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# Should the Courts Defer to the Government When Judging Proportionality Under the Human Rights Act 1998?

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## 1 Introduction

Nearly eight years ago, three members of the House of Lords sought permission for Maryam Rajavi to enter the UK. Rajavi was a member of Mujahedin e-Khalq – a formerly proscribed organisation under the Terrorism Act 2000 – and had been invited to address a meeting in Parliament. But the Home Secretary refused permission. She held that Rajavi's entry would not be conducive to the public good, that the Lords' rights under Articles 9 and 10 of the European Convention of Human Rights (ECHR) were not engaged, and that in any case the refusal was proportionate. She made this decision on the grounds that Rajavi's entry might provoke a reaction from the Iranian Government which could damage Iranian-UK relations and put UK citizens at risk. In response, Lord Carlile and his colleagues launched judicial review proceedings.<sup>1</sup>

The Supreme Court's ruling had implications not only for British-Iranian diplomacy. By reasoning that the Home Secretary's decision was in fact proportionate, the court added fuel to a different controversy: how far the judiciary should defer to government when determining whether restrictions to Convention rights are proportionate. Lord Sumption, in the majority, felt compelled to grant substantial weight to the Home Secretary's assessment of the risk and its consequences, and to incorporate that weight into his assessment of the proportionality of the decision.<sup>2</sup> But Lord Kerr, dissenting, ruled that the Home Secretary's decision was unjustifiable; according the Government's assessment far less weight, he held that the applicants' rights had been unjustifiably restricted.<sup>3</sup>

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<sup>1</sup> *R (Lord Carlile) v Secretary of State for the Home Department* [2014] UKSC 60, [2015] AC 945.

<sup>2</sup> *ibid* [98]-[108].

<sup>3</sup> *ibid* [169]-[174].

The judgement exposed more clearly the conceptual premises on which contrasting judicial views of deference are based – premises which this essay examines in three stages. First, it set outs the contexts in which proportionality and deference arise under the Human Rights Act (HRA), and clarifies their meanings. Second, it assesses three related justifications for deference – (a) the separation of powers, (b) democratic legitimacy and (c) relative institutional competence – and argues that deference should only be owed on ground (c). Third, it examines how this justification determines the practical extent to which the courts should defer to government. Though it concurs with Lord Steyn's belief that the degree of deference 'will... depend on and vary with the context', it argues that this need not preclude attempts to identify the contexts which should trigger institutional deference.<sup>4</sup> It therefore concludes by briefly setting out a (non-exhaustive) set of factors for establishing when, and how much, deference should be given on ground (c).

## **2 Proportionality and deference**

### **2.1 Proportionality**

As the European Court of Human Rights (ECtHR) made clear in *Soering v UK*, the Convention demands a 'fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's human rights'.<sup>5</sup> Proportionality assists the court in striking that balance by demanding a 'reasonable relationship between the goal pursued and the means the state has chosen to achieve that goal'.<sup>6</sup> Within the HRA, it is therefore particularly relevant at the 'justification stage' of human rights adjudication, when restrictions to rights are balanced against competing demands such as the 'public interest'. Proportionality is therefore central for determining whether interferences with qualified rights are justified.

Compared to irrationality, proportionality demands a greater level of judicial scrutiny of the primary decision-maker's actions. It is not enough for a local authority's decision to pass the lower threshold of *Wednesbury* unreasonableness if an applicant's

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<sup>4</sup> Lord Steyn, 'Deference: A Tangled Story' (2005) PL 346, 352.

<sup>5</sup> (1989) 11 EHRR 439 [89].

<sup>6</sup> *Fayed v UK* (1994) 18 EHRR 393 [71].

Convention rights have been engaged. Instead, the court must 'assess the balance which the decision-maker has struck'.<sup>7</sup> It must therefore give these decisions far less respect – and, conversely, perform a far more intensive level of scrutiny – than it would in respect to normal administrative decisions. As Lord Sumption outlined in *Bank Mellat v Her Majesty's Treasury*, this demands:<sup>8</sup>

an exacting analysis of the factual case advanced in defence of the measure, in order to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community.

## **2.2 Deference**

The proportionality test under the HRA, at least for now, may be settled law. But the question of whose view should inform its application is certainly not. For many, responsibility for the assessment belongs squarely with the court. Any less would result in an abrogation of its responsibilities under the HRA and a weakening of the rule of law. But for others, a degree of latitude can and should be given to the public authority whose decision has restricted the right in question. Such latitude is predominantly justified on the basis that the court should respect the separation of powers, acknowledge the democratic legitimacy of the decision-maker or recognise its own institutional shortcomings.

Deference can manifest in different degrees. At one end, respect can be given to the views of the primary decision-maker and incorporated into the court's own proportionality assessment. But at the other, the court could step aside and submit to the executive's view about whether its decision was justified.<sup>9</sup> Deference can also manifest in different ways. As Elliott illustrates, the extent to which a court is prepared to grant such

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<sup>7</sup> *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26, [2001] 2 AC 532.

<sup>8</sup> [2013] UKSC 39, [2014] AC 700 [20].

<sup>9</sup> David Dyzenhaus, 'The Politics of Deference' in Michael Taggart (ed) *The Province of Administrative Law* (Hart Publishing 1997) 279, 286.

latitude can determine its approach to each stage of the proportionality test. At the 'necessity' stage (iii), the court could 'ascribe considerable weight to [the decision-maker's] view about whether the desired objective could have been achieved by another less restrictive means'.<sup>10</sup> And at the 'fair balance' stage (iv), it could defer to the decision-maker's assessment of the severity of the consequences and the relative value of the right against the competing interests of the community. However, in order to ascertain how much deference should be owed, it is first necessary to examine the primary grounds on which it is justified.

### **3 Justifications for deference**

#### **3.1 The separation of powers**

Appeals to the separation of powers constitute some of the most controversial justifications for deference. These accord the legislature and executive deference by virtue of their different constitutional functions, since failing to exercise restraint would upset the system of checks and balances which regulates the powers of the three branches of government.<sup>11</sup> It is on these grounds that the judiciary has granted the executive latitude on national security matters, as well as the legislature respect on social policy issues. Describing the latter, Lord Nicholls stated in *Bellinger v Bellinger* that:<sup>12</sup>

these issues are altogether ill-suited for determination by courts and court procedures. They are pre-eminently a matter for Parliament.

Indeed, respect for the separation of powers often motivates demands that the term 'deference' be shelved altogether. Lord Hoffmann believes the term's 'overtones of servility or perhaps gracious concession' belie a legal obligation on the courts, since 'when a court decides that a decision is within the proper competence of the legislature or executive, it is not showing deference. It is deciding the law'.<sup>13</sup>

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<sup>10</sup> Mark Elliott, 'Proportionality and deference: the importance of a structured approach' (2013) 32 *Legal Studies Research* 5.

<sup>11</sup> *Carlile* (n 1) [22].

<sup>12</sup> [2003] UKHL 21, [2003] 2 AC 467 [36].

<sup>13</sup> *R (Pro-Life Alliance) v British Broadcasting Corporation* [2003] UKHL 23, [2004] 1 AC 185 [72].

The difficulty with Lord Hoffmann's contention, however, is that it comes close to viewing some areas of decision-making as non-justiciable. This not only jars with the court's obligation under section 6(1) of the HRA to ensure that public authorities comply with Convention rights – and one which Lord Hoffmann himself took seriously when he dismissed the Government's national security assessment in *Belmarsh*.<sup>14</sup> It also contradicts accepted parameters of judicial jurisdiction. As Lord Phillips stated in *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs*, areas on which the judiciary was historically 'forbidden' from adjudicating are no longer out of bounds when the HRA applies.<sup>15</sup> Since this means that 'every public body is in principle subject to the supervision of the court as regards every decision it makes', the courts cannot be under a legal obligation to defer to government.<sup>16</sup> As Lester and Pannick put it, deference must concern 'not the legal limits to jurisdiction but the wise exercise of judicial discretion'.<sup>17</sup>

Denying that there should be no 'legal zones of executive immunity' does not, however, undermine arguments for deference based on the separation of powers.<sup>18</sup> After all, deference can still be granted on a discretionary basis. In *Bank Mellat*, for instance, Lord Sumption held that although issues relating to nuclear non-proliferation were no longer 'unsuitable for judicial scrutiny', they fell to such an extent within the public interest that the judiciary should grant the executive a 'large margin of judgment' when judging whether its policy was proportionate.<sup>19</sup> And in *Carlile*, Lord Sumption ruled that while 'there can be no absolute constitutional bar to any inquiry which is both relevant and necessary to enable the court to adjudicate', governmental views should be given a considerable margin of respect when they relate to matters of national security, since this comes within the 'special constitutional function of the executive'.<sup>20</sup>

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<sup>14</sup> *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68.

<sup>15</sup> [2002] EWCA Civ 1598, [2002] 11 WLUK 114.

<sup>16</sup> Sir John Laws, 'Law and Democracy' (1995) PL 72 [75].

<sup>17</sup> Lord Lester and David Pannick, *Human Rights Law and Practice* (2<sup>nd</sup> edn, Butterworths 2004), 3.19.

<sup>18</sup> *Steyn* (n 4) 352.

<sup>19</sup> *Bank Mellat* (n 8) [21].

<sup>20</sup> *Carlile* (n 1) [28].

However, even when based on discretion, these arguments still fail to appreciate the extent of the constitutional changes introduced by the HRA. Thus, underlying Lord Sumption's assertion in *Carlile* was a belief that the HRA 'did not abrogate the constitutional distribution of powers between the organs of state which the courts had recognised for many years before it was passed'.<sup>21</sup> Accordingly, he held that historically non-justiciable areas such as national security must remain within the jurisdiction of the executive – albeit on a discretionary rather basis. This meant that the Government's assessment of the risk was not only capable of influencing stages (i)-(iii) of the proportionality test. It could also dictate the court's approach to stage (iv); that is, whether it had struck a fair balance between the right to freedom of expression under Article 10(2) and the demands of national security.<sup>22</sup> Yet as Lord Kerr argued, according deference on this basis disregards the obligations imposed on the judiciary by the HRA:<sup>23</sup>

Whether executive action transgresses a Convention right, however, and, if it does, the importance to be attached to the right interfered with are emphatically matters on which courts are constitutionally suited to make judgments. The courts' competence to make those judgments is secondary, however, to the consideration that the current constitutional order, in the form of the Human Rights Act 1998, requires courts to make those very judgments.

Thus while Lord Kerr conceded that 'very considerable respect for the executive decision is called for', he agreed with Lord Neuberger that this decision 'cannot be simply 'franked' by the courts'.<sup>24</sup> In determining whether a fair balance had been struck between the rights of the individual and the interests of the community, Lord Kerr therefore refused to defer to the Government's view on the relative importance of this right, since it would necessitate an abdication of the court's own constitutional responsibility under the HRA:<sup>25</sup>

The courts, charged with the solemn duty by Parliament of deciding whether the political reasons that have actuated the decision to interfere with the particular Convention right justify the interference, have a clear obligation to have proper

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<sup>21</sup> *ibid.*

<sup>22</sup> Mark Elliott, 'Human rights, proportionality and the judicial function' (2014) Public Law 2.

<sup>23</sup> *Carlile* (n 1) [152].

<sup>24</sup> *ibid* [150].

<sup>25</sup> *ibid* [152].

regard to the importance of the right which has been interfered with. That exercise requires the courts not only to examine the reasons given for the interference but also to decide for themselves whether that interference is justified.

Proponents of constitutionally justified deference may reply that this approach flies too close to the sun of merits-based review. Since stage (iv) of the proportionality test involves striking a balance between 'two incommensurate values: the Convention rights engaged and the interests of the community relied upon to justify interfering with it',<sup>26</sup> a lack of deference effectively results in the court '[substituting] its own decision for that of the constitutional decision-maker.'<sup>27</sup> This, as Laws LJ states, involves the court trying to answer an inherently 'political question'.<sup>28</sup>

Indeed, its proponents may argue that this points to a wider problem with rights adjudication. The courts can never have sole responsibility for performing this task because rights can never be determined without reference to the context in which they operate. Lord Kerr may think himself capable of determining a right's importance; but since that right will always be qualified by a set of competing considerations (in this case, national security), its value can never be determined intrinsically. It requires input from other sources, such as the decision-maker. By refusing to acknowledge this, Lord Kerr transforms a complex value judgment – about the relative importance of a right in a particular context – into a legal test on which he *is* capable of adjudicating.

The problem with justifying deference in this way is that this sort of adjudication – regardless of its merits – is precisely the task demanded by the HRA. Through its proportionality test, the HRA deliberately restricts the extent to which a decision-maker can qualify a right. Thus while Lord Sumption is correct to state that value judgments of this kind mean there can be 'no single "right" answer', it is equally true that the HRA charges the courts with the responsibility of ensuring there are no wrong ones – that is,

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<sup>26</sup> *ibid* [34].

<sup>27</sup> *ibid* [20].

<sup>28</sup> EWHC 255 (Admin).

answers which come at the disproportionate expense of an individual's right.<sup>29</sup> Lord Sumption may complain that this stems from a long-term objective of the ECtHR to subject inherently political questions to artificial legal tests. Indeed, he may be correct to state that 'by giving legal effect to the Convention... we have transferred it out of the political arena altogether, and into the domain of judicial decision-making'.<sup>30</sup> However, by doing so, Lord Sumption's comments only serve to show that Lord Kerr's approach is the correct one, since it is constitutionally required by the HRA.

### **3.2 Democratic legitimacy**

Underlying Lord Sumption's justification for constitutional deference is a more fundamental belief about the HRA and its effect on democracy. For him, deference is owed because the value judgments which proportionality raises must be given a democratic legitimacy which an appointed judiciary is incapable of providing. This line of reasoning is evident in Lord Hoffmann's jurisprudence. Writing after 9/11, he held that the judiciary should 'respect the decisions of ministers... on the question of whether support for terrorist activities in a foreign country constitutes a threat to national security' because:<sup>31</sup>

such decisions, with serious potential results for the community, require a legitimacy which can be conferred only by entrusting them to persons responsible for the community through the democratic process.

Equally distinguished members of the judiciary have thrown their weight behind these ideas. Lord Bingham rejected a challenge to the Hunting Act 2004 on HRA grounds, believing that 'the democratic process is liable to be subverted if, on a question of moral and political judgment, opponents of the Act achieve through the courts what they could not achieve in Parliament'.<sup>32</sup> And Lord Sumption has raised similar fears, arguing that if the courts make value judgments of the kind demanded by the proportionality test, then this will erode popular confidence in the ability of our democratic institutions to find

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<sup>29</sup> *Carlile* (n 1) [32].

<sup>30</sup> Jonathan Sumption QC, 'Judicial and Political Decision-Making' (FA Mann Lecture, 2011) 4.

<sup>31</sup> *Secretary of State for the Home Department v Rehman* [2001] UKHL 47, [2003] 1 AC 153 [62].

<sup>32</sup> *R (Countryside Alliance) v Attorney General* [2008] 1 AC 719 [45].

compromise. This in turn will lead to demands for greater democratic influence over the judiciary.<sup>33</sup>

Three problems arise from these arguments, however. First, they cannot justify deference to the abundance of administrative decisions which give rise to HRA claims since, as Richard Clayton argues, these have 'no direct connection with voters making choices through the ballot box'.<sup>34</sup> In *Belfast City Council v Miss Behavin' Ltd*, Baroness Hale distinguished between different layers of decision-making which led to a City Council decision – in this case, the refusal of a licence to sell pornography.<sup>35</sup> At the top was the Northern Ireland legislature's granting of permission to local authorities to regulate sex shops; at the bottom lay the decision of Belfast City Council to refuse a licence to Miss Behavin'. Since, on democratic legitimacy grounds, deference would only be justified to the former, the court would have to adjudicate without recourse to deference in large swathes of HRA claims.

Second, these claims depend on a flawed conception of democracy. A parliamentary majority is just one constituent of our democratic system; equally necessary is a judiciary capable of upholding fundamental rights, such as freedom of expression, which are essential for its preservation. Thus while Lord Sumption's belief that the Convention is a 'restraint on the democratic process' may *prima facie* seem reasonable,<sup>36</sup> a cursory glance at the state of the Hungarian press should militate against accepting Prime Minister Orbán's contention that an 'illiberal democracy' is no contradiction in terms.<sup>37</sup> Lord Bingham rejected the Attorney General's submissions on these grounds, when he considered whether the Home Secretary's response to a 'public emergency threatening the life of the nation' was proportionate:<sup>38</sup>

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<sup>33</sup> Lord Sumption, 'The Limits of Law' (27th Sultan Azlan Shah Lecture, 2013) 14.

<sup>34</sup> Richard Clayton QC, 'Principles for Judicial Deference (2006) 11(2) JR 115.

<sup>35</sup> [2007] UKHL 19, [2007] 1 WLR 1420 [33].

<sup>36</sup> Sumption (n 30) 10.

<sup>37</sup> Jessica Simor QC, 'Is the civil law interpretation of proportionality causing the Court to become political and therefore harder to predict?' (White Paper Conference, 2018) 2.

<sup>38</sup> A (n 14) [42].

I do not in particular accept the distinction... between democratic institutions and the courts... the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself. The Attorney-General... is wrong to stigmatise judicial decision-making as in some way undemocratic.

Third, Parliament has expressly authorised the judiciary to take on this role. Through sections 6, 3 and 4 of the HRA, it confers its 'democratic legitimacy' on the courts' jurisdiction over the proportionality test. Lord Bingham goes on to make this very point in *Belmarsh*:<sup>39</sup>

Parliament has expressly legislated in section 6 of the 1998 Act to render unlawful any act of a public authority, including a court, incompatible with a Convention right, has required courts (in section 2) to take account of relevant Strasbourg jurisprudence, has (in section 3) required courts, so far as possible, to give effect to Convention rights and has conferred a right of appeal on derogation issues.

Lord Sumption views Parliament's authorisation as immaterial to his critique, since it is perfectly capable of making undemocratic legislation. It can abolish elections or appoint a dictator, for instance.<sup>40</sup> But not only does this line of argument disregard the vast practical gulf between the HRA's consequences and the appointment of a dictator. It illustrates the very point that Lord Sumption seeks to refute: a parliamentary majority cannot be synonymous with democracy, since democracy must comprise additional constitutional protections, such as the HRA, for its maintenance.

### **3.3 Relative institutional competence**

Though related to constitutionally justified deference, a more acceptable basis for deference is the 'relative institutional competence' of the decision-maker. This school of thought holds that when the courts have less expertise or access to knowledge than the executive or legislature, they are justified in deferring to its opinion.<sup>41</sup> Frequently, this justification arises when the subject matter of the decision falls beyond the usual remit of

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<sup>39</sup> *ibid.*

<sup>40</sup> Sumption (n 30) 12.

<sup>41</sup> Jeffrey Jowell, 'Judicial Deference: servility, civility or institutional capacity' (2003) PL 592, 601.

the court. As Laws LJ reasons, the judiciary is far more equipped to deal with matters relating to criminal justice or discrimination, for instance, than those relating to macro-economic policy.<sup>42</sup> Lord Nicholls' observations in *Ghaidan v Godin-Mendoza* follows a similar logic:<sup>43</sup>

The readiness of the court to depart from the view of the legislature depends upon the subject matter of the legislation and of the complaint. National housing policy is a field where the court will be less ready to intervene. Parliament has to hold a fair balance between the competing interests of tenants and landlords, taking into account broad issues of social and economic policy.

That this reasoning can justify deference at each stage of the proportionality assessment is apparent from *Carlile*. Lady Hale justified her deference to the Government at stage (i) of the assessment on the grounds 'that they have access to sources of information which cannot be put before any court. They have advisers whose job it is to assess what is likely to happen in the future and how serious that will be.'<sup>44</sup> Though he ultimately demanded more convincing reasons for deference than the Government provided, Lord Kerr also conceded that respect for executive expertise should be given on relative institutional capacity grounds:<sup>45</sup>

In conducting the review of government decisions, courts must, of course, be keenly alive to the expertise and experience that ministers and public servants have by reason of their involvement in affairs of state, an involvement that courts cannot possibly replicate.

In addition to the subject matter of decisions, proponents of 'relative institutional competence' hold that their knock-on consequences can justify deference. Thus, when Lord Sumption drew on the language of Lon Fuller to caution against interference in 'polycentric' decisions, he was asking the courts to show restraint when faced with

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<sup>42</sup> *International Transport Roth GmbH v Secretary of State for the Home Department* [2002] EWCA Civ 158.

<sup>43</sup> [2004] UKHL 30, [2004] 2 AC 557 [19].

<sup>44</sup> *Carlile* (n 1) [99].

<sup>45</sup> *ibid* [176].

decisions that 'have multiple consequences, each with its own complex repercussions for many other people'.<sup>46</sup>

'Relative institutional competence' justifications facilitate a more contextual approach to deference. This allows the court to judge proportionality in traditionally non-justiciable areas, according them respect only if respect is due. As such, in *Smith and Gray v UK*, while the court accepted that 'each State is competent to organise its own system of military discipline and enjoys a certain margin of appreciation in this respect', it rejected abdicating its responsibility for determining whether the interference with the applicants' Article 8 rights was proportionate.<sup>47</sup> Instead, after examining a report that claimed homosexual servicemen would reduce the operational effectiveness of the armed forces, the court decided that the decision was patently disproportionate.

#### **4 Justifications for deference**

Since deference should be owed on institutional rather than constitutional grounds, there must be no area of decision-making in which the court cannot judge proportionality. 'Deference as submission', as Dyzenhaus calls it, is prohibited.<sup>48</sup> Instead, as proponents of 'due deference' argue, it must be the quality of opinion advanced by Government – and the expertise that government evinces to support this opinion – that dictates the level of deference owed. This follows Kavanagh's account of 'substantive deference', in which deference must be 'earned' by the decision-maker through the reasons it advances.<sup>49</sup>

It is far from easy, however, to distil this justification into a set out principles for determining when, and how much, deference should be given. Indeed, whether this task can be performed at all has produced decades of academic debate. 'Non-doctrinal' theorists of deference in particular hold that there can and should be no distinct doctrine of deference.<sup>50</sup> This is because these principles can only be formulated at such a high

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<sup>46</sup> Sumption (n 30) 13.

<sup>47</sup> 29 EHRR 493 [89].

<sup>48</sup> Dyzenhaus (n 9) 286.

<sup>49</sup> Aileen Kavanagh, 'Deference or Defiance?' in Grant Huscroft (ed) *Expounding the Constitution: Essays in Constitutional Theory* (CUP 2008) 191.

<sup>50</sup> Paul Craig, *Administrative Law* (8<sup>th</sup> edn, Sweet & Maxwell 2016), 621.

level of abstraction – given the need for the court to adopt a highly contextualised approach to proportionality – that they would have limited utility.<sup>51</sup>

Clearly, 'context is all important'.<sup>52</sup> Beloff is correct, then, to state that 'the degree of deference to be accorded to the executive and Parliament is entirely dependent upon the context of any given decision or measure, and will be informed by a complex set of considerations pertaining to each particular case'.<sup>53</sup> But this recognition is not inconsistent with a belief in the utility of setting out 'particular considerations which should be taken cognizance of when deciding on the appropriate degree of restraint that a court should give to the primary decision-maker'.<sup>54</sup> Such a task is required if the courts' approach to deference is to be conducted transparently.

On an institutional account of deference, the degree of weight which a decision-maker's reasons is accorded therefore depends on the relevance of the following factors:

#### **4.1 The evidence provided by the decision-maker**

Less deference should be accorded to the decision-maker when it cannot present evidence that its decision was proportionate. Institutional deference is grounded in the notion that the decision-maker has greater expertise than the court, so if it lacks the capacity to justify its decision then the court has no reason to defer. This reasoning was adopted by the Supreme Court in *R (Aguilar Quila) v Home Secretary* when the Government failed to provide evidence that its policy was no more than necessary to accomplish its aim of deterring forced marriages.<sup>55</sup>

#### **4.2 The importance of the right**

Less deference should be accorded to the views of a decision-maker when its decision engages a right of particular constitutional importance. As Lady Hale held in *Countryside*

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<sup>51</sup> Tom Hickman, *Public Law after the Human Rights Act* (Hart Publishing 2010) 137.

<sup>52</sup> Steyn (n 4) 7.

<sup>53</sup> The Hon Michael J Beloff, 'The Concept of "Deference in Public Law"' [2006] 11:3 JR 223.

<sup>54</sup> Craig (n 50) 622.

<sup>55</sup> [2011] UKSC 45.

*Alliance*, a proportionate interference with a less important right might be a disproportionate interference with a more important right.<sup>56</sup> Clearly, such an assessment can depend on the wider context. In *R (ProLife Alliance) v BCC*, the court was less deferential to a decision to restrict an organisation's freedom of expression during an election campaign than in *Miss Behavin'*, where the Council's restriction on the selling of pornography had far fewer constitutional implications.<sup>57</sup>

#### **4.3 The subject matter of the decision**

More deference should be accorded to the views of the decision-maker when the subject matter of their decision falls outside their expertise. As above, 'relative institutional competence' rather than constitutional grounds can justify a court's deference to a decision-maker's view on matters of social policy or national security. Thus, in *R (Rowe) v Revenue and Customs*, the Court of Appeal afforded a greater degree of deference to the Government since the decision in question concerned taxation.<sup>58</sup> Conversely, as Laws LJ held in *Roth*, less deference will be due where the issue lies within the 'constitutional responsibility' of the courts.<sup>59</sup>

#### **4.4 The nature of the decision**

More deference should be accorded to the views of the decision-maker when the decision involves complex, factual predictions. As Arden LJ states, 'where it is difficult to predict the effect of a particular course of action in the future, one answer may be to apply a lower intensity of review and leave the matter to the decision-maker.'<sup>60</sup> On this basis, the majority in *Carlile* was correct to accord a considerable degree of weight to the Home Secretary's assessment of Rajavi's entry on British-Iranian relations. Similarly, a

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<sup>56</sup> (n 32) [124].

<sup>57</sup> [2004] 1 AC 185.

<sup>58</sup> [2018] STC 462.

<sup>59</sup> *International Transport Roth GmbH v Secretary of State for the Home Department* [2002] EWCA Civ 158 [84].

<sup>60</sup> Lady Justice Arden, 'Proportionality: the way ahead?' (2012) UKEL 31.

court should be more respectful of 'polycentric' decisions which could have significant knock-on effects elsewhere.<sup>61</sup>

## **5 Conclusions**

This essay has argued that the courts should, in certain circumstances, defer to the Government when judging proportionality under the HRA. However, it rejects arguments for deference which appeal to the separation of powers. Such justifications give too little weight to the constitutional requirements which are demanded of courts by the HRA. It also rejects arguments for deference on the basis of democratic legitimacy, since it is far from clear that the courts' role can be conceived as oppositional to democracy. Indeed, Parliament has explicitly authorised the court to adjudicate on Convention rights and ensure its standards of review are upheld. Instead, this essay has accepted that the courts can legitimately defer to the decision-maker on grounds of relative institutional competence. This has a bearing on the process that the courts should adopt when judging proportionality, as well as the types of factors for determining the extent to which deference is owed.

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<sup>61</sup> Lon Fuller, 'The Forms and Limits of Adjudication' (1978) 92 Harvard L Rev 353.

# What Should Happen on the Demise of the Crown?

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The phrase 'demise of the Crown' has, in legal terms, a much narrower semantic designation than might be read into or interpreted from these words on an abstract level of linguistic appraisal. As such, the demise of the Crown is defined by Jowitt's Dictionary of English Law to mean the 'death of the sovereign,...an expression which signifies merely a transfer of property; for when we say the demise of the Crown, we mean only that in consequence of the disunion of the sovereign's natural body from his body politic, the kingdom is transferred or demised to his successor, and so the royal dignity remains perpetual. A demise of the Crown may occur on the death of the sovereign or on his being deposed'.<sup>1</sup>

Whilst such a definition appears superficially to delineate the scope and consequence of a monarchical demise, in actuality it fails to capture the intricacies of the process and the justificatory debates that are inextricably intertwined therein. It is this discourse that I shall attempt to clarify and engage with through the course of this essay. Using the concept of the passing on of the office of the Crown as a definition of its demise, I shall consider this process on an theoretical level. Whilst the possible practical implications of the demise of the current monarch may be fascinating, particularly as concerns the independence of the Commonwealth, it shall be excluded from this study. Instead I shall focus more intently on the constitutional and jurisprudential justifications for the process following the demise of the Crown.

I shall begin by unpacking Jowitt's definition of the demise of the Crown and what its implications are for what should happen upon the occurrence of this event. I shall then move on to consider the process as it occurs now, how this has evolved from historical practice and what the justifications for these different processes are, both in a social context and from a theoretical viewpoint. Ultimately, I shall frame the debate of what should happen on the demise of the Crown as a conflict between an apparent common

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<sup>1</sup> Daniel Greenberg, *Jowitt's Dictionary of English Law* (4th edn, Sweet & Maxwell 2015).

law principle and an alternative statutory approach. The common law principle in question is the nature of the prerogative power as being residual and separate from statute. I shall argue that the manner in which statutory intervention has been deployed in order to minimise the historically inconvenient effects of the demise of the Crown could be argued to undermine their very nature as prerogative powers.

