISO / ASTM52901 – 16. American Society for Testing and Materials International <http://www.astm.org/cgi-bin/resolver.cgi?ISOASTM52901> accessed 19 December 2017.
[11] Michael Weinberg 'It Will Be Awesome If They Don't Screw It Up: 3D Printing, Intellectual Property, and the Fight Over the Next Great Disruptive Technology'(*Public Knowledge*, November 2010) <https://www.publicknowledge.org/blog/it-will-be-awesome-if-they-dont-screw-it-up-3d-printing/> accessed 19 December 2017.
[12] For a brief description of of 3D printing methods and materials: Eli Greenbaum, 'Three-Dimensional Printing and Open Source Hardware' JIPEM 2013 (2) 271; A description is also given in 'Layer by layer: How 3D Printers Work' (*The Economist*, April 2012); <www.economist.com/node/21552903> accessed 11 January 2018. See also *Ormco Corp. v. Align Tech., Inc.,* 609 F. Supp. 2d 1057 (C.D. Cal. 2009).

2.2. Domestic 3D printing

With advances in technology and lowered manufacture costs, 3D printing has moved from being a solely industrial application and into the domestic market. 3D printers can now be bought for as low as under $200[13] (£149.68)[14] and it was estimated that by 2017, 70% of all 3D printers would be sold to domestic users.[15] Economic worth of the domestic 3D printing market was calculated to grow to $12.8B by 2018 with further growth in worldwide revenue to $21B forecast by 2020.[16] In 2013, Dr Greg Gibbons of Warwick University stated that 3D printing is moving to high street photo & print shops, thereby enabling customers can print their own artwork; jewellery or replacement parts to household appliances.[17] While still not yet a ubiquitous technology in the home, the domestic user share of the 3D print market is clearly growing, therefore, with increased domestic users, there is an increased likelihood of IP rights infringement.

3. Copyright law

Copyright subsists automatically for the lift time of, and 70 years after death, the author of a work[18] where the work is original[19], that is, the author has affected skill, labour, judgement and effort in the creation of an idea[20] and the author has fixed the expression of that idea.[21] Copyright

[13] 'Tom's Guide: Best 3D printers 2017' <https://www.tomsguide.com/us/best-3d-printers,review-2236.html> accessed 19 December 2017. High street supermarket Aldi opened pre-orders for domestic 3D printers at a price of £299 <https://www.aldi.co.uk/3d-printer>.
[14] <http://www.xe.com> currency conversion of $1.336/£1 correct as of 19 December 2017.
[15] <https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Technology-Media-Telecommunications/gx-tmt-pred15-3d-printing-revolution.pdf> accessed 19 December 2017.
[16] Columbus L. 'Roundup of 3D Printing Market Forecasts And Estimates' (*Forbes Magazine*, 2015) <https://www.forbes.com/sites/louiscolumbus/2015/03/31/2015-roundup-of-3d-printing-market-forecasts-and-estimates/#482745641b30>.
[17] Conal Urquhart '3D printing: coming to a high street near you' (*Guardian* 11 May 2013) https://www.theguardian.com/technology/2013/may/11/3d-printing-coming-high-street accessed 22nd December 2017.
[18] Copyright, Design & Patents Act 1988 s12(2).
[19] CDPA 1988 s1(1).
[20] Andreas Rahmatian, 'Originality in UK Copyright Law: The Old "Skill and Labour" Doctrine Under Pressure' IIC (2013).
[21] *Ibid.*

law exists to protect, inter alia, rights relating to the creation of literary and artistic work[22] where a literary work:

> "means any work, other than a dramatic or musical work, which is written, spoken or sung, and accordingly includes—
>
> (a) a table or compilation **[** other than a database **]** [1] , **[...]**[2]
>
> (b) a computer program **[** , **[...]**[3] **]** [2]
>
> **[** (c) preparatory design material for a computer program; **[** and **]** [4] **]** [2]
>
> **[** (d) a database; **]** [5]**.**"[23]

and design work[24], where a design is defined as "the shape or configuration (whether internal or external) of the whole or part of an article".[25] Copying is, therefore, an infringing act where "Copying in relation to a literary, dramatic, musical or artistic work means reproducing the work in any material form"[26], or, in relation to 3D works "copying includes the making of a copy in three dimensions of a two-dimensional work and the making of a copy in two dimensions of a three-dimensional work."[27] Additionally, and importantly, secondary infringement may occur in copying:

> "(4) Where in any proceedings the question arises whether an article is an infringing copy and it is shown—
>
> (a) that the article is a copy of the work, and
>
> (b) that copyright subsists in the work or has subsisted at any time,
>
> it shall be presumed until the contrary is proved that the article was made at a time when copyright subsisted in the work."[28]

This presents a conundrum in relation to the sharing, downloading and making of 3D objects from 3DPFs, although, there are exceptions to this rule. Under Section 4: Infringement, of the Intellectual Property Act, 2014 and Section 244A(a) of the CDPA, so long as those activities of sharing, downloading and copying are performed by individuals for non-commercial or teaching

[22] CDPA 1988 s1(1)(a).
[23] CDPA 1988 s3(1)(a-d).
[24] CDPA 1988 s213.
[25] CDPA 1988 s213(2).
[26] CDPA 1988 s17(2).
[27] CDPA 1988 s17(3).
[28] CDPA 1988 s27(4)(a)(b).

use then the copying act is not an infringement.[29] Copyright is infringed under section 16(2) of the act where "a person who without the licence of the copyright owner."[30] Making and drawing of a copyright work is, therefore, a principle tort.[31] However, defence of copyright can also be sought under Section 51 of the CDPA whereby copyright is not infringed when:

> "(1) It is not an infringement of any copyright in a design document or model recording or embodying a design for anything other than an artistic work or a typeface to make an article to the design or to copy an article made to the design.
> (2) Nor is it an infringement of the copyright to issue to the public, or include in a film **[** or communicate to the public **]**[1] , anything the making of which was, by virtue of subsection (1), not an infringement of that copyright."[32]

What this essentially means is that a work can be copied without infringing on copyright so long as it is not an artistic work.[33]

4. 3D printing & copyright law

4.1. 3D print files as literary & artistic works

Provision of both CAD and 3DPFs may be enough for copyright infringement of a literary work if the file used to make the physical work is made public, i.e. through a public forum such as a website. The case of *Anacon Corp Ltd v Environmental Research Technology Ltd*[34] is a test case for whether a literary work can also be considered an artistic work. Anacon claimed Environmental Research Technology infringed their copyright by indirectly copying their circuit diagrams by compiling a list of circuit components. While Anacon circuit diagrams were not copied directly, copying of a net list of components that made up the Anacon circuit diagram was judged to amount to copyright infringement of both a literary work[35] and an artistic work[36], even though

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[29] Intellectual Property Act, 2014 s4 & CDPA 1988 s244A(a)(b)(c)(i)(ii).
[30] CDPA 1988 s16(2).
[31] <https://euipo.europa.eu/ohimportal/en/web/observatory/faqs-on-copyright-uk#4>.
[32] CDPA 1988 s51(1)(2).
[33] 'Copyright protection - were the costume/props in question (the stormtrooper helmets and armour) works of artistic craftsmanship' (The Solicitors Group) <http://www.thesolicitorsgroup.com/Downloads/Articles/04Mar2010/Copyright-CopyrightProtection.pdf>.
[34] *Anacon Corp Ltd v Environmental Research Technology Ltd* [1994] FSR 659.
[35] CDPA 1988 s9.
[36] CDPA 1988 s16 & s17.

the resulting circuit diagram constructed from the net list was altogether different to the original. Jacob J, therefore, ruled that "creation of the plaintiffs' circuit diagram had involved sufficient original work to create a copyright work"; "circuit diagrams are artistic works" and that:

> "The alleged infringements did not reproduce a substantial part of the circuit diagrams as artistic works. The essential nature of a graphic work was that it was a thing to be looked at. What mattered was what was visually significant. The alleged infringements simply did not look like the artistic works."[37]

To rule that circuit diagrams were artistic works, Jacob J drew upon the case of *Interlego AG v Tyco Industries Inc.*, where it was held that:

> "Copyright in engineering drawings could not be obtained merely by reproducing earlier drawings with alterations to the instructions for the manufacturing process written thereon, since those alterations were not alterations to the artistic nature of the drawing, however important they were to the finished product derived from that drawing."[38]

Further, Jacob J also ruled that Anacon's circuit diagram was a literary work by ruling "Provided a work was written down and contained information which could be read by someone, as opposed to being appreciated simply with the eye, it was a literary work" and that "When the first defendant made its net list it had reproduced the information which was the literary work contained in the diagram"[39] by citing *Rose Plastics GmBH v William Beckett & Co (Plastics)*, in so far that Whitford J ruled that where there is a substantial difference made from a copied work, copyright cannot be protected.[40] Contrary to the Anacon case, in *Autospin (Oil Seals) Ltd v Beehive Spinning (A Firm)*[41]Laddie J dismissed claims of copyright infringement by former employees of Autospin, who manufactured their own oil seals using similar design documents to the Autospin oil seal, although he stated, obiter dictum, that:

> "since a literary work could be infringed by reproducing it in any material form, there was no reason why it should not be an infringement to take a compilation of dimensions and reproduce it in the form of a three dimensional article which embodied those dimensions. There was, however, authority to the contrary, albeit obiter in one case."[42]

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[37] *Anacon Corp Ltd v Environmental Research Technology Ltd* [1994] FSR 659.
[38] *Interlego AG v Tyco Industries Inc* [1989] PC (Hong Kong) AC 217.
[39] *Anacon Ltd v Environmental Technology Ltd* [1994] FSR 660.
[40] *Rose Plastics GmBH v William Beckett & Co (Plastics)* [1987] 1 FSR 113.
[41] *Autospin (Oil Seals) Ltd v Beehive Spinning (A Firm)* [1995] RPC 683.
[42] *Ibid.*

The contrary authority being that three-dimensional design files, or engineering drawings, can be protected.[43]

It has also been argued that 3DPF's should be protected as literary works in the same way that computer software is in so far that 3DPFs contains specific series of instructions which must be performed for the file to execute.[44] In *Electronic Techniques (Anglia) Ltd. v Critchley Components Ltd.*[45] Laddie J upheld the substantive "copying of the shape and configuration of technical data and circuit diagrams" had led to infringement of copyright under the CDPA, therefore, ""literary work" in the Act covers much more than works of literature."[46] However, Greenbaum contests this idea in so far that copyright protection fails for "utilitarian objects" and that protection exists "only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article."[47] This, therefore, suggests copyright is only useful in the protection of 3D printed work when they fall under the category of artistic works within the CDPA. Additionally, 3DPFs are created using either OBJ or STL files, which describe the external surface of the object using a mesh type structure, similar to meshed finite element analysis wireframes[48]. In the case of *Ormco Corp v Align Tech Inc*, it was determined that Align Tech copied technical aspects of the files used to recreate 3D printed orthodontic braces which not only amounted to copyright infringement but also infringement of 4 US patents. As such, STL files are "akin to engineering or technical drawings in that they contain data that represent the contours of a specific object, but do not provide instructions to a three-dimensional printer regarding how that object is to be constructed".[49]

In *Lucasfilm Ltd v Ainsworth*, damages were sought for copyright infringement in the making and selling of a Star Wars "Stormtrooper" helmet.[50] Mann J ruled that as the primary purpose of the Storm trooper helmet was utilitarian it was, therefore, a sculpture: "It is not that it lacks artistic merit; it lacks artistic purpose."[51] This afforded the defendant defence under Section 51

[43] *Interlego AG v Tyco Industries [1989] PC (Hong Kong)* AC 217.
[44] Diusha Mendis, 'The Clone Wars: episode 1 – the rise of 3D printing and its implications for intellectual property law - learning lessons from the past?' EIPR 2013.
[45] Electronic Techniques (Anglia) Ltd v Critchley Components Ltd [1977] FSR 401.
[46] *Ibid.*
[47] Eli Greenbaum, 'Three-Dimensional Printing and Open Source Hardware' JIPEM 2013 (2) 274.
[48] <http://ss.whiteclouds.com/3dpedia-index/file-types-used-3d-printing>.
[49] *Ormco Corp v Align Techs Inc* [2009] 609 F. Supp. 2d 1057, 1071.
[50] *Lucasfilm Ltd v Ainsworth* [2011] UKSC 39.
[51] *Ibid.*

& 52 of the CDPA[52] in that copyright is not infringed when a copy is made of a design of anything other than an artistic work. This has implications for infringing of design rights in 3D printing when it comes to the production of spare parts. Typically, spare parts have a technical function and are not normally afforded copyright, or design right protection due to the 'must fit' exclusion rule.[53] Similarly, in *Mackie Designs Incorporated v Behringer Specialised Studio Equipment (U.K.) Ltd and Ors*, [54] Pumfrey J ruled that defence under s51 of the CDPA was right as Mackie, being neither based in nor citizens of the European Union, could not claim copyright infringement of their circuit boards.[55]

4.2. 3D printing and design rights

Design Rights are granted to any design whereby a design is not commonplace[56] and does not perform a technical function[57]. Importantly, design rights do not subsist until the design has been expressed as a physical object in conjunction with the design document from where the design arises from.[58] However, some designs are not afforded protection. Designs which are registered under the Registered Designs Act 1949 are protected where the design may be the "whole or part of a product"[59] and where a product is defined as "any industrial or handicraft item; and, in particular, includes packaging, get-up, graphic symbols, typographic type- faces and parts intended to be assembled into a complex product"[60]. However, design parts that are manufactured by 3D printing and are included into complex assemblies are not afforded protection if they are not visible during ordinary use[61]. For an unregistered design, the 'must fit exclusion' states a design which performs a technical function, or where a design is made specifically to fit with other components, is not granted protection.[62] This was the case in *Dyson Ltd v Qualtex*[63], where it was ruled that Qualtex had copied Dyson's design for a handle on it's vacuum cleaner. Jacob J stated plainly "Those who wish to make spares during the period of

[52] CDPA 1988 s51 & s52.
[53] EU Design Regulation Art 8(2).
[54] *Mackie Designs Incorporated v Behringer Specialised Studio Equipment (UK) Ltd and Ors* [2000] ECDR, 445.
[55] *Ibid*., at 454.
[56] CDPA 1988 s213(4).
[57] Registered Designs Act 1949 s1C(1).
[58] CPDA 1988 s213(6).
[59] RDA 1949, s1(2).
[60] RDA 1949 s1(3).
[61] David Musker, 'Hidden Meaning? UK perspectives on Invisible in Use Designs' (2003) 25 450-456.
[62] CDPA 1988 s213(3)(b)(ii).
[63] *Dyson Ltd v Qualtex (UK) Ltd* [2006] EWCA 166; RCP 31.

design right must design their own spares and cannot just copy every detail of the OEM's part"[64]. However, where a user 3D prints spare parts – for commercial purposes or otherwise – that fall within the 'must-fit exclusion' and are of mundane design, in that the parts are commonplace, then it is likely that design rights subsist[65].

Bradshaw also states that the 'must-fit' exclusion would also exist for mobile phone accessories[66]. However, there have been cases of infringement from small & medium enterprises (SMEs) who have fallen foul of the intellectual property law by using 3D printers. For example, Fernando Sosa produced a replica "Iron Throne", a prop from the TV show "Game of Thrones" which was to function as a decorative iPhone docking station and was to be sold through his online business nuPROTO.com[67]. Sosa was served a cease and desist letter by HBO which stated:

> "While we appreciate the enthusiasm for the Series that appears to have inspired your creation of this device, we also are concerned that your iron throne dock will infringe on HBO's copyright in the Iron Throne."[68]

Subsequently, Sosa agreed to remove the replica from the website and refund all consumers who had purchased it online[69]. As a point of observation, it is interesting to note that HBO's cease and desist letter was based on infringement of copyright and not design right, possibly given the differing duration of protection between the sets of rights. As such, there was no court case associated with Sosa's activities and so this point was not contested.

4.3. Copyright & transmission of data

Issues surrounding copyright infringement during the transmission of data between networks is far from straightforward. The case of *A&M Records Inc v Napster Inc* is probably the most high-

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[64] *Ibid.*
[65] Simon Bradshaw, Adrian Bowyer, Patrick Haufe, The intellectual property implications of low-cost 3D printing' (2010) SCRIPTed.
[66] *Ibid.*
[67] Paul Banwatt, 'HBO Blocks "Game of Thrones' 3D Printed Iron iPhone Throne' <https://lawitm.com/hbo-blocks-game-of-thrones-3d-printed-iron-iphone-throne/> accessed 9th March 2018.
[68] *Ibid.*
[69] <https://www.bloomberg.com/news/articles/2013-08-13/3-d-printing-stirs-copyright-clash-on-homemade-iphone-gear-tech> accessed 21 December 2017.

profile case regarding infringement by direct downloading of copyright material online[70]. In 1999, Napster Inc. enabled download of digital music files from a centralized online server. Whilst the service was ordered to shut down as downloading material from a centralized server constituted copyright infringement on the basis that users were not ignorant to the infringing act[71], there is discussion on whether transfer of copyright material by downloading for private use is covered by the InfoSoc Directive Art 5(2)(b).[72] In response to the *Napster* decision, internet based file sharing services have moved from centralized servers to decentralized servers such as Gnutella, FastTrack and, now more commonly, BitTorrent.[73]

However, in *EMI Records (Ireland) Ltd v UPC Communications Ireland Ltd*, while Charleton J agreed with the evidence presented by EMI that copyright infringement occurred on UPC Communications servers by 3rd party downloading of copyright material, the facility by which to download material by peer-to-peer file sharing was not in itself an infringing act[74]. While Directive 2001/29 Art. 8 requires EU member states to grant injunctions against service providers that allow for copyright material to be downloaded, it is generally up to Member States to decide whether or not to pursue such action. Charleton J ruled that:

> "Authority to the effect that an injunction could be granted requiring an internet service provider to block its users' access to a website which facilitated music piracy had been decided without the benefit of full argument and was wrong."[75]

Additionally, and contrary to the *Napster* case, under section 40(4) of the Copyright and Related Acts 2000 (Ireland), provision of copyright material by an internet service provider that could be freely accessed by 3rd party users were not thought to constitute as to providing permission to download, and therefore, infringe[76].

