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Crossing the Rubicon by Transporting Secret Justice across to Europe: Closed Material Procedure in the UK and EU Courts

J.R. Williams

INTRODUCTION

The European Court of Justice ('ECJ') is currently considering a proposal from the General Court ('GC') to permit, for the first time, the use of classified and sensitive evidence in actions for annulment at the Luxembourg Court. President Skouris has confirmed that the Court intends to 'propose a series of amendments to the Rules of Procedure of the General Court in the near future', but that 'the precise amendments to be proposed is still a matter of internal discussion within the Institution and that no decisions have yet been taken'.¹ These proposals are yet to be enunciated, published, or publicly consulted on. They have, though, reportedly been discussed with Member States, the European Council and the Commission. The need for specific procedures has been anticipated by the GC and ECJ for some time, with Advocate General Sharpston in 2011 discussing both the need for a scheme and the possible introduction of a UK-style Closed Material Procedure ('CMP') at the European Courts.²

The dilemma is easy to state. A claimant either wishes to bring a claim in damages against the executive³ or judicially review its actions. The executive seeks to defend these claims, but fears that in doing so it would have to disclose sensitive material which would threaten national security (usually related in some way to the risk of terrorism) and thus deems it contrary to the public interest to do so. Does the executive withdraw from the case and settle, or proceed regardless and potentially

¹ Letter from President Skouris to Maura McGowan QC, Chairman of Bar Council of England of Wales, dated 18 June 2013.

² C-27/09 P *French Republic v People's Mojahedin Organisation of Iran*, Opinion of Advocate General Sharpston of 14 July 2011, at [171] ff. The ECJ declined to discuss the matter in its judgment, C-27/09 P *French Republic v People's Mojahedin Organisation of Iran* Judgment of 21 December 2011, as the issue had become moot after the Council had delisted the People's Mujahedin Organisation of Iran (OMPI) after the General Court ruling.

³ E.g. the Government and its agencies in the United Kingdom, and the Council and Commission in the European Union.

endanger public safety? Or is a *via media* possible, whereby the Court can see all the (sensitive) evidence, but that evidence is not disclosed to the applicant who is excluded from seeing and challenging it? Enter the CMP and its Special Advocate system whereby an advocate is appointed to represent the interests of the excluded party, but cannot communicate with that party once they have seen the sensitive material. However, proceedings *in camera* are, to say the least, highly controversial. A CMP requires,

... the court not only to sit in private, but to sit in a closed hearing (i.e. a hearing at which the court considers the material and hears submissions about it without one of the parties to the appeal seeing the material being present) and to contemplate giving a party closed judgment (i.e. a judgment part of which will not be seen by one of the parties).⁴

Thus, a CMP involves one party not being informed of their opponent's allegations, not being allowed to see the evidence advanced, not being able to challenge the evidence except through a Special Advocate who represents their interests but with whom they are not able to communicate once proceedings have begun, and not being shown judgment to the extent it deals with protected information. In sum a CMP potentially, at best, erodes and, at worst, extinguishes every due process right imaginable. Thus 'anybody concerned about the dispensation of justice must regard the prospect of a closed material procedure, whenever it is mooted and however understandable the reasons it is proposed, with distaste and concern'.⁵ It is for this reason that it is both useful and desirable for a critical analysis of the use of CMPs in the United Kingdom – a system endorsed and implicitly recommended for the EU by Advocate General Sharpston in her Opinion⁶ – where the Justice and Security Act 2013 has made CMPs generally available in any civil trial. It is hoped that a number of lessons will be learnt from examining the UK system so that the European Court can implement a procedure which better protects due process rights.

This article is structured as follows. First, the process of CMPs in the United Kingdom will be summarily set out. Second, this system will be critically evaluated according to the extent that it accords with: (1) instrumental and non-instrumental rationales for procedural protection; (2) established common law fundamental rights, namely open and natural justice; (3) European Convention on Human Rights and Fundamental Freedoms ('ECHR') case law; (4) EU case law; and (5) the UK Government's own rationale for introducing CMPs as set out in the Green Paper.⁷ Third, the EU's current procedures and case law relating to disclosure of evidence, trials and giving reasons will be outlined. This will provide context and explain why

⁴ *Bank Mellat v Her Majesty's Treasury (No. 1)* [2013] UKSC 39 per Lord Neuberger at [51]

⁵ *Ibid.*

⁶ Fn. 2

⁷ Green Paper, 'Justice and Security', October 2011

CMPs are being suggested at the European Courts. Finally, lessons will be drawn from the UK jurisprudence and applied to the EU context; possible options for the introduction of the procedures dealing with sensitive information are outlined and improvements and solutions suggested.

THE UNITED KINGDOM

A. Summary of the position under the Justice and Security Act 2013

CMPs are not new – at least twenty different statutory and procedural schemes have previously existed in the UK.⁸ The spread over the past ten years has been alarming. Whilst ‘originally intended for a mere handful of deportation cases each year’,⁹ they grew to be applicable in proceedings concerning a wide range of situations including immigration, control orders, employment tribunals, the Parole Board and counter terrorist investigations. Even prior to 2013 CMPs were therefore already ‘a more routine part of the legal system’.¹⁰ However, CMPs were not universally available in civil trials. This, the Supreme Court held, by majority (Lord Hope, Lord Brown, Lord Kerr and Lord Dyson), in *Al Rawi v The Security Service*¹¹ was not possible to be achieved by the courts in the absence of statutory authorisation. Whilst the Civil Procedure Rules (‘CPR’) provided exceptions to the general right of access to evidence, in matters relating to national security for example,¹² none of these narrow exceptions, noted the Supreme Court, related to statements of case, disclosure, inspection of witness statements, or evidence and argument in court. Lord Dyson therefore stated that the court’s inherent power to regulate its own procedures could not be exercised other than ‘in a way which respects [the principles of open justice and respect for the principles of natural justice] which are integral to the common law right to a fair trial’¹³ which he, and the other Justices, deemed CMPs did not satisfy.

⁸ See, for example, s.10 Employment Tribunals Act 1996; s.6 of the Special Immigration Appeals Commission Act 1997; s.91(7) of the Northern Ireland Act 1998; para.3 of Sch.8 to the Employment Relations Act 1999; s.5 of the Terrorism Act 2000; s.70 of the Anti-Terrorism, Crime and Security Act 2001; r.8(1) Parole Board Rules 2001; para.7 of the Schedule to the Prevention of Terrorism Act 2005; ss67 and 68 Counter Terrorism Act 2008; Sch. 4 Terrorist Prevention and Investigation Measures Act 2011; CPR rr 79 and 80. For a full list of CMP that exist in the UK see Annex A to the HM Government Response to the House of Lords Select Committee on the Constitution 3rd Report of Session 2012 – 13: The Justice and Security Act 2013.

⁹ Metcalfe, ‘Representative but not responsible’ (2004) 2 JUSTICE Journal 11, 33

¹⁰ Ip, ‘The rise and spread of the special advocate’ (2008) Public Law 717

¹¹ [2011] UKSC 34, [2012] 1 AC 531

¹² CPR 39.2(3)(b)

¹³ [2011] UKSC 34, [2012] 1 AC 531 at [22]

Despite some forceful concerns and reticence expressed by the Supreme Court Justices in *Al-Rawi*, the UK legislature enacted the Justice and Security Act 2013 thereby achieving what the Court itself could not do:¹⁴ extend the possibility of CMPs to all civil proceedings. This legislation authorised the making of rules of court for the conduct of CMP, found in CPR 82.

The CMP process involves two steps.¹⁵ The first step is obtaining a court declaration under s. 6 that the proceedings are ones in which a closed material application may be made to the court. For this declaration to be made, first, sensitive material (s.6(11)) would be required to be disclosed in the course of the proceedings; second, the court must be satisfied that it is in the interests of the fair and effective administration of justice in the proceedings to make a declaration (s.6(5)); and third, these previous two requirements must be met in relation to any material that would be required to be disclosed in the course of the proceedings (s.6(6)). The second step is the making of a closed material application that would allow material to be screened from one or more of the parties to the proceedings (CPR 82.13). A special advocate must be appointed to represent the interests of the excluded party (s.9 and CPR 82.9). Where granted, the sensitive evidence will not be disclosed to the other party and there will be a hearing in private dealing with closed material will be attended only by the Government's legal team and a special advocate (CPR 82.6) who is not responsible to the party to the proceedings whose interests the advocate is appointed to represent (s.9(4)). The special advocate has the following functions (CPR 82.10):

- (a) making submissions to the court at any hearing or part of a hearing from which the specially represented party and the specially represented party's legal representatives are excluded;
- (b) adducing evidence and cross-examining witnesses at any such hearing or part of a hearing;
- (c) making applications to the court or seeking directions from the court where necessary; and
- (d) making written submissions to the court.

¹⁴ Though see *Bank Mellat v Her Majesty's Treasury (No. 1)* [2013] UKSC 38 where the Supreme Court held, despite *Al-Rawi*, that the Supreme Court could imply a right to sit in closed hearing without an explicit statutory provision (S. 73 of the Counter-Terrorism Act 2008 made no provision for a closed material procedure in the Supreme Court) where an appeal was coming from lower courts which had sat in closed material procedure. This statutory warrant to hold a closed material procedure was implied from s.40(2) and (5) Constitutional Reform Act; the majority reasoned that since this provided that an appeal lies to the Supreme Court against 'any' judgment of the Court of Appeal and that it had to 'determine any question necessary...for the purposes of doing justice', then justice would not be able to be done in cases if the Supreme Court could not consider or examine the closed material itself (Lord Neuberger at [37]).

¹⁵ See more generally A. Zuckerman, *Civil Procedure: Principles of Practice* (Third Edition) (2013) (Sweet and Maxwell), 938 - 943

The Special Advocate is not allowed to contact or liaise with the excluded party whose interests they represent once the hearing has begun (CPR 82.11(3)), although they may seek court directions to communicate with them, though serious restrictions will be placed on these communications and other parties are notified and may object (CPR 82.11(4)-(5)). Notice of the hearing must be given to every party whether or not they are entitled to attend (CPR 82.7). The hearing is, obviously, also barred from public viewing. Where the Court gives judgment in CMP, it may withhold its reasons, or any part of them, to the extent that it is impossible to give those reasons without disclosing sensitive information which would damage national security (CPR 82.16).

B. Critical evaluation

Closed Material Procedure compared with Public Interest Immunity

In order to evaluate CMP, it is first appropriate to distinguish it from the alternative possible procedure available where the Government seeks not to disclose sensitive material to the opposing party: Public Interest Immunity ('PII') under CPR 19 and 31. PII works as follows.¹⁶ Claims are normally made by a Government minister who provides a PII certificate listing documents that they do not wish to disclose to the other party and the reasons for request. The court may allow parties to withhold disclosure of documents if it considers that the harm that disclosure would do to the public interest outweighs the harm that non-disclosure would do to the administration of justice. It is for the court itself to determine whether a minister's claim that disclosure would be injurious to public interest is weighty enough. In doing this the court must, on the one hand, weigh the injury that would be done to the public interest by the disclosure of the material (e.g. the threat to public safety) and, on the other hand, the harm that would be done to the administration of justice if disclosure were refused (the so-called '*Wiley* balance'). This later part includes assessing the court's ability to ascertain the truth and the ability of the party seeking disclosure to prove its case.¹⁷ The court can request to examine the actual material to judge the evidence for itself.¹⁸ Where the claim for PII is accepted, the documents shall not be disclosed. Neither, however, can they be relied on by the party claiming the immunity, nor can the court consider them in adjudicating on the substance of the case. Whilst Special Advocates may be utilised in the proceedings deciding whether PII should be granted in the first place, there are therefore no closed and

¹⁶ See A. Zuckerman, *Civil Procedure: Principles of Practice* (2013) (Sweet and Maxwell), 913 - 933 for a detailed analysis

¹⁷ See *Conway v Rimmer* [1968] AC 910 HL and *R v Chief Constable of the West Midlands Police Ex parte Wiley* [1995] AC 274 for enunciation of these principles and their interplay.

¹⁸ *Air Canada v Secretary of State for Trade (No. 2)* [1983] 2 AC 394, [1983] 1 All ER 910.

private hearings for substantive consideration of evidence which the other party has not seen and cannot challenge. There is also no possibility of a redacted judgment.

The Government's justifications for enacting the Justice and Security Act 2013 allowing CMPs in any civil proceeding were premised on this PII procedure not being sufficient. It was argued in a Government Green Paper¹⁹ that the PII principles can lead to the exclusion of most of the evidence of which the Government would otherwise rely on, leaving the Government to face the all-or-nothing choice of having to either disclose sensitive material which could threaten national security and the public interest, or having to settle what it deems to be a bad case in circumstances where it would otherwise wish to put forward a defence but feels it cannot without threatening public safety. Second, it was argued that the application of PII principles could lead to the striking out of the claim as in *Carnduff*.²⁰ Instead, the Government premised its proposals on seeking to maximise 'the amount of relevant material that is considered by the court while at the same time ensuring that, where the material is sensitive, it is protected from potential harmful disclosure' on the assumption that it is 'fairer in terms of outcome to seek to include relevant material rather than to exclude it from consideration altogether'.²¹ Thus, in the Government's view, extending CMPs into ordinary civil proceedings would in this way be fairer than the existing PII system because, by excluding material, the PII procedure 'means that the case cannot always be contested fairly for both sides'.²² All relevant material would be reviewable by the court, regardless of security classification, unlike under the PII system. Third, a more sinister rationale is also detectable. Following the Court of Appeal decision in *Al Rawi*, the Government decided to settle the claim rather than undertake a PII procedure. Its explanation for this was that the PII exercise was expensive due to the large number of documents which would have to be sifted through by the Minister or Government department in order to decide whether PII should be claimed.

These justifications are, in the main, misguided and fundamentally flawed. There are significant and essential differences between the CMP and PII procedures which decisively affect the 'fairness' balance which the Green Paper argues CMPs strike. This is so for four reasons.

First, resting a case for use of CMPs on grounds of administrative convenience is not smart. The administrative convenience hand is 'over-played' as it will still be

¹⁹ Green Paper, 'Justice and Security', October 2011.

²⁰ [2001] EWCA Civ 680; [2001] 1 W.L.R. 1786

²¹ *Ibid.* at [2.2]

²² *Ibid.*

necessary for the laborious process of document review and redaction to be undertaken when a CMP is used.²³ Further, if personal review of every document truly is impossible (which is doubted), this is not a reason in itself to introduce CMPs rather than modify the PII process.

Second, it is quite simply not at all possible to claim that the CMP process is necessarily fairer because it ‘allows the court to consider all the relevant material. A judgment based on the full facts is more likely to secure justice than a judgment based only on a proportion of relevant material’.²⁴ This is for two reasons. First, the PII system works in an inherently fairer manner. PII was developed from the common law out of principles of fairness and the concept of equality of arms – either all the material is disclosed or otherwise the sensitive material simply cannot be used at all. No party is excluded from participation in any way, whereas in a CMP the Government may rely on and use closed material notwithstanding that the other party and advisor have not seen it or able to challenge it. Second, there are issues with the explanation proffered that the process is more likely to lead to the correct or more accurate outcome. This takes a result-orientated, instrumental approach to procedural justice that procedure is best assessed by its ability to determine true facts. However, it is not at all clear that the CMP system achieves this. The fallacy of the argument that the more evidence seen by the court, the more justice is done was pointed out by Lord Kerr in *Al-Rawi*:

... the central fallacy of the argument, however, lies in the unspoken assumption that, because the judge sees everything, he is bound to be in a better position to reach a fair result. That assumption is misplaced. To be truly valuable, evidence must be capable of withstanding challenge. I go further. Evidence which has been insulated from challenge may positively mislead. It is precisely because of this that the right to know the case that one’s opponent makes and to have the opportunity to challenge it occupies such a central place in the concept of fair trial. However astute and assiduous the judge, the proposed procedure hands over to one party considerable control over the production of relevant material and the manner in which it is to be presented. The peril that such a procedure presents to the fair trial of contentious litigation is both obvious and undeniable.²⁵

²³ T. Hickman ‘Turning out the lights? The Justice and Security Act 2013’, UK Const. L. Blog (11th June 2013) (available at <http://ukconstitutionallaw.org>)

²⁴ Green Paper, Justice and Security, October 2011 at [2.3]

²⁵ [2011] UKSC 34, [2012] 1 AC 531 at [93].

Furthermore, a powerful dictum of Sedley LJ in *AF (No. 3)* at the Court of Appeal level points out the central problems with a judge relying only on one side's interpretation or analysis of disclosed evidence:

[I]t is in my respectful view seductively easy to conclude that there can be no answer to a case of which you have only heard one side. There can be few practising lawyers who have not had the experience of resuming their seat in a state of hubristic satisfaction, having called a respectable witness to give apparently cast-iron evidence, only to see it reduced to wreckage by ten minutes of well-informed cross-examination or convincingly explained away by the other side's testimony. Some have appeared in cases in which everybody was sure of the defendant's guilt, only for fresh evidence to emerge which makes it clear that they were wrong. [...] In a system which recruits its judges from practitioners, judges need to carry this kind of sobering experience to the bench. It reminds them that you cannot be sure of anything until all the evidence has been heard, and that even then you may be wrong. It may be, for these reasons, that the answer to Baroness Hale's question – what difference might disclosure have made? – is that you can never know.²⁶

These concerns are especially pertinent in CMPs when one imagines the type of evidence which will usually be in question. As noted in the Supreme Court in *AF (No. 3)*, often the closed material 'is comprised of a mosaic of information drawn in various combinations, depending on the particular case, from a variety of sources, such as (1) intercept evidence, (2) covert surveillance and (3) agent reporting'.²⁷ As will be seen later, Special Advocates are hampered by their inability to test or rebut the validity of this 'mosaic' evidence as they lack the fundamental requirement necessary for representing the excluded party properly – the ability to communicate with them. The instrumental rationale proffered for CMPs that it helps the court to get closer to the truth is thus unfounded.

Third, material in CMPs can be withheld without conducting the *Wiley* balancing which, crucially, it is for the Court, not the executive officials, to conduct in PII. This provides a powerful reason why CMP should be last resort. As noted by Lord Kerr in *Al-Rawi*, the Government has different incentives under PII and CMP:

At the moment with PII, the state faces what might be described as a healthy dilemma. It will want to produce as much material as it can in order to defend the claim and therefore will not be too quick to have resort to PII. Under the closed material procedure, all the material goes before the judge and a claim that all of it involves national security or some other vital public interest will be very tempting to make.²⁸

In PII claims it is explicitly for the Court to decide whether disclosure should be granted. However, a close analysis of s.6 Justice and Security Act 2013 shows that the

²⁶ *Secretary of State for the Home Department v AF (No. 3)* [2009] 2 WLR 423 CA (Civ Div) at [113]

²⁷ [2009] UKHL 28; [2010] 2 A.C. 269 at [104]

²⁸ [2011] UKSC 34, [2012] 1 AC 531 at [96]

notion of judicial discretion is in practice ‘so fettered to be meaningless’.²⁹ This is a significant change. As explained, the first step in CMP is the court to declare, under s.6(1) that the proceedings are proceedings in which CMP can be used. It has a discretion whether to do this or not: the court can weigh the interests of justice and it decide whether CMP would further the fair and effective administration of justice (s.6(5)). However, once a s.6(1) declaration has been made s. 8(1)(c) provides that rules of court ‘must secure’ that if the Government applies to withhold material from a party and to adduce it by way of CMP (the second step), the court ‘is required to give permission for material not to be disclosed if it considers that the disclosure of the material would be damaging to the interests of national security’. Therefore, as Hickman rightly states, ‘once the CMP trigger has been pulled, the court loses its power to order disclosure of sensitive material where this is required in the interests of natural justice or openness’.³⁰ Once the section 6(1) declaration is made, the court can bring no balance of interests to bear in an application for material to be considered in a CMP and is required to approve the withholding of such material from the excluded party.