Jowitt's definition of the demise of the Crown immediately introduces two important maxims of constitutional law. Firstly, the idea that the 'King has two bodies' and secondly the notion that 'the King never dies'. Both of these concepts were explored in depth by Blackstone in his *Commentaries*,<sup>2</sup> and have also received considerable review in modern academic literature. These maxims date back to the Middle Ages and their importance has endured for centuries, succinctly summed up in the judgement in *Calvin's Case* of 1609, in which Lord Ellesmere stated that 'The King hath two capacities in him: one a natural body...subject to death, infirmity and such like; the other is a body politics or capacity...in this capacity the King is esteemed to be immortal, invisible, not subject to death, infirmity, infancy, nonage, etc'.<sup>3</sup> Thus it is clear that the two bodies and immortality maxims are two sides of the same coin – whilst the body corporeal of the monarch may cease to exist, the Crown as an office or a 'corporation' is perpetual and continues, uninterrupted, through variations in the individual in which it vests itself.

The logical corollary of a blind acceptance of the two bodies doctrine would seemingly be that royal powers are constant and are not affected by something as mundane as the death of the natural body of the monarch. Indeed, Jowitt's definition emphasises that the 'royal dignity is perpetual' and that therefore the demise of the Crown merely shifts the locus of power, rather than its manifestation. As such, under a simplistic reading of common law maxims, what should happen on the demise of the Crown is, to put it bluntly, precisely nothing. There are clearly practical aspects of this that are very important – as Chitty explains that 'immediately on the demise of the King, his successor is entitled to the prerogatives attached to the Crown: no coronation, no formal recognition of the claim of the successor is necessary to the perfection of his title; he becomes instantly on the dissolution of his ancestor, a King for every purpose. Much

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<sup>2</sup> William Blackstone, *Commentaries on the Laws of England* (8th edn, 1778) book 1, ch 3.

<sup>3</sup> *Calvin's Case* [1609] 77 ER 37, [1608] Co Rep 1a.

inconvenience would occur if the realm were deprived, even for a short period, of a sovereign; without whom no act of legislation, however trifling can be perfected, or executive affair, however immaterial, be legally performed. Hence it is a maxim in the English law that the King never dies: his political existence is never in abeyance, or suspended'.<sup>4</sup>

However, as sensible as jurists have been in recognising the practicality of treating the Crown as perpetual, even upon the demise of a monarch, they did not historically succeed in creating reflections of these sentiments in real life. Indeed, it has been shown by constitutional practices over the past millennia that these old adages have not, in fact, found themselves with much practical application as binding common law doctrines. In the words of Maitland, 'when on a demise of the Crown we see all the wheels of the State stopping or even running backwards, it seems an idle jest to say that the king never dies'.<sup>5</sup> Stop and run back they indeed did, and perhaps still would without the significant statutory intervention that has taken place. As far back as 1547, when, under King Edward VI, there was passed 'An Acte for the continuance of Actions after the Deathe of anny King of this Realme',<sup>6</sup> there have been multiple efforts to ease the inconvenience caused by a demise of the Crown.

As was laid out at length in the 1984 Report of the Law Reform Commission of South Australia, regarding issues Relating to the Demise of the Crown, there were multiple ways in which daily life and legal procedure have been hindered upon the death of the monarch.<sup>7</sup> Until 1696, Parliament was automatically dissolved on the demise of a monarch.<sup>8</sup> Until 1830, numerous fees and stamp duties that were chargeable on the renewal of warrants, letter patents and grants consequent of the Crown had to be paid again with the demise of the Crown and the accession of the new monarch. Indeed, it wasn't until 1901 that it was decreed that 'the holding of any office under the Crown whether within or without His Majesty's dominions, shall not be affected, nor shall any

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<sup>4</sup> Joseph Chitty, *A Treatise on the Prerogatives of the Crown* (J Butterworth & Sons 1820).

<sup>5</sup> Frederic Maitland, 'The Crown as a Corporation' (1901) LQR 17, 139.

<sup>6</sup> Demise of the Crown Act 1547, 1 Edw 6 c 7.

<sup>7</sup> Law Reform Commission of South Australia, *Relating to the Demise of the Crown* (1984).

<sup>8</sup> Demise of the Crown Act 1696, 7&8 William 3 c 15.

fresh appointment thereto be rendered necessary, by the demise of the Crown'. Even, as highlighted by Pollock in his *First Book of Jurisprudence*, the expiry of the King's peace was threatened, creating an atmosphere in which 'every man that could forthwith robbed another'.<sup>9</sup> Evidently, the historical upshots of a monarch passing cannot be understated in terms of its far-reaching effects on public and private lives and thus sits at tension with the apparently widely accepted notion that the powers of the monarch exist in perpetuity.

From a more academic perspective, many early theories of jurisprudence would be consistent with, and perhaps require, considerable change and upheaval upon the demise of the Crown. One of the earliest popular theories of the law was propounded by Austin and has commonly become known as the command theory. In an outline, this theory states that legal norms are really 'orders backed by threats' and become valid and binding where they are given by an authority to whom the general populous has a habit of obedience.<sup>10</sup> A key aspect of this theory is that it justifies the law's nature as a protected reason for action through the idea of personal allegiance. Whilst in the modern era this is largely demonstrated through personal allegiance to the Government and to Parliament, there are still royal prerogatives powers that exist independently from statute and therefore, under the Austinian theory, are maintained through a habit of obedience to the monarch himself. This creates extreme difficulties in justifying public allegiance immediately after succession, as Hart discussed at considerable length, and, I contend, requires uncomfortable jurisprudential gymnastics to be fit for purpose in explaining legal systems in the modern era.<sup>11</sup> More cogently in the frame of this debate, it also brings us to the uncomfortable conclusion that, despite all of the statutory effort we have made to minimise the effects of the demise of the Crown, such effects are actually necessary in order to ensure a coherent jurisprudence. If we truly contend that prerogative powers come from the monarch and that they are justified by a personal allegiance to that monarch, it is difficult to understand how positions held 'at the Queen's pleasure' can

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<sup>9</sup> Frederick Pollock, *The First Book of Jurisprudence for Students of the Common Law* (Macmillan 1896).

<sup>10</sup> John Austin, *The Province of Jurisprudence Determined* (John Murray 1832) ch 1.

<sup>11</sup> H L A Hart, *The Concept of Law* (OUP 1961) ch 2.

continue for any time after that Queen's life (and thus presumably her pleasure) has ended.

However, more sophisticated and modern theories of law, such as Hart's positivism would not necessarily entail the immortality of the Crown, and yet nor would they necessarily require upheaval following the demise of the Crown. Under Hart's positivism, rules of law can only be created where the process of creation conforms to a predetermined pattern – the 'rule of recognition', which identifies what may or may not constitute secondary rules of law.<sup>12</sup> It might be argued that the Rex has two bodies insofar as he acts in his official capacity whilst conforming to the rule of recognition and acts in his private capacity at all other times. However, I would reject both the necessity and the sensibility of this contention – in fact, the rule of recognition theory, I would argue, entirely undermines the need for two bodies. Rather than having different capacities, Rex can function in both the private and public sphere through a single personage by conforming his activities to a certain pattern to signal the appropriate recipient.

As such, it is clear that whilst different jurisprudential approaches to the nature of the law would imply different approaches to the nature of the Crown, they are neither wholly in agreement, nor necessarily individually conclusive about the approach academics should take to the demise of the Crown. In any case, there has clearly been a change in the legal and political approach to the demise of the Crown – the eventual death of HM Queen Elizabeth II will certainly not result in a return to a Hobbesian state of nature or the need to reappoint every senior member of the military or civil service. However, these are changes that have been brought about by the specific statutory provisions noted above, and indeed many more. Thus if it has taken statute to keep the wheels of the State well-greased upon the death of the monarch, what is it about these areas of legal norms that put them at such a risk of grinding to a halt in the absence of legislation? The clear answer is the source of these powers – all of them are activities at common law that originate from royal prerogative powers, that is, powers that are exercised (theoretically unilaterally) by the executive. In the 21st Century we are very much beyond believing, or even pretending, that the monarch alone constitutes the executive branch of government. It is for this very reason that academics such as Maitland

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<sup>12</sup> *ibid.*

argue for the idea of the 'Crown' as a corporation aggregate – a fictional legal person made up of multiple internal sections (e.g. the Queen, the Cabinet, the military, the foreign office).<sup>13</sup> Following this pragmatic line of thought, it becomes difficult to see why the death of just a single person, who nowadays does little in the way of meaningful decision-making, can cause many royal prerogative powers to be suspended and require renewal. Allen, writing in 2018, highlights this, stating that 'it would be better to say that acts of the Crown count as acts of (Her Majesty's) Government, and accord the Crown a place in public constitutional theory commensurate with its actual function'.<sup>14</sup>

However, when we consider the historical constitutional function of the monarch and nature of the prerogative power, it becomes a little clearer why such drastic steps were taken upon the demise of the Crown. As Maitland explains, in the Middle Ages and some way into the Renaissance, the monarch had a considerably more powerful constitutional function and was seen, at base, to be the ultimate delegator, whose decisions were not subject to review in the same manner as the executive may be reviewed in modern times.<sup>15</sup> Indeed, the religious nature of the monarch's position during the Middle Ages heightened this sense of importance – the medieval prevalence of theories of natural law, propounded by scholars such as Aquinas only served to augment the personal importance of the monarch. Thus, 'at the delegator's death the delegation ceased'<sup>16</sup> – regardless of the maxims, the king's body politic and his body natural were considered very much as one. As such, it is arguable that the consequences of the demise of the Crown have correctly evolved to continually reflect the changing status of the monarch in English constitutional law. Thus as the monarch's personal handle on royal prerogative powers has become arguably just symbolic, the legal and constitutional importance of the monarch as an individual has been downgraded, something that is then reflected in a change in our approach to the Crown's demise.<sup>17</sup>

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<sup>13</sup> Maitland (n 5) 143.

<sup>14</sup> J G Allen, 'The Office of the Crown' (2018) CLJ 314.

<sup>15</sup> Maitland (n 5) 138.

<sup>16</sup> *ibid.*

<sup>17</sup> House of Commons Briefing Paper (No 03861, 17th August 2017).

Arguably this evolution in power can also be linked to the office of the Crown evolving from a corporation sole to a corporation aggregate. This is a key distinction. In law, a corporation sole is a successive line of persons that creates a continuous fictional legal person that will be vested in different bodies in turn. Meanwhile, a corporation aggregate is group of coexisting persons that make up a continuous fictional legal person that will be simultaneously *and* successively vested in different bodies. Thus, as the individual power of the monarch has been diluted, the practical importance of his demise has been diluted also.

This is a practical and, in some ways, a very attractive argument. The concept of the monarch having two bodies is, it must be conceded, a useful one. As Hart pointed out, the imaginary King, Rex, is not giving state orders when he talks to his mistress – he is perhaps exercising powers of charm rather than powers of royal prerogative. However, as useful as it may be to allow for an evolution in the way we treat the demise of the Crown, it is important to note that this evolution has been based on statutory intervention rather than a gradual alteration of a common law approach. Indeed, perhaps it is wrong to call it an evolution at all, considering the conscious nature of the interference. The need for legislation to prevent the wheels of the State from grinding to a halt implies that in the absence of such intervention, the common law practice might still be to allow calamitous and disruptive events to take place. There is also the wider constitutional and jurisprudential question of allowing statute to interfere in prerogative powers. It has long been affirmed that statute has priority and takes precedence over the exercise of prerogative power,<sup>18</sup> but it is more difficult to interpret the case law on statute changing the scope and nature of prerogative powers. Blackstone defines prerogative powers as being residual – they are not created by Parliament, nor conferred on the Crown, but exist as norms just because the legislature has not yet encroached on those fields of play.<sup>19</sup> Consideration of the debate from this angle throws up a most interesting question – during the period immediately following the demise of the Crown, does Parliament sit by statutory authority or at the (previous or incumbent) monarch's pleasure by prerogative power? A study of the case law might direct one to *Attorney General v De Keyser's Royal*

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<sup>18</sup> *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2017] EWHC 2768.

<sup>19</sup> Blackstone (n 2) book 1, ch 7, p 111.

*Hotel* and the ascendancy of statute,<sup>20</sup> leading to the conclusion that Parliament in fact sits with statutory authority. Clearer still is the example of the 1901 Demise of the Crown Act which, it could be argued, changed the locus of the prerogative power of official appointment – no longer were appointments held at the pleasure of a particular sovereign, but they were now held at the pleasure of the Crown as an institution.<sup>21</sup>

Understanding the result of the aforementioned legislation as being a transfer of power between the two bodies of the monarch could, in fact, be the key to unlocking just how the two bodies and immortality maxims fit within the schema of the law as it is and has been. Whilst in the Middle Ages it was accepted that the King had two bodies, a vast number of the powers that were attributed to the sum of those bodies fell under the jurisdiction of the Crown as a natural person. This fitted with the contemporary understanding of monarchs as somewhat deified. The interruption of the exercise of those powers therefore seems justified when we look at them through the lens of their genuinely personal nature. Over the next five centuries, we experienced a shrinkage in the number of prerogative powers, and many of the remnant royal prerogatives that previously lay personally with the monarch, now lie only with the Crown as an office. An office, it has previously been concluded, that exists as a corporation aggregate, and therefore which hardly seems linked to the demise of the Crown's natural body. This in turn, provides a clear justification for the continuation of their uninterrupted exercise, even upon the demise of the Crown's natural body, as this body is linked in no way to the perpetuity of the office.

This explanation provides a parsimonious elucidation of how the common law doctrines of the Crown's two bodies and the Crown's immortality could apply coherently and yet with such different practical outcomes both now and in the Middle Ages. On the other hand, it also begs a far deeper constitutional question – to what extent do 'royal' prerogative powers even exist anymore? As the aforementioned quote from Maitland on affording the monarchy only the title of its functional role, the scope of the royal prerogative is in serious retreat and perhaps, in actuality, no longer exists. Furthermore, the quiet imposition of statute on the manner of exercising these prerogative powers

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<sup>20</sup> *Attorney General v De Keyser's Royal Hotel* [1920] UKHL 1, [1920] AC 508.

<sup>21</sup> Demise of the Crown Act 1901, 1 Edw 7 c 5.

could be considered a competence creep that flies in the face of English jurisprudence's traditional approach to the separation of statutory and prerogative powers. Nevertheless, it is arguable that since modern administrative law allows for identical rights of review over both forms of state power, the distinction is perhaps an unimportant one.

Ultimately, whilst the coherence of English jurisprudence seems to be somewhat stretched by the way in which we have altered our approach to the demise of the Crown, this should not be taken to be a negative. The law is a human instrument, created with the intention of achieving certain aims and with the ability to evolve itself, or be actively altered, such that it might become a better servant to society. Whilst theoretical coherence might demand that the demise of the Crown be met with a drastic, medieval-style response, this is clearly not something worth advocating for. The law does not only exist on an abstract, theoretical level, but also, more importantly, on a practical level. The death of significant public figures and heads of state can cost governments, businesses and individuals enormous amounts of money, as well as seriously stymying economic activity. As such, it seems most pragmatic and commendable that, over the years, the national and legal response to the demise of the Crown has been gradually and concretely changed in order to reflect the monarch's own importance qua Crown in the legal system and the process of governance.

As such, this essay proposes that the on the demise of the Crown, the practical legal impact should be minimal. Whilst this perhaps raises concerns about the encroachment of Parliamentary authority into the realm of prerogative powers and the dilution of such powers 'by the back door', this theoretical debate should not have an impact on the normative, practical, human question of what should actually happen on the demise of the Crown.

# Inherent Vice, Bailment and the Burden of Proof:

## *Volcafe v CSAV* [2018] UKSC 61

HARRISON EDMONDS\*

### 1 Introduction

When property that has been carried by a shipowner acting as a bailee is returned to a bailor in a damaged state, where does the burden of proof lie regarding the potential negligence of the carrier? Does the bailor have to prove that the bailee was negligent in their custody of the property, or does the bailee have to demonstrate that they were not negligent? This was the main question the Supreme Court considered in *Volcafe Ltd and others v Compania Sud Americana De Vapores SA*.<sup>1</sup> The Court held that under English law, and the Hague Rules, the burden of proof lay with the bailee to demonstrate that they were not negligent.

### 2 Facts

The claimants were the owners of nine separate lots of Columbian coffee beans and the holders of the respective bills of lading. They were shipped by the defendants from Columbia to Bremen from 14<sup>th</sup> January 2012 to 6<sup>th</sup> April 2012. As coffee beans are a hygroscopic cargo, they store and emit moisture. The beans were stored in unventilated containers, insulated with 'Kraft' paper, an absorbent material that was commonly used throughout the industry in 2012, in order to minimize the risk of water damage to the coffee. Yet, out of the 20 containers that arrived in Bremen, 18 had suffered water damage through condensation.

The cargo owners pleaded in the London Mercantile Court that the carrier was in breach of its duties as the bailee to deliver the cargo in the same condition as recorded on the bills of lading. They alternatively pleaded that the carriers had been in breach of article III, rule 2 of the Hague Rules in that they had failed to properly load, stow, care for

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<sup>1</sup> *Volcafe Ltd and others v Compania Sud Americana De Vapores SA* [2018] UKSC 61, [2019] AC 358.

and discharge the cargo. In particular, they had failed to use enough Kraft paper to fully insulate the coffee beans. The carrier's defence was to plead inherent vice on the ground that the coffee beans were unable to withstand the levels of condensation that usually formed within the containers during voyages from warm to cooler climates. The cargo owners pleaded in response that any damage that arose out of any inherent characteristic of the cargo did so because the carriers had refused to take proper measures protecting the beans.

### **3 In the courts below**

The initial judgment by David Donaldson QC, sitting as a deputy High Court judge, held that there was no legal burden on the carrier to prove that the damage was not caused by negligence and that there was only a factual presumption that damage suffered was due to negligence during the discharging of the cargo.<sup>2</sup> The judge's examination of the facts found that the use of unventilated containers lined with Kraft paper to transport coffee from warm to cooler climates was routine commercial practice, but that there was no accepted common practice on how thick the Kraft paper ought to be, or how many layers used.<sup>3</sup> The judge also found that the evidence did not establish how thick the Kraft paper in the instant case was, nor how many layers were used and that the paper had not been improperly fixed by the stevedores acting on behalf of the carrier.<sup>4</sup> In the Court of Appeal, Mr Justice Flaux found that once a *prima facie* case for the application of the exemption of inherent vice was shown, the burden fell on the bailor to prove that the bailee was negligent.<sup>5</sup>

### **4 In the Supreme Court**

The deputy judge's judgment gave rise to the major issue of law on the appeal to the Supreme Court, in was the burden of proving whether the cargoes were damaged by negligent preparation of the containers or by the cargoes' inherent vice. In his judgment

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<sup>2</sup> *Volcafe Ltd and others v Compania Sud Americana De Vapores SA (trading as CSAV)* [2015] EWHC 516 (Comm) [17], [2016] 1 All ER (Comm) 657, 672.

<sup>3</sup> *ibid* [49].

<sup>4</sup> *ibid* [48].

<sup>5</sup> *Volcafe Ltd and others v Cia Sud Americana de Vapores SA (trading as CSAV)* [2016] EWCA Civ 1103 [50], [2017] 3 WLR 1 at 22.

on behalf of the Supreme Court, Lord Sumption JSC began by considering bailment at common law, as despite the fact that the bills of lading incorporated the Hague Rules, the common law provided the background to the creation of the Rules and have remained influential.<sup>6</sup> His lordship examined the historic cases of *Coggs v Bernard*,<sup>7</sup> and *Reeve v Palmer*,<sup>8</sup> and found that there were two principles of bailment at common law.<sup>9</sup> First, the bailee is not an insurer and only had a duty to take reasonable care of goods. Second, while the bailee had a qualified obligation to take reasonable care, he bears the burden of proving the absence of negligence and demonstrating that he took reasonable care of the goods. Lord Sumption found<sup>10</sup> that these principles had been applied to carriers by Atkin LJ in *The "RUAPEHU"*.<sup>11</sup>

The Court finished its analysis of bailment at common law by making three points.<sup>12</sup> First, the burden of proof was a legal burden. Second, the rule about the burden of proof has been constantly supported by the common law because it may be difficult or impossible when goods are in possession of the bailee for anyone else to account for the loss or damage sustained by them. Third, although this principle regarding the burden of proof developed independently in the common law, it is consistent with Roman law which formed the basis of French and Scots law and other civil law systems.

Lord Sumption then considered whether the principles regarding burden of proof are different in the context of a modern contract by sea incorporating the Hague Rules. His lordship did this by considering article III.2 and article IV of the Hague Rules.<sup>13</sup> The Court found that, in principle, when a cargo is shipped in apparent good order but is discharged damaged, the carrier has the burden to prove that there was no breach in

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<sup>6</sup> *Volcafe* (n 1) [7].

<sup>7</sup> (1703) 2 Ld Raym 909.

<sup>8</sup> (1858) 5 CBNS 84.

<sup>9</sup> *Volcafe* (n 1) [8]-[9].

<sup>10</sup> *Volcafe* (n 1) [9].

<sup>11</sup> (1925) 21 L1 L Rep 310.

<sup>12</sup> *Volcafe* (n 1) [10].

<sup>13</sup> *ibid* [12].

their obligation to take reasonable care set out in article III.2.<sup>14</sup> The Court also confirmed that the carrier has the burden of proving facts that can bring them within one of the exceptions in article IV, such as an act of God or inherent vice, which would mean they were not liable for the damage caused.

The Court then considered cases governed by the Hague Rules. It reached the conclusion, after examining *Pyrene Co Ltd v Scindia Navigation Co Ltd*,<sup>15</sup> *Silver v Ocean Steamship Co Ltd*,<sup>16</sup> and *The "TORENIA"*,<sup>17</sup> that the Rules have not altered the burden of proof in cases of bailment for carriage.<sup>18</sup> The Court also found that the true rule is that the carrier must show either that the damage to the cargo occurred without fault in the various respects covered by article III.2, or that it was caused by something included within the exceptions in article IV.<sup>19</sup>

The Court then considered the exception (q) of article IV.2 of the Hague Rules, namely the exception in the case of inherent vice, and whether the cargo-owner must positively prove that carrier's negligence resulted in damage when the carrier has proved the cargo suffered from an inherent vice. In determining the answer to this, the Court considered the Court of Appeal's judgment in *The "GLENARROCH"*,<sup>20</sup> which found that when it can be demonstrated that the damage could have resulted from an exception found within the relevant bill of lading the carrier had satisfied the burden. The Supreme Court found the conclusion of the Court of Appeal conceptually problematic as it made a distinction between the existence of the excepted circumstance and the circumstance's causative effect, as if the carrier acts in a way that led to the excepting circumstances arising, they would not be liable for any negligence.<sup>21</sup>

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<sup>14</sup> *ibid* [20].

<sup>15</sup> [1954] 2 QB 402.

<sup>16</sup> [1930] 1 KB 416.

<sup>17</sup> [1983] 2 Lloyd's Rep 210

<sup>18</sup> *Volcafe* (n 1) [22]-[24].

<sup>19</sup> *Volcafe* (n 1) [25].

<sup>20</sup> [1984] P 226.

<sup>21</sup> *Volcafe* (n 1) [30]-[31].

The Court therefore decided to overrule *The "GLENARROCH"* as it is both out of place in the context of the Hague Rules and against the commercial purpose of including exceptions to the burden of proof in regards to bailment, and held that the carrier had the legal burden of disproving negligence for the purpose of invoking an exception found within article IV.2.<sup>22</sup>

The Court then turned to the issue of inherent vice. Through consulting *Albacora SRL v Westcott & Lawrence Line Ltd*,<sup>23</sup> it found that inherent vice is not an abstract concept, and that in the current case, the hygroscopic nature of the coffee beans as cargo could only be considered an inherent vice if the effects could not be countered by reasonable care of the goods.<sup>24</sup> Therefore if the carrier could and should have taken precautions which would have prevented some inherent characteristic of the cargo from causing damage, the characteristic cannot be considered an inherent vice. The Court said that as a result of this, the carrier had the burden to prove that they took reasonable care of the damaged cargo, or to prove that the reasonable steps taken to protect the cargo would have failed in the face of its inherent properties.<sup>25</sup>

## 5 Conclusion

*Volcafe Ltd* has clarified where the burden of proof lies in proving negligence in bailment cases, ending the resulting confusion brought about by previous case law and interpretation of the Hague Rules. The Supreme Court, in examining both common law and civil law cases from before the Hague Rules, as well as cases governed by the Rules, found principles regarding bailment that have remained consistent throughout most of legal history. By determining that carrier has to demonstrate that their negligence did not result in the excepting circumstances that caused the damage in order for them not to be found liable, the Supreme Court has ensured that the law remains consistent with those long-standing principles.

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<sup>22</sup> *ibid* [33].

<sup>23</sup> 1996 SC(HL) 19

<sup>24</sup> *Volcafe* (n 1) [34]-[35].

<sup>25</sup> *Volcafe* (n 1) [37].

# Blurred Lines:

## Social Media in Armed Conflict

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### 1 Introduction

Technological advancements have revolutionised the social interactions of global society and in turn influenced the means and methods of warfare; increasing the involvement of civilians in hostilities, not only as victims but also as participants.<sup>1</sup> Together with the involvement of multiple state and non-state actors, civilian participation makes these modern conflicts all the more unpredictable, challenging inter alia the traditional notion of direct participation in hostilities established under international law. The author aims to explore whether certain types of social media use by civilians in the context of armed conflict could be deemed as a 'hostile act',<sup>2</sup> legally sufficient to render civilians as direct participants in the hostilities and to ultimately affect their protected status under international law, leaving them vulnerable to lawful targeting by the warring party negatively affected.

### 2 Social media as a modern weapon

The first 'internet war' in Kosovo witnessed the utilisation of the internet for the advancement of military operations.<sup>3</sup> Non-state actors, and more specifically terrorist organizations such as Al Qaida, were the first to realise the power of the internet and the importance of harnessing social media networks for the recruitment of followers, the dissemination of information and the gathering of intelligence.<sup>4</sup> State actors, such as the U.S., Israel, and Syria, as well as inter-state actors such as NATO, have also gradually

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<sup>1</sup> Andreas Wenger, Simon J A Mason, 'The civilianization of armed conflict: trends and implications' (2008) 90(872) *International Review of the Red Cross* 835, 837.

<sup>2</sup> Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (ICRC 2009) 44 [hereinafter *ICRC Interpretive Guidance*].

<sup>3</sup> Thomas Elkjer Nissen, *#TheWeaponizationofSocialMedia: @Characteristics\_of\_contemporary\_conflict* (Royal Danish Defence College, 2015) 8.

<sup>4</sup> *ibid* 76.

embraced social media as platforms suited for military operations,<sup>5</sup> effectively weaponising them through their adaptation and utilisation to 'achieve "military" effects'.<sup>6</sup>

Social networking platforms (Facebook) and microblogging websites (Twitter) are examples of 'social media' enabling social interaction through the creation, collection, sharing and delivery of user-generated content such as photographs and written posts.<sup>7</sup> Such networks have been employed in different conflicts by various actors for targeting purposes, the collection of intelligence, the conduct of psychological warfare as well as of cyber operations, and for the fulfilment of command and control activities.<sup>8</sup> Information from social media sites has been used for the singling out and targeting of individuals believed to be linked with the opposing parties to a conflict, for example NATO used Google Maps to geo-locate targets in Libya,<sup>9</sup> whilst 800 Palestinians were arrested by the Israeli authorities in 2017, based on computerised analysis of their Twitter and Facebook activity, in an attempt to prevent further 'lone-wolf' attacks.<sup>10</sup>

'Open source intelligence' available through social media has proven instrumental for parties with no boots on the ground of the conflict,<sup>11</sup> whilst controlling the narrative through the sharing of information on such networks has also become a vital aspect of psychological warfare, as exemplified in ISIS' online propaganda and recruitment

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<sup>5</sup> John Pollock, 'People Power 2.0: How civilians helped win the Libyan information war' (MIT Technology Review, 20 April 2012) <<https://www.technologyreview.com/s/427640/people-power-20/>> accessed 4 April 2018.

<sup>6</sup> Nissen (n 3) 81-82.

<sup>7</sup> *ibid* 40.

<sup>8</sup> *ibid* 72.

<sup>9</sup> *ibid* 82. Although not a traditional social media site, the author contends that for the context of this paper and in light of the recent 'share' options added to the website, Google Maps falls under the social media category.

<sup>10</sup> John Brown, 'Opinion Arrest of Palestinians for Potential Terror Attacks Brings New Meaning to 'Minority Report' (Haaretz.com, 24 April 2017) <<https://www.haaretz.com/opinion/.premium-arrest-of-palestinians-brings-new-meaning-to-minority-report-1.5464664>> accessed 25 May 2018.

<sup>11</sup> Pollock (n 5) 68.

campaigns.<sup>12</sup> Additionally, social media networks have been used in different conflicts for cyber operations, for example a Daesh-associated hacker group using the handle 'CyberCaliphate' was responsible for the hacking of various Twitter and YouTube accounts including that of the U.S. Central Military Command (CENTCOM), through which it publicised confidential information.<sup>13</sup>

This 'weaponisation' of social media can become particularly problematic when undertaken by civilians in a way that it provides a military advantage to one of the warring parties.

### **3 Who is a civilian under International Humanitarian Law?**

International Humanitarian Law (IHL) is the body of law regulating instances of armed conflict, existing 'whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State'.<sup>14</sup> The notion of direct participation in hostilities stems from the principle of distinction, the most fundamental principle in IHL requiring the differentiation between civilians and military objects, affording the former protection against attacks.<sup>15</sup> Article 48 of Additional Protocol I (AP I), obliges State Parties 'to ensure respect for and protection of the civilian population and civilian objects' by distinguishing them from combatants and military objectives respectively. In a similar fashion Common

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<sup>12</sup> Nissen (n 3) 84; James P Farwell, 'The Media Strategy of ISIS' (2014) 56(6) *Survival* 49, 52.

<sup>13</sup> Josh Constine 'ISIS "Cyber Caliphate" Hacks U.S. Military Command Accounts' (TechCrunch.com, 12 January 2015) <<https://techcrunch.com/2015/01/12/cyber-caliphate/?guccounter=1>> accessed 10 June 2018; Armin Rosen, 'A self-proclaimed ISIS fan is hacking local news outlets', (Business Insider, 6 January 2015) <<http://www.businessinsider.com/a-self-proclaimed-isis-fan-is-hacking-local-news-outlets-2015-1>> accessed 10 June 2018.

<sup>14</sup> *Prosecutor v Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1 (2 October 1995) [70] (emphasis added).

<sup>15</sup> Geneva Conventions I-IV (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31-287; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (Additional Protocol I); Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of non-international armed conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 (Additional Protocol II).

Article 3 to the four Geneva Conventions and Article 13(1) of Additional Protocol II, both applicable to non-international armed conflicts, provide for the protection of individuals that do not actively participate in the hostilities 'against the dangers arising from military operations' of both state and non-state actors.<sup>16</sup>

The 'cardinal' principle of distinction has now attained customary law status, and applies to all types of armed conflict.<sup>17</sup> As the applicability of IHL is subject to an objective factual analysis, the principle of belligerent equality implies that when an armed conflict is objectively deemed to exist, IHL and by extension the principle of distinction, applies equally to all parties irrespective of their consent.<sup>18</sup> The only way for a party to the conflict to lawfully target non-military objectives is for the notion of direct participation in hostilities to be applicable; namely when there is a) *a civilian*, that is b) *directly participating in hostilities*.<sup>19</sup>

Under IHL, civilians are defined negatively as all persons who are not members of the organised armed forces of one of the parties to the conflict. The parties involved in a conflict vary with the nature of the conflict itself. In international armed conflicts civilians are those who are not members of either the state armed forces or participants in a *levée en masse*.<sup>20</sup> Similarly, in the context of non-international armed conflicts, civilians are those who do not belong to either the armed forces of a state, or to an organised armed group.<sup>21</sup> These negative definitions of civilians inevitably lack clarity and thus amplify the need of interpreting the concept of 'civilians' in good faith, in accordance with its ordinary meaning, and in light of the object and purpose of the law.<sup>22</sup> Since one of the main aims

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<sup>16</sup> The ICTR however has maintained that terms 'active' and 'direct' are similar and thus they should be treated as synonyms, see *Prosecutor v Akayesu* (Trial Judgment) ICTR-96-4 (2 September 1998) [629].

<sup>17</sup> *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion* (Advisory Opinion) [1996] ICJ Rep 226, 257.

<sup>18</sup> *Akayesu* (n 16) [603].

<sup>19</sup> Additional Protocol I (n 15) art 51(3); Additional Protocol II (n 15) art 13(3).

<sup>20</sup> Additional Protocol I (n 15) art 50(1).

<sup>21</sup> Geneva Conventions I-IV (n 15) art. 3; Additional Protocol II (n 15) art 1(1).

<sup>22</sup> Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 30(1).

of the IHL regime is to protect civilians, a good faith interpretation would imply that when there is doubt in relation to the status of an individual, civilian status should be inferred.<sup>23</sup>

However, the general protection from attack afforded to civilians is forfeited when the individual is thought to have undertaken a hostile act, likely or intended to cause harm to, or benefit one of the parties to the conflict.<sup>24</sup> Due to a lack of settled definition on the notion of 'hostility' in treaty law, the ICRC Commentary on the Additional Protocols to the Geneva Conventions states that hostilities should be understood as 'acts of war which are intended by their nature and purpose to hit specifically the personnel and equipment of the armed forces of the adverse Party.'<sup>25</sup> Moreover, the ICRC has suggested that such an 'act of war' is necessary for there to be 'direct participation'.<sup>26</sup> The non-legally binding nature of the organisation's interpretation of the law however, prevents it from establishing a universal definition accepted by all States.<sup>27</sup>

States have in fact adopted a case-by-case strategy when dealing with this controversial area of humanitarian law, undertaking a factual assessment of any arising issues.<sup>28</sup> Whilst some follow the ICRC's direction, others have expanded these concepts into encompassing acts intended to also damage civilians not merely military objects,<sup>29</sup> or have even gone as far to as to suggest that civilian action can be deemed as direct participation when it is likely or intended to benefit one of the parties.<sup>30</sup> There is no

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<sup>23</sup> Additional Protocol I (n 15) art 50(1); *ICRC Interpretive Guidance* (n 2) 27.

<sup>24</sup> Michael N Schmitt, 'Deconstructing Direct Participation in Hostilities: The Constitutive Elements' (2010) 42 *NYU Journal of International Law and Politics* 697, 698 footnote 2.

<sup>25</sup> ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Yves Sandoz et al. eds., 1987) [1679] [hereinafter *ICRC Commentary*].

<sup>26</sup> *ibid* [1944].

<sup>27</sup> *ICRC Interpretive Guidance* (n 2) 23.

<sup>28</sup> Schmitt 2010 (n 38) 705; United Kingdom Ministry of Defence, 'The Manual on the Law of Armed Conflict' (2004) ch 5.3.3  
<[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/27874/JSP3832004Edition.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/27874/JSP3832004Edition.pdf)> accessed 20 February 2018. Judicial bodies also usually deal with direct participation on a case-by-case basis, see ICTY, *Prosecutor v Strugar* (Appeals Chamber Judgment) IT-01-42-A (17 July 2008) [176-179].

<sup>29</sup> *The Public Committee Against Torture in Israel (PCATI) v Israel* [2005] 46 *ILM* 375 [33].

<sup>30</sup> Schmitt 2010 (n 38) 690.

requirement that such 'hostile' acts be of military nature, so far as they negatively affect the enemy's operations and are direct in the sense that they have a connecting link to the resulting harm.<sup>31</sup> Social media use which is not military in nature could still fall under the rule. It is important to note however, that mere contribution to the general war effort, for example the provision of financial support or food to one of the parties, would not directly result in the harm of the other, and thus it would not merit the loss of the protection from attack.<sup>32</sup>

With more than half of the world's population using the internet, out of which 71% were active social media users in 2017,<sup>33</sup> it is evident that social media platforms have infiltrated the everyday lives of people around the globe. Characterised as 'cheap hand-held technology', social media networks and profiles are inexpensive to develop, access, and maintain, thus making them highly attractive to a wide-range of users and audiences wishing to join the free and rapid flow of information.<sup>34</sup> Civilians with interest in a particular conflict can join discussions, as well as collect and share information in relation to the situation on the ground from virtually any geographic location, in nearly real time, under the presumed protection of their anonymity while unaware of the legal consequences.<sup>35</sup>

The line distinguishing civilians from direct participants however becomes blurred when information collected through, and shared on social media by civilians, has real military effects for the conflicting parties. This in turn challenges the principle of distinction and inevitably results in legal uncertainty when it comes to the applicability of the general protections from attack afforded to civilians under IHL.

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<sup>31</sup> *ibid* 712.

<sup>32</sup> *ICRC Commentary* (n 25) [1945].

<sup>33</sup> 'Global digital population as of April 2018 (in millions)' (Statista.com, 2018) <<https://www.statista.com/statistics/617136/digital-population-worldwide/>> accessed 10 June 2018; 'Number of social media users worldwide from 2010 to 2021 (in billions)' (Statista.com, 2018) <<https://www.statista.com/statistics/278414/number-of-worldwide-social-network-users/>> accessed 10 June 2018.

<sup>34</sup> Pollock (n 5) 71.

<sup>35</sup> Nissen (n 3) 46.

The ICRC and NATO sought to bridge the definitional gaps in the legal provisions by providing guidance for their application in both traditional and cyber conflicts.<sup>36</sup> The ICRC Interpretive Guidance proposed the division of direct participation into three elements: a) threshold of harm, b) direct causation, and c) belligerent nexus.<sup>37</sup> Although non-binding and only reflective of the ICRC's interpretation of this legal notion, the ICRC Interpretive Guidance is seen by many as the starting point in ascertaining when the rule of direct participation in hostilities is applicable, notwithstanding its flaws.<sup>38</sup>

This tripartite approach has been adopted in the also non-legally binding Tallinn Manuals, commissioned by NATO.<sup>39</sup> These Manuals provide direction on how the notion of direct participation is applied in the context of cyber warfare,<sup>40</sup> which can be seen to bear many similarities with social media warfare. For example, civilians involved in both types of warfare can be far withdrawn from the actual territory in which the fighting takes place and they also heavily rely on the internet.

Whilst the ICRC maintained a restrictive stance to ensure that the protection of civilians as posited by IHL would be guaranteed, NATO was expansive in its interpretation of certain aspects, so as to safeguard military superiority. Due to the novelty of this social media warfare, it is important to examine, compare, and apply the legal interpretations of both the ICRC and NATO in order to determine under which circumstances social media use could be deemed as direct participation in hostilities.

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<sup>36</sup> ICRC *Interpretive Guidance* (n 2) 44. Michael N. Schmitt ed., *Tallinn Manual on the International Law Applicable to Cyber Warfare* (CUP 2013). Michael N. Schmitt ed., *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (CUP 2017).

<sup>37</sup> ICRC *Interpretive Guidance* (n 2) 46.

<sup>38</sup> Schmitt (n 24) 712.

<sup>39</sup> Collin Allan, 'Direct Participation in Hostilities from Cyberspace' (2013) 54 *Virginia Journal of International Law* 173, 176.

<sup>40</sup> *Tallinn Manuals* (n 36).

## 4 Social media use – ticking all three boxes

### 4.1 Threshold of harm

In the context of armed conflict, an attack against civilians is only permitted when it is necessary, namely when they themselves undertake acts likely to either harm the military operations of one of the parties, such as the clearing of mines fixed by the enemy,<sup>41</sup> or when they adversely affect otherwise protected persons and objects, for example the taking of civilian hostages pursuant to motivations related to the conflict.<sup>42</sup> The question arises however, as to exactly how harmful should these activities be in order to justify the drastic measure of stripping off civilian protection.

In the social media context, a broad interpretation of the degree of harm required seems inevitable as it would be very rare, if not impossible, for social media activity to directly result in actual harm.<sup>43</sup> Looking at the case of Robert Rowley, an ice-cream man from Tucson, Arizona, who after examining satellite images of Tripoli during the conflict in Libya, he identified and posted the coordinates of a 'suspected pro-Gaddafi military base', that was then targeted by NATO mere instances after his post;<sup>44</sup> it could be argued that while his acts could be deemed to have harmed the military operations of one of the parties to the conflict, it remains unclear whether NATO did in fact act upon this intelligence when it bombarded the building or whether it had access to the coordinates through alternative sources.

The Interpretive Guidance also states that the harm need only be 'likely', and thus it need not have materialised before the notion of direct participation is applicable, so

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<sup>41</sup> *ICRC Interpretive Guidance* (n 2) 48.

<sup>42</sup> Schmitt (2010) (n 38) 724.

<sup>43</sup> *ICRC Commentary* (n 25) [551].

<sup>44</sup> Adam Gabbatt, 'Nato, Twitter and air strikes in Libya' (The Guardian, 15 June 2011) <<https://www.theguardian.com/help/insideguardian/2011/jun/15/nato-twitter-libya>> accessed 8 June 2018. Graeme Smith, 'How social media users are helping NATO fight Gadhafi in Libya' (The Globe and Mail, 14 June 2011 updated 1 May 2018) <<https://www.theglobeandmail.com/news/world/how-social-media-users-are-helping-nato-fight-gadhafi-in-libya/article583325/>> accessed 8 June 2018.

long as the results may be reasonably expected.<sup>45</sup> Considering the sheer number of information and data collected and/or shared on social media platforms every minute, it is doubtful whether action from one of the parties to the conflict, based on social media posts, could be reasonably expected; they would need to meticulously search and identify the social media profiles circulating reliable information. Nevertheless, the majority of social media users sharing such information, more often than not, try their best to ensure that the party to which the post is directed is notified, by posting on their official feed. For example, Rowley that shared the coordinates of military objectives on Twitter said, 'I just do @Nato and hope for the best.'<sup>46</sup> Whilst NATO itself has confirmed that it relies on open source intelligence from social media networks, it still remains that any party to a conflict would need to double-check with their own intelligence services whether the material is in fact accurate before taking action.<sup>47</sup>

The Tallinn Manual goes a step further to suggest that in the context of cyberspace attacks, mere 'intent' on the part of the civilian to adversely affect the enemy would suffice to meet the threshold of harm requirement.<sup>48</sup> Applying this lower threshold requirement to the example of Rowley, it would follow that since his intention to harm the pro-Gaddafi forces in Libya can be safely presumed from his directed post, it is irrelevant whether NATO did in fact use, or even accessed the information he shared on social media. This would imply that Rowley could essentially lose his protection as a civilian and become a lawful target for the Gaddafi loyalist forces based merely on his presumed intent, even if there was no actual harm caused to any military objective.<sup>49</sup>

Even though one could assume that IHL rules in the context of social media warfare would best be interpreted in a manner more akin to cyber than kinetic warfare, it seems somewhat problematic that a civilian, oceans away from the actual fighting, could be

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<sup>45</sup> *ICRC Interpretive Guidance* (n 2) 47.

<sup>46</sup> Gabbatt (n 44).

<sup>47</sup> Richard Norton-Taylor and Nick Hopkins, 'Libya air strikes: NATO uses Twitter to help gather targets' (The Guardian, 15 June 2011) <<https://www.theguardian.com/world/2011/jun/15/libya-nato-gathers-targets-twitter>> accessed 8 June 2018.

<sup>48</sup> *Tallinn Manual* (n 36) 119.

<sup>49</sup> Allan (n 39) 184.

lawfully targeted and potentially killed for an online post, based merely on intent to cause harm. Whilst cyber activities and social media activities can both be undertaken using the internet from locations far removed from the battlefield – cyber operations, unlike social media posts, can cause disruptions to a nation without requiring an intermediary action by one of the parties to the conflict,<sup>50</sup> such as the hacking of internet-connected industrial systems in power plants and oil wells.<sup>51</sup>

In the case of social media use therefore, although unlikely that a tweet or a post in their normal sense would be regarded as a sufficient 'harmful act', it is not unthinkable that but for the intelligence disseminated through a civilian's social media account, certain damage to persons, objects or the enemy's military operations would not have occurred; justifying therefore a lower threshold requirement where the harm only needs to be 'likely'. On the other hand, the even lower standard put forward by the Tallinn Experts, that can be solely satisfied based on intent, would not be appropriate in the context of social media. The very 'independent' nature of cyber operations seems to merit a threshold that would otherwise seem arbitrary, particularly in the context of social media use that could only be considered harmful under the broad interpretation of an attempt to negatively affect as direct harm.

#### **4.2 Direct causation**

The second constitutive element of direct participation as put forward by the ICRC is direct causation, requiring that an act qualifying under the threshold of harm should either be: a) directly linked to the harm likely to be caused, or b) 'integral' to a coordinated

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<sup>50</sup> Michael Schmitt, 'Classification of Cyber Conflict' (2012) 17 *Journal of Conflict & Security Law* 245, 246.

<sup>51</sup> James Conca, 'Russia Hacks Into U.S. Power Plants, But Nuclear Reactors Should Be Impervious' (Forbes.com, 16 March 2018) <<https://www.forbes.com/sites/jamesconca/2018/03/16/russia-hacks-into-u-s-nuclear-power-plants/#2aeeafa957b9>> accessed 28 June 2018. Nicole Perlroth and David E. Sanger, 'Cyberattacks Put Russian Fingers on the Switch at Power Plants, U.S. Says' (*New York Times*, 15 March 2018) <<https://www.nytimes.com/2018/03/15/us/politics/russia-cyberattacks.html>> accessed 28 June 2018. 'Oil cyber-attacks could cost lives, Shell warns' (BBC.com, 8 March 2012) <<https://www.bbc.com/news/technology-16137573>> accessed 28 June 2018.

military operation likely to cause the harm.<sup>52</sup> The ICRC has suggested in the Interpretive Guidance that for there to be a direct participation, there needs to be a causal link and that 'the harm in question must be brought about in one causal step',<sup>53</sup> meaning that there should be 'a sufficient causal link between the act of participation and its immediate consequences.'<sup>54</sup> Recruitment and training of individuals are examples of indirect participation, that though they undoubtedly add to the military capacity of the respective party, the harm inflicted on the opposing forces cannot be considered immediate unless these activities were specifically undertaken for the execution of a certain hostile act.<sup>55</sup>

Crowdsourcing for technical information through social media is becoming all the more evident in modern conflicts. In April 2011 for example, the leader of the Twawa freedom fighters in Libya joined a conference call over Skype, with Nuredding Ashammakhi, a biomaterials technology researcher from Finland, and Khalid Hatashe, a doctor residing in the UK – in an attempt to disable some 'Grad 122-milimeter multiple-rocket launchers' in Yefren, Libya.<sup>56</sup> The two civilians were effectively providing real time training to the freedom fighter's brigade using a social media network, and could potentially be deemed as directly participating to the hostilities since their actions would have been directly linked to the resulting harm on the opposition's military capacity.

An analogy could be drawn between this scenario and unmanned aircrafts or remote-controlled missiles, which are examples of how 'the causal relationship... remains direct regardless of temporal or geographical proximity.'<sup>57</sup> It could be argued that the freedom fighter in this case was merely fulfilling directions – just like the abovementioned machinery. On the other hand, however, the suggestion that there should literally be only one step between the act and its effects could still be deemed as far-fetched, as the actual harm was caused by the actions of the freedom fighter – an independent agent, albeit their guidance.

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<sup>52</sup> *ICRC Interpretive Guidance* (n 2) 51-53.

<sup>53</sup> *ICRC Interpretive Guidance* (n 2) 53.

<sup>54</sup> *ICRC Commentary* (n 25) [4787].

<sup>55</sup> *ICRC Interpretive Guidance* (n 2) 53.

<sup>56</sup> Pollock (n 5) 63.

<sup>57</sup> *ICRC Interpretive Guidance* (n 2) 55.

In practice there are many instances in which the act has to pass through a number of other agents before its military effect can be realised. For example, before a party to the conflict acts upon received intelligence it firstly needs to analyse its reliability and then disseminate it to the armed forces.<sup>58</sup> Drawing back to the scenario of sharing coordinates of military objectives in Libya via Twitter, it would be unwise to assume that NATO would not firstly corroborate the information. Moreover, a literal interpretation of a 'single step' would run against the ICRC's assertion that the action need not be 'indispensable to the causation of the harm',<sup>59</sup> giving the example of financial support which is indispensable but not the direct cause of harm.

Alternatively, the ICRC maintains that such direct causation can also be prevalent when the act plays an 'integral part' in the execution of 'collective operations'.<sup>60</sup> This two-fold test requires firstly the existence of operations that in order to come into effect, necessitate a number of actions from the participants.<sup>61</sup> Secondly the specific act needs to play an integral part in the operation, meaning that if the standalone act would have failed the threshold of harm requirement, being an integral part of such an operation could render it as direct participation nevertheless.

In the case of Steen Kirby, a high-school student from the U.S., the use of Twitter to create a group in charge of researching different types of weapons for the production of user guides that were to be shared with freedom fighters in Libya,<sup>62</sup> would fail to satisfy the second constitutive element of direct causation as it would most likely be considered an indirect act contributing to the general war effort. The only way that Kirby and his team could be considered as direct participants and thus be susceptible to lawful targeting would be if their actions were integral to a collective operation. However, seeing as this project essentially provides freedom fighters with general weapons and military training, and it was probably undertaken at the civilians' own initiative, it would most likely fail the 'integral part' test.

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<sup>58</sup> Schmitt (2010) (n 38) 728.

<sup>59</sup> *ICRC Interpretive Guidance* (n 2) 54.

<sup>60</sup> Schmitt (2010) (n 38) 727.

<sup>61</sup> *ICRC Interpretive Guidance* (n 2) 54.

<sup>62</sup> Pollock (n 5) 67.

To this effect, the Tallinn Manuals once again introduce the element of 'intent', suggesting that there shall exist a direct causal link between the act and the harm 'intended or inflicted.'<sup>63</sup> This lowers the standard, implying that even in cases where the harm does not materialise, the direct causation requirement could still be satisfied.<sup>64</sup> If this approach is followed in the context of social media, civilians could potentially be rendered as direct participants even if the effects expected to follow from their use of social media did not materialise and thus in effect failed to affect the enemy. Whilst such an approach could be justifiable for cases falling under the first limb of the direct causation test, namely activities directly linked to the harm likely to be caused – such as real time guidance over Skype, provided to freedom fighters for the disarmament of rockets – civilians who are thought to undertake acts integral for a collective operation that has not materialised should not be considered as direct participants since it would imply that their specified assistance did not bear any fruits.

It is important to note that the Interpretive Guidance put forward the highly controversial suggestion that for an act to be direct, it should be physical.<sup>65</sup> Nevertheless, there is no basis for this assertion neither in law nor in practice.<sup>66</sup> In the cyberspace context, just like in the social media context, such a requirement of a physical act would be highly impractical if one considers the realities and practicalities of cyber warfare and the involvement of actors far removed from the actual location of combat.

### **4.3 Belligerent nexus**

The third and final requirement, for the notion of direct participation in hostilities to be satisfied according to the ICRC, is that the act in question 'must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another'.<sup>67</sup> Moreover, the belligerent nexus requirement necessitates that the act be directly linked to the unfolding of the conflict; meaning that civilians taking

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<sup>63</sup> *Tallinn Manual* (n 36) 119.

<sup>64</sup> Allan (n 39) 186.

<sup>65</sup> *ICRC Interpretive Guidance* (n 2) 56-57.

<sup>66</sup> Schmitt (2010) (n 38) 733.

<sup>67</sup> *ICRC Interpretive Guidance* (n 2) 46.

advantage of the resulting situation, for example by engaging in the looting of cultural property for personal gain, cannot be deemed as direct participants as they will not be materially supporting any of the parties to the conflict.

It is essential that the action is of such a harmful nature that could negatively affect the adversary, regardless of whether it is voluntary or not – even child soldiers forced to carry out certain harmful conduct could lose their civilian status protection and be vulnerable to targeting.<sup>68</sup> The Interpretive Guidance introduces the element of subjective intent in this constitutive element, but only in order to dismiss it as relevant in 'exceptional cases'.<sup>69</sup> Alternatively, the Tallinn Manual adopts an even broader definition of the belligerent nexus requirement, namely that cyber acts must merely 'be directly related to the hostilities.'<sup>70</sup>

Adopting the 'zero-sum' assumption in relation to conflict, the Tallinn experts insist that an act in favour of one of the parties would inherently lead to the detriment of the other, and thus there would be no need for explicitly demanding a direct action that would result in both; after all it would be irrelevant as to who benefits or who is being harmed.<sup>71</sup> In applying this broader approach to Steen Kirby's case mentioned above, the primary intention of the civilians was to benefit the freedom fighters in Misrata, Tripoli and the Nafusa Mountains by providing military and medical guidance. Bearing in mind the 'zero-sum' nature of conflict however, which implies that 'a contribution to one side typically weakens its opponent',<sup>72</sup> it could be argued that improved training would, to a certain extent, have a detrimental effect on the opposition.

The only restriction imposed by NATO's expansive interpretation is that private motives, such as financial gain, unrelated to the conflict would not suffice as establishing a belligerent nexus. For example, catfishing expeditions undertaken by civilians using fake Facebook profiles in an attempt to approach the local population, promising an expensive

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<sup>68</sup> Ibid 58-59.

<sup>69</sup> Ibid 60.

<sup>70</sup> *Tallinn Manual* (n 36) 119.

<sup>71</sup> Allan (n 39) 189.

<sup>72</sup> Schmitt (2010) (n 38) 719

way out of the conflict zones, could not be considered as direct participation unless the money collected were to be used for the military advantage of one of the parties.<sup>73</sup>

Conversely, engagement in social media platforms that meets the threshold of harm, as well as the direct causation requirement, would be deemed as satisfying all three cumulative requirements for the application of direct participation if it is clearly intended to assist one of the parties to the conflict. For example, in the case of Ashammakhi and Hetashe, and their Skype conference call with the leader of Twawa freedom fighters, as well as in the case of Rowley's tweets sharing the coordinates of military objectives with NATO, the belligerent nexus is unequivocal as the civilians have clearly chosen to assist one of the warring parties.

The first hurdle put forward by the ICRC in the Interpretive Guidance, namely that the act needs to be in support of the one and in the detriment of the other party to the conflict, is superfluous and archaic; in contemporary conflicts civilians are likely to oppose both parties to the conflict.<sup>74</sup> Nevertheless, this initial, albeit minor, requirement for the act to be specifically designed to affect the warring parties should be preserved for the sake of clarity and in light of the many different ways in which this novel social media warfare can present itself. It would be sufficient however for the act to be undertaken either for the detriment or to benefit of one of the parties, so long as it is not for the personal gain of the civilian.

## **5 Civilians using social media**

There are a number of ways in which social media platforms could be 'weaponised' by civilians, for example Google Maps could be used to identify the coordinates of military objectives that could in turn be shared on Twitter or Facebook. The latter could also be employed for tricking opposition soldiers into sharing confidential information, also known as catfishing, or even for broadcasting live from the conflict areas in order to raise awareness and gain support. Facebook, Twitter and Skype could be used by civilians for

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<sup>73</sup> Nissen (n 3) 87-88.

<sup>74</sup> For example, the Shia militia in Iraq at the early days of the conflict, see Schmitt (2010) (n 38), 736.

crowdsourcing in an attempt to gather technical knowledge in assistance of one of the parties to the conflict.

Ultimately use of social media networks that can be deemed to satisfy the three-fold test provided by the ICRC Interpretive Guidance and followed by NATO in the Tallinn Manuals would be sufficient to render a civilian as direct participant in the hostilities, regardless of the temporal and geographical proximity of the act to its eventual effects. Nevertheless, under the legal provisions civilians can only become legitimate military targets only '*for such time*' as they directly participate in the hostilities.<sup>75</sup> The time dimension incorporated in the notion of direct participation has proven somewhat controversial in modern conflicts, that are way more complex than what the drafters of these legal provisions must have anticipated.

The exact point when a civilian can be deemed as directly participating in the hostilities depends on a case-by-case analysis of the preparatory measures undertaken before the hostile act.<sup>76</sup> Considering the relatively limited time period required for a social media activity to be executed, it would seem appropriate that civilians remain direct participants for an amount of time after their engagement, providing therefore a more realistic window of opportunity for the victim or intended victim to react. Maintaining the direct participant status for such time as there can be a *reliable causal link* between the individual and the hostilities is an appropriate way of dealing with direct participation in the social media context.<sup>77</sup> The problem that follows however is the lack of a universal understanding as to the meaning of 'reasonable causal link'. Nevertheless, 'each civilian action must be treated separately'<sup>78</sup> even if the perpetrator has repeatedly engaged in hostile acts, since in the context of social media activity, that is often undertaken anonymously, intent to re-engage in such actions can never be accurately presumed.

Drawing analogies from the case studies previously explored, the author suggests that if Rowley continues to regularly post tweets on NATO's official page, he could he still

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<sup>75</sup> Additional Protocol I (n 15), art 51(3); Additional Protocol II (n 15) art 13(3).

<sup>76</sup> *ICRC Interpretive Guidance* (n 2) 65-70.

<sup>77</sup> *Tallinn Manual* (n 36) 121.

<sup>78</sup> Allan (n 39) 192.

be considered as a legitimate target for the opposition forces, whether or not they contain any sort of intelligence.<sup>79</sup> On the contrary, the mere fact that Ashammakhi and Hatashe maintain their Skype accounts and still have the Twawa leader's contact number in their address book it would most likely not follow that there a causal link reasonable enough to justify the continuing loss of their protected status for seven years.<sup>80</sup> These hypotheses epitomise the need for guidance in relation to what it would be considered reasonable and in the lack thereof, it would rest upon the parties to determine what causal link would result in the continuation of direct participator status in the context of social media warfare.

## **6 Conclusion**

The blurred line separating social media activists from civilians taking direct participation in hostilities hinders the effectiveness of IHL, as it renders the parties to a conflict unable to resolve whether certain individuals involved in such actions could be lawfully targeted. The lack of a settled approach in determining the applicability of direct participation in hostilities implies that if actors to an armed conflict are adversely affected by hostile civilian acts, they use their own interpretations when applying the IHL provisions, driven by their own motives. Whilst the novelty of social media warfare requires IHL rules to be applied in a manner flexible enough to meet the complexities of this modern battlefield, the proliferation and widespread use of social media platforms seem to necessitate an adequately reserved interpretation of the rules so as to ensure the protection of civilians. There is a pressing need therefore, for a comprehensive manual to provide guidance to international actors and form the basis for the development of this new controversial area of IHL.

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<sup>79</sup> Gabbatt (n 44).

<sup>80</sup> Pollock (n 5) 63.

# Can 'Human Dignity' Provide a Convincing Justification for the Prohibition of Hate Speech?

DAMILOLA MAKINDE\*

## 1 The problem of hate speech

The phenomenon of hate speech is fraught with allegations of oversensitivity and insensitivity, both levelled at targets of such speech, the bodies and institutions charged with regulating it and the broader societal arena where such speech finds voice. Assessing the merit of these allegations and the content of possible solutions involves a slew of penetrating questions - what is more crucial to the proper functioning of society: public order or robust and unhindered expression? Are these issues that are fundamentally opposed, or is there a way of considering them as aspects of a single conception of a well-ordered society? What contribution does human dignity make presently to understanding these tensions in the round, and what contribution does it stand to make? Answering these questions will involve an assessment of judicial reasoning across different jurisdictions, as a means of understanding the phenomenon of hate speech, but also as a means to understand the present role of human dignity in judicial interpretation here and the possible development of this role and function across jurisdictions.