A recent case in the United States has looked at the limit of jurisdiction in the case of copyright protection and illegal file transmission. In *ClearCorrect Operating LLC v International*

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[70] Colin Nasir. *Taming the file sharing beast – legal and technological solutions to the problem of copyright infringement over the internet. Part 1*. (2005) Entertainment Law Review.
[71] *A&M Records v Napster Inc* 239 F. 3d. 1004 (2001) (9th Cir (US)).
[72] Bernard Justin Jütte, 'Co-existing digital exploitation for creative content and the private use exemption' (2016) Int J Info Law Tech.
[73] *Ibid.*
[74] *EMI Records (Ireland) v UPC Communications Ireland Ltd* [2010] IEHC 377.
[75] *Ibid.*
[76] *Ibid.*

Trade Commission, it was deemed that, while importation of electronic 3DPFs from ClearConnect was in violation of Section 337 of the Tariff Act, 19 U.S.C. §1337 and violation of patents held by Align Technology Inc, it was ruled that the International Trade Commission cannot exclude the electronic import of digital 3DPFs from a jurisdiction outside of the US.[77]

4.4. Infringement through ownership

It has been postulated that simply owning a 3D printer as a private user may be an infringing act.[78] An analogy can be drawn from previous cases in the use of cassette recorders. In *CBS Songs Ltd v Amstrad Consumer Electronics Plc*[79], the issue of whether it is legal for a home user to make a personal recording of a sound recording, which was under protection of the CA 1956, was heard before the House of Lords. Templemen LJ quoted the Whitford Committee Report saying:

> "292. It is generally accepted that the use of tape recording equipment, particularly in the home, is resulting in the wide-spread infringement of rights in musical and other works, as well as in sound recordings .... the practical problems of policing acts of infringement which take place in private render it impossible for copyright owners to exercise their rights.[80]

It was ruled, therefore, that the sale of recording devices by Amstrad to consumers was not deemed to be an infringing offence as the seller of the device would have no control over what the purchaser would do with the devices once sold.[81] Similarly, in the preceding case *of Amstrad Consumer Electronics Plc v British Phonographic Industry Ltd*[82], it was held on appeal that there was neither infringement or breach of tort on the part of Amstrad for supply and sale of tape to tape cassette recorders even though they could be used for copying of copyright material as advertising for the recorders dissuaded purchasers from recording pre-recorded material. However, the cassette recorders featured in the *Amstrad v British Phonographic Industry* and *CBS v Amstrad* cases are not limited to a single function, whereas a 3D printer is. Directive 2001/29/EC Art. 5(a) provides for temporary acts of reproduction and for "transmission of in a

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[77] K Elia *ClearCorrect Operating, LLC v. International Trade Commission* 819 F.3d 1334 (Fed. Cir. 2016) (per curiam).
[78] Ashley Roughton, Robert Peake, James Plunkett, '3D Printing – the real story' (*Inside IP*, Autumn/Winter 2017 31) <https://www.vennershipley.co.uk/uploads/files/AutumnWinterInside_IP_for_pagesuite.pdf> accessed 10 January 2018.
[79] *CBS Songs Ltd v Amstrad Consumer Electronics Plc* [1988] UKHL 15.
[80] Sir John Witford, *Copyright and Designs Law: Report of the Committee to Consider the Law on Copyright and Designs* (Cmnd. 6732, 1977).
[81] *CBS Songs Ltd v Amstrad Consumer Electronics Plc* [1988] AC 1013
[82] *Amstrad Consumer Electronics Plc v British Phonographic Industry Ltd* [1985] FSR 159.

network between third parties by an intermediary".[83] This would, therefore, mean that a private consumer should be able to freely download 3DPFs from servers without fear of copyright infringement.

Scanners and printers allow for direct reproduction of copyright material which would, therefore, constitute a copyright infringement.[84] Malaquias draws on guidelines set out by the UK Intellectual Property Office[85] to argue that alterations to 3DPF's during whilst calibrating a scanner prior to printing would not constitute originality[86] However, should the 3DPF be altered after scanning or downloading, this may constitute a change to the file substantial enough to be considered the authors own creation and, therefore, original.[87] This was highlighted in *Biotrading & Financing OY v Biohit Ltd*[88] as it was ruled that the defendant had not infringed copyright by substantial taking in the copying of Biotrading's pipette design.

5. Conclusion and future direction

For the home user, 3D printing has yet to become ubiquitous, however, it's use is in industry is increasing as the technology expands to increase the type of materials which can be printed. Where 3DPF files are transferred between users, this leads to an increase in the scope of infringement. To protect against legal action, it is always preferable that a 3D printer user, especially commercial, prints from a 3DPF file they have authored themselves[89]. However, as discussed above, once downloaded, reproduction of downloaded 3DPF's to make a physical object by use of a 3D printer should be protected under section 51(1) of the CPDA 1988.[90]

This paper, however, is only concerned with copyright and design issues related to 3D printing. Although 3DPF's are protected by literary and artistic copyright, they are akin to technical drawings but not protected under the Patent Act 1977 by virtue of being "a program for

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[83] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.
[84] CDPA 1988 s17(2).
[85] <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/481194/c-notice-201401.pdf> accessed10 January 2018.
[86] Pedro Mallaquias, 'Consumer 3D printing: Is the UK Copyright and Design Law for purpose?' (2016) QMIPJ 6 321 – 340.
[87] *Ibid.*
[88] *Biotrading & Financing OY v Biohit Ltd* [1998] FSR 109.
[89] *Ibid.*
[90] Simon Bradshaw, Adrian Bowyer, Patrick Haufe, The intellectual property implications of low-cost 3D printing' (2010) SCRIPTed.

a computer".[91] Further, copying a patent that is in force for commercial reasons is an infringing act[92] although it may not be in the case of copying for home use.[93] As a technology, 3D printing was approximately a year old when the Patent Act came into force so while computer programs are excluded from patentability, 3D printing would likely not have been considered. However, this has been addressed somewhat with the implementation of the Computer Implemented Invention rule under Article 52(2) and Article 52(3) of the European Patent Convention[94] whereby a patent may be granted for an invention which involves use of a computer program, network and the invention itself has technical character.[95] Given the growing importance of 3D printing in industry, future research should be directed towards investigating the scope of protection for IP rights holders where patentable inventions maybe transferred across jurisdictions under current patent laws.

[91] Patent Act 1977 (as amended) s1(2)(c).
[92] PA 1977 s60(1).
[93] PA 1977 s60(5)(a).
[94] European Patent Convention 2000 Articles 52(2) & 52(3).
[95] < https://www.epo.org/law-practice/legal-texts/html/guidelines/e/g_ii_3_6.htm > accessed 10 January 2018.

Was the Court of Appeal's approach to the criminal and welfare issues in assessing the permissibility of the surgical separation of the conjoined twins in Re A [2001] 2 WLR 480 justifiable?

Casey Whelan*

1. Introduction

The *Re A* case was perhaps one of the most controversial cases in decades, due to the surgical intervention performed, which was against the wishes of the parents. [1] The case took place before the High Court and Court of Appeal, whereby both courts deemed the procedure was permissible, and the surgical separation was ordered. I will be focusing my analysis on the Court of Appeal's judgment, with reference to the High Court decision. The courts had to consider the legal permissibility of such a procedure, with reference to criminal law and welfare issues.

This case concerns conjoined twins, one of whom, named as Jodie by court, possessed a normal heart and lungs. The other twin, Mary, had no independent circulatory system, her tissues were oxygenated only because she shared a common aorta and venous return with her sister.[2] Mary depended on Jodie for oxygen and blood. Mary would die immediately were the twins to be separated, whereas Jodie would be expected to live a relatively normal life. Both would die within a matter of months if no medical action was taken. The parents refused consent for a surgical intervention to be performed, due to their religious beliefs. The doctors applied for a declaration to the court that it would be lawful and in the best interests of the children to operate. The High Court granted the declaration by stating that the operation would be akin to the withdrawal of life support. They found the operation to be an omission not a positive act to end Mary's

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[1] *Re A* [2001] 2 WLR 480.
[2] Laurie G.T., Harmon S.H.E., Porter G. (eds), *Mason and McCall Smith's Law and Medical Ethics* (3rd edn, OUP 2001), 533.

life, and also that the death of Mary, although inevitable, was not the primary purpose of the operation.

The parents appealed this decision to the Court of Appeal on the grounds that the learned judge had erred in learning that the operation was; in Mary's best interest, in Jodie's best interest and that in any event the operation would be legal.[3] The appeal was dismissed and the operation was held to be lawfully carried out. This was extremely contentious as it posed the question as to whether or not the surgical intervention could be equated to a form of 'killing' Mary, which was seen as the main legal issue.

2. The Issue of Legal Personhood

This case has provided a number of methodological questions regarding how legal personhood can be defined in medical law and ethics. It is of my understanding, that in this case, the courts did not address the issue of legal personhood in an appropriate manner.

There is a challenge with regards to this case, as to whether or not the twins are two distinct human beings. All parties took it for granted on the first instance that Mary was a live and separate person from Jodie.[4] This can be argued due to the medical evidence given to the Court of Appeal, which formed a strong basis that the twins were two separate individuals. The cardiologist in the case stated, 'Although the twins share some common tissue, they each have separate hearts, brains, etc, and thus medically [I] feel are separate individuals.'[5] Ward LJ, agreed, stating that, '…it would be contrary to common sense to say that Mary is not alive or that there are not two separate persons. It is, therefore, unnecessary to examine the law in any depth at all.'[6] There is no denial that the twins are not two distinct bodies, and Ward LJ himself said that 'each child is separate both for the purposes of the civil law and the criminal law'.[7] The idea of legal personhood can be defined as the idea of being a legal person; one who is recognized as having certain rights, protections, responsibilities and legal liability. This poses the question that the courts it seems, did not answer; whether or not the twins existed as two living bodies,

[3] *Re A* (n. 1).
[4] J.K. Mason, 'Conjoined twins: a diagnostic conundrum' (2001) *Edinburgh Law Review* 226, 228.
[5] *Ibid.*
[6] *Re A (*n. 1) at 995.
[7] J.K. Mason (n. 4) at 3.

rather than two distinct bodies. I am of the opinion that the courts made the assumption of legal personhood based on medical evidence, rather than delving within the issues of what it means to be defined as a legal person within the realms of the law.

The courts refer to the 'born alive' rule, with regards to determining whether or not the twins exist as two separate persons. Mason argues that this rule has been applied in an incorrect manner, and that the question still exists as to whether or not they are two independent legal persons.[8] Mason gives an interesting argument which contradicts the Court of Appeal's judgment, whereby he states that officially, Mary can be deemed as a 'stillborn' child. A still-birth is defined in section 41 of the Births and Deaths Registration Act 1953 as a child that is issued from the mother after the twenty-fourth week of pregnancy and that did not at any time after being expelled from its mother breathe or show any sign of life.[9] It was held in the *C v. S* case, that a live birth depended on the capacity of the child in question to maintain life by breathing through its own lungs, with or without the assistance of a ventilator.[10] It can be argued that Mary was never alive, due to the fact that she did not possess her own set of lungs, making it impossible for her to breathe by herself. This definition was later repeated in the *Rance v. Mid-Downs Health Authority* case,[11] as set out by Mr Justice Brooke (as he then was); 'A child is born alive if, after birth, it exists as a live child, that is to say breathing and living by reason of its breathing through its own lungs along, without deriving any of its living or power of living by or through any connection with its mother.'[12] It is argued that Mary does not fit the criteria of a child 'born alive,' with regards to the judgment in Rance[13]. In addition to being separated from their mothers' bodies, infants must be born alive before they can be regarded as a person within the eyes of the criminal law system.[14] In the face of doubt regarding Mary's ability to feel pain or to exhibit self-awareness, and despite medical evidence indicating that had she formed as a separate twin she would almost certainly

[8] *Ibid*. at 6
[9] *Ibid.*
[10] *C v. S, per Sir John Donaldson MR* [1988] QB 135
[11] *Rance v. Mid-Downs Health Authority* [1991] 1 QB 587
[12] *Ibid.* per Brooke J at 621.
[13] *Ibid.*
[14] Davis Colleen, 'Conjoined Twins as Persons That Can be Victims of Homicide' (2011) *Medical Law Review,* 430-466

have been still-born, the court was committed to according Mary, the weaker twin, full legal status.[15]

Ward LJ used definitions to determine whether a child was 'born alive' or not, these of which required independent breathing as a pre-requisite. Had these legal arguments been accepted by the Court of Appeal, Mary's death during surgery would not have been unlawful because no legal person would be killed.[16]

Jodie sustained the life of Mary by pumping oxygenated blood through a common artery. This can be equated to a pregnant mother's umbilical cord carrying oxygen and nutrients from the mother into the baby's bloodstream. Conjoined twins who depend on their siblings' organs for survival would not be born in a legal sense because they cannot function and live independently.[17] Reiterating these arguments, it can be said that Mary does not meet the criteria and standard as a living, independent being. Many of the difficulties which the courts had to discuss could have been avoided by accepting Mary as a stillbirth, which would have been possible given that she never had any lung function.[18]

There are differing opinions as to what 'legal personhood' really means. Harris provides an interesting viewpoint that personhood is not merely just 'existing' but rather having a biographical life. Harris places value on the idea of what it means to be a legal person; that a legal person is made up of experiences, that there is more of a 'biographical' life. He states that it appears the judges viewed Jodie and Mary as fetuses, or as individuals in a persistent vegetative state than persons. He compared this case to the *Airedale National Health Service Trust v Bland* case, whereby he explained that Bland had acquired legal personhood, as he had lived a biographical life, whereas the twins had not achieved this.[19] In Bland, it was accepted that Bland had ceased to exist in any real biographical sense, although his body remained alive, and it was agreed that his life-sustaining food and hydration would be withdrawn. Harris states that, 'The fact that

[15] Munro E. Vanessa, 'Square Pegs in Round Holes: The Dilemma of Conjoined Twins and Individual Rights' University of Reading, UK at 7
[16] Davis Colleen, 'Separating conjoined twins: a medical and criminal law dilemma' (2010) 17(4) J Law Med 594, 594.
[17] *Ibid.*
[18] Laurie G.T. *et al*. (n. 2) at 535.
[19] *Airedale National Health Service Trust v Bland* [1993] AC 789.

neither Mary nor Jodie were persons at the time of the operation…explains why the decision to operate knowing that Mary must die was not unethical.'[20] Harris provides an interesting ethical critique about the concept of personhood. Mary was only surviving due to the resources derived from her sister, which can be likened to the artificial nutrition and hydration that was provided to Bland. For Harris, he finds that Mary is not a legal person and therefore the surgery is justified. However, he does not find that Jodie has acquired the status of a legal person either, the parent's wishes would then have held more legal weight and the surgery would not have occurred.

3. Welfare Issues

This case addresses key doctrinal questions about the permissibility of controversial treatments by using welfare statutory rules in relation to promoting the best interests of the child principle under the Children's Act 1989. The welfare of the child is the court's paramount consideration.

The Court of Appeal decided that the surgical intervention was lawful, although it would ultimately lead to Mary's death. It was seen as the least detrimental alternative and the medical intervention defended Jodie from being killed by Mary through the gradual overloading of her vital organs.

Johnson J of the High Court, at first instance, and Walker LJ on appeal were happy in the notion that it was not in Mary's best interests to be maintained alive.[21] This was due to the quality of life Mary would be expected to have. Other members of the Court of Appeal refuted this view, Ward LJ held that the separation would bring her life to a close before it had run its natural span without providing any countervailing advantage.22

The Court of Appeal began with addressing the best interests of the twins as two separate persons. It was held by the Court of Appeal that Johnson J was right in concluding that the separation would be in Jodie's best interest. Prolonging Jodie's life was of best interest to her, as it was held that she would live a generally normal life. The Court of Appeal defined that the sanctity of life possesses an intrinsic dignity which entitled to it

[20] Harris John, 'Human Beings, Persons and Conjoined Twins: An Ethical Analysis of the Judgment in Re A' (2001) *Medical Law Review* 221, 235-6.
[21] Laurie G.T. *et al*. (n. 2) at 534.
[22] *Ibid.*

protection from an unjust attack.[23] The courts accepted that the sanctity of life doctrine explicitly affirms that each life has inherent value and the right to life is equal for all of us. The sanctity of life doctrine does, however, acknowledge that it may be proper to withhold or to withdraw treatment.

With regards to Mary's best interests, the courts looked at the quality of life which she would have. The court of appeal determined that the only benefit from the operation, would be that Mary would be given bodily integrity and dignity. This goal was deemed as 'illusory' by the court, as she would die before enjoying her independence, and she possessed no capacity for life. The operation would not ensure any other improvement or would prevent any further deterioration in her health. The court stated that in terms of her best health interests, that there were none. The court also could not see that it was in her best interests to remain conjoined to her sister. They did not know if Mary suffered pain due to this attachment, as she had no lungs, so could not cry out if she was in fact in pain. It was found by the court that there would be no countervailing advantage to Mary, therefore the procedure would not be in her best interests. Death was an inevitable fact if the operation were to be carried out, which was the crux of one of the criminal law issues which the courts had to address.

Now the question is posed; did they appropriately address the welfare issues of Mary with regards to her legal personhood? Due to the assumption that Mary was a legal person, the court was obligated to look at her best interests. However, as argued previously, had Mary been considered a stillborn, it would not have been necessary to assess what the best interests were for her.

The courts were faced with a paradoxical situation. The courts used a balancing exercise, which was not determined by one child's right to life over the other, but rather, the consideration of the worth of life compared with the other. The courts found that the best interests of both children was to give the chance of life to the child whose actual bodily condition is capable of accepting the chance to her advantage even if she has to be at the cost of the sacrifice of life which so unnaturally supported.[24] Ward LJ concisely put it, Mary could survive only as long as did Jodie and her 'parasitic living would be the cause

[23] *Re A (*n. 1).
[24] *Re A (*n. 1) per Ward LJ.

of Jodie's ceasing to live.'25 Had only Jodie been defined as a legal person, the conflict of the balancing exercise would not have occurred. A balance had to be struck somehow and, in doing so, it was right to place the worthwhileness of the treatment in the scales – and this was heavily weighted in favour of Jodie.26

4. Criminal Law Issues

This case was controversial with regards to whether or not the surgical separation would be permitted under criminal law doctrines. There was stark debate as to whether or not the procedure could be considered lawful. Some critics have argued that the operation was no better than an act of simply murdering Mary, due to her inevitable death upon separation. Only human beings that are persons in the eyes of the law can be deemed to be victims of homicide. The judges had to assess the permissibility with regards to English criminal law as the operation would essentially end Mary's life, and whether or not this could be deemed as a homicide.

In order for the crime of murder to be established, actus reus and mens rea must be present. It must be proved beyond reasonable doubt that the defendant unlawfully killed a person with intent to kill or cause grievous bodily harm. In presenting a verdict in favour of performing an operation to separate them, despite it inevitably causing the death of the weaker twin, the three-judge panel contraindicated not only the wishes of the parents involved, but also the moral doctrines of the Catholic church, the ethical doctrines of pro-life campaigners and the legal doctrines of certain well-established authorities.27 With regards to the issue of legal personhood, there can be no criminal responsibility for the murder or manslaughter of a conjoined twin if that twin is not regarded as a person capable of being killed in law, or a life in being.28 Had the issue of personhood been approached adequately regarding Mary, it would not have been necessary to discuss the criminal law implications.

The High Court found that the separation was to be deemed as a non-culpable omission, not an act. This decision and reasoning was appealed to the Court of Appeal.

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25 J.K. Mason (n. 4) at 536.
26 *Ibid.*
27 Davis Colleen (n. 17) at 600.
28 Davis Colleen (n. 17) at 594.

The High Court adopted the reasoning that the surgery was lawful as it was said to be a withdrawal of treatment, they relied on the precedent case of Bland[29]. Here, the withdrawal of treatment was lawful, as it was in the best interests of the patient to do so. The surgery was conveyed as an omission as it effectively withdrew Mary's blood supply from her. Johnson J in the High Court found that this withdrawal was analogous to the withdrawal of food and hydration from the patient in Bland.[30] The fact that treatment was futile was also made apparent by the courts. Both omission and futility are of relevance when discussing the act, as the futility of the situation removes the culpability of the omission.

Having accepted that Mary was receiving no treatment which could be withdrawn in a passive fashion, the Court of Appeal concluded that the operation to separate the twins constituted an assault on Mary.[31] There is a duty of care on doctors with regards to their patients, the Court of Appeal found the High Court's characterization of an omission not an act implausible, and it was overruled.

The lawfulness of the procedure was also addressed with regards to necessity. Necessity may justify an otherwise unlawful action by excusing it in order to avoid a greater harm. Brooke LJ leads with this argument, to which the other judges also supported. Brooke LJ found that the elements of necessity were satisfied and that the absence of an emergency was no bar to such a defence.[32] It is a necessity for the surgery to proceed to save the healthy twin, but it is also a necessity that the surgery not go ahead if the life of the ailing twin is to be cut short.