The stark difference between the CMPs and the PII system, and the important role of the *Wiley* balance in protecting open justice, is illustrated by *R(Binyam Mohamed) v The Secretary of State for Foreign and Commonwealth Affairs*.³¹ Mohamed brought legal proceedings against the UK Government to seek some redress for mistreatment he had experienced at the hands of American agents in foreign prisons where his genitals were mutilated, he was held in stress positions for days, and was threatened and psychologically abused. He alleged that the UK security services were complicity in this mistreatment. In this case, pre the Justice and Security Act 2013, a CMP was used with the consent of the parties, but, unlike in the statutory contexts in which CMP was used, PII principles (including the *Wiley* balance) were applied. The Court of Appeal held that information revealing how much UK intelligence officials knew about the mistreatment whilst detained in Pakistan should be revealed. Additionally, because the Government had applied the *Wiley* balance to all sensitive material and judged that there was, on balance, a public interest in disclosure of a considerable amount of it, the Government had disclosed important information about the activities of the Intelligence Services and CIA’s. The disclosures made would not have been made if CMP under the Justice and Security Act had been in force. This saga reminds one of the ‘sorry story of the dirtier side of government’ like in the Matrix Churchill saga,³² and evidences the problems of going back to a similar situation to a *Duncan v Cammell Laird & Co*³³ situation where Crown immunity

²⁹ Lord MacDonald of River Glaven: The 37th annual FA Mann lecture: ‘Security in Justice – can it ever be fair?’, 2013

³⁰ T. Hickman ‘Turning out the lights? The Justice and Security Act 2013’, UK Const. L. Blog (11th June 2013) (available at <http://ukconstitutionallaw.org>)

³¹ [2011] QB 218

³² Adam Tomkins, ‘Public Interest immunity after Matrix Churchill’, Public Law 1963, 650

³³ [1942] 1 All R 587

certificates were deferentially accepted without challenge by the Courts. The executive should not have a free hand: public knowledge of the sorts of illicit activities by the Security Services in *R(Binyam Mohamed)* is absolutely vital for proper accountability by both the public and Parliament. CMPs close the door on these sorts of revelations of serious wrongdoing being exposed. There is one potential saving grace, however. S.7 Justice and Security Act 2013 enables the courts to exit CMP, at any time, when it is no longer in the interests of the fair and effective administration of justice. This could open up the possibility of serious wrongdoing being revealed, but whether this will happen depends very much on how 'fair and effective administration of justice' in both s.6(5) (the trigger provision) and s.7(2) (the exit provision) will be interpreted.

Fourth, the Government's fears that cases under PII risk having to be settled or struck out, thus necessitating the introduction of CMPs, rest on 'flimsy evidentiary foundations'.³⁴ If a substantial number of cases were being struck out because of PII, then that might provide a reason for legislative reform, but there is only one example of a case that was struck out as a result of the exclusion of material under PII.³⁵ This one case is *Carnduff Rock*.³⁶ There, the Court of Appeal struck out the claim by a police informer for the money said to be due under an alleged contract to supply information; the court held that deciding the matter would disclose sensitive information which should remain confidential. A number of justices in the Supreme Court in *Al-Rawi* appear to have therefore assumed that this case means that there may be cases where the application of PII leads to the claim being struck out. For example Lord Mance stated that there if a successful PII claim makes an issue untriable 'the court will simply refuse to adjudicate upon the case'.³⁷ However, this is wrong for two reasons: 'no such course is open; the court cannot refuse to adjudicate'.³⁸ First, Lord Dyson in the same case rejected Lord Mance's reasoning:

the problem cannot be looked at so narrowly and in any event it seems that cases such as *Carnduff* are a rarity. They do not pose a problem on a scale which provides any justification (let alone any compelling justification) for making a fundamental change to the way in which litigation is conducted in our jurisdiction ...³⁹

More importantly, secondly, the majority's reasoning in *Carnduff* 'is open to doubt'.⁴⁰ Laws LJ considered it unjust to place the police in a position where it had to pay up or alternatively risk harm to the public interest. However, the *Carnduff* decision

³⁴ Amnesty, *Left in the Dark: the use of secret evidence in the United Kingdom*, 2012.

³⁵ Chamberlain, *The Justice and Security Bill*, (2012) 31(4) CJK 424

³⁶ [2001] EWCA Civ 680; [2001] 1 W.L.R. 1786

³⁷ [2011] UKSC 34, [2012] 1 AC 531 at [108]

³⁸ Zuckerman, *Editor's Note: Closed Material Procedure - Denial of Natural Justice* (2011) 30(4) CJK 345

³⁹ [2011] UKSC 34, [2012] 1 AC 531 at [50]

⁴⁰ Zuckerman, *Editor's Note: Closed Material Procedure - Denial of Natural Justice* (2011) 30(4) CJK 345

provides weak support for the proposition that in a hard choice case (where disclosure would cause substantial harm to public interest, and yet also without disclosure the court cannot determine the issues in dispute) the court may sanction non-disclosure on grounds of public interest even if it means that the affected party is thereby deprived of a fair trial of his claim or defence. The result of the case is better explicable by the fact, acknowledged by all members of the court, that it was highly unlikely that the claimant would have been able to make out his extraordinary claim even if the case had gone forward.⁴¹ *Carnduff* had more in common with an action founded on an illegal contract as it is hard to see how the contract alleged by the informer could be valid. As this is the only case where the court has come down in favour of suppressing evidence despite the fact it has condemned the claimant to losing, it does not provide a strong precedent.⁴²

For these four reasons it is deeply regrettable that the Government did not insert a clause into the Justice and Security Act 2013 that a CMP could only be used if a fair determination of the case could not be reached by any other means. It is also equally deeply regrettable that a clause was not inserted to the effect that it is necessary for a PII claim to be made first (and accepted) before an application for a CMP could be made. Whilst, under the Act, the court must be satisfied that the Secretary of State has considered whether to make a claim for public interest immunity in relation to the material on which the application is based (s.6(7)), s.6(3) stipulates that in deciding whether a party would be required to disclose material, the court must ignore the fact that there would be no requirement to disclose if the material were withheld on grounds of PII. *CF v Security Service and others*⁴³ has accepted this: whilst Irwin J said that the co-existence of the Act and PII was ‘uneasy’ as the two processes are ‘antithetical’, he accepted that the court could make a CMP declaration and adopt a CMP before disclosure had been given and without a PII claim having been made or determined. This is a grave shame. Unless the PII system is gone through first it will not be possible to tell whether a closed material procedure is the only possible way of ensuring that the issues in the case are judicially determined. Further, there is ‘nothing logically inconsistent’ in the PII and CMP processes co-

⁴¹ Zuckerman, Editor’s Note: Closed Material Procedure – Denial of Natural Justice (2011) 30(4) CQJ 345,

⁴² See the more relevant guidance in criminal cases such as *R v H* [2004] UKHL 3; [2004] 1 All ER 1269, and *R v Davis (Ian)* [2008] UKHL 36 which suggest that in a hard choice case, the court would not allow the compromising of the right of an accused to defend himself.

⁴³ [2013] EWHC 3402 (QB)

existing with the former an initial step.⁴⁴ The political reality is, however, that the Government envisages that CMPs will lead to a 'much reduced role for PII'.⁴⁵

Closed material procedure contrary to due process rights

CMP represents 'a major inroad into not just one, but into all the common law principles of fair trial',⁴⁶ namely due notice, open (public) justice, and the duty to give reasons. The effect of the general applicability of CMPs means that claims concerning allegations of complicity, torture and the like by UK Intelligence Services abroad will be heard in proceedings from which the claimants are excluded, with secret defences they cannot see, secret evidence they cannot challenge and secret judgments withheld from them and from the public for all time.⁴⁷ CMPs therefore inflict on the dignity of the excluded party by not treating them like rational human beings deserving of an opportunity to participate and contribute. Non-instrumental rationales for procedural protection recognise that even if the procedures would make no difference to the outcome, there is worth in them for intrinsic reasons related to protecting human dignity and autonomy by ensuring that the individual is fairly treated. It is an integral part of treating an applicant with the respect which his dignity as a citizen demands. Process rights enable litigants to understand and participate in decision-making which allows them to more readily accept the legitimacy of a decision: by addressing a citizen as a rational agent the connection between authority and legitimacy is enhanced. CMPs offend these principles in three ways.

First, the principle of due notice is offended by CMPs. Where the court gives permission to the relevant person to withhold sensitive material, it must consider whether to direct the relevant person to serve a summary of that material on the represented party (CPR 82.14(7)). It is, however, under no obligation to do so. There will thus be many cases in which the excluded party does not know either what the case and allegations against him are or what evidence is being used to support that. Sometimes even 'gisting' is not given.⁴⁸ The excluded party is given no opportunity to see, comment on, or rebut this evidence. *In camera* proceedings like this are therefore an exception to the usual rule that:

⁴⁴ Craig, *Administrative Law* (Seventh Edition) (2012) (Sweet and Maxwell) at 406.

⁴⁵ Green Paper, 'Justice and Security', October 2011, at [2.82].

⁴⁶ A. Zuckerman, *Civil Procedure: Principles of Practice* (Third Edition) (2013) (Sweet and Maxwell). See also Lord Dyson in *Al-Rawi v The Security Service* [2011] UKSC 34.

⁴⁷ *Ibid*, Lord Brown

⁴⁸ *Home Office v Tariq* [2011] UKSC 35.

a person or other properly interested party must have the right to see all the information put before the judge, to comment on it, to challenge it and if needs be to combat it, and to try to establish by contrary evidence that it is wrong. It cannot be withheld from him in whole or in party.⁴⁹

This, in effect, leads to what has aptly been called ‘trial by stealth’.⁵⁰ The excluded party’s lack of knowing the case against him is contrary to the very notion of a fair trial. Indeed notice is a ‘fundamental and constitutional principle of our legal system’.⁵¹ As Lord Denning said in *Kanda v Government of Malaya*:⁵²

If the right to be heard is to be a real right which is worthy of anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him; and then he must be given a fair opportunity to correct or contradict them.

Second, the duty of publicity (or open justice) is curtailed by CMPs. It is a well known idiom of justice in the UK that it is ‘of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done’.⁵³ This publicity principle is expressed in s. 67 of the Senior Courts Act 1981 (‘Business in the High Court shall be heard and disposed of in open court except in so far as it may, under rules of court or in accordance with the practice of court, be dealt with in chambers’) and CPR 39.2(1) (it is the ‘general rule is that a hearing is to be in public’). The public’s right to know what happens in court proceedings is also protected under the ECHR.⁵⁴ There are good reasons for open justice. As Bentham remarked: ‘publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial’⁵⁵. In this way, the courts cannot be hidden from the public gaze which ‘provides a safeguard against judicial arbitrariness or idiosyncrasy and maintains the public confidence in the administration of justice’.⁵⁶ However, the purpose is also wider that deterring impropriety or sloppiness by the judge, as it also enables the public to

⁴⁹ *Official Solicitor v K* [1963] Ch. 381; [1962] 3 WLR 1517 at 405, per Upjohn LJ. See also *D v National Society for the Prevention of Cruelty to Children* [1978] AC 171 at 243 per Lord Edmunds-Davies.

⁵⁰ Zuckerman, ‘Common law repelling super injunctions, limiting anonymity and banning trial by stealth’ (2011) CJQ

⁵¹ *R(Anufrijeva) V Secretary of State for the Home Department* [2004] 1 AC 604 HL, per Lord Steyn.

⁵² [1962] AC 322 PC (Fed. Malay States), 337

⁵³ *R v Sussex Justices Ex p McCarthy* [1924] 1 KB 256 and 259.

⁵⁴ Article 6 – right to a fair trial: ‘everyone is entitled to a fair and public hearing... Judgment shall be pronounced publicly’. Article 10(1) also protects the public’s right to know what happens in court proceedings as the Court of Appeal recognised in *R(Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 65 at [180].

⁵⁵ Quoted by Lord Diplock in *Home Office v Harman* [1982] 1 All ER 523 at 537.

⁵⁶ *A-G v Levens Magazine Ltd* [1979] AC 440 at 450 per Lord Diplock. See also *Axen v Germany* B/57 December 14, 1981 Com Rep (European Commission Report) (EComHR).

understand and scrutinise the justice system⁵⁷ along with the executive branch of government and its agencies. Lord MacDonald therefore rightly warns that CMPs 'will inevitably weaken democratic control [of security agencies], because they will have a tendency to keep from the public and from the great mass of parliamentarians, material which the public, which Parliament may need' in order to come to informed conclusions about aspects of the security and intelligence agencies' performance.⁵⁸ This is starkly evidenced by the Binyad Mohamed already discussed.

It also leads to fears that the separation of powers is seriously curtailed in cases of national security. As seen, CMPs have to be utilised when 'national security' concerns are in play which fetters judicial discretion to a large extent (s.8 of the Justice and Security Act 2013). As Lord Radcliffe in 1956 prophetically warned: 'the interests of government, for which the Minister should speak with full authority, do not exhaust the public interest'⁵⁹ however. The courts must therefore remain guarded about the relationship between the executive being based solely on trust.⁶⁰ The courts must be prepared to full assess the closed evidence and ready to implement its powers under s.7 of the Justice and Security Act to withdraw from closed proceedings. The lessons from the Binyad Mohamed saga must be kept in mind, as well as the fact that ministers are not necessarily reliable in their assessment of evidence as a threat to national security e.g. *R(on the application of Al-Sweady) v Secretary of State for Defence*⁶¹ where the court found that a PII certificate was partly false since part of the material covered by the certificate had in fact been disclosed in earlier proceedings; this must or should have been known within the Ministry of Defence at the time when the secretary of state signed the certificate.

Third, the duty to give reasons can be abrogated in CMPs. CPR 82.16 provides that a court's judgment can exclude any of its reasons to the extent that it is not possible to give those reasons without disclosing information which might potentially be damaging to the interests of national security. This veils the secrecy and makes appraisal of the decision impossible. The whole culture of legality is affected by this. The party will know the outcome only, but not any of the reasons why this decision has been reached or based on what evidence. The excluded party will not be able to

⁵⁷ See Toulson LJ in *R(in the application of Guardian News and Media Ltd) v City of Westminster Magistrate's Courts* [2012] EWCA Civ 420 at [79]

⁵⁸ Lord MacDonald of River Glaven: The 37th annual FA Mann lecture: Security in Justice – can it ever be fair? 2013

⁵⁹ *Glasgow Corporation v Central Land Board* 1956 SC (HL) 1, 18.

⁶⁰ See, for example, the suggestion *M v Home Office trust*' [1980] AC 1090 1134F.

⁶¹ [2009] EHC 1687 (Admin)

know whether the decision is sound or otherwise, and his legal team will be unable to advise whether an appeal is worthwhile. This offends against every non-instrumental and dignitarian rationale of process rights: the party is not treated fairly or like a rational being, deserving of the information or reasons why they have lost their case. The mental effects of this on the individual must be profound: feelings of resentment, confusion, anger, rejection and helplessness surely abound. This truly is the stuff of Franz Kafka's nightmare story, *The Trial*.

The fig-leaf of the Special Advocate

The rise and spread of the use of Special Advocates is well documented.⁶² Whether or not CMPs comply with the ECHR, EU and domestic common law rights jurisprudence is centred around on the effectiveness of these Special Advocates to allay and reduce the aforementioned concerns regarding the effects of CMPs on due process rights. If the Special Advocate can effectively represent the excluded party's interests and properly 'fight their corner' on their behalf then the core of due process might be afforded. The case law suggests that both the domestic⁶³ and international⁶⁴ courts believe that the special advocate procedure does sufficiently safeguard the excluded party against significant injustice and thus renders the process as a whole palatable. Everything hinges on whether this is true and to what, if any, extent.

Article 6 ECHR requires that litigants are afforded equality of arms.⁶⁵ However, the entitlement to disclosure of evidence as part of the rights of the defence in ECHR law is not an absolute right.⁶⁶ National security may justify the exclusion of the complainant and the general public from proceedings where adequate procedural safeguards exist and the right is restricted for a proportionate and legitimate purpose.⁶⁷ An exception must be founded on paramount considerations of justice and must be kept to the bare minimum⁶⁸ in order that the 'the very essence of the right' to a fair trial is not impaired.⁶⁹ In order to ensure that the excluded party receives a fair trial, any difficulties caused to the party by a limitation on their rights

⁶² Ip, 'The rise and spread of the special advocate' (2008) Public Law 717

⁶³ See, for example, Lord Brown in *MB v Secretary of State for the Home Department* [2007] UKHL 46; [2008] 1 AC 440 at [90].

⁶⁴ Boon and Nash, 'Special Advocacy', (2006) 9 Legal Ethics 101 suggest at 102 that the ECtHR has, at the very least, 'tacitly endorsed' the special advocate system.

⁶⁵ *Neumeister v Austria* (1968) 1 EHRR 91 (ECtHR).

⁶⁶ *Doorson v. the Netherlands, Reports of Judgments and Decisions* 1996-II, at [70]

⁶⁷ *Kennedy v UK* (2011) 52 EHRR 4

⁶⁸ *Roe and Davis v United Kingdom* (2000) 30 EHRR 1, ECtHR

⁶⁹ *Tinnelly & Sons Ltd v United Kingdom* (20390/92) (1999) EHRR 249 ECtHR at [72].

must be sufficiently counterbalanced by the procedures followed by the judicial authorities.⁷⁰ These procedural safeguards must be sufficient to secure fair trial.⁷¹ The extent to which Special Advocates and CMP are capable of providing the 'substantial measure of procedural justice' is the criterion which the Strasbourg court will use.⁷² The Strasbourg Court evaluated the UK's CMP most recently in *A. and Others v. the United Kingdom*⁷³ and decided that judicial review of certificates under the Anti-Terrorism, Crime and Security Act 2001 satisfied these criteria. It ruled that, in order for the requirements of the Convention to be satisfied, it is necessary that as much information about the allegations and evidence against each applicant be disclosed as is possible without compromising national security or the safety of others, that the party concerned be 'provided with sufficient information about the allegations against him to enable him to give effective instructions to the special advocate', and that 'any difficulties caused to the defendant by a limitation on his rights [be] sufficiently counterbalanced by the procedures followed by the judicial authorities'⁷⁴.

This has been followed by the domestic jurisprudence on Article 6 ECHR. In *Secretary of State for the Home Department v AF (No. 3)*⁷⁵ the House of Lords affirmed the existence of a core minimum of natural justice and held that the CMP and Special Advocate provisions in Prevention of Terrorism Act 2005 complied with the Convention jurisprudence. Nevertheless, as a core right, some sort of notice (i.e. 'gisting') was held to be required to render the whole process compliant. However, it is not clear when this right to gisting applies. The Supreme Court in *Tariq*,⁷⁶ in holding that the CMP was compatible with Article 6 ECHR, held that providing the claimant with the gist of the case against him is not required in a case of security vetting and may only be mandatory where the liberty of a subject is at stake. The safeguards in the CMP and Special Advocate scheme were held to make up for this and lead to the overall process being compliant with the Convention.

The EU jurisprudence is similar, though less explicit, in its endorsement: the CMP process is implicitly held to have sufficient safeguards with the use of Special Advocates implicitly protecting the overall essence of the right to a fair trial. This is gleaned from the recent case of *ZZ v Secretary of State for the Home Department* (Case

⁷⁰ *Jasper v. the United Kingdom*, [GC], no. 27052/95 at [52]

⁷¹ *Edwards and Lewis v UK* (2005) 40 EHRR 24, ECtHR at [53].

⁷² *Chahal v United Kingdom* (1996) 23 EHRR 413 at [131]

⁷³ *A v United Kingdom* No. 3455/05, February 19, 2009

⁷⁴ *Ibid.* at [205] and [220]

⁷⁵ [2009] UKHL 28; [2010] 2 AC 269 (HL)

⁷⁶ [2011] UKSC 35

C-300/11) where the Court of Appeal, in a preliminary reference, asked whether, in a case concerning the exclusion of an EU citizen from a Member State on national security grounds, EU law requires that the individual:

... is informed of the essence of the grounds against him, notwithstanding the fact that the authorities of the Member State and the relevant domestic courts, after consideration of the totality of the evidence the European Union citizen relied upon by the authorities of the Member State, conclude that the disclosure of the essence of the grounds against him would be contrary to the interests of state security?

Like the ECtHR, the ECJ held that ‘to the greatest possible extent’ the ‘essence’ (or gist) of the grounds should be given to the excluded party.⁷⁷ However, the ECJ held that ‘in exceptional cases’ where a national authority opposes precise and full disclosure to the person concerned by invoking reasons of State security, the court ‘must have at its disposal and apply techniques and rules of procedural law which accommodate, on the one hand, legitimate State security considerations regarding the nature and sources of the information taken into account in the adoption of such a decision and, on the other hand, the need to ensure sufficient compliance with the person’s procedural rights, such as the right to be heard and the adversarial principle’.⁷⁸ For this the Court must carry out an ‘independent examination’ to be satisfied that security would in fact be compromised⁷⁹ and there must be no presumption that the reasons invoked by a national authority existed and were valid. The Court held that it was for domestic authority to ensure this under the national procedural rules. The Court therefore refused an opportunity to actively denounce a CMP procedure, but set out some necessary criteria which it seems that the CMP and Special Advocate system will have to comply with.

However, Chamberlain, himself a Special Advocate in the UK, disputes the effectiveness of the Special Advocate system to provide the effectiveness required.⁸⁰ He lucidly argues that the view that the current system is sufficient is based on a ‘series of misunderstandings and partial understandings’ about the way in which Special Advocates perform their function. Each of these assumptions is, according to Chamberlain, ‘at best questionable and at worst mistaken’.⁸¹ These problems persist under the Justice and Security Act 2013.

⁷⁷ *ZZ v Secretary of State for the Home Department* (Case C-300/11) at [65].

⁷⁸ *Ibid.*

⁷⁹ *Ibid* at [61-62]

⁸⁰ Chamberlain, ‘Special Advocates and procedural fairness in closed proceedings’, (2009) 28 CJQ 314

⁸¹ *Ibid.*

The first mistaken assumption is that the special advocates' ability to adduce evidence to rebut the closed material contributes to their ability in practice to ensure procedural justice. In practice there is a 'serious inequality of arms'⁸² as special advocates have no access to their own experts nor access to independent interpreters. Instead they have to rely on those provided for by the Secretary of State who have security clearance. The second mistaken assumption is that special advocates are able to challenge effectively the Government's objections to disclosure of the closed case. However, in practice, unless the Special Advocate can point to an open source for the information in question, the Government's assessments about what can and cannot be disclosed are 'effectively unchallengeable'.⁸³

The most serious mistaken assumption is a third one that, although they can obtain permission to communicate with the excluded person once they have seen the closed material, this ability to apply for such permissions assists them in a practically significant way. As explained, the special advocate is not responsible to the party to the proceedings whose interests the advocate is appointed to represent (s.9(4)) and may communicate with the party only before they have seen the sensitive material (CPR 82.11(1)), thereafter having to seek court directions to communicate with the person (CPR 82.11(4)-(5)). However, there are significant restrictions on this communication: the special advocate can, for instance, only communicate with the excluded party and his lawyers if the precise form of communication has been approved by his opponent, and permission is served on the secretary of state. In practice therefore special advocates make very sparing use of the possibility as it is deemed not tactically desirable because of the risk that it might give away to the opposing party the parts of the closed evidence in relation to which the controlled person does not have an explanation.⁸⁴ Communication is precluded even on matters of legal strategy or advice. The lack of communication matters significantly. The true nature of the case often does not become fully apparent until the closed proceedings have begun so that the Special Advocate has no opportunity to find out potential explanations or alibis for the sensitive evidence offered by the executive in the closed hearing. In many cases only the appellant may be aware of information that may prove his innocence, but is unable to provide it as does not know the allegations. It might, as Chamberlain points out, prevent that person producing alibi evidence showing that he was not the person involved in a conversation, or, if he was, to explain that it was incorrectly transcribed or wrongly translated or wrongly interpreted or to provide an alternative context or meaning. Without instructions

⁸² *Ibid.*

⁸³ *Ibid.*

⁸⁴ Joint Committee on Human Rights, 19th Report, 2006-2007, July 30, 2007

from the affected person, the special advocate ‘can tentatively suggest innocent explanations, but no more’.⁸⁵

In addition to these three mistaken assumptions offered by Chamberlain, there are two other problems of the Special Advocate scheme in practice. First, special advocates cannot act in subsequent proceedings if the closed materials which they have seen in one case might give rise to a leak of information to an individual in a subsequent CMP. These ‘quite extensive’⁸⁶ measures taken to avoid leaking (or ‘tainting’ in the official jargon) prevent the build up of relevant experience and know-how for a special advocate to enhance their ability to challenge Government evidence. Second, there seems to be an endemic problem of late disclosure of documents on behalf of the Government. This means that the role of arguing for the disclosure of closed material is reduced as the special advocate has less time to analyse the material.

In sum, these problems mean that special advocates, despite their undoubted value and stellar efforts, are significantly hindered in their role. They are effectively reduced to taking blind shots at a hidden target.⁸⁷ The conclusion that this process ensures that the ‘essence’ of a right to a fair trial remains intact is ‘an implausible proposition’.⁸⁸ The special advocate scheme as it currently exists thus results in nothing more than a fig leaf: an innocuous and seemingly benign scheme, but actually achieving no more than loosely covering a deeply embarrassing and distasteful truth. It is difficult to conclude other than ‘no matter how skilled or conscientious the special advocate is, he has become part of a system to which the accused is subject rather than in which the accused participates’.⁸⁹ Dissenting in *Roberts*, Lord Steyn thus seems justified in claiming that, ‘It is important not to pussyfoot about such a fundamental matter: the special advocate procedure undermines the very essence of elementary justice. It involves a phantom hearing only’.⁹⁰

⁸⁵ Chamberlain, ‘Special Advocates and procedural fairness in closed proceedings’, (2009) 28 CJQ 314

⁸⁶ C. Murphy, *Secret Evidence in EU Security Law: Special Advocates before the Court of Justice?* Kings College Working Papers in European Law 02/2012, 2012.

⁸⁷ Metaphor borrowed from Lord Bingham in *Roberts v Parole Board* [2005] UKHL 45.

⁸⁸ Chamberlain, *Al-Rawi v Security Service and Home Office v Tariq*, (2011) CJQ 30(4), 360, 365

⁸⁹ C. Murphy, *Secret Evidence in EU Security Law: Special Advocates before the Court of Justice?* Kings College Working Papers in European Law 02/2012, 2012.

⁹⁰ [2005] UKHL; [2005] 2 AC 738 at [88]

THE EUROPEAN UNION

A. The current position

The ECJ is considering a proposal from the GC to permit, for the first time, the use of classified and sensitive evidence in actions for annulment at the European Court. It is necessary, first, to understand what the current procedural rules and case law relating to disclosure of evidence, trials and giving reasons. This will provide context and explain why CMPs are being suggested at the European Courts in Luxembourg. Only then can one, secondly, properly evaluate, in light of the UK's experience, what the effect of introducing CMPs is likely to be.

Under Article 67 of the Rules of Procedure of the General Court the Court will take into consideration at the substantive hearing only those documents which have been made available to the lawyers and agents of both parties and on which they have been given an opportunity to express their views. Article 67(3) of the Rules of Procedure of the General Court allows that Court, where a document is submitted under a request that it be treated as confidential, two options. The General Court may accept the request, in which case the document will neither be disclosed to the other party or parties to the proceedings nor be taken into consideration for the purposes of the Court's judgment. Alternatively, it may reject the request, in which case the document will be disclosed to the other party or parties and may be taken into consideration for the purposes of the judgment.⁹¹ There are very close parallels with this system and the PII process in UK law discussed above.

What is therefore absent from the Rules of Procedure of the General Court is any provision which allows the Court to take account of confidential or sensitive material submitted by one of the parties to an action before it without that evidence being disclosed to the other party (i.e. a CMP situation).⁹² No special procedures or techniques have yet evolved to address the issue of sensitive evidence in cases involving, for example, security listing, asset freezing, or terrorism measures. It is for this reason that Advocate General Sharpston in 2011, discussing both the need for a scheme and the possible introduction of a UK-style Closed Material Procedure

⁹¹ Opinion of Advocate General Sharpston in C-27/09 P *French Republic v People's Mojahedin Organisation of Iran*, of 14 July 2011, at [171] ff.

⁹² *Ibid.* at [177]

(‘CMP’) at the European Courts, suggested that amending the Rules of Procedure of the General Court merited ‘serious consideration’.⁹³

This consideration deserves all the more attention due to Article 346(1)(a) TFEU which provides that ‘no Member State shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security’ and the incessant commitment of the Court to only considering material which has been disclosed to both parties. As is well known, the failure to respect due process rights in EU law renders the EU measure invalid.⁹⁴ The right of defence⁹⁵ requires that the European authorities disclose the evidence it relies on and also an opportunity for the party to effectively make observations on that evidence.⁹⁶ The Court must review not only that there had been a proper procedural, legal basis and reasons for listing, but also must conduct a ‘verification of the allegations’ to check whether the reasons are ‘substantiated’, ‘well founded’ and have a ‘solid factual basis’. The court must ‘assess the probative value of the information or evidence’, ‘whether the facts alleged are made out’, and ‘whether the accuracy of the facts relating to the reason concerned has been established’.⁹⁷ If a particular reason is unfounded or unsubstantiated then the EU institution may not rely on it, and the Court will base its assessment only on the evidence disclosed to it. This is forcefully reiterated in the recent case of *Fulmen*.⁹⁸ There the ECJ stated that ‘judicial review cannot be restricted to an assessment of the cogency in the abstract of the reasons relied on’,⁹⁹ and that ‘it is for the Courts of the European Union... to request the competent European Union authority... to produce information or evidence, *confidential or not*, relevant to such an examination’ of the sufficiency of those reasons.¹⁰⁰ The ‘secrecy or confidentiality of that information or evidence is no valid objection’ to disclosing evidence.¹⁰¹ If the institution does not comply with the request to supply evidence, then the Courts will ‘base their decisions solely on the material which has been disclosed to them’¹⁰². The Court acknowledged that it would need to apply ‘techniques which accommodate’ national security and procedural rights, but did not state what these were.¹⁰³

⁹³ *Ibid.* at [186]

⁹⁴ *Kadi v Council of the European Union* (C-402/05 P) [2009] 1 A.C. 1225; [2009] 3 W.L.R. 872

⁹⁵ See Article 47 Charter of Fundamental Rights, 2000

⁹⁶ See, for example, Case C-450/06 *Varec* [2008] ECR I-581 at [45]; Case C-89/08 P *Commission v Ireland and Others* [2009] ECR I-11245 at [52]; and Case C-472/11 *Banif Plus Bank* [2013] ECR I-0000 at [30]

⁹⁷ *European Commission v Kadi* (C-584/10 P) [2014] 1 C.M.L.R. 24; (2013) 163(7578) N.L.J. 20

⁹⁸ Case C-280/12 *Council of the European Union v Fulmen*

⁹⁹ *Ibid.* at [64]

¹⁰⁰ *Ibid.* at [65] (my emphasis)

¹⁰¹ *Ibid.* at [70]

¹⁰² *Ibid.* at [68]

¹⁰³ *Ibid.* at [70]

The potential issues which the introduction of CMPs into EU law seeks to remedy are therefore remarkably similar to those faced by the UK leading to the Justice and Security Act, if not more potent due to the Court's firm commitment to only considering material which has been disclosed to both parties. The fear is that it can lead to the exclusion of most of the evidence of which the executive branch would otherwise rely on, leaving the executive branch to face the all-or-nothing choice of having to either disclose sensitive material which could threaten (inter)national security and the public interest, or having to settle what it deems to be a bad case in circumstances were it would otherwise wish to put forward a defence but feels it cannot without threatening public safety. This problem is likely to be amplified due to the international multi-national approach necessitated in the EU context: not only must it be asked whether the EU institutions would be prepared to disclose material to the ECJ, but also whether a sovereign designating state would be willing to release the evidence or intelligence to the ECJ. The question is therefore how the ECJ should address the issue of evidence that is security sensitive, but which nonetheless forms, for example, the basis for restrictive measures against individuals.

B. The implementation of closed material proceedings at the EU: lessons to be learnt

There are four options open to the ECJ in its considerations. First, the ECJ could do nothing; it could keep the PII-similar procedure as set out in Article 67 of the Rules of Procedure of the General Court the Court and continue to decide whether to either disclose or not to disclose the sensitive material and only base its decision on the disclosed material. Second, this procedure itself could be modified in some way. Third, alongside the current Article 67(3) system, the ECJ could incorporate the UK's CMP and Special Advocate procedure wholesale into EU law. Fourth, and my preferred suggested solution, is to implement a substantially modified CMP and Special Advocate procedure (also keeping the Article 67(3) system), learning from the serious problems of the UK system as discussed above.

The first two options: solely retaining the Article 67(3) procedure

It is crucial to be reminded of the central dilemma the court faces in a hard choice case. The central dilemma involves a situation where to order disclosure would cause substantial harm to public interest, and yet without that disclosure the court cannot determine the issues in dispute. As seen when discussing the PII procedure in the UK, a situation, as is the case under Article 67 of the Rules of Procedure of the

General Court, can arise where, because most of the evidence is excluded, the executive branch is faced with an all-or-nothing choice of having to either disclose sensitive material which could threaten (inter)national security and the public interest, or having to settle what it deems to be a bad case in circumstances were it would otherwise wish to put forward a defence but feels it cannot without threatening public safety. Advocate General Sharpston expands further on the conundrum facing anyone seeking to implement reforms in this area by pithily demonstrating the two sorts of rights that have to be balanced between, on the one hand, the individual's right to a fair trial, and on the other, a host of general rights:

227. Possible dilution of the rights of the defence is liable to be a material factor in any case in which evidence is withheld on grounds of confidentiality. Any restriction of any kind on the evidence which is available to a party seeking to defend itself risks compromising the rights of that party and impairing its rights of defence.

228. The same is, however, also true of the effective protection of national security. Those involved in monitoring and pursuing terrorist activities, particularly those operating on the ground, may be exposed to personal danger in the form of torture or even death, should information be disclosed that may give a clue as to their activities or identities.¹⁰⁴ As a rule, therefore, Member States will legitimately wish to insist that effective restrictions on divulging material that may lead (directly, indirectly or accidentally) to the identification of sources or the unmasking of particular surveillance techniques must be maintained.¹⁰⁵

It is not at all clear that *only* the existence of a PII/ Article 67 procedure is sufficient to deal with these competing dilemmas. It must be reiterated at this point that the dilemmas outlined may be extremely rare and extremely unlikely. This has been evidenced in the discussion above regarding the UK system. This does not mean, however, that the dilemmas are not real. I am simply not convinced that the *only* possible way out of the dilemma is to force the institutions to either disclose safety-threatening information by going to trial or to concede a bad case or compensate a litigant who does not, in truth, deserve to be victorious. This cannot be the *only* possible and sensible solution and it is not clear that it is either wholly pragmatic or morally justifiable. Why should the Government or EU institutions be forced to pay undeserving challengers, or, more worrying, be forced to remove potentially dangerous individuals from security lists? A *via media* which protects both the interests of the individual to a fair trial and the right of the general population to safety must be possible for the rare – and I really wish to stress this: very rare – situation where the hard choice dilemma exists. It is not at all clear how any sort of modification of the PII/ Article 67 procedure could itself ever possibly resolve these conundrums: the necessary core is either that material is disclosed, or that it is not in which case the evidence cannot be used in the substantive hearing.

¹⁰⁵ C-27/09 P *French Republic v People's Mojahedin Organisation of Iran*, Opinion of Advocate General Sharpston of 14 July 2011

Option three: implement the UK system wholesale

One alternative to this would be to transport the UK's CMP and Special Advocate procedures to the European Courts wholesale. As Murphy correctly notes, it is not explicitly clear from Advocate General Sharpston's Opinion¹⁰⁶ whether she fully endorses the UK system or not.¹⁰⁷ She does, though, seem to implicitly accept the use of the CMP and Special Advocates as in the UK by setting out its operation and then stating that whilst the system is 'not without its critics' the criticisms 'relate essentially to the operation of the system rather than its core structure'.¹⁰⁸ However, this distinction between operation and core structure might be difficult to delineate considering the range and intensity of issues outlined regarding the Justice and Security Act 2013 and the use of CMPs and Special Advocates in any civil proceeding in the UK. As seen in the above discussion, there are some serious weaknesses of the entire structure of how CMPs and Special Advocates operate. These concerns relate to the inherent unfairness of the process as it currently works and the lack of effective procedural safeguards for a fair trial in the guise of Special Advocates who are currently seriously hampered in their role. Thus by transporting the UK's CMP and Special Advocate procedure wholesale across to the GC and ECJ, one would simply be exporting the same problems and deficiencies as mentioned above.

In addition to the flaws of the UK's CMP and Special Advocate system *ipso facto*, there are specific features of the European Courts and context which would either extenuate or amplify these problems.¹⁰⁹ First, the makeup of the GC may further hamper its ability to make appropriate assessments about closed material evidence. Unlike the Special Immigration Appeals Committee ('SIAC') which operates CMPs in the immigration context in the UK, the GC does not include an intelligence expert and immigration expert. Second, differences in the legal profession across the EU may also pose challenges: it is therefore 'difficult to conceive of EU special advocates that could perform an equivalent role to special advocates in the UK'¹¹⁰ because of many advocates in Member States do not have to deal with secret evidence. Third,

¹⁰⁶ C-27/09 P *French Republic v People's Mojahedin Organisation of Iran*, Opinion of Advocate General Sharpston of 14 July 2011 at [171] ff)

¹⁰⁷ C. Murphy, *Secret Evidence in EU Security Law: Special Advocates before the Court of Justice?* Kings College Working Papers in European Law 02/2012, 2012.

¹⁰⁸ C-27/09 P *French Republic v People's Mojahedin Organisation of Iran*, Opinion of Advocate General Sharpston of 14 July 2011

¹⁰⁹ C. Murphy, *Secret Evidence in EU Security Law: Special Advocates before the Court of Justice?* Kings College Working Papers in European Law 02/2012, 2012.

¹¹⁰ *Ibid.*

European securities law and institutions are a ‘complex constellation’ involving different ‘national cultures, institutional norms, political agendas, local perceptions and global needs’.¹¹¹ It is difficult to simply transplant wholesale one system into another. Finally, the legitimacy of the ECJ changing its own procedures¹¹² to include CMPs is questionable. As seen in UK context, the Supreme Court refused to introduce such procedures generally into UK law of its own motion without Parliamentary legislative authorisation.¹¹³ The introduction of the Justice and Security Bill was subject of extensive legislative scrutiny and debate before enactment. No such debate been had at EU level. The ECJ should therefore hold a wide consultation on its proposals before implementation.¹¹⁴

The fourth option: implementation of a significantly adapted CMP and Special Advocate scheme

The problems of the CMP and Special Advocate procedures as they work in the UK can, however, be overcome. It must be reiterated and stressed at this point that the following suggestions as to how to improve the whole system are not meant to contradict any of the very strong criticisms of the CMP process, as a whole, outlined above. CMPs are inherently unfair to the applicant who is excluded. In an ideal world they would not exist. But pragmatic and political reality suggests that their use is inevitable: in the real, harsh world we live in hard cases and difficult dilemmas exist, as explained, and the balance between the individual right to a fair trial and the general rights of citizens to safe existence is therefore a hard one to strike in some situations. Again, it must be stressed that these situations are very rare. The normal expectation should be fully open justice. I believe that the following suggestions and improvements to the CMP and Special Advocate procedures make it possible to rectify the many shortcomings of the CMP system as it currently works in the UK. If the EU does decide to implement CMPs in Luxembourg, as seems inevitable, then the following general schema and modifications should be seriously considered rather than simply transporting the UK approach wholesale. There are seven general improvements needed.

¹¹¹ JP Burgess, ‘There is No European Security, Only European Securities’, (2009) 44 *Cooperation and Conflict* 309, 310)

¹¹² Though the European Council must approve any amendments of the Rules of Procedure: Article 281 TFEU and Protocol (No 3) TFEU

¹¹³ *Al-Rawi* [2011] UKSC 34, [2012] 1 AC 531

¹¹⁴ Letter from Maura McGowan QC, Chairman of the Bar Council of England and Wales dated 22 July 2013 and signed by various other organisations.

First, CMPs should not be generally available in all areas and in all civil proceedings. Specific contexts, such as security listings, should be identified where there has historically been a need for the EU institutions or Member States to rely on sensitive material. CMPs should be rare and must not become the norm or allowed to modify standard ideas of fair trials in all areas where national security, for example, is not at threat as opposed to areas where the EU institutions may just want to suppress embarrassing or controversial practice.

Second, in areas where CMPs are possible, they should only be implemented very rarely and only as a last resort. A necessary first step should be for the GC to go through Article 67(3) of the General Court's Rules of Procedure. This should involve a UK-style PII process allowing the Court to decide whether non-disclosure is justified by balancing whether the harm that disclosure would do to the public interest outweighs the harm that non-disclosure would do to the administration of justice. It should be for the court itself to determine whether the institution's claim that disclosure would be injurious to public interest is weighty enough. In doing this the court must, on the one hand, weigh the injury that would be done to the public interest by the disclosure of the material (e.g. the threat to public safety) and, on the other hand, the harm that would be done to the administration of justice if disclosure were refused (the UK's 'Wiley balance'). CMPs should never be allowed to proceed without having gone through this stage and the Court holding that non-disclosure is justified on public interest grounds.

Third, where national security is held to trump disclosure, the institutions should be under a strong presumptive obligation that at the very minimum gisting of the case against the individual (or organisation) should be given. This would take place at the end of the Article 67 process. It should be for the institutions to rebut this obligation by convincing a judge that national security makes it absolutely necessary and impossible to provide even the gist of the case against the individual. It should be the court's discretion whether national security is in issue in the case.

Fourth, where the court is satisfied national security concerns make it absolutely impossible to provide even a gist of the reasons against the person, then a CMP should take place subject to the following improvements. The Special Advocate system as it currently operates in the UK needs significant improvements in order that the problems outlined when discussing the UK system are rectified. Therefore, Special Advocates should have more chance to communicate with the excluded party even during the trial. Communication on matters not related to substance of

closed procedure should be permitted (e.g. legal advice or strategy). They should be able to apply to the court *ex parte* for permission to communicate about the substance of the closed material without notice given to the institution unless the judge deems there to be a serious risk of disclosing sensitive evidence. Special advocates should also be allowed to act in subsequent proceedings even if they have seen related evidence. There is no reason why security-cleared special advocates should not be trusted any less in subsequent cases when they have managed to keep confidential material to themselves in a situation where there is more pressure on them to divulge. Allowing experience and knowledge to be accumulated would help increase Special Advocate's skills and ability to represent the interests of the excluded parties. Training and education should be able to overcome any issues regarding differences in practitioner standards across the EU.

Fifth, it is essential that, during a CMP, where the evidence in question is doubtful or ambiguous, any doubt or ambiguity be construed in favour of a party who has been unable to comment on it or to question it to the fullest possible extent.¹¹⁵ This helps to rectify the issue that secret evidence may originate from flawed or a 'mosaic' of sources. Further, there may be a tendency on the part of Member States and their security services to over-classify information so that what ought truly to be in the public domain becomes classified as secret.

Sixth, Article 257 TFEU might be utilised. This provides that 'the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish specialised courts attached to the General Court to hear and determine at first instance certain classes of action or proceeding brought in specific areas.' Setting up a specialised court to hear CMPs might overcome some of the problems identified with European judges not holding sufficient knowledge or experience of the security services. It would allow specific judges to be fully trained and develop a growing understanding of security service practice enabling them to more effectively challenge evidence put before them.

Seventh, where a judgment is given after a CMP there should be a strong presumption that, at the very minimum, a gist of reasons should be supplied in the judgment. Again, it should be for the institutions to rebut this obligation by convincing a judge that national security makes it absolutely necessary and impossible to provide even the gist of the reasons for judgment against the

¹¹⁵ C-27/09 P *French Republic v People's Mojahedin Organisation of Iran*, Opinion of Advocate General Sharpston of 14 July 2011 at [232]

individual. Where it is absolutely impossible for even a gist of reasons to be given due to national security reasons, then reasons should be given in closed session to the special advocate who would sign off the redacted judgment stating that he or she is satisfied that the reasons adequately and reasonably reflect the issues which were discussed in the closed proceedings. Where the Special Advocate then thinks that there is cause to appeal, he/she should be able to advise this, though not allowed to disclose any closed evidence or information, nor allowed to represent in the appeal. This would help negate the fears that an excluded party has no way of knowing when to appeal a closed judgment.

CONCLUSION

This article has sought to do two things. First, the system of CMPs and Special Advocates as in the UK was critically evaluated. It was concluded that the system, as made generally available in all civil proceedings by the Justice and Security Act 2013, is flawed when analysed against (1) instrumental and non-instrumental rationales for procedural protection; (2) established common law fundamental rights, namely open and natural justice; (3) European Convention on Human Rights and Fundamental Freedoms ('ECHR') case law; (4) EU case law; and (5) the UK Government's own rationale for introducing CMPs as set out in the Green Paper. Indeed, like the Joint Committee on Human Rights, it is hard:

not to reach for well worn descriptions of it as Kafkaesque or like the Star Chamber... we are left with the very strong feeling that this is a process which is not just offensive to the basic principles of adversarial justice in which lawyers are steeped, but it is very much against the basic notions of fair play as the lay public would understand them.¹¹⁶

Second, with the experience of CMPs and Special Advocates in the UK fresh in mind, it was suggested that this system should not be transported across to the European Courts wholesale. Having learnt from the UK's mistakes, a number of improvements and adaptations of the CMP and Special Advocate system were suggested which would reduce the impact on due process rights. This article has urged caution and vigilance in the transposing of CMPs from one system to another and suggested measures to ensure that they are introduced in a more acceptable manner and 'remain exceptional rather than normal features of our legal system'.¹¹⁷ The fear of terrorism makes it easy to lose sight of the imperative of good

¹¹⁶ Joint Committee on Human Rights (19th Report of Session 2006-07, HL Paper No.157/HC Paper No. 394 (Session 2006-07) at [2.10].

¹¹⁷ Kavanagh, Special Advocates, Control Orders and the Right to a Fair Trial, (2010) MLR 73(5) 824, 857.

governance of our security and intelligence agencies and basic fairness in procedures for all who come into contact with the justice system. It is the hallmark of a society abiding by the Rule of Law that the same, civilised, process rules are followed by both the governed and governing. The ECJ is urged not to cross the Rubicon by transporting the UK's inherently unfair CMPs with mere fig-leaves of protection in the form of ill-equipped Special Advocates across to Europe, thereby signalling its approval to systems across Europe.

Muslim Marriage in Britain: Case of *KC & Anor v City of Westminster*

Menaal Munshey

INTRODUCTION

This paper will critically evaluate the decision in the case of *KC & Anor v City of Westminster*¹, while examining the wider question of the requisites for marriage under Islamic law, and whether Islamic Law should be followed in relation to Muslim marriages within Britain.

FACTS

This case involved a Muslim ceremony of marriage conducted over the telephone between two parties, one of whom was severely handicapped. As per Bangladeshi law, it was stated that “within the Hanafi School of law, the basic starting point is that the parties to the marriage must have capacity to enter into it. However, the guardian of a person who lacks capacity can enter into a valid marriage contract on their behalf.”² The Court of Appeal, however, emphasised that simply because a marriage was recognised in a foreign state did not mean that it was necessarily recognised in the United Kingdom. It was confirmed that IC could not have lawfully married in the United Kingdom because he lacked the capacity to marry. However, under Islamic law, lack of capacity is only a ground that the marriage be voidable, not void. This meant that only the parties themselves could apply to have the marriage annulled. Neither of them was seeking such an application.³

ISSUES RAISED

This case raises many questions for British society as well as Islamic law. It is an exemplification of “the pluralism of modern British society”⁴ and highlights the issues raised by the pluralistic nature of Islamic law. Although marriages by telephone are accepted as valid marriages, under which law should they be regulated? In this case, was there valid consent from both parties? Does the disability of IC cause him to lack capacity? If so, under Islamic law can a guardian of such a person contract on their behalf? And ultimately, is this a valid marriage under Islamic law and UK law?

¹ *KC & Anor v City of Westminster Social & Community Services Department & Anor* [2008] EWCA Civ 198.

² Rebecca Probert, *Hanging on the Telephone: City of Westminster v IC* (2008) 20 *Child & Fam. LQ* 395, 400.

³ *KC & Anor v City of Westminster*, *supra*.

⁴ Probert, *supra*.

Distinct Nature of Muslim Marriage

In determining whether the marriage between IC and NK is a valid marriage or not, it is important to understand the distinct meaning of marriage in Islamic law. This distinction was highlighted as early as 1913 in the case of *Ex parte Mir Anwaruddin*⁵. One illustration of this is that “a Christian marriage is the voluntary union for life of one man and one woman to the exclusion of all others. Mahomedan law, on the other hand, allows four wives, which renders the status of the Mahomedan marriage entirely different to that of a Christian one.”⁶ This was also highlighted by Wall LJ⁷ and reiterated in the similar case of *XCC v AA*.⁸

Under Islamic Law, marriage is "a contract which has for its object the procreation and legalising of children";⁹ it is also “instituted for the solace of life and is one of the prime original necessities of man.”¹⁰ This establishes the importance of marriage as a basic necessity of life under Islamic law. Although “every adult Muslim of sound mind may enter into a valid contract of marriage”¹¹ this does not limit adult Muslims of unsound mind from marrying, because of the importance ascribed to marriage in every Muslim’s life. This would validate the marriage between IC and NK. Furthermore, although an objective of marriage is procreation, “marriage remains lawful even in extreme old age, after hope of offspring has ceased or during *marz-ul-maut* (terminal illness).”¹² Therefore, although IC’s ability to have children is disputed,¹³ this would not affect the validity of the marriage under Islamic law provided both parties had knowledge of this and had consented to the marriage.

Capacity of Contracting Parties

A pre-requisite of a valid marriage under Islamic law is capacity. Legal capacity (*ahliyyah*) is “the ability to conduct one’s affairs by oneself” and “the fitness of a person to enter into obligation.”¹⁴ Although Muslims are considered to have full religious legal capacity at puberty (*ahliyyat ada’ diniyyah*), their full *ahliyyat al-ada’* is incomplete until the age of maturity (*rushd*). Maturity is "the ability to see and foresee risks and accordingly make reasonably good decisions regarding one's own

⁵ *Ex parte Mir Anwaruddin* (1917) 1 KB 634.

⁶ Wesley Lloyd, *Interesting Marriage Questions* (1917) 10 *Law. & Banker & S. Bench & B. Rev.* 82, 82

⁷ *KC & Anor* (note 1) para 45.

⁸ *XCC v AA* [2012] EWHC 2183 (COP).

⁹ Shaheen Sardar Ali, *Is an Adult Muslim Woman Sui Juris* (1996) 3 *Y.B. Islamic & Middle E. L.* 156, 157.

¹⁰ *ibid.*

¹¹ *ibid.*

¹² *ibid.*

¹³ *KC & Anor* (note 1) para 46.

¹⁴ Mahdi Zahraa, *Legal Capacity of Women in Islamic Law* (1996) 11 *Arab LQ* 245, 245.

actions and transactions.”¹⁵ It is clear that although IC had achieved *ahiliyyat ada’ diniyyah*, he had not attained *rushd*. Upon reaching maturity, human beings attain full legal capacity provided that the person does not have a mental or physical defect that constitutes an impediment to legal capacity, as in the case of IC. The determination of whether IC had attained *rushd*, and consequently full legal capacity depends on the definitions of the impediments.

Impediments can be natural or incidental; natural causes include insanity and mental derangement. It is possible that IC falls under this category. In accordance with these conditions, it would appear that IC did not have legal capacity to enter

into a marriage on his own. However, a guardian (in this case IC’s father) with full legal capacity, given IC’s consent, was able to contract into the marriage on his behalf therefore rendering IC’s marriage valid despite not meeting the requirement of capacity.

Power of the Guardian

In considering the validity of IC and NK’s marriage, it is vital to consider the role of the guardian, IC’s father. Under Islamic law, the guardian must “insure that the public’s interest in the marriage is being protected.”¹⁶ To assess the power of the guardian under the Maliki school would mean an assessment of whether the male who lacks majority, is an adult/minor or is insane. The “importance of the guardian’s role is exclusively a function of the majority, or lack thereof of the *ward*.”¹⁷ If the *ward* (minor) has attained majority, the biological father has “no power to compel the marriage of his adult son or daughter.”¹⁸ However, if we are to regard IC as a minor (given that his understanding is measured as that of a 3 year old) it is stated that “the only free males whose marriages can be compelled are those of the insane and minors.”¹⁹ This gives great power to the guardian: “it empowers a father or other guardian to impose the status of marriage on his minor children/*wards*”²⁰ by acting as a *wali*. “The *wali*, under all four schools of Sunni jurisprudence, has the power to give his minor children/*wards* of both sex in marriage without their consent, until they reach the age of puberty or *bulugh*.”²¹ If the marriage is contracted by a guardian other than the father of the minor, “the minor has the right to exercise what is technically called *khiyar-ul-bulugh* (option of puberty).”²² IC, by age, is not a minor therefore will not attain *khiyar-ul-bulugh*. In short, this marriage

¹⁵ *ibid* 250 .

¹⁶ Mohammed Fadel, Reinterpreting the Guardian’s Role (1998) 3 J. Islamic L. 1, 5.

¹⁷ *ibid*.

¹⁸ *ibid* 10.

¹⁹ *ibid*.

²⁰ Shaheen Sardar Ali (note 9) 170.

²¹ *ibid*.

²² *ibid* 171.

was contracted by IC's father, which effectively erases IC's right to *khiyar-ul-bulugh*.

In the case of NK, she has attained majority and has given free and informed consent, diminishing the importance of the role of the guardian. However, the *wali* acting on her behalf may rely on the doctrine of *Kafat* to annul the marriage.²³ *Kafat* signifies the equality of a man with woman based on societal norms, "it provides the *wali* with a right to withhold consent to or seek annulment of the marriage of his ward on grounds of it being an unequal match."²⁴ If the parties ascribe to the Hanafi school, the guardian is allowed to "obtain, on grounds of non-equality, the annulment of a marriage contracted by his adult ward without his consent or intervention"²⁵ although it is doubtful that the "courts would interfere with the consent of the spouses, if they are adults."²⁶ Maliki law differs and states that "a marriage can be validly contracted only by the bride's guardian and a petition for annulment on grounds of non-equality is accordingly restricted to cases where the husband has fraudulently misrepresented his status".²⁷ This also does not appear to be the case: NK has given her consent to marry IC, her *wali* too has agreed, therefore limiting the use of the doctrine of *Kafat*.

Islamic View on Marriage of Disabled Person(s)

According to the majority of legal sources, "classically disabilities were not considered marriage inhibitors under Islamic law."²⁸ Disability that compromised *aql* (mental health) was considered by later generations of Hanafi jurists for *Kafat* purposes. This view was supported by Al Shafi'i and Ibn Hanbal who also stressed the importance of impotence and *junun* (insanity).²⁹ "Ibn Hanbal argues that a woman's guardian may prevent her from marrying the *majnun* (insane)."³⁰ According to the Malikis, even if the man is inflicted with *junun*, and this developed after consummation, the wife is entitled to request *faskh* (dissolution).³¹ However, if it is prior to the marriage contract, the wife is not entitled because she knowingly consented. Therefore, even if IC is classified as inflicted with *junun*, because NK knew of IC's disabilities prior to the marriage and consented to this, she has no right to request a dissolution of the marriage.

Junun is accepted by all schools of thoughts as "an impediment either to contracting

²³ *ibid* 167.

²⁴ Shaheen Sardar Ali (note 9) 167.

²⁵ *ibid* 168.

²⁶ *ibid*.

²⁷ *ibid*.

²⁸ Vardit Rispler-Chaim, *Disability in Islamic law* (Springer c2007) 51.

²⁹ *ibid* 49.

³⁰ *Ibid*.

³¹ *ibid* 55.

a marriage or to maintaining an ongoing one.”³² However, it is the definition of *majnun* that is important. In Islamic legal literature, there is hardly any classification of types of *junun*. There is much debate between the schools of thought³³ but commonly it is meant to be “deviation from human behaviour guided by reason.”³⁴ Based on a basic definition of *junun*, it would appear that IC was a *majnun*; however, his particular condition is not specified, which makes his position unclear. Nowadays, for instance, “a medically treatable disease cannot furnish legal grounds for request of dissolution.”³⁵ Thus, although epilepsy was classified as *junun*, this would not be true today - advances in medicine, particularly neurology, must be factored in.

Despite the defects, the sanctity of marriage is paramount. Although “the five specified defects in the husband entitle the wife to request dissolution, she may also choose to stay with him.”³⁶ According to the Hanafis, “In all other situations (apart from *Jabb*, ‘*Unna* or *Khisa*’), as difficult as it might be for the wife to stay with her husband, she may not request dissolution because the Hanafis believe that marriage is contracted for ‘better and worse’, and one should stick by a sick spouse take care of him or her.”³⁷ Therefore although the discovery of such defects is important, they do not render the marriage automatically void. Instead, the option of continuing a married life is encouraged in the interest of the sanctity of marriage and recognition of its vital nature in individuals’ lives regardless of their disability.

This highlights the fact that there is “much leniency, consideration, and compassion in the law of marriage regarding people with disabilities.”³⁸ This is why there is the option of accompaniment by a guardian. This stresses the view of Islamic law that “it is not fair to determine that those who are not perfectly healthy should not marry, because many people who suffered a chronic disease or a birth defect have married, and their marriages have turned out to be as happy as can be imagined.”³⁹ It is important to note that the right to marry is a human right under international law⁴⁰ as well as Islamic law; excluding disabled persons from this would be unfair and inequitable. Given the fact that disability is not seen as an impediment to marriage, and the timing of knowledge of the disability, it is clear that the marriage between NK and IC is valid under Islamic law.

³² *ibid* 64.

³³ *ibid* 66.

³⁴ *ibid* 64.

³⁵ *ibid* 63.

³⁶ Vardit Rispler-Chaim, *Islamic Law of Marriage and Divorce and the Disabled Person: The Case of the Epileptic Wife* (1996) *Die Welt des Islam* 90, 102

³⁷ *ibid* 102.

³⁸ Rispler-Chaim (note 28) 67.

³⁹ Rispler-Chaim, (note 36) 100.

⁴⁰ Ann Loquer Estin, *Family Law, Pluralism and Human Rights* (2011) 25 *Emory Int’l L. Rev.* 811, 815.