Part One of the essay will situate the problem of hate speech within a (possible) clash between the rights to freedom of expression, freedom of religion and freedom from discrimination, and the duty of states around incitements to hatred. Part Two will introduce the concept of human dignity and outline the aspects of it most relevant to the question, while Part Three will sample the offerings of Jeremy Waldron on human dignity and relay them to some of the case law prohibiting hate speech. Part Four will tie the above into an answer on whether human dignity provides a clear enough justification for the prohibition of hate speech.

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## 2 Understanding prohibitions on hate speech

Hate speech exists as a phenomenon for a host of reasons,<sup>1</sup> but a key part of why it is a problem is because of human rights law: its desire to ensure and safeguard minimum standards of treatment and protections for individuals within states. It is not suggested that this situation arises out of an explicit desire on the part of the various framers and drafters concerned, but rather that the fact of recognising and safeguarding certain minimum standards anticipates a reckoning of these to each other in the course of lived experience. The more human rights there are, the greater prospect there is of these rights coming into conflict with each other. Hate speech is an exemplar of the need for and problem of this reckoning, and calls into play human rights that are vociferously championed as indispensable, but for opposing reasons. These are the right to freedom of expression, the right to freedom of religion and the right not to be discriminated against on the basis of any of a number of protected characteristics. Race, religion and sexual orientation represent prominent examples.

Determining what constitutes hate speech and setting the parameters of its inclusion or exclusion within the bounds of acceptability is done with reference to international, supranational and domestic law. The international framework is broadly outlined in instruments of the United Nations, and straddles the Universal Declaration of Human Rights,<sup>2</sup> International Covenant on Civil and Political Rights,<sup>3</sup> the International Covenant on Economic, Social and Cultural Rights<sup>4</sup> and the Convention on the Elimination of all forms of Racial Discrimination.<sup>5</sup> The relevant rights are also safeguarded

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<sup>1</sup> Philip Johnston, 'Feel Free to Say It: Threats to Freedom of Speech in Britain Today' (CIVITAS 2013) 55.

<sup>2</sup> UN General Assembly, *Universal Declaration of Human Rights* *Universal Declaration of Human Rights*, GA Res 217A (III), UN Doc A/810, at 71 (1948).

<sup>3</sup> UN General Assembly, *International Covenant on Civil and Political Rights (ICCPR)*, GA Res 2200A (XXI), 21 UN GAOR Supp (No. 16), at 52, UN Doc A/6316 (1966), 999 UNTS 171.

<sup>4</sup> UN General Assembly, *The International Covenant on Economic, Social and Cultural Rights (ICESCR)*, GA Res 2200A (XXI), 21 UN GAOR Supp (No 16), at 49, UN Doc A/6316 (1966), 993 UNTS 3.

<sup>5</sup> UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations, Treaty Series, vol 660, p 195 <<https://www.refworld.org/docid/3ae6b3940.html>> accessed 25 January 2019.

supranationally (such as through Articles 8, 10 and 14 of the European Convention of Human Rights)<sup>6</sup>, and also in domestic constitutions. Such robust accounts of these rights engage the vexed questions of whether hate speech is indeed free speech, and on answering this in anything other than the affirmative, whether speech can be thought truly free in the light of such a distinction and the regulation attendant to it. Hate speech is the precise category of issue that poses a formidable challenge to the legitimacy of human rights law, and with it to democracy, because this question is open to be disposed of in a number of ways, and it is not inconceivable that some approaches of resolving it may, by improperly weighting one right or element of a right, undermine the integrity of the entire rights system.

Is it possible to arrive at a principled approach to the question, where we are not swayed by the level to which feelings of distaste are evoked in particular instances, but where there is enough distance from the particular circumstances and context for our approach to be objectively justified? Or, is this desire for distance impeding the arrival at a fitting solution because it does not adequately regard the subjects to which hate speech is addressed? Does human dignity speak to one part of this enquiry in particular? To both? To neither?

### **3 What is human dignity?**

Human dignity plays a prominent role in human rights discourse and practice - it provides a conceptual underpinning for the enterprise of rights.<sup>7</sup> This is evident from its place within the foundational human rights documents already mentioned. As a foundation to these foundations, the concept of human dignity is relevant not only at these initial stages but also in the development of human rights law as a key interpretative tool.<sup>8</sup> So, human dignity provides a basis on which to build the edifice of human rights and informs the development of the structure of the human rights enterprise. Furthering the analogy, it is

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<sup>6</sup> Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5 <<https://www.refworld.org/docid/3ae6b3b04.html>> accessed 25 January 2019.

<sup>7</sup> Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19(4) EJIL 655.

<sup>8</sup> *ibid* 677.

not difficult to conceive that developments upon the foundation of human dignity in human rights adjudication which do not cohere with this basic understanding stand to imperil the integrity of the structure as a whole.<sup>9</sup>

Understanding human dignity in this way requires the concept to be of sufficient depth and meaning to bear the weight of the vast structure of human rights, but also for this to translate to something meaningful in adjudication on particular rights, and perhaps especially in adjudication where there is an apparent clash of rights. Divining an answer to this is the general aim of the rest of this essay, and this section will lay down the aspects of the interpretation and use of human dignity that will guide this endeavour. It is submitted that human dignity is indeed equal to the task of supporting the human rights enterprise, though the manner by which this is understood requires considerable flexibility.

The utility of human dignity to human rights consists not only in the content of its strong rendering of the worth of humanity,<sup>10</sup> and that on account of this worth, humans possess human rights 'simply' on the basis of this humanity,<sup>11</sup> but also, and perhaps even more strongly so, in the form of this rendering. It is on this point that a flexibility of approach is needed – substantive understandings of dignity vary considerably between jurisdictions<sup>12</sup> and probing these gives way to greater contestation rather than settlement, hence a more imaginative way of understanding the functional utility of human dignity is needed.<sup>13</sup>

This way becomes accessible when examining the institutional use of human dignity in human rights adjudication,<sup>14</sup> in which the concept is rather amenable to the contours of context and is expansive enough to admit of particularity, even in its universality.<sup>15</sup> This

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<sup>9</sup> *ibid* 671.

<sup>10</sup> *ibid* 657.

<sup>11</sup> *ibid* 679.

<sup>12</sup> *ibid* 689.

<sup>13</sup> *ibid* 710.

<sup>14</sup> *ibid* 712.

<sup>15</sup> *ibid* 716.

is evident in the employment of dignity language in the course of proportionality analysis, as a means of indicating the weight of particular values relative to the value of dignity itself, for example in the context of German constitutionalism and case law.<sup>16</sup> Dignity thus offers a platform on which to set different rights in conversation with each other by providing a metric for mutual understanding between rights in judicial interpretation.<sup>17</sup> Amidst the various conceptions of human dignity, it is possible to discern a minimum core, comprising the ontological, relational and limited-claims.<sup>18</sup> For the purposes of answering the instant question, the rest of this paper will focus its attention on the relational and limited-state claims.

#### **4 Part three: stating the problem of hate speech in dignity terms**

This section of the paper will examine the ways in which dignity is employed to qualify the precise nature of the harm suffered by the occasion of hate speech in a section of the relevant case law. This will be done by comparing cases across jurisdictions, as discussing dignity lends itself to comparison of this sort,<sup>19</sup> and by relating this to Jeremy Waldron's argument on dignity terms in his book, 'The Harm in Hate Speech'.<sup>20</sup>

Waldron's formulation of this harm is enabled by an understanding of dignity as one's social standing, 'the fundamentals of basic reputation that entitle them to be treated as equals in the ordinary operation of society',<sup>21</sup> and that hate speech seeks to undermine this by associating the denigration of an individual in society with their membership of a group.<sup>22</sup> This approach puts the indignity suffered by those on the receiving end of hate speech into focus, and assesses the extent to which permitting this contravenes the relevant society's touted commitment to democracy and equality.<sup>23</sup>

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<sup>16</sup> *ibid.*

<sup>17</sup> *ibid* 718.

<sup>18</sup> *ibid* 679.

<sup>19</sup> *ibid* 718.

<sup>20</sup> Jeremy Waldron, *The Harm in Hate Speech* (OUP 2012).

<sup>21</sup> *ibid* 5.

<sup>22</sup> *ibid* 57.

<sup>23</sup> *ibid* 82, 111.

This articulation of the harm in hate speech is well-represented in the Canadian Supreme Court case of *R v Keegstra*.<sup>24</sup> In *Keegstra*, concerning a former high-school teacher charged with making anti-Semitic remarks, Dickson CJ expressed the problem of such conduct as undermining the 'equality, security and dignity of others', and with regard to how these values 'are the genesis of the rights and freedoms guaranteed by the charter and the ultimate standard against which a limit on a right or freedom must be shown to be justified.' Here, a particular conception of dignity is employed, but it operates in a manner consistent with invocations of human dignity in general – as a foundation for and limit to a right. This judgment also elucidates the potential of human dignity to act as a 'trump' –the particular conception of dignity in play can justify the marginalisation of other considerations that are also amenable to being expressed in dignity terms.

Similar arguments have been fronted in America, with *RAV v City of St Paul*<sup>25</sup> an example. This case involved the burning of a cross on the lawn of a black family and the prosecution of this act under a city ordinance that was found by the United States Supreme Court to be broad and impermissibly content-based. In his dissenting judgement, Justice Stevens defends the city's content-based restriction as appropriate in the light of the 'qualitatively different' nature of injury on the basis of membership of an ethnic group, and like Waldron,<sup>26</sup> he apprehends a difference between mere offence and suffering an attack on one's dignity.<sup>27</sup>

It is illuminating to chart the transposition of this conception in the South African context. In *Afri-forum v Malema*,<sup>28</sup> in which the anti-apartheid campaigner Malema was found to have infringed hate speech laws in his rendition of a song from the struggle, the element of historical disadvantage that frequently factors into a finding of the indignity suffered by a minority group<sup>29</sup> is conspicuously absent, and so the understanding of the

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<sup>24</sup> *R v Keegstra* [1990] 3 SCR 697.

<sup>25</sup> *RAV v City of St. Paul*, 505 U.S. 377 (1992).

<sup>26</sup> Waldron (n 20) 108.

<sup>27</sup> *RAV* (n 25).

<sup>28</sup> *Afri-Forum and Another v Malema and Others* (20968/2010) [2011] ZAEQC 2.

<sup>29</sup> Waldron (n 20) 58.

assault on dignity is accommodated to the precise circumstances of post-apartheid South Africa, with dignity understood in relation to the principle of ubuntu<sup>30</sup> and the need to provide assurance on standing in a democratic South African to all citizens equally. Rather fascinatingly from the point of view of Waldron's comprehension of dignity, the court here assesses impact of the impugned speech on dignity of the offending party, not through the anticipated prism of dignity as autonomy and or self-disclosure, but through the effect of their speech on their estimation in society: 'the group and its members participate in a morally corrupt activity which detracts from their own dignity. It lowers them in the eyes of right-minded balanced members of society, who then perceive them to be wrongdoers.' Much emphasis is placed on the fundamental character of the new nation and the changes in organisation and ordering of public life pursuant to this, among them prohibiting hate speech by virtue of its impact on social cohesion and the social standing of both minority and majority elements.

It seems to this author that both the understanding and use of dignity displayed here provide a clear justification for the prohibition of hate speech. The crucial question, however, in determining the sufficiency of this justification is whether this or other understandings of dignity necessarily beget certain approaches to hate speech, whether they dictate but one approach to handling hate speech well, and if so, what this means for the relationship between the state and the individual, appropriately limited by the concept of human dignity.

## **5 Part four: dignity as autonomy and the role of the state**

It is in keeping with the nature of human dignity that it can provide support for positions that are considerably divergent to the foregoing. Waldron engages with one such alternative formulation of dignity, that of dignity as autonomy<sup>31</sup> in his examination of the work of C. Edwin Baker. For Baker, 'respect for personhood, for agency, for autonomy,

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<sup>30</sup> Ubuntu is an indigenous South African concept of humanism, see Humanity's Team SA, 'What is Ubuntu' (*Humanity's Team*) <<http://www.humanitysteamsa.org/ubuntu/>> last accessed 24 January 2019.

<sup>31</sup> This can then be related to the other rights and interests to be protected in adjudication on hate speech such as the right to freedom of religion and the right to freedom of expression.

requires that each person be permitted to be herself and to present herself.<sup>32</sup> It is interesting that this focus on autonomy (rather than say civility) as one of the key guarantors of rightly-ordered social life accords with the reasoning of the Supreme Court of Canada in *Gosselin v Quebec*,<sup>33</sup> 'self-determination, personal autonomy, feelings of self-worth and empowerment...are the stuff and substance of essential dignity', even though there is a considerable degree of variance between this position and that adopted by the Supreme Court in *Keegstra*.

The challenge posed by this difference is not insurmountable, however. It is the limited-state claim at the minimum core of human dignity that, to this author, decimates the prospect of human dignity providing a clear *enough* justification of the prohibition of hate speech. This claim, that the state should be understood to exist for the individual,<sup>34</sup> is sceptical of the state and its penchant for power over the individual, whereas laws on the prohibition of hate speech involve the bolstering of the position of the state as enforcer of political orthodoxy. As Waldron deftly outlines, a host of benevolent reasons may be the object of this strengthening of the state, but the effect of this is still a practical strengthening of the state vis-à-vis the individual.<sup>35</sup> It is this distrust of the state, which is accounted for in the core of human dignity itself, that motivates the prohibition on regulating the content of speech in the US, as evocatively witnessed in cases such as *Snyder v Phelps*,<sup>36</sup> *RAV v City of St Paul*<sup>37</sup> and *Matal v Tam*.<sup>38</sup> 'The possibility that the city is seeking to handicap the expression of a particular idea', as was found to be in *RAV*, is staunchly resisted.

In whatever manner a prohibition of hate speech operates as a gloss to the state's desire to quash dissent and substitute the autonomy of individuals and groups for its own

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<sup>32</sup> Waldron (n 20) 162, quoting Baker.

<sup>33</sup> 2002 SCC 84.

<sup>34</sup> McCrudden (n 7) 701.

<sup>35</sup> Johnston (n 1) 22.

<sup>36</sup> 562 U.S. 443 (2011)

<sup>37</sup> *RAV v City of St Paul* (n 25).

<sup>38</sup> 582 U.S. \_\_\_ (2017).

expedience, it is illegitimate.<sup>39</sup> It is thus necessary to grapple with the question of whether this is all that is at stake in the contest over allowing or disallowing speech or expression, and dignity supplies vital assistance in identifying other interests. The work of harnessing this crucial contribution of dignity must make sense of the contingent nature of dignity when embedded within a particular context. So, the instant question can be answered thus – human dignity can provide a clear justification for the prohibition of hate speech: sometimes, in some places. This is because a concept as expansive as dignity is necessarily engaged on both sides of the conflict of rights, and the judicial treatment of dignity in such instances is markedly different in different countries. The degree to which this constitutes a satisfactory answer depends on whether the enquiry seeks a substantive conception of dignity to be discernible across and within jurisdictions, or whether an institutional functional of dignity will suffice.<sup>40</sup>

## **6 Conclusion**

Prohibiting hate speech does in fact need justification because the interest it challenges, free speech, is of no marginal importance to democratic society. Neither, however, should a democracy be overly accommodating of the denigration of those targeted by purported hate speech. In this paper, the quest for a stable, principled basis by which to rightly dispose of this issue has involved assessing the nature of the problem of hate speech, examining the concept of human dignity and the contribution it stands to make to this endeavour, analysing dignity in legal scholarship and in international case law by adopting a comparative approach, and finally, determining the effect of this enquiry on the central question of whether human dignity does indeed provide a clear justification of the prohibition of hate speech. Pursuing an answer to the question in this way enables more robust accounting for and more adequate naming of the tension apprehended when looking at the right to freedom of expression and the rights engaged in the desire to prohibit hate speech. It is also a means by which we can come to more sustainable and satisfactory resolution of the problem. The nature of dignity means such resolution is not likely to be expressed identically across jurisdictions, but perhaps this is not dignity's concern at all.

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<sup>39</sup> Johnston (n 1) 34.

<sup>40</sup> McCrudden (n 7) 713.

# Order, Justice and the Ideal of Synonymity

DANIEL SANTOS-COSTA\*

Order and Justice are usually regarded as the two essential components of a functioning society. It is often thought that one cannot exist without the other, or that one ordinarily brings with it the other. This article will question the foundations of that proposition. Law is often the vehicle used in an attempt to achieve both order and justice. Legislation, and in some jurisdictions the common law, is believed to be the tool that governments use to implement an orderly and just society. At least that is what they are supposed to do in theory; in reality, the situation is rather different.

The concept of 'order' can mean different things to different people and therefore it is apt to determine a unilateral definition of what order can represent for the purposes of this piece. Order is simply the absence of disorder. Philosopher Thomas Hobbes defined order in this manner, and he explained that during the 'state of nature' that existed prior to civilized society, there was absolute disorder; 'all men had right to all things, which necessarily causeth war'.<sup>1</sup> Therefore, Hobbes prophesized that mankind would form a society based on a mutual relinquishing of this 'right to all things' (the 'covenant'). Through fidelity to this covenant, Hobbes believed there would be order. Despite Hobbes' belief that a 'sovereign' figure, in the form of the Leviathan, was required to form such a society having lost its value as a literal concept, the Hobbesian premise that order is the absence of disorder remains conceptually sound.

A unilateral definition of justice is more difficult to establish. It is a fluid concept that transcends any definite understanding or interpretation. Hobbes attempted to define justice in a similarly simplistic manner to which he defined order. He asserted that when humankind form the 'covenant', surrendering their 'right to all things' in the state of nature, any breach of this covenant would be unjust. It follows that working within this covenant and abiding by the order that such a society necessarily creates, is just. Whilst this minimalistic approach to what justice represents is attractive in the sense that it is

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<sup>1</sup> Thomas Hobbes, *Leviathan* (first published 1651, Oxford: Clarendon Press 1909) 128.

simple, it is accordingly too simplistic. Hobbes neglects that this 'covenant' might be unjust in itself, and therefore, his theory requires a Leviathan figure who is omniscient, omnipotent and entirely just for it to work. Hobbes filled the hole in his theory with a Leviathan figure, and if such a being existed, it would make sense; however, of course, such a figure is fictional. A modern-day approach as to what a Leviathan might represent is a 'true democracy'. In his work, 'Disobedience as a Plea for Reconsideration', Peter Singer defines what is meant by a 'true' democracy. It is described as being the balancing of minority and majority interests, which is partly managed by giving everyone rights and securing the interests of everyone equally. Justice can be considered the maintenance of these rights, norms and values that are applicable to all and accepted as 'just' in a truly democratic society.

A tectonic analogy can be used in an attempt to visualize the relationship between the law, order and justice. One could imagine order and justice as representing tectonic plates that move side by side. Order can maintain rights that are applicable to all and accepted as just in a truly democratic society, however, as soon as order maintains rights, norms and values that are considered immoral by a truly democratic society, order will prevail at the expense of justice. Whilst, in theory, order and justice can potentially be harmonious in their existence, it is argued that, 'the status quo is unjust'.<sup>2</sup> History provides us with a plethora of examples of regimes, now considered 'unjust', that manufactured a semblance of order, at the expense of justice. The propensity for order to exist at the expense of justice results in a constant imbalance within the status quo, resulting in a constant tension between the two ideals. The only way these two 'plates' can move together in harmony once again is if an event, such as an earthquake, occurs to reconcile the two imperatives. Civil disobedience can represent such a metaphorical event. Civil disobedience is a byproduct of the relationship between order and justice and, throughout history, has emerged during the periods where order has prevailed at the expense of justice. In reality, civil disobedience is necessary to restore the homogeneity

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<sup>2</sup> Temi Ogunye, 'Global Justice and Transnational Civil Disobedience, Ethics & Global Politics' (2015) 8(1) DOI <<http://www.tandfonline.com/doi/pdf/10.3402/egp.v8.27217>> accessed 10 February 2018.

of order and justice; 'the just society... may be likened to a good piece of machinery: there may occasionally be a little friction and some lubrication will then be necessary'.<sup>3</sup>

Having said that, John Rawls sets out an interesting argument to suggest that order and justice can function harmoniously. He defines justice as, 'the choice, which rational men would make in [a] hypothetical situation of equal liberty... [that] determines the principles of justice'.<sup>4</sup> This is the idea that if rational and conscious beings were behind a 'veil of ignorance', having no perception of, inter alia, gender, race, ethnicity or religion, but having an understanding of 'general facts about human society',<sup>5</sup> they will reach a fundamental agreement that is fair and subsequently just. For Rawls, at this 'original position', decisions would be made from a level playing field in the sense that 'no one is able to design principles to favor his particular condition [meaning] the principles of justice are the result of a fair agreement'.<sup>6</sup> This 'justice as fairness'<sup>7</sup> would subsequently depict a cooperative relationship between order and justice. For Rawls, the two principles of justice are that; 'each person has the same inalienable claim to a fully adequate scheme of equal basic liberties',<sup>8</sup> and social and economic inequalities are only permitted 'insofar as they contribute to raising the level of the worst off in society'.<sup>9</sup> In this deontological respect, order and justice would exist without tension as, 'it is assumed that the persons in the original position would choose a principle of equal liberty and restrict economic and social inequalities to those in everyone's interests'.<sup>10</sup> However, despite Rawls' concession that a belief that this 'original position' can be achieved universally would, 'stretch fantasy too far'<sup>11</sup> the nature of society dictates that no

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<sup>3</sup> Peter Singer, 'Disobedience as a Plea for Reconsideration' in Hugo Adam Bedau (ed), *Civil Disobedience in Focus* (Routledge 2002) 125.

<sup>4</sup> John Rawls, *A Theory of Justice* (Clarendon Press 1972) 12.

<sup>5</sup> *ibid.*

<sup>6</sup> *ibid.*

<sup>7</sup> *ibid.*

<sup>8</sup> Rawls (n 4) 42.

<sup>9</sup> Peter Singer, 'One World' (The Carnegie Council, 29 October 2003) <<https://www.utilitarian.net/singer/by/20031029.htm>> accessed on 4 February 2018.

<sup>10</sup> Rawls (n 4) 30.

<sup>11</sup> *ibid* 139.

individual can truly be free of subjective thought, and in reality this 'original position' cannot be reached. Even within our current 'democratic' models, it is argued that our lawmakers and governments are unable to reach an 'original position' that would enable them to create fair agreements that will result in justice.

Peter Singer's concept of a 'true' democracy is another avenue society could look to exploit in its ambition to exist in an orderly and just manner. Singer highlights that a 'true' democracy will recognize 'the intensity of which views are held'.<sup>12</sup> This suggests that in a 'true' democracy order and justice can exist harmoniously as the law will reflect everyone's rights equally. Singer criticizes the binary nature of current democratic regimes and expresses concern that, 'the democratic system takes no account of the intensity of which views are held, so that a majority which does not care very much about an issue can out-vote a minority'.<sup>13</sup> If everyone's rights are considered 'just' by a truly democratic society and are maintained equally there will be justice. If the law recognizes everyone's rights there will be no disobedience. If there is no disobedience, there will be no disorder and therefore order.

However, while these theories portray hypothetical circumstances where a tension between order and justice might not exist, they are *hypothetical*. In his work, Singer appreciates that a 'true' democracy doesn't exist. As a society, we are yet to distance ourselves from a binary democratic system. The vote as to whether Britain should leave the European Union was bestowed two words, 'Yes' or 'No'. Such arbitrary options for an intrinsically complex question are nonsensical and entirely contrary to what Singer envisaged a 'true' democracy should represent. Singer concedes that in the current democratic model, 'there will, of course, be some instances in a society when the actions of the majority can only be seen as a deliberate violation for selfish ends of basic principles of justice. Such actions do invite submission or resistance'.<sup>14</sup> Singer introduces a fundamental concept that this essay will explore, the existence of civil disobedience as evidence for the law involving a constant tension between order and justice. Singer

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<sup>12</sup> Peter Singer, 'Disobedience as a Plea for Reconsideration' in Hugo Adam Bedau (ed), *Civil Disobedience in Focus* (Routledge 2002) 122.

<sup>13</sup> Peter Singer, *Democracy and Disobedience* (first published 1973, Oxford Clarendon Press) 85.

<sup>14</sup> *ibid* 91.

suggests that disobedience can 'mitigate one of the weaknesses with the democratic model... a danger of injustice'.<sup>15</sup> There exists, in every 'normal' democratic society, a dormant tension between order and justice through the overarching potential for injustices to become the norm. This tension grows, as order becomes a regime's priority at the expense of justice. Civil disobedience becomes a product of this tension as the oppressed attempt to reestablish a balance between order and justice. An example of this is the Civil Rights Movement in the 1960s. The SCLC and other campaigners showed the world how even in a supposedly forward-thinking 'democratic' society like modern America, there was immoral law and injustice underpinning a semblance of order. In his Letter from Birmingham Jail, Martin Luther King exposed a stark reality to his readership by explaining how the 'white moderate', 'commended the Birmingham Police Force for 'keeping order'<sup>16</sup> despite not knowing that 'keeping order' was the releasing of 'angry violent dogs'<sup>17</sup> who were 'literally biting six unarmed negroes';<sup>18</sup> with the remark, 'let those people come forward... I want 'em to see those dogs work'<sup>19</sup> coming out of the mouth of the man in charge of maintaining order, Eugene 'Bull' Connor. Martin Luther King also sets out an illuminating example of the dichotomy between order and justice:

[f]irst I must confess that over the last few years I have been gravely disappointed with the white moderate. I have almost reached the regrettable conclusion that the Negro's great stumbling block in the stride toward freedom is not the White Citizen's Council or the Ku Klux Klanner, but the white moderate who is more devoted to 'order' than to justice; who prefers a negative peace which is the absence of tension to a positive peace which is the presence of justice; who constantly says 'I agree with the goal you seek, but I can't agree with your methods of direct action'; who paternalistically feels

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<sup>15</sup> Singer (n 3) 122.

<sup>16</sup> Martin Luther King, 'Letter from the Birmingham Jail' (first published 1963, Harper San Francisco 1994) 5.

<sup>17</sup> *ibid.*

<sup>18</sup> *ibid.*

<sup>19</sup> 'Nation: Dogs, Kids, Clubs' *Time Magazine* (New York, 10 May 1963) <<http://content.time.com/time/magazine/article/0,9171,830260,00.html>> accessed 3 June 2019.

he can set a timetable for another man's freedom; who lives by the myth of time and who constantly advises the Negro to "wait until a more convenient season".<sup>20</sup>

This is powerful. Martin Luther King isn't coming from a perspective that the 'white moderate' of America weren't aware of what was and wasn't just. Many of them realized the lawful persecution of African-Americans was morally wrong and therefore unjust. However, the unjust status quo was the prerogative. Order existed at the expense of justice, not because of any universal moral infirmity, but merely because of convenience. King's reference to the 'myth of time' is interesting. This suggests that order *does not* necessitate justice. Justice is something to be achieved, rather than something synonymous with order. Time is a myth; it is not a precursor for synonymy.

The separation of law and morality is further evidence to suggest that law involves a constant tension between order and justice. Hart approached the relationship between law, order and justice from a positivist perspective. He proposed that law was a product of society that stemmed from accepted practice, norms and customs and is founded upon 'fundamental accepted rules specifying the essential lawmaking procedures'.<sup>21</sup> Interestingly, Hart makes no reference to whether these accepted norms would be considered 'just' in a truly democratic society and he makes a distinction between what 'the law is and what it ought to be'<sup>22</sup>. Through this distinction Hart purports that law and morality are separable, in that one can exist independently of the other. Hart suggested that a function of law is that it affects everyone equally, which subsequently substantiates order through the rule of law applying unequivocally to all members of society. Hart identifies that through this universal application of law and order, law contains a 'germ' of justice in the sense that it can achieve formal justice. Law and order in this fashion will not bring with it substantive justice. Justice is the maintenance of norms and values that are considered 'just' in a truly democratic society, whereas, Hart suggests that there is no implicit morality in law, so law can create order that reflects immoral norms, so long as they are accepted in the society. He recognizes a close relationship between morality

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<sup>20</sup> *ibid.*

<sup>21</sup> H L A Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 HLR 593, 603.

<sup>22</sup> *ibid* 612.

and justice as; 'principles of justice and moral claims of individuals'<sup>23</sup> are present within our legal system in the UK. Therefore, in a society that produces immoral standards of accepted practice, norms and customs, order and justice will be distinct from each other entirely. Hart proposes an example of a woman in Nazi Germany who 'denounced [her husband] to the authorities for insulting remarks he had made about Hitler'.<sup>24</sup> Under Nazi law, this was a lawful act, regardless of its moral iniquity. The issue remained as to whether Nazi law should be disregarded as law due to its immorality, thus leaving the woman at mercy of the democratic 'legitimate' law that followed. This would appear to be contrary to the essence of law. Law and morality are separable to the point where law can be considered immoral yet still constitute legitimate law, 'bad law' perhaps, but still law. This has implications for whether there is a tension between order and justice. As aforementioned, justice and morality can be considered interwoven. As law can exist without morality, order can exist without justice. This friction undoubtedly creates tension.

Looking at a contrasting perspective, Fuller did not reiterate the positivist ideology and viewed law and morality to be intertwined, 'law ... contains, then, its own implicit morality'.<sup>25</sup> This essay makes the assumption that law creates order and that morality can reflect justice, therefore, according to Fuller, order and justice are arguably synonymous. Fuller suggests that there is a, 'distinction between order and good order... good order is law that corresponds to the demands of justice, or morality, or men's notions of what ought to be'.<sup>26</sup> This distinction is an attractive conclusion to make considering that arguably good order should indeed correspond to the demands of justice. If this were to be true, the law would not involve a tension between order and justice. However, it is argued that this is not the case. Fuller's insistence that law and morality are interlinked is challenging because it is apparent that some laws cannot have any innate morality simply because they are law. Immoral laws exist that create order at the expense of justice, implicating that a clear tension is present. According with his stance, Fuller would declare that these immoral laws are not to be considered 'law'. He uses the Nazi example to say

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<sup>23</sup> *ibid* 613.

<sup>24</sup> *ibid* 618.

<sup>25</sup> Lon F Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart' (1958) 71 HLR 630, 645.

<sup>26</sup> *ibid* 644.

that, 'if all Nazi statutes... were indiscriminately 'law', then these despicable creatures were guiltless since they had turned their victims over... by the name of law'.<sup>27</sup> While regarding Nazi actions as lawless might seem a desirable outcome for the victims and their families, in reality, this was law. It is seemingly irrelevant if one conceptually regards something to be law or not as immoral laws are enacted and a subsequent order is maintained by ensuring adherence to those immoral standards. Therefore, regardless as to whether one might consider the law to be illegitimate, law can, and sometimes does, maintain order without regard to any form of morality or justice. As eluded to earlier in the discussion of the Civil Rights Movement, these 'unjust' or 'immoral' laws are not only prevalent in extreme societies born out of Fascism; they are ever-present even in western democracies. Another example would be the illegality of homosexuality in the UK until 1967. This was a law that was wholeheartedly enforced despite being considered immoral today, and yet another example of order existing at the expense of justice.

The separation of law and morality creates an environment where tension between order and justice is a fundamental outcome. There is substantial potential for order to exist at the expense of justice. Law creates order, morality and justice are intertwined but law and morality are separable. Though Hart uses Nazi Germany as an example of when immoral law has created order at the expense of justice that is not the only example modern history can provide. Hart's work highlights the *potential* tension that can occur between order and justice. This tension is more than potentially evident in reality. Although in theory law *can* reflect morality, justice will only be a natural outcome of law if law is *always* reflective of morality. Whilst this is possible, it is argued that this is an ideal that has yet to be achieved. Although the theorists mentioned hitherto provide hypothetical situations whereby order and justice can exist homogeneously, it is suggested that humans are yet to reach this level of understanding. 'If nature therefore have made men equal, that equality is yet to be acknowledged'.<sup>28</sup>

It has been established that the natural by-product of the relationship between order and justice is tension, what is not so clear is whether the relationship can be considered problematic. In both Singer and Rawls' work, civil disobedience is judged to

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<sup>27</sup> *ibid* 649.

<sup>28</sup> Hobbes (n 1) 118.

only be justifiable if it is peaceful and non-violent. Rawls defines civil disobedience as, 'a public, non-violent, conscientious act contrary to the law usually done with the aim of bringing about a change in the law or policies of the government'.<sup>29</sup> Rawls is quick to define civil disobedience as non-violent, as his concept of justice requires for disobedience to have some fidelity to law in order to, 'establish to the majority that the act is indeed politically conscientious and sincere, and that it is indeed to address the public's sense of justice'.<sup>30</sup> For Rawls, 'civil disobedience is founded on the 'natural duty of justice''<sup>31</sup> as he advocates the importance of supporting 'just institutions on the one hand... [whilst opposing] injustice on the other'.<sup>32</sup> Whilst civil disobedience is a product of, and evidence for, the tension between order and justice, such tension is not necessarily problematic. Every person has a moral right to disobey the law in search for a 'just' and truly democratic society, so long as they are in 'allegiance to the regime'<sup>33</sup> that they seek to disobey. This allegiance and non-violent approach suggests that the tension is not problematic; it is fundamental to the pursuit for justice.

Peter Singer was discomforted by Rawls' justification for civil disobedience, suggesting that his justification depends 'heavily on the idea that a community has a sense of justice'<sup>34</sup>. Singer implies that Rawls' ideal that there is a shared conception of justice may well be considered a 'pure ideal'.<sup>35</sup> He suggests that 'Disobedience' should be used 'As a Plea for Reconsideration' through democratic means, in order 'to make the majority realize that what is for it indifferent is of great importance to others',<sup>36</sup> as the title of one of Singer's work elucidates. Martin Luther King was of a similar opinion that 'non-violent direct action... seeks to dramatize the issue [so] that it can no longer be ignored',<sup>37</sup>

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<sup>29</sup> Rawls (n 4) 364.

<sup>30</sup> *ibid* 366-367.

<sup>31</sup> Ogunye (n 2).

<sup>32</sup> *ibid*.

<sup>33</sup> *ibid*.

<sup>34</sup> Singer (n 13) 87.

<sup>35</sup> Singer (n 3) 126.

<sup>36</sup> *ibid* 122.

<sup>37</sup> Martin Luther King (n 16) 3.

suggesting that the tension between order and justice is essential for change rather than being problematic.

Theoretically for Singer, civil disobedience is, in fact, evidence that the tension between order and justice is problematic, as civil disobedience would fundamentally undermine a democracy that is supposed to truly reflect public opinion. A 'true' democracy should represent the perfect relationship between order and justice; therefore, civil disobedience should not be necessary nor should it exist. However, the pursuit of reconciling order and justice in a non-violent way should never be considered 'problematic' in non-'true' democracies. King asserted in his Letter from Birmingham Jail, that one must work within society to instigate change through non-violent civil disobedience. King advocated that, in reality, 'there are just laws, and there are unjust laws'<sup>38</sup>. This essay is of the opinion that whilst in a 'true' democracy civil disobedience would be problematic, democracies around the world are yet to achieve a perfect balance between order and justice, therefore, it must be appreciated that civil disobedience should be used in the interim as a means to achieve this goal; we should not be 'afraid of the word tension'.<sup>39</sup>

The existence of civil disobedience and the fact that law and morality are separable is evidence that the law involves a tension between order and justice. The theorists mentioned hitherto paint utopian archetypes that demonstrate the potential for a society where law will involve a seamless bond between order and justice. Unfortunately, all of these theories are fundamentally idealistic. In practice, the build-up of the tension between order and justice more often than not leads to the emergence of disobedience to law as a means of reconciling these two imperatives. This begs the question as to whether real justice is achievable. As morbid as it sounds, real justice has yet to be achieved. There will always be a tension between order and justice because our society has inequality engrained within it. Law and morality within our society can be, and often are, distinct from each other, which subsequently provides an environment for order to prevail at the expense of justice far too easily. Until we can develop a 'true' democracy whereby everyone's rights are recognized, considered 'just' and enforced equally, there

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<sup>38</sup> *ibid.*

<sup>39</sup> *ibid.*

will be inequality and subsequent injustice. Tension between order and justice is a natural consequence of current society. Inequality can be reflected in law, which illuminates pressure between order and justice through the potential for order to exist at the expense of justice. Ideally these two imperatives can exist in harmony, however, this is not realistic. Having said that, this tension should not be considered problematic and should, in fact, be welcomed. Civil disobedience is a product of this tension, which subsequently provides an extremely useful means of striving towards a state of 'true' democratic representation where law, order and justice can operate synonymously.

# Online Libel:

## New Challenges in Defamation law

SOPHIE SHEERIN\*

### 1 Introduction

The law of defamation in England and Wales has always been technical and, historically, convoluted.<sup>1</sup> Parker LJ referred to the 'tangled web of the law of defamation' in *Brent Walker Group plc v Time Out Ltd*,<sup>2</sup> and Diplock LJ drew attention to 'the artificial and archaic character of the tort of libel' in *Slim v Daily Telegraph Ltd*.<sup>3</sup> The Defamation Act 2013<sup>4</sup> consolidated and clarified much of what had only previously existed in common law. But it moreover supplemented the existing corpus of defamation law and introduced significant new principles; the 'serious harm' threshold for defamation claims, the 'single publication rule' and the removal of the presumption to try claims by jury are just a few examples. Of utmost relevance for this essay, it made provision for online libel, which can be defined as a retrievable defamatory statement published online. Such provision includes, importantly, defences specific to operators of websites<sup>5</sup>.

The development of online media has urged lawmakers to reconsider traditional principles of defamation. This first took place with courts approaching digital subject matter using a traditional analysis derived from existing common law principles. Then followed the provisions, made in the DA 2013, for defamatory content published on the internet. Nevertheless, online media have thus far been analysed according to the traditional principles, as opposed to creating new, technology-specific principles.<sup>6</sup>

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\* This article was written on the basis of the law as it stood February 2019.

1 Geoffrey Robertson and Andrew Nicol, *Media Law* (5<sup>th</sup> edn, Sweet & Maxwell 2007) 102.

2 *Brent Walker Group plc v Time Out Ltd* [1991] 2 QB 33.

3 *Slim v Daily Telegraph Ltd* [1968] 2 QB 157.

4 Henceforth the 'DA 2013'.

5 Defamation Act 2013, s 5.

6 Colin Duncan and Andrew Nicol, *Duncan and Neill on Defamation* (4<sup>th</sup> edn, LexisNexis 2015) 8.02.

The character of online media, their plurality and their functions have evolved relentlessly. It has been five years since the DA 2013 came into force. In that time alone, Facebook, for example, has developed facial recognition technology to alert users that a photo of them has been uploaded,<sup>7</sup> enabled users to fundraise, buy and sell through Facebook Marketplace, and permitted any user to live-stream directly to the site.

Online media present peculiar challenges for determining the appropriate defendant in libel. The potential for anonymous use of websites can create difficulty in identifying an author. Even if the identity of the author is disclosed, there may be practical considerations which prevent a claimant from pursuing the author. If they have no means to pay costs and damages, any victory may be pyrrhic. Much of the content online is posted by individuals and therefore not edited. Therefore those who are defamed may be confronted with difficulties, under existing law, in suing a publisher, in the same way as is possible with traditional print media. Thus far, the courts have been hesitant to regard websites where defamatory content is posted as liable.

The existing legal framework is not sufficient for regulating these types of claims. It does not provide nuance regarding the different types of possible defendants online nor sufficiently reflects the breadth and developing multitude of digital media. Subsequently, it may leave those defamed online without remedy. This essay will firstly outline the relevant law and established principles of defamation in England and Wales. Secondly, it will explore how the peculiarities of online media create difficulties for determining who can be sued in an action for libel, with particularly focus on publisher liability.

## **2 Libel**

Defamation is to libel as homicide is to murder. In other words, 'defamation' is a generic term. It encompasses the torts of libel and slander<sup>8</sup>. Libel is distinct from slander in a few ways. The general rule is that libel is written or permanent, whereas slander is spoken or

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7 Tom Simonite, 'Facebook can now find your face, even when it's not tagged' (*Wired*, 19 December 2017) <[www.wired.com/story/facebook-will-find-your-face-even-when-its-not-tagged/](http://www.wired.com/story/facebook-will-find-your-face-even-when-its-not-tagged/)> accessed 19 February 2019.

8 Ursula Smartt, *Media and Entertainment Law* (3<sup>rd</sup> edn, Routledge 2017) 262.

transient.<sup>9</sup> Nevertheless, libellous content can be read aloud, and slander can be republished in writing.<sup>10</sup>

Claims in slander are accompanied by further requirements of evidence. Firstly, there must be proof of the statement having been made.<sup>11</sup> Libel claims do not require such evidence, as the defamatory statement is permanent. Additionally, a successful claim in slander requires either proof of financial loss or special damage as a result of the statement.<sup>12</sup> Special damage can result from a criminal allegation, for which the claimant could lose their liberty, or from denigrating the claimant in any position they hold at the time of publication.<sup>13</sup>

Some statements are difficult to classify. For example, statements made in phone conversations have historically been unrecorded. A statement over the phone would seem to constitute slander<sup>14</sup>. More recently, however, conversations over the phone can be retrieved and are frequently recorded. A voicemail containing a defamatory statement was considered by the court to constitute libel in *Cooper v Turrell*.<sup>15</sup> In general, if a statement is permanent or retrievable, it should be classified as libel. This creates potential difficulty with classifying online statements as libel. It is possible to remove content which has been posted online, although permanent removal is difficult. Facebook, for example, retains content, which has been deleted from plain sight, for its potential value as marketing data. Websites exist, which can archive webpages, so that they can be viewed even after being taken down. It is even easier to take screenshots of content before it's removed, and republish it online. Content which has been simply removed from plain sight is retrievable. Thus, most defamatory content posted online would be considered to be libel.

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9 Duncan and Neill (n 6) 3.01.

10 *ibid* 3.02.

11 *Umeyor v Ibe* [2016] EWHC 862 (QB)

12 Duncan and Neill (n 6) 6.03.

13 *ibid* 6.03.

14 *ibid* 3.04.

15 *Cooper v Turrell* [2011] EWHC 3269 (QB) [78].

Recovery of content can, however, be laborious. Where a defamatory post has been deleted, an evidential hurdle must be overcome in order to establish that the statement was made at all. Claimants must be scrupulous if they hope to succeed.

### 3 Defamation

The tort of injury to reputation in this jurisdiction was born out of the courts. It came first from the ecclesiastical courts, as a criminal contravention of the law of Leviticus: 'You shall not go up and down as a tale-bearer among the people'.<sup>16</sup> The criminal offence of libel was abolished in the UK as recently as 2009.<sup>17</sup> Between private individuals, duelling had historically been the conventional means of redressing injury to reputation. After duelling became prohibited, defamation became a common law tort in civil law, conceived by Queen's Bench judges to provide protection for the reputations of gentlemen in the courts.<sup>18</sup>

The tort was never strictly defined but has been subject to the interpretation of judges. One notable account came from Atkin LJ in 1936:<sup>19</sup> 'Would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally?'. By a modern account, the elements of defamation are:

- 1 A statement;
- 2 Published;
- 3 To at least one third party;
- 4 Which refers to an identifiable legal person;
- 5 Where that statement is defamatory;<sup>20</sup> and,
- 6 There is no common law or statutory defence

In order to establish a successful claim in defamation, the claimant must show that the statement referred to them, that it was defamatory, and that the defendant was

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16 Robertson and Nicol (n 1) 95.

17 Duncan and Neill (n 6) 1.05.

18 Smartt (n 8) 263.

19 *Sim v Stretch* [1936] 2 All ER 1237 (Lord Atkin).

20 i.e. it causes or is likely to cause serious reputational harm to the claimant.

responsible for the publication of the statement.<sup>21</sup> Intention is not a necessary element for establishing defamation. As Russell LJ stated in *Cassidy v Daily Mirror Newspapers*, 'Liability for libel does not depend on the intention of the defamer; but on the fact of defamation'.<sup>22</sup> Unintended libel is nevertheless libel. Moreover, lacking intention to defame a particular claimant is not a defence. In *E Hulton & Co v Jones*, a newspaper was held liable for a defamatory statement about a claimant it did not know existed.<sup>23</sup>

The European Court ruled, in *Axel Springer AG v Germany* in 2009, that Article 8 of the European Convention on Human Rights (ECHR), which protects the right to a private life, extends to reputation. But this must also be balanced with a consideration of Article 10, the right to freedom of expression. The case of *Jameel* considered this balance in determining that claims in defamation may be struck out where there was little reputational damage, on the grounds of being an abuse of process.<sup>24</sup>

#### 4 Reform

The Defamation Acts of 1952 and 1996 made important changes to the law.<sup>25</sup> But the DA 2013 has been the most comprehensive piece of legislation to regulate defamation law so far. Public feeling, that the law of defamation needed to be reformed, culminated in passing of the DA 2013. It was largely driven by policy considerations, fearing that the UK had become the top destination for 'libel tourism'.<sup>26</sup> It was clear from the cases of *Singh*<sup>27</sup> and *Flood*,<sup>28</sup> that the cost of defamation proceedings excluded all but the very wealthy. The infamous *McLibel* case, as it became known, highlighted the inequality of access in

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21 Duncan and Neill (n 6) 6.01.

22 *Cassidy v Daily Mirror Newspapers* [1929] 2 KB 331, 354.

23 *Hulton (E) & Co v Jones* [1910] AC 20.

24 *Jameel v Dow Jones & Co Inc* [2005] EWCA Civ 75.

25 Henceforth, respectively, the 'DA 1952'; the 'DeA 1996'.

26 Kenneth Clarke MP told Parliament on 12 June 2012 'Nor can it be a matter of pride when powerful interests overseas with tenuous connection to this country use the threat of British libel laws to suppress domestic criticism in cases of so-called libel tourism', Hansard: Defamation Bill (Second Reading) 12 June 2012, Col 177.

27 *British Chiropractic Association v Singh* [2010] EWCA 152.

28 *Flood v Times Newspapers Ltd* [2011] UKSC 11.

defamation law in the UK.<sup>29</sup> Moreover, the law lacked clarity and was felt to be too restrictive of freedom of expression for journalists, academics and activists.<sup>30</sup> American courts have refused to uphold English defamation decisions, on the grounds of the law being in contravention of the First Amendment, which establishes, amongst other things, the right of free speech.<sup>31</sup>

It was considered by the public and many within the legal community, that the threshold was too low for establishing whether a statement was defamatory.<sup>32</sup> One of the most significant changes made under the act was the introduction of the statutory 'serious harm' test.<sup>33</sup> A claimant must prove that the publication of a statement caused, or is likely to cause, serious harm to their reputation, in order to establish defamation. Moreover, corporate claimants can only meet the serious harm threshold by demonstrating actual or likely financial loss.<sup>34</sup> A threshold of 'substantial harm' already existed in case law.<sup>35</sup> Indeed, *Thornton v Telegraph Group* had set a precedent in common law for 'serious harm'.<sup>36</sup> But it was held that the law, as it was, made it too easy to bring a claim against, and thereby limit the free expression of, the media. Therefore, lawmakers considered that the test should be strengthened by upholding this in statute, and decided to raise the threshold to 'serious harm'.

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29 McDonald's brought libel proceedings against two unemployed protestors, who unsuccessfully represented themselves. The High Court awarded McDonald's £60,000 in damages. But the European Court considered that the inequality of the proceedings violated the defendants' right to a fair trial under Article 6 of the Convention.

30 Smartt (n 8) 276.

31 *Bachan v India Abroad Publications*, 585 N.Y.S 2d 661 (1992).

32 Paragraph 4 Draft Defamation Bill: Summary of Responses to Consultation, Ministry of Justice.

33 Defamation Act 2013 s 1: 'A statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant'.

34 Defamation Act 2013, s 2.

35 *Jameel (Yousef) v Dow & Co Inc.* [2005] EWCA Civ 75.

36 *Thornton v Telegraph Media Group* [2012] EWCA Civ 383.

Following the DA 2013, *Lachaux* was one of the first cases which considered the 'serious harm' test.<sup>37</sup> The High Court judge in this case, Warby J, gave a concise exposition of how the 'serious harm' threshold is to be met:<sup>38</sup>

A statement is not defamatory of a person unless it has caused or will cause serious harm to that person's reputation, these being matters that must be proved by the Claimant on the balance of probabilities. The court is not confined, when deciding this question, to considering only the defamatory meaning of the words and the harmful tendency of that meaning. It may have regard to all the relevant circumstances, including evidence of what has actually happened after publication.

What the consideration of this test particularly established was that there must actually have been or there must be a real prospect of serious harm. It is not enough, to assert that the words complained of have a mere tendency to cause harm. Courts may consider all of the circumstances, including events post-publication, in establishing whether there has been, or is likely to be, serious reputational harm to the claimant.

The number of libel claims brought in this jurisdiction declined, following the enactment of the DA 2013. This was most likely due to the enforcement of the 'serious harm' test, which makes bringing an action more challenging.<sup>39</sup> But 2017 saw the beginning of a reversal of this trend, with defamation claims rising to 156 in that year, from only 112 issued in 2016.<sup>40</sup> This is perhaps due to the extensive opportunities for publishing defamatory content online, either by individuals or by corporate authors.<sup>41</sup> The 'serious harm' threshold no doubt continues to limit the claims that can be brought. But with

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37 *Lachaux (Bruno) v Independent Print Ltd; Lachaux v Evening Standard Ltd, Lachaux v AOL (UK) Ltd* [2015] EWHC 2242 (QB).

38 *ibid* [65] (Warby LJ). Judgment is pending, at the time of writing, from the appeal in the case, heard in the Supreme Court on 13th November 2018.

39 Ursula Smartt, *Media and Entertainment Law* (3<sup>rd</sup> edn, Routledge 2017) 319.

40 Grania Langdon-Down, 'Media Law: Out of harm's way' [2018] Law Society Gazette.

41 'The ever-increasing use of the internet as a platform to allow more and more people to, in effect, become publishers is likely to mean that there will be a steady trickle of defamation claims' - Imogen Allen-Back, 'Defamation claims on the rise in London' (Out-law, Pinsent Masons, 27 Jun 2018) <[www.out-law.com/en/articles/2018/june/defamation-claims-rise-london/](http://www.out-law.com/en/articles/2018/june/defamation-claims-rise-london/)> accessed 19 February 2019.

online libel being capable of wider readership, it may well be easier in these cases to demonstrate that a libellous statement has caused more extensive, and therefore serious, harm.

## 5 Defendants

The author of a defamatory statement would be the logical person against whom to bring a claim. But an author might not have deep enough pockets to be worth suing. In which case, another party involved in the publication of the statement, such as an editor or publisher, may be sued.

Where libellous content has been published online, it can be hard to bring a claim against the author for a number of additional reasons. It is possible to create online content anonymously.<sup>42</sup> Therefore, the author may not be identifiable. Claimants may also struggle to sue authors who are located outside of the jurisdiction. An editor or publisher based in England and Wales may be more readily sued. The DA 2013 created a statutory test which determines whether the court has jurisdiction over the case: the court does not have jurisdiction unless, of all the places where the statement has been published, England and Wales is the most appropriate jurisdiction in which to bring an action.<sup>43</sup> In establishing this, the court would consider the claimant's link to England and Wales, the extent of their reputation here, compared to elsewhere, the location of evidence, the content of the publication and any advantage of bringing a claim in this jurisdiction.<sup>44</sup> Therefore it may not be possible to bring a claim against an author of online content, who is based and who has published outside the jurisdiction. Thus it is even more important, in cases of online libel, where jurisdiction can cause particular issues, that it is possible for claimants to seek redress from another party involved.

In some cases, it can be difficult to establish a publisher distinct from the author. On the face of it, anyone who has allowed or been involved with the publication of a

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42 It is possible to anonymise online activity using tools such as Virtual Private Networks (VPNs), Proxy Servers and anonymous communication software such as Tor.

43 Defamation Act 2013, s 9.

44 Duncan and Neill (n 6) 9.06.

defamatory statement can be sued for defamation.<sup>45</sup> The more pertinent consideration is: who has a defence? Parties involved with, albeit without primary responsibility for, publication, would not be publishers according to the definition provided by statute. Instead, they may constitute secondary publishers under common law.<sup>46</sup> The law instates considerable protection for such publishers.

The DeA 1996 provides a defence for those who are not the statutory author, editor or publisher of the statement.<sup>47</sup> The statute defines an author as 'the originator of the statement'; an editor is 'a person having editorial or equivalent responsibility for the content of the statement or the decision to publish it'; and a publisher is 'a commercial publisher, that is, a person whose business is issuing material to the public, or a section of the public, who issues material containing the statement in the course of that business'.<sup>48</sup> In addition, that person will have a defence if they took reasonable care in publication. Finally they must not have known, nor had reason to believe that they caused or contributed to the publication of defamatory content. This is a conjunctive defence; all three strands must apply in order for the defence to stand. Therefore, a secondary publisher may still be liable for the publication of a defamatory statement if they did not take care in its publication, and they may become liable upon being notified of the defamatory content.

The DA 2013 added further protections for secondary publishers. Under s.10, a claimant cannot bring an action in defamation against someone other than the author, editor or publisher of defamatory content, unless it was not reasonably practical to bring an action against either the author, editor or publisher.<sup>49</sup> Thus, where it is possible to sue an author, editor or publisher, the court will not hear a claim against another party.

Case law considering whether website operators could be liable as secondary publishers has lacked clarity and consistency. Therefore defences, specific to website

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45 Defamation Act 1996, s 1.

46 Duncan and Neill (n 6) 22.01.

47 Defamation Act 1996, s 1.

48 Defamation Act 1996, s 2.

49 Defamation Act 2013, s 10.

operators, were also introduced under the DA 2013.<sup>50</sup> There is a defence available for operators of websites who did not author the statement. But this defence fails under a three-pronged criterion, which lays out responsibilities falling to operators of websites. The defence fails where it's not possible to identify the author of the statement, the claimant complained to the operator and the operator failed to respond to the complaint appropriately. This is another conjunctive formulation. In practice, where the author of the statement cannot be identified, if a website operator receives complaint and does not follow correct procedure, they can be held liable.

Appropriate procedure for website operators dealing with complaints of libel is set out in the Defamation (Operators of Websites) Regulations 2013.<sup>51</sup> Under these regulations, a website operator must:

- 1 acknowledge receipt of the complaint within 48 hours;
- 2 notify the author of the statement about the complaint or delete the post where the author cannot be contacted;
- 3 require a response from the author, whether they consent to their identity being disclosed, within 5 days of notification; and,
- 4 notify the complainant of the outcome within 48 hours

A website operator will not be protected if there was any demonstrable malice by the operator in relation to the posting of the statement.

Under EU law, the Electronic Commerce (EC Directive) Regulations 2002,<sup>52</sup> provided protections for 'information society services' from liability as secondary publishers. For these purposes, 'information society services' refer to 'any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing (including digital compression) and storage of data, and at the individual request of a recipient of a service'.<sup>53</sup>

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50 Defamation Act 2013, s 5.

51 Defamation (Operators of Websites) Regulations 2013, SI 2013/3028, Schedule.

52 Henceforth ECR 2002.

53 Electronic-Commerce (EC Directive) Regulations 2002, s 2.

Information society services are afforded protection by ECR 2002 in three tiered scenarios, depending on the level of involvement with the publication of defamatory content:<sup>54</sup> Mere conduit; Caching; and Hosting. An information society service is a mere conduit where it 'does not initiate the transmission, does not select the receiver of the transmission and does not select or modify the information contained in the transmission'<sup>55</sup> This is involvement to the least degree out of these three scenarios and provides complete protection of those secondary publishers that play only a minimal role.

Caching is a process of automatic storage of information which 'is performed for the sole purpose of more efficient onward transmission of the information to other recipients upon the request of those recipients'.<sup>56</sup> Caching is routine for service providers.<sup>57</sup> The defence fails where the information stored has been modified or interfered with. Unlike Regulation 17, therefore, the defence under Regulation 18 is conditional.

Finally, Regulation 19 relates to the storage of information related to illegal activity, such as defamatory content, unbeknownst to the information society service. In this case, the service provider has a defence, so long as it 'act[s] expeditiously to remove such content or disable access'.<sup>58</sup> Hosting is the greatest level of involvement under these regulations. Similarly to Regulation 18, the defence under Regulation 19 is conditional. But the conditions upon which the defence depends are even more onerous upon the secondary publisher in the case of hosting than with caching.

## **6 Secondary publishers**

The courts have tended to be reluctant to hold Internet Service Providers<sup>59</sup> and website operators liable as secondary publishers. But as the functions of online media have

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54 Duncan and Neill (n 6) 22.15.

55 Electronic-Commerce (EC Directive) Regulations 2002, reg 17.

56 Electronic-Commerce (EC Directive) Regulations 2002, reg 18.

57 *Bunt v Tilley* [2006] EWHC 407.

58 Electronic-Commerce (EC Directive) Regulations 2002, reg 19.

59 Henceforth 'ISPs'.

developed, new considerations as to their status, for the sake of defamation proceedings, must be addressed.

Cases where the liability of secondary publishers is at issue can be divided into three categories: the Defendant's involvement is minimal and automatic, therefore they are not liable for publication even when notified of the defamatory material; the Defendant, once notified, may be liable for further publications; the Defendant is involved sufficiently with the publication to be liable, even without notification.<sup>60</sup>

An early case, which considered whether ISPs could be regarded as publishers was *Godfrey v Demon Internet* in 2001.<sup>61</sup> In this case, defamatory material was published about Dr Lawrence Godfrey on a website outside of the UK. Demon Internet was the UK-based ISP hosting the website. The ISP did not remove the content for twelve days after Godfrey reported it. It was republished on multiple news servers around the world. Pre-dating the ECR 2002, Demon attempted to rely on US e-commerce case law, which held that ISPs were not publishers but hosts.<sup>62</sup> But the judge in this case held that the ISP was a secondary publisher for these purposes and was, therefore, liable for the statement, since it was aware of the content but did not remove it. Morland J considered that the defence under s1 of the DeA 1996 did not apply. The ISP was liable due being notified and having failed to act.<sup>63</sup>

The case of *Godfrey* was said to have created a 'chilling effect' on freedom of expression, where online material was often taken down, without much scrutiny, when a complaint was received.<sup>64</sup> Case law following the enactment of the E-Commerce Regulations, however, deviated from the decision in *Godfrey*. In the case of *Tamiz v Google*,<sup>65</sup> Mr Payam Tamiz sued Google for defamatory blog posts which were published on the platform blogger.com, which was a service provided by Google. The court held

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60 Duncan and Neill (n 6) 8.13.

61 *Godfrey v Demon Internet* [2001] QB 201.

62 *Lunney (Alexander G.) & c. v Prodigy Services Company et al.* (1999) 99 NY Int 0165.

63 Defamation Act 1996, s 1

64 Smartt (n 8) 73.

65 *Tamiz (Payam) v Google Inc., Google UK Ltd* [2012] EWHC 449 (QB).

that Google, as an ISP, was a host of the material and was protected under regulation 19.<sup>66</sup> Nevertheless, Eady J found that there was not an existing framework in common law for web publishers in defamation and observed that 'the position may well be fact sensitive'.<sup>67</sup>

A recent case which highlights how the developments in online media have outgrown the law is that of *Lewis v Facebook*. In January 2019,<sup>68</sup> Martin Lewis settled his libel case against Facebook, having initiated proceedings in the High Court eight months previously.<sup>69</sup> Lewis argued that he was defamed by thousands<sup>70</sup> of scam advertisements, which appeared on Facebook.<sup>71</sup> The advertisements used his image falsely to endorse bitcoin investments, which transpired to be exploitative binary trading schemes.<sup>72</sup> Martin Lewis is notable as a financial journalist and the founder of MoneySavingExpert.com. Therefore there was actual and, it was evidently likely that there would be further, serious harm to his reputation and business resulting from the use of his image to endorse online scams.

Lewis took steps to have the advertisements taken down. He reported each advert to Facebook, in line with their policy. Facebook duly removed each advertisement. But the authors continued to upload new adverts. Moreover, Facebook uses a 'dark ad' mechanism, whereby advertising is only visible to the publisher and the targetted demographic of the advert.<sup>73</sup> As a result of this, Lewis was himself unable to see the advertisements, and had to rely on being informed about them by third parties. Mr Lewis

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66 Electronic-Commerce (EC Directive) Regulations 2002, reg 19.

67 *Tamiz v Google Inc* [33] (Eady J).

68 23<sup>rd</sup> January 2019.

69 Amol Rajan, 'Martin Lewis seeks damages for 'fake' Facebook ads' (BBC News, 23 April 2018) <[www.bbc.co.uk/news/entertainment-arts-43857921](http://www.bbc.co.uk/news/entertainment-arts-43857921)> accessed 19 February 2019.

70 Digital, Culture, Media and Sport Committee, *Subject:Fake News* (HC 2018).

71 'Martin Lewis to sue Facebook over fake ads which scam people out of thousands', *The Telegraph* (London, 23 April 2018).

72 Digital, Culture, Media and Sport Committee, *Subject:Fake News* (HC 2018).

73 Alex Hern, 'Facebook 'dark ads' can swing political opinions, research shows' *The Guardian* (Las Vegas, 31 July 2017).

contacted the Advertising Standards Agency.<sup>74</sup> The ASA ruled that Facebook had broken advertising standards, but was unable to ban the adverts, as the company is based outside the UK. Equally, Lewis appealed to the police, Action Fraud, and the Financial Conduct Authority, all of whom publicised warnings against the advertisements but were unable to suppress them.<sup>75</sup>

Lewis argued that Facebook was the publisher of these advertisements, drawing on distinctions in the way the platform is used. For private users of the platform, Facebook is akin to a mere noticeboard and has no input on the content posted there.<sup>76</sup> Facebook is, however, paid to display advertisements, and therefore provides a commercial service to advertisers.<sup>77</sup> Lewis argued that Facebook was negligent in the regulation of its advertisements, as it relies on users to report scam adverts, rather than actively policing those advertisements, despite profiting from them. In this capacity, Lewis argued, Facebook was liable as a secondary publisher.<sup>78</sup>

The case settled before trial. Therefore it has no precedential value; it does not establish that the social media platform could be considered to be liable as a secondary publisher. Importantly, however, Facebook paid Lewis' legal costs. This is an indication that Facebook anticipated serious risk from continuing the proceedings. Lewis dropped the claim on the agreement that Facebook would donate three million pounds to an anti-scam charity and establish greater anti-scam precautions on the platform itself. Both of these terms are significant. Firstly, the three million pound settlement is far greater than any possible award in damages for defamation in the UK. This is an offer, which would have been unreasonable for a claimant to reject. Consequently, Facebook has avoided further difficulties for itself from any precedent that could have been set in court. UK

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74 Henceforth, ASA.

75 Martin Lewis, 'Martin Lewis: Suing Facebook left me shaking – it's now admitted 1,000s of fake ads, here's the latest' (MoneySavingExpert.com, 1<sup>st</sup> May 2018) <[blog.moneysavingexpert.com/2018/05/martin-lewis—suing-facebook—left-me-shaking--it-s-now-admitted/](http://blog.moneysavingexpert.com/2018/05/martin-lewis—suing-facebook—left-me-shaking--it-s-now-admitted/)> accessed 19 February 2019.

76 *Bunt v Tilley & Others* [2006] EWHC 407 (QB).

77 Digital, Culture, Media and Sport Committee, *Subject: Fake News* (HC 2018).

78 Will Gore, 'Facebook still claims it's not a publisher – but Martin Lewis' court action could be set to change that' *The Independent* (23 April 2018).

defamation law, then, is still a much more navigable landscape for the very wealthy. Secondly, it is unclear what the implications of the new anti-scam precautions may be for Facebook. Greater involvement with content posted on the site would undoubtedly saddle the site with more responsibility in the eyes of the court. This could lay the path for social media websites to be considered as publishers or even editors for the purposes of DeA 1996, s1(1).

## **7 Conclusion**

The law of defamation continues to be complicated and becomes increasingly technical. Despite attempts to consolidate the law, additional legislation has allowed it to grow more convoluted. This is particularly true of that written specifically for regulating secondary publishers of material online. The nature of defamation proceedings is that the majority of cases are concluded outside of court, without establishing a clear precedent, and without many of the facts publicly known. Many cases are not litigated at all. Many of those who are the subjects of defamatory content cannot afford to litigate, or sometimes appear as litigants-in-person. These factors impose limits on the how defamation law can evolve to reflect the developing media landscape going forward. But Lewis' case against Facebook may be an indication of future developments for the status of ISPs and website operators. The case certainly highlights the nuances in ways in which material is published online, and how the law, as it is, lacks the proficiency to handle this. The law must adapt to reflect nuance, distinguishing the different types of defendants there may be online as well as the different ways that the internet can be used. *Lewis v Facebook* may yet pave the way for holding social media sites, in particular, more accountable when they are acting in a capacity more akin to editors or publishers.

# The Unfair Commercial Practices Directive

AZYAN IBRAHIM\*

## 1 Introduction

The Unfair Commercial Practices Directive<sup>1</sup> constitutes an ambitious attempt at introducing a legal framework to cover all types of unfair commercial practices. It provides a high level of consumer protection against unfair commercial practices while ensuring a level playing field for traders. The directive aims for 'maximum harmonisation' which is an unusual approach compared to the orthodox model of 'minimum harmonisation' that has been witnessed in previous consumer measures.<sup>2</sup> This horizontal approach could be seen as an effective way to achieve a high level of consumer protection and to increase the smooth functioning of the internal market.<sup>3</sup> A brief analysis of the main objectives of the Directive as set out in the Preamble will first be considered. Following this will be a critical evaluation of the extent to which the average consumer benchmark and the vulnerable group benchmark attempt to provide a high level of consumer protection. Ultimately, the overall aim of this discussion is to show that true uniformity of interpretation and application is attainable, however, the objectives of the UCPD might be hindered as a result of these two benchmarks.

## 2 Objectives

Two formal objectives are established in Article 1 of the Unfair Commercial Practices Directive (UCPD): providing a high level of consumer protection and increasing the smooth functioning of the internal market. Recital 1 of the preamble notes that ensuring

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1 Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council [2005] OJ L149/22 (Unfair Commercial Practices Directive).

2 Hugh Collins, 'Harmonisation by example: European laws against unfair commercial practices' (2010) 73 MLR 89.

3 Unfair Commercial Practices Directive (n 1) art 1.

a high level of consumer protection derives on the basis of Article 153(1) and 3(a) of Treaty Establishing the European Community. The UCPD now meets the aim as set out in the Internal Market Clause and the Treaty of the Functioning of the European Union which use to be the EC Treaty. However, the UCPD fails to explain the rationale behind consumer protection and as to what can be regarded as a high level of consumer protection. Accordingly, consumer protection is seen as something that is instrumental to the internal market which is then able to stimulate consumer confidence if it is effectively protected.

Moreover, there is much emphasis on the protection of vulnerable consumers which acknowledges that there is a weaker group of individuals who require more protection. It is viewed as a socially oriented perspective on consumer protection, whereby, it does not link to the internal market.<sup>4</sup> The UCPD could be seen as a legislative instrument that provides comprehensive standards by pushing traders to act fairly rather than standards on how consumers could act responsibly in order to be unaffected by the potentially unfair behaviour of traders.

The next formal objective of the Directive is to 'increase the smooth functioning of the internal market', serving a dual purpose. From the trader's perspective, it removes many barriers affecting businesses by harmonising national laws across the European Union. It decreases a business' cost of exercising internal market freedoms which then allows them to engage in cross border commercial practices such as marketing and advertising campaigns. Nonetheless, eliminating the differences in national laws could discourage traders from exploring the full potential offered by the single market. It is also a major setback for member states to be innovative and limits national courts' autonomy in finding new ways to improve traders' accessibility to cross border commercial transactions. On the other hand, the consumers' perspective aims to increase consumer confidence by making sure they are certain of their rights and providing them with a high level of consumer protection.<sup>5</sup>

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<sup>4</sup> Thomas Wilhelmsson, 'The informed consumer v the vulnerable consumer in 'European unfair commercial practices law—a comment' in Geraint Howells et al (ed), *The yearbook of consumer law* (Ashgate 2007) 211.

<sup>5</sup> Unfair Commercial Practices Directive (n 1) recital 4.

The Directive also aims to improve competition in the marketplace.<sup>6</sup> It is not one of the formal objectives in Article 1 of UCPD but rather, the EC Guidance has mentioned that apart from focusing on consumer protection, it should also aim to 'ensure, promote and protect fair competition'.<sup>7</sup> It proposes that unfair commercial practices do not only harm consumers but competitors as well. Whereby, traders who follow honest business practices will not be able to obtain market share or be active in the marketplace hence harming competition.<sup>8</sup> In other words, this would affect the smooth functioning of the internal market. This broader goal of improving competition is reflected in Recital 8 of the Preamble.

### **3 Consumer Benchmarks in the UCPD**

The consumer benchmarks in the UCPD essentially operates as a standard to judge a commercial practice against 'average consumers' and for traders to assess whether their practice could be potentially unfair. It is an objective test that can be applied to every EU member states, thus upholding the notion of maximum harmonisation.<sup>9</sup> Therefore, the main consumer benchmark in the Directive is the 'average consumer' benchmark.<sup>10</sup> It originated in Case C-210/96 *Gut Springenheide GmbH and Rudolf Tusky v Oberkreisdirektor des Kreises Steinfurt - Amt für Lebensmittelüberwachung*<sup>11</sup> where the ECJ held that an average consumer is an individual who is 'reasonably well-informed and reasonably observant and circumspect'. The UCPD also introduced two alternative benchmarks to that of the average consumer: the target group benchmark<sup>12</sup> and vulnerable group benchmark.<sup>13</sup> These three benchmarks are set in the context of

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<sup>6</sup> Fernando Gómez, 'The Unfair Commercial Practices Directive: a law and economics perspective' (2006) 2 ERCL 4.

<sup>7</sup> Commission, 'Guidance On the Implementation/ Application of Directive 2005/29/EC On Unfair Commercial Practices' SEC (2009) 1666.

<sup>8</sup> Hugh Collins, 'EC regulation of unfair commercial practices' in Hugh Collins (ed), *The forthcoming Directive on Unfair Commercial Practices* (Kluwer Law International 2004) 2.

<sup>9</sup> Collins 2010 (n 2).

<sup>10</sup> Unfair Commercial Practices Directive (n 1) recital 18.

<sup>11</sup> [1998] ECR I-4657 [31].

<sup>12</sup> Unfair Commercial Practices Directive (n 1) recital 18.

<sup>13</sup> Unfair Commercial Practices Directive (n 1) recital 19.

providing high level consumer protection and to encourage traders in engaging with cross border transactions.

#### **4 Average Consumer Benchmark**

The benchmark is a concept that is found in the three mini general clauses: misleading actions, misleading omissions and aggressive commercial practices, including the main general clause. There is a concern that this test might end up setting a relatively low level of consumer protection which undermines the potential for a high level of protection set out in the UCPD. Additionally, given the nature of maximum harmonisation, some member states are forced to reduce their pre-existing levels of protection. It is essential to take into account the reference of 'social, cultural and linguistic factors' set out in the average consumer benchmark whereby courts have to consider the commercial practice in relation to local markets. There is a certain degree of autonomy given to justify that an average consumer might not have been as observant and circumspect in one Member State without having to break the rule of maximum harmonisation.<sup>14</sup> Apart from the factors taken into account when setting a benchmark for an average consumer, it seems to have rather high expectations for average consumers to act upon. These expectations are only functional for the market order envisioned by the European Commission which is to uphold free trade.<sup>15</sup>

Therefore, a key concern about this particular test was to see whether the standard was unrealistically high, so much that it fails to protect the consumers who fall below the threshold. Nonetheless, the high level of competence set in the benchmark does not reflect the majority of consumers. In an ideal world, consumers are bound to make informed choices while purchasing goods and services.<sup>16</sup> A.G. Fennelly in Case C-220/98 *Estée Lauder Cosmetics GmbH & Co. OHG v. Lancaster Group GmbH* stated that, "The presumption is that consumers will inform themselves about the quality and price of products and will make intelligent choices".<sup>17</sup> This assumption that consumers are rational,

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<sup>14</sup> Collins 2004 (n 8).

<sup>15</sup> Rosella Incardona and Cristina Poncibò, 'The average consumer, the unfair commercial practices directive, and the cognitive revolution' (2007) 30 J Consum Policy 21.

<sup>16</sup> Richard Allen Posner, 'Rational Choice, Behavioral Economics, and the Law' (1997) 50 SLR 1551.

<sup>17</sup> [1999] ECR I-117, [25].

sensible and attentive when analysing the messages behind commercial practices might seem rather artificial.

With the emergence of behavioural economics, a combination of economics and psychology, this suggests that there is a whole range of cognitive biases that interfere with a consumer's ability to effectively process and act upon the given information. The findings have mentioned that an individual's choices systematically deviate from what agencies view as 'rational' behaviour due to the consequences of an individual's 'cognitive biases'.<sup>18</sup> The most common cognitive biases are post-purchase rationalisation, framing effect and over-optimism. Post-purchase rationalisation is when consumers try to rationalise or justify the decision they made when purchasing a product or service. Framing effect is when individuals have the tendency to make a decision based on how the proposition is framed. L'Oreal's famous slogan 'Because you're worth it' could imply that when a consumer chooses not to purchase their products, they are not worth it.<sup>19</sup> However, it all depends on how the individual chooses to interpret it. As for over-optimism, it focuses on how some consumers are over-optimistic about purchasing a product and do not analyse the possible negative outcomes. For instance, individuals might be over-optimistic about their future use of service such as fitness clubs where they enter into a suboptimal contract and probably forget to end it.<sup>20</sup> Therefore, consumers are likely to misinterpret the risk posed by certain products that could be dangerous, which makes them 'subject to a host of cognitive biases' hence vulnerable to manipulation.<sup>21</sup>

Moreover, it destroys confidence in the belief of information paradigm where an increasing amount of information and establishing full transparency helps consumers to make an informed decision. The understanding behind this approach is that information asymmetries will eventually lead to market failure. This has led to EU consumer policies that have imposed extensive information obligations also voiding potential unfair

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18 Iain Ramsay, *Consumer law and policy: text and materials on regulating consumer markets* (3rd edn, Hart 2012) 41.

19 *ibid.*

20 Ramsay (n 18).

21 Incardona and Poncibò (n 15).

commercial practices.<sup>22</sup> The UCPD in particular has followed this approach, Article 6 (misleading actions) and Article 7 (misleading omissions) where it mentioned that information provided by traders are regulated on the basis of whether an average consumer is deceived or is likely to be deceived on the information provided. This information paradigm is premised on the notion that consumers are 'rational actors' who make full use of the information that is provided by traders. Nonetheless, the *OFT v Purely Creative*<sup>23</sup> case that dealt with the violation of Article 6 and Article 7 recognised that an average consumer will not necessarily read all the information provided. Therefore, rational choice model which underpins neoclassical economics is becoming seemingly irrelevant due to the framework on behavioural economics.

Accordingly, consumers assumed 'irrationality' could question whether the average consumer benchmark is seen to be artificial. This concept does not recognise that consumers might not be able to be the best judge of their own interest and maximise their utility within the constraints of their economic resources.<sup>24</sup> The overly demanding standard in the average consumer test seems to set an inadequate level of consumer protection while providing a rather generous level for businesses to comply with. Nonetheless, government agencies are increasingly adopting the behavioural economic framework. The EU Commission recommends its use in the interpretation of UCPD which indicates that individuals are not always 'reasonably well-informed and reasonably observant and circumspect' and can potentially be in vulnerable circumstances.<sup>25</sup>

## **5 Vulnerable Group Benchmark**

Following the notion that consumers are not always capable of making good purchase decisions, the assumption is that individuals are not the best judges of their own interest which raises the issue of paternalism. Paternalism is when the state is therefore justified to intervene and limit that freedom of choice where they are able to help citizens overcome problems of unbounded rationality. This notion then acknowledges that

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<sup>22</sup> Ramsay (n 18).

<sup>23</sup> [2011] EWHC 106 (Ch).

<sup>24</sup> Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms* (Oxford University Press 2016) 142.

<sup>25</sup> Incardona and Poncibò (n 15).

consumers might not have the ability to evaluate information given to them thus the state aims to make the decision for them instead. It could prevent consumers from major economic losses or even physical injury from potentially dangerous products.<sup>26</sup> As a result, there is a certain degree of paternalism in the context of vulnerable group benchmark where it recognises that additional protection should be given to certain individuals that do not have the required capacity to make an informed choice thus aiming for a higher level of consumer protection.<sup>27</sup> The idea of this benchmark is clearly referred to in the context of the general prohibitions clause but is rather vague in showing if specific prohibitions could be assessed against the vulnerable group benchmark. However, it is problematic to consumers who are particularly vulnerable but do not fall into the 'clearly identifiable group' while traders might not always be able to foresee which practices will be assessed against this benchmark.<sup>28</sup>

The application of this category provides a very vague understanding as to what is meant by 'clearly identifiable groups'. Although it explicitly mentions that characteristics such as age, mental or physical infirmity or credulity will be taken into account to define who qualifies as a vulnerable consumer, it does not recognise consumers who might be particularly vulnerable due to other characteristics that might fall outside of this scope.<sup>29</sup> Moreover, some potentially vulnerable individuals simply do not share a common level of vulnerability. For instance, when assessing fairness with regard to consumers' age, it starts to question whether people are always more vulnerable because of their age with the exception of young consumers. Hence, old age does not always mean that they are not able to be observant and circumspect. An average elderly person is likely to have acted similarly to the rest of the population. To some extent, a consumer who is aged over 100, might be more vulnerable to the rest only because they lost their critical faculties.<sup>30</sup> The issue that might arise is that certain consumers who has lower levels of educational attainment or even lower income that could be particularly vulnerable when

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<sup>26</sup> Ramsay (n 18).

<sup>27</sup> Incardona and Poncibò (n 15).

<sup>28</sup> Geraint G. Howells, Christian Twigg-Flesner and Thomas Wilhelmsson, *Rethinking EU consumer Law* (Routledge 2017) 70.

<sup>29</sup> *ibid.*

<sup>30</sup> Incardona and Poncibò (n 15).

making a purchase decision is not protected within the scope of the benchmark. It could have been that the particular product was affordable compared to the alternative which puts the consumer in a considerably weaker position than the trader. It shows that he or she is pressured into buying the product without understanding the potential detrimental impact it might have. This individual will then be assessed against the 'average consumer' test thus have a lower protection against the trader. It is all a matter of interpretation of the national courts to identify how an average member of such a group would make a transactional decision and to recognise the unfairness towards certain consumers who are vulnerable due to certain situations they may find themselves in. Cartwright proposed the different types of taxonomy of vulnerability which would help to identify vulnerabilities created by particular circumstances: informational vulnerability, pressure vulnerability, supply vulnerability, redress vulnerability and impact vulnerability.<sup>31</sup>

It is then clear that the interpretation blurs the distinction between the vulnerable group benchmark and the target group benchmark, possibly becoming complex for traders to interpret them. The most obvious group of individuals who would fall into the vulnerable group would be children as they have difficulties in making rational choices, especially if the specific commercial practice involves a large amount of information.<sup>32</sup> Subsequently, the method of presentation of information being provided is extremely crucial to these vulnerable consumers. As Ian Ramsay mentions the role of advertising is 'in creating wants and exploiting interdependent utilities' and how advertising campaigns are able to manipulate consumers in such a way that it could be deemed as an unfair commercial practice.<sup>33</sup> These benchmarks could then be seen as guidelines in place for traders to think about the different vulnerabilities. They are expected to reflect on how each particular groups would act in accordance to the specific commercial practice. It is still unclear whether vulnerable group benchmarks will be referred to in the context of specific prohibitions in Article 6 to 9. Therefore, the guidelines in the Directive are not so extensive for traders to comply with. Viewed in this light, businesses might refrain

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<sup>31</sup> Howells, Twigg-Flesner and Wilhelmsson (n 22).

<sup>32</sup> Bram Duivenvoorde, *The Consumer Benchmarks in the Unfair Commercial Practices* (Springer 2015) 24.

<sup>33</sup> Ramsay (n 18).

themselves from taking part in interstate commerce to avoid unpredictable regulatory entanglement.<sup>34</sup>

Overall, there are tensions between the need to liberalise commercial practices where it encourages traders to engage in cross border trade and to also protect vulnerable consumers that do not sufficiently meet the particular standards set out in the average consumer benchmark. The issue that arises is whether national courts are able to look at characteristics that are outside the scope of mental or physical infirmity, age and credulity. If the national courts do choose to recognise other elements, it would then contradict the whole purpose of maximising harmonisation (\*or clarity in the law). Accordingly, the arbitrariness of this notion could confuse national courts in the assessment of commercial practices and the directive's attempt to offer high consumer protection for consumers only accentuates the present difficulties posed by this consumer benchmark.

## **6 Conclusion**

It is apparent that the Unfair Commercial Practices Directive has provided some type of recognition to consumers who may not necessarily fit the average consumer benchmark. However, an amendment is necessary to make the provision clearer by only requiring the average consumer benchmark to be varied when there is a particular 'clearly identifiable group' being affected, rather than to cover practices reaching the general consumers. It requires careful consideration of the impact on markets and traders, as it is particularly unfair for traders to attempt to take into account of all possible vulnerabilities in achieving a fair commercial practice. When a product is being targeted to all consumers, the standards are unclear as to what steps businesses should be taking for a particular vulnerable consumer to not be misled. Therefore, businesses might be discouraged to take part in interstate commerce. The vagueness in the benchmarks could increase the cost of compliance and enforcement. The courts should then accept more descriptive sciences as it only helps to achieve a higher level of consumer protection by recognising the insights of human decision making. The notion on 'information paradigm' should also be reconsidered as increasing amount of information does not always lead to consumers

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<sup>34</sup> Mateja Durovic, *European Law on Unfair Commercial Practice and Contract Law* (Hart 2016) 41.

making effective transactional decisions even if the information is clear and correct. These insights could also help to set the standard for professional diligence and economic distortion of the average consumer in the directive. Extensive guidelines on this might increase the foreseeability of a potential unfair commercial practice and traders will then be more equipped with predictive tools to interpret them. Consequently, intervention is necessary at the EU level if these objectives are hindered as a result of the consumer benchmarks set in the UCPD. Nonetheless, there is a tradeoff between the competing objectives meaning that the two formal objectives can't be maximised at the same time.

# Reforming the Law on Medical Manslaughter

KATHERINE WRIGHT\*

## 1 Introduction

The English law on medical manslaughter, manifested in the common law offence of gross negligence manslaughter, seeks to punish conduct in the process of healthcare which is so negligent that it causes death, and hence warrants the gravity and stigma of a criminal conviction. It therefore has practical implications not only in the criminal justice system, but also in the context of patient safety in the healthcare setting. However, despite its broad reach, the legal framework of medical manslaughter is tainted with flaws which mean that it is unsatisfactory and ineffectual in furthering either justice or patient safety.

This article will explore the numerous weaknesses in the law and how they affect these overriding objectives, focussing on the substantive law itself and the wider aspects of prosecution and sentencing, as well providing some consideration as to the ramifications of the law in the clinical setting. In this article, the legal test for gross negligence manslaughter will be analysed alongside the approaches of the CPS, courts and sentencing mechanisms. It will be argued that the flaws within the legal framework cannot be reconciled with the principles of the law which seek to uphold justice, owing to the vast uncertainties surrounding the law and disregard for moral culpability.

## 2 Justice

The theory of 'justice' is the topic of limitless jurisprudential discussion and has been postulated in numerous different models. However, for the purposes of this essay, 'justice' will be considered in its most simple form: The Oxford Dictionary of Law defines 'justice' as 'a moral ideal that the law seeks to uphold in the protection of rights and punishment of wrongs'.<sup>1</sup> The cornerstones of English criminal law which have evolved through the years are all instrumental in the achievement of justice, yet the offence of gross negligence manslaughter seems to be incongruous with many of these central concepts,

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<sup>1</sup> J Law and E Martin, *Oxford Dictionary of Law* (8th edn, OUP 2015).

to the extent where some commentators have even called for its abolition.<sup>2</sup> Given the conflict with these principles, namely the requirements for certainty and culpability,<sup>3</sup> it cannot be said that the law of medical manslaughter is conducive to justice, as it fails to 'protect rights' and 'punish wrongs', and ultimately is unduly burdensome upon some doctors who are guilty of nothing more than doing their best under overwhelming pressure.

## **2.1 Problems with *Adomako***

Arguably the greatest issue with the existing law is that the legal test for gross negligence manslaughter lacks clarity and certainty,<sup>4</sup> which puts into question its compatibility with the rule of law. The case of *Adomako* lays out the test which distinguishes between mere negligence and gross negligence capable of punishment under the criminal law.<sup>5</sup> After establishing that there must be breach of duty which causes the death, Lord Mackay concludes that, 'the jury must go on to consider whether that breach of duty should be characterised as gross negligence and therefore as a crime', based upon the extent to which the defendant's conduct departed from the standard of care.<sup>6</sup> This test, however, offers very little guidance as to what is meant by the elusive principle of 'grossness', aside from Lord Mackay's comment that conduct should be 'so bad' as to amount to a criminal act.<sup>7</sup> Given that this 'badness' is the fundamental element of the offence which transforms negligence into a criminal act, it certainly ought to be a distinct concept. Furthermore,

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<sup>2</sup> See, for example, O Quick 'Prosecuting 'Gross' Negligence: Manslaughter, Discretion and the Crown Prosecution Service' (2006) 33 *Journal of Law and Society* 421.

<sup>3</sup> Requirement for legal certainty is embodied within Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 (hereafter 'the ECHR') and in English common law: *R v Rimmington and R v Goldstein* [2005] UKHL 63.

<sup>4</sup> Kazarian, Griffiths and Brazier conclude that the 'elusive concept of grossness' is, along with causation, the main problem in the English law of gross negligence manslaughter: see M Kazarian, D Griffiths and M Brazier, 'Criminal responsibility for medical malpractice in France' (2011) 27 *Professional Negligence* 185.

<sup>5</sup> *R v Adomako* [1995] 1 AC 171.

<sup>6</sup> *ibid* 187.

<sup>7</sup> *ibid*.

the use of the criminality of the act as a part of the definition of the offence is a cause for significant concern, and Lord Mackay himself acknowledges the circularity of it.<sup>8</sup>

Despite this, opportunities to clarify this test have been overlooked by the judiciary when the *Adomako* test for gross negligence was affirmed by the Court of Appeal in *R v Misra*,<sup>9</sup> following an appeal by two senior house officers against their convictions for manslaughter on the grounds of contravention of Article 7 of the European Convention on Human Rights.<sup>10</sup> Judge LJ concludes that the law as it stands provides 'sufficient clarity, as certainty needn't be absolute',<sup>11</sup> thus setting the threshold for 'sufficient' certainty very low. Whilst he confirms that the test asks the jury to consider grossness and criminality as a single element, rather than two separate questions, the definition of 'gross negligence' remains ambiguous and leaves too much interpretation open to the jury. Indeed, Quick has observed that the jury are actually having to grapple with the meaning of the offence and hence a legal principle, rather than just the facts of the case. This again puts the certainty of the offence into question, as there is too great a scope for interpretation from one jury to the next, and no clear standard to guide such an interpretation. Quick sees this as incompatible with Article 6 of the ECHR,<sup>12</sup> which guarantees the right to a fair trial: it certainly is questionable how a trial for medical manslaughter can be fair when the definition of the defence is so ambiguous and can change at the whim of the jury.

Moreover, the validity of the offence and its enforcement is dubious given the convention that two medical experts must condemn the conduct as grossly negligent in their evidence<sup>13</sup>. Again, given the lack of clear definition, medical experts are essentially being asked to judge what constitutes 'grossness'. Quick has argued that they determine,

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<sup>8</sup> *ibid.*

<sup>9</sup> *R v Misra (Amit)* [2005] Crim LR 234.

<sup>10</sup> The Council of Europe, The European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950.

<sup>11</sup> Reaffirming the principle outlined in *Sunday Times v United Kingdom* [1979] 2 EHRR 245.

<sup>12</sup> ECHR (n 10) art 6.

<sup>13</sup> This is not a legal requirement, but a practice adopted by prosecutors when constructing a case of gross negligence: Quick (n 2) 444.

rather than inform, the conception of gross negligence.<sup>14</sup> This reflects concerns which are prevalent throughout medical law as to excessive deference of the law towards the medical profession.<sup>15</sup> The uncertainty of the offence provides a platform for this deference to manifest itself and is problematic for the legitimacy of criminal procedure. Witnesses and juries at trial act *ultra vires* by interpreting and informing the legal definition of gross negligence, which is contradictory to the overriding aim of justice.