Self-defence can be an adequate defence to murder, as the actus reus and mens rea of murder can be justified. It was argued that the operation could be justified as an act of quasi self-defence, as the doctors were acting on the defence for Jodie, as they are essentially protecting her from being killed by Mary. Ward J in the Court of Appeal states that there should be an obligation on the parents 'to save Jodie from Mary.'[33] The other judges did not share Ward's explanation of self-defence. Walker J held a contrary view,

[29] *Airedale* (n. 20).
[30] *Ibid.*
[31] Laurie G.T. *et al.* (n. 2) at 534.
[32] J.K. Mason (n. 4) at 536.
[33] *Re A* (n. 1).

that the situation at hand was not an aggressor situation, it is not Jodie actively needing to defend herself from Mary. Ward LJ recognized the dilemma posed by conflicting duties to both babies and saw no way to resolve the conflict other than to choose between the lesser of two evils. The least detrimental choice was to allow the surgery to proceed.34

The doctrine of double effect was also discussed by the judges, however none of the judges in the Court of Appeal wished to invoke this. According to this doctrine, an act which produces a bad effect is nevertheless morally permissible if the action is good in itself, the intention is solely to proceed the good effect, the good effect is not produced from the bad effect and there is sufficient reason to permit the bad effect.35 Ward and Brooke LJ held that the doctrine of double effect had no application because the side-effect of the good cure for Jodie was Mary's death.36

5. Conclusion

The ethical and legal positions of a separation of conjoined twins is far from clear.37 In order to justify the surgical intervention, the judges had to address criminal and welfare issues, whilst also taking account of the legal personhood of the twins.

It is arguable that the judges did not discuss the status of legal personhood appropriately. The medical evidence presented before the court clearly stated that had Mary been born unattached to her twin, she would not have survived. As argued previously, had Mary been considered a stillborn birth, taking guidance from statutory instruments, the criminal and welfare issues would not have caused as much conflict within the courts. The courts immediately assumed on the face of medical evidence that each twin was accorded their own status of legal personhood, without taking careful consideration of the law concerning the issue.

The courts had to take into account the welfare issues surrounding this case, in order to justify the declaration granting the operation to be performed. The courts recognized both twins as two distinct legal persons, they approached each best interest

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34 Davis Colleen (n. 17) at 594.
35 *Ibid.*
36 *Ibid.*
37 Sally Sheldon and Stephen Wilkinson, 'Conjoined Twins: The Legality and Ethics of Sacrifice' (1997) *Medical Law Review* 147, 169.

of each twin separately. The judges found that by continuing Mary's life, it would cause her possible pain and discomfort, if she could feel anything at all. A balancing exercise was used in order to determine the outcome, and examined not just the sanctity of life, but the quality of life each twin would be expected to enjoy. It is conveyed that the judges considered the welfare issues appropriately.

It was held that Johnson J had erred in law by equating the intervention to the discontinuation of medical treatment. It was held a positive act to end Mary's life, and that the operation constituted an assault on her. Under the European Convention of Human Rights,38 Mary has a right to life, making it unlawful to kill her intentionally by undertaking an operation with the primary purpose of killing her. Whilst addressing the criminal law issues, the judges were at conflict with their legal reasoning. Before deeming the operation as lawful, it had to be cleansed of suspicion of murdering Mary. They examined strategies such as; self-defence on behalf of Jodie, the necessity of avoiding an inevitable wrong and an absence of intention to kill.39 The judges appropriately addressed the criminality of the separation at hand, upon justifying the intervention being performed, as they explored every avenue possible in an extremely complex case.

It can be said, that with regards to criminal and welfare issues, that the judges addressed these adequately, based upon the assumption that the twins were two distinct legal bodies. It is argued, however, that had the judges relied upon the statutory instruments at hand and accepted Mary as a stillbirth, it would have caused less legal controversy. Ward LJ himself stated that Mary was not a viable child, and had this been advocated, the criminal and welfare issues would not have been such a task in dealing with. This judgement has been said to have left matters unsettled, and the judges made a recommendation to Parliament for guidance if a situation arose again. My concluding thoughts, whilst the judges addressed criminal and welfare issues coherently with regards to two distinct persons, retrospectively, if Mary was accepted as a stillbirth, it would not have caused such a conundrum for the courts. The juxtaposition of the overwhelming medical evidence against the legal definition of personhood is also worth dwelling on.

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[38] European Convention on Human Rights, Article 2.
[39] Laurie G.T. *et al.* (n. 2) at 534

Sign Me Up: automated digital signatures in *Neocleous v Rees[2019] EWCH 2462*

Hugh Rowan*

1. Introduction

As the new decade dawns, legal professionals are preparing for major changes to the profession, including the rising use of so-called 'smart-contracts'. Yet, before addressing these 21st century problems, we must be certain where we stand on much more fundamental concerns over electronic contracting. A 'signature' is a concept laden with inferences, many of which cannot and do not apply to electronic communication. Hence, a new concept of signature, i.e. eSignature, must be provided for the modern world. This was the question for the court in the case of *Neocleous v Rees*[1] whose judgement was handed down on 20th September 2019.

2. Facts

The case concerned a right of way which the Defendants had attempted to register against the title of the Claimant's property. The Claimant objected, but prior to the tribunal hearing offered to buy a part of the land in question to resolve the dispute. To that end, a number of emails were sent between the parties' solicitors in March 2019. At the bottom of these emails, it was the policy of the firms in question to automatically include the sender's name, occupation, role and contact details.

On 9 March 2018, the Defendant's solicitor, David Tear, emailed the Claimant's solicitor, Daniel Wise, confirming that "terms of settlement…have been reached." These terms were listed in the email and the email concluded:

> *I would be grateful if you could acknowledge receipt of this email and confirm your agreement to the above…*
> *Many thanks*
> *[there followed Mr Tear's automated email footer]*

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On 12 March 2018, Mr Wise replied:

> *Thank you for your email and I confirm my agreement with its contents.*
> *Kind regards*
> *Daniel*
> *[there followed Mr Wise's automated email footer]*

Mr Tear subsequently wrote to the Tribunal requesting the hearing be vacated and sent a draft consent order to Mr Wise. Mr Wise responded with amendments on the 22 March 2018, and on the same date the Tribunal wrote to Mr Tear confirming that the hearing was being vacated. On 9 May 2018, the Defendant's solicitor wrote to request that the hearing be re-listed. On 16 May 2018, Mr Wise wrote to the Tribunal contending that the matter had been compromised hence there was no basis for relisting the application.

3. Issue: the recognition of eSignatures

The question for the court was whether the Defendant's 'automated' email footer could be considered a signature for the purposes of s.2 *Law of Property (Miscellaneous Provisions) Act 1989*. This provision provides that, "a contract for the sale or other disposition of an interest in land can only be made in writing … [and] must be signed by or on behalf of each party to the contract."

An individual's signature carries enormous significance in both British and international law. Key cases such as *L'Estrange v F Graucob Ltd*[1] highlight the probative value of a persons 'mark' in specific areas (e.g. the incorporation of terms). Notionally, a signature is a mere string of letters, although the courts have deemed a person's initials[2] or even a mere 'X'[3] sufficient.

The principal purpose of a signature, as summarised in the Law Commission report, is "to demonstrate an intention of the party to authenticate a document."[4] Provided therefore that such an intention to authenticate is present, and any other statutory requirements are fulfilled, a signature may be deemed present in law. These principles apply as equally to digital signatures as they do physical (or 'wet ink') ones. Although, it is worth noting that it is possible for a statute

[1] [1934] 2 KB 394.
[2] *Phillimore v Barry* (1818) 1 Camp 513.
[3] *Jenkins v Gaisford & Thring, In the Goods of Jenkins* (1863) 3 Sw. & Tr 93.
[4] Law Commission, *Electronic Execution of Documents* (Law Com No 386, 2019) para 3.28.

or statutory instrument to require signatures for specific purposes to be handwritten. Nonetheless, the courts have been generous in their interpretation of a 'valid signature', allowing acts as simple as clicking 'I accept' at the bottom of a web page to suffice.[5]

The current regulation governing eSignatures is EU Regulation No 910/2014 ('eIDAS').[6] This broadly defines eSignatures as "data in electronic form which is attached to or logically associated with other data in electronic form and which is used by the signatory to sign."[7] A second definition is provided by s.7 *Electronic Communications Act 2000* (as amended), to include "anything in electronic form as is incorporated into or otherwise logically associated with any electronic communication or electronic data; and purports to be used by the individual creating it to sign." It is important to note how far removed these definitions are from the plain English meaning of the word 'signature'; the focus is on the purpose or intention of the signatory and the form of the signature is largely inconsequential.

ln line with this, the courts have recognised typing a name at the bottom of an email[8] and the heading on an interbank ('SWIFT') message[9] as acceptable signatures. Accordingly, the Law Commission report concludes that there is no reason, in principle, to think that the courts will not recognise "electronic equivalents of these non-electronic forms of signature…as legally valid."[10]

The problem arises in that there are certain things which can be accomplished digitally which have no obvious parallel with wet ink communication. In *Neocleous v Rees,* this is the possibility of automatically generating a footer which includes the name, occupation, role and contact details of the sender at the foot of the e-mail. This question of 'automated signatures' was specifically addressed by HHJ Pelling (QC) in *J Pereira Fernandes SA v Mehta.*[11] He concluded that in the absence of contrary evidence, an automatically inserted email address (of the sort included in all emails after sending) could not be deemed to be intended as a signature. However, he suggested *obiter* that "providing always that whatever was used was inserted in a document in order to give and with the intention of giving authenticity to it…the fact that the document is created electronically as opposed to as a hard copy can make no difference."

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[5] *Bassano* v *Toft* [2014] EWHC 377 (QB) [44].
[6] EU Regulation No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC.
[7] *Ibid.,* Article 3(10).
[8] *Golden Ocean Group Ltd* v *Salgaocar Mining Industries PVT Ltd* [2012] EWCA Civ 265 [32].
[9] *WS Tankship IV BV* v *Seoul Guarantee Insurance Co* [2011] EWHC 3103 (Comm) [155].
[10] Law Commission (n. 5) para 3.45.
[11] [2006] EWHC 813 (Ch).

A similar *ratio* was reached in the case of *Firstpost Homes Ltd v Johnson.*[12] Here, a director of the plaintiff company prepared a letter of sale for the vendor, typing out his name and address in the header. This letter was signed and dated by the plaintiff, but the director had failed to do the same. The vendor died shortly thereafter, and the plaintiff bought an action seeking specific performance, contending that the name and address as the top of the letter was sufficient to constitute a signature for the purposes of s.2 *Law of Property (Miscellaneous Provisions) Act 1989.* However, the Court of Appeal held that there was a specific section requiring signatures and therefore the typed name at the beginning of the document was insufficient.

4. Judgment

Applying the law to the facts above, HHJ Pearce held that the Defendant's signature in this case could be considered a signature for the purpose of s.2 *Law of Property (Miscellaneous Provisions) Act 1989*. In reaching this conclusion, HHJ Pearce made four key observations. First, that the inclusion of the email footer was a conscious decision at some point, even if that decision was general to the firm as a whole. Second, the sender was aware of his name being applied at the bottom. Third, the use of the phrase 'many thanks' displayed an intention to connect the body of the email with the footer. Finally, in contrast to *Firstpost Homes* the purported signature was at the end of the document, as is conventional, not above the text of the letter.

Consequently, it was held that the Claimants were entitled to the order for specific performance of the contract sought.

5. Analysis

The first of HHJ Pearce's reasons for finding an effective signature in this case recognises the importance outlined above of the intention attached to the signature in question. Following HHJ Pelling's analysis in *J Pereira Fernandes,* it is possible to say that the company's reason for their policy in automatically including email signatures was to lend authenticity to those emails.

Nonetheless, it would have been of use if HHJ Pearce had distinguished between the general intention of giving authenticity to emails sent by the firm and the specific intention relating to the email of 9 March 2018. It may appear that on the facts of *Firstpost Homes* the plaintiff director had intended to give authenticity to his letter by typing out his name as an addressee.

[12] [1995] 1 WLR 1567.

To that end, it is helpful to consider HHJ Pearce's reasons as cumulative rather than discrete. Once we recognise the general intention present, we may find specific intention in relation to this email by recognising that: (i) the sender was aware of his name being applied as a footer; and (ii) there was an intention to connect this footer with the email through the use of the words 'many thanks'.

The least persuasive aspect of the *ratio* of this case is the fourth reason provided, namely, that the presence of the signature at the end of the document is the conventional placement in contrast to the placement in *Firstpost Homes*. Given what has been said about the divorce of the legal understanding of a 'signature' from its ordinary English counterpart, the conventionally accepted location of a name on a page should not be listed as a requirement for its status as a signature. Nonetheless, it may be considered evidentially valuable. HHJ Pearce does not explain which of these two interpretations he was preferring in his judgement.

6. Conclusion

As our methods of communication and contracting change, so must our methods of agreeing to such contracts. The traditional notion of signature has been eroded by statute, regulation and case law for decades now. New ground is covered in *Neocleous v Rees* insofar as it is the first time the court has recognised automatically included information as a signature. The reasoning, that this automatically included information had the same intention as a more conventional signature, demonstrates an emphatic step away from concern over the form of the signature towards its purpose. Nevertheless, vestiges of the traditional concept remain in this judgement with the concern over the placement of the signature relative to the agreement.

An evaluation as to whether the decision to prosecute Dr. Bawa-Garba for the crime of gross negligence manslaughter was the correct course of action, on both a legal and ethical basis, in light of the Williams Report on Gross Negligence Manslaughter in Healthcare

Kelly Grace Gallagher*

1. Introduction

The area of gross negligence manslaughter is controversial, especially in the area of medical practice, due to the complex legal and ethical arguments both for and against the prosecution of doctors. The conflict of interests between retribution for a patient's family and the protection of doctors were prominent in *R v Bawa-Garba,* when a junior doctor, Hadiza Bawa-Garba, was convicted for gross negligence manslaughter after a six year-old child, Jack Adcock, who had been admitted to Leicester Royal Infirmary, died under her care.[1] The case followed *R v Adomako*,[2] which established the test for gross negligence manslaughter. There must be: an existing duty of care, a breach of that duty, the breach must have caused a death and the jury should decide if the defendants conduct "was so bad in all the circumstances as to amount…to a criminal act".[3] When applied in *Bawa-Garba*[4] the jury decided her behaviour did amount to that of a criminal standing. However, whether 'all the circumstances' were considered in an appropriate context, by considering their accumulative effect, and whether the jury were qualified to make a decision which not only affects the parties but a whole profession, is doubted. Since the decision in *Bawa-Garba*,[5] *R v Rose*[6] has adapted the *Adomako*[7] test and the Williams

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[1] *R v Bawa-Garba* [2016] EWCA Crim 1841
[2] *R v Adomako* [1994] 3 WLR 288
[3] *Ibid.,* 187
[4] *R v Bawa-Garba* [2016] EWCA Crim 1841
[5] *Ibid.*
[6] *R v Rose (Honey Maria)* [2017] EWCA Crim 1168
[7] *R v Adomako* (n. 2).

Report has aimed to refine and clarify the area.[8] These changes raise questions about how *Bawa-Garba*[9] would be decided today.

2. The test for prosecution and *Bawa-Garba*

The Crown Prosecution Service uses a two-part test when whether or not to prosecute. Firstly, there must be "sufficient evidence to provide a realistic prospect of conviction"[10] and, secondly, prosecution must be "in the public interest".[11] The requirement of a public interest can be conflicting when it concerns a doctor. One reason to prosecute would be to create awareness and deter those in the profession from making similar mistakes. However, Alghrani argues "if the injury…is a mistake…how will the prospect of criminal liability deter future mistake…".[12] Similar mistakes may still occur due to them not being intentional. Deterrence has a resulting problem of defensive medicine, the idea that a doctor will not perform treatments for fear of being prosecuted. This would go against public interest both by stopping treatment in the patient's best interest and allowing for the "…degradation of [doctor] and patient relationship…".[13] Both are imperative to trust in healthcare, which benefits more of society than prosecution does.

In February 2018, in light of *Bawa-Garba*,[14] Jeremy Hunt asked Professor Williams to "…conduct a rapid review into the application of gross negligence manslaughter in healthcare".[15] Mr Hunt specified that "…the vital role of reflective learning, openness and transparency is protected"[16] and that the report should clarify "…where the line is drawn between gross negligence manslaughter and ordinary human error…so that

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[8] Norman Williams, *Gross negligence manslaughter in healthcare: The report of a rapid policy review* (HM Government, 2018).
[9] *R v Bawa-Garba* (n. 4).
[10] Crown Prosecution Service, *The Code for Crown Prosecutors* (London: Crown Prosecution Service, 2018) at 4.6 <https://www.cps.gov.uk/publication/code-crown-prosecutors> accessed 4th December 2018].
[11] *Ibid.*
[12] Margaret Brazier and Amel Alghrani, 'Fatal medical malpractice and criminal liability', *Journal of Professional Negligence*, 2 (2009) 51, 65.
[13] M Sonal Sekhar and N Vyas, 'Defensive Medicine: A Bane to Healthcare', *Annals of Medical & Health Science Research,* 3(2) (2013) 295, 295.
[14] *R v Adomako* (n. 2).
[15] Hansard, *Topical Questions: 06 February 2018* (London: Hansard, 2018) vol. 635, para 1 <https://hansard.parliament.uk/Commons/2018-02-06/debates/CD4BD00A-044D-40F0-85D9-76DE5A35C13F/TopicalQuestions?highlight=bawa-garba#contribution-34EED974-6D59-4046-8971-77800E643C04> accessed 2 December 2018.
[16] *Ibid.,* para 2.

doctors…know where they stand in respect of criminal liability…".[17] This confirms Parliament's concern for the impact gross negligence manslaughter has on healthcare. In particular, Mr Hunt emphasised the need for transparency, one of the main ethical arguments against the prosecution of Bawa-Garba. Instead of admitting fault, "fear of reprisals…may lead to reluctance to disclose such events…",[18] which would prevent the ability to learn from mistakes and decreases chances for retribution. It would also stop the NHS from implementing measures to lower risks occurring. After the impact of *Bawa-Garba*,[19] Leicester Royal Infirmary has created more awareness about symptoms of sepsis by training staff to be 'sepsis champions'. John Parker said the champions will "promote prompt recognition and treatment of sepsis".[20] This shows a positive impact by correcting a mistake in *Bawa-Garba*,[21] that there was a failure to identify sepsis. Figures from Leicester have shown that in 2014, 50% of patients received intravenous antibiotics within one hour of developing sever sepsis, which was a rise from the previous year's figure of 25%.[22] The hospital also held a balloon release in 2014 to mark World Sepsis Day.[23] These attempts to promote awareness by the NHS demonstrated the vitality of having a culture of openness.

Rose[24] refined the *Adomako*[25] test, which provides that there must be "a serious and obvious risk of death at the time of the breach of duty"[26] and the conduct must be "truly, exceptionally bad".[27] Although this clarifies the *Adomako*[28] test, it must be highlighted that it does not overrule it. The requirements that there must be an 'obvious risk' and 'exceptionally bad' conduct provide for a higher threshold in satisfying the *Adomako*[29] test. *Bawa-Garba* arguably may not have been prosecuted if decided after

[17] *Ibid.,* para 2.
[18] Ash Samanta and Jo Samatha, 'Gross negligence manslaughter and doctors: ethical concerns following the case of Dr Bawa-Garba', *Journal of Medical Ethics*, 1 (2018) 1, 3.
[19] *R v Bawa-Garba* [2016] EWCA Crim 1841
[20] NHS University Hospitals of Leicester, *Press Release* (Leicester: NHS Trust, 2014) <https://www.leicestershospitals.nhs.uk/aboutus/our-news/press-release-centre/?entryid8=28578> accessed 4 December 2018.
[21] *R v Bawa-Garba* (n. 1).
[22] NHS University Hospitals of Leicester, *Press Release* (n. 20).
[23] *Ibid.*
[24] *R v Rose* (n. 6).
[25] *R v Adomako* (n. 2).
[26] *R v Rose* (n. 6), 337.
[27] *Ibid.,* 420
[28] *R v Adomako* (n. 2).
[29] *Ibid.*

Rose.[30] Jack's sepsis was not immediately apparent and arguably there was not an obvious risk of death. SepsisUK says the illness "can initially look like flu",[31] suggesting that the symptoms of sespis can be confused for common illnesses. In 'Doctors on Trial', Bawa-Garba stated "the last picture I have of Jack is him sitting up drinking from a beaker, nothing prepared me for expecting to see Jack crash".[32] Again, this asserts the idea that the risk was not foreseeable. While her conduct was negligent, the failure of the system to highlight a problem with Jack's blood test that could have identified sepsis means that it does not seem just to consider her conduct "exceptionally bad".

Furthermore, the general reception from healthcare workers in support of Bawa-Garba to not be prosecuted can be seen on social media. This suggests the reliable professional opinion was that her conduct was not "truly, exceptionally bad".[33] The use of '#iamhadiza'[34] was see as a symbol of solidarity, suggesting this could happen to any doctor as a consequence of human error. An ethical approach is that doctors do not have an intention to kill: to hold doctors criminally liable for a mistake creates a dilemma for prospective doctors when they consider entering a profession with a high occurrence of death. This approach suggests that it is not within the public interest to prosecute doctors. However, in 9.1 of the Williams report it states "…the risk of a healthcare professional being prosecuted for gross negligence manslaughter is very small".[35] This expresses that the fear of prosecution within healthcare may be a matter of perception. The fear could be an accumulation of not only trial results, but also other anxieties within the profession which could affect the propensity of mistakes occurring.

One worry for the healthcare profession is funding cuts to the NHS which is worsened by large fines when a case of gross negligence manslaughter is successful. This shortage of funding will influence technological advancement and staff-shortage, both large areas of debate in *Bawa-Garba.*[36] Matt Hancock says technology is vital "…to

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[30] *R v Rose* (n. 6)
[31] 'About Sepsis' (*UK Sepsis Trust,* 2018) <https://sepsistrust.org/about/about-sepsis/> accessed 3 December 2018.
[32] *Panorama: Doctors on Trial,* BBC One, 13 August 2018, 8:30pm, at 14:59.
[33] *R v Rose* (n. 6).
[34] '#iamhadiza – Twitter Search' (*Twitter*, 2018) <https://twitter.com/search?q=%23iamhadiza&src=typed_query> accessed 5 December 2018.
[35] Norman Williams (n. 8), 20.
[36] *R v Bawa-Garba* (n. 1).

transform health and social care so it can improve treatment and deliver better care…"[37] into which £20 billion is being invested. The amount of money is substantial, especially considering the lack of funding in the area, highlighting a current problem with the technology relied upon by medical staff. However, as the technological problems have only been identified recently as an issue, the faults that occurred in *Bawa-Garba*[38] due to technical problems potentially were not emphasised to the same degree they would be today. An NHS survey showed 69% of staff thought there was not enough staff to enable them to do their job properly.[39] This figure supports the idea that Bawa-Garba, who was covering four floors and was working a double shift without breaks, was put in a position for failure. New sentencing guidelines list mitigating factors, which include: "the offender lacked the necessary…equipment, support…which contributed to the negligent conduct"; "the offender was subject to stress or pressure"; "no previous convictions" and "remorse".[40] All of these are present in *Bawa-Garba* and could have reduced the seriousness of her sentence.

Legally, if the *Adomako*[41] test is satisfied then the person should be held accountable, otherwise gross negligence manslaughter may lose respectability. In *R v Zaman,*[42] Lord Hickinbottom stated the behaviour "…driven by money, was appalling".[43] This view that the behaviour was 'appalling' shows the seriousness of the crime and affirms that doctors should not be exempt. However, this judgement can be contrasted to *Bawa-Garba*[44] as her actions were not a result of another motive but from mistake. Accountability is still necessary, but prosecution may not be the best way to seek it.

3. Alternatives to prosecution

[37] 'Matt Hancock: new technology is key to making MHS the world's best' (*Gov.UK,* 2018) <https://www.gov.uk/government/news/matt-hancock-new-technology-is-key-to-making-nhs-the-worlds-best> accessed 7 December 2018.
[38] *R v Bawa-Garba* (n. 1)
[39] NHS Survey Coordination Centre, *NHS Staff Survey 2017: National Briefing* (NHS, 2018). 15 <http://www.nhsstaffsurveys.com/Caches/Files/P3088_ST17_National%20briefing_v5.1_LB_RC_FR_20180419.pdf> accessed 3 December 2018.
[40] Sentencing Council, *Manslaughter: Definitive Guideline* (HM Government, 2018), 7 <https://www.sentencingcouncil.org.uk/wp-content/uploads/Manslaughter_Definitive-Guideline_WEB.pdf> accessed 5 December 2018.
[41] *R v Adomako* (n. 2).
[42] *R v Zaman (Mohammed Khalique)* [2017] EWCA Crim 1783
[43] *Ibid.,* at 81
[44] *R v Bawa-Garba* (n. 1).

Contributory negligence may be a more satisfying way to balance the need for retribution and protection against criminal prosecution. This approach may also be welcomed by UK courts, which are generally are uneasy with cases against doctors in criminal law. Additionally, the accountability of doctors is inconsistent. The *Adomako*[45] test requires a death in order to prosecute; whereas negligent behaviour which causes serious injury has no basis for criminal prosecution. Arguably a person with lifelong complications due to negligent behaviour endures more suffering than someone who dies. This inconstancy is not sufficiently justified or satisfactory in providing justice for surviving victims.

The main reason for prosecution relates to the purpose of criminal law: to allow for retribution. Prosecution is found to be "…an emotionally satisfying way of exacting retribution…".[46] However, if appealed it can leave families disappointed. After hearing about the recent decision to allow Bawa-Garba to practise again Mrs Adcock said, "I can't believe how they try and rip everything apart that's been done for the past seven and a half years".[47] This relates to issues with the trail process, which is long and stressful for both parties. Jack died in 2011 and proceedings have only ceased in 2018. During this time, due to the nature of the case, there has been wide media coverage. This media storm heightens public and professional input of opinion, and it increases emotional stress for both parties. For Jack's family the coverage creates an inescapable issue which does not allow a natural grieving process to occur, and it encourages the idea that justice is only gained through prosecution. An example is the ITV News headline 'Justice for Jack as grieving parents end four-year battle'.[48] Yet, the stress for Bawa-Garba was of being identified as incompetent and untrustworthy, a reputation which could remain even if there had been no prosecution. This suggests prosecution is not the correct course of action for either party's mental health. Juries can also be influenced by the media resulting in an unfair trial, which would be a breach of Article 6 Human Rights Act.[49] Another potential breach is of Article 14,[50] if racism was found to have influenced the

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[45] *R v Adomako* (n. 2)
[46] Margot Brazier, Sarah Devaney and Alex Mullock, 'Improving healthcare through the use of 'medical manslaughter'? Facts, fears and the future', 22 *Clinical Risk* (2016) 88, 90.
[47] *Panorama: Doctors on Trial,* BBC One, 13 August 2018, 8:30pm, at 26:56.
[48] ITV News, '*Justice for Jack as grieving parents end four-year battle'* (itv.com, 2018) <http://www.itv.com/goodmorningbritain/news/justice-for-jack-adcock> accessed 6 December 2018.
[49] Human Rights Act 1998, Article 6.
[50] Human Rights Act 1998, Article 14.

jury. Bawa-Garba is part of an ethnic minority, a group which has more cases brought against them and judgements usually have "…more serious punitive measures and guilty verdicts".[51] These findings, therefore, undermine the credibility behind Bawa-Garba's prosecution.

A further issue is that laypeople are not qualified to make serious decisions, as Stuart-Cole comments, "[the jury] …are incapable of any objective and fair measurement".[52] This is due to them not understanding intricacies of medical issues but being able to empathise with the emotional aspects. Similarly, the legal test the jury must apply - that the conduct was "truly, exceptionally bad"[53] - can be criticised because of its objective nature. There is no certainty in what this statement means and Quick argues "…prosecutors often rely on gut instinct…",[54] showing no uniformity in how it will be interpreted. However, in *R v Misra,*[55] Lord Judge said there was not uncertainty because the question for the jury is not one "of law, but one of fact".[56] This creates a circular argument: if the jury are judging on fact which will have legal consequences, their decision is considering criminality. If deciding legality on fact the law is concerned and there must be consistency in application, even more so in cases of serious crime otherwise there exists doubt about the accuracy of prosecution.

Looking at this area, the guidelines for referral to prosecute seem unclear. The Williams report at 7.3 suggests clarification in understanding "…why a prosecution might, or might not, be appropriate in specific cases."[57] Explaining the circumstances in which a prosecution is appropriate would provide certainty for both professionals and families as to why a judgment has been made. This would help the family with understanding the process and coming to terms with a negative finding, as well as

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[51] Amitava Banerjee, 'Institutional racism is still a major problem in the NHS', *The BMJ Opinion*, 31st January 2018 (p. 1)
[52] Elizabeth Stuart-Cole, 'Medical Manslaughter: The Effect of Lay Findings of (Criminal) Gross Negligence on Professional Tribunals General Medical Council v Dr Bawa-Garba [2018] EWHC 76', *Journal of Criminal Law*, 82 (2018) 197- 201, at 199
[53] *R v Rose (Honey Maria)* [2017] EWCA Crim 1168, at 420
[54] Oliver Quick, 'Medicine, Mistakes and Manslaughter: A Criminal Combination?', *The Cambridge Law Journal,* 69 (2010) 186-203, at 193
[55] *R v Misra (Amit)* [2004] EWCA Crime 2375
[56] *R v Misra (Amit)* [2004] EWCA Crime 2375, at 62
[57] Norman Williams (n. 8), 16.

lowering doctors' fears of prosecution. The NHS must also take more responsibility when mistakes occur by improving on criticisms made that they make "…insincere apologies and [give] unclear explanations…".[58] If the NHS did this it would show more support for their employees and sympathy towards families, which could have helped in *Bawa-Garba*[59] to reduce bitterness in proceedings.

4. Conclusion

Overall, considering the legal and ethical arguments surrounding the prosecution of Bawa-Garba, and in light of the Williams report,[60] the correct course of action should have been to not prosecute Bawa-Garba, as it is now unlikely that she would have been prosecuted since reform has occurred. Arguments surrounding this case tend to support either the family or Bawa-Garba, instead of seeking to find a fair result for both. The family understandably wants retribution for their loss, but prosecuting Bawa-Garba as a solution to this fails to provide a truly satisfying outcome for either party or a long-term solution for remaining problems in the area of gross negligence manslaughter. The Williams report[61] has improved the area by reducing legal problems caused by previous uncertainty. However, an ethical dilemma will remain in cases as emotive as *Bawa-Garba*.[62]

[58] Jeremy Laurance, 'Health Ombudsman Criticises 'Insincere Apologies and Unclear Explanations' Over NHS Mistakes', *Independent*, (London, 9 November 2012) 1.
[59] *R v Bawa-Garba* (n. 1).
[60] Norman Williams (n. 8).
[61] *Ibid.*
[62] *R v Bawa-Garba* (n. 1).

We Have a Drug Problem: a study of patent regimes, market forces and global health in the context of developing countries

Sonia Larbi-Aissa*

1. Introduction

When working towards ameliorating global health disparities in the context of development, the international pharmaceutical patent regime is a formidable obstacle to equitable treatment. According to the World Health Organization (WHO), more than ten million people in the developing world die each year from preventable and treatable diseases (Kapczynski, Chaifetz, Katz & Benkler, 1046).[1] This is not due to the absence of a medicine or treatment, but to the fact that the medicine is unaffordable. Essentially, the profit margins of pharmaceutical companies determine who in the developing world lives or dies. These profit margins are derived from the exclusive rights regimes of patents, initially created to incentivise costly innovation through the promise of high future payoffs (Kapczynski et al., 1035).[2]

For a pharmaceutical company, the guarantee of a monopoly in its drug's future market, and consequently the ability to set the price of their product at above profit-generating levels, justifies the company's long-term investment in a medication's development. This model, successful in high-income areas due to the steady demand of lifestyle drugs and the ubiquity of third-party payment systems such as insurance, fails to deliver badly needed medication to areas of the world which cannot pay out of pocket for monopoly prices of essential medicine (Kapczynski et al., 1041).[3] This paper will explore the contradictions between human rights and market forces in the context of global health and examine potential solutions to the world's drug problem.

More than 30% of the world's population does not have access to essential medicines (Kapczynski et al., 1046).[4] The WHO defines essential medicines as medicines that satisfy priority

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[1] A. Kapczynski, S. Chaifetz, Z. Katz & Y. Benkler, 'Addressing Global Health Inequities: An open licensing approach for university innovations' [2005] 20(2), *Berkeley Technology Law Journal,* 1031, 1046.

[2] *ibid.,* 1035.

[3] *ibid.,* 1041.

[4] *Ibid.,* 1046

health care needs of populations. These medicines can range from vaccines to treatment for diabetes, and a list updated every two years by the WHO identifies exactly which medications are deemed 'essential,' ("Action," 5).[5] The WHO recognises that spending on pharmaceuticals in the developing world is substantial, with countries devoting up to 66% of national health spending on pharmaceuticals (Kapczynski et al., 1050).[6] At the household level, drug costs have proven to be a major cause of household impoverishment in the developing world (Kapczynski et al., 1050).[7] In a study of median prices and affordability of essential medicines, the UN found that a 30-day supply of medicine for high cholesterol requires the equivalent of over 35 days of wages in Kyrgyzstan; an affordable medication was deemed to be a day's wage (2013 Gap Report, 62).[8] 6-15 days of wages are needed to purchase essential medication in Burkina Faso and Nicaragua (2013 Gap Report, 62).[9] Additionally, benchmarks are based on the wages earned by the lowest-paid unskilled government workers in the country (2013 Gap Report, 62).[10] As government jobs constitute only a small portion of the labour market in the developing world, the true unaffordability of these medications is likely worse (2013 Gap Report, 62).[11]

The cause of this market-based health inequality can be traced back to two phases in the drug development pipeline: licensing rights and research and development. Whilst the latter precedes the former chronologically, more has been done to change the way patents are licensed to increase access to essential medicines (Kapczynski et al., 1046).[12]

2. Licensing Accessibility: Profits over people?

Patents have a direct price-raising effect on drug prices, and the fact that monopoly prices can constitute weeks of wages for those in low-income countries means that many cannot afford them and go untreated. This is termed "the access gap," and it speaks to an environment where cures are available, but out of reach (Kapczynski et al., 1046).[13] Development and aid agencies have identified the introduction of generic competition as, according to Oxfam, the "single most

[5] World Health Organization, *WHO medicines strategy: Framework for Action in Essential Drugs and Medicines Policy 2002-2003,* 5.
[6] A. Kapczynski (n. 1), 1050.
[7] *Ibid.*
[8] 2013 Gap Report, "Millennium Development Goal 8 – The Global Partnership for Development: The Challenge We Face," MDG Gap Task Force Report 2013, The United Nations, New York, 62.
[9] *Ibid.*
[10] *Ibid.*
[11] *Ibid.*
[12] A. Kapczynski (n. 1), 1046.
[13] *Ibid.*

important tool to remedy the access gap".[14] Pharmaceutical companies, however, have a vested interest in blocking the creation of generic competition in developing countries, as it poses a threat to capturing potential markets in emerging economies such as India and Brazil. Not at all incidentally, the largest generic production of medicines occurs in these middle-income countries, rendering the specific concession demanded by developed countries on Brazil and India in trade agreements especially concerning.[15]

The Trade Related Intellectual Property Rights Agreement (TRIPS) created during the Uruguay round of the General Agreement of Trade and Tariffs negotiations in 1986 represented the first comprehensive agreement on intellectual property rights as trade policy (Abbott, 470). Out of fear of a rise of a global generics market and the destruction of developed-country patent monopolies, pharmaceutical companies and developed-country governments crafted a universalised intellectual property rights regime that would allow pharmaceutical companies to export their exclusive patents to developing countries (Cohen-Kohler, 233). These exclusive rights regimes would enjoy a robust enforcement mechanism built into corresponding commodity trade agreements and transnational legal regimes, essentially leveraging a country's commodity exports – on which many developing countries are primarily reliant – against public health (Abbott, 470).

Predictably, the governments of Brazil and India opposed the strict enforcement of these patent regulations, citing the negative effects on their public health systems from the prohibition of their generic manufacturing industries (Abbott, 470). The US, Japan and the EU, however, outvoted these countries during rounds of negotiations and ensured that their own industries were protected (Abbot, 480). Nonetheless, a vague public health measure was preserved in Article 8 the TRIPS Agreement allowing World Trade Organization members to "adopt measures necessary to protect public health and nutrition" (Cohen-Kohler, 236). While the exact measures permitted were left unspecified, compulsory licensing agreements emerged as key tools in the fight against AIDS.

Compulsory licensing of a patent allows a third party, often a government, to use patented technology outside of a patent holder's price and market monopoly on the condition that the technology is not exported. Governments can produce drugs generically utilising the patented

[14] *Ibid.,* 1049.
[15] *Ibid.,* 1050-1051.

compound and supply its market with affordable medicine during a public health emergency.[16] While this arrangement theoretically renders previously exclusive technology more accessible, it ignores the facts on the ground.

Many low-income countries import generic medication from India, Brazil, or Thailand. The no-export condition effectively traps affordable medicines inside these countries' borders and stops the flow of life-saving medication to areas in crisis.[17] It was this obstacle to the generic versions of antiretroviral medication found abroad to treat the HIV/AIDS epidemic in South Africa that prompted a constitutional amendment in 1997 that would allow South Africa to circumvent this no-export condition.[18]

The US pharmaceutical industry feared that the violation of TRIPS would lead to the complete collapse of the patent system and thus sued the South African government, even in the face of an exponentially increasing public health emergency.[19] After the South African Supreme Court ruled that the amendment was not unconstitutional, South Africa was put on a WTO trade watch list and was at risk for sanctions. US development assistance was also conditioned on the repeal of this amendment.[20]

After years of vigorous protest by civil society both in the US and South Africa, the US announced it would stop pressuring South Africa through trade agreements and adjust its trade policies to enable access to essential medicines. In 2000, President Clinton announced that "the United States shall not seek, through negotiation or otherwise, the revocation or revision of any intellectual property law or policy of a beneficiary sub-Saharan African country […] that regulates HIV/AIDS pharmaceuticals or medical technologies".[21] By 2001, the Bush administration reaffirmed that the US would not object to WTO member countries using the flexibility of Article 8 to address "major health crises". Additionally, the pharmaceutical companies dropped their court challenges of the South African constitution and agreed to cover the South Africa government's legal expenses "in the face of what has been described as a public relations

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[16] Cohen-Kohler, Jillian Clare, Lisa Forman & Nathaniel Lipkus, 'Addressing legal and political barriers to global pharmaceutical access: Options for remedying the impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the imposition of TRIPS-plus standards.' [2008] 3 *Health Economics, Policy and Law* 229, 239.
[17] *Ibid.*
[18] W. Fisher & C. Rigamonti, 'The South Africa AIDS Controversy: A Case Study in Patent Law and Policy' [2005] *The Law of Business and Patents,* Harvard Law School, 5.
[19] *Ibid.*
[20] *Ibid.,* 7.
[21] *Ibid.,* 9.

nightmare".[22] In return, South Africa pledged to comply with TRIPS and invited the pharmaceutical industry to draft future regulations.

The immense difficulty of utilising the flexibility of Article 8 in TRIPS illustrated in the South African example betrays just how robustly enforced these intellectual property regimes are in the global economy, to the detriment of public health. In response, the African Group of WTO Members initiated a discussion of the tension between intellectual property and public health during the WTO conference in Doha in 2001. The result was the Doha Declaration, an agreement that attempted to reconcile the TRIPS Agreement with public health concerns. The Doha Declaration states: "each WTO Member has the right to grant compulsory licenses and the freedom to determine the grounds upon which such licenses are granted [and] has the right to determine what constitutes a national emergency or other circumstances of extreme urgency".[23] In recent years, the Malaysian government has been able to utilise this clarification to grant compulsory licenses of AIDS drug patents held by Bristol-Myers Squibb and GlaxoSmithKline to the Indian generic manufacturer Cipla, and Zambia has granted similar compulsory licenses to an Italian generic manufacturing company incorporated in Zambia.[24]

While patent protection of AIDS drugs has loosened considerably since the beginning of the AIDS epidemic, member of the US Senate Foreign Relations Committee Senator Norm Coleman famously stated on a 2003 visit to South Africa that access still remains a problem: "In a country in which there are 11 million orphans from AIDS, over 5 million people are HIV positive. And yet with 5 million people being HIV positive only 20,000 are receiving the anti-retro viral drug that is needed".[25]

3. Research and Development: a numbers game

A particular statistic is often repeated when discussing global health inequalities: only 10% of the world's spending on research and development goes to address conditions that make up 90% of the global burden of disease. This 10/90 gap is further illustrated by the fact that only 1% of all medications introduced between 1975 and 1999 – exactly 13 out of an estimated 1393 medications – targeted tuberculosis and tropical diseases that cause 11.4% of the global disease burden.[26] This is due to the fact that diseases of poverty are not profitable – contrary to industry

[22] *Ibid.*
[23] *Ibid.,* 14-15.
[24] *Ibid.,* 16.
[25] *Ibid.,* 16-17.
[26] A. Kapczynski (n. 1), 1051.

arguments that development is not sufficiently incentivised by strong patent protections. For example, when research is oriented towards conditions affecting low and middle-income countries, it tends to focus on conditions affecting the upper classes who are more able to pay monopoly prices, rather than diseases of poverty.[27]

It is also important to note who is doing the research. Biotechnology companies and university labs provide over half of the research for new drugs.[28] The difficulty patent protections pose to researchers is immense, as data is locked away behind intellectual property restrictions and cross-licensed patent thickets trap innovations. These roadblocks serve to "dampen scientific exchange" and discourage researchers from sharing information with their peers. At its worst, a patent can block research outright. For example, Myriad Genetics has used its patents on genes that appear to trigger breast cancer to force medical schools to abandon research programs.[29]

In response to these barriers, some researchers have chosen to simply ignore them. Companies have rarely sought to prosecute individual scientists, but universities put themselves at risk of patent infringement if they lend institutional support to a large study.[30] The result of the currently intellectual property regime, in sum, has been to disincentivise neglected disease research and slow the little research that manages to find funding.

4. University Activism: a potential solution?

Universities often sell technology to pharmaceutical companies, meaning they are in a unique position to extract concessions from pharmaceutical companies to ensure equitable access.[31] Commons-based approaches to licensing can create a self-enforcing open licensing regime for biomedical research and development. Universities can negotiate to retain the necessary rights to ensure freedom to operate in low and middle-income countries from pharmaceutical companies through grant-back and cross-licensing structures. These rights would allow the university to grant licenses to third parties to use the medical technology in low and middle-income countries. This approach would be most effective in the production of small molecule drugs such as aspirin that can be easily reverse-engineered.[32] This equitable access approach

[27] *Ibid.,* 1052.
[28] Robert Kneller, 'The Importance of New Companies for Drug Discovery: Origins of a Decade of New Drugs' [2010] *Nat. Rev. Drug Discovery* 867, 879.
[29] A. Kapczynski (n. 1), 1053-4.
[30] *Ibid.,* 1056.
[31] *Ibid.,* 1090.
[32] *Ibid.,* 1094-5.

should not be limited to HIV/AIDS, TB, or malaria as "[t]he majority of the global burden of chronic, noncommunicable diseases such as diabetes, cancer, cardiovascular disease, and chronic respiratory disease […] is borne by those living in developing countries," with cardiovascular disease accounting for as many deaths in young and middle-aged adults in developing countries as HIV/AIDS.[33]

Cross-licensing functions as a middle ground between granting exclusive rights to pharmaceutical companies in every country and not licensing a medical technology at all. Under cross-licensing, in exchange for exclusive monopoly rights in high-income countries, a pharmaceutical company allows for the rights to its finished product to be transferred back to the university for sublicensing in a developing country market.[34]A generic manufacturer can obtain a sublicense directly from the university and distribute it in low and middle-income countries.[35]

For research, universities can adopt neglected disease licensing clauses which allow research on neglected diseases to be accessed and shared using licensed technology. Using this clause, universities could free data on neglected disease research for use anywhere in the world and allow for the production of new technology stemming from this research in low and middle-income countries.[36]

If universities collectively implemented these policies, researchers "could maximize their joint potential to close the R&D and access gaps and improve the lives of people living in [low and middle-income] countries".[37] Even if the sum of these actions is a drop in the bucket of preventable deaths from diseases of poverty, universities will have accomplished something both the international community and the market have failed to do: to take a principled stance on health as a human right, and come up with a functional plan to increase access to essential medicines.

[33] *Ibid.*, 1097.
[34] *Ibid.,* 1100.
[35] *Ibid.*
[36] *Ibid.,* 1099-1100.
[37] *Ibid.,* 114.

How far does the scope and application of the law on state responsibility serve international values?

Suraj Bhaskaran*

1. Introduction

State responsibility is one of the defining features of international law (IL) and is vital in understanding the development and regulation of inter-state relations. Although it is generally regarded that the laws of state responsibility are sufficiently clear in respect to inter-state relations, there are unresolved issues that pose a threat to the uniformity of international law. Moreover, there seems to be a serious deficiency in being able to hold other subjects in international law to account, such as international organisations and, to some extent, even individuals.

This essay seeks to draw out these unresolved controversies in IL. It begins by exploring the basic principles of international law and their underlying issues, followed by an examination of who can actually invoke state responsibility, before finally analysing the impact that the law of responsibility has and should have on international organisations and individuals as a form of extension, in order to protect more community-focused interests that ensure clarity and uniformity is upheld in IL.

2. Fundamental principles of state responsibility

In evaluating the scope and application of state responsibility, its fundamental principles are worth highlighting due to its sufficiency, or lack thereof, in ensuring the responsibility of states themselves. As formulated by ARSIWA, there are two fundamental principles that can be gleaned from this.[1] Firstly, a State's conduct consisting of 'an act or omission' is an internationally wrongful act when the conduct in question is 'attributable to the State under international law' and secondly, when it 'constitutes a breach of an international obligation of the State'.[2] The area that is generally under scrutiny here is attribution. Although the relative rule in direct responsibility is that states are not responsible for acts of private parties since the state itself is

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[1] International Law Comission, 'Draft Articles on the Responsibility of States for Internationally Wrongful Acts' contained in ILC, 'Report of the International Law Commission on the Work of its 53rd Session' (2001) UN Doc A/56/10 ("ARSIWA").

[2] *Ibid*., Art 2.

completely abstract, there are a number of exceptions.[3] If the actions of a state's organs or officials are deemed as *ultra vires*, then the state may be held responsible.[4]

The point of contention comes in the form of Article 6 (ARSIWA), which refers to the conducts and acts of 'organs placed at the disposal of a State by another State'.[5] One of the key fault lines here has developed in peace-keeping operations. Namely, if Member States place their forces at the disposal of an international organisation such as the United Nations, should the international organization or the Member State be held responsible if there are allegations of an internationally wrongful act conducted by peacekeepers?[6] Two cases highlight this uncertainty in the law explicitly: *Behrami* and *Al-Jedda*. Initially, in *Behrami*, the European Court of Human Rights decided that the conduct of military personnel involved in operations under the auspices of the UN were attributable to the UN, as the Security Council had ultimate authority and control over them.[7] Although this answers the questions surrounding Article 6 (ARSIWA) and supports Article 7 (ARIO), they are unsatisfactory as the judgment in *Behrami* allows states to escape responsibility, instead allowing all the blame to be placed upon the UN, reiterating the influence that politics has over IL, and creating a gap in the accountability of States as a result.[8]

The decision in *Al-Jedda* in 2011 however, overcame the hurdles brought about by *Behrami*. The House of Lords and the ECtHR found that based on the facts of the case, UK troops were not under UN control and the UK was responsible for their misconduct.[9] However, *Behrami* was not overruled. The ECtHR instead chose to almost side step it and leave it open, not willing to consider the *Behrami* precedent as 'bad law', thus maintaining the sense of doubt and confusion.[10] Irrespective, the decision in *Al-Jedda* is significant as in order for the law on state responsibility to fulfill its role in international law to the fullest extent, there needs to be clarity in it. *Al-Jedda* provides the perfect platform for this as the Court recognised 'the possibility that certain conduct may be attributed both to the UN and to member states contributing troops'.[11]

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[3] Jan Klabbers, *International Law* (2nd edn, CUP 2017), 139.
[4] *Ibid.*, 140.
[5] ARSIWA (n. 1), Art 6.
[6] Francesco Messineo, 'Things Could Only Get Better: Al-Jedda beyond Behrami' [2011] 50 (3-4) *Military Law and the Law of War Review,* 325.
[7] *Behrami and Behrami v France* (Application no. 71412/01) and *Samarati v France and others* (Application no. 78116/01) (2 May 2007) 45 EHRR SE 10.
[8] *Ibid.*, para 91.
[9] *R (Al-Jedda) v Secretary of State for Defence* [2008] 1 A.C. 332
[10] Kjetil Mujezinović Larsen, 'Attribution of Conduct in Peace Operations: The 'Ultimate Authority and Control' Test' [2008] 19 *European Journal of International Law,* 527.
[11] Francesco Messineo, 'Things Could Only Get Better: Al-Jedda beyond Behrami' [2011] 50 (3-4) *Military Law and the Law of War Review,* 14.

Based on this recognition, there should be no reason why both member states and international organisations should not be held responsible as there could potentially be situations of multiple responsibility, which then calls for multiple attribution.[12] Although this was not the case in *Al-Jedda*, the concept of dual or multiple attribution could well be the form of mediation between certainty and the true reflection of circumstances in these types of cases, while attaching legal certainty to state responsibility in an area of international law that desperately lacks it.

3. Causal overdetermination and state responsibility

Following on from that, although the law of state responsibility is generally sufficient in terms of inter-state relations, there are still deficits that are evident in the international arena. The notion of overdetermination is one that especially stands out as it causes significant issues in the law through lack of clarity around the causation mechanism used to guide the decision-making processes of the courts in relation to overdetermination itself. Although causal overdetermination is seemingly minor and quite technical, it is imperative in analysing the scope and applicability of state responsibility on a wider scale. In dealing with this, overdetermination is defined as 'the existence of multiple causes (multiple wrongdoers, external natural causes and so on) contributing towards a harmful outcome'.[13] Based on this definition, it can be observed that due to the complexity of inter-state relations, there could be a corresponding diverse range of sources that lead to harmful outcomes between states, thus posing significant problems to the laws on state responsibility.[14]

To put this into context, the court's 'lack of elaboration' when dealing with causal mechanisms needs to be examined first. The *Corfu Channel* case specifically provides evidence of the courts failing to engage in a meaningful form of causal analysis, leading to judgments that are evasive and lower in value.[15] In *Corfu Channel*, Albania were accused of 'failing to warn the British fleet of the presence of mines in the channel', although Albania had nothing to do with the mines, with Yugoslavia instead possibly involved.[16] This was a complex case with many factors involved and the ICJ unsurprisingly erred in its judgment, as the majority did not even consider an analysis of causality, instead ascribing the wrongful act to Albania without looking at the facts in their

[12] *Ibid.*, 15.
[13] Ilias Plakokefalos, 'Causation in the Law of State Responsibility and the Problem of Overdetermination: In Search of Clarity' [2015] 26 *European Journal of International Law,* 471
[14] *Ibid*.
[15] *Corfu Channel Case (UK v Albania)* (Merits) [1949] ICJ Rep. 4.
[16] Ilias Plakokefalos, 'Causation in the Law of State Responsibility and the Problem of Overdetermination: In Search of Clarity' [2015] 26 *European Journal of International Law,* 484.

entirety.[17] This was noted by the dissenting opinion of Judge ad hoc Ečer, who criticised the value of the judgment, as if the notion of causality had been examined in more detail, there could have been a more just view on the reparations involved and the courts could have set a precedent through formulating a guiding structure for future cases that are of similar complexity in nature.[18]

Indeed, even when courts engage with the causal mechanism in state responsibility, there is often a 'lack of clarity' as the courts often mix up the applicable tests.[19] This was especially evident in *Naulilaa*, which concerned reparations claims by Portugal regarding the damage caused by Germany in Naulilaa.[20] Although the Tribunal performed a valid cause-in-fact inquiry in great detail to assess the damages involved, the Tribunal added the element of foreseeability and stated that the result 'should have been foreseen by the Germans'.[21] This had the effect of blurring the lines between two separate steps of causal analysis: causation-in-fact and the scope of responsibility, thus mixing up objective and subjective criteria where there is no need to in cases of overdetermination.[22]

Thus, as seen above, the laws of state responsibility are not as straightforward as first thought, especially regarding complex inter-state relations. It goes without saying that there needs to be clarity in the law and the courts are an integral part to this. The correct identification of the type of overdetermination is inherently needed; there needs to be a simplification, yet detailed analysis of the causal mechanisms in these complex cases; and finally, there needs to be a precedent set that can guide future cases of causal overdetermination, which may ensure that states do not unnecessarily get caught in any 'red tape', whilst also providing greater certainty and uniformity in the scope and application of the law on state responsibility.

4. Who can invoke state responsibility?

State responsibility under international law has typically developed in the context of bilateral obligations.[23] However, calls for a collective standpoint on state responsibility were answered as

[17] *Ibid.*
[18] *Corfu Channel Case (UK v Albania)* (Compensation) [1949] ICJ Rep. 244, per Dissenting Opinion by Judge Ečer.
[19] Ilias Plakokefalos, 'Causation in the Law of State Responsibility and the Problem of Overdetermination: In Search of Clarity' [2015] 26 *European Journal of International Law,* 486.
[20] *The Naulilaa Case (Portugal vs Germany)* [1928] 1 RIAA I0011.
[21] Ilias Plakokefalos, 'Causation in the Law of State Responsibility and the Problem of Overdetermination: In Search of Clarity' [2015] 26 *European Journal of International Law,* 487.
[22] *Ibid*.
[23] Jan Klabbers, *International Law* (2nd edn, CUP 2017), 145.

Article 48 of ARSIWA outlines the 'invocation of responsibility by a State other than the injured State' when an obligation owed to the international community as a whole is breached.[24] It should be noted however, that movement away from the strict, horizontal system of bilateral obligations did not start with the Articles. The *Barcelona Traction* case laid these foundations in 1970, where the ICJ recognised that obligations can be owed towards the 'international community of states as a whole', instead of being restricted to one's treaty partners.[25] This judgment was crucial as along with the Articles, it permitted the entry of *erga omnes* obligations into the area of state responsibility, which the ICJ emphasised in *Construction of a Wall*: 'states are under an obligation not to render aid or assistance to the state carrying out the wrongdoing'.[26]

Although these cases and the Articles are seen to be a positive move towards more states being able to invoke the laws on state responsibility in response to serious breaches to the international community, there is scope for abuse of these laws that lead to the larger theme of political indeterminacy in international law and a form of inequality among states. This comes in the form of aggravated responsibility through Articles 40 and 41 (ARSIWA) which recognises that some breaches of international law are more serious and significant than others and compels states to work together to bring an end to 'a serious breach by a State of an obligation arising under a peremptory norm' of IL, thus directly relating to the *erga omnes* obligations mentioned previously.[27]

Now, although the capacity to call for the obligation to end is more broadly shared, due to these Articles, what states can actually call for is much more limited than in a situation of bilateral obligations between two states where there is a clearly identified state that has acted unlawfully and a clearly identified wronged state. Firstly, the fact that an *erga omnes* obligation was violated is not enough to give the ICJ jurisdiction as exemplified in *East Timor*[28] and *DRC v Rwanda*[29], where the injured state or the alleged wrongdoer has not agreed to the jurisdiction of the Court. Secondly, the insertion of *erga omnes* also brings with it the principle of *jus cogens* and vice-versa. This has the potential to set up a regime where some norms will trump others, creating a hierarchy of norms as a result. As Koskenniemi contends, these elements may give the green light to more powerful states to intervene and establish domination in all sorts of situations, thus

[24] ARSIWA (n 1), Art 48.
[25] *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* [1970] ICJ Rep. 3.
[26] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] ICJ Rep. 136.
[27] ARSIWA (n 1), Arts 40 and 41.
[28] *East Timor (Portugal v Australia)* [1995] ICJ Rep. 90.
[29] *The Democratic Republic of Congo v Rwanda* [2006] ICGJ 14.

providing these states with a tool to further their own political agendas and reinforcing the unneeded link between hegemony and IL.[30]

All this begs two questions: who can invoke state responsibility and how far should international law be pushing at mechanisms to enforce community interests? Although the Articles seemingly create a broad scope for the invocation of state responsibility, they are just as narrow as before, as at least in bilateral relations, there was no issue in holding the state in the wrong responsible. Presently, the mechanisms in place are insufficient in meaningfully holding states responsible due to the complexities brought about by the Articles and *erga omnes* obligations. This seems to emphasise the overarching limitations of international law as a political project, with the powerful using state responsibility to maintain the disparity of power between states. Thus, there seems to be a delicate tightrope to be walked between ensuring that states live up to their responsibilities and finding a mechanism to do that, which until resolved, will continue to create unnecessary tensions in the sphere of state responsibility in IL.

5. Extension of Responsibility to International Organisations

Since the adoption of the ARIO 2011, the law has moved towards ensuring responsibility for international organisations as well.[31] Although the ARIO 2011 should be commended for possessing similar authority to ASRIWA, as observed even with ASRIWA, there are underlying issues involved that threaten this extension of responsibility. This especially occurs when holding international organisations responsible in terms of their omissions.[32] The UN's refusal to intervene in the Rwandan genocide exemplifies international organisations failing to be sufficiently held responsible, despite the adoption of the Articles. Klabbers however, suggests ways to overcome these omissions, primarily by examining the mandates of international organisations when there are no primary obligations that exist under IL.[33]

For example, by examining the mandate of the UN during the Rwandan genocide, it is clear that the UN's role is to take measures preventing the genocide from occurring, thus the UN should be morally and legally responsible if it fails in this respect.[34] In order to explore this further, one

[30] Martti Koskenniemi, 'Solidarity Measures: State Responsibility as a New International Order?' [2001] 72 *British Yearbook of International Law*, 337.
[31] ARSIWA (n 1).
[32] *Ibid*., Art 4.
[33] Jan Klabbers, 'Sins of Omissions: The Responsibility of International Organisations for Inaction' [2016] *Jean Monet Working Paper* 2/16 1, 60.
[34] *Ibid*., 5.

can look at a strong counter-argument to the UN justifying its actions. Although the UN can justify taking actions in certain countries based on its mandate, the UN cannot make the same argument in terms of its omissions.[35] To make this more concrete, the UN cannot 'claim that its inaction in Rwanda was necessary in order to enable it to function effectively'.[36] Thus, there remain avenues for the control of international organisations in terms of holding them responsible, especially in the area of omissions that is consistently taken advantage of.

Furthermore, there is the general consensus that international organisations are dissatisfied with a greater emphasis for rules on responsibility, with large organisations such as the EU instead preferring to 'carve out a separate niche for itself', through its own rule-making for the Member States under EU law jurisdiction.[37] With international organisations preferring self-control over the assertion of rules on responsibility by IL, there seems to be a lack of authority in place to deal with this. Scholars have proposed the idea of using administrative law to hold these international organisations accountable and responsible through 'transparency in decision-making, broad participation in decision-making and the use of proportionality in applying the law'; however it is recognised that there needs to be a major development in these proposals as to what actually determines proportionality and the rest.[38]

In essence, the creation of the ARIO in 2011 is undoubtedly a positive one, as the notion of responsibility should be transferred to international organisations as well, fitting in with the broader notion of international law keeping up with the rise of global governance. However, in doing so, issues naturally arise, some of which can be dealt with such as omissions by international organisations, while others are seemingly more complicated and require greater action and attention in order to ensure that the extension of responsibility from state responsibility to responsibility of international organisations does not set a model that has an adverse effect on the role of responsibility in IL.

6. Extension of responsibility to individuals

The area of individual responsibility has also traditionally been overlooked in IL, with the exception of conduct on the battlefield. As drawn upon by Lauterpacht and Allott, there were major drawbacks of previously shielding individuals from responsibility, mainly that the

[35] *Ibid.*, 31.
[36] *Ibid.*, 55.
[37] Pieter Jan Kuijper and Esa Paasivirta, 'The EC and the Responsibility of International Organisations' [2004] *1 International Organisations Law Review,* 111.
[38] Jan Klabbers, *International Law* (2nd edn, CUP 2017), 149.

authority and role of international law was undermined.[39] The ICC changed this by being able to directly hold individuals responsible for certain actions. It is crucial then to note that the courts have recognised the existence of a strong relationship between state and individual responsibility, and have developed a 'general conceptual scheme' to further highlight this, as in the *2007 Genocide case* involving Bosnia and Serbia.[40] However, in setting up a scheme to recognise this relationship, the Court errs in its consistency to implement this scheme and risks blurring the separation between the two systems of responsibility, thus emphasising the notion of indeterminacy and lack of clarity in the law of responsibility under IL.

This general conceptual scheme adopted by the Courts involved state and individual responsibility existing from the violation of the same primary norms, but remaining distinct through their different set of secondary rules as evidenced in the *2007 Genocide case*: 'the Court observes that duality of responsibility continues to be a feature of international law… the Court concludes that State responsibility can arise without an individual being convicted of the crime'.[41] However, here is where the controversy lies. Although a general conceptual scheme exists, there is evidence that the ICJ has incorrectly applied this scheme in practice. In the *2007 Genocide case*, the Courts concluded that intent must be established in state liability for genocide.[42] This directly refers to the element of *mens rea* usually required in individual criminal responsibility, thus the Courts have come under major criticism from critics such as Gaeta who state that the Courts have applied a secondary rule typical to individual criminal responsibility, to state responsibility where there is no need to.[43]

The lack of a separation maintained between the *mens rea* of both the state and the individual in these type of cases would prove contrary to the general conceptual scheme of Court in the first place, especially in relation to the crime of genocide as 'state responsibility appears more dependent on individual responsibility than it should be'.[44] Therefore, in order to maintain the relationship between state and individual responsibility, the Court should be consistent with the principles and theory of its general conceptual scheme when applying it in practice to ensure

[39] Hersch Lauterpacht, *International Law and Human Rights* (Archon Books, 1950), 40.
[40] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* [2007] ICJ 2.
[41] *Ibid.,* [182].
[42] *Ibid.,* [186].
[43] Paola Gaeta, 'On What Conditions Can a State Be Held Responsible for Genocide?' [2007] *European Journal of International Law*, 643.
[44] Beatrice I. Bonafè, 'Reassessing Dual Responsibility for International Crimes' [2016] 73 *Sequência (Florianópolis)* 36.

that the two regimes of responsibility are not blurred and are in fact, complimentary to each other, ensuring greater certainty in international law as a result.

As observed above, through the notions of international responsibility and state responsibility, there seems to be a co-existence of responsibility systems in international law that could give rise to complexities, leading to unjust results and the common theme of indeterminacy in IL. Room for development is needed to ensure that when these different systems of responsibility overlap, there would be mechanisms in place to ensure that the attribution of responsibility especially is not blurred. On the whole however, with the laws of responsibility being extended, it can be argued that more clarity and uniformity has been achieved in the sphere of IL.

7. Conclusion

To conclude, state responsibility is vital in international law and is constantly developing. Although it is reasonably settled in regards to inter-state relations, there are bound to be a number of unresolved issues in its scope and application that produce tensions as part of this development.[45] This is evident in terms of the fundamental principles of state responsibility, with the notion of attribution remaining a contentious point, as well as causal overdetermination needing to be restructured in order to further contribute to the uniformity and certainty in IL.

Moreover, the question of who can invoke state responsibility still needs to be answered in certain respects. The development of *jus cogens* and *erga omnes* principles leave the law searching for an effective balance between ensuring that states live up to their responsibilities and finding an adequate mechanism to do that. In addition, the extension of the laws of responsibility to international organisations and individuals provide their own challenges, such as the insufficiency of the ARIO 2011, as well as the risk of blurring the lines between state responsibility and individual responsibility, leading to a co-existence of responsibility regimes in IL.

Despite these numerous issues, however, law has undoubtedly moved forwards rather than backwards in a relatively short space of time. As with international law in general, there is always great flux and as long as adjustments and rectifications are made to resolve these issues in relation to the law of responsibility, international law would benefit from a strong system that ensures greater coherence, certainty and uniformity in the international arena.

[45] Jan Klabbers, *International Law* (2nd edn, CUP 2017), 152.

A prognostication regarding elderly care in the future – can we trust the robots with our elderly?

Tabitha Elise*

1. Introduction

This article will explore and critically evaluate the potential role of robots in undertaking care-related activities for the elderly through the findings of academic research. Firstly, the definitions of robots and care-related activities will be examined. These definitions will then be expanded, and current and potential technological developments will be discussed to determine whether these innovations should be welcomed.

Subsequently, the legal, ethical, philosophical and moral implications that these advances bring shall be looked at in light of current and future political, economic and social landscapes, in the context of comparing and contrasting different cultures 'and countries 'approaches, specifically Japan, the European Union (EU) and the United Kingdom (UK) among others. This article will conclude by proposing what legal safeguards, if any, should govern such developments and innovations, by looking at the possibilities outlined by the European Commission.

There is no agreed definition of a robot. For this article, a robot will encompass both artificial intelligence (AI) and physical machines which operate both autonomously and non-autonomously. Care is somewhat easier to define and is the provision of what is necessary for the health, welfare, maintenance and protection of someone or something.[1] Similarly, 'if you look after someone, you keep them in a good state or condition'.[2] It is clear to see from both of these definitions that care is not only the provision of what is necessary, but it is also keeping an individual in a good state or condition. The key elements of care are emotional, physical and mental wellbeing.[3] For this article, care will be divided into two subsets – physical care and

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[1] 'Oxford Dictionary' (2019) <https://en.oxforddictionaries.com/definition/care> accessed 12 March 2019.

[2] *Ibid.*

[3] UN POP, United Nations 'Principles for Older Persons' (1991) Resolution 46/91, adopted by General Assembly, para 11 <https://www.ohchr.org/EN/ProfessionalInterest/Pages/OlderPersons.aspx> accessed 12 March 2019.

psychological care. For this article, surgically assistive robots are not included within these categories of care.

2. The need for care robots

Firstly, it needs to be determined whether there is a need for robots to perform care-related activities for the elderly. For the first time in history, fourteen per cent of the world's population is now older than sixty-five.[4] By 2050, this is expected to reach nearly 2.1 billion people (UN DESA). Consequently, more individuals are now living with various debilitating conditions and the costs and practical difficulties associated with these issues are often high and complex.[5] Indeed, statistics show that the total current healthcare expenditure in 2016 was nearly two-hundred billion in the UK alone.[6] There is an economic and social need for more elderly care assistance, which is only going to become more drastic in the future with the gap between the non-working and the working increasing, straining economy resources.[7] In this sense, it seems that robots have arrived at the perfect time.

It is clear that robots that undertake care-related activities for the elderly need to be reliable, affordable and conduct genuinely useful functions, interacting in a simple, safe and intuitive manner.[8] However, just because robots may fulfil these criteria does not guarantee that they will be accepted by the public. A study conducted to compare and analyse care personnel attitudes toward care robots found that overall, Japanese care personnel assessed the usefulness of robots more positively than their Finnish counterparts. Japan, however, is a more developed country concerning the use of robotics in nursing care.[9] In comparison, a 2014 survey involving around twenty-seven thousand individuals from different social and demographic groups found that fifty-one per cent of the respondents were uncomfortable with the idea of robots providing services and companionship to the elderly.[10] These finding shows that the cultural, historical,

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[4] R. Bogue, 'Europe leads the way in assistive robots for the elderly' [2017] 44(3) *The Industrial Robot* 253, 253.
[5] *Ibid.*
[6] Office for National Statistics, 'UK Health Accounts: 2016' (*Statistical bulletin*, 2018) <https://www.ons.gov.uk/peoplepopulationandcommunity/healthandsocialcare/healthcaresystem/bulletins/ukhealthaccounts/2016> accessed 12 March 2019.
[7] Maria Isabel Aldinhas Ferrieira & João Silva Sequeira, 'Robots in Ageing Societies' in S.G. Tzafestas, P. Antsaklis, N.R. Gans, C. Tzafestas, A. Ferreira, M. Isabel, João Silva Sequeira & G. Singh Virk (eds), *A World with Robots: International Conference on Robot Ethics: ICRE 2015* (Springer 2017), 218-219.
[8] R. Bogue (n. 4), 253.
[9] K. Coco, M. Kangasniemi, & T. Rantanen, 'Care Personnel's Attitudes and Fears Toward Care Robots in Elderly Care: A Comparison of Data from the Care Personnel in Finland and Japan' (2018) 50(6) *Journal of Nursing Scholarship* 634, 634-5.
[10] R. Bogue (n. 4), 253.

social and political background of different countries is likely to impact upon the degree of acceptance of robots who carry out care-related activities.

To determine whether these technological advances should be welcomed, it is necessary to gather public opinion. In Europe, a large survey in 2012 showed a general public perception which is still not very open to home service robotics.[11] Thirteen per cent of the European citizens think robots should be applied in priority to "domestic use, such as cleaning''. In consequence, this technology must follow a user-centred approach, and, arguably, more research is needed to identify and distinguish the profiles of prospective users, including their needs, preferences, expectations, cultural contexts and typical environment.[12] It has been suggested that good management may help care personnel accept care robots, to combat unwelcoming attitudes towards robots.[13] It does seem quite clear, however, that consumers 'trust and uptake of these technologies will depend on whether they are perceived to be safe and whether the legal framework is considered clear and effective.[14]

3. The benefits and risks to robot carers

As well as predicting whether these advances will be welcomed, it is necessary to critically evaluate the potential benefits and risks of these robotic developments. Predictions say that service robots will massively enter every home in the near future and in recent years there have been robotic developments in different areas such as fall detection systems, like the hobbit program.[15] Robots for body assistance have also been developed, such as the RIBA robot that transfers patients from bed to chair.[16] Robots could also be used for administrative tasks in hospitals, like the AI robots in Ipswich that have cut down the processing time of general practitioner referrals by half, allowing staff to focus on 'frontline services 'and human care.[17]

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[11] Francesco Mondada, Julia Fink, Séverin Lemaignan, David Mansolino, Florian Wille, Karmen Franinović, ' Ranger, An Example of Integration of Robotics into the Home Ecosystem' in M. Ceccarelli, H. Bleuler, M. Bouri, F. Mondada, D. Pisla, A. Rodic & P. Helmer (eds), *New Trends in Medical and Service Robots: Assistive, Surgical and Educational Robotics* (Springer 2016), 182.
[12] Maria Isabel Aldinhas Ferrieira (n. 7), 223-6.
[13] K. Coco (n. 9), 635.
[14] EC SWD, European Commission Staff Working Document, 'Liability for emerging digital technologies Accompanying the document Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions Artificial intelligence for Europe' (2018) < https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A52018SC0137> accessed 12 March 2019.
[15] Francesco Mondada (n. 11), 181-3.
[16] K. Coco (n. 9), 635.
[17] Department of Health and Social Care Case Study (UK) 'Artificial Intelligence robots in Ipswich hospital' (2018) < https://www.gov.uk/government/case-studies/artificial-

On the psychological side, more sophisticated social robots, such as seals, have been, according to patients, a useful and pleasant interaction. They were, however, not considered a replacement for human interaction. There are other social robots such as Pepper and the Care O bot 4, which can communicate in a variety of ways.[18] The Care O bot's functions include acting as a mobile information centre, performing collection and delivery services and being used for various security applications.[19] Socially, robots could enable the elderly to manage longer and more independently in their own homes, reducing social isolation and exclusion.[20] There is, however, the contrary argument that these social robots will replace human interaction.[21] Consequently, there are fears related to the introduction of care robots, concerning the dehumanisation of treatment and increased loneliness in the elderly.[22]

On the topic of safety, there may be an increase in security and a decrease in the risk of falls and other injuries. Additionally, robots can also provide services, such as reminding people when to eat and take medicine, carrying loads and drug administration.[23] They can also provide practical healthcare, do household work, and guide the use of a phone or bank-related issues.[24]

Economically there will be a benefit to welcoming robots in this area due to reduced healthcare costs.[25] However, there is no consensus on what this will mean for the workforce. There may be rising unemployment due to replacement by robots, or just different types of employment supporting AI. It has been predicted that there is a high risk of automation in the next two decades, equating to roughly 1.4 million jobs in the health and social work sector.[26]

The difference between whether robots should be welcomed in this situation and whether they would be welcomed is an important one, and the impact of deployment in domestic and institutional environments must be carefully anticipated.[27] Other objections regarding the

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intelligence-robots-in-ipswich-hospitall> accessed 12 March 2019; A. Downey, 'Invest in automation to free up frontline resources, Thoughtonomy boss says' (*Digital Health,* 2019) <https://www.digitalhealth.net/2019/02/automation-frontline-services-thoughtonomy/> accessed 12 March 2019.

[18] K. Coco (n. 9), 635; R. Bogue (n. 4), 256.

[19] R. Bogue (n. 4), 256.

[20] K. Coco (n. 9), 635.

[21] Maria Isabel Aldinhas Ferrieira (n. 7), 223-6.

[22] K. Coco (n. 9), 634.

[23] *Ibid.,* 635.

[24] *Ibid.,* 638.

[25] *Ibid.*, 635.

[26] House of Commons Science and Technology Select Committee, 'Robotics and Artificial Intelligence' (2016) Committee publications, para 21 <https://publications.parliament.uk/pa/cm201617/cmselect/cmsctech/145/14502.htm> accessed 12 March 2019.

[27] Maria Isabel Aldinhas Ferrieira (n. 7), 223-6.

use of robotic technology with vulnerable older people are the loss of social contact, deception, and even infantilisation.[28]

Regarding deception, humanoid robots can, if equipped with sensory capacities, mimic emotional states like the Robot NAO. There are ethical worries about this because these expressions do, on the face of it, amount to deception. There are also concerns regarding the opposite argument – humans are quick to personify objects and add human features to them.[29] This potential could have dangerous consequences. A recent study found that human subjects will 'overtrust 'a robot in an emergency, even in the face of evidence that the robot is malfunctioning and that its advice is bad (Kuipers).

4. Robots and ethics

The ethics of robots are a huge part of the reluctance to implement legislation, clearly demonstrating the important intersection between science, culture and law. Arguably, ethical standards are needed so that robots do not do morally 'bad 'things. Still, the question is how we go about creating a universal ethical standard when cultures are so different. An 'internal 'ethical standard is not going to do much good unless robots are prohibited from being imported into different countries other than those in which they are made.

A. Leveringhaus proposes an ethical framework that makes a commitment to human rights, human dignity and responsibility for those developing robots, advocating that legislation could be relaxed or tightened depending on the moral response. Leveringhaus suggests that regarding policy, there should be an assessment of whether the use of particular robots would result in human rights violations and secondly creating adequate institutions through which human individuals can be held responsible for what robots do. The strengths of the article are that a policy approach should be in place and that ethics should play a role in the debate of robotics.[30] However, the critical flaw is the actual approach he advocates. Via the focus on human rights, it is neglecting to take into account the foreseeable future where robots will function and behave autonomously, and the differences between humans and robots will become increasingly smaller.[31] Of course, human rights need to be respected and should be – yet what happens when robots are fused with artificial intelligence? Does it become impossible not to grant 'robot rights '

[28] *Ibid.,* 221-222.
[29] R. Gelin, 'The Domestic Robot: Ethical and Technical Concerns' in S.G. Tzafestas (et al.) (eds), *A World with Robots: International Conference on Robot Ethics: ICRE 2015* (Springer 2017), 212-3.
[30] A. Leveringhaus, A., 'Developing robots: The need for an ethical framework.' [2018] 17(1) *European View* 37, 40.
[31] *Ibid.,* 39.

because the capacities of robots are so similar to humans? Could it even be discriminatory for robots not to have rights? These are just some of the issues that could arise.

Although Leveringhaus allows a caveat of 'moral response', where rules could be changed on an ethical basis, the fundamental basis of the theory is still rooted in humanity's superiority – and a simplistic categorisation of robots. While Leveringhaus accepts that this theory would only really apply to robots who operate under the four principles he outlines, a policy cannot be developed on such a basis; indeed, the framework is outdated. AI and deep learning are already here, and it would be greatly extraneous to create a whole new legal framework just for this new technology. The theory proposed by Leveringhaus looks good in principle. Still, in practice, it would cause difficulty distinguishing types of robots, AI and deep learning, and also would present far greater difficulties pertaining to 'moral response'. It is well known that in the recent past there has been confusion as to what constitutes public morality in areas of law like homosexuality.[32]

Currently and generally, the EU has embraced a harmonious approach, trying to adapt rather than change their legal framework to accommodate AI and robotic developments, such as possibly allowing autonomous drones to be covered by strict liability aircraft legislation. A strict liability concept which applies to AI systems, in general, does not exist, and whether it should exist is a concept that needs further exploration.[33] However, there cannot be too much strict liability so that innovation is stifled. Safeguards such as a 'black box 'to breakdown the programmes 'decision making may be a potential solution.[34] It could be argued that if a product does not have this safety feature, it should not be allowed on the market.

At the moment, there are many unregulated or self-regulated schemes such as GiraffPlus, Mobiserv, Domeo, MARIO, ENRICHME and Robot-Era being supported within the EU to combat the problem of an increasingly elderly population. The worry with this is that something will be created (in the absence of legal regulation) that ultimately harms people because the only regulation it is subject to is internal within the company or body that has created it.[35] The other concerns regarding safety are more practical. If a robot is powerful enough to lift things, it is

[32] Committee on Homosexual Offences and Prostitution, *Report of the Committee on Homosexual Offences and Prostitution (The Wolfenden Report)* (Her Majesty's Stationery Office, 1957).
[33] EC SWD (n. 14).
[34] R. Gelin, (n. 29), 214.
[35] R. Bogue (n. 4), 254-5.

potentially powerful enough to be dangerous.[36] To combat risks such as these, Google Deepmind was reported to be working on creating a 'kill switch'.[37]

From a user's point of view, the feeling of being observed and watched is a concern, as is the storing of sensitive and private information.[38] In particular, Google Deepmind's access to patient data and their use of it.[39] Fundamentally, non-autonomous robots are controlled by something, and when it is a large company like Google, they could be programmed to have a vested interest in that company. Alternatively, what happens if robots start to demand privacy themselves? It may seem these questions are hypothetical, but it is argued that they must not be overlooked nor ignored if a full prognostication of care, the elderly and robotics law is to be somewhat accurate.

From an academic point of view, Bertolini advocates a clear legal framework and suggests that different rules should apply to different devices. Initially, this approach appears to have merit. However, it is arguable that it is ineffective as different rules would have to be developed all the time to keep up with innovation.

5. Robotic autonomy

The next issue is whether robots should have the autonomy to control their decision making, monitor their decision making or just be programmed to react in the way we want them to (no autonomy). Autonomy is an intrinsic feature of AI and the complexity posed is that AI could potentially become more intelligent than us.[40] For example, Google Deepmind's AlphaGo beat reigning world champion Lee Sedol, by a move that spectators initially thought was a mistake.[41]

Because of this divide in potential and capacity, we need to differentiate between autonomous robots and non-autonomous robots, as they are not the same even though closely related.[42] Non-autonomous robots will be fairly easy to legislate on, as they have no capacity to make their own decisions. However, AI is different because they have the capacity to make autonomous decisions, facilitating unpredictable behaviour. AI also has the capacity to supersede our intelligence, fondly termed the singularity point.[43] With AI, the possibilities are immense, and

[36] R. Gelin, (n. 29), 211-2.
[37] House of Commons Science and Technology Select Committee (n. 26), para 42.
[38] R. Gelin, (n. 29), 210-1.
[39] House of Commons Science and Technology Select Committee (n. 26), para 50.
[40] EC SWD (n. 14).
[41] House of Commons Science and Technology Select Committee (n. 26), para 3.
[42] *Ibid.,* para 7.
[43] R. Bickerstaff, R 'Do we need robot law?' (*Digital Business Law*, 2017) <https://digitalbusiness.law/2017/02/do-we-need-robot-law/> accessed 12 March 2019.

there must be a legal framework which should aim to prevent any harm being caused by future technology.

It is strongly suggested that the law should respond to these developments by making the selling of autonomous robots illegal unless approved by the government. Also, the robot's design must comply with the rules outlined by the European Commission.[44] All robots must possess a shutdown or kill switch, which can be triggered at any time. Autonomous robots should be given out on a prescription basis, which will not only help with marketing robots as an officially approved medical aid (which will facilitate trust) but will also help differentiate between caring robots and other robots. In this way, safeguarding consumers via the sale of robots does not impact the progress of technological innovation itself and allows robots to operate within this framework. Educational schemes for the public to help them understand robots ethically may also assist any legal provisions' effectiveness.[45]

AI and robotics present an unprecedented and powerful potential, yet it is difficult to predict how this technology will unfold.[46] There needs to be global transparency on the provision, creation, and regulation of robotic products to deal with these concerns. The public need to have a clear picture of what the standards are going to be. Legal regulation is the appropriate method for this, as a secure regulatory environment may also help build public trust in robots, which in turn will help integration with humans. It is for these reasons that legal regulation must be put in place immediately, to maximise benefit and mitigate risk.[47]

6. Conclusion

In conclusion, and after critical evaluation, the increase of the elderly population is an issue that needs to be addressed promptly. This article has suggested that this should be approached on a flexible basis, allowing the legally regulated integration and augmentation of robots to fill desired roles, with particular emphasis on a differentiation between autonomous and non-autonomous robots and different legal regulations applying to each category respectively.

Given the speed of technological advancements, in the next few years, robots are likely to be carrying out many care-related activities for the elderly, purely due to societal pressures regarding a lack of resources for an increasing population. Whether this potential new role for robots will be welcomed is open to debate. It carries with it many implications for society. However, schemes and educational programmes need to be actioned so that the integration of

[44] EC SWD (n. 14).
[45] R. Gelin, (n. 29), 212-3.
[46] EC SWD (n. 14); House of Commons Science and Technology Select Committee (n. 26), para 8.
[47] House of Commons Science and Technology Select Committee (n. 26), paras 61-62.

robots in society is smooth. There is a strong argument that there should be at least some legal safeguards put in place to govern robotic developments concerning care-activities for the elderly, but not to the extent that technological and scientific advances are slowed or obstructed.

Two Reunions: The Good Friday Agreement and The Treaties of the European Union

Paula Kelly*

1. Introduction

It has become a platitude to contrast the minimal attention Northern Ireland received in the run-up to the 2016 referendum on the United Kingdom's (UK) membership of the European Union (EU) with the hours of negotiations, parliamentary time and media coverage it subsequently generated after 23rd June 2016. The interplay between the Belfast/Good Friday Agreement ('GFA') and Article 50 of the Treaty on the European Union ('TEU') became a critical dimension in the Brexit negotiations, with the Protocol on Northern Ireland and Ireland ('the Protocol') threatening to derail the entire process at several points.[1]

The Conservative Party's resounding victory in the 2019 General Election signalled the end of the three and a half years of a constitutional and political earthquake that revolved around Art. 50 TEU and created two inevitabilities for the UK: its exit from the EU and, with it, further strain on the union itself. The dynamic between the GFA and the EU treaties will continue to be a critical factor in this regard, with a route back into the EU open to Northern Ireland that is as distinct as its exit, bypassing the Art. 49 TEU accession provision altogether.

This article considers the interaction between the GFA, the TEU and the Treaty on the Functioning of the EU ('TFEU') and traces the exception carved out by the EU27 for Northern Ireland as a direct response to the Supreme Court's judgment in *R v Miller No. 2* in 2017[2]. Section 2 examines Art. 49 in order to understand the process which a future application to rejoin the EU by the UK or an independent Scotland would be subject to and from which the European Council has indicated that Northern Ireland is exempt. Section 3 sets out the unique constitutional settlement the GFA granted to Northern Ireland and details the events leading up to the European Council's confirmation. Section 4 recalls the political response and, finally, Section 5 offers commentary on the the significance of the exemption and the legal implications.

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[1] *The Agreement on the Withdrawal of the United Kingdom from the European Union and the European Atomic Energy Community.*

[2] *R (on the application of Miller and Dos Santos) v Secretary of State for Exiting the European Union and associated references* [2017] UKSC 5, [2018] AC 61.

2. Article 49 TEU

Art. 49 TEU reads:

> *Any European State which respects the values referred to in Article 2*[3] *and is committed to promoting them may apply to become a member of the Union. The European Parliament and national Parliaments shall be notified of this application. The applicant State shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the consent of the European Parliament, which shall act by a majority of its component members. The conditions of eligibility agreed upon by the European Council shall be taken into account.*
>
> *The conditions of admission and the adjustments to the Treaties on which the Union is founded, which such admission entails, shall be the subject of an agreement between the Member States and the applicant State. This agreement shall be submitted for ratification by all the contracting States in accordance with their respective constitutional requirements.*

Unlike Art. 50, Art. 49 was not novel to the Lisbon Treaty and "does no more than raise to primary law a procedure that has taken hold over time, starting with the old text of ex-Art. 237 EEC"[4]. The Art. 50 process required two major pieces of litigation to illuminate the provision: *Miller* at a domestic level and *Wightman* on revocability of a notification in the Court of Justice of the EU ('CJEU').[5] Whether one adheres to the view that the negotiations on the UK's exit from the EU have exposed the shortcomings of the Art. 50 process or that they showcased its flexibility is a matter of opinion but one might hope that the several rounds of EU enlargement informing Art. 49 would result in fewer questions about its practice.

Art. 49, however, has been likened to Art. 50 as "a sparse, framework provision"[6] and analysis of previous accessions demonstrates "many grey areas, both in the standards adopted

[3] Article 2 states: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."

[4] Blanke, H and Stelio Mangiameli *The Treaty on the European Union: A Commentary* (2013), 1358.

[5] Case C-621/18 *Wightman & Ors v Secretary of State for Exiting the EU* [2018] EU:C:2018:999.

[6] Edward, D and Niamh Nic Shuibne, '"While Europe's eye is Fix'd on Mighty Things": Implications of the Brexit Vote for Scotland', 41(4) *European Law Review* (2016) 481, 482.

and in the criteria used to measure the state of progress of the various [applicant states] in adapting to such standards"[7].

Art. 50 (5)[8] makes clear that any future application by the UK to rejoin the EU will be governed by Art. 49. More likely, as pressure for a second independence referendum grows, a future independent Scotland would also be subject to Art. 49 with no control over the process or guarantee of the outcome of the consultation between the Commission, the Council and the European Parliament, as well as the ratification requirements of each Member State. Indeed, the question of Scotland's EU membership dogged pro-independence campaigners in the 2015 referendum and is likely to do so in a future referendum. Northern Ireland, by contrast, could avoid the wrangling and uncertainties of Art. 49 entirely as a direct result of the GFA.

3. Northern Ireland's Constitutional Settlement

The GFA comprises a multi-party agreement between political parties in Northern Ireland and an international treaty between the British and Irish Governments, in which they refer to themselves as "partners in the European Union", having both joined on 1st January 1973.

The prominence of the Protocol in the Brexit negotiations could understandably leave one with the impression that the GFA dealt exclusively with the land border between Northern Ireland and the Republic of Ireland. In actual fact, there is no explicit reference to the physical border in the GFA because the customs border had already been removed four years before the negotiations began.

Instead, the crowning achievement of the GFA was the principle of consent, whereby the parties to the talks stated that they:

> *recognise the legitimacy of whatever choice is freely exercised by a majority of the people of Northern Ireland with regard to its status, whether they prefer to continue to support the Union with Great Britain or a sovereign united Ireland; [...] that it is for the people of the island of Ireland alone, by agreement between the two parts respectively and without external impediment, to exercise their right of self-determination on the basis of consent, freely and concurrently given, North and South, to bring about a united Ireland, [and…] the*

[7] Blanke, H and Stelio Mangiameli (n. 4) 1366.
[8] "If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49."

present wish of a majority of the people of Northern Ireland, freely exercised and legitimate, is to maintain the Union.[9]

The compromise reassured unionists of Northern Ireland's place in the UK, whilst recognising the nationalist desire for a united Ireland as a legitimate political objective that could be achieved through peaceful and democratic means. This formed the basis of Section 1 of the Northern Ireland Act 1998:

Status of Northern Ireland.

(1) It is hereby declared that Northern Ireland in its entirety remains part of the United Kingdom and shall not cease to be so without the consent of a majority of the people of Northern Ireland voting in a poll held for the purposes of this section in accordance with Schedule 1.

(2) But if the wish expressed by a majority in such a poll is that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland, the Secretary of State shall lay before Parliament such proposals to give effect to that wish as may be agreed between Her Majesty's Government in the United Kingdom and the Government of Ireland.

Brexit served to highlight what common Irish and British EU membership had hitherto obscured: the unique constitutional settlement of Northern Ireland within the UK. The common EU membership the two Governments explicitly referred to was not incidental or a mere formality: it was deeply rooted in the functioning of the GFA itself. The North-South Ministerial Council ('NSMC'), for example, would:

consider the European Union dimension of relevant matters, including the implementation of EU policies and programmes and proposals under consideration in the EU framework. Arrangements to be made to ensure that the views of the Council are taken into account and represented appropriately at relevant EU meetings.

By virtue of this, despite Brexit, Northern Ireland will continue to have representation at relevant EU meetings and to be able to work on a direct bilateral basis to coordinate, cooperate and jointly implement policy with an EU Member State. Moreover, the GFA makes Northern Ireland the only part of the UK whose citizens will retain entitlement to Irish, and therefore European, citizenship as a birth right[10].

[9] The Belfast Agreement; Constitutional Issues; para. 1 (i) - (iii)
[10] The Belfast Agreement, Constitutional Issues, paragraph 1 (vi)

Some therefore took the view that the principle of consent and the hardwiring of EU membership into the GFA constituted a buttress against Northern Ireland leaving the EU without its express consent, which was unforthcoming in a 56% vote to 'remain' in the 2016 referendum. In *R (on the application of Miller and Dos Santos) v Secretary of State for Exiting the European Union and associated references*, however, the Supreme Court ruled on two references from Northern Ireland[11] and held that no such consent was required:

> *[Section 1 of the Northern Ireland Act 1998], which arose out of the Belfast Agreement, gave the people of Northern Ireland the right to determine whether to remain part of the United Kingdom or to become part of a united Ireland. It neither regulated any other change in the constitutional status of Northern Ireland nor required the consent of a majority of the people of Northern Ireland to the withdrawal of the United Kingdom from the European Union.*[12]

The court also held that a Legislative Consent Motion, whereby devolved legislatures consent to Westminster passing legislation on areas within devolved competence, in line with the Sewel Convention, was unnecessary. As a convention, it was non-justiciable[13]. This narrowing of the political definition of consent attracted some consternation, including from legal academics, with the judgement criticised for its "deploy[ment] [of] a very traditionalist, and rather blunt approach to Parliamentary sovereignty when it came to Northern Ireland"[14].

The judgment also raised a longer-term question about the reverse scenario: whether reunification was not itself a mandate for European membership. If the UK can leave the EU without Northern Ireland's consent, would the Republic of Ireland's existing EU membership be questioned in the event of a united Ireland, i.e. would it have to make an application as a new state? Any shred of uncertainty would undoubtedly be a factor in the debate, particularly in the Republic of Ireland, where a majority in a referendum would also be required for a united Ireland, just as the ratification of the GFA itself was subject to dual referendums.

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[11] *Reference by the Attorney General for Northern Ireland from the High Court of Justice in Northern Ireland: In the matter of an application for leave to apply for judicial review by Agnew and others; Reference of a devolution issue by the Court of Appeal of Northern Ireland: In the matter of an application by Raymond McCord for Judicial Review* [2017] UKSC 5. *On appeal from [2016] EWHC 2768 (Admin); [2016] NIQB 85*

[12] R (on the application of Miller and Dos Santos) v Secretary of State for Exiting the European Union and associated references [2017] UKSC 5, [135].

[13] *R (on the application of Miller and Dos Santos) v Secretary of State for Exiting the European Union and associated references* [2017] UKSC 5, [141].

[14] McCrudden, C and Daniel Halberstan, '*Miller and Northern Ireland: A Critical Constitutional Response*' [2017]. The UK Supreme Court Yearbook, Vol. 8, December 2017; U of Michigan Public Law Research Paper No. 575; Queen's University Belfast Law Research Paper No. 2018-3 <https://ssrn.com/abstract=3062964> accessed 20 September 2020.

4. Political Response

Constitutional upheaval exposed the lack of a firm legal foundation for what were once the UK's political certainties and the Supreme Court judgment sounded an alarm to those who wished to safeguard against any possible ambiguity and to fortify the GFA's place in the Withdrawal Agreement.

The potential ambiguity was first identified by the then MP for Foyle and GFA negotiator, Mark Durkan, who raised it in the House of Commons in a question to the Secretary of State for Exiting the EU, David Davis MP, hours after the Supreme Court delivered its judgment:

> *The judgment's terms tell us that we should not rely on mere political convention for legal adherence or political confirmation on key matters […] Does the Secretary of State recognise that the key constitutional precept of the Good Friday agreement – the principle of consent and the democratic potential for a united Ireland – will have to be explicitly included in any new UK-EU treaty in order to fully reflect the principle that those issues are a matter for the people of Ireland, without external impediment, and to properly reflect the terms of today's Supreme Court judgment?*[15]

The Secretary of State reaffirmed the Government's "determin[ation] to preserve the peace settlement and all that underpins it"[16].

Despite the EU coming into existence in part to prevent states extending their territory, there was a political precedent in the reunification of the Federal Republic of Germany with the German Democratic Republic. However, there were three important distinctions, the first being that German reunification took place before the Lisbon Treaty and the insertion of Art. 49 into the TEU, as well as Art. 52 TEU and Art. 355 TFEU on the territorial scope of the treaties. Secondly, there was also an overriding political consensus in support of the reunification of Germany that will most certainly not be present in any future border poll on Irish reunification. Thirdly, and most importantly from an international law perspective, the Federal Republic of Germany had retained a territorial claim over the German Democratic Republic in its Basic Law[17]. The GFA, however, required the equivalent provisions in the Republic of Ireland's constitution to be removed and replaced. Article 2 and 3 of *Bunreacht na hÉireann* originally stated that "the national territory consists of the whole island of Ireland" and "asserted the right of the parliament and government established by this constitution to exercise jurisdiction over the whole territory".

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15 *Official Report*, 24th January 2017, Vol 620, Col. 181
16 *Ibid.*
17 Article 23 of the Basic Law for the Federal Republic of Germany

This was amended to provide for the citizenship rights of those born on the island and the "special affinity" the nation has with its diaspora and expressing the wish for reunification solely through the use of "peaceful means with the consent of a majority of the people, democratically expressed, in both jurisdictions in the island".

Mr Durkan questioned the Secretary of State again at the Select Committee for Exiting the EU on 15th March, raising Art.49 directly:

> ***Mark Durkan:*** *Do you accept that, after Brexit, if the Good Friday agreement is properly reflected in the future relations between the EU and the UK, Northern Ireland is one part of the UK that could elect to re-join the EU without requiring an Article 49 negotiation?*
>
> ***David Davis:*** *Not while it is a member of the United Kingdom, no.*
>
> ***Mark Durkan:*** *That would be under the consent provisions of the Good Friday agreement.*
>
> ***David Davis:*** *That is exactly why I need to talk to the Northern Ireland Secretary. I will come back to you on that. You are dealing in very delicate areas, quite rightly, and I will come back to you with a formal decision today, a formal response today.*[18]

The letter arrived five days later on 20th March. While emphasising the Government's policy of supporting Northern Ireland's position within the UK, the Secretary of State wrote:

> *As is clearly set out in the Belfast Agreement, if a majority of the people of Northern Ireland were ever to vote to become part of a united Ireland, the UK Government will honour its commitment in the Belfast Agreement to enable that to happen. In that event,* ***Northern Ireland would be in a position of becoming part of an existing EU member state, rather than seeking to join the EU as a new independent state. It would of course be for the EU Commission to respond to any specific questions about the procedural requirements for that to happen.*** [19] (Emphasis added.)

[18] Select Committee on Exiting the European Union, 'The UK's negotiating objectives for its withdrawal from the EU', HC 1072. Oral evidence session, 15th March 2017. Questions 1371-1503.

[19] Letter from Secretary of State for Exiting the EU to Mark Durkan (20 March 2017) <https://www.parliament.uk/documents/commons-committees/Exiting-the-European-Union/16-17/Correspondence/DExEU-to-Committee-re-Belfast-Agreement-170320.pdf> and <https://twitter.com/markdurkan/status/1181585869758697472?s=20> accessed 20 September 2020.

The use of 'in a position of becoming' rather than 'would become' was tellingly cautious. As the Secretary of State rightly noted, the procedural details were for the EU, and not a withdrawing Member State, to determine. The Irish Government quickly set about to secure that response.

After a concerted lobbying effort from the then Taoiseach, Enda Kenny, in the face of reported resistance by the UK Government[20], the unpublished minutes of the 29th April summit of EU27 leaders included what was hailed as the 'Kenny text'. It stated the European Council's view that Northern Ireland could regain EU membership via the reunification of Ireland, whereby "the entire territory of such a united Ireland would […] be part of the European Union" without a notification and negotiations under Art. 49, under the terms of the GFA:

> *The European Council acknowledges that the Belfast Agreement expressly provides for an agreed mechanism whereby a united Ireland may be brought about by peaceful and democratic means, and, in this regard, the European Council acknowledges that, in accordance with international law, the entire territory of such a united Ireland would thus be part of the European Union.*[21]

5. Commentary

The benefits of circumventing Art. 49 for a state wishing to accede to the EU are difficult to overstate and leaves Northern Ireland in an enviable position for proponents of an independent Scotland within the EU. That membership of international organisations and the territorial scope of treaties to which an incorporating state is a signatory would extend to an absorbed territory may seem beyond question as a customary part of international law. Yet the framing of the confirmation within the GFA sets up a continuing dialogue between it and the European treaties, coming just months after the Supreme Court precluded EU membership from its analysis of the Irish constitutional question.

It is a classic contrast between British and European treatments of international law, yet, more so, it demonstrates how the EU Treaties have sharpened the function of GFA. If the GFA was

[20] RTE News, 'UK tried to block Kenny move on unity clause' (12 June 2017) <https://www.rte.ie/news/brexit/2017/0612/881978-brexit-unity-clause/> accessed 20 September 2020.
[21] See the briefing note on 'Outcome of the special European Council (Article 50) meeting of 29 April 2017' produced by the European Parliamentary Research Service <https://www.europarl.europa.eu/RegData/etudes/ATAG/2017/603226/EPRS_ATA(2017)603226_EN.pdf> accessed 20 September 2020.

not a shield against leaving the EU, the European Council quickly confirmed that it would provide a passage back.

EU membership will undoubtedly be a key factor in the campaign in the event that the Secretary of State for Northern Ireland initiates a border poll. Any action that can be interpreted as an attempt to influence the debate on Northern Ireland's constitutional settlement must be handled with care. Restricting the Kenny text to unpublished minutes rather than the negotiating guidelines reflects the EU27's sensitivity to any charge of political and constitutional recklessness.

Nonetheless, it is extremely questionable whether unpublished minutes with a notably vague invocation of "international law" are sufficient to meet the requirements of Art. 15 of the Vienna Convention on the Law of Treaties, regarding the consent of acceding states to be bound by treaties[22]. Minutes of a 2017 summit are unlikely to provide the required legal underpinning that such a profound constitutional shift would demand. The EU27 will have to be prepared to incur the political cost of legal certainty in its treaty with the UK on the future relationship to prevent EU membership being drawn into another debate about a seismic constitutional change.

[22] Article 15 reads:

"Consent to be bound by a treaty expressed by accession

The consent of a State to be bound by a treaty is expressed by accession when:

(*a*) the treaty provides that such consent may be expressed by that State by means of accession;

(*b*) it is otherwise established that the negotiating States were agreed that such consent may be expressed by that State by means of accession; or

(*c*) all the parties have subsequently agreed that such consent may be expressed by that State by means of accession."

Cuckooing and the Modern Slavery Act 2015

Oliver Pateman*

1. Introduction

It's never been easier to buy controlled drugs. The preferred method for drug dealers to establish a new market is to open up a 'County Line'; a dedicated phone number to make contact between a supplier in a metropolitan centre, and a purchaser in a provincial town. The number of such county lines is estimated by the National Crime Agency to have grown from 720 to approximately 2,000 in the year 2017/18.

[1] County lines drug dealers are highly organised and ruthlessly exploitative. Establishing a successful county line relies on the abuse of vulnerable people, such as children, the disabled and drug addicts, who might be co-opted to deliver drugs or otherwise assist in the supply chain. The Modern Slavery Act 2015 (MSA) is designed to protect such people in the face of exploitation by criminal gangs, and works alongside the UK's obligations in international law.[2] However, the legislation requires change to help protect one particularly vulnerable class of victims and combat cuckooing, which is an essential part of any county lines operation.

The term 'cuckooing' refers to the practice of the cuckoo bird, which turns eggs out of a nest built by one bird and uses the host nest for its own young. Far from Wordsworth's "thrice welcome, darling of the Spring",[3] 'cuckooing', in the context of county lines, describes a situation where vulnerable occupiers of property, usually dependent drug users, the elderly, the disabled, single parents or those suffering with mental or physical health problems, are coerced into giving their home over to be used as a "trap-house".[4] Supplies of drugs may be stored there, and the cuckooed individuals homes become a narcotics warehouse or distribution depot. Such individuals are often bribed, with a supply of free drugs, or threatened with violence, or both, for the use of

*BA, (Oxon).
[1] National Crime Agency, *National Strategic Assessment of Serious and Organised Crime*, 2019, [89].
[2] The Stationery Office, Explanatory Notes, Modern Slavery Act 2015, [5-6].
[3] Poetry Foundation, William Wordsworth, *To The Cuckoo*, <https://www.poetryfoundation.org/poems/45562/to-the-cuckoo> accessed 19 October 2020.
[4] HM Government, *Serious Violence Strategy*, 48.

their premises for these purposes.[5] Those who perpetrate cuckooing, the 'cuckoos', place the exploitation of the vulnerable in their own homes at the very heart of their operations.[6] The practice of County Lines dealing relies on this exploitation, in order to ensure a ready supply of drugs for the local market, day in, and day out. Currently, the MSA has been used to prosecute those who traffic individuals from cities to towns to assist in drug dealing or co-opt children to deliver drugs to paying clients, but the ability of the act to protect those at risk of cuckooing *per se* is much more limited. This article therefore suggests that the MSA should be amended, to support the victims of cuckooing in particular, thereby protecting the victims of organised criminal drug gangs and enabling the police and criminal prosecutors to make 'cuckoos' answer for their exploitation in open court.

2. The Modern Slavery Act 2015

The MSA created two new criminal offences in relation to slavery, servitude and forced labour under s.1.1:

> *A person commits an offence if –*
>
> *a) the person holds another person in slavery or servitude and the circumstances are such that the person knows or ought to know that the other person is held in slavery or servitude;*
>
> *b) the person requires another person to perform forced or compulsory labour and the circumstances are such that the person knows or ought to know that the other person is being required to perform forced or compulsory labour.*[7]

The meaning of this part of the statute is to be interpreted in accordance with Article 4 of the European Convention of Human Rights.[8] However, the Strasbourg jurisprudence does not address the issue of cuckooing, or activities similar to it, directly.

It appears to be relatively clear that the activity of cuckooing would not fall under s. 1.1.a). The European Court of Human Rights has held that 'slavery' describes a state of affairs where an individual is literally the chattel of another, while a necessary condition

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[5] *Ibid.*
[6] *Ibid.,* 47.
[7] Modern Slavery Act 2015 s. 1.1.
[8] Modern Slavery Act 2015 s.1.2.

of 'servitude' is that the individual is compelled to live on another person's property.[9] Cuckoos, it seems, cannot therefore be charged under this section, though those who traffic individuals to distribute drugs can, and are. Similarly, it is ambiguous at best whether cuckooing could fall under s. 1.1.b). The case of *Van der Mussele v Belgium* is the leading authority for the meaning of "forced or compulsory labour". The applicant was a pupil barrister in Antwerp, who complained that he was not to be paid for representing a foreign national, Mr Erimba, in court as an "officially appointed" avocat.[10] However, the Court dealt with whether Mr Van der Mussele's representation amounted to "labour" by admission.

The court held that it was common ground between those appearing before the Court that the services rendered by Mr. Van der Mussele to Mr. Ebrima amounted to "labour" for the purposes of Article 4 § 2 (art. 4-2). They noted that the English word "labour" is often used in the narrow sense of manual work, but it also bears a broader meaning (as in the French word "travail") and the latter was adopted.[11] The Court found corroboration of this approach in the definition included in Article 2 § 1 of Convention No. 29 ("all work or service") in Article 4 § 3 (d) (art. 4-3-d) of the European Convention ("any work or service", "tout travail ou service") and in the name of the International Labour Organisation (Organisation Internationale du Travail), whose activities are not limited to the prohibition of slavery as manual work.[12] Such a definition, however, does not assist our purpose; knowing that "labour" should be construed in a wide sense to include the provision of services does not get us any closer to deciding whether the cuckooed individual is, as a matter of fact, providing any "work or service"; specifically whether allowing an individual to use another's home may be considered as such. It is certainly not the case, as a matter of normal spoken English, that allowing someone to stay at your house without paying is regarded as "forced labour".

Not only is it unclear whether the victim is providing a service, but it is also common in cuckooing cases for the victim to agree to the use of their flat initially, only for the coercive behaviour of the drug dealers to become apparent later. Cuckooing is often a slow, gradual process, beginning with an invitation into the premises, and the victim is then cultivated over time. One victim of cuckooing in Oxfordshire, "Mark", a cocaine and heroin addict, described the process to Oxford City Council in the following terms, "they

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[9] *Siliadin v. France*, no. 73316/01, § 123, ECHR 2005-VII.
[10] *Van der Mussele v Belgium,* no. 8919/80, § 9-12, ECHR 1983-XIII.
[11] *Ibid.,* § 33.
[12] *Ibid.,* § 33.

asked me to stay at the flat, which I agreed to because all I wanted was the drugs. They kept me in debt with them just so they could stay there and then, yeah, taking over the flat basically (…) They're looking for people who are vulnerable. They're looking for people who are not in a position to fight back".[13] However, following *Van der Mussele*, it is not possible to make a finding of a breach of Article 4 of the convention where the applicant has "offered himself voluntarily" for the work in question.[14] This describes the vast majority of cuckooing cases, and it is an open question whether the subsequent conduct of the cuckoo and the withdrawal of the victim's consent will give rise to a finding that they were from that point required to perform forced or compulsory labour for the purposes of s.1.1.b) MSA.

Overall, it is unclear, on the basis of the Strasbourg jurisprudence, whether cuckooing can be regarded as a form of forced or compulsory labour for the purposes of the MSA. It is equally unclear whether the fact that some cuckooing victims apparently consent to their treatment renders prosecution under the act impossible, or whether this can be saved by s. 1.5 MSA.[15] This ambiguity makes it difficult for prosecutors and the police to know whether they should try to seek a conviction for cuckooing under the MSA, and as a result it has therefore never been used to prosecute cuckoos for cuckooing. Rather, they are charged under the Misuse of Drugs Act and the issue of cuckooing is dealt with at sentencing. For reasons to be discussed later, this is an inferior approach.

3. The Misuse of Drugs Act 1971

The current approach that the CPS is taking, as a general rule, is to prosecute cuckoos under the Misuse of Drugs Act 1971 (MDA). The act creates a number of offences, but the most important offences, for the purposes of this article, are supply and possession of a controlled drug, prohibited by s.4 and s.5 MDA respectively. Because cuckooing is a drugs-related offence, the MDA seems the obvious legislation under which to prosecute it, and the cuckooing elements are dealt with in sentencing. However, the act is an inexact legal fit when considering the nature of cuckooing and associated problems of fair labelling. Cuckooing is a practice that targets specific individuals, while the MDA deals with the harm caused by possession and supply of dangerous drugs at large in the community. A

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[13] Oxford City Council, "Cuckooing", Oxford City Council, 4th February 2019, <https://www.oxford.gov.uk/info/20101/community_safety/1308/cuckooing> accessed 19 October 2020.
[14] *Van der Mussele v Belgium*, no. 8919/80, § 36, ECHR 1983-XIII.
[15] Modern Slavery Act 2015 s. 1.5.

reform to the law to allow cuckoos to be charged under an amended MSA rather than the MDA, would separate out the harm caused by the possession and supply of controlled drugs and that caused by the exploitation of the vulnerable. This would ensure that the harm cause by the cuckoo is fairly labelled – they have not only caused harm by virtue of their supply of dangerous drugs to the community, but have also caused harm to a private individual.

The criminal division of the Court of Appeal has addressed how to sentence cuckoos convicted under the MDA in *R v Ajayi & Anor*.[16]In that case, the applicant Ajayi was convicted at Ipswich Crown Court for the supply and possession with intent to supply cocaine and heroin.[17] Ajayi lived in Dagenham, and cuckooed the home of Sam Prior, a heroin addict in Leiston, Suffolk.[18] His case was joined with that of Limby, who had been convicted at Portsmouth Crown Court on two counts of possession of cocaine and heroin. Police on patrol followed a group, who were involved in a drug transaction, back to a gang member's home.[19]There, they found the applicant, who had come from London and had no links to Portsmouth at all. Both defendants appealed against the length of their sentences and the court considered how cuckooing fitted in to the existing sentencing regime.

Sentencing judges must determine three things before they can establish the starting point for a sentence under the MDA. The first is to determine the class of drug involved (Class A, B or C).[20] Secondly, the category of the offence must be considered, which is determined by the quantity of the drugs involved in the case. Category 1, the most serious, encompasses cases involving large quantities of drugs for supply, down to category 4 cases, which involve quantities more suitable for more limited individual, or personal consumption. Thirdly, when determining the length of their sentence, the judge must have regard to whether a defendant should be placed into a "leading", "significant", or "lesser" role. This last factor in the context of cuckooing is what the Court of Appeal considered in *Ajayi*. Treacy LJ remarked that, "Neither of the two cases before us appears on the evidence to involve a person or persons organising such an operation from the metropolitan centre. Such a person would appear clearly to fall within a leading role in the drug supply guideline".[21] However, "those who do not fall within a leading role, but

[16] *R v Ajayi and Anor* [2017] EWCA Crim 1011, [2018] 4 W.L.R. 42.
[17] *Ibid.,* [11].
[18] *Ibid.,* [12].
[19] *Ibid.,* [24].
[20] Misuse of Drugs Act 1971, Schedule 2.
[21] *R v Ajayi and Anor* (n. 16)*,* [6].

who are involved in the process of cuckooing will ordinarily fall into a significant role. Where there is evidence of involvement of others in the operation by pressure, influence, intimidation or reward, that should be given particular weight in the assessment of culpability".[22] Ajayi and Limby were therefore both assessed to have played a "significant" role in the drug supply operation. The Court of Appeal held that the original judge's sentence was not manifestly excessive, and both applications were refused.

Since the case of *Ajayi*, the Sentencing Council has made it clear that culpability is increased where there has been the "targeting of premises intended to locate vulnerable individuals or supply to such individuals".[23] In a case brought under the MDA, such targeting is to be treated as an aggravating factor from 1st October 2019.[24] The current approach of the courts, therefore, has a commendable degree of flexibility when assessing the culpability of those involved in cuckooing operations. It also takes into account the extra harm caused by those who perpetrate cuckooing in addition to traditional street dealing. However, there are still a number of problems with charging cuckoos under the MDA.

Firstly, the starting point when considering the length of any sentence under the MDA is the quantity of drugs involved (except for where the defendant was street dealing).[25] While the quantity of controlled drugs is relevant when considering the harm done to the public as a result of drug dealing, it is effectively incidental to the harm done to a cuckooed individual. It makes no particular personal difference to the victim if their home is used to stash twenty or forty wraps of cocaine.

Secondly, the criminal practice of cuckooing bears more of the qualities of an offence against the person, rather than against the community in general. Consequently, prosecutions under an amended MSA rather than the MDA would address this disconnect. If, in the process of cuckooing, other offences against the person have taken place, such as an assault, then these charges may be added separately to the indictment. However, common assault is a summary only offence, which does not reflect the serious harm caused by cuckooing, and it is often not necessary to use physical violence to cuckoo

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[22] *Ibid.,* [7].
[23] Sentencing Council, "Supplying or offering to supply a controlled drug/Possession of a controlled drug with intent to supply it to another", 27th February 2012, <https://www.sentencingcouncil.org.uk/offences/magistrates-court/item/supplying-or-offering-to-supply-a-controlled-drug/>, accessed 19th October 2020
[24] *Ibid.*
[25] *Ibid.*

someone's home. Such factors need not be put to a jury in a prosecution under the MSA: s.1.5 makes it clear that the consent of the victim is not a defence to charges brought under that act.[26]

Thirdly, charges brought under the MSA rather than the MDA would allow defendants to address the allegations of cuckooing in open court, and offer a defence. It is not necessary to prove that cuckooing has in fact taken place in order to secure a conviction under s.4 or s.5 of the MDA.[27] However, if cuckooing is treated as an aggravating factor for the purposes of sentencing, or can increase the sentence by promoting a gang member into a 'significant role', then one might expect this extra element to be proved to the satisfaction of a jury. Overall, therefore, the MDA is an inexact legal fit when considering a criminal prosecution for cuckooing. An amended MSA, with the potential to capture cuckooing as an offence under s.1, would be preferable.

4. Advantages

The MSA has the potential, therefore, to be amended in order to enable cuckoos to be charged with an offence under s.1. Such an approach would be of great advantage to the victims of cuckooing who would consequently be entitled to the various protective measures prescribed in the MSA.

Firstly, the court could make a reparation order to the victim following any confiscation of the cuckoo's assets under the Proceeds of Crime Act 2002.[28] This would clearly demonstrate that drugs crime does not pay, and that victims of drugs crime should be rightly compensated. Such a reparation order may also help in situations where the cuckooing victim has to move house following the incident. In one recent case in the Court of Appeal, it was held that a housing association had the power to evict a mentally and physically disabled tenant who had been the victim of cuckooing.[29] Longmore LJ held that an order for possession was the only viable option open to the landlord to prevent other tenants in the same block of flats from being affected by the antisocial behaviour in the claimant's flat.[30] In such circumstances, a reparation order may help to defray the costs of relocation.

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[26] Modern Slavery Act 2015 s. 1.5.
[27] Misuse of Drugs Act 1971 s. 4, s. 5.
[28] Modern Slavery Act 2015 s.8.
[29] *Forward v Aldwyck Housing Group* [2019] EWCA Civ 1334, [2020] 1 W.L.R. 584, [34].
[30] *Ibid.,* [34].

Secondly, victims of cuckooing could use the statutory defence under s. 45 MSA, which has the effect of exculpating the victims of slavery from other criminal offences. There may be many relevant criminal offences depending on the circumstances of the case, but one obvious example would be charges brought under s. 8 of the MDA, which makes it an offence for an occupier to suffer the production or supply of drugs on his premises.[31] If an additional prosecution were brought against the victim, as happened in the *Ajayi* case, then this statutory defence could be deployed, depending on the nature and the extent of the exploitative conduct.

Thirdly, the cuckoo would not necessarily be able to argue the defence that the victim had apparently consented to provide the premises, under s. 1.5 MSA. In such circumstances, where the cuckooed individual may seem to consent, or even appear to be complicit in the drugs operation, such evidence would not necessarily be fatal to the Crown's case against a cuckoo, and would reflect the nature of the exploitation perpetrated by cuckoos.

Finally, charges brought under an amended MSA would have the legal character of offences against the person, rather than bearing the impersonal nature of offences under the MDA. Therefore, when considering how to prosecute cuckoos in the future, using an amended form of the MSA rather than the MDA could provide a solution to some of the problems of using the MDA on its own.

5. Conclusion

This article has sought to demonstrate that the current legal regime to deal with the menace of County Lines, particularly the practice of cuckooing, is inadequate. The current system of prosecuting cuckoos under the Misuse of Drugs Act 1971, and its associated Sentencing Guidelines, does not appropriately reflect the exploitative nature of cuckooing and its character as an offence which does particular harm to given individuals. Liability incurred under the Misuse of Drugs Act also does not conform to the principle of fair labelling, as it does not accurately describe the nature of the harm caused by the defendant or incurred by the victim. An alternative statute, such as an amended Modern Slavery Act 2015, may provide the answer. Such a statute would put the practice of cuckooing at the front and centre of any criminal trial, rather than as an ancillary activity to conventional possession and supply of drugs. It would also allow the victims of

[31] Misuse of Drugs Act 1971 s. 8.

cuckooing, on the defendant's conviction, to avail themselves of the various protective and reparative measures laid out in the Modern Slavery Act. It has long been known that controlled drugs have the potential to destroy lives and communities. However, the modern practice of organised criminal gangs, which has established the exploitation of the vulnerable in their own homes as the new norm when opening up a drugs market, has increased, and changed the nature, of the harm caused. County lines drug dealing relies on the acquisition of a residential property through cuckooing in the relevant area to ensure a constant supply of drugs to the local market. Such exploitative practices require a response in the criminal law.