CONCLUSION

Although it could be argued that IC lacked capacity, this analysis shows that his guardian could contract him into a binding marriage because Islam does not view disability as an impediment to marriage. In fact, it accords leniency in such a situation, allowing disabled persons the possibility of attaining love, solace and happiness through marriage. A disabled person is not incapable of love and devotion. It would be unfair to exclude this category of people as unable to marry, and therefore take away from them a huge source of joy and comfort. In conclusion, therefore, IC and NK's marriage was a valid one under Islamic law, given with full and informed consent, contracted into for IC by a guardian, all formalities satisfied, and meeting the requirements of a valid marriage under Islamic law. UK law should respect and appreciate this, and recognise the marriage between IC and NK as valid.

Extending non-delegable duties of care: Liability without fault¹

John Goss

On 5th July 2000, Annie Woodland was ten years old and attending a school swimming lesson at Gloucester Park swimming pool in Essex. She was a pupil at a primary school run by Essex County Council, who had hired a small independent contractor to run swimming lessons as part of the National Curriculum. Tragically, she got into difficulties – the cause is as yet undetermined – and suffered serious hypoxic brain injuries. As a result, she has severe mental impairment and will require care for the rest of her life.

The Supreme Court heard a preliminary point in her claim for damages almost exactly 13 years after the accident. The Court was asked to rule on whether Essex County Council, the education authority, owed Woodland a non-delegable duty of care. Such duties will be familiar to law students from the field of employers' liability, but the Supreme Court's ruling both extends them to other situations and clarifies when they apply. Non-delegable duties are an exception to the general rule in negligence that liability depends on fault. Lord Brandon of Oakbrook described them tersely in *McDermid v Nash*:

The essential characteristic of the duty is that, if it is not performed, it is no defence for the [defendant] to show that he delegated its performance to a person, whether his servant or not his servant, whom he reasonably believed to be competent to perform it. Despite such delegation the [defendant] is liable for the non-performance of the duty.²

Lord Sumption, giving the leading judgment, described two broad areas in which such duties arise.

Extra-hazardous activities

The first is a varied class of cases where someone employs an independent contractor to do an inherently dangerous task, particularly where this might pose a danger to the public. The cases cited are not recent and he highlighted that 'many of these decisions are founded on arbitrary distinctions between ordinary and extraordinary hazards which may be ripe for re-examination.'³ Examples include a

1 *Woodland v Swimming Teachers Association & others* [2013] UKSC 66, [2013] 3 WLR 1227.

2 *McDermid v Nash Dredging & Reclamation Co* [1987] AC 906 HL.

3 *Woodland* (n.1) 1232B.

pedestrian tripping on a soil heap left on the road overnight by a highway repair firm,⁴ a passer-by injured when a benzoline lamp exploded during the laying of telephone cables⁵ and a railway passenger falling into a coal cellar left open on a station platform.⁶ In each case, the defendant was found liable for the injuries caused despite having hired an independent contractor for the task. It is difficult to see how the more onerous non-delegable duty arises, although Lord Sumption suggested, without expansion, that it might be on account of a 'special public policy for operations involving exceptional danger to the public.'⁷

Antecedent relationships of control

The second class of non-delegable duties is more relevant to Woodland's case. Certain non-delegable duties arise because of a prior relationship between claimant and defendant characterised by protection and control. When the relationship imposes 'a positive or affirmative duty to protect a particular class of person against a particular class of risks,' such a duty will be personal and non-delegable.⁸ This does not mean that the duty-holder must actually carry out the task in question – but it does mean that he has a duty to ensure that whoever he gets to perform the task carries it out carefully. The duty-holder is analogous to a contractor who promises to do work carefully. This will usually be taken as a promise that whoever he gets to do the work – be he employee, sub-contractor or independent agent – will do the work carefully.⁹

Such duties arise from the special character of the defendant's relationship with the claimant, which leads to the imputation of an assumption of responsibility. They have primarily been found in employment cases,¹⁰ but perhaps also in hospitals.¹¹ Lord Sumption used these examples, along with a survey of the Australian case law, to provide a detailed exposition of when a non-delegable duty will arise. He was concerned to limit the scope of such duties, since they run directly counter to the usual rules of negligence. They are not therefore different purely in degree or in level of risk from ordinary duties of care.

4 *Penny v Wimbledon Urban District Council* [1899] 2 QB 72.

5 *Holliday v National Telephone Co* [1899] 2 QB 392.

6 *Pickard v Smith* (1861) 10 CBNS 470.

7 *Woodland* (n.1) 1232B.

8 *Woodland* (n.1) 1232D.

9 *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 per Lord Diplock at 848.

10 *Wilsons & Clyde Coal Co Ltd v English* [1938] AC 57.

11 *Gold v Essex County Council* [1942] 2 KB 293 per Lord Greene MR; *Cassidy v Ministry of Health* [1951] 2 KB 343 per Denning LJ (diss.) and *Roe v Minister of Health* [1954] 2 QB 66 per Denning LJ (diss.).

Lord Sumption identified five criteria for a non-delegable duty. The first is that the claimant is 'especially vulnerable or dependent on the protection of the defendant against the risk of injury.'¹² As well as patients and pupils, he suggested that prisoners and care home residents would be likely to qualify. The second is that there is an antecedent relationship between claimant and defendant which places the claimant in the actual custody, care or charge of the defendant and from which it is possible to impute a positive duty to protect the claimant from harm. Such a relationship will usually involve an element of control over the claimant. The third is that the claimant has no control over how the defendant chooses to perform his obligations. The fourth is that the defendant has delegated a function to a third party which is an integral part of his positive duty and that third party is exercising, for that purpose, the defendant's element of control. The fifth is that the third party has been negligent in the performance of the very function assumed and then delegated by the defendant. He limits Lord Phillips MR's suggestion in *A (A Child) v Ministry of Defence*¹³ that a non-delegable duty depends on the defendant having control of the environment to the hazardous activity cases described above.

Limitations on non-delegable duties

The rest of Lord Sumption's speech, and much of Baroness Hale's concurring judgment, focuses on the limitations on non-delegable duties. Without such limitations and controls, there would be a grave risk of imposing crushing liability on defendants for acts for which they bore no responsibility – a particular concern when many of the defendants are likely to be public service providers. A non-delegable duty will therefore not arise where the defendant has assumed a responsibility to arrange a certain function, rather than provide it (so the decision in *A (A Child)* was correct, as the MoD's responsibility was to arrange rather than provide healthcare for military dependants; similarly, an education authority has a responsibility to arrange transport to and from school, not provide it¹⁴). If the defendant does not have control over the claimant at the relevant time – for example, on extra-curricular activities outside school hours – they will not arise. Nor will they arise when no control has been delegated, as on a school trip, supervised by teachers, to a zoo or a museum. Nor when the third party's negligence relates to something other than the function specifically delegated to them.

12 *Woodland (n.1)* 1241H.

13 [2005] QB 183 para 47.

14 *Myton v Woods* (1980) 79 LGR 28 CA.

Baroness Hale's speech focused on the importance of the law of tort providing equitable outcomes that are comprehensible to 'the man on the Underground.'¹⁵ She pointed out that a private school pupil in Woodland's position would have a remedy in contract; a state school pupil whose swimming lessons were run by the education authority would have a remedy in vicarious liability; it was only a pupil in Woodland's position who would have no remedy if a non-delegable duty did not exist. Like Lord Sumption, she stressed the limitations of this doctrine and the fact that many of the situations in which it would arise would historically have been run by the defendant's employees, but are now outsourced.

Consequences and Implications

The conditions for a non-delegable duty outlined by the Supreme Court certainly mean that non-delegable duties will remain the exception rather than the rule. They do not open the door for any and all claimants to pursue defendants whose only act was to hire – carefully and responsibly – a negligent contractor. In the vast majority of cases, a successful claim for negligence must still be based on fault. That does not mean that this ruling is without significance.

Firstly, the judgment is to be welcomed as both the correct result in the instant case and an overdue clarification of a vexed area of law. It is surely right that Woodland ought to be able to obtain a remedy in circumstances where an equivalent pupil at a private school or a non-outsourcing state school could do. The imposition of strict conditions on such duties will prevent the much-feared floodgates of litigation from bursting open. Moreover, the idea of liability for contractors has been a troublesome one at least since Professor Glanville Williams somewhat acerbically attacked it as a 'logical fraud' in 1956.¹⁶ Lacunae on the topic remain – for example, precisely when and why does someone retain liability for a contractor hired to perform an extra-hazardous task? – but this judgment helpfully sets out when and why non-delegable duties can arise in situations where the claimant is under the defendant's control.

The imposition of such strict conditions on non-delegable duties does, however, raise the question of the basis on which employers owe employees a non-delegable duty. While employees may well be under the control of an employer, it is difficult to conclude that they are especially vulnerable, which Lord Sumption made his first condition. The idea of an employer's non-delegable duty of care originally arose to

15 *Woodland* (n.1) 1245E.

16 Glanville Williams, "Liability for Independent Contractors" [1956] CLJ 180 at 193.

circumvent the doctrine of common employment, under which an employer could not be vicariously liable for the act of an employee when only a second employee suffered a loss. The common employment doctrine was abolished in 1948¹⁷ but non-delegable duties for employers remain. It is not suggested that employers should not be under a duty to provide safe systems of work, safe materials and tools and safe workforce, only that there is no good reason for that duty to be non-delegable. In the overwhelming majority of situations, an employer would still be liable if that duty is breached through the operation of vicarious liability. Where the party responsible for the breach is not a fellow employee, it is an unusual operation of the law to make the employer responsible nonetheless. There are arguments in its favour, particularly when considering contractors who may be out of the jurisdiction or otherwise unavailable to sue,¹⁸ and the concept is too well established for this case to undermine it directly. Nonetheless, the ready imposition of non-delegable duties on employers is somewhat inconsistent with the strict conditions before it will be imposed on schools, hospitals and the like. It is perhaps explainable by the courts' general policy of treating the employment relationship as one in which employees requires special protection.

More directly, there is ample scope for argument over several of Lord Sumption's conditions. He gave a short list of classes of people who could be owed a non-delegable duty of care by virtue of particular vulnerability and an antecedent relationship – pupils, patients, prisoners and those in care homes. Arguments will no doubt follow over how this might be extended. Similarly, there will inevitably be arguments over whether a defendant has delegated a function that it was under a duty to perform or simply a duty to arrange. For example, is the provision of foster care for children a function that local authorities must arrange or perform? Doubtless such questions will be settled in time. As Baroness Hale observed, 'The boundaries of what the hospital or school has undertaken to provide may not always be as clear cut as in this case [...] but will have to be worked out on a case by case basis as they arise.'¹⁹

There are significant implications for the conduct of duty-holders. This judgment could have a 'chilling effect' on their willingness to contract out their functions. This was one of the reasons given by the Court of Appeal in this case for rejecting the idea of the education authority owing a non-delegable duty.²⁰ Particularly where those

17 S.1 Law Reform (Personal Injuries) Act 1948.

18 *McDermid v Nash* (n.2).

19 *Woodland* (n.1) 1248A.

20 [2012] EWCA Civ 239; [2013] 3 WLR 853 *per* Tomlinson LJ at 878.

functions are optional, the result could be an unintended consequence of leaving duty-holders unwilling to outsource and unable – probably for financial reasons – to perform them directly. An NHS hospital that has an arrangement to contract out minor operations to a private clinic, for example, might be markedly more reluctant to do so. The result could be either increased delay in accessing certain public services, or a narrowing of the services available. Such an effect is limited by the conditions set out by the Supreme Court, but is unlikely to be eradicated.

The alternative to a chilling effect is likely to be a detailed re-examination of the contractual relationships of local authorities, schools, hospitals and prisons. They are unlikely to be able to obtain cost-effective insurance for breaches of a non-delegable duty, so will need to obtain indemnities from contractors in case of breach – or ensure that their contractors have sufficient liability insurance to make pursuing the duty-holder a pointless exercise. This is likely to push duty-holders away from contracting with small businesses towards larger undertakings that are more able to bear the risk and to afford either an indemnity or insurance. Free schools, which operate outside the umbrella of local authority control, are an example of a class of duty-holder who might be severely affected and this extension of non-delegable duties should be added to the list of legal issues that are particularly relevant to them.²¹

Finally, this judgment marks another step away from the highly restrictive approach to duties owed by public bodies typified by the House of Lords decision in *X (Minors) v Bedfordshire County Council*.²² That decision has already been confined by the subsequent decisions in *Phelps v Hillingdon London Borough Council*²³ and *Barrett v Enfield London Borough Council*²⁴ but this decision shows the willingness of the current Supreme Court to strengthen the content of duties owed by public authorities – even when they are not at fault. To a great degree, this is a response to the outsourcing of a variety of public services that would previously have been covered by vicarious liability for the acts of the duty-holder’s employees. It is thus an excellent example of how the common law adapts to changes in economic and social structures and how the judiciary may act to limit the presumably unforeseen consequences of executive and legislative decisions.

21 Ogg, T ‘A free reign?’ [2013] 7582 NLJ.

22 [1995] 2AC 633.

23 [2001] 2AC 619.

24 [2001] 2AC 550.

Conclusion

In Woodland's case, the Supreme Court's unanimous decision was that the criteria for a non-delegable duty of care on the part of the education authority were met. The case now returns to the High Court to determine whether the contractors who provided the swimming lesson were in fact negligent. If they were, it is the County Council who will bear much of the estimated £3 million damages, despite not being at fault. Nonetheless, this is surely a fair and equitable result for Woodland, who would otherwise go uncompensated. The Supreme Court has done its best to avoid imposing non-delegable duties in an overly wide set of circumstances – 'to prevent the exception from eating up the rule,' in Lord Sumption's terms.²⁵ Even so, this is a broad and significant judgment that both answers and raises important questions and runs counter to normal tortious principles.

25 *Woodland* (n.1) 1241F.

The Cayman Islands' Offshore Model: Historical Happenstance, Shifting Norms, and the Ongoing Realignment of Interests

Adrian Davey

Introduction

*"In creating a global financial market-place the banks altered the geography of the world system. The basic geographical dimensions of space and time were warped to suit the banks operating needs. ... Nations attempted to control the system through regulation or taxes: tax havens, dots in geographic space but substantial territories in the bankers' world, enabled such restrictions to be by-passed. ... Time and space in the bankers' world were pliable, moveable, profitable constructions which might or might not correspond with the mundane geography of national territories"*¹

Susan Roberts has described the emergence of offshore financial centres² (OFCs) as 'the secretions of distinct new spatial forms.'³ However, the use of domestic regulatory constructs to shape international economic flows is probably almost as old as the search for public sector revenue from international trade. Indeed, the establishment of Delos as a 'free-trade zone' indicates that the Romans were quite familiar with the concept 2,000 years ago.⁴

The origin of what may be viewed as the modern OFC model, in which a State elects to apply differentiated regulation to certain financial transactions between non-residents that notionally occur in or are "booked" as occurring within its borders, may be traced to the development the Eurodollar market in London from 1957. Variants and offshoots of the OFC model, as implemented in the then remote jurisdictions such as the Cayman Islands, were initially developed as support structures for "The City" in London, in itself an OFC given that it primarily serves the interests of non-residents.⁵ In response to a wide range of changes affecting the international regulatory architecture and the requirements of the underlying clients,

¹ Daly M and Logan M (1989) *The brittle rim: finance, business and the Pacific region*. Harmondsworth: Penguin, p. 103.

² "Amongst the many definitions of Offshore Financial Centers (OFCs), perhaps the most practical characterizes OFCs as centers where the bulk of financial sector transactions on both sides of the balance sheet are with individuals or companies that are not residents of OFCs, where the transactions are initiated elsewhere, and where the majority of the institutions involved are controlled by non-residents." IMF "Offshore Financial Centres: The Role of the IMG" (June 23, 2000)

See: < <http://www.imf.org/external/np/mae/oshore/2000/eng/role.htm> > (accessed 15 Nov 2012).

³ Roberts SM, 'Small Place, Big Money: The Cayman Islands and The International Financial System' (1995) 71 *Economic Geography* 3, p.239

⁴ Toutain, Jules 'The Economic Life of the Ancient World' (New York: Alfred Knopf, 1930) p. 232; Farole, Thomas 'Special Economic Zones in Africa: Comparing Performances and Learning from Global Experiences' (2011) The World Bank, p.31, Reger, G 'Regionalism and Change in the Economy of Independent Delos' (1994) University of California Press, Berkeley; Champion, C (ed) 'Roman Imperialism: Readings and Sources' (2003) Wiley-Blackwell Publisher, Malden, Mass.

⁵ Zoromé, A, 'Concept of Offshore financial Centres: In Search of an Operational Definition' IMF Working Paper WP/07/87 <<http://www.imf.org/external/pubs/ft/wp/2007/wp0787.pdf?>>

OFCs have morphed in form over the years. However, notwithstanding their various changes OFCs remain fundamentally dependent on a number of presumptions and axioms derived from, inter alia English colonial reception of law theory, the modern international relations system, and the company jurisprudence of onshore legal systems.

The modern incarnation of these spatial forms arose in response to the arbitrage opportunity created between the 17thC Westphalian sovereignty paradigm as applied in the post-second World War era, and the new realities of a globalised world in which capital is increasingly unconstrained by national borders.⁶ The historical sovereignty paradigm, which still dominates today, confines the jurisdiction of a nation-state's regulatory authority to its geographic borders, with the corollary being the reciprocal recognition of that geographically defined monopoly authority of each individual nation state by other nation states. As monopoly authority within their geographic borders in relation to the imposition of regulation, nation-states may chose to assume and behave as if there were no market-related constraints in relation to the cost imposed by regulation. In contrast, economic actors controlling mobile capital tend not to adopt such assumptions and behaviours. Rather, they may utilise the construct of mutual recognition to "outsource" preferred regulatory regimes related to their capital. In essence, a disregard for the costs of regulation in relation to mobile capital may give rise to an arbitrage opportunity in the context of mutual recognition of foreign corporate entities.

The Role of Recognition of Corporate Legal Personality and the Exercise of Sovereignty

Virtually all modern OFCs, including the Cayman Islands, are derivatives or vestiges of what once was the British Empire.⁷ Notwithstanding its non-sovereign status, the Cayman Islands are recognised by the international system as having exclusive law-making authority over economic activities that take place within its geographic borders and within its delegated areas of competence. A cursory glance at the law-making abilities of the colonies of other European Colonial powers will show that this need not have been the case.

⁶ The 'Peace of Westphalia' agreement, signed in 1648, in which the major European countries consisting of the Holy Roman Empire, Spain, France, Sweden and the Dutch Republic, agreed to respect the principle of territorial integrity. Westphalian Sovereignty is the concept of the sovereignty of nation-states on their geographic territory, with no role for external agents in the domestic structure.

⁷ Palan R, *International Financial Centers: The British-Empire, City-States and Commercially Oriented Politics*, (2010) 11 *Theoretical Inq. L.* 149.

The Introduction of European legal constructs into European colonies

Each of the European colonial powers sought to extend to their colonies, in one form or another, the law of the relevant colonial power, thereby transmitting not only elements of control and commercial certainty, but also elements of borrowed legitimacy in relation to the laws in force in the relevant colonies. By extension, entities created under those laws in effect in the relevant colonies, were recognised as parallels with analogues of the legal entities created within the geographic space of the European colonial powers themselves. Spain, France and Portugal tended to extend the entire bodies of their European laws to their colonies, whereas England tended to grant a degree of local legislative autonomy to its colonies with the proviso (in effect until 1865) that the colony was prohibited from passing any law contrary to the laws of England.⁸

As colonies and former colonies gained greater legislative autonomy, the presumptions of the earlier period persisted although the direct linkage with the European colonial powers loosened. As a result, the colonies gained a sufficient degree of recognised legislative capacity, that is, recognised autonomy in the creation of legislation and rule-making authority within the geographical limits of their territory.

Over time, the economic interests of colonies and former colonies have not necessarily remained in alignment with those of the colonising powers. In a modern context, jurisdictions with recognised law-making authority, including OFCs, are able to set the relative cost of regulation within their borders, and in that context may exercise their legislative authority to develop and implement lower cost regulatory regimes relating to the regulation of capital.⁹ Such lower cost regulatory regimes - in a world where demand for low-cost capital is high and where modern financial innovations facilitate the increasing mobility of global capital - may attract capital away from jurisdictions with higher cost regulatory regimes.

⁸ McPherson, BH, *The Reception of English Law Abroad*, Supreme Court of Queensland Library 2007, p.2 - 3.

⁹ Stiglitz, J 'Credit Markets and the Control of Capital' (1985) 17 *Journal of Money, Credit and Banking*, 2, p. 133-152; Kletzer, K and Bardhan P, 'Credit Markets and Patterns of International Trade' (1987) 27 *Journal of Development Economics* 1-2, p. 57-70;
Simmons B, 'The International Politics of Harmonization: The Case of Capital Markets Regulation' (2001) 55 *International Organization* 3, p. 589-620.

Corporate bodies are not modern constructs. By way of example, even before the adoption of the Treaty of Westphalia,¹⁰ English law permitted the creation of the antecedents of modern corporate entities by Royal Patent or Charter granted by a Monarch or a Sovereign (*in personam*).¹¹ The popularity of the use of the corporate form for business ventures, rather than the previously preferred partnership form, increased in the late 16th Century, particularly in relation to the encouragement of investment in the risky business of overseas trade and colonisation.

In the first two decades of the seventeenth century, trading monopolies held by a mere forty European-based companies, had been granted letters patents or charters by their respective sovereigns in respect of a large part of international trade to and from Europe.¹² Individual sovereigns recognised, at least to a degree, these patents and charters as a courtesy among sovereigns in a manner analogous to the mutual recognition of diplomats who also carried letters patent. These early charter and letters patent companies in which the substance and the form were narrowly defined and closely linked to the substance of the relevant letters patent or charters,¹³ were also recognised by the jurisdictions with which they traded as a matter of practicality, so that each state could achieve a benefit in the form of taxes and duties and otherwise.¹⁴

Indeed, 17th and 18th C corporations with connections to English, (and after 1707 'British'), colonies as well as Dutch colonies, were among the principle engines and organisers of colonial expansion and settlement with such expansion and settlement made effective on the basis of the extensive powers, inclusive of legislative powers, provided by the terms of their charters.¹⁵ In the context of 17th and 18th C English and British colonies, the English construct of law relating to English colonies provided that as a corollary of the loyalty owed by a subject to its sovereign, the sovereign governed his subjects outside his territory, and thus could confer on such subjects

¹⁰ 'Treaty of Westphalia: Peace Treaty between the Holy Roman Emperor and the King of France and their Respective Allies', (24th Oct,1648) Munster in Westphalia, The Avalon Project, Yale Law School, See: <http://avalon.law.yale.edu/17th_century/westphal.asp> (accessed 15 Nov 2012)

¹¹ The oldest commercial cooperation in the world is the *Stora Kopparberg* in Sweden which obtained its Charter from King Magnus Eriksson in 1347. <see: <http://www.economicexpert.com/a/Falun.htm>>.

¹² McLean J, 'The Transnational Corporation in History: Lessons for Today?' (2004) 79 *Indian Law Journal* 263. Some examples of these early charter companies include; the Dutch East Indies Company (1602), The Hudson Bay Company (1670), the British East India Company (1600), the Royal Africa Company (1660) etc.

¹³ Some examples of these early charter companies include; the Dutch East Indies Company (1602), The Hudson Bay Company (1670), the British East India Company (1600), the Royal Africa Company (1660) etc.

¹⁴ The so-called *Asiento* of 1713 may be considered such an arrangement. Nelson, G. *Contraband Trade under the Asiento, 1730-1739*, *The American Historical Review* Vol. 51, No. 1 (Oct., 1945), pp. 55-67

¹⁵ Koskenniemi M, (2001) *The Gentler Civilizer of Nations: The Rise and Fall of International Law 1870-1960*, Cambridge University Press, Cambridge.

wherever they were, the right to trade and to settle outside the sovereign's territory, with those rights being enforceable under English law.¹⁶

Further, the use of the corporate form in such British colonies affected how property was conceived in relation to sovereignty and was effective in preventing the extension of European concept of property as 'property of the State' to these colonies.¹⁷ Specifically, in any arising issues of commercial rivalry in relation to colonial activities it was mutually recognized, at least in general, by the European colonial powers that such disputes could be between the corporations, and not the States that gave legal effect to the corporations. Accordingly, wars could be waged between rival corporations without necessarily engaging their corresponding European powers in hostilities at home.¹⁸ Notwithstanding, these early colonial corporations emerged as a significant source of public finance available to the sovereigns.¹⁹ Indeed, in addition to furthering foreign policy on a self-funded basis, colonial corporations also allowed the Monarch to raise revenue without Parliament and were perceived as particularly attractive to both James I and Charles I.²⁰

The concept of legal personality in relation to corporations has not been static over time. From its rather constrained origins, the corporate form has survived and proliferated as a result of mixed public and private motives for over 250 years.²¹ Until the 18th Century, there was no explicit conception of the corporation as either a public or a private person and shares held in a corporation were not then considered a protectable property right.²² Indeed, in order to receive the privilege of incorporation every corporation was required to make its case to the Crown, and later to Parliament, that it fulfilled a 'public purpose'.²³ Further, as noted by Harris

¹⁶ Mclean J, 'Divergent Legal Conceptions of the State: Implications for Global Administrative Law' (2004-5) 68 *Law and Contemporary Problems* 167; *The Great Case of Monopolies* 36 Car. II 1684.

¹⁷ Grewe W, (2000) *The Epochs of International Law*, translated and revised by Byers M, de Gruyter, Berlin, New York.

¹⁸ Lindley, M, (1969) *The Acquisition and Government of Backward Territory in International Law* - being a treatise on the Law and practice relating to colonial expansion, Negro University Press, New York. By way of example the British East Indian Company was certainly viewed as a Sovereign Power to the Indian States and was known to make war with the French, Dutch or Portuguese notwithstanding that their respective governments were at peace in Europe.

¹⁹ Harris R, (2000) *Industrializing English Law: Entrepreneurship and Business Organization 1720-1844*, Cambridge, Cambridge University Press.

²⁰ *ibid.*

²¹ Bernstein J, (2000) *Dawning of the Raj: The Life and Trials of Warren Hastings*, Ivan R Dee, Chicago. By way of example, the Regulating Act of 1773 declared that all acquisitions made by the British East India Company to have been vested in or exercised by the Company in trust for the Queen and therefore belonged to the Crown.

²² Harris (note 23) p. 113.

²³ Mclean (note 16) p. 375.

the larger the corporation the greater the likelihood of the State interfering in its activities.²⁴

Early charters and letters patent relating to corporate entities tended to be narrow in scope. This gave rise to an assumption that the express legal form of a corporate entity as set out in its letters patent or charter was a proxy for the substance of the activities of the corporate entity. This assumption persisted, as trade grew, into the 19th and 20th Century.²⁵ During the second wave of 'colonisation' by trading companies in the 19th Century, the experience of companies such as the British East India Company helped to establish the corporate form as the dominant form for colonial business association which in turn provided an impetus for the crystallisation of the public/private distinction.²⁶

The distinction between public and private in relation to the purpose and roles of corporate entities was critical, as it allowed colonising corporations to own property in perpetuity. Further, as entities that were private rather than public, they could assume equality as individuals, rather than sovereigns, and thereby avoid entanglement with international territorial principles.²⁷ Harris has persuasively argued that as part of the re-defining of the role of corporate entities, from the 1720's, a power struggle emerged between Parliament and the Crown over which institution should grant the privilege of incorporation. In this evolving dialectic, the linkages between business corporations, the trading monopoly system and public finances began to slacken.²⁸

Chartered companies, including Cecil Rhodes' British South Africa Company of 1889, were utilised to acquire in excess of 75% of British acquisitions in Southern Africa.²⁹ As noted by Westlake, these 'charter corporations' served the interest of the chartering state with the added benefit of promoting the recognition of the colonial encounter as an encounter between equals.³⁰ The ambiguous private sector status of such charter companies allowed them to serve limited public-interest role as 'mediate sovereigns' while pursuing private-interest trade activities.³¹ Indeed,

²⁴ Harris (note 23) p. 113.

²⁵ McLean (note 16).

²⁶ Lindley (note 22).

²⁷ McLean (note 16) p. 370.

²⁸ Harris (note 23) p. 58.

²⁹ McLean (note 16) p. 370.

³⁰ Westlake, J, (1914) *The Collected Papers of John Westlake on Public International Law*. Edited by L. Oppenheim Cambridge, Cambridge University Press, p.196-7.

³¹ *Ibid.*

relative to early formal colonisation activities of sovereigns, trade-based colonisation was viewed as a pure and liberal endeavour. This assumption permitted further variance in the corporate form itself. Specifically, as trade opportunities increased and trade patterns began to change in arguably more unpredictable manners, it became and continued to be common practice for economic actors to create corporate bodies with extremely broad corporate objects and arguably nebulous articles that facilitated forward-looking commercial uncertainties. Regulatory regimes, particularly in common law jurisdictions were adapted in the 19th and 20th C to permit such flexibility in order to support and allow for the advancement of commerce. Accordingly, corporations may be the product of legal positivism, but such positivism is responsive to, and reflective of, political, economic and social factors.

Modern Events in the Context of Ongoing Changes in Corporate Form and Cross-Border Regulation

The currently effective norms relating to the mutual recognition of corporate entities were established and adapted over time to suit the needs of geo-politically dominant states. As the composition of the group of geopolitically dominant states changes, as cohesion among such states changes, and as the needs of such states change, we can expect the norms to change. In the present context, the Organisation for Economic Co-operation and Development's (OECD) project to revise Chapter VI of the Transfer Pricing Guidelines on intangibles provides one example.³²

It would appear that a significant concern of delegates is the cross-border tax base erosion and profit shifting facilitated by the use of intellectual property (IP) holding companies which are commonly located in low-tax or tax-free jurisdictions such as the Cayman Islands. In particular, the OECD proposes that if the IP holding company does not have personnel who could '*physically perform ... the important functions relating to the development, enhancement, maintenance and protection of the intangibles*',³³ then that IP holding company should be unable to claim intangible related returns (IRR). It follows that, should the OECD's proposal become widely accepted and therefore normative, the current generally accepted 'form' of corporate structure of the IP holding company will no longer be recognized unless the 'substance' of personnel to physically perform the defined task are also in place in the jurisdiction seeking to claim IRR. Whether the proposed changes will achieve the

³² OECD, Discussion Draft - Revision of the Special Considerations for Intangibles in Chapter VI of the OECD Transfer Pricing Guidelines and Related Provisions <see:

http://www.oecd.org/document/41/0,3746,en_2649_33753_50509929_1_1_1_1,00.html>.

³³ *ibid*, para 40.

results the OECD seeks remains to be seen.³⁴ What is clear is that the geo-politically dominant powers will continue to evolve the norms of legal positivism to suit their own interests.

A second current example of the nature of change relating to mutual recognition of corporate entities may be seen in the evolution of the work of the Financial Stability Board (FSB). The FSB, at the behest of the G-20, a geo-politically and economically dominant group of countries, has launched the Global Legal Entity Identifier Initiative (LEI) which seeks to create a registry of all economic entities of participating States.³⁵ The stated aim of the LEI is to provide participating States with ownership, and beneficial interest, information on all economic entities around the globe in order ostensibly to militate against any decline in the tax bases of participating States. In order to galvanise global participation in the LEI, the FSB is likely to recommend limiting legal reciprocity to only participating States and in this context has indicated that failure to implement this new meta-regulatory framework may result in exclusion, of the entities of non-participating States, from the markets of participating States. Accordingly, it would appear that the LEI initiative is in effect a modification of the rules of legal comity and legal reciprocity by which the geo-politically dominant states are again able to modify the established norms and by so doing serve their own interests.

The Role of Rule-Making (Legislative) Authority in the Cayman Islands

The Cayman Islands as a 21st Century OFC falls to be understood within the contexts of its colonial origins and its Constitutional status including its legislative capacity. Sovereignty is at the core of legal personality. As noted by Hudson,³⁶ modern sovereignty is the '*ordering principle of international relations*',³⁷ which confers on States the sole authority to regulate those actions which take place within the State's geographically defined space, and in turn grants those regulations recognition by other States. The concept of the sufficiency of legislative autonomy in relation to the recognition of legal personality relating to corporate bodies is not fixed but rather, is dynamic. Hudson adopts as a construct in relation to legislative autonomy, a more

³⁴ There is some expectation in the market that jurisdictions with suitably skilled personnel, such as India and China, will adjust their regulatory structure by providing tax carve-out to attract IRR to those jurisdictions. Sprague G, 'OECD Intangibles Project - Speculations on its Effects on IP Holding Company Structure of U.S. MNCs.' Bloomberg BNA (November 15, 2012) <see: <http://www.bna.com/oecd-intangibles-project-n17179870922/>>.

³⁵ Financial Stability Board, 'A Global Legal Entity Identifier for Financial Markets' (8 June 2012) http://www.financialstabilityboard.org/publications/r_120608.pdf.

³⁶ Alan Hudson's defined sovereignty as the '*bundling of rule-making authority within bounded territories, is the hall mark of the modern international political economy*.' In 'Beyond the Borders: Globalisation, Sovereignty and Extra-Territoriality' (1998) 3 Geopolitics 1, <See: <http://www.tandfonline.com/doi/abs/10.1080/14650049808407609>>.

³⁷ Hudson A, 'Offshorenness, globalization and sovereignty: A postmodern geo-political economy?' (2000) 25 Transactions of the Institute of British Geographers 3, p. 269-83.

modern definition of sovereignty; ‘...*bundling of rule-making authority within bounded territories, is the hall mark of the modern international political economy.*³⁸

In this context, the history of rule-making authority of the Cayman Islands was recently outlined by Lord Walker of Gestingthorpe in the 2005 Privy Council judgment of *Al Sabah* where His Lordship delivered the following Constitutional history of the Cayman Islands:³⁹

Jamaica was a British colony acquired by conquest; and the Cayman Islands were a British colony acquired by settlement but governed (under the Cayman Islands Act 1863 of the Westminster Parliament) as a dependency of Jamaica. The Bahamas became fully independent in 1973; Jamaica became fully independent in 1962; and the Cayman Islands are still a British colony, now officially termed a British overseas territory. Before the 1863 Act the Cayman Islanders had magistrates and a parish meeting which exercised limited law-making powers. The effect of the 1863 Act was to confirm the existing arrangements so far as they went, but the islanders’ institutions became subject to the jurisdiction of the Governor, legislature and Supreme Court of Jamaica. The law of Jamaica was in general to apply to the Cayman Islands. That state of dependency continued until 1959.⁴⁰

.... The Cayman Islands were still a dependency of Jamaica at the inception of the short-lived British Caribbean Federation. But the Cayman Islands and Turks and Caicos Islands Act 1958 repealed the Cayman Islands Act 1863 and provided for the Cayman Islands to have a new constitution, granted by The Cayman Islands (Constitution) Order in Council 1959 (SI 1959 No. 863). This provided for the Governor of Jamaica to be ex-officio the Governor of the Cayman Islands, with limited legislative powers conferred concurrently on the Governor with the advice and consent of the Cayman Legislative Assembly (on the one hand) and the legislature of Jamaica (on the other hand), with power being reserved to Her Majesty in Council to amend or vary the Order in Council.⁴¹

....The 1959 Order in Council was revoked by The Cayman Islands (Constitution) Order in Council 1962 (SI 1962 No. 1646), which was intended to take effect on 6 August 1962, simultaneously with Jamaica’s attainment of full independence under the Jamaica Independence Act 1962. The 1962 Order in Council was inadvertently not laid before Parliament and was brought into force retrospectively by The Cayman Islands (Constitution) Order 1965 (SI 1965 No. 1860). The present constitution was brought into force by The Cayman Islands (Constitution) Order 1972 (SI 1972 No. 1101). Both the 1962 and the 1972 Constitutions conferred law-making power “for the peace, order and good government of the Islands” on the Administrator (later the Governor) with the advice and consent of the Legislative Assembly, with power reserved to Her Majesty in Council.⁴²

It is also noteworthy that the Imperial Act of 1863 provided that, in addition to granting a degree of legislative autonomy to the Cayman Islands legislature, the laws of Jamaica would apply in the Cayman Islands, but only “so far as the same

³⁸ Hudson A, ‘Beyond the Borders: Globalisation, Sovereignty and Extra-Territoriality’ (1998) 3 *Geopolitics* 1, <See: <http://www.tandfonline.com/doi/abs/10.1080/14650049808407609>>.

³⁹ *Al Sabah v Grupo Torras S.A.* [2005A] Part 2 Case 8 [PC].

⁴⁰ *ibid*, para 14.

⁴¹ *ibid*, para 18.

⁴² *ibid*, para 19.

shall be applicable to the circumstances thereof.”⁴³ In turn, a 1728 Act of the Jamaican legislature had provided that the laws of England as then in effect should become the laws of Jamaica to the extent applicable to Jamaican circumstances. Conventional reception of law theory in relation to the Cayman Islands would provide that English laws were received in the Cayman Islands starting no earlier than the first official land grants and persisting until no later than the 1863 Imperial Act.⁴⁴ In contrast and somewhat paradoxically, the Cayman Islands Interpretation Law (1995 Revision) borrowed *en bloc* from an earlier Jamaican law, specifies a reception date corresponding to the 1728 Jamaican Act referred to above, even though there were no recognized settlements which could apply in relation to the 1728 date in the Interpretation Law.

In addition, the 1865 Colonial Law Validities Act provides that laws passed by local legislatures were valid even if they conflicted with English Law.⁴⁵ Further, the English Interpretation Act of 1892 provided that the amendment of a law in England did not have effect in the colonies unless such intent is express. Thus subsequent amendments to the English Interpretation Acts did not automatically apply in the Cayman Islands in the absence of express provisions.

Accordingly the common law of the Cayman Islands has been shaped, in part, by the general rule that common law in effect in England at the time of settlement was brought to the jurisdiction by the original English settlers and continued thereafter unless and until superseded by later common law or statute.⁴⁶

The Cayman Islands utilization of the changing geo-regulatory realities

As observed by Lord Gestingthorpe, *The Cayman Islands (Constitution) Order in Council 1959* conferred limited legislative powers conferred on the Governor with the advice and consent of the Cayman Legislative Assembly. In an effort to diversify its economy, in 1960, the Cayman Island utilised its newly expanded rule-making authority, and with the consent of the United Kingdom enacted its first Companies

⁴³ Commercial Laws of the World (1911) Vol 17, P. 1047.

⁴⁴ McPherson (note 12).

⁴⁵ Campbell E, 'Colonial Legislation and The Laws of England' (1964-1967) 2 U. Tas. L. Rev 148. This law would appear to still be in effect, [2008] UKHL 61.

⁴⁶ Dupont J, (2000) *The Common Law Abroad: Constitutional and Legal Legacy of the British Empire*, Fred B Rothman & Company, Littleton, Colorado.

Law which facilitated the Companies Registry function and laid down the legislative framework that was the foundation of its OFC.⁴⁷

As has been noted in the literature,⁴⁸ the evolution of the Cayman Islands as an OFC is interconnected with the regulatory, tax and reporting constraints of the geographically dominant and so-called 'onshore jurisdictions' of the United Kingdom (UK) and the United States of America (USA). The Cayman Islands legislation was responsive to the demands of global commerce relating to "onshore" regulatory strictures, new realities created by globalisation, and the old global ordering paradigms. The conceptual tool that the Cayman Islands exploited was what Alan Hudson has referred to as, the '*unbundling of sovereignty*.'⁴⁹ By this term Hudson means the "*splitting up*" of sovereignty over various activities" and "*the practice of varying the use of sovereign powers by issue area*."⁵⁰ Understanding this development in which the State is empowered to regulate all that is within its territorial scope, but in fact elects to implement differentiated regulation within its geographic space in the regulation of particular economic activities is crucial to an understanding of how OFCs became critical components of the modern financial system.

The seminal legislation on which the Cayman Island OFCs is based is generally recognised as the Cayman Islands Companies Law. The impetus for this instrument of legal positivism came from the input of a Canadian lawyer, Mr. James McDonald, who understood, in the context of global recognition of corporate entities that jurisdictions which afforded corporate entities with wider scope for economic activities could, all other factors including political stability remaining the same, be favoured. In this context law was effectively a product that could be exploited in the then changing regulatory landscape.⁵¹ Indeed, the Hansard Reports indicate that Mr. McDonald advised the lawmakers in the Cayman Islands on both the benefits of diversifying into the registration of companies, as well as the merits of emulating facets of Delaware's company's legislation.⁵²

⁴⁷ M Craton and Cayman Islands New History Committee, (2003) *Founded Upon the Seas: A History of the Cayman Islands and their People*, I. Randle Publishers, Kingston, Jamaica. P. 310.

⁴⁸ Stoll-Davey 'Global Comparison of Hedge Fund Regulation' 2008 D.Phil Thesis, University of Oxford.

⁴⁹ Hudson A, *Offshorenness, globalization and sovereignty: A postmodern geo-political economy?*, (2000) 25 *Transactions of the Institute of British Geographers* 3, p.15.

⁵⁰ *ibid*.

⁵¹ Stoll-Davey, C 'Global Comparison of Hedge Fund Regulation' 2008 D.Phil Thesis, University of Oxford.

⁵² Romano's 'Law as a Product: Some Pieces of the Incorporation Puzzle' (1985) 1 *Journal of Law, Economics & Organization* 2.

In the context of alignment of interest it is noteworthy that the development of the Cayman Islands as an OFC supported the activities of the 'City' in London, and in particular propelled London to become the global leader in the Eurobond market.⁵³ In addition the economic diversification into financial services by the Cayman Islands and other traditional economies in the Caribbean was supported by the United Kingdom (UK), as such diversification held out the promise of reducing, or at least moderating, aid-dependence in the region.

It is also noteworthy in the context of legislative autonomy that the UK, by way of the UK appointed Governor, must assent to each legislative instrument enacted in all of the British Overseas Territories, including the Cayman Islands. Further, the Cayman Islands Constitution has provided, and continues to provide, that the UK maintains the authority to legislate for the Cayman Islands by way of either primary legislation or by Orders in Council.

Conclusion

The Cayman Islands OFC operates in a niche which is, in part, dependent on the presumption that global recognition of Cayman Islands corporate entities will continue on terms that will permit the existence of the Cayman Islands OFC. The Cayman Islands, has done well in evolving from a jurisdiction providing company registration back office services to become the domicile of choice for hedge funds.⁵⁴ The OFC model is dependent on an alignment of interests involving OFCs and the geo-politically dominant jurisdictions that supply the economic substrates OFCs utilise, and consume the financial products OFCs generate. Given the seemingly continuous changes in the international regulatory landscape and the norms reflected in the 'soft law' generated by international constructs such as the G20 and its appendages in the forms of the OECD, the IMF and the Financial Standards Board, OFCs must ensure that they are particularly alert and responsive, at least within their legislative authority, to the demands of the geo-politically dominant jurisdictions. In order to secure any degree of continued success OFCs ought to be particularly aware of the historical context regarding the presumptions that underpin their niche in global commerce and, in particular, anticipate the likely changes in the theoretical framework underpinning the global recognition of their corporate entities. On the basis that OFCs can continue to persuade the geo-politically dominant that an alignment of interest can continue to exist then it is likely that OFC may enjoy some measure assurance of their future success.

⁵³ Stoll-Davey (note 52).

⁵⁴ Stoll-Davey (note 52).

Whose Castle Is It Now?

A Review On The Law Of Squatters' Rights In Light Of Article 8

Marie Thomas

Introduction

"For a man's house is his castle, et domus sua cuique est tutissimum refugium [and each man's home is his safest refuge]"¹

The English common law dictum that an Englishman's house is his castle has long been considered a privilege; no one is allowed to enter his personal space without his permission. This representation is old-fashioned and its place in modern legal times is questionable given the changes in the legal world and, in particular, in light of the Human Rights Act 1998. The appropriate legal question which has arisen is how, if at all, if squatters have established homes on the land without the consent of the landowner, does the court, faced with a claim for possession by a private landowner against the trespassers, give effect to the squatters' right to respect for their homes guaranteed by Article 8 of the European Convention on Human Rights? This article will seek to answer this question by focusing on two significant cases: first, *McPhail v Doulton* [1970] UKHL 1 and second, *Malik v Fassenfelt and Others* [2013] EWCA Civ 798. The question this article seeks to answer is: who's castle is it now?

1. Defining 'Squatters'

"He is one who, without any colour of right enters an unoccupied house or land, intending to stay there as long as he can."²

Although property law may have encountered various changes in the area of squatters, the definition attached to this category of occupiers has remained the same. In essence, squatting is an unlawful intrusion, in the absence of consent or permission of the owner, that subsequently interferes with one's property.

Although the intrusion is classified as 'unlawful', an issue arises when the occupier calls another's property 'his home'.

¹ Sir Edward Coke, *The Institutes of the Laws of England* (1628).

² *McPhail v Doulton* [1970] UKHL 1, 456.

2. The Law Pre- 2000

"And I am satisfied that a court of equity would never intervene in aid of a wrongdoer"³

McPhail governed the law prior to the year 2000 whereby it was held that squatters have no defence in law regardless of their personal circumstances; "He may say that he was homeless and that this house or land was standing empty, doing nothing. But this plea is of no avail in law."⁴ The courts maintained a strict stance in regards to squatters and in particular, to homeless squatters. It had been advocated in *Southwark London Borough Council v Williams* [1971] Ch. 734, 744, and upheld in *McPhail*, "If homelessness were once admitted as a defence to trespass, no one's house would be safe... So the courts must, for the sake of law and order, take a firm stand."

As a result, it is possible for the owner to use reasonably and necessary force to remove the squatters or, seek an order from the court to issue a writ of possession.

The issue raised in this case was whether the court could extend the time for squatters to evict the premises. It was held that the court did not have jurisdiction to do so and rather, it was for the owner of the property to decide how much time occupiers had to leave the premises. It was concluded that the Court did not have the discretion to suspend the order and nevertheless, expressed the hope that owners "will act with consideration and kindness in the enforcing of [the law]".⁵

3. The Law Post- 2000

Major change came about with the launching of the Human Rights Act 1998. Effectively, domestic law had to break away from its traditional chains so as to accommodate the rights and freedoms enshrined in The Articles.⁶ Article 8 preserves the right to respect for private and family life and consequently, it is highly arguable that there is an inevitable clash between the rights of squatters and the rights of the owners. In addition to the rights of an owner, a squatter is also entitled to the right to respect for private and family life. This consciousness bares fruit to a number of questions; What if the squatters occupy for long enough to establish their home within keep? The crucial question is who must the law protect? *Malik* gave rise to

³ *Ibid.*, 457.

⁴ *Ibid.*, 456.

⁵ *Ibid.*, 460.

⁶ Schedule 1, Human Rights Act 1998.

two main issues which sought to address these issues. In particular, whether or not article 8 applied in a claim for possession by a private landowner against squatters and whether or not *McPhail* was still good law. The appellants in *Malik* (the squatters) appealed on the basis that eviction would interfere with their rights under Article 8 and that such interference would not be proportionate.

3.1 Application of Article 8

At the Court of First Instance, Judge Karen Walden Smith concluded that given the court is a public authority, coupled with the fact that the land was being occupied as a home, Article 8 is applicable despite the fact that the landlord is a private individual and the occupier a squatter. On appeal, the squatters did not challenge the judge's finding in this regard therefore, there is an *assumption* that Article 8 applies. All three judges dismissed the squatters' appeal but did not achieve consensus to their reasoning. As a result, the court did *not* address the matter. While Sir Alan Ward accepted that a private landowner is not a public authority and not obliged to respect the trespasser's human rights (section 6(3) Human Rights Act 1998), rather a court is obliged to act in a way which is compatible with Convention rights, Lord Toulson and Lloyd LJ did not share this view. Both expressed reservations on this matter. Therefore, it is right to say that Sir Alan Ward's dicta cannot form the ratio of the case.

It is highly arguable that the uncertainty which clouds this area of law is due to the lack of clarity of the Human Rights Act 1998; whilst depicting any infringement of Convention rights by public authorities in the UK unlawful, the courts were cast as "public authorities" without any further explanation (section 6(3)). As a consequence, the view of the law creates a dichotomy in opinion. On the one end is the traditional view which supports that Convention rights should directly apply where the landowner is a public authority. The revisionist view, on the other end, supports that a court is a public authority and therefore a court must act in a way compatible with convention rights. The effect of the latter permits convention rights to be directly applicable between private parties through the back door and the case of *Malik* is an indicative example of this. Arguably, this was not the intention of Parliament as reflected in the 2004 Report of the House of Lords/ Commons Joint Committee on Human Rights, whereby the Committee established that: "The extent of the "horizontal" application of the Human Rights Act as between private parties has been the subject of extended academic debate, but it is generally accepted that these provisions fall far short of full horizontal effect, which would apply the obligation to comply with Convention rights to both private and public persons on an equal basis."

It is also important to note, there are no reported decisions in the UK supporting the extension of Article 8 to the private landowner at present apart from occasional obiter comments. For instance, Lord Neuberger and the Supreme Court in *Manchester City Council v Pinnock*⁷ indicated that their ruling did not apply to private landlord cases but went on to add, "no doubt, in such cases Article 1 of the First Protocol to the Convention will have a part to play, but it is preferable for this Court to express no view on the issue until it arises and has to be determined."⁸

3.2 Is *McPhail* Good Law?

There is evidence of considerable support for *McPhail* on the one hand. On the other, Sir Alan Ward (the minority) suggested the contrary; "*So the court will have to consider whether the making of a possession order is proportionate if the issue has been raised by the occupier and it has crossed the high threshold of being seriously arguable. The question will then be whether making an order for the occupiers' eviction is a proportionate means of achieving a legitimate aim.*"⁹ Sir Alan Ward then went on to clarify that if proportionality is in issue, the rule in *McPhail* inevitably hinders the extension of time to vacate. On the other hand, Lord Toulson recognised that when establishing whether *McPhail* remained good law in such a claim by a private owner, there is an unavoidable connection with the question of whether Article 8 extends to such a case or not. However, since that issue was not raised on appeal, he reserved his opinion.

4. The Future

Firstly, one may rightly say that the legislation of human rights is not a permit to squat. Nevertheless, the practical effect of *Malik* is likely to prompt more trespassers to raise Article 8 as a defence. Consequently, this is a daunting development for owners of real estate as there will be increased delays and costs.

Secondly, even if Article 8 has a place in such cases, possession would nevertheless be ordered. For even Sir Alan Ward accepted that: "*...if the [individuals] have established a home on the land but...otherwise [have] no legal right to remain there, it is difficult to imagine circumstances which would give the defendant an unlimited and unconditional right to remain. The circumstances would have to be exceptional.*"¹⁰ No guidance or further explanation has been provided to clarify what is meant by

⁷ [2009] EWCA Civ 852.

⁸ *Ibid.*, [50].

⁹ *Malik v Fassenfelt and Others* [2013] EWCA Civ 798, [26].

¹⁰ *Ibid.*, [28].

"exceptional circumstances" and it is difficult to picture relevant examples therefore, such a defence is unlikely to affect everyday possession actions.

Conclusion

The question remains as to whether a squatter, or occupier, has a defence in respect of possession orders against private landlords on the basis that the court is a public body. There has not been a definitive answer to this issue thus, the law remains unanswered in this area and to a degree, uncertain. *Malik* exposes the vagueness of the Human Rights Act 1998 and reveals deeper issues which further divide the traditional and revisionist view of the ECHR in the UK. At first glance, it appears that an Englishman's home is no longer his castle in such circumstances. However, on closer review this is not the case. Although Article 8 affords squatters rights, thus creating a concurrence of human rights from both sides, in actuality the rights of a landowner endure. As a result of *Malik*, many would agree that victory can not be assigned to either side and it is safe to admit that the status quo is: *McPhail* remains good law.

An Englishman's house is still his castle but it remains to be seen how long this notion will continue to exist.

At the limits of available law

Chris Petch

Introduction

I was once informed that it would take one person 400 years, without so much as a restroom break, to read all the law in England. Personally, I find reassurance in this fact, whatever its provenance, as it means that no one can know it all; we are human after all. However, to know some of it, even just as much as anyone else, is a seemingly difficult feat.

I think it apt to describe the mass of English law as a cloud. Apt, because we are now firmly in the age of the internet, which has changed the meaning of communication, and for that matter, the meaning of 'cloud'. This particular cloud is ever expanding, and more accessible than it probably ever has been before. In this sense, accessible means that, with only a couple of clicks, and maybe a short flurry of typing too, one can find the law, and its interpretation and debate.

Although it is clear that it is comparatively easier to access law and its commentary, perhaps because you no longer require an obscure textbook, how do we measure, or describe, what access we actually have? Is what is available actually correct? How do we know? What happens if it is not?

In this essay I discuss the conundrum of accessibility to law and why it needs to be improved. The problem became apparent to me during a personal experience, which I shall outline. I will then discuss the plans for the future, which were revealed to me when I contacted the National Archives. Lastly, I consider why this issue is important, and encourage the National Archives to strive to improve the services available in order to protect the fundamental legal principles to which our society abides.

The issue

The issue is an obvious one to some extent. Vast amounts of law, or law-related material, exist. Much of this is now on the internet. The British and Irish Legal Information Institute (BAILII) provide a free source of case law for the UK (<http://www.bailii.org>). The website www.gov.uk provides a range of information for UK citizens to seek advice, basic information and details about many matters. There are many other government funded websites, charity or voluntary group websites, and corporate and personal websites, providing assistance and information on legal processes and the law in general. There are also the professional databases, providing comprehensive services to those who know of their existence, and can pay for those comprehensive services. This article concerns one particular website, www.legislation.gov.uk, which replaced the Statute Law Database in 2010. It is also concerned with what is, or should be, freely available to the public.

Legislation.gov.uk is an easy to use database comprising much of the primary and secondary legislation passed in the UK since 1988.¹ It is, without a doubt, a positive influence on the accessibility and availability of law to citizens in the UK. The one issue that is evident is that, strangely, it is not up to date. Given that there is a great deal of guidance and advice available,² this may not be much of an issue: how many people really want to look at what legislation actually says? However, if someone does want to know, or check that what the guidance refers to is correct, can they, when it is not clear whether it is up to date? Although new law is uploaded onto the website, any amendments that the legislation makes are not displayed in texts of other instruments. This leaves us with, at best, a pretty misleading situation. As one of the only free sources of legislation, my argument is that it is imperative that, in providing such a database, efforts need to be made to improve the content to ensure it is contemporary, functional and clear.

Personal experience

The problem has surfaced in my own experience over the last year or so. This came during my work with the Department of Health.

¹ The National Archives, 'Help' (undated) <<http://www.legislation.gov.uk/help#aboutLeg>> accessed 31 May 2014.

² One particularly useful example that I recently considered was from the Intellectual Property Office on copyright. See, '*Copyright essential reading*' available from: <http://www.ipo.gov.uk/c-essential.pdf> (accessed 31 May 2014).

The Department of Health

Until March of 2013, I was employed by the Department of Health in a policy team responsible for two sets of draft regulations. One set of these regulations was intended to replace the National Health Service (Performers Lists) Regulations 2004 (“the 2004 Regulations”),³ a little known (as most are) piece of secondary legislation that has implications for doctors, dentists and ophthalmic practitioners⁴ who provide NHS primary care services in England (there are similar set ups in Wales and Scotland). These ‘lists’ of performers provide, in reality, a framework of rules and procedures to NHS bodies, allowing them to manage those providing services on their behalf, but who are not enjoined by any employment relationship.

I encourage you to search for the old 2004 Regulations: but there is a catch, depending on who you are. I make a reasonably safe presumption: you are reading this via the printed publication or possibly some sort of database, either provided by your university, your employer, or otherwise. Now, I would like you to ‘web search’ the 2004 Regulations, without using any professional database. This will (within a degree of certainty) result in your finding them on www.legislation.gov.uk. (In fact, to save time, here they are: <http://www.legislation.gov.uk/ukxi/2004/585/contents/made>).

So, this is all fine. You have accessed the 2004 Regulations in the same manner that anyone could, or is ever likely to do. This demonstrates the issue: what you looked at does not even hint at the possibility that the 2004 Regulations were repealed in 2013 by the National Health Service (Performers Lists) (England) Regulations 2013 (“the 2013 Regulations”).⁵ This latter set of Regulations may well have come up in the results of your web search (if you ran one). For the most part, the 2004 Regulations no longer exist (apart from the effect of some transitional or saving provisions). For the remaining parts, there is no indication that they were ever amended (they were, in fact, amended by 16 different instruments prior to their repeal). For any person who currently (at the time of writing) accesses the 2004 Regulations, they would not appreciate from the information available on [legislation.gov.uk](http://www.legislation.gov.uk) that, by the time they came to be repealed, they had burgeoned to four Parts from two, and 43 regulations, as opposed to the 27 listed.

I fully concede that this example is a little obscure and would only affect a subset of individuals in the UK, and not society in its entirety. In truth, those who have cause to find these Regulations are likely to already know of the changes to the legislation. Nevertheless, the 2013 Regulations affect the work of all GPs, dentists and

³ SI 2004 No.585.

⁴ ‘Ophthalmic practitioners’ is defined as, ‘...a registered optometrist, who is not a corporate body; or, an ophthalmic medical practitioner.’ See, regulation 36 of the 2013 Regulations.

⁵ SI 2013 No.335.

ophthalmic practitioners practising within the NHS, which is up to 100,000 people.⁶ So these Regulations are not completely obscure. Also, the key underlying intentions of both the 2004 and 2013 Regulations are patient safety and the quality of services.⁷ So, indirectly, they are relevant to all of us who use the NHS. Additionally, should it be expected that people, whomever they may be, should know whether the legislation they are considering is correct?

My example demonstrates the problem. For all intents and purposes, an uninformed, possibly disinterested, observer, who had cause to find and look at the performers lists regulations may stumble upon the 2004 Regulations, and consider that they represented the law even though they had been heavily amended, even though they have now been repealed. The alternative here is that the observer heeded to the warnings on the website. The one above the 2004 Regulations reads: *'Status: This is the original version (as it was originally made). This item of legislation is currently only available in its original format.'*⁸ The observer recalls that during their initial search there were listed a similarly named set of Regulations, so they look them up, and they may discover that they revoked the earlier ones. The observer may not realise that the more recent 2013 Regulations have themselves already been amended, this change to the law not being obvious. It is in fact hidden in an instrument called the Coroners and Justice Act 2009 (Commencement No.15, Consequential and Transitory Provisions) Order 2013,⁹ which amended the 2013 Regulations in July 2013. For sure, it is too much to ask that legislation.gov.uk be immediately updated after an amendment; but, if further amendments are made to the 2013 Regulations, the web version will slide further towards being less reliable.

www.legislation.gov.uk

During the course of writing this article I contacted the National Archives, the organisation currently responsible for the legislation.gov.uk database. They

⁶ I have used the figures for doctors and dentists at the end of December 2013. For doctors, there were 60,381 doctors with a licence to practise on the GP register (although this may be a slight overestimation as some of these may not provide NHS services, or even currently practise in the UK) see: http://www.gmc-uk.org/doctors/register/search_stats.asp (accessed 28 December 2013); for dentists, there were 40,389 dentists registered with the General Dental Council (again this figure may be an overestimation as many will not provide NHS services) see: <https://www.gdc-uk.org/Newsandpublications/factsandfigures/Documents/Facts%20and%20figures%20from%20the%20GDC%20register%20December%202013.pdf> (accessed 28 December 2013)

⁷ Department of Health, *Tackling Concerns Locally: the Performers List System – a review of current arrangements and recommendations for the future* (2010) <http://webarchive.nationalarchives.gov.uk/20130107105354/http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/documents/digitalasset/dh_096487.pdf> (accessed 31 May 2014) para.2.6 at page 10.

⁸ See the Status bar above the 2004 Regulations at: <http://www.legislation.gov.uk/ukxi/2004/585/contents/made> (accessed 31 May 2014).

⁹ (SI 2013 No.1869).

confirmed that they have an ongoing work programme to update legislation on the website. The existing intention is to have all primary legislation up to date by the end of the current Parliament (currently, April 2015). Further, they are beginning to update secondary legislation. A few hundred statutory instruments will be updated this year. Over the course of the next few years a great deal more secondary legislation will become available in updated form. I was also informed that a new facility is being added onto the website. This facility will display a 'green' rating when the Act, or instrument, is up to date, which will replace the 'red' rating currently displayed over many Acts at the moment.

This is encouraging news, and even more so alongside the information about the extent of the programme, which includes use of software to automatically read legislation and the involvement of relevant expertise through their Expert Participation Programme, which will give greater depth to the number of people revising legislation. One particularly impressive statistic provided is that the National Archive team managed to review 100,000 amendments to legislation in 2012/13. According to the adviser that responded to me, this was "*...work that previously would have taken six or seven years*".

Although this is very encouraging, the only problem at this stage is that the National Archives team has not set a date for the complete revision of statutory instruments. Some work is ongoing and we are likely to see updated SIs on legislation.gov.uk soon. It is too much to ask that all secondary legislation is revised and published to the same timetable as primary legislation. However, it remains an important issue. Given the range and number of instruments, it is undeniably going to take longer than revision to primary legislation. It is easily arguable, of course, that primary legislation is of greater importance. Regardless, much of the working substance of legislation is held within statutory instruments, and given that there are far more statutory instruments than Acts of Parliament, their importance cannot be denied. It would, however, be ideal if a date were set at which point we would know that there is a timetable. We cannot expect overnight changes, but a timetable would provide assurance that, at the very least, changes are on the horizon.

The 'why' question - why is it important?

'...the law should be such that people will be able to be guided by it...the law must be capable of being obeyed. A person conforms with the law to the extent that he does not break the law. But he obeys the law only if part of his reason for conforming is his knowledge of the law.'

Therefore, if the law is to be obeyed it must be capable of guiding the behaviour of its subject. It must be such that they can find out what it is and act on it... - Joseph Raz.¹⁰

In this part, I look briefly at some of the basic reasons why accessibility to law is important and some of the recent commentary on the subject from a number of different perspectives.

The rule of law

Accessibility to the law is a fundamental supporting principle of the rule of law. Lord Bingham explains that there are three reasons why accessibility to law is important:

- (1) we should be able to determine before we perform some act, whether or not it will cause us to be prosecuted for some criminal offence;
- (2) anyone claiming civil rights or performing obligations needs to know what those rights and obligations are, '*...otherwise we cannot claim the rights or perform the obligations...*';¹¹ and lastly,
- (3) in order for the running of trade, investment and business to be successful, there needs to be accessible and clear rights and obligations.

As Lord Bingham states, '*[n]o one would choose to do business, perhaps involving large sums of money, in a country where the parties' rights and obligations were vague or undecided.*'¹² He goes on to cite Lord Diplock whilst delving into the meaning of accessibility:

[t]he acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal principles which flow from it.¹³

In my opinion, Lord Bingham's observations on the rule of law form the foundation for the remaining discussion. Nevertheless, there is also support from the European Court of Human Rights, although the principle has lacked significant development.

¹⁰ Uta Kohl, 'The Rule of Law, Jurisdiction and the Internet' (2004) *Int J Law Info Tech* 12 (3) 365, 368 citing Joseph Raz, 'The Rule of Law and its Virtue' (1977) *Law Quarterly Review* 93 195, 198

¹¹ Tom Bingham, *The Rule of Law* (2010, Penguin Books) 38.

¹² *Ibid* 38 - Rule of Law.

¹³ *Ibid* 39 citing Lord Diplock's comments in *Black-Clawson International Ltd. v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, 638 D.

The Court has considered the meaning of accessibility to law. The favoured quotation is that in *Sunday Times v United Kingdom*,¹⁴ namely:

First, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able—if need be with appropriate advice—to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.¹⁵

As Uta Kohl highlights, '*...the court did not set out what adequate accessibility entails*';¹⁶ however, Kohl asserts that, '*...the party seeking to avoid the effect of a law [by basing their argument on inaccessibility to law] needs to make out a strong case indeed*.'¹⁷ This was on the basis that the *Sunday Times* case concerned common law rules that are 'unwritten'. The Court considered the common law to be law 'enough' for the purposes of 'prescribed by law' in the European Convention on Human Rights (ECHR). So, for the purposes of this discussion, the ECHR recognises that citizens require an indication of the applicable legal rules that may apply in a particular circumstance; but, it is just that: an indication. In other words, if the common law is law (and is unwritten and arguably vaguer than out of date legislation on a website), legislation published on-line is definitely 'accessible'. Whether, because the legislation is not updated, it fails to remain accessible (in terms of its practicality and relevance for understanding) over a period of time, is another issue. Arguably, the longer a text is left without updates, the less accessible it becomes (for example, the 2004 Regulations mentioned above are now completely irrelevant, but are still available).

As Kohl argues though, for law to be accessible, it requires more than formal publication.¹⁸ He states that for law to be accessible, a broad-brush approach is not appropriate and what is needed is a different approach to different laws in order to '*...bring [...] them home to their intended subjects*.'¹⁹ I agree with this statement, that, through the use of advice websites, such as www.gov.uk, specific obligations can be

¹⁴ (1979) 2 EHRR 245.

¹⁵ *Ibid* 39; see also, *Sunday Times v United Kingdom* (1979) 2 EHRR 245 [49].

¹⁶ Uta Kohl, 'Ignorance is no defence, but is Inaccessibility?' (2005) *Information & Communications Technology Law* 14 (1) 25-41; also available at <http://www.frli.org/IMG/pdf/utakohl.pdf> page 7 (accessed 31 May 2014).

¹⁷ *Ibid* 7.

¹⁸ *Ibid* 9.

¹⁹ *Ibid* 9.

explained in an appropriate manner for the intended audience. I still maintain that we should all have access to the basic texts at the same time.

The 2006 Law Commission Report

In 2006, the Law Commission reported on *Post-Legislative Scrutiny* (“the 2006 Report”). Included within its report²⁰ was a discussion of delegated legislation and accessibility to it. In its consideration, it reflected on responses that access to delegated legislation was problematic: in particular, one response stated that legislation, ‘...is difficult to identify, obtain and understand and is frequently out of date.’²¹ The Commission summarized a further consideration of the respondent in the following terms:

... experience of practice in childcare suggests that many injustices are the result not of failure to comply with the statute, but of failure to know about, understand or access secondary legislation.²²

The Law Commission considered solutions such as the consolidated re-enactment of delegated legislation once it has been amended a certain number of times, use of consolidation (in general) and greater use of sunset clauses. It also recommended that the Government take steps to ensure that primary and secondary legislation “...should be capable of being accessed in a coherent fashion by a straightforward and freely available electronic search.”²³

The Government’s response in 2008²⁴ set out the work that was ongoing at the time, including the opportunities that an online database of legislation provided, such as links to ‘relevant information’ (further suggestions in the response concerned live links on the website to relevant EU Directives, Commencement Orders and amending legislation). It is clear that some of these aspirations bore fruit, such as the links to Explanatory Memoranda for Statutory Instruments and Explanatory Notes for Acts of Parliament.

²⁰ The report is available on the Law Commission’s website accompanied by the Government’s response: Law Commission, *Post Legislative Scrutiny* (Law Com No 302, 2006) <http://lawcommission.justice.gov.uk/areas/Post-legislative_Scrutiny.htm> (accessed 31 May 2014).

²¹ *Ibid*, para 4.11.

²² *Ibid*, para 4.12.

²³ *Ibid*, para 4.15.

²⁴ Office of the Leader of the House of Commons, *Post-Legislative Scrutiny – The Government’s Approach* (Cm 7320, 2008), paras 33-37 at pages 22 and 23.

On the one hand, the Government has achieved what the Law Commission's recommendation set out to change: a great deal of legislation is available on the legislation.gov.uk website (and searchable via web search engines, helpfully). However, in my view, the problem subsists. Although the improvements in the access to primary and secondary legislation via legislation.gov.uk are noteworthy, the reliability of the information is questionable (or unknown on the face of the website), and further work is required in order for the service to become reliable, and meet the not un-reasonable expectations of users.

A perspective from Ireland

In 2011, Patricia Rickard-Clarke considered accessibility to Irish legislation and her general observations are helpful for the English context.²⁵ She considers that there is a great deal of additional work required, on an on-going basis, to ensure that the law keeps up with society, is not overly complex, and is accessible to the people who rely on it: the public. She states:

Since legislation incorporates the norms by which society operates, its availability in an up to date, accessible and coherent form is crucial for the effective functioning of society, in particular the rule of law.²⁶

Rickard-Clarke highlights one of the primary issues: that it is not enough to look in one place for the law. She states in relation to Irish law,

[i]n many cases the relevant provisions are contained in a number of Acts. They may be scattered among a Principal Act, amending Acts and various statutory instruments. The user may often have to piece together the various texts to ascertain the current state of the law.²⁷

This is certainly the current position in England.

It is this problem, of having to piece together the true position from many different sources that leads her to dub the problem the '*buried amendment phenomenon*'.²⁸ The problem is adequately demonstrated, in my opinion, by the 2013 Order that amended the 2013 Regulations (as discussed above): an Order relating to the Coroners and Justice Act 2009 amended a set of Regulations relating to the National Health Service. It is counter intuitive. Having said that, from the Government

²⁵ Patricia Rickard-Clarke, 'Access to Justice: Accessibility (2011) Legal Information Management 11 159-164.

²⁶ *Ibid* 159.

²⁷ *Ibid* 159.

²⁸ *Ibid* 159.

perspective, it makes sense, as it was an amendment relating to findings made by coroners at inquests in relation to a (i.e. medical) practitioner. However, it only serves to confuse those working with the law and those referring to it, as it (arguably) would not come to mind to start checking legislation intended for coroners and justice for amendments to provisions in relation to the health service.

The English criminal law

It seems that there has been greater consideration of the accessibility to law in respect of the criminal law. Professor Ashworth convincingly makes an argument for greater accessibility to law within the context of a proposition against the doctrine of 'ignorance of the law is no defence', in his 2011 article "Ignorance of the Criminal Law, and Duties to Avoid it".²⁹ He weighs the mutual duties of state and individual in the following terms,

Thus part of my argument is that it is fair and right to expect people to make a reasonable effort to find out what the law is: the other part of my argument...is that the State should also have an obligation to provide more information about the criminal law and about changes made to it, thus making the citizen's task easier.³⁰

He then balances this with the rule of law, by stating: "To impose this moderate duty on people is not inconsistent with the rule of law, so long as the State discharges its duty to make the criminal law sufficiently accessible."³¹

With regards to accessibility, Ashworth notes that the creation of the UK Statute Law Database was reinforced by the outcome of the 2006 Report. He goes one step further than my current argument though, and highlights that, in respect of the criminal law, how are people to know what the law is when the database does not cover much written law from outside the specified dates; but also, does not include the common law.³² I do not disagree with Professor Ashworth, and would only suggest that the following: in respect of the UK Statute Law Database (now legislation.gov.uk), it is not enough to publish the original versions of legislation, it requires constant updates; the next stage would be to increase the depth of legislation available on the internet; and lastly, to make the common law available would be a difficult task, although perhaps one that could be tackled by appropriately framed guidance through www.gov.uk, and linked to certain relevant

²⁹ Andrew Ashworth, 'Ignorance of the Criminal Law, and Duties to Avoid it' (2011) *Modern Law Review* 74 (1) 1-26.

³⁰ *Ibid* 5.

³¹ *Ibid* 5.

³² *Ibid* 22.

provisions on legislation.gov.uk. The latter; however, falls outside the scope of this essay.

A practical example of the consequences

I found the following example cited in the article by Ashworth³³ and Lord Bingham used the same example in *The Rule of Law*.³⁴ In this case, Her Majesty's Revenue and Customs relied on regulations available from the internet³⁵ in a tobacco import duty case. It turned out, the day before the Court of Appeal was to hand down its judgment, that the regulations the Court had relied upon were incorrect, as they had been amended in 2001 and no longer applied to tobacco products.³⁶ A lawyer at the Revenue and Customs Prosecutions Office spotted the error and telephoned the lawyers involved in the case to inform them of the problem. Lord Justice Toulson, who had also sat as Chairman of the Law Commission for its 2006 Report,³⁷ said this: "To a worryingly large extent, statutory law is not practically accessible today, even to the courts whose constitutional duty it is to interpret and enforce it."³⁸

Toulson LJ then went on to set out four reasons for this:

- (1) the majority of legislation is secondary legislation;
- (2) the volume of legislation has increased significantly over the last 40 years...;
- (3) on many subjects the legislation cannot be found in a single place, but in a patchwork of primary and secondary legislation...; [and]
- (4) there is no comprehensive statute law database with hyperlinks which would enable an intelligent person, by using a search engine, to find out all the legislation on a particular topic.³⁹

As Ashworth notes in relation to the 2006 Report,

Finding out what is the criminal law presents a particular problem when so much legislation is secondary...it is no less a problem when legislation amending previous legislation is

³³ Ibid 21, at footnote 91.

³⁴ Bingham (n 12) 41 and 42.

³⁵ The website was the old Office of Public Sector Information website and the Statute Law Database.

³⁶ Bingham (n 12) 42.

³⁷ See n 21, above.

³⁸ *R v Chambers* [2008] EWCA Crim 2467 [64].

³⁹ Ibid [65] - [68].

passed (and particularly if its commencement dates are staggered), and the official web-site fails to incorporate the latest amendments into the text of the law.⁴⁰

Toulson LJ concluded his judgment having commented on the Government's response to the 2006 Report:

The aim is laudable, indeed imperative, but there is a long way to go and meanwhile the volume of legislation advances apace. It is a serious state of affairs when the relevant legislation is not accessible, the Government's own public information website (OPSI) is incomplete [...]. Although the problem has in the case arisen in an excise context, it is part of a wider problem of substantial constitutional importance.⁴¹

In Ashworth's article, the case fell within a discussion as to whether there should be a defence of 'mistake of law' in certain criminal circumstances where individuals genuinely did not know that they were committing an offence (because the law was not communicated by the state or accessible), and the offence does not fall within the categories of crimes that would be obvious to anyone (i.e. murder, rape, assault would be classed as obvious wrongs). In his discussion on accessibility, Lord Bingham does not go so far as to set out a desire for such a defence, but does mention two Italian Supreme Court Decisions where they held that ignorance of the law was an excuse, "...when the formulation of the law is such as to lead to obscure and contradictory results".⁴²

Lord Bingham concludes his section on statute law and accessibility to law in the following terms:

it must be questioned whether the current volume and style of legislation are well suited to serve the rule of law even if it is accepted, as it must be, that the subject matter of much legislation is inevitably very complex.⁴³

It would be foolish me to attempt to add to this statement. However, in agreement, I do question how appropriate our current situation is. I would argue that there is an opportunity for our legal system to enhance its adherence to the rule of law by making legislation on the internet comprehensive, and maintain its availability for free. This will only be a benefit to everyone. There are many further arguments relating to modernisation and consolidation⁴⁴ and the provision of clear, concise and

⁴⁰ Ashworth (n 30) 21.

⁴¹ *R v Chambers* [2008] EWCA Crim 2467 [72].

⁴² Bingham (n 12) 42.

⁴³ Bingham (n 12) 42.

⁴⁴ See, for example, Rickard-Clarke (n 26) 2-4.

easily understood advice, which I also fully support. I, however, maintain that the law needs to be available to everyone.

Law is the domain of lawyers and the level playing field

One point of view that I have come across that falls against the free access to all legislation in its up to date form is that law is the domain of lawyers. I am not suggesting that on making up to date law available that citizens will be able to tackle potentially complicated, stressful and problematic legal proceedings themselves without assistance. But there are a greater number of examples of individuals being forced to represent themselves, and with further cuts to legal aid there is a general increased likelihood of people *having* to represent themselves.⁴⁵

As already mentioned, Lord Bingham states as the second reason behind the need for accessible law:

[i]f we are to claim the rights which the civil...law gives us, or to perform the obligations which it imposed on us, it is important to know what our rights or obligations are. Otherwise we cannot claim the rights or perform the obligations.⁴⁶

My overall argument against the 'domain of lawyers' view is approached from the angle of the 'level playing field', as was hinted to above in relation to Kohl's views that the State has an obligation to make categories of subjects aware of specific laws applicable to them. We, as a society, have the means, the manpower and the technology to make law available, and reliable. Individuals, on the other hand, do not, and have a very great challenge when they have not been exposed to law, perhaps through a university course.⁴⁷ I believe we all have a right to know what the law is, without cost, or reliance on any privileged status. Regardless of whether a person may need expert advice on an issue, they should start from a position that they have the law there, available for them to read and understand. If individuals require advice there are some avenues open to them, such as the Government's advice websites, charities and voluntary organizations, pro-bono units and, of course, expert advice from lawyers. But, they start from an even greater disadvantage if they do not have access, easily, to the basic texts.

⁴⁵ There have already been casualties in the profession from the cuts to legal aid. See, for example, Took Chambers, that closed in December 2013: 90 percent of their funding was from legal aid, see: Decca Aitkenhead, 'Michael Mansfield QC interview: 'What's wrong with rights?' *The Guardian* (London, 1 November 2013). <<http://www.theguardian.com/law/2013/nov/01/michael-mansfield-qc-interview>> (accessed 31 May 2014).

⁴⁶ Bingham (n 12) 38.

⁴⁷ Arguably the challenge exists whether they have studied law or not.

The counter here is that people do currently have access to the basic texts. Arguably, they are not at a disadvantage. I disagree; in fact, people are at an even greater disadvantage if they have access to basic texts, but those texts are wrong, out of date, or simply misleading.

The legal system should not look at those individuals who are not legally qualified as those for whom the law is beyond understanding. This is wholly unfair. For the law to be any use, it needs to be accessible. For it to be accessible, it needs to be up to date.

Conclusion

In sum, it would appear there are numerous bases for accessibility to law. Primarily the rule of law; but also, supported in the context of human rights. Perspectives from Lord Justice Toulson, the Law Commission, Ireland and also the English criminal law demonstrate the issue's importance. I have always found it frustrating the legislation is not provided online in its up-to-date form. It is the antithesis of the legal profession to be inexact. But, it is the unfairness that strikes me as the most compelling reason to justify the continued push to make legislation comprehensively available. Why should not everyone who is subject to the law know what that law is? Does it not argue against the rule of law, justice, equality and fairness to maintain the current position? The level playing field is powerful to me. You have the right to know the law just as much as the next person, regardless of whether he or she can pay for access to databases, or gets access through an institution, such as a university.

I would urge that the National Archives programme to continue, and to broaden. Resource needs to be invested in this process of publishing and maintaining accurate legal texts. Inevitably, the processes will become more efficient and cost effective. It would be a step forward for the National Archives to set a deadline for completing their programme of updating secondary legislation.

Other steps should also be considered: more advice, freely available, on mediums such as the internet, more empowerment to individuals to protect themselves, adhere to law and to address their issues, on a level playing field with their fellow citizens, across the board.