The vast scope for ambiguity in the *Adomako* test undermines the key principle of legal certainty within the criminal law. The lack of a definition of 'grossness' means that the law of medical manslaughter cannot adequately inform healthcare professionals' conduct and it is difficult, as Brazier and Alghrani assert, to advise as to when negligence may 'cross the barrier' between civil and criminal liability.<sup>16</sup> It is therefore almost impossible to see how the use of the *Adomako* test to determine liability for gross negligence manslaughter is conducive to justice, given that its lack of certainty promotes inconsistency and leads to arbitrary decision making in the criminal courts.

## **2.2 Problems with prosecution policy**

Whilst the *Adomako* test gives rise to considerable ambiguity, this problem of uncertainty arises well before cases of medical manslaughter reach the courtroom. Quick's 2006 study<sup>17</sup> is very useful in conveying the sentiments of those who implement the test, through interviews with four senior prosecutors who have experience of gross negligence manslaughter prosecutions. In the study, issues with defining 'gross negligence' were identified even within the CPS. It was observed that prosecutors themselves had difficulty with articulating their interpretation of 'gross negligence' without simply referring to

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<sup>14</sup> O Quick 'Medicine, mistakes and manslaughter: A criminal combination?' [2010] 69 CLJ 186.

<sup>15</sup> See Brazier and Miola, 'Bye Bye Bolam: A Medical Litigation Revolution?' (2010) 8(1) Medical Law Review 85; Mulheron R, 'Trumping Bolam: a critical legal analysis of Bolitho's 'gloss'' [2010] 69(3) CLJ 609.

<sup>16</sup> M Brazier and A Alghrani, 'Fatal Medical Malpractice and Criminal Liability' (2009) 25 Professional Negligence 49.

<sup>17</sup> Quick (n 2). Statistical analysis was conducted of all known cases of medical manslaughter since 2000. Additionally, four senior prosecutors with experience in handling medical manslaughter cases were interviewed at the York office of the CPS Directorate in July 2004.

badness and its synonyms.<sup>18</sup> The fact that even those involved in enforcing the criminal law struggle with the offence and the *Adomako* test suggests that there are fundamental issues within it which require clarification. Indeed, it is hard to comprehend how the offence is to be understandable to a jury made up of laypeople and even to medical practitioners themselves if even those well versed in the criminal law cannot properly understand it.

Additionally, there seems to be little evidence of a solid prosecution policy in this morally charged area of law, as prosecutors emphasised the importance of experience and 'gut feeling'<sup>19</sup> in their pursuit of criminal liability for medical manslaughter. Prosecutors were also seen to be somewhat reliant on their own personal 'moral frames' to prosecute practitioners about whom there was a lack of stored comparative information regarding their conduct.<sup>20</sup> Although Hawkins perceives individual moral framework to be inherent in all prosecutorial discretion,<sup>21</sup> it is here argued that a culture of arbitrary decision making at the prosecution stage exacerbates the uncertainty of the offence and impairs transparency, doing very little to invoke justice.

Quick's study also uncovered a greater interest on the part of the CPS to prosecute cases with repeated failures and decisions to ignore warnings, though there have been some cases of momentary blunders which have been prosecuted.<sup>22</sup> It is certainly the logical approach for the CPS to pursue prosecutions in this manner in line with the concept of culpability, however it is here suggested that a 'habit' or observable pattern in prosecutions is not enough and undermines transparency. Quick makes a compelling comparison<sup>23</sup> of the prosecutorial approach towards medical manslaughter with the case of *R (On the application of Purdy) v DPP*.<sup>24</sup> In Purdy's case, concerns as to the certainty

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<sup>18</sup> *ibid* 442.

<sup>19</sup> *ibid* 440.

<sup>20</sup> *ibid* 441

<sup>21</sup> K Hawkins, *Law as a Last Resort: Prosecution Decision Making in a Regulatory Agency* (OUP 2002) 52.

<sup>22</sup> Quick (n 2) 440.

<sup>23</sup> Quick (n 14) 190.

<sup>24</sup> [2009] UKHL 45, WLR 403.

of the application of the law on assisted dying led to the Director of Public Prosecutions issuing a new prosecution policy in this area,<sup>25</sup> clarifying the factors which are considered by the CPS in the decision to prosecute. Such prosecution policies also exist in other areas of the criminal law, such as for cases of domestic violence<sup>26</sup> and rape.<sup>27</sup> It seems that these prosecution policy guidelines seem to be distributed specifically where there is a need to protect vulnerable parties. Given that doctors are vulnerable to the law of medical manslaughter purely by their role as healthcare professionals and the sensitive nature of their work, it follows that the issue of prosecution policy guidelines for gross negligence manslaughter might better provide transparency to properly inform their behaviour, thus promoting certainty and hence, justice.

Brazier et al<sup>28</sup> have suggested that the provision of a clear prosecution policy may assist in ensuring that the only cases which come to trial are those with robust and compelling expert evidence to support the finding of 'grossness'. This might also help to address the overriding difficulty suggested in Quick's study of the CPS in contending with the framework of medical manslaughter; he notes that there is some unease with bringing the full force of prosecution upon individuals whose errors have catastrophic consequences.<sup>29</sup> This scepticism even amongst prosecutors suggests that there are fundamental problems in the law which result in excessive punishment of professionals who work in some of the most stressful and precarious environments, which is contrary to the fair distribution of justice.

It certainly appears that the reservations of the CPS towards applying the *Adomako* test, and their difficulty in understanding it conceptually, highlight significant underlying issues with the law. Given the apparent prevalence of moral intuition in decision-making, it seems that the prosecution stage cultivates the uncertainty which the offence invites.

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<sup>25</sup> Director of Public Prosecutions, Policy for Prosecutors in Respect of Cases of Encouraging or Assisting Suicide, February 2010, updated October 2014

<sup>26</sup> Director of Public Prosecutions, Domestic Abuse Guidelines for Prosecutors, December 2014.

<sup>27</sup> Director of Public Prosecutions, CPS Policy for Prosecuting Cases of Rape, September 2012.

<sup>28</sup> Brazier, Devaney, Griffiths, Mullock, and Quirk, 'Improving healthcare through the use of 'medical manslaughter'? Facts, fears and the future' (2016) 22 *Clinical Risk* 88, 91.

<sup>29</sup> Quick (n 3) 441.

Whilst the general approach of the CPS in searching for blame and culpability when prosecuting is consistent with wider criminal law and the ethical cornerstones of criminal justice and undoubtedly a favourable approach, the absence of any clear policy leads to arbitrariness. This lack of transparency and certainty simply exacerbates the shortcomings of the judicial approach to medical manslaughter and is detrimental to justice.

### **2.3 Culpability**

The attitudes of the prosecutors in Quick's study emulate a prominent criticism amongst academics as to the focus of the law on medical manslaughter upon harm rather than moral culpability.<sup>30</sup> The fact that prosecutors recognise this ethical pitfall and actually search for blameworthiness when bringing a case demonstrates the incongruity of the offence with key principles of justice.

The issue lies in the fact that there is no distinction in law between those doctors who have made a catalogue of poor decisions and display incompetency, and those who make momentary errors under pressure or because of systematic failings. The case of Drs. Sullman and Prentice, whose appeals were heard in *Adomako*, provides a very clear example of good doctors who have been ensnared by the unrefined law in this area. The pair were junior doctors instructed to perform a young boy's chemotherapy regime, and, through inexperience and poor supervision, administered the wrong drug into the boy's spine. The boy died and both doctors were convicted of manslaughter at trial – it mattered little in the eyes of the law that they were 'far from being bad men', as their momentary error rendered them criminals.<sup>31</sup> Similarly, in 2009 Dr Ubani was convicted in his home country of accidentally killing a patient in England whilst working as an out of hours doctor. He had been flown to England under 'tremendous stress' and exhausted, and had not received adequate general training or information on the medication he incorrectly administered.<sup>32</sup> If these cases are contrasted to ones of blatant negligence,

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<sup>30</sup> See, for example, H Quirk, 'Sentencing white coat crime: the need for guidance in medical manslaughter cases' (2013) *Criminal Law Review* 871; Kazarian et al (n 4); Quick (n 14).

<sup>31</sup> The trial judge, quoted M Brazier and A Alghrani (n 16) 56. The doctors' convictions were overturned upon appeal.

<sup>32</sup> Despite the CPS' request for extradition, Dr Ubani has not been prosecuted in the UK. See Care Quality Commission, 'Investigation into the out of hours services provided by Take Care Now', July 2010:

such as Dr Adomako, who failed to notice a dislodged oxygen tube in the course of surgery for almost five minutes, then the shortcomings of the current law are undeniable.

The law of gross negligence manslaughter has been criticised for its 'incoherent and unjust' punishment of doctors simply owing to the inherently risky work which they perform.<sup>33</sup> Even some prosecutors see it as 'wrong' to 'pillory' doctors because of the dangerous nature of their job.<sup>34</sup> There have even been calls from some academics to abolish the offence altogether.<sup>35</sup> However, this would be a step too far, and would surely undermine the purpose of the criminal law as a device with which to maintain order if doctors could cause death without repercussion. Cases such as *Adomako* and that of Dr Sinha, who administered a fatal overdose of morphine to a patient with kidney failure,<sup>36</sup> have made it clear that there is a need for some criminal sanction on poor doctoring.

### 2.3.1 *Recklessness and culpability*

But it is perhaps the continued affirmation of objectivity in the test for gross negligence manslaughter which leads to an uncompromising and unjust application of the law. It was confirmed in *Attorney-General's Reference (No. 2 of 1999)*<sup>37</sup> that the test is objective, with Rose LJ stating that, '...evidence of his state of mind is not a prerequisite to a conviction for manslaughter by gross negligence'<sup>38</sup>. This persistent rejection of subjectivity fails to take account of the human nature of error and of whether or not the defendant truly had a 'guilty mind'. The enforcement of a consequence-based offence such as gross negligence manslaughter again seems to run contrary to essential principles of the criminal law, namely the requirement for culpability.<sup>39</sup>

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[http://www.cqc.org.uk/sites/default/files/documents/20100714\\_tcn\\_summary.pdf](http://www.cqc.org.uk/sites/default/files/documents/20100714_tcn_summary.pdf)  
(accessed 22nd September 2017)

<sup>33</sup> M. Kazarian, D. Griffiths and M. Brazier 'Criminal responsibility for medical malpractice in France' (2011) 27 *Professional Negligence* 185.

<sup>34</sup> *Quick* (n 2) 440

<sup>35</sup> *ibid.*

<sup>36</sup> [2004] 328 *British Medical Journal* 726.

<sup>37</sup> *Attorney General's Reference No 2 of 1999* [2000] 3 All ER 182.

<sup>38</sup> *ibid* 186.

<sup>39</sup> Criminal Justice Act 2003, s143(1) asserts legal requirement for culpability.

Whilst this is undeniably problematic, it does seem that a requisite of some moral blame has remained within the peripheral of the scope of the law on medical manslaughter. Quick has commented that the law is 'out of step' with the modern shift towards subjectivism in the criminal law,<sup>40</sup> however this may increasingly not be the case. Lord Mackay advised in *Adomako* that, 'it is perfectly open to the trial judge to use the word 'reckless' in its ordinary meaning as part of his exposition of the law if he deems it appropriate', which suggests that recklessness may come into play within the legal test. Furthermore, subjectivity was affirmed by the Court of Appeal in *Misra*, where it was concluded that the defendant's state of mind may be a 'critical factor' in their guilt, despite the apparently objective test.<sup>41</sup> The trial judge's direction as to the grossness of the conduct was also upheld, stating that negligence must be 'truly exceptionally bad, which showed... indifference to an obviously serious risk to the life' of the patient.<sup>42</sup> This idea of 'indifference' indicate that judges may be looking for something more than mere negligence: the notion that a risk was recognised and ignored, rather than just an accident with disastrous consequences.

Suggestions of recklessness in the case law on medical manslaughter demonstrates a similar approach to that taken by the CPS, which places some emphasis on blameworthiness. Whilst, as previously stated, this is a more favourable approach than the current one, there remain inconsistencies in the application of the law, as the test has been confirmed as an objective one which hinges on the outcome of the defendant's conduct rather than his moral responsibility for this outcome.<sup>43</sup> These inconsistent and sporadic allusions to recklessness simply enhance the uncertainty of medical manslaughter and allow ambiguity to permeate through the law. In order for the application of gross negligence manslaughter to be justifiable in serving the needs of justice, the law needs to be properly clarified and sufficiently certain. The adoption of a test based on recklessness has been advocated by numerous critics, with Glanville

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<sup>40</sup> Quick (n 2) 423.

<sup>41</sup> 'Evidence of his state of mind is not a prerequisite to a conviction for gross negligence': A-G Ref No 2 of 1999 (n 37) per Rose LJ.

<sup>42</sup> *Misra* (n 9) [25].

<sup>43</sup> A-G Ref No 2 of 1999 (n 38) per Rose LJ.

Williams concluding that recklessness is 'socially superior' to gross negligence,<sup>44</sup> and Brazier and Alghrani proposing a modified test which considers moral blame,<sup>45</sup> and it is argued that the affirmation of this approach by the judiciary would best balance harm with culpability. A test based on culpability is ultimately the most logical and defensible way for the law to achieve justice, and mitigates the harshness of the law upon doctors who simply do their best in stressful and demanding circumstances.

### 2.3.2 *Sentencing and culpability*

In making a legal distinction between flagrant negligence and fleeting mistake on the part of healthcare practitioners, there may also be a role for sentencing to ensure that justice is done. Quirk puts forth a very compelling argument for the need of the sentencing approach towards gross negligence manslaughter to take into account the particular situation of medical practitioners and the element of culpability.<sup>46</sup> She criticises the fact that sentencing in recent cases of medical manslaughter have failed to balance properly harm and culpability, despite the new guidelines in s 143 of the Criminal Justice Act 2003, which states that, 'in considering the seriousness of any offence, the court must consider the offender's culpability in committing the offence and any harm which the offence caused, was intended to cause or might foreseeably have caused'.<sup>47</sup> In *R v Garg*,<sup>48</sup> the Court of Appeal focussed on the harm rather than the culpability of the defendant, demonstrating that more punitive sentences are being handed down to doctors to reflect the seriousness of harm caused and 'the fatal consequences of a criminal act'.<sup>49</sup> Quirk's concerns are very much justified, as sentences are considerably harsh given that they do not take into account the precarious nature of medical practitioners' work, with Lord Judge CJ stating that 'there is no special exception [to sentencing tariffs] where

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<sup>44</sup> Glanville Williams, *Textbook of Criminal Law* (2nd edn, London 1983) 100.

<sup>45</sup> Brazier and Alghrani (n 16).

<sup>46</sup> H Quirk, 'Sentencing white coat crime: the need for guidance in medical manslaughter cases' (2013) *Criminal Law Review* 871.

<sup>47</sup> *Attorney General's Reference No 2 of 1999* [2000] 3 All ER 182, 186.

<sup>48</sup> *R v Sudanshu Garg* [2012] EWCA Crim 2520.

<sup>49</sup> *ibid* 44 (Lord Judge CJ, citing Sweeney J in *R v Holton* [2010] EWCA Crim 934).

manslaughter occurs in the context of gross medical negligence'.<sup>50</sup> Such an approach reflects the harshness of the law of medical manslaughter and is based on what Merry and McCall Smith condemn as a 'denial of the nature of human error'.<sup>51</sup> Such an inflexible approach to the moral culpability of medical practitioners cannot possibly serve the interests of fairness or justice, when those who make momentary errors in the heat of the moment are punished to the same degree as those who continually violate their duty of care.

There seems to be a missed opportunity for sentencing to reflect the spectrum of culpability in cases of medical manslaughter and the intense medical environment, rather than the application of a 'one size fits all' approach which is unduly severe on those who are simply doing their best. Quirk makes a comparison to the sentencing guidelines for the offence of causing death by dangerous driving;<sup>52</sup> although these do not necessarily translate into the clinical setting, factors such as awareness of risk, the duration of the negligence and the relative responsibility of others should be taken into account when creating an overall picture of the defendant's culpability.<sup>53</sup> The provision of such guidelines would again promote transparency and certainty in ensuring that justice is done, and would improve fairness in the punishment of medical mishap.

## **2.4 Justice**

It is clear that the law on medical manslaughter and the surrounding frameworks of prosecution and sentencing are inadequate to ensure that justice is properly done. Primarily, there is a worrying lack of certainty in the offence which undermines fundamental principles of the law and does not properly inform the conduct of the medical profession. As Norrie has argued, 'grossness depends on the way the conduct is socially and morally perceived, rather than its inherent quality';<sup>54</sup> thus, we see how the absence of a clear definition of 'grossness' in the *Adomako* test produces too much scope

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<sup>50</sup> *R v Garg* (n 48) [45].

<sup>51</sup> A Merry and A McCall Smith, *Merry and McCall Smith's Errors, Medicine and the Law* (CUP 2001) 104.

<sup>52</sup> Contrary to Road Traffic Act 1988, s 1.

<sup>53</sup> Quirk (n 46) 882.

<sup>54</sup> A Norrie, *Crime Reason and History* (OUP 2014) 85.

for interpretation in the courtroom. This is exacerbated by the lack of transparency and consistency within the CPS, and the argument for the provision of clear prosecution guidelines is very compelling if we aim to reduce arbitrary decision making.

The legal framework of gross negligence manslaughter is undeniably problematic, but the law is unduly harsh on the medical profession insofar as it fails to distinguish between doctors who have shown blatant incompetence, and those who make momentary errors. This disregard for the moral culpability of defendants means that the law is excessively harsh on those defendants who have made fleeting errors under the pressure of a clinical environment whilst trying to do their best for the patient. Whilst there is no justification for the law to provide the medical profession with favourable treatment as such, there ought to be mechanisms in place to provide flexibility and allow for the demanding circumstances in which doctors work. The argument put forth by Quirk to 'rediscover recklessness'<sup>55</sup> is convincing in that it puts a greater emphasis on the culpability of doctors, rather than the harm caused, and reflects trends in the judiciary and CPS to look for some blameworthiness as a requisite for criminal punishment. Similarly, Quirk's suggestions as to the role of sentencing in representing the 'spectrum' of culpability and mitigating the severity of the law on doctors<sup>56</sup> are persuasive when we consider the ultimate goals of the law in fairness and justice.

It is difficult to see how a law which is riddled with uncertainty and arbitrariness and undermines the core principle of culpability can possibly be conducive to justice. Whilst the numbers of convictions for medical manslaughter are relatively low, one cannot help but question whether the fates of medical professionals such as Drs Sullman and Prentice, the inexperienced and ill-supervised junior doctors, might have been different if a greater focus had been placed upon certainty and culpability. If we are to say that justice is truly being done, then the law must develop beyond its current drawbacks to ensure that only those whose conduct is so bad as to warrant a conviction are brought into the dock.

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<sup>55</sup> Quirk (n 14) 188

<sup>56</sup> Quirk (n 46).

### 3 Conclusion

Throughout this essay, it has been argued that the current legal framework of medical manslaughter is unsatisfactory and ineffectual in furthering either justice or patient safety. The application of the law in the courts and at the prosecution stage is unclear and inconsistent, regardless of affirmations of the certainty of the *Adomako* test by the Court of Appeal in *Misra*. There is also a widespread feeling of dissatisfaction from both prosecutors and academics with the failure of the law to distinguish between doctors who have shown blatant incompetence, and those who make momentary errors. This disregard for the moral culpability of defendants means that the law is excessively harsh on those defendants who have made fleeting errors under immense pressure whilst trying to do their best for the patient. While the CPS and courts may attempt to look for moral culpability in the enforcement of the offence, this does not lend itself to transparent justice, and results in arbitrary law, which further fosters uncertainty.

Quick has rightly argued that, 'gross negligence manslaughter suffers from a lack of intelligent (and clear) communication that we might legitimately expect from the law',<sup>57</sup> and this expectation is particularly so given the implications of a criminal conviction for those in the medical profession. This has led to a number of suggested reforms. Arguments to create an offence-specific prosecution policy, such as those for other contentious and ethically-charged areas of law such as assisted suicide<sup>58</sup> are compelling, as this would help to alleviate some uncertainty surrounding the offence and promote transparency. So, too, are proposals for a recklessness-based offence, which would, again, clarify the current test, as well as provide a greater focus upon moral culpability by allowing for genuine error.

Whilst this essay has not sought to argue that the law should provide the medical profession with favourable treatment, it has demonstrated that the law is stringent in response to medical mistake, leading to excessive harshness upon doctors working in high-risk settings. The reforms discussed may be able to introduce some flexibility into the application of the law on medical manslaughter, and the provision of new sentencing

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<sup>57</sup> Quirk (n 14) 190.

<sup>58</sup> Quirk (n 14) 190.

guidelines based on numerous factors of the defendant's culpability<sup>59</sup> may also contribute to the pursuit of proper justice in this respect.

The inflexibility of the law towards doctors is not only felt within the justice system, however, and the ramifications of prosecutions of medical manslaughter are extremely detrimental to patient safety. The approach of the criminal law stigmatises error and does not properly differentiate between unintentional errors and blameworthy violations, which inhibits openness and the ability to learn from error. There are also suggestions that the fear of criminal sanction encourages 'defensive doctoring'<sup>60</sup> which will inevitably hinder development and may involve acting against patients' best interests to avoid liability.

In light of these drawbacks, it is truly questionable whether the criminal law has a role to play in the medical sphere at all. The 'deterrent' justification for the use of the criminal law is extremely limited by the fact that errors are innately unintended and, as such, cannot be deterred, and so most cases of medical error will happen regardless of intent by the criminal law to discourage error. Extensive research into human factors<sup>61</sup> undertaken in an attempt to maximise patient safety is undermined by the rigid approach of the law and its focus upon harm rather than culpability, and the framework of gross negligence manslaughter demonstrates a somewhat naïve approach to error which is at odds with the realities of clinical practice. Furthermore, as Brazier et al have pointed out, 'the adversarial nature of the criminal trial does not lend itself to the task of identifying what lessons can be learned from a tragic and unexpected medical event'.<sup>62</sup> It is certainly arguable that the criminal law serves no role in the healthcare context, particularly as there are professional bodies and civil redress to serve the purposes of regulating and ensuring accountability. Considering the aforementioned reform suggestions and recent

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<sup>59</sup> Quirk (n 46).

<sup>60</sup> See M Sonal Sekhar and N Vyas, 'Defensive Medicine: A Bane to Healthcare' (2013) *Ann Med Health Sci Res* 3(2) 295.

<sup>61</sup> See, for example, X Mao, P Jia, L Zhang, P Zhao, Y Chen, M Zhang, *An Evaluation of the Effects of Human Factors and Ergonomics on Health Care and Patient Safety Practices: A Systematic Review* (2015) 10(6) *PLoS ONE*; and S Wright, G Crofts, TC Uter, Speechley SD, 'Errors and adverse events in dentistry – a review' (2017) 44(10) *General Dental Practice* 979.

<sup>62</sup> Brazier et al (n 28) 92.

new offences of ill-treatment and wilful neglect, it is important that any reform in this area acknowledges the inevitability of error in healthcare and uses this as a mechanism for improvement rather than punishment. Given current strains on public resources, particularly in the NHS, it is important for the law to support, rather than hamper, the preservation of patient safety.

It is unfortunate that the law of gross negligence manslaughter is so flawed and is damaging to both justice and patient safety. The harshness of the law upon doctors and the fear which it instils within them is unsustainable in practical terms, and it is hoped that the law will soon develop a clear and coherent approach to medical manslaughter which reinforces and advances the achievement of justice and patient safety.

# Hybrid Public Authorities: 'Contracting out' and the Lacuna in the Protection of Human Rights

JACK BEADSWORTH\*

## 1 Introduction

Attitudes towards the Human Rights Act 1998 ('HRA') are uniquely dichotomic. They are generally either totally in favour of its retention as it stands, or in favour of its total repeal and/or replacement. In this article, however, I will be adopting a middle ground in arguing for an amendment to the HRA. The amendment concerns the scope of the HRA's ambit with regards to the 'horizontal' effect of 'hybrid public authorities', currently delineated by sections 6 (3) (b) and 6 (5) of the HRA:

Section 6(3)(b): In this section, 'public authority' includes - any person certain of whose functions are functions of a public nature; section 6 (5): In relation to a particular act, a person is not a public authority by virtue only of subsection (3) (b) if the nature of the act is private.

The circumstances in which these provisions operate are becoming increasingly common as 'government by contract', whereby government authorities discharge their duties by delegating performance via a contract with a private body, has come to dominate the discharge of public services. The command and control model of pre-1980s public regulation has been replaced by privatisation, PFIs and 'contracting out'. A dearth in accountability has thus appeared and the law is, as it currently stands, unable to reconcile modern methods of government with a commitment to ensuring the protection of human rights. Section 6 (3) (b) has, combined with a restrictive judicial approach, created a lacuna in the law; a black hole into which human rights claims disappear without redress. This lacuna commonly arises in situations of 'contracting out', as exemplified by the following: *Authority* enters into a contract with *Provider* to perform services *Authority* is under a statutory duty to perform/discharge. *Provider* breaches the ECHR rights of *Victim* (commonly article 8 of the ECHR). On the current approach, very often *Victim*

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\* University of Law, Birmingham. Thanks must go to Professor Sanja Bogojevic (Lady Margaret Hall, Oxford) for first introducing me to this issue and for sparking my love of public law.

cannot obtain redress. *Provider* has breached the right, but is rarely captured by section 6 (3) (b) so cannot be subjected to a claim. Whilst *Authority* can be sued under the Act as a public body, *Authority* itself has not breached *Victim's* rights. The 'contracting out' serves to preclude any meaningful action against *Authority* as claims that could have been made if it had performed the service in-house will rarely be possible where it has contracted this out<sup>1</sup>. Simply put, the *Authority* has 'contracted out' of its human rights obligations. This may well be leaving the UK in breach of its international obligations to protect the Convention rights of all those in the jurisdiction and to provide mechanisms for redress where those rights are breached.<sup>2</sup>

The optimal solution to ensuring that human rights protection is not undermined by modern methods of government is, I shall argue, by amending the HRA. As will be shown below, it is the text of the Act itself that has created the problem outlined above. The provisions concerning hybrid public authorities are vague, confusing and insufficiently horizontal in their effect. The relationship between s.6 (3) (b) and s.6 (5) is somewhat unclear, and no underlying principle is identifiable from its wording. As a result, a set of seemingly arbitrary factors have been applied inconsistently, the courts have misapplied s.6 (5), and thus failed to acknowledge that the method of delivering a public service is irrelevant to rights protection<sup>3</sup>. The amendment I propose is to replace the text of section 6 (3) (b) and section 6 (5) with: *'When a public body delegates functions that the public body is under a duty to perform, those functions and the private body delivering them are considered public for the purposes of the Human Rights Act'*.

In Part I of this article I will provide the theoretical basis and normative justifications for further broadening the scope of human rights protections beyond the strict confines of the State-Individual relationship, and consider its compatibility with the HRA framework. Part II will outline the conceptual apparatus of 'government by contract' and its relationship with the HRA, examine the case law on section 6 (3) (b) that has given rise to the lacuna in rights protection, and detail the deficiencies in the judicial reasoning that

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<sup>1</sup> Paul Craig, 'Contracting Out, the Human Rights Act and the Scope of Judicial Review' (2002) 118 LQR 551, 568.

<sup>2</sup> *Costello-Roberts v UK* (1993) 19 EHRR 112.

<sup>3</sup> Craig (n 2) 554.

justify a change in the law. Finally, in Part III I will consider a number of possible solutions to the present problem. I shall conclude that the optimal solution is the amendment to the HRA stated above.

## **2 Part 1**

When arguing for extending human rights protections and the scope of the HRA beyond the traditional State-Individual paradigm, one must provide normative justifications for the horizontal (individual-individual) application of an area of law traditionally viewed as limited to vertical application (State-individual).<sup>4</sup>

### **2.1 Horizontality in legal theory**

Outside the confines of the HRA, strong arguments can be found in the jurisprudence on the public-private divide for the horizontal application of human rights protections and obligations. Whilst it is beyond the scope of this article to consider in detail all justifications for horizontality, the major premise behind horizontality is, as Hunt writes: 'the state is constitutive of all legal relations, because law is itself a construct of the state....relations between private individuals as well as relations between individuals and the state are moulded by both legislation and common law, and that the state lurks behind both forms of law'.<sup>5</sup> On this view, one must question why infringements of the most basic values should be tolerated simply because the violator is a private entity rather than a government authority. Indeed to understand why this cannot be tolerated, one only needs recall the vast history of private discrimination and segregation in the USA, or, for a more recent example closely linked to the cases discussed in this article, the widespread abuses of elderly patients in private care homes<sup>6</sup>.

Once it is recognised that the State is present in all legal relations between private individuals it becomes artificial and dishonest to constrain the reach of fundamental rights

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<sup>4</sup> For example, international instruments such as the ECHR only impose obligations on States. See also Sir Richard Buxton, 'The Human Rights Act and Private Law' (2000) 116 LQR 48.

<sup>5</sup> Murray Hunt, 'The "horizontal effect" of the Human Rights Act' (1998) PL 423, 424.

<sup>6</sup> Equality and Human Rights Commission, *Close to home – an inquiry into older people and human rights in home care* (2011).

protection by limiting it to the so-called public sphere<sup>7</sup>. Restricting human rights protections solely to vertical relationships (State-individual) fails to acknowledge this truth, and is further incapable of adapting to the re-conceptualisation of the 'State' as neoliberalism increasingly involves private entities in the performance of public services, blurring the public-private divide upon which vertical effect heavily relies. The cases on 'contracting out' discussed below demonstrate the impossibility of sensibly and accurately separating the public sphere from the private sphere.

The premise that the State is constitutive of all legal relations thus provides a principled basis for horizontality as it reveals the dishonesty in preserving human rights protections to the public sphere. Furthermore, the growing involvement of private entities in the performance of public functions<sup>8</sup> provides a normative justification. Just as State inaction led to abuses by private parties in the past<sup>9</sup>, so too does the delegation of the performance of public functions to private parties provide fresh ground for human rights violations to go without redress. With the private sector now playing a fundamental part in the performance of public functions, the horizontal application of human rights law is necessary to meet the modern challenges presented by the modern methods of government.

## **2.2 Horizontality of the Human Rights Act 1998**

Returning to the HRA, it is not simply that horizontality is normatively justified in legal theory, but it is perfectly compatible with the principles and framework of the HRA. The policy and circumstances behind enacting the HRA evince its horizontality. As the Joint Committee on Human Rights (JCHR) stated in 2004:

The Human Rights Act was enacted at a time when the map of the public sector had been redrawn, as privatisation and contracting-out had, over several decades, increased the role of the private and voluntary sectors in the provision of public services. This development was acknowledged and considered by those who drafted

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<sup>7</sup> Hunt (n 6) 425.

<sup>8</sup> Joint Committee on Human Rights, *The Meaning of Public Authority under the Human Rights Act 1998* (Seventh Report of the 2003-04 session) para 4.

<sup>9</sup> Erwin Chemerinsky, 'Rethinking State Action' (1985) 80 NWUL Rev 503.

and debated the Act. In particular, it was clearly envisaged that the Act would apply beyond activities undertaken by purely State bodies, to those functions performed on behalf of the State by private or voluntary sector bodies, acting under either statute or under contract.

Furthermore, as Wade argues, the spirit of the HRA is influenced by the normative character of modern human rights which are now 'general principles of justice'<sup>10</sup> and have 'a universal and fundamental character which ought ... to be operative erga omnes'.<sup>11</sup>

The text of the HRA confirms the spirit and policy driving its enactment. As Hunt writes, 'the text of the Act...points irresistibly towards the HRA being interpreted as applying the ECHR to all law, including the common law applicable in private disputes, and therefore being horizontally applicable to a significant degree'.<sup>12</sup> Section 3's obligation is clearly not confined to 'vertical cases', thus suggesting that the courts are required by the Act to apply Convention rights through statutory interpretation in cases of a 'horizontal' nature as well.<sup>13</sup> Section 6, with its creation of 'hybrid public authorities', further exemplifies the HRA's scheme of horizontality.

It should be noted, however, that the HRA does not provide 'direct horizontal effect' in the sense of creating new causes of action in private law<sup>14</sup>. Nor does section 6 make any sanction available against a court for failure to act in accordance with Convention rights in 'horizontal' cases<sup>15</sup> (whether or not the HRA should provide direct horizontal effect is beyond the remit of this article, which is limited to indirect horizontal effect in cases of 'contracting out'). Whilst Sir Richard Buxton has denied that the HRA has any horizontal effect on the basis that the ECHR, whose content has been replicated in

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<sup>10</sup> Sir William Wade, 'Horizons of Horizontality' (2000) 116 LQR 217, 224.

<sup>11</sup> *ibid.*

<sup>12</sup> Murray Hunt (n 6) 442.

<sup>13</sup> Nicholas Bamforth, 'The true "horizontal effect" of the Human Rights Act 1998' (2001) 117 LQR 34, 37.

<sup>14</sup> *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22, [2004] 2 AC 457 [132] (Lady Hale).

<sup>15</sup> Bamforth (n 14) 38.

domestic law, is only applicable against the State,<sup>16</sup> it is clear from s.3 that the HRA 'envisages a wider role for such rights (or values)'.<sup>17</sup> The HRA, whilst not having full 'direct horizontal effect', does have 'indirect horizontal effect'. As will be shown, however, this framework of horizontal effect has not always been fully realised.

### **3 Part II**

#### **3.1 Government by contract**

Before considering the relevant case law, it is important to first understand the context in which the cases have arisen. The 1980s saw an increasing emphasis by the government on the notion of 'contracting out': inviting private companies to tender for the provision of a service which had hitherto been provided by the government<sup>18</sup>. Part of this shift in the administration of public services was the phenomena of 'government by contract'. Government at all levels was transformed into a model based on private sector management, part of which entailed the use of contracts to structure discretion [in the provision of public services] through the simulation of markets rather than through ordinary administrative law doctrines. Private bodies became integral in performing public functions on behalf of public authorities. Arm's Length Management Organisations now manage an estimated 420,000 homes on behalf of local authorities,<sup>19</sup> 1.9 million homes are owned by Registered Social Landlords (RSL),<sup>20</sup> and 95% of all care homes are provided by the private sector.<sup>21</sup> The scale of private sector involvement in the provision of public functions on behalf of public authorities is so vast that, as argued above, it has become extremely difficult to accurately and sensibly depict where the public sphere

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<sup>16</sup> Buxton (n 5) 50.

<sup>17</sup> Bamforth (n 14) 37.

<sup>18</sup> Anne Davies, *Accountability: A Public Law Analysis of Government by Contract* (OUP 2001) ch 1.

<sup>19</sup> 'ALMOs' (National Federation of ALMOs) <<http://www.almos.org.uk/almos>> accessed 16 July 2019.

<sup>20</sup> Dawn Foster, 'Who lives in the 4.1 million social homes in England and Wales?' *The Guardian* (London, 18 November 2015).

<sup>21</sup> Rob Davies, 'Profit-hungry firms are gambling on social care. Are the stakes too high?' *The Guardian* (London, 28 February 2018).

ends and the private sphere begins. There are very few signs that this method of governance will be reversed in the near future.

This method of governance and the blurring of the public and private sphere was inevitably going to conflict with and put a strain on human rights protections. The private sector model of governance based on contract is in almost direct conflict with the public law minded 'rights culture' and the indirect horizontal effect of the HRA. The contractualisation of government threatens to reinstate private law paradigms at the constitutional level, and threatens to shrink the province of public law (and application of ECHR rights via the HRA) as the private sphere inevitably expands.<sup>22</sup> It is unclear whether it is the private law entering the public realm via 'contracting out', or the public law entering the private realm via the 'rights culture' and horizontal effect. Moses J first judicially recognised this 'collision between public law and private rights'<sup>23</sup> in *R v Servite House and Wandsworth LBC, ex p. Goldsmith* [2001] ACD 4, and that the case (in which an RSL decided to close a residential care home it had managed on behalf of the local council) 'demonstrates an inadequacy of response to the plight of these applicants now that Parliament has permitted public law obligations to be discharged by entering into private law arrangements'.<sup>24</sup> In sum, the adequacy of the horizontality of the HRA, vital to human rights protection, is threatened by 'government by contract'.

### **3.2 The case law**

The inadequacies of s. 6 HRA to fully realise the need for horizontality are borne out in a number of high profile cases in which an individual was unable to obtain redress against a private company contracted by the local authority to perform certain functions (generally associated with the provision of social housing and care homes).

In *R v Servite House*, the local council discharged its duty to G by placing her in a residential home run by S, as it was entitled to do under the National Assistance Act 1948.

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<sup>22</sup> Murray Hunt, 'Constitutionalism and the Contractualisation of Government' in M Taggart (ed), *The Province of Administrative Law* (Hart Publishing 1997).

<sup>23</sup> *R v Servite House ex parte Goldsmith* [2000] 5 WLUK 327 [105] (Moses J).

<sup>24</sup> *ibid.*

G lived in the home for four years, until in 1999 S decided to close it for financial reasons. Moses J held that although S could be said to be carrying out a public function, the relationship between S and the council was purely a commercial one to which the court could not affix a public law duty.<sup>25</sup> Keith J in *R v Partnerships in Care Ltd* [2002] 1 WLR 2610 held that the decision by managers of a private psychiatric hospital to change the focus of the care of a patient detained under the Mental Health Act 1983 was of a public nature as it was 'a body upon whom important statutory functions have devolved'<sup>26</sup> and on the basis of the public interest in the treatment of those detained under the Mental Health Act 1983.<sup>27</sup>

In the case of *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48, the local housing authority granted a weekly tenancy to D before transferring the property to Poplar Housing, a RSL. Poplar Housing proceeded to notify D that possession of the property was required as it had been decided that she had become intentionally homeless. Lord Woolf CJ adopted an institutional approach, focusing on the links between Poplar Housing and the local housing authority: 'the more closely the acts that could be of a private nature are enmeshed in the activities of a public body, the more likely they are to be public'<sup>28</sup>. His Lordship was also concerned about over-extending the reach of s. 6(3)(b):

The fact that a body performs an activity which otherwise a public body would be under a duty to perform cannot mean that such performance is necessarily a public function...if this was the case, then when a small hotel provides bed and breakfast accommodation as a temporary measure, at the request of a housing authority that is under a duty to provide that accommodation, the small hotel would be performing public functions and required to comply with the Human Rights Act 1998. This is not what the Human Rights Act 1998 intended.<sup>29</sup>

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<sup>25</sup> *ibid.*

<sup>26</sup> *R v Partnerships in Care Ltd* [2002] EWHC 529 (Admin), [2002] 1 WLR 2610 [17] (Keith J).

<sup>27</sup> *ibid* [24] (Keith J).

<sup>28</sup> *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48, [2001] 3 WLR 183, 69 (Woolf LCJ).

<sup>29</sup> *ibid* 67 (Woolf LCJ).

Woolf CJ also gave the Court of Appeal's judgment in *R (on the application of Heather) v Leonard Cheshire Foundation* [2002] EWCA Civ 366, a case in which the applicant had been placed in a private care home by the local authority and promised a home for life in the care home, only for it to be shut down and its residents relocated. Woolf LCJ held that LCF was not a hybrid public authority as the applicant has contractual rights against LCF, public funding was not determinative of the issue, and LCF 'was not standing in the shoes of the local authority'.<sup>30</sup> In *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37, though the Court rejected that the Church was performing a function of a public nature in taking steps to enforce the defendants' liability for the repair of the chancel, Lord Nicholls held that 'giving a generously wide scope to the expression 'public function' in section 6(3)(b) will further the statutory aim of promoting the observance of human rights values without depriving the bodies in question of the ability themselves to rely on Convention rights when necessary'.<sup>31</sup> His Lordship further adopted a factor based approach, holding that 'factors to be taken into account include the extent to which in carrying out the relevant function the body is publicly funded, or is exercising statutory powers, or is taking the place of central government or local authorities, or is providing a public service'.<sup>32</sup>

The landmark case of *YL v Birmingham City Council* [2007] UKHL 27 concerned the use of a private company by a local authority to provide a care home for a publicly funded resident, L. The local authority, in discharging its duties under s.21 of the National Assistance Act, contracted with the private company for L to be placed in one of their care homes. L was placed in the care home, before the private company subsequently sought to terminate the contract for her care and remove her from the home. L alleged that the private company was a hybrid public authority that had breached her Article 2, 3 and 8 rights under the ECHR. By a judgment of 3-2, the Court rejected that the private company was a public authority under s.6(3)(b). Lord Scott, concerned about re-defining all private bodies a local authority may deal with as hybrid public authorities, adopted a

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<sup>30</sup> *R (on the application of Heather) v Leonard Cheshire Foundation* [2002] EWCA Civ 366, [2002] 2 All E.R [35] (Woolf LCJ).

<sup>31</sup> *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank and Another* [2003] UKHL [2004], 1 AC 546 [11] (Lord Nicholls).

<sup>32</sup> *ibid* [12] (Lord Nicholls).

highly restrictive approach<sup>33</sup>. Lord Mance rejected the institutional approach in *Poplar*,<sup>34</sup> but did not regard the actual provision of care and accommodation for those unable to arrange it themselves as an inherently governmental function,<sup>35</sup> and held that the private and commercial motivation behind the private company's operations pointed against treating it as a person with a function of a public nature.<sup>36</sup> Lord Neuberger also adopted a restrictive approach holding that an activity was not a function of a public nature merely because it was contracted-out as opposed to being provided directly by a core public authority.<sup>37</sup> His Lordship further held that the existence of wide-ranging and intrusive statutory powers may well, however, be determinative in many cases<sup>38</sup>. Finally, the minority of Lord Bingham and Lady Hale both adopted a factor-based approach, but focused on the public interest in the provision of care, the extent of the State's involvement and the use of public funds in determining that the private company's provision of care to L was a function of a public nature.<sup>39</sup>

### **3.3 Analysis**

Many of the cases above are difficult to justify in terms of their results: vulnerable people in care homes or emergency council accommodation have their claims dismissed before there has been any consideration of the substantive issue of whether their rights have been violated. The housing charity Shelter has stated that, in the absence of HRA protection, tenants of RSLs and Housing Authorities have little protection against indiscriminate, unreasonable or disproportionate actions by their landlords.<sup>40</sup> Little more

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<sup>33</sup> *YL v Birmingham City Council* [2007] UKHL 27, [2008] 1 AC 95 [27], [30] (Lord Scott).

<sup>34</sup> *ibid* [105] (Lord Mance).

<sup>35</sup> *ibid* [115] (Lord Mance).

<sup>36</sup> *ibid* [116] (Lord Mance).

<sup>37</sup> *ibid* [144] (Lord Neuberger).

<sup>38</sup> *ibid* [167] (Lord Neuberger).

<sup>39</sup> *ibid* [7], [10], [18] (Lord Bingham) and [65]-[69] (Lady Hale).

<sup>40</sup> Joint Committee on Human Rights Seventh Report (n 9) para 72.

needs to be said about the rights violations taking place in private care homes;<sup>41</sup> violations going without redress as the limited scope of the HRA creates a gap in accountability. Contracting out has deprived thousands of the protections afforded by the HRA.

A number of issues in the reasoning from the case law reveal fundamental problems in the text of the HRA. Three main issues are identifiable:

### 3.3.1 *Counter intuitive premise*

As Craig has identified,<sup>42</sup> the major premise in the Courts is that the fact a body performs an activity which otherwise a public body would be under a duty to perform cannot mean that such a performance is necessarily a public function when the self-same activity is undertaken by a private service provider.<sup>43</sup> However, the major premise is counter-intuitive. It is difficult to see why the nature of a function should alter if it is contracted out, rather than being performed in house. If it is a public function when undertaken in house, it should be equally so when contracted out.<sup>44</sup> The 'absurd case examples'<sup>45</sup> used to justify the premise are mistaken as in many of the examples given, the 'function' contracted to the private body e.g. to clean the council's office, are not of a public nature to begin with so would never fall within s.6(3)(b). Yet the courts' premise is the direct result of and compatible with the text of the HRA. In s.6(3)(b) and s.6(5) there is no mention of the key principle that the public authority is under a duty to perform certain functions, which may be contracted out. It is precisely because the public authority is under a duty to perform these functions that the 'contracting out' confers upon the private body public functions. The HRA fails to make this position clear to the courts.

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<sup>41</sup> Sarah Knapton, 'Abuse and neglect present in nine out of 10 care homes, survey shows' *The Telegraph* (London, 21 March 2018).

<sup>42</sup> Craig (n 2) 551-552.

<sup>43</sup> *Poplar* (n 29); *YL* (n 34) [144] (Lord Neuberger).

<sup>44</sup> Craig (n 2) 556.

<sup>45</sup> *YL* (n 34) [27] (Lord Scott); *Poplar* (n 29) 67 (Woolf LCJ); *Heather* (n 31) [18], [21] (Woolf LCJ).

### 3.3.2 *Arbitrary list of factors*

The courts' premise has also led to the unsatisfactory result of judges articulating great lists of seemingly arbitrary factors to be considered. Without clear guidance on the meaning of 'public function', an incoherent factor-based approach has developed. The existence of a commercial contract,<sup>46</sup> extent of statutory powers,<sup>47</sup> the public interest in the function,<sup>48</sup> the extent of the State's assumption of responsibility,<sup>49</sup> and the presence of private residents<sup>50</sup> have all been considered. Inconsistencies abound amongst the cases. The relevant factors, their weight and the direction they point are deployed in a seemingly random way that appears to be more dependent on the judge's own attitudes<sup>51</sup> than in any principled way in accordance with HRA's policy of horizontality.

*YL* demonstrates this point. The fact that the majority and minority in *YL* considered numerous factors and yet came to radically different solutions suggests that the guidance given by the HRA is vague and incomplete. For example, Lord Bingham and Lady Hale thought that the greater the State's involvement in paying for the function the greater its assumption of responsibility hence the function being of a public nature.<sup>52</sup> In contrast, Lord Neuberger disputed the relevance of the fact that the State had, for 60 years, accepted responsibility to ensure that care was provided to the old, holding that the actual provision of care was a private function even if paid for by a public authority.<sup>53</sup> Furthermore, whilst Lord Bingham considered the detailed contractual arrangements

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<sup>46</sup> *YL* (n 34) [116] (Lord Mance).

<sup>47</sup> *ibid* [167] (Lord Neuberger).

<sup>48</sup> *ibid* [134] (Lord Neuberger) and [67] (Lady Hale).

<sup>49</sup> *ibid* [10] (Lord Bingham).

<sup>50</sup> *Heather* (n 31) [35] (Woolf LCJ).

<sup>51</sup> In *YL* (n 34) Lord Mance, a former commercial lawyer, adopted a free-market starting position ([105]), whilst the liberal Lady Hale took a 'rights protection' starting position ([56]).

<sup>52</sup> *YL* (n 34) [10] (Lord Bingham) and [65] (Lady Hale).

<sup>53</sup> *ibid* [163] Lord Neuberger).

unimportant,<sup>54</sup> Lord Scott in *YL*<sup>55</sup> and Woolf CJ in *Leonard Cheshire*<sup>56</sup> accorded commercial motivations significant weight in pointing away from a public function. It cannot be right that such a variable, random approach was intended by the Parliament when passing the HRA. Yet the arbitrariness and inconsistencies are the inevitable result of a lack of clarity in s. 6(3)(b)

### 3.3.3 *Confusion between function and act*

The lack of clarity in s.6(3)(b) is further compounded by s.6(5) qualifying 'public function' with 'private acts' i.e. not a public authority solely by virtue of the function being public if the act of performing it is private. S.6(5) has been misapplied in the cases in a way to undermine s.6(3)(b) and the horizontality of the HRA. It cannot be right that whenever a public function is performed by a private company under a contract with a public authority, the performance is an act that is private by virtue of its performance by a private company under a private contract. That would render s. 6(3)(b) redundant. Yet this approach is present in the case law, revealing a struggle to reconcile the broadening of public human rights law with increasing private involvement in the provision of public services. Lord Mance in *YL* held that: 'The private and commercial motivation behind Southern Cross's operations does in contrast point against treating Southern Cross as a person with a function of a public nature'.<sup>57</sup> Lord Scott also held in *YL* that: 'The nature of the function of privately owned care homes, such as those owned by Southern Cross, no different for section 6 purposes from that of ordinary privately owned schools or privately owned hospitals...seems to me essentially different from that of local authority care homes'.<sup>58</sup>

Contrary to the approach in *YL*, the text of s.6 (5) and its relationship with s.6 (3) (b) suggests that it was intended to avoid capturing any private company that was *not*

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<sup>54</sup> *ibid* [16] (Lord Bingham).

<sup>55</sup> *ibid* [116] (Lord Scott).

<sup>56</sup> *Heather* (n 31) [20]-[21] (Woolf LCJ).

<sup>57</sup> *YL* (n 34) [116] (Lord Mance).

<sup>58</sup> *ibid* [31] (Lord Scott).

performing public functions *on behalf* of a public authority under a contract. S.6 (5) is meant to prevent direct horizontal effect, not inhibit indirect horizontal effect. As Elias LJ held in *Weaver v London Quadrant Housing Trust*:<sup>59</sup> 'If an act were necessarily a private act because it involved the exercise of rights conferred by private law, that would significantly undermine the protection which Parliament intended to afford to potential victims of hybrid authorities...It would severely limit the significance of identifying certain bodies as hybrid authorities if the fact that the act under consideration was a contractual act meant that it was a private act falling within section 6(5)'.<sup>60</sup> Once more, however, this is not fully clear from the text of the HRA which omits reference to the fact that the private company is performing the function *on behalf* of the public authority.

In summation, the narrow interpretation adopted by the courts risks preventing the HRA from having the broad effect intended by Parliament.<sup>61</sup> The present situation cannot be tolerated. The human cost due to the lacuna in rights protection is sufficient to warrant major concern, and there is good reason to suggest that the present situation will persist. The case law exhibits a confusing approach based on arbitrary factors without a clear principle in mind and must be reformed.

#### **4 Part III**

In this part I will consider the feasibility of a number of options that have been considered by the JCHR in its reports from 2004 and 2007 on the meaning of public authority.

##### **4.1 Contractual solution**

One solution, as suggested by the Charity Commission and Housing Corporation before the JCHR in 2004<sup>62</sup> is to require all contracts made between public authorities and private companies to include terms protecting Convention rights, thus circumventing the deficiencies in the text of the HRA. However, the contractual solution was rejected

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<sup>59</sup> *Weaver* [2009] EWCA Civ 587, [2010] 1 WLR 363.

<sup>60</sup> *ibid* [72] (Elias LJ).

<sup>61</sup> Joint Committee on Human Rights, 'The Meaning of Public Authority under the Human Rights Act 1998' (Ninth Report of the 2006-07 session) para 150.

<sup>62</sup> Joint Committee on Human Rights Seventh Report (n 9) para 112.

outright by the JCHR due to concerns over enforceability, consistency in drafting and application, and the status of contracts entered into before the passing of the HRA.<sup>63</sup> Paul Craig has also persuasively challenged the conceptual foundations of such a solution, arguing that 'there is something odd in the suggestion that the local authority owes a secondary obligation, enforceable through contract, to ensure the application of Convention rights against a party which is not itself bound by the HRA'.<sup>64</sup>

The normative justifications for the horizontal application of human rights protections cannot easily be incorporated into the contractual solution. Contracts are of a conceptually different legal nature and open to the vagaries of unequal bargaining power that are not present in the universality of human rights. Leaving the solution to contracts between the private service provider and the vulnerable recipient of the service or the cash-strapped local authority would unacceptably leave that individual's human rights at the mercy of the superior bargaining power of the private service provider.

#### **4.2 Judicial solution**

The JCHR in its 2004 report was firmly in favour of an interpretive solution.<sup>65</sup> Reporting soon after *Aston Cantlow* adopted functional approach and judicial dicta evoked hopes of a broad approach to the HRA,<sup>66</sup> the JCHR concluded that the problem was not due to the drafting of the law, but due to the institutional approach adopted in cases such as *Poplar Housing*.<sup>67</sup> Whilst the institutional approach was rejected in later cases, and judicial references supporting broad interpretations of the s.6(3)(b) continue,<sup>68</sup> the case of *YL* has made the prospect of a judicial solution bleak.

In accordance with the JCHR 2004 report *YL* rejected the institutional approach in favour of a functional approach, and yet the lacuna persists. This suggests that the lacuna

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<sup>63</sup> *ibid* paras 115-117.

<sup>64</sup> Craig (n 2) 560.

<sup>65</sup> Joint Committee on Human Rights Seventh Report (n 9) para 156.

<sup>66</sup> *Aston Cantlow* (n 32) [11] (Lord Nicholls).

<sup>67</sup> Joint Committee on Human Rights Seventh Report (n 9) 136-137.

<sup>68</sup> *Weaver* (n 60) [72] (Elias LJ).

in human rights protection is not simply down to the approach taken by the courts in applying the law, but a fundamental problem with the drafting of the law. The issue is not something that can be solved by a change in the judicial approach. Deficiencies in the text of the HRA<sup>69</sup> cannot be resolved by this method. Even if Lord Nicholl's broad approach suggested in *Aston Cantlow* were adopted, it would not alter a fundamental part of the problem – the confusing phrasing of s.6(5) and the lack of guidance provided by s. 6(3)(b). Furthermore, a purely practical concern identified by the JCHR in 2007 was simply the time a judicial solution would take: 'Waiting for a solution to arise from the evolution of the law in this area through judicial interpretation may mean that uncertainty surrounding the application of the HRA will continue for many years. It could lead to a serious risk of discrepancies across public service delivery. We consider that this is unacceptable'.<sup>70</sup> Unfortunately, this concern has come to fruition as no cases have since reached the Supreme Court to attempt to resolve the issue.

#### **4.3 Legislative solution – amendment to the Human Rights Act 1998**

This solution was recommended by the Law Society in 2004,<sup>71</sup> the National Secular Society in 2007,<sup>72</sup> the JCHR were at least open to the idea in 2007,<sup>73</sup> and a Bill<sup>74</sup> was proposed in 2007 to clarify the meaning of 'public authority' (though was rejected after a lengthy delay). Whilst these recommendations did not materialise in the past, and an amendment is unlikely to occur in the current political climate surrounding Brexit, it is the optimal solution to closing the lacuna. The root cause of the issue is not the judicial approach itself, but underlying the deficiencies in the judicial approach is the text of the HRA itself. The failure to express the principle that if something is a public function when undertaken in house, it should be equally so when contracted out, and the confusing, negative phrasing of s.6 (5) have provided the foundations upon which the case law has created the loophole.

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<sup>69</sup> Considered in Part II.

<sup>70</sup> Joint Committee on Human Rights Ninth Report (n 62) para 127.

<sup>71</sup> Joint Committee on Human Rights Seventh Report (n 9) para 97.

<sup>72</sup> Joint Committee on Human Rights Ninth Report (n 62) para 144.

<sup>73</sup> *ibid* 150.

<sup>74</sup> Human Rights Act 1998 (Meaning of Public Authority) Bill 2007.

Two options have been presented for amending s.6(3)(b). The first is to set out the permissible list of factors that the court may consider, reducing the level of arbitrariness in the decisions. This was the substance of the Human Rights Act 1998 (Meaning of Public Function) Bill 2007. The factors enumerated were: assumption of responsibility by the State; role and responsibility of the State; the public interest in the function; relevant statutory powers; State regulation and supervision; State payment; use of statutory coercive powers; and the risk of ECHR violations. The second option is a broader one that does not take a factor based approach but has the aim of making expressly clear that when a public body delegates functions that would otherwise be the responsibility of that public body to a private entity, those functions and the private body delivering them, are considered public for the purposes of the HRA.<sup>75</sup>

It is the latter option that should be adopted. In broadly endorsing the National Secular Society's proposal,<sup>76</sup> I propose replacing s.6(3)(b) and s.6 (5) with: '*When a public body delegates functions that the public body is under a duty to perform, those functions and the private body delivering them are considered public for the purpose of the Human Rights Act*'. This avoids simply listing a set of factors, an approach that fails to correct all of the problems highlighted in the case law. The 2007 Bill's approach leaves too much room for inconsistent application and uncertainty that is already abundant in the cases. The second option, though perhaps not without the risk of some anomalies continuing<sup>77</sup>, broadens the indirect horizontal effect of the HRA, removes the need for an inconsistent application of arbitrary factors, and gives effect to the basic principle that a public function remains public even when contracted out to a private company. It is also much clearer than the current text of s.6(5) in explaining that the provision only applies to situations of 'contracting out' and does not transform all private institutions that are not operating under a contract with a public authority into hybrid public authorities. No solution to this complex problem is perfect, but amending the HRA in this manner is the best way to close as many gaps in the protection of human rights as possible. In order to

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<sup>75</sup> Per the Law Society's recommendations to the JCHR: Joint Committee on Human Rights Seventh Report (n 9) para 75.

<sup>76</sup> Joint Committee on Human Rights Ninth Report (n 62) memorandum 12, para 31.

<sup>77</sup> *ibid* para 146 (though these anomalies were not specified by the committee).

close the loophole and secure compliance with the UK's international obligations under Articles 1 and 13 of the ECHR, the HRA must be amended.

#### **4.4 Legislative solution – expansion sector by sector**

A final option is to simply react to judgments on a case by case basis, expanding the definition of 'public function/authority' sector by sector. This was one approach considered by the JCHR in its 2007 report 'The Meaning of Public Authority under the Human Rights Act'.<sup>78</sup> It was also the solution adopted by the Labour government as a response to the *YL* case. Section 145 of the Health and Social Care Act 2008 made the provision of care home accommodation an exercise of a public function for the purposes of the HRA. Whilst it was an admirable course of action to take, reversing *YL*, it was of limited application and did not alter the more general reasoning of the majority in *YL*. It is also too ad hoc of a solution to be of any general utility in resolving the issues identified in this article and could lead to further problems, namely the inconsistent application of the HRA as the court's may misinterpret Parliament's intentions and question whether any other functions were intended to be subject to the application of the HRA.<sup>79</sup>

## **5 Conclusion**

In this article I have set out the case for amending the HRA by replacing s. 6 (3) (b) and s. 6 (5) with: '*When a public body delegates functions that the public body is under a duty to perform, those functions and the private body delivering them are considered public for the purpose of the Human Rights Act*'. Whilst this does broaden the horizontal application of the HRA, this is normatively justified in legal theory, is compatible with the general framework and policy of the HRA, and is a necessary response to the enormous growth of private bodies discharging public functions on behalf of public authorities. The lacuna in human rights protection created by the failure of the HRA to enact a clear, principled response to the obfuscation where the private and public sphere's separate. Fundamentally, it cannot be correct as a matter of principle for the availability of ECHR rights to be dependent upon the fortuitous incidence as to how the core public authority chooses to discharge its functions. Amending the HRA prevents this discrepancy.

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<sup>78</sup> *ibid* para 138.

<sup>79</sup> *ibid* para 140.