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CONTENTS

Foreword	4
<u>Articles</u>	
Have the Courts interpreted section 3 of the Human Rights Act 1998 in a way which undermines the sovereignty of Parliament? <i>Sîân McGibbon (Winner of the Michael Beloff Essay Prize)</i>	5
Can human rights effectively ensure environmental protection? <i>Alexander Barbour</i>	14
How do the Article 4.4 (Therapeutic Use Exemptions) and Article 10.5 (No Significant Fault of Negligence) help mitigate the potential unfairness of strict liability in anti-doping cases? <i>Chloe Ogley</i>	22
Taking up arms for an embattled decision: <i>Pennington v Waine</i> 15 years on <i>Daniel de Lisle</i>	32
“Native Title as a form of permissive occupancy at will”: An analysis of the legal formula in <i>Mabo (No 2)</i> (1992), the Native Title Act 1993 and its effect in Australia. <i>Horaine Henry</i>	39
Exceptions to Exceptionalism: should the Supreme Court use international and foreign laws as an interpretative aid to the US Constitution? <i>Julija Stukalina</i>	52
Are mimes not pantomimes? A critical assessment of the protection of television formats under UK Copyright Law <i>Paulo Fernando Pinheiro Machado</i>	66
The Rebirth of the Common Law: Common Law Constitutional Rights and Legality <i>Philippe Kuhn</i>	74
Is there a need to abolish the floating charge? A critical discussion on the distinction between floating and fixed charges. <i>Ryan Martin</i>	94

Sticks and stones will break my bones and online words will hurt me <i>Patrick Boyers</i>	102
Following <i>Gow v Grant</i> [2012] UKSC 29: to what extent does English law protect cohabiting couples? <i>Hollie-Mae Le Cras</i>	117
Judicial Determinations through Sport: The Application of EU case law to sport and in relation to the development of the jurisprudence of the EU. <i>Victoria Alicea</i>	126
Infringement of rights or enhanced national security: considering the unimaginable <i>Anastasiya Sattarova</i>	137
<i>Case C-157/15 (G4S Secure Solutions)</i> : a critical discussion on the Islamic veil as a human right <i>Zara Kayani</i>	145
Exploring the relationship between copyright and freedom of expression <i>Kin-Hoe Loi</i>	154
<u>Case Notes</u>	
<i>R (on the application of Tigere) v Secretary of State for Business, Innovation and Skills</i> [2015] UKSC 57 <i>Markus Findlay</i>	162
<i>Williams v Bridgeport Music Inc</i> (USDC, C.D. California) March 10, 2016 <i>Mark Baldwin</i>	166
<i>Isle of Wight Council v Platt</i> [2017] UKSC 28 <i>Philip Jones</i>	170

FOREWARD

It has been a privilege to take on the role of Editor for volume nine of the Gray's Inn Student Law Journal. I am particularly grateful to the many students who have contributed excellent articles to this year's Journal. I have attempted to make selective choices to bring a wide variety of interests and opinions to the Journal. This year there is a wide variety of issues discussed from the rebirth of the common law to Native title in Australia.

A special mention must be given to Siân McGibbon whose excellent essay on the Court's interpretation of section 3 of the Human Rights Act 1998 opens the Journal as the winner of the annual Micheal Beloff Essay Prize.

Further, I am most grateful to all those who contributed to the production of the Journal. The Education Department of Gray's Inn and the rest of the AGIS Committee have all worked hard to support the Journal.

Into the future, I hope that the Journal will continue to provide students with the prospect of engaging academically with the law, developing further an area of interest, and sharing their perspectives on topical legal issues.

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HAVE THE COURTS INTERPRETED SECTION 3 OF THE HUMAN RIGHTS ACT 1998 IN A WAY WHICH UNDERMINES THE SOVEREIGNTY OF PARLIAMENT?

Síân McGibbon

Introduction

In our unwritten constitution, the sovereignty of the elected legislature is the cornerstone of democracy; any perceived compromise of this principle has tended to evoke strong reactions. In more recent years, the legal protection of human rights, the most significant provision for which in UK law is arguably the Human Rights Act 1998, has been also accorded increasing weight and value. It is perhaps inevitable, then, that where these two principles come into conflict, as they do in the application of s3 of the Human Rights Act, there is a need for delicate balance to be struck. The ability of these two features of UK law to co-exist is dependent on both the scope of s3 as interpreted by the Courts, and the definition of the concept of sovereignty.

This article will begin by analysing the application and interpretation of s3 by the Courts, before proceeding to explore the meaning of Parliamentary sovereignty within the modern constitution. A definition of sovereignty will be advanced which allows for Parliament to bind its successors to the limited extent necessary to enact legislation providing for a continuing intention from which it does not mean to depart without express provision. It will be submitted that such an understanding offers both a descriptively accurate account of the modern constitutional understanding of sovereignty, and a normatively desirable evolution of the principle. The final section of this work will argue that the interpretation of s3 of the Human Rights Act is compatible with such a conception of sovereignty and that examination of the reasoning in the jurisprudence concerning s3 supports this conclusion.

The Interpretation of S3 of the Human Rights Act 1998

S3(1) of the Human Rights Act 1998 provides that '[s]o far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect to in a way which is compatible with Convention rights'¹. This creates an interpretative obligation which applies to all legislation, whether passed before or after the coming into force of the 1998 Act.

The strength of the obligation contained in s3 remains the subject of voluminous academic debate. Nonetheless, there are certain parameters of the power which appear to be almost universally accepted. At the least, it is clear that the obligation is stronger than the usual purposive

¹ Human Rights Act 1998 (HRA) s3(1). The term 'Convention rights' refers to the Articles and Protocols of the European Convention on Human Rights and Fundamental Freedoms (ECHR), which are incorporated in Schedule 1 to the Act.

interpretative obligation imposed on courts. At the highest, it appears to be settled that the phrase ‘so far as it is possible to do so’ is to be accorded at least some significance; there will be cases in which it is *not* possible to apply s3 to render legislation Convention-compliant. If nothing else, the existence of the power to make a ‘Declaration of Incompatibility’, contained within s4 of the 1998 Act, to complement the power in s3, is a clear indication that Parliament did not anticipate that *all* legislation would be capable of being interpreted under s3 so as to comply with Convention rights.

However, within these broad boundaries, the extent of the power is contentious. The wording of the section itself is open to more than one possible meaning; to use the words of Lord Nicholls in *Ghaidan v Godin-Mendoza*, ‘section 3 itself is not free from ambiguity...[and] is open to more than one interpretation. The difficulty lies in the word ‘possible’².

Despite initial discord amongst senior judges as to the proper scope of s3³, more recent jurisprudence concerning s3 has clarified matters to some extent. In *R v A (No 2)*, which concerned the ‘rape shield’ enacted in s41 of the Youth Justice and Criminal Evidence Act, illustrated the difficulties which the court faced in grappling with the extent of their new power. The challenged statutory provision severely restricts cross-examination of a rape victim on the subject of her sexual conduct. The House of Lords unanimously held that the section had to be read subject to s3 of the Human Rights Act, and consequently interpreted the section as applying only where the exclusion of the evidence would not endanger the fairness of the trial in breach of Article 6 of the Convention⁴. The tone of the leading speech in that case, delivered by Lord Steyn, suggests an activist approach. He makes clear that ambiguity in the language of the challenged legislation is not a prerequisite for the application of s3.

By contrast, the judgement of Lord Hope is more cautious, accepting the strength of the rule of construction laid down in s3 as being ‘quite unlike any previous rule of statutory interpretation’, but emphasising that ‘the rule is only a rule of interpretation...s3 does not entitle the court to legislate’⁵. Lord Hope reiterated the conservative analysis of s3 which he had given in his judgement in *R v Lambert*⁶, and it was later adopted by the House of Lords in *In Re S (Care Order: Implementation of Care Plan)*⁷. In that case the Court declined to reinterpret the Children Act under s3 of the Human Rights Act, expressing concern that to do so would involve giving

² *Ghaidan v Godin-Mendoza* [2004] UKHL 30 at [27].

³ See for example: *R v Lambert* [2001] UKHL 37; *R v Kansal* [2001] UKHL. In both of these early cases, the three members of the House who heard the case were unable to arrive at a unanimous decision.

⁴ Article 6 ECHR, which enshrines the right to a fair trial.

⁵ *R v A (No 2)* [2002] 1 AC 45, per Lord Hope at [108].

⁶ *R v Lambert* [2001] UKHL 37. It should be noted that Lord Hope later held that *Lambert* had been wrongly decided on its facts.

⁷ *In Re S (Minors)(Care Order: Implementation of Care Plan)* [2002] 2 AC 291.

adopting an interpretation which ‘departs substantially from a fundamental feature of an Act of Parliament...especially where the departure has important practical repercussions which the Court is not equipped to evaluate’⁸. Lord Nicholls, with whom the other judges agreed, decided that to interpret the challenged legislation under s3 so as to bring it into conformity with Convention rights would require departure from a ‘cardinal principle’ of the relevant Act, which would pass ‘well beyond the boundary of interpretation’⁹.

The Court has adhered to this boundary even where it has believed that the law should be otherwise, as illustrated by the ruling of the House of Lords in *Bellinger v Bellinger*¹⁰. In that case, the House held that it was not within its powers to interpret s11(c) of the Matrimonial Causes Act 1973, which required a marriage to be between a man and a woman, to include a marriage between a man and a trans-sexual female, despite the fact that the provision was incompatible with the applicant’s rights under the ECHR.

Ghaidan later became the leading case on the subject of s3; the House of Lords, comprising the Lords Slynn, Lloyd, Steyn, Hope, and Hutton, interpreted the challenged provisions of the Rent Act 1977 so as to make survivorship rights in respect of statutory tenancies apply to cohabiting same-sex couples rather than only those living together as husband and wife¹¹. It was held to be unnecessary that the interpretation of legislation under s3 should accord with an intention which might possibly be attributed to Parliament at the time of its enactment. Indeed, the only real limitation on the exercise of s3 which the majority of the House appear to have envisaged is that the power of construction cannot be applied to remove the ‘very core and essence, the ‘pith and substance’ of the legislative measure’¹². However, it should be noted that even following the liberal interpretation of s3 settled on in *Ghaidan*, the House has been careful to maintain some constraints on its application: in the subsequent cases of *R (Hooper) v Work and Pensions Secretary*¹³ and *R (Wilkinson) v Inland Revenue Commissioners*¹⁴ the Court declined to use s3 to extend statutory provisions for bereavement allowance to remove discrimination between the positions of widows and widowers and bring the scheme into compliance with Article 14 ECHR¹⁵.

The jurisprudence concerning s3 of the Human Rights Act can therefore be summarised in a number of key principles. Firstly, it is clear that the rule of construction is not limited to cases in which ambiguity arises from the language of the statute used; s3 may apply even in a case where,

⁸ Ibid, per Lord Nicholls at [40].

⁹ Ibid at [42]-[43].

¹⁰ [2003] 2 AC 467. See also: *In Re S (Minors)(Care Order: Implementation of Care Plan)* [2002] 2 AC 291; *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837.

¹¹ *Ghaidan v Godin-Mendoza* [2004] UKHL 30.

¹² Ibid, per Lord Rodger at [111].

¹³ [2005] UKHL 29.

¹⁴ [2005] UKHL 30.

¹⁵ Article 14 ECHR, which contains a prohibition on discrimination.

according to ordinary principles of interpretation, the terms of a provision admit of no doubt whatsoever as to their meaning¹⁶. Further, it is acceptable apply s3 to arrive at a construction of a provision which is inconsistent with the intention which Parliament may be taken to have had when it enacted the legislation in question¹⁷. On the other hand, they have consistently stopped short of adopting an interpretation which requires a departure from a fundamental feature of an Act of Parliament, particularly where such the case involves matters of policy which the Court believes itself to be ill-equipped to appraise¹⁸.

The application of the rule of construction created by s3 has required the judiciary to navigate a narrow and uncharted constitutional course. It is the submission of this author that in their response to s3 the Courts have, for the most part, arrived at an acceptable balance between the need to preserve the separate functions of the legislature and judiciary, and the need to respond to the clear call for a measure of judicial activism in the protection of the rights enshrined in the HRA 1998. Further, both Parliament and the Courts alike have repeatedly asserted that this balance has left the principle of Parliamentary sovereignty intact¹⁹. In order to determine whether their analysis is accurate, it is necessary to consider what precisely is entailed by Parliamentary sovereignty in the first place.

The Scope of Parliamentary Sovereignty

An orthodox English lawyer following the tradition of celebrated academics Coke, Blackstone, and Dicey, would explain the concept of Parliamentary sovereignty thus: no act of the sovereign legislature (comprising the Queen, Lords, and Commons) may be invalid in the eyes of the courts; the legislature has only one process for enacting sovereign legislations, whereby it is declared to be a joint act of the Crown, Lords, and Commons assembled; it is always open to the legislature to repeal legislation, with the consequence that no Parliament may bind its successors²⁰. It is this third feature of the traditional understanding of sovereignty which causes controversy in relation to s3 of the Human Rights Act 1998. The conventional view, for many years accepted by the courts, is that the doctrine of sovereignty entails that Parliament may not bind its successors in any way, shape or form²¹. The provisions of S3, regardless of how these were interpreted and applied by the Courts, would clearly be incompatible with such an understanding.

¹⁶ See: *R v A* [2002] 1 AC 45.

¹⁷ See: *Ghaidan v Godin-Mendoza* [2004] UKHL 30.

¹⁸ *In Re S (Minors)(Care Order: Implementation of Care Plan)* [2002] 2 AC 291, per Lord Nicholls at 40.

¹⁹ See for example: *In Re S* [2002] UKHL 10, per Lord Nicholls at [39].

²⁰ A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, (1885).

²¹ See for example: *Vauxhall Estates v Liverpool Corporation* [1932] 1 KB 733; *Ellen Street Estates Ltd. v Minister for Health* [1934] 1 KB 590; *British Coal Corporation v The King* [1935] AC 500.

However, there are a number of reasons to challenge and reject this traditional conception of sovereignty. Perhaps most obviously, it was first espoused many years ago in an entirely different legal, political, and constitutional landscape than that which modern legislation such as the Human Rights Act must operate. Constitutional practices and conventions change over time, particularly in Britain's famously unwritten constitution, and it is therefore necessary to re-examine the constitutional landscape to see whether the Dicean view still provides an accurate descriptive account of how the concept of sovereignty is understood by our constitutional institutions today. It is submitted below that it fails to do so by a wide margin. More importantly, Dicey's analysis was, by own admission, an empirical rather than a normative account of the concept of sovereignty. It therefore remains necessary to assess the normative implications of concept of sovereignty and allow this to guide the future shape of the principle in UK law. It is proposed that in both descriptive and normative terms, it is desirable to part with the orthodox understanding of sovereignty as being continuing and accept that it is possible for Parliament to bind its successors to a limited extent.

An Empirical Account of the Concept of Sovereignty

Jennings suggests that 'legal sovereignty is merely a name for indicating that the legislature has for the time being the power to make laws in the manner required by the law'²². He concludes from this that 'a legal sovereign may impose limitations on itself as courts will recognise a rule which changes the law itself (if properly enacted), as its power to change the law includes the power to change the law by affecting itself'. This understanding more accurately reflects constitutional practice today than Dicey's traditional account. In purely descriptive terms, it is clear that in practice for many years both Parliament and Courts alike have gradually shifted towards a self-embracing rather than continuing notion of sovereignty. Parliament's repeated use of so-called 'Henry VIII clauses'²³ along with enactment of statutes such as the Parliament Act of 1911 and 1949, the Acts of Union with Scotland, European Communities Act, Human Rights Act 1998, and myriad others, all of which depend for their functionality on the existence of some limited ability to bind future Parliaments, clearly indicate that the legislature understands itself to have the power to bind its successors as to the form of future legislation. The Courts have adopted a similar approach, most notably holding in *R v Secretary of State for Transport Ex Parte Factortame* that the European Communities Act would not be subject to implied repeal by subsequent inconsistent legislation²⁴. Yet it is generally accepted that the principle of Parliamentary sovereignty has not only survived these changes, but indeed that it remains a fundamental pillar of the UK constitution. Indeed, in the context of s3 of the Human Rights Act 1998, the House of Lords has held that 'the Act seeks to preserve Parliamentary sovereignty'²⁵. What these examples illustrate is not an attenuation of Parliamentary sovereignty, but rather the development of a general constitutional understanding that sovereignty does not prevent

²² W. I. Jennings, *The Law and the Constitution*, 2nd Ed (University of London Press, 1938).

²³ Barber & Young, 'The rise of Prospective Henry VIII clauses and their Implications for Sovereignty' [2003] Public Law 113.

²⁴ *R v Secretary of State for Transport ex parte Factortame Ltd (Interim Relief Order)* [1990] UKHL 7.

²⁵ *In ReS* [2002] UKHL 10, per Lord Nicholls at [39].

Parliament from enacting legislation which expresses a continuing purpose, which is to be taken to be in accordance with its intentions unless it expressly provides otherwise.

A Normative Account of the Concept of Sovereignty

The evolution described above, away from a ‘continuing’ notion of sovereignty in favour of a ‘self-embracing’ concept in so far as this relates to the manner and form of legislation, should be welcomed as being normatively desirable. Craig is right to suggest that ‘there are good normative arguments for requiring the legislature to expressly state its intention to repeal or derogate from statutes of national constitutional importance’²⁶. In the context of an increasingly globalised world, it is essential that the legislature should have the power to enact legislation binding its successors to expressly state its intention to depart from core constitutional values and commitments.

Moreover, a self-embracing conception of sovereignty is desirable in the face of the inevitability of mistakes on the part of the legislature. It would be impossible to expect Parliament to consider all the possible implications of every individual piece of legislation in advance, and this is more unrealistic than ever as Parliament becomes increasingly overloaded and the statute book continues to grow. It is necessary that Parliament should have the power to determine its priorities ahead of time, and to protect long-term, fundamental constitutional commitments such as membership of the European Union and Human Rights values from inadvertent or ill-considered compromise by hasty legislation.

Reconciling s3 HRA and Parliamentary Sovereignty

On the understanding of Parliamentary sovereignty proposed above, it is submitted that the concept is compatible in principle with the approach which the courts have adopted to the exercise of their powers under s3 HRA. S3 commits Parliament to a rule of construction which may depart from the ordinary meaning of the statutory language used, but it does so only to an extent requested by Parliament itself in enacting the 1998 Act and which can be cast aside by Parliament at any moment through the use of express language. On a self-embracing view of Parliamentary sovereignty, this is not only acceptable but is an exercise of an essential element of Parliament’s powers.

The conclusion that the application of s3 has not undermined sovereignty is supported by the reasoning of the Courts in key cases in which the rule of construction has been applied. In justifying decisions taken under s3, judges have repeatedly made direct reference to the intentions of Parliament in enacting the Human Rights Act and specifically in relation to that section, emphasising the view that the rule of construction is applied subject to Parliament’s continuing

²⁶ Craig, ‘Britain in the European Union’, in Jowell and Oliver (eds.) *The Changing Constitution*, 7th ed (Oxford University Press, 2011).

intention not to enact legislation which infringes the rights protected by the ECHR. The intention behind the Act as a whole was to ‘bring rights home’ to national courts from the Strasbourg institutions²⁷. The issue which the Act was to resolve was that rights set out in the Convention, which Britain had ratified decades previously in 1951, could not be vindicated by litigants in UK courts without recourse to the European Court of Human Rights (ECtHR) which for many individuals may be prohibitively time consuming and costly. Parliament’s ability to act on this intention would be significantly restricted if the Courts had insisted on a definition of sovereignty which rendered provisions such as s3 ineffective. In *In Re A (No 2)* Lord Steyn refers to the observation of the Lord Chancellor as the Bill progressed through Parliament that it was anticipated that ‘in 99% of cases...there will be no need for judicial declarations of incompatibility’²⁸, and to the statement of the Home Secretary that ‘We expect that, in most cases, the courts will be able to interpret legislation in compatibility with the Convention’²⁹. He holds that this understanding is ‘at least a relevant aid to the interpretation of section three against the executive’³⁰. He continues to justify the ruling in that case on the basis that ‘in accordance with the will of Parliament as reflected in section 3 it will sometimes be necessary to adopt an interpretation which linguistically may appear strained’³¹. Similarly, the majority in *Ghaidan* refer specifically to the intentions of Parliament in enacting the Human Rights Act and specifically s3³². Lord Nicholls states that the answer to the question of how far s3 may require the Court to depart from the intention of the Parliament which enacted a challenged legislative provision ‘depends upon the intention reasonably to be attributed to Parliament in enacting section 3’³³. Likewise, Lord Rodger suggests that in enacting s3 Parliament intended ‘not to devise an entertaining parlour game for lawyers [by placing a premium on the ability to think up a neat way around the draftsman’s language, but, so far as possible, to make legislation operate compatibly with Convention rights’³⁴. It is difficult to see how this purpose could have been achieved if Parliament did not have the power to enact remedial provisions such as the rule of interpretation contained in s3 to prevent the possibility of inadvertent contravention of the ECHR. Such an understanding of sovereignty would paradoxically limit Parliament’s ability to act on its intention to protect human rights.

Importantly, the boundary between interpretation and amendment based on the ‘fundamental feature’ principle found in *In Re S*³⁵, *R v A (No 2)*³⁶, *Ghaidan*³⁷, and other cases is based also

²⁷ Rights Brought Home: The Human Rights Bill (1997) (cm 3782) para 2.7.

²⁸ Hansard (HL Debates), 5 February 1998, col 840 (3rd Reading).

²⁹ Hansard (HC Debates), 16 February 1998, col 778 (2nd Reading).

³⁰ *R v A (No 2)* [2002] 1 AC 45, per Lord Steyn at [44].

³¹ *Ibid.*

³² See *Ghaidan v Godin-Mendoza* [2004] UKHL 30, per Lord Steyn at [40]-[42], Lord Nicholls at [26]-[30], per Lord Rodger at [123].

³³ *Ibid.*, per Lord Nicholls at [30].

³⁴ *Ibid.*, per Lord Rodger at [123].

³⁵ *In Re S (Minors)(Care Order: Implementation of Care Plan)* [2002] 2 AC 291.

³⁶ *R v A (No 2)* [2002] 1 AC 45, per Lord Hope at 109.

³⁷ *Ghaidan v Godin-Mendoza* [2002] 1 AC 45.

based on the Court's analysis of the intention of Parliament when enacting the legislation. In *In Re S*, the difficulty which the House faced in applying section 3 to the legislation was not that it was unable to find the language to render the Act compatible, but rather that regardless of the language which the Court might have used it would have necessitated introducing a change which was inconsistent with one of the 'cardinal principles' of the Act³⁸. Such a use of s3 would be unacceptable even where linguistic ambiguity was present to some degree. The key feature to which the Courts have had regard in determining whether a legislative principle is 'cardinal' or 'fundamental' is the intention of Parliament itself³⁹.

It is difficult to see the benefit of a constitutional doctrine which requires that a considered statement of intention such as that enacted in s3 should as a matter of course be overridden by a subsequent provision which it is entirely possible that Parliament did not anticipate, let alone intend, to contravene human rights. This is particularly so in view of the introduction of the requirement for a Statement of Compatibility to be made before the relevant House of Parliament before the Second Reading of a Bill⁴⁰ and the creation of the Joint Committee on Human Rights. The fact that such measures were contained within the Act further reaffirm the intention of Parliament not to act in contravention of human rights, or at the very least not to do so without being fully informed of the human rights implications of the provisions which it enacted. In this context, s3 should be viewed as one of a range of measures taken by Parliament to enable it to act on an overriding commitment to human rights. Moreover, the fact that none of these measures have yet been repealed is indicative of an ongoing commitment to this effect⁴¹.

Finally, it remains the case that, as Lord Steyn highlights in *Ghaidan*, 'If Parliament disagrees with an interpretation by the courts under section 3(1), it is free to override it by amending the legislation and expressly reinstating the incompatibility'⁴². Parliament is therefore presented with a trade-off between this relatively minor inconvenience where application of s3 leads to an interpretation of a statute which contradicts its intentions, and the huge increase in its practical ability to act to protect constitutionally important values such as human rights which s3 represents.

Conclusion

To conclude, the interpretation of section 3 HRA by the Courts undermines Parliamentary sovereignty only on an outdated and undesirable understanding of that constitutional principle. Sovereignty remains the cornerstone of the democratic constitution of the United Kingdom and

³⁸ *In Re S (Minors)(Care Order: Implementation of Care Plan)* [2002] 2 AC 291, per Lord Nicholls.

³⁹ *Ibid*, at [42]-[43]; *Bellinger v Bellinger* [2003] 2 AC 467.

⁴⁰ s19 Human Rights Act 1998.

⁴¹ See: D Feldman, 'The Impact of Human Rights on the UK Legislative Process' (2004) 25(2) Statute Law Review, 91-115.

⁴² *Ghaidan v Godin-Mondoza* [2004] UKHL 30, at [43].

it is important that the concept is maintained and protected. However, the powers accorded to the judiciary under s3 perform a valuable function within the modern constitution in ensuring that the human rights enshrined within the Act are not contravened lightly or unintentionally. It is therefore desirable to embrace a concept of Parliamentary sovereignty which is compatible with the functioning of section 3 of the 1998 Act. There are clear indications, not the least of which are the terms in which Parliament enacted the Human Rights Act and particularly s3, that Parliament itself understood its sovereignty in this manner. Moreover, the application of s3 in the Courts demonstrates a respect for the intentions of Parliament which would be incongruous with a desire to erode sovereignty. It would be a senseless and retrograde step to insist on a definition of Parliamentary sovereignty which did not take align with the understanding of these constitutional actors.

CAN HUMAN RIGHTS EFFECTIVELY ENSURE ENVIRONMENTAL PROTECTION?

Alexander Barbour

Human rights, by virtue of being human, do not protect the environment any further than the environment benefits us, and arguably “have little to do with environmental issues”.⁴³ Human rights have, however, been used in most jurisdictions to secure environmental protection.

At an international level, human rights have most successfully been invoked to protect indigenous rights relating to the environment. For example, the rights of Finnish Samis to breed reindeer was considered by the Human Rights Committee in *Länsman et al. v. Finland*.⁴⁴ Though no unlawful violation was found, the Committee held that “measures whose impact amount to a denial of the right [to enjoy one’s culture] will not be compatible with the obligations under article 27 [ICCPR]”.⁴⁵

The three systems of human rights at a regional level are Africa, the Americas and Europe. The 1981 African Charter on Human and Peoples’ Rights is alone in setting out “environmental rights in broadly qualitative terms”,⁴⁶ protecting the right to the “best attainable standard of health” in Article 16, and the right to “a general satisfactory environment favourable to [...] development” in Article 24.

In the case of *Ogoniland*,⁴⁷ the African Commission on Human and Peoples’ Rights held that Article 24 of the Charter imposes a positive obligation on States “to prevent pollution and ecological degradation, to promote conservation, and to secure ecologically sustainable development and use of natural resources”.⁴⁸ The substantive obligation created by this decision goes further than any other previous case,⁴⁹ and shows great potential for human rights as a mechanism for environmental protection. The unique characteristics of the African Charter,

⁴³ Ole Pederson, ‘The Ties that Bind: The Environment, The European Convention on Human Rights and the Rule of Law’ (2010) 16(4) European Public Law 571 <<http://ssrn.com/abstract=1673125>> accessed 28 December 2015

⁴⁴ Communication No. 511/1992, U.N.Doc. CCPR/C/52/D/511/1992 (1994)

⁴⁵ *ibid.*, para 9.4

⁴⁶ Alan Boyle, ‘Human Rights and the Environment: A Reassessment’ (2008) 18 Fordham Environmental LR 471; revised (2010)

<<http://www.unep.org/environmentalgovernance/Portals/8/documents/Events/HumanRightsEnvironmentRev.pdf>> accessed 4 January 2016, 3

⁴⁷ *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*, ACHPR, Communication 155/96 (2002)

⁴⁸ *ibid.*, para 52-53

⁴⁹ Alan Boyle (n.4), 4

however, especially its focus on peoples' rather than individual rights,⁵⁰ limits this optimism to Africa.

The Inter-American Commission on Human Rights (IACHR), applying the American Convention on Human Rights, reached a less general, but equally protective,⁵¹ decision in the *Maya Indigenous Community Case*.⁵² Here, the Commission found that deforestation threatened the system of agriculture of the indigenous Maya people,⁵³ and ordered Belize to demarcate and protect Maya land, and repair the environmental damage.⁵⁴ Though the Commission accepted the "importance of economic development",⁵⁵ it believed it more important that actions "do not proceed at the expense of the fundamental rights of persons who may be particularly and negatively affected, including indigenous communities and the environment upon which they depend".⁵⁶

This essay will focus on the European system, as the European Court of Human Rights has produced the most extensive case law.⁵⁷ It will first consider this case law, and its protective effectiveness, before assessing the role of a right to a healthy environment in Europe.

ECHR and the Environment

The European Convention on Human Rights makes no reference to the environment.⁵⁸ Nonetheless, the interpretation of the Convention as a "living instrument"⁵⁹ has allowed the European Court of Human Rights to develop an extensive case law.⁶⁰ Three categories of case have prompted the most litigation and debate: industrial pollution; noise; and environmental risk.⁶¹ The case law relating to these three areas will be considered in turn in order to assess whether the threshold of harm and margin of appreciation in each is hindering environmental protection.

Industrial Pollution

One of the earliest human rights cases concerning environmental degradation was *López Ostra v Spain*.⁶² Here, the applicant claimed a breach of Article 8 ECHR as a result of the authority's failure to respond to complaints about the smells, noise and polluting fumes from a waste-

⁵⁰ *ibid.*, 5

⁵¹ *ibid.*

⁵² *Maya indigenous community of the Toledo District v. Belize*, Case 12.053, Report No. 40/04, Inter-Am. C.H.R., OEA/Ser.L/V/II.122 Doc. 5 rev. 1 (2004)

⁵³ Alan Boyle (n.4), 5

⁵⁴ *Maya Community Case* (n.10), recommendations 2-3

⁵⁵ *ibid.*, para 150

⁵⁶ *ibid.*

⁵⁷ Alan Boyle (n.4), 13

⁵⁸ Pederson (n.1), 3

⁵⁹ Alan Boyle (n.4), 13

⁶⁰ *ibid.*

⁶¹ Pederson (n.1), 3

⁶² (1995) 20 EHRR 277

treatment plant located metres from her home.⁶³ The state's inaction led the Court to rule that a fair balance was not struck between the town's economic well-being and the applicant's Article 8 right.⁶⁴

The Court famously asserted in *López Ostra* that, "severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely".⁶⁵ This led the Court to similarly conclude that a fair balance had not been achieved, in breach of Article 8, in *Fadeyeva v Russia*,⁶⁶ *Giacomelli v Italy*,⁶⁷ *Tătar v Romania*,⁶⁸ and *Dubetska and others v Ukraine*.⁶⁹

Despite the applicants' success in the aforementioned cases, the threshold of harm remains high. In *Dubetska*, the Court set out that the risk must be compared to the "environmental hazards inherent in life in every modern city";⁷⁰ the Court in that case accepting that the area complained of was "empirically unsafe for residential use".⁷¹

These cases also show that the Court will only intervene where national law is contravened.⁷² In *López Ostra*, for example, the waste-treatment plant operated without a license.⁷³ Similarly, in *Fadeyeva*, the Russian authorities authorised the operation of a steel plant in a densely populated area in contravention of unimplemented domestic legislation.⁷⁴ This wide margin of appreciation, together with the high threshold of harm, raises significant questions about the ability of human rights to prevent environmental damage from industrial pollution.

Noise

In *Powell and Rayner v UK*,⁷⁵ concerning noise from Heathrow Airport, the applicants claimed a breach of Article 8 as a result of inadequate noise minimisation measures.⁷⁶ In rejecting their claim, the Court relied on the UK's margin of appreciation, asserting that a fair balance had been struck between individual and community interests, highlighting the economic importance of

⁶³ ECtHR, 'Factsheet: Environment and the ECHR' (*ECtHR Press Unit*, November 2015) <http://www.echr.coe.int/Pages/home.aspx?p=press/factsheets&c=#n1347890855564_pointer> accessed 28 December 2015, 10

⁶⁴ *ibid.*

⁶⁵ (1995) 20 EHRR 277, [51]

⁶⁶ (2007) 45 EHRR 10

⁶⁷ (2006) 5 EHRR 871

⁶⁸ judgment of 27 January 2009

⁶⁹ judgment of 10 February 2011

⁷⁰ para 105

⁷¹ Council of Europe, *Manual on human rights and the environment* (2nd edn, CoE Publishing 2012) 48

⁷² Pederson (n.1), 7

⁷³ *ibid.*, 6

⁷⁴ ECtHR (n.21), 11

⁷⁵ (1990) 20 EHRR 277

⁷⁶ ECtHR (n.21), 13

Heathrow Airport.⁷⁷ An assessment of the merits of the balance between competing interests in this case is an example of what Letsas terms “the substantive concept of the margin of appreciation”.⁷⁸

Applying a substantive margin of appreciation in *Hatton and others v UK*,⁷⁹ the Third Section of the Court held that the noise from night flights from Heathrow Airport constituted a breach of Article 8, as a fair balance had not been struck between economic considerations and the individuals’ Article 8 right, violated due to severe harm to health from levels of noise deemed dangerous by the World Health Organization.⁸⁰

The Grand Chamber in *Hatton*,⁸¹ however, applied a structural conception of the doctrine of the margin of appreciation,⁸² where the Court concludes that “national authorities are *better placed* to decide certain human rights cases”.⁸³ Significant deference of this kind is a fundamental barrier to effective protection of the environment by a system of human rights. If decisions are unable to be challenged simply by reason of the decision-maker’s position, even where there is a flagrant breach of human rights, the system of review loses legitimacy.

The structural margin of appreciation can be seen in other noise cases, with claims only successful where, as with industrial pollution, there has been a breach of national law. In *Moreno Gómez v Spain*,⁸⁴ for example, high levels of noise from bars in the applicant’s neighbourhood breached Article 8. The Court found a violation as the local authority had disregarded rules designed specifically to abate the noise.⁸⁵ Similarly, in *Mileva and others v Bulgaria*,⁸⁶ noise from a flat used as a computer club was held to violate Article 8 as the authorities knew the club was operating without a license, and failed to enforce multiple court rulings designed to protect the applicants’ well-being.⁸⁷

These cases also show that a wide margin of appreciation results irrelevant of the level of harm involved. For example, *Hatton* involved extreme levels of noise, but the Grand Chamber found no violation. On the other hand, *Mileva* involved much lower levels of noise,⁸⁸ but the Court found a violation. Politically, such deference is sensible, but *Hatton* is yet another case in a worrying trend of insufficient environmental protection resulting in severe harm to health.

⁷⁷ Pederson (n.1), 4

⁷⁸ G Letsas, ‘Two Concepts of the Margin of Appreciation’ (2006) 26 OJLS 705, 709

⁷⁹ (2002) 34 EHRR 1

⁸⁰ *ibid.*, [76]

⁸¹ (2003) 37 EHRR 28

⁸² *ibid.*

⁸³ *ibid.*

⁸⁴ (2005) 41 EHRR 40

⁸⁵ Pederson (n.1), 5

⁸⁶ judgment of 25 November 2010

⁸⁷ ECtHR (n.21), 15

⁸⁸ Justice and Environment, ‘ECHR Case Law in Environmental Cases’ (*J&E*, 2011) <<http://www.justiceandenvironment.org/publications/>> accessed 5 January 2016, 46

Environmental Risk

The Court has been most proactive in safeguarding against environmental risks. Where there is inadequate safeguarding, or lack of access to information, violations of Articles 2 and 8 have been found, even where there has been no harm to health.

In *Guerra v Italy*,⁸⁹ the failure of Italian authorities to inform the public of the hazards and evacuation procedures in case of a malfunction at a nearby chemical factory breached their right under Article 8.⁹⁰ Similarly, in *Brândușe v Romania*,⁹¹ it was held that the failure to inform prisoners of the risks associated with living in close proximity to a disused landfill site violated Article 8.⁹²

The Court took the “unprecedented step”⁹³ in *Tătar v România*⁹⁴ of reading procedural environmental rights into the Convention. Despite the inability of the applicants to prove a causal link between the use of sodium cyanide in a neighbouring gold mine⁹⁵ and the worsening of symptoms,⁹⁶ the Court found an Article 8 violation, holding that a series of positive obligations exists requiring states to construct a legislative and administrative framework regulating hazardous activities, including commissioning surveys and studies allowing the public to assess the relevant risks.⁹⁷ Though this may only be a procedural right, it arguably goes further to protect the environment than the use of other substantive human rights in the pollution and noise cases. This is because the case law indicates no evidential requirement of harm to health, and a far narrower margin of appreciation.

The narrow margin of appreciation is most clearly evidenced by the recent decision in *Brincat and others v Malta*.⁹⁸ Here, the Court found a violation of Article 2 in respect of one applicant, and a violation of Article 8 in respect of the others, as a result of failure to manage and inform the applicants of the risks of asbestos exposure at a shipyard.⁹⁹ While the Maltese government argued the existence of a margin of appreciation “in balancing the competing interests involved”,¹⁰⁰ the Court found a margin of appreciation only “as to the choice of means” of implementing the positive obligations that the state failed to satisfy in this case.¹⁰¹

⁸⁹ (1998) 26 EHRR 357

⁹⁰ ECtHR (n.21), 7-8

⁹¹ decision of 7 April 2009

⁹² Pederson (n.1), 8

⁹³ *ibid.*

⁹⁴ (n.26)

⁹⁵ Pederson (n.1), 9

⁹⁶ Council of Europe (n.29), 50

⁹⁷ Pederson (n.1), 9

⁹⁸ [2014] ECHR 836

⁹⁹ ECtHR (n.21), 9

¹⁰⁰ (n.56), [99]

¹⁰¹ *ibid.*, [116]

Human Right to a Healthy Environment

The aforementioned case law shows unwillingness on the part of the Court to acknowledge the fundamental importance of a healthy environment. The Court's continued insistence on the ECHR's status as a living instrument that "must be interpreted in the light of present-day conditions"¹⁰² has been seen as negating the need to have an explicit substantive right.¹⁰³

English has argued, however, that the Court's maintenance of a "medieval gap between human interests and those of our natural environment [...] shows just how lopsided the evolutionary capacity of this 'living instrument' is".¹⁰⁴ This is particularly notable when compared to the Courts' willingness to develop other areas of law, such as the right to recognition of gender change for post-operative transsexuals implied into the Convention following *Goodwin v United Kingdom*.¹⁰⁵

The 'medieval gap' is highlighted by the case of *Kyrtatos v Greece*,¹⁰⁶ in which the Court asserted, "neither Article 8 nor any of the other articles of the Convention are specifically designed to provide general protection of the environment".¹⁰⁷ Thus, environmental protection under the Convention is merely incidental, which is clearly not sufficient.

An explicit right to a healthy environment has been successfully enforced in other regional systems, as shown by *Ogoniland* and the *Maya Indigenous Community Case*. Given the relative inadequacy of the protection given by European Court of Human Rights, the adoption of a substantive right could improve environmental protection. On the other hand, adopting such a right may make no difference, as the European Court of Human Rights has "effectively read procedural safeguards into Article 8 to a very similar effect".¹⁰⁸ For example, in *Öneraydız v Turkey*,¹⁰⁹ concerning hazardous activities, the Court asserted: "public access to full and clear information is deemed to be a basic human right".¹¹⁰

The right to a healthy environment is in fact a constitutional norm in Eastern Europe,¹¹¹ with 19 constitutions including the right.¹¹² This is largely because the shift from communism and authoritarianism to capitalism and democracy lifted the Iron Curtain that previously "hid some of the most dramatic environmental abuses in the world".¹¹³ The constitutional right has been

¹⁰² *Soering v UK* (1989) 11 EHRR 439, [102]

¹⁰³ Pederson (n.1), 2

¹⁰⁴ Rosalind English, 'Kyrtatos v Greece' (*ICOR*, June 2003)

<http://www.lcor.com/1315/?form_1155.replvids=352> accessed 5 January 2016

¹⁰⁵ (2002) 35 EHRR 622

¹⁰⁶ judgment of 22 May 2003

¹⁰⁷ *ibid.*, [52]

¹⁰⁸ Pederson (n.1), 15

¹⁰⁹ (2005) 41 EHRR 20

¹¹⁰ *ibid.*, 56

¹¹¹ David Boyd, *The Environmental Rights Revolution* (UBC 2012) 76

¹¹² *ibid.*, 193

¹¹³ *ibid.*

enforced in at least 12 of the 19 Eastern European constitutions.¹¹⁴ The extensive litigation supports Shemshuchenko's assertion that the right to a healthy environment in Eastern Europe is a substantive right able to be relied upon, rather than a mere social intention.¹¹⁵

In Western Europe, Portugal and Spain were "global pioneers" when they included the right in their constitutions,¹¹⁶ and there are now nine Western European states that explicitly recognise the right to a healthy environment.¹¹⁷ This right has been litigated in eight of the nine states,¹¹⁸ and has influenced "major revision and amplification of environmental policies".¹¹⁹ Boyd believes that if the proposed protocol to the Convention on the right to a healthy environment were implemented, this would extend the right to the remaining countries in Western Europe.¹²⁰ Given the amount of litigation based on existing constitutional provisions, increased enforceability would likely improve environmental protection.

Conclusion

Charles Darwin, in *The Descent of Man*, observes that moral development has been a continual extension in the objects of man's "social instincts and sympathies".¹²¹ In other words, over time, man has developed from having regard only for himself and those of a "very narrow circle around him",¹²² to caring for "men of all races, to the imbecile, maimed, and other useless members of society, and finally to the lower animals".¹²³ Stone asserts that "the history of the law suggests a parallel development",¹²⁴ much like the mirror thesis, advocated by legal philosophers such as Tamanaha.¹²⁵ The gradual introduction of the environment into the jurisprudence of the European Court of Human Rights represents a manifestation of the mirror thesis,¹²⁶ as a growing section of society becomes environmentally aware, continuing Darwin's so-called 'descent of man'.

With the growing desire to protect the environment comes the increasing need to scrutinise the means employed, and this essay has sought to uncover the many flaws of human rights as a system of protection. The assessment of the European Court of Human Rights' case law suggested that the Court is unwilling to enforce a substantive right to a healthy environment, instead demanding

¹¹⁴ *ibid.*, 195

¹¹⁵ Y Shemshuchenko, 'Human Rights in the Field of Environmental Protection in the Draft of the New Constitution of the Ukraine' in Diemann and Dyssli (eds), *Environmental Rights: Law, Litigation and Access to Justice* (Cameron May 1995)

¹¹⁶ Boyd (n.69), 214

¹¹⁷ *ibid.*

¹¹⁸ *ibid.*

¹¹⁹ *ibid.*, 215

¹²⁰ *ibid.*, 229

¹²¹ Christopher Stone, *Should Trees Have Standing?* (3rd edn, OUP 2010) 1

¹²² *ibid.*

¹²³ Charles Darwin, *The Descent of Man* (2nd edn, 1874) 120-121

¹²⁴ Stone (n.79)

¹²⁵ B Tamanaha, *A General Jurisprudence of Law and Society* (OUP 2001)

¹²⁶ Pederson (n.1), 21

a high threshold of harm to the applicant and allowing an extremely wide margin of appreciation to states. This is restricting the effectiveness of human rights to protect the environment.

Gradually, however, the Court has been more willing to enforce procedural rights, arguably in response to the growing procedural rights under EU law, in particular the Aarhus Convention. Though the procedural environmental rights from *Tătar* are narrower than those under the Aarhus Convention,¹²⁷ their recognition by the Court represents a positive step toward more effective environmental protection. Furthermore, the rejection of Malta's public interest argument in *Brincat* suggests a positive move away from deference to states, and greater precaution taken by the Court when it comes to environmental risks.

The essay then assessed whether the creation of a substantive right to a healthy environment would improve the effectiveness of the human rights system of protection. Constitutional environmental rights in Eastern Europe mean that the introduction of a substantive right would have less impact there than in Western Europe.

The creation of a substantive right, with the narrower margin of appreciation and lower threshold of harm it would bring, would secure the Convention's status as a "portfolio of effective rights rather than a Convention of good intentions".¹²⁸ It remains to be seen whether the future will bring this improvement, or perhaps the further step of a more ecocentric system of environmental rights, as Stone advocates.¹²⁹ The only certainty is that the current system of human rights protection is inefficient, and therefore insufficient.

¹²⁷ *ibid.*, 15

¹²⁸ *ibid.*, 2

¹²⁹ Stone (n.79)

HOW DO ARTICLE 4.4 (THERAPEUTIC USE EXEMPTIONS) AND ARTICLE 10.5 (NO SIGNIFICANT FAULT OF NEGLIGENCE) HELP MITIGATE THE POTENTIAL UNFAIRNESS OF STRICT LIABILITY IN ANTI-DOPING CASES?

Chloe Ogley

Introduction

Doping is the biggest problem facing sport. The last two decades of the twentieth century saw many doping scandals concerning the major sporting events and leading athletes.¹³⁰ The development of harmonised, universally accepted anti-doping regulations reached a pinnacle in March 2003 when WADA (World Anti-Doping Agency) revealed its Anti-Doping Code (WADC) in Copenhagen.¹³¹ Within these Codes is the policy of strict liability in doping which provides that it is not necessary for the sport's governing bodies to show intent, fault, negligence or knowing use on the athlete's part in order to establish an anti-doping rule violation under article 2.1 or 2.2 of the Code.¹³² However, the policy of strict liability has come under criticism for being unfair in some cases due to its unvarying nature.

This essay seeks to establish what strict liability is in relation to doping and how it is regarded as being unfair using case law throughout to demonstrate this point. Finally, it will be considered whether therapeutic uses exemptions (Article 4.4) and no significant fault or negligence (Article 10.5) helps mitigate the potential unfairness of strict liability.

What is doping?

Sports doping is regulated by the World Anti-Doping Agency (WADA), which was established by the International Olympic Committee (IOC) as an independent international doping control body.¹³³ The World Anti-Doping Code was created in order to promote, co-ordinate and monitor at international level the fight against doping in sport in all its forms. The Agency's principal task was to co-ordinate a comprehensive anti-doping programme at international level, laying down common, effective, minimum standards, compatible with those in internationally recognised quality standards for doping controls.¹³⁴

¹³⁰ David P, 'A Guide to the World Anti-Doping Code' (Cambridge University Press 2008) 1

¹³¹ Gardiner S and others, 'Sports Law' (3rd edn, Taylor & Francis 2011) 272

¹³² Du Pisani A, 'A contractual perspective on the strict liability principle in the world Anti-Doping Code' (2014) <http://reference.sabinet.co.za/webx/access/electronic_journals/dejure/dejure_v46_n4_a5.pdf> accessed 18 November 2016 917-927

¹³³ Toit N, 'Strict Liability and Sports Doping - What Constitutes a Doping Violations and What Is the Effect Thereof on the Team?' (2011) International Sports Law Journal <http://www.doping.nl/media/kb/2044/20131023T040659-ISLJ_2011_3-4%20-%20163-164%20Niel%20du%20Toit.pdf> accessed 19 November 2016

¹³⁴ WADA's Mission Statement 1999

Doping is defined as the occurrence of one or more of the anti-doping rule violations.¹³⁵ A rule violation occurs when an athlete takes a banned (or prohibited) substance in order to enhance their sporting performance. It is each Athlete's personal duty to ensure that no prohibited substances enters his or her body.¹³⁶ An athlete makes an anti-doping rule violation under a number of circumstance, which are:

Presence of a prohibited substance in an athlete's sample.

2.2 Use or attempted use by an athlete of a prohibited substance or a prohibited method.

2.3 Refusing to submit to sample collection.

2.4 Failure to submit whereabouts information.

2.5 Tampering or attempted tampering with any part of doping control.

2.6 Possession of a prohibited substance or method.

2.7 Trafficking or attempted trafficking in any prohibited substance or prohibited method.

2.8 Administration or attempted administration to any athlete of any prohibited method or prohibited substance.

2.9 Complicity.

*2.10 Prohibited Association.*¹³⁷

There are two distinct consequences of a doping violation: disqualification from a particular competition and suspension from future competitions. If a performance-enhancing substance is found in an athlete's body during a competition the disqualification is automatic, regardless of the fault of the athlete, to ensure fairness for the other athletes taking part in the competition.¹³⁸

What is meant by strict liability in doping?

The principle of strict liability is applied in situations where urine/blood samples collected from an athlete have produced adverse analytical results.¹³⁹ A doping rule of strict liability means that a competitor or person subject to the jurisdiction of a sport's governing body can be found guilty of a doping offence without the sport's governing body proving culpable intent, knowledge or fault, or without the possibility of the accused being allowed to show that she had no culpable intent, knowledge and/ or was faultless.¹⁴⁰ Even where a sports person can provide evidence of unknowing, inadvertent consumption of a prohibited substance this evidence will be treated as irrelevant by the sporting association.¹⁴¹

¹³⁵ Hartley H, *Legal issue sin sport, PE and recreation* (Routledge 2008) 227

¹³⁶ World Anti-Doping Code 2015 Article 2.1.1

¹³⁷ *ibid*

¹³⁸ Connolly, R 'Balancing the Justices in Anti-Doping Law: The Need to Ensure Fair Athletic Competition through Effective Anti-Doping Programs vs. the Protection of Rights of Accused Athletes' (2006) *Virginia Sports and Entertainment Law Journal* 5(2) 178

¹³⁹ WADA 'Strict liability in Anti-Doping', (15 January 2015) <<https://www.wada-ama.org/en/questions-answers/strict-liability-in-anti-doping>> accessed 19 November 2016

¹⁴⁰ Wise A 'Strict Liability rules - are they legal?'' (1996) *Sport and Law Journal* 4 (3) 70

¹⁴¹ Sithamparanathan A, and Schillings M.H 'Are sporting bodies abusing human rights?'' (2003) *Sport and law Journal* 11 (3) 140

The principle of strict liability can be challenging for an athlete. They have to ensure that they understand all the anti-doping rules and that their family, friends, coaches and athlete support personnel understand them too. They need to be aware of the danger to their career at all times and question the advice they are given – not all advice is in their best interests.¹⁴² However, the principle of strict liability ensures that all athletes are required to follow the anti-doping rule. If the policy of strict liability did not exist athletes would simply say that they do not know how the substance got into their bodies. Thus, such athletes will go unpunished rendering the WADC useless.¹⁴³

Why is strict liability unfair?

It must be noted that there are situations in which athletes accidentally ingest banned substances due to no fault of their own, however they still commit a rule violation for doping regardless and the policy of strict liability ensures that they are banned as a consequence.

Some cases involve athletes suffering from a sudden illness or discomfort on the eve of or during a competition and then taking medication to relieve their symptoms. Often they seek medical advice and either this advice proves to be faulty or the athlete makes a mistake in following the advice.¹⁴⁴ The effects of being banned for two years from one's sport through no fault of one's own are often catastrophic for athletes. Not only do athletes who accidentally ingest a banned substance suffer the loss of a longer period of lost competition, they suffer the much greater harms to their reputation, loss of contracts or endorsements, and a mark on their record that will remain with them for the rest of their careers and possibly even beyond.¹⁴⁵ This is where strict liability is unfair.

In a subset of inadvertent doping cases, they have neither intent to enhance their performance nor have they actually gained any advantage. This is why these types of case sit so uneasily with us, not because a morally innocent athlete is sanctioned but because they have done nothing which satisfies our instinctive definition of doping.¹⁴⁶

Raducan, a sixteen-year-old gymnast, was stripped of the gold medal she won for the Women's Individual All-Around Event at the 2000 Olympic Games, the most prized gold medal for gymnastic events. The reason was cold medicine. The team doctor had administered to her a standard cold remedy containing pseudoephedrine, a banned substance for which she

¹⁴² UK Anti-Doping, 'How to have clean sporting success' (2016)

<<http://ukad.org.uk/education/athletes/performance/clean-sport/>> accessed 19 November 2016

¹⁴³ Toit N, 'Strict Liability and Sports Doping - What Constitutes a Doping Violations and What Is the Effect Thereof on the Team?' (2011) *International Sports Law Journal*
http://www.doping.nl/media/kb/2044/20131023T040659-ISLJ_2011_3-4%20-%20163-164%20Niel%20du%20Toit.pdf> accessed 19 November 2016

¹⁴⁴ Amos, A 'Inadvertent Doping and the WADA Code' (2007) *Bond Law Review* 19(1) 3

¹⁴⁵ Foschi, J 'Constant Battle: The Evolving Challenges in the International Fight against Doping in Sport' (2006) *Duke Journal of Comparative International Law* 16(2) 476

¹⁴⁶ Amos, A 'Inadvertent Doping and the WADA Code' (2007) *Bond Law Review* 19(1) 23

subsequently tested positive.¹⁴⁷ Despite the clear evidence of lack of fault, Raducan was unsuccessful in her fight to keep her gold medal.¹⁴⁸ Although Raducan's case was certainly extreme, avoiding positive tests might be more difficult than one might initially think for athletes who are regulated by the World Anti-Doping Code. Medicines, recreational drugs and contaminated supplements can all lead to positive drug tests and are not necessarily taken for performance-enhancing purposes.¹⁴⁹

Another example of unfairness was when Alain Baxter was stripped from his bronze medal in 2002 for testing positive for a banned substance, methamphetamine, after he used a Vick Vapour Inhaler which in the UK contained no banned substances however the United States version which he purchased did. In circumstances such as these it is easy to see why critics would suggest that the strict liability policy is unfair.¹⁵⁰ In cases like Baxter's, where there was no deliberate intention to cheat, this rule can and does cause hardship or injustice. But without it, sports governing bodies would find it impossible to catch the drug cheats.¹⁵¹

The Court of Arbitration in Sport (CAS) in the case of Quigley v UIT addressed the issue of strict liability and acknowledged the unfairness by saying:

*"It is true that a strict liability test is likely in some sense to be unfair in an individual case...where the athlete may have taken a medication as the result of mislabelling or faulty advice for which he or she is not responsible...but it is also in some sense unfair for an athlete to get food poisoning on the eve of an important competition. Yet in neither case will the rules of competition be altered due to the unfairness. Just as the competition will not be postponed to await an athlete's recovery, so the prohibition of banned substances will not be lifted in recognition of its accidental absorption..."*¹⁵²

Another CAS panel has also asserted that a too literal application of the principles nulla poena sine culpa could have damaging consequences on the effectiveness of anti-doping measures. Indeed, if for each case the sports federations had to prove the intentional nature of the act (desire to dope to improve one's performance) in order to be able to give it the force of an offence, the fight against doping would become practically impossible.¹⁵³ Anti-doping rules are not established to protect athletes who have been accused of doping, but rather to safeguard the integrity of the competition itself and protect those athletes who have not been accused of

¹⁴⁷ Raducan v IOC 2000 (CAS 2000/011)

¹⁴⁸ Wyatt Cox T, 'The International War Against Doping: Limiting the Collateral Damage from Strict Liability' (2014) 47 The Vanderbilt University Law School Vanderbilt Journal of Transnational Law 295

¹⁴⁹ ibid

¹⁵⁰ Baxter v IOC 2002 (CAS A/376)

¹⁵¹ Blackshaw I, 'Innocent drugs, harsh bans' *The Times* (London, 26 March 2002) <

https://www.nexis.com/results/enhdocview.do?docLinkInd=true&ersKey=23_T25078854962&format=GNBFI&startDocNo=0&resultsUrlKey=0_T25078854964&backKey=20_T25078854965&csi=10939&docNo=3> accessed 19 November 16

¹⁵² Quigley v UIT 1995 (CAS 94/129)

¹⁵³ C v FINA 1996 (CAS 95/150)

doping.¹⁵⁴ CAS basically justifies the unfairness of the principle of strict liability with the guaranteed fairness of all sports.

It has been suggested that in order to overcome the inconsistency, both the intent of the athlete and the performance-enhancing effect of the substance would need to be taken into account in determining whether a doping violation had taken place. If intent to enhance performance was present, then the doping sanctions could be applied as they stand. If no intent was found, then a further enquiry could be made into whether any performance enhancing effect was gained by the athlete.¹⁵⁵

CAS itself acknowledges that strict liability may be unfair in certain circumstances but what does the Code do to mitigate the potential unfairness? The WADC provides that the two-year ban can be reduced or even avoided if the athlete can establish to the 'comfortable satisfaction' of an anti-doping tribunal that, inter alia, they bear no significant fault or negligence, or that the prohibited substance was not intended to enhance, or mask the enhancement of, their performance (Article 10.4 and 10.5 WADC).¹⁵⁶ An athlete that has a pre-existing medical condition may also apply for a therapeutic use exemption (Article 4.4), which essentially allows them to take banned substances if it is required to treat their illness.

How does Therapeutic Use Exemption help to mitigate the potential unfairness of 'strict liability'?

Doping often involves the illegitimate use of a therapeutic product. Indeed, many Prohibited Substances and Methods are pharmaceutical innovations that are or have been developed to serve legitimate therapeutic purpose. Much is being done within the anti-doping movement to coordinate efforts with the pharmaceutical industry in order to prevent abuse of drugs that have been discontinued or are still in development phase. At the other end of the spectrum, some Athletes may require legitimate medical treatment and wish to receive that treatment without being forced to give up their sport.¹⁵⁷

¹⁵⁴ Canadian Olympic Committee & Beckie Scott v International Olympic Committee 2002 (CAS O/373)

¹⁵⁵ Amos, A 'Inadvertent Doping and the WADA Code' (2007) *Bond Law Review* 19(1) 1-25

¹⁵⁶ Anderson J, Doping, sport and the law: time for repeal of prohibition? (2013) *International Journal of Law in Context*, 9 (2) 137

¹⁵⁷ Duval A and others, 'The world Anti-Doping code 2015: ASSER international sports law Blog symposium' (*The International Sports Law Journal*, 10 June 2016) <http://download.springer.com/static/pdf/98/art%253A10.1007%252Fs40318-016-0097-9.pdf?originUrl=http%3A%2F%2Flink.springer.com%2Farticle%2F10.1007%2Fs40318-016-0097-9&token2=exp=1479814973~acl=%2Fstatic%2Fpdf%2F98%2Fart%25253A10.1007%25252Fs40318-016-0097-9.pdf%3ForiginUrl%3Dhttp%253A%252F%252Flink.springer.com%252Farticle%252F10.1007%252Fs40318-016-0097-9*~hmac=0227a440b4a44e004b63684c6ed349ff951e1b17a3859b45d8c98155450c12db> accessed 22 November 2016

A Therapeutic Use Exemption (TUE) is a certificate which allows an athlete to take an otherwise banned substance either in or out of competition. It is designed to ensure those with a genuine medical condition for which there is no effective alternative treatment are not unfairly penalised, while at the same time trying to prevent them gaining an undue advantage over others.¹⁵⁸ If there was no alternative effective therapy not prohibited under the anti-doping rules, it would be unreasonable and therefore discriminatory for a sports body to require the athlete not to take the drug.¹⁵⁹

The 2015 regime preserves the national vs international distinction that existed under previous rules. The basic principle is that International-Level Athletes request TUEs from their International Federation, while National-Level Athletes request TUEs from their National Anti-Doping Organisations.¹⁶⁰ A certificate for a therapeutic use exemption will be granted where an athlete can prove that they would suffer significant health problems without taking the substance, it would not be significantly performance-enhancing, there is no reasonable therapeutic alternative to its use and the need to use it is not due to prior use without a TUE.¹⁶¹ TUEs are a good system but it does have the potential to be abused if not regulated properly.¹⁶²

Whilst TUEs do provide some protection for athlete with recognised medical conditions the case of *ISSF v WADA*¹⁶³ demonstrated where TUEs fail to protect athletes. The Athlete in this case was a female shooter who has been diagnosed with a genetic disorder putting her at risk of a sudden cardiac arrest and was prescribed Atenolol (a beta-blocker) in order to reduce that risk. The Athlete applied for to the International Shooting Sports Federation for a TUE after violating an anti-doping rule in a previous competition. The TUE was rejected as the Athlete could not demonstrate that there was an absence of performance enhancement or absence of other reasonable alternative therapeutic options.¹⁶⁴ A therapeutic uses exemption for an international-level shooter will never be considered or granted by the ISSF for the use of a beta-blocker as the shooter would experience enhanced performances.¹⁶⁵

¹⁵⁸ Clark S, 'I am not ashamed of getting a therapeutic use exemption but the system is open to abuse' *The Telegraph* (16 September 2016) <<http://www.telegraph.co.uk/sailing/2016/09/16/i-am-not-ashamed-of-getting-an-therapeutic-use-exemption-but-the/>> accessed 21 November 2016

¹⁵⁹ Opie H 'Australian Medico-legal issues in sport: the view from the grandstand' (2002) *The Marquette Sports Law Review* 13 138

¹⁶⁰ World Anti-Doping Code 2015 Article 4.4.4

¹⁶¹ International Standard for Therapeutic Use Exemptions (ISTUE) 2015

¹⁶² BBC, 'Lord Sebastian Coe: Therapeutic use exemptions 'good system'' *BBC Athletics* (18 September 2016) <<http://www.bbc.co.uk/sport/athletics/37400986>> accessed 22 November 2016

¹⁶³ *ISSF v WADA* 2013 (CAS A/3437)

¹⁶⁴ Team WC, 'The ISSF v. WADA CAS award: Another therapeutic use exemption request for beta Blockers shot down' (10 August 2015) <<http://wadc-commentary.com/issf-v-wada/>> accessed 22 November 2016

¹⁶⁵ ISSF, 'BULL'S EYE ON DOPING THE ISSF IPOD WHAT IS THE ISSF ' IPOD ' ? THE ' ANTI-DOPING TEAM ' AT THE WORLD CUP IN MUNICH' (2012) <http://www.issf-sports.org/getfile.aspx?mod=docf&pane=1&inst=257&file=IPOD-ISSFNEWS_2009-03.pdf> accessed 22 November 2016

Some athletes who have been granted TUEs have come under scrutiny recently after the hacking group Fancy Bears got into the database of the World Anti-Doping Agency (WADA) and revealed that a number of high profile sporting participants have taken TUEs. Among them are Mo Farah, the Williams sisters and Britain's first Tour de France winner and most successful Olympian of all-time, Bradley Wiggins.¹⁶⁶ The implication of the leaks, which come from a Russian group, appears to be that WADA has allowed some athletes to take banned substances, while at the same time accusing Russia of running a state-sponsored doping programme.¹⁶⁷ However this is not the case, these athletes have been allowed to take banned substances because of existing and serious medical conditions, not in order to improve their performance in their sports.

Sir Bradley Wiggins had been granted three TUEs to use triamcinolone to treat asthma and pollen allergies and did not break any rules. Double Olympic triathlon champion Alistair Brownlee was allowed to use acetazolamide to treat altitude sickness while climbing Kilimanjaro.¹⁶⁸ These are just two of the examples of successful TUE applications.

Elite athletes, similar to their non or less athletic counterparts, do experience medical conditions that necessitate treatment with drugs that are prohibited in sport. Fortunately, a tightly regulated process does enable both the therapeutic needs of most of these athletes to be met and for them to participate at the highest levels of sport.¹⁶⁹ Therefore, Therapeutic Uses Exemptions does help to mitigate unfairness from the policy of strict liability as it allows Athletes to take banned substances for illnesses that are out of their control and cannot be treated by any other means. Without this provision, athletes suffering from medical conditions would have to sacrifice their career in sport in order to receive the treatment that they need or they would have to face a ban for taking the substance that is needed.

¹⁶⁶ Rice S, 'What are the TUEs sir Bradley Wiggins has admitted to using?' *Sport* (27 September 2016) <<http://metro.co.uk/2016/09/27/what-are-therapeutic-use-exemptions-heres-what-you-need-to-know-6156599/>> accessed 22 November 2016

¹⁶⁷ 'Wada hacking scandal: What are therapeutic use exemptions?', *THE WEEK* (15 September 2016) <<http://www.theweek.co.uk/russian-doping-scandal/76623/wada-hacking-scandal-what-are-therapeutic-use-exemptions>> accessed 22 November 2016

¹⁶⁸ Gray J, 'What is a Therapeutic Use Exemption? Who has used TUEs? Who are the Fancy Bears?' *Express* (13 October 2016) <<http://www.express.co.uk/sport/othersport/720925/Doping-sport-therapeutic-use-exemption-TUEs-drugs>> accessed 22 November 2016

¹⁶⁹ Fitch K, 'Proscribed drugs at the Olympic Games: permitted use and misuse (doping) by athletes' (2012) *Clinical Medicine* 12(3) <<http://search.proquest.com/docview/1036613909/fulltextPDF/FB87FB6B631642E4PQ/1?accountid=12860>> accessed 22 November 2016 260

How Does No Significant Fault or Negligence help to mitigate the potential unfairness of 'strict liability'?

The WADC follows this idea of strict liability for the initial finding of a doping offence but it does soften its standards slight if exceptional circumstances exist and the athlete can demonstrate that he or she was not at fault or significant fault to a comfortable satisfaction.¹⁷⁰

Article 10.5.1.1 states that where the anti-doping rule violation involves a specified substance, and the Athlete or other person can establish no significant fault or negligence then, depending on the degree of culpability, then a minimum of a reprimand and a maximum of two years can be imposed.¹⁷¹ The appropriate reduction is determined by measuring the degree of the athlete's culpability in contributing to the analytical positive result and ensuring the sanction is proportionate to the seriousness of the infringement.¹⁷² It is important to note that an athlete may only rely on Article 10.5 for a specified substance which is any prohibited substance except substances such as anabolic steroids, growth hormones, amphetamines and cocaine.¹⁷³

The difference between fault and intent is significant. Simply because an athlete did not intend to ingest a prohibited substance does not mean that he or she does not possess some level of culpability or blame for the ingestion of the substance. Although the doping offence still occurs in a circumstance in which the athlete does not intend to ingest a banned substance, the athlete will have the opportunity to have his or her sanction reduced by showing he or she bears no significant fault or liability.¹⁷⁴

When assessing whether an athlete's fault or negligence was significant the WADC imposes an onerous duty of utmost caution to avoid any prohibited substance entering his or her body¹⁷⁵ and the duty requires athlete's to leave no reasonable stone unturned although the taking of reasonable steps should be sufficient as one can always do more.¹⁷⁶

Degree of fault may be influence by a number of relevant factors such as youth/inexperience¹⁷⁷, age¹⁷⁸, whether research was undertaken and if so, how extensively¹⁷⁹, whether or not a doctor or other medical professional was consulted¹⁸⁰, whether or not the substance was contained in a

¹⁷⁰ World Anti-Doping Code 2003 Art. 2.1.1.8

¹⁷¹ World Anti-Doping Code 2015 Art. 10.5.1.1

¹⁷² Squizzato v FINA 2005 (CAS A/830)

¹⁷³ World Anti-Doping Code 2015 Art. 4.2

¹⁷⁴ Connolly, R 'Balancing the Justices in Anti-Doping Law: The Need to Ensure Fair Athletic Competition through Effective Anti-Doping Programs vs. the Protection of Rights of Accused Athletes' (2006) Virginia Sports and Entertainment Law Journal 5(2) 188

¹⁷⁵ FIFA v WADA 2005 (CAS C/976)

¹⁷⁶ WADA v Serges Despres 2008 (CAS A/1489)

¹⁷⁷ WADA v FIG & Melnychenko 2011 (CAS A/2403)

¹⁷⁸ WADA v FIBV & Berrios 2010 (CAS A/2229)

¹⁷⁹ Kendrick v ITF 2011 (CAS A/2518)

¹⁸⁰ ISU v Fauconnet 2012 (CAS A/2618)

product which was widely used,¹⁸¹ whether the product was bought from a reputable supplier or online¹⁸², whether the use of a product was encouraged/ recommended by an Athlete's club or trainer¹⁸³, what information was on the product label¹⁸⁴, whether or not the recommended dosage was exceeded¹⁸⁵ and personal and/or family circumstances at the time.¹⁸⁶

An example of a situation where the CAS panel found that this standard was met was the case of *Squizzato v FINA*. In the case, a 17-year old swimmer had been given a cream containing clostebol by her mother to help fight a skin affection between her toes. The panel found that although the athlete had failed to abide by her duty of diligence and was negligent in using a medical product without the advice of a doctor, her negligence was mild. Therefore, the athlete bore no significant fault or negligence and was eligible to have her sanction reduced.¹⁸⁷

Another example is the case of *Knauss v International Ski Federation*¹⁸⁸ where a skier tested positive for Norandrosterone. He did not take the supplement for performance-enhancing purposes and was unaware that the supplement contained Norandrosterone. The supplement's packaging did not indicate the presence of any prohibited substances; however, he undertook further enquiries with the distributor. CAS held that his conduct would have constituted significant fault or negligence if he had not made enquires with the distributor and held that the athlete established no significant fault or negligence and was given a four-month reduction.¹⁸⁹

Article 10.5 helps to mitigate the unfairness of the policy of strict liability by allowing a reduction in ban for those that can prove that they were at no significant fault when taking the banned substance. It also provides for circumstances where products have been contaminated with a banned substance such as the case of *Cielo et al.*¹⁹⁰ In the case four Brazilian swimmers ingested contaminated caffeine tablets and were given a reprimand as the caffeine tablets had been contaminated at the pharmacy.

Conclusion

The strict liability standard currently employed by WADA affords an innocent athlete virtually no opportunity to be fully exonerated. Yet, on the flip side, giving the federations the burden to prove an athlete's guilty is equally unappealing.¹⁹¹ The policy of strict liability is necessary in the

¹⁸¹ *Sterba v WADA* 2012 (CAS OG 12/07)

¹⁸² *UCI v Kolobnev* 2011 (CAS A/2645)

¹⁸³ *Kendrick v ITF* 2011 (CAS A/2518)

¹⁸⁴ *WADA v FIBV & Berrios* 2010 (CAS A/2229)

¹⁸⁵ *UCI v Kolobnev* 2011 (CAS A/2645)

¹⁸⁶ *Kendrick v ITF* 2011 (CAS A/2518)

¹⁸⁷ *Squizzato v FINA* 2005 (CAS A/830)

¹⁸⁸ *Knauss v International Ski Federation* 2005 (CAS A/847)

¹⁸⁹ Czarnota P 'The World Anti-Doping Code, the Athlete's Duty of Utmost Caution, and the Elimination of Cheating' (2012) *Marquette Sports Law Review* 23(1) 45-74

¹⁹⁰ *FINA v Cielo et al* 2011 (CAS A/2495)

¹⁹¹ Foschi, J 'Constant Battle: The Evolving Challenges in the International Fight against Doping in Sport' (2006) *Duke Journal of Comparative International Law* 16(2) 482

fight against doping in sports world wide. The therapeutic uses exemption and no significant fault provisions achieves a satisfactory balance between the attempt by the WADA to effectively regulate the fight against doping by harmonising the surrounding regulatory and sanctioning framework, and the athletes' legitimate expectation of both a fair process and proportionality in the outcome.¹⁹² These two provisions allow some leeway in the policy of strict liability in order to ensure that some protection is afforded to athletes who fall foul under the strict liability doctrine as they are not to blame for their use of a banned or prohibited substance.

WADA has also taken on board the criticisms of the policy of strict liability and for the first time in the 2015 code distinguishes between intentional and unintentional rule violations.¹⁹³ Stating the term intentional is meant to identify those Athletes who cheat. The term, therefore requires that the Athlete engaged in conduct which he/she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk.¹⁹⁴ This reduces the unfairness significantly as now there is some recognition that there are possible circumstances in which Athletes do not intentionally take a banned substance.

¹⁹² Du Pisani, A 'Contractual Perspective on the Strict Liability Principle in the World Anti-Doping Code' (2013) *De Jure* 46(4) 923

¹⁹³ World Anti-Doping Code 2015 Art. 10.2

¹⁹⁴ World Anti-Doping Code 2015 Art. 10.2.3

TAKING UP ARMS FOR AN EMBATTLED DECISION: PENNINGTON V WAINE 15 YEARS ON

Daniel de Lisle

The judgment of Arden LJ in *Pennington v Waine* has, to borrow a phrase from Lord Bingham, been raked with academic grapeshot.¹⁹⁵ There are reasons to think it a wrong turn. It appears to undermine *Milroy v Lord*,¹⁹⁶ the leading case on the constitution of trusts and an authority binding on the Court of Appeal in *Pennington*. It appears to go much further than the authority on which it most heavily relies, *Choithram v Pagarani*.¹⁹⁷ Academics have focused on the uncertainty which its principle brings into the law.¹⁹⁸ Even those who accept the novel statement of principle have suggested that the principle may not actually apply on the facts of *Pennington*.¹⁹⁹ However, there is much of value in *Pennington*, and it is time for a rehabilitation. It is a useful and just exception to *Milroy v Lord* on its facts, and if the opportunity were to arise to the Supreme Court to either adopt or overrule it, it should adopt. This is a complicated area, and demands some paragraphs explaining the principles which *Pennington* is taken to have offended. From there, a defence of *Pennington*, analysing its ratio and the arguments of its many, learned, critics. It was a turn, certainly, but it was not wrong.

The rule in *Milroy v Lord* is clear, and harsh. It is that there is no equity in the court to perfect an imperfect gift.²⁰⁰ This accords with the maxim that equity will not assist a volunteer. Hence, where a donor has not complied with all the necessary formalities to effect a gift at common law, equity will not step in and complete the transaction. The form of such assistance would be by construing words of gift as words of self-declared trust, so that the donor is then holding the intended gift as a trustee, on a self-declared express trust for the donee as beneficiary. The beneficiary would then be at liberty to demand the transfer of the trust property, thus getting hold

¹⁹⁵ [2002] EWCA Civ 227 [2002] 1 WLR 2075 ; Lord Bingham of Cornhill, Address at the Service of Thanksgiving for the Rt. Hon. Lord Denning, OM in *The Business of Judging: Selected Essays and Speeches*: 1985-1999 (2011)

¹⁹⁶ 45 ER 1185 (1862) 4 De G.F. & J. 264 (CA)

¹⁹⁷ [2001] 1 WLR 1 (PC)

¹⁹⁸ Halliwell, M, "Perfecting Imperfect Gifts and Trusts: Have we reached the end of the Chancellor's Foot?" [2003] 67 Conv 192 ; Morris, J, "Questions: when is an invalid gift a valid gift? When is an incompletely constituted trust a completely constituted trust? Answer: after the decisions in Choithram and Pennington" P.C.B. 2003, 6, 393-403

¹⁹⁹ Doggett, A., Case Comment^[SEP]: Explaining Re Rose: the search goes on? C.L.J. 2003, 62(2), 263-266

²⁰⁰ *Milroy v Lord* 45 ER 1185 (1862) 4 De G.F. & J. 264 (CA) 274

of the intended gift. Such a self-declared trust would require no formalities. *Milroy v Lord* explicitly rules out such an approach.²⁰¹

Why should the courts take this line? The traditional rationale is stated in Maitland's essays on equity, that the intention to give and the intention to hold on express trust are different, and the later potentially more onerous than the former:

It would be an imperfect gift, and being an imperfect gift the court will not regard it as a declaration of trust. I have made quite clear that I do not intend to make myself a trustee, I meant to give. The two intentions are very different—the giver means to get rid of his rights, the man who is intending to make himself a trustee intends to retain his rights but to come under an onerous obligation. The latter intention is far rarer than the former. Men often mean to give things to their kinsfolk, they do not often mean to constitute themselves trustees. An imperfect gift is no declaration of trust.²⁰²

This is a convincing argument as far as it goes, but it does not go all that far. It does not shield *Milroy v Lord* from the challenge presented by *Pennington*. Nevertheless, the courts seemed content with the rule, applying it in a range of cases in the latter 19th century.²⁰³ It had the virtue of being readily understandable. It had the vice of not being flexible enough to do justice. The idea that *Pennington* and *Choithram* constitute a wrong turn in the law is predicated on the idea that *Milroy* was on the right track. Yet it was not. The intention to create a trust should not be diluted, but it was not necessary to take this rigid approach.

The first exception to *Milroy* was stated in the two *Re Rose* cases (unrelated).²⁰⁴ It was that equity may step in where the settlor has done all that they need to do to effect the transfer, and it is possible for the donee to complete the transfer themselves. This was a sensible development, as all it amounted to was equity recognising the ability of the donee to complete the gift, and not actively preventing it. Yet if Maitland's statement of principle underlay the rule in *Milroy*, it was dealt a severe blow in this decision. What happens if the donee does not immediately complete the gift? The correct view is that it is being held on constructive trust by the donor, for the donee as beneficiary.²⁰⁵ This runs counter to Maitland's logic. To the extent that *Milroy* was a principled decision, its principles had been departed from long before the beginning of the 21st century.

²⁰¹ *Milroy v Lord* 45 ER 1185 (1862) 4 De G.F. & J. 264 (CA)

²⁰² Maitland's *Lecture on Equity* (1909), p.72, as extracted in *Pennington v Waine*, [53]

²⁰³ *Richards v Delbridge* (1874) LR 18 Eq. 11 attempted gift was a business lease ; *Jones v Lock* (1865-66) LR 1 Ch. App. 25, attempted gift was a cheque. (LC)

²⁰⁴ *Re Rose* [1949] Ch 78 (HC) ; *Re Rose* [1952] Ch 499 (CA)

²⁰⁵ Doggett, A., Case Comment^[1]: Explaining *Re Rose*: the search goes on? C.L.J. 2003, 62(2), 263-266

For most critics however, the start of the 21st century is when the law started down the wrong path.²⁰⁶ Even if some can live with *Choithram v Pagarani* on its facts,²⁰⁷ few can live with *Pennington*. However, they have overstated their case, and both have their uses. In *Choithram*, the attempted gift was of shares in various companies, between the donor and a charitable foundation of which the donor was one of the trustees. This status was crucial. The donor did not comply with the formalities necessary to transfer the shares at common law, nor had he done all that was necessary for him to do himself, so the principle in *Re Rose* could not come to his aid. Lord Browne-Wilkinson dealt with this by creating another exception to *Milroy v Lord*, that although the courts will not construe gifts as self-declared trusts, in this case, words of gift disguised what was in fact a mixture of a self-declared trust and a third party trust. The settlor had declared a trust of the shares, for the benefit of the foundation. Once this stage was reached, it was unconscionable for him not to share the trust property with his fellow trustees of the foundation settlements, and the property passed to be held on the foundation settlements, by all the trustees. There was much that was novel in this decision, but it seemed to be limited to its own facts. In particular, the first stage of the reasoning is not in fact an exception to *Milroy v Lord* at all: it merely states that there are times when the court must not be misled by words of apparent gift which are in fact words of gift on trust.

Choithram is less controversial than *Pennington*, but it is worth stating its use nonetheless. It gives effect to the will of the settlor. Their Lordships found in *Choithram* that the settlor did not intend the gift to the foundation to be revocable.²⁰⁸ The decision gave effect to a transaction that was the intention of the settlor at all relevant times, but which had been interrupted by the settlor's untimely death. The traditional rationale for *Milroy v Lord*, that the duties of a trustee are so much more onerous than that of a donor, did not apply on these facts. The property immediately passed to be held on the trust settlements as intended. The donor had, after all, intended to be a trustee of the foundation. The respondents, as with many of these cases, were those entitled to the residuary estate of the donor under the donor's will. It might be said in their favour that the settlor's will was as much his intention as the gift ineffective at common law. It cannot be doubted that the donor intended their residuary estate to pass to these individuals under their will. But they did not intend their residuary estate to constitute virtually the whole of their estate, which they thought they had successfully passed to a charitable foundation before they died. The principles of the constitution of trusts thus shift from whether the donor intended to be a donor or a trustee to whether the donor intended their gift to be revocable.

²⁰⁶ Halliwell, M, "Perfecting Imperfect Gifts and Trusts: Have we reached the end of the Chancellor's Foot?" [2003] 67 Conv 192

²⁰⁷ *T Choithram International SA v Pagarani* [2001] 1 WLR 1 (PC)

²⁰⁸ *T Choithram International SA v Pagarani* [2001] 1 WLR 1 (PC) 9

Pennington v Waine is quite a different beast but it is not, as has been suggested, an unruly one.²⁰⁹ In *Pennington*, the settlor had not complied with the necessary formalities for the transfer of shares at common law, and had not done all that she needed to do to pass them, so that the intended donee (Harold), could not benefit from the exception in *Re Rose*. Further, there was no element of the donor being one of the trustees of the donee, as in *Choithram*. Arden LJ set out three exceptions to *Milroy*, starting with the *Re Rose* exception. The second was that where it would be unconscionable for the donor to resile from their gift, a constructive trust would be imposed in favour of the donee (derived from *Choithram*). The third was that words of gift could be given a benevolent construction to give them effect, reasoning Arden LJ later defended in *Shah v Shah*.²¹⁰ Arden LJ decided the case on the basis of the second exception, stating that as it was unconscionable for the donor to resile from her gift, a constructive trust would be imposed in favour of the donee. This exception thus deserves close attention. This is seemingly inspired by *Choithram*, yet it is distinct from it. Some have questioned what type of trust operates in *Pennington*, but the most cogent analysis, as put forward by Abigail Dogett, is that it is a constructive trust.²¹¹ This is the sensible way around *Milroy*: express trusts after all require words of intention to create a trust, whereas constructive trusts can be imposed by law on the occurrence of a given trigger. The trigger here was the unconscionability of the donor resiling from their gift, and the result is a constructive trust where the donor holds the intended gift on trust for the donee. It is submitted, and will be expanded upon below, that this is a desirable innovation in the principles of the constitution of trusts.

Before moving on to analyse the principles behind *Pennington*, it is worth noting recent attempts to distinguish the decision. This right turn has not sat easily with judges of the superior courts. The Court of Appeal in *Zeital v Kaye* attempted to confine *Pennington* to its facts, on the basis that in that case, the share certificates were held by the company, and so nothing turned on their delivery.²¹² This is not all that convincing, and is a thinly veiled instruction to courts not to apply *Pennington* in future. The High Court in *Curtis v Pulbrook* introduced the idea that *Pennington* was a case of detrimental reliance.²¹³ The paragraph of Arden LJ's judgment on which it relies, 59, does not mention detrimental reliance. It is, however, attractive for those who wish to confine the effect of *Pennington*, for it fits it within the established exception to formalities of proprietary estoppel. Both of these mischaracterise *Pennington* in an attempt to restrain its application. The idea of unconscionability in *Pennington* is not one characterised by detrimental reliance of the donee. They undercut the debate on whether *Pennington* constituted a wrong turn or not, by suggesting that it was not a turn at all. It was.

²⁰⁹ [2002] EWCA Civ 227 [2002] 1 WLR 2075; Halliwell, M, "Perfecting Imperfect Gifts and Trusts: Have we reached the end of the Chancellor's Foot?" [2003] 67 Conv 192

²¹⁰ [2010] EWCA Civ 1408, Official Transcript, [17]

²¹¹ Doggett, A., Case Comment^[SEP]: Explaining Re Rose: the search goes on? C.L.J. 2003, 62(2), 263-266

²¹² *Zeital v Kaye* [2010] EWCA Civ 159, Official Transcript, [40]

²¹³ *Curtis v Pulbrook* [2011] EWHC 167 (Ch), Official Transcript, [43]

There are strong policy reasons why the novel approach in *Pennington* in fact constituted an improvement in the law, and should be upheld in the future. Arden LJ was right when she stated in her judgment that the cases on the constitution of trusts ‘do not reveal any, or any consistent single policy consideration behind the rule that the court will not perfect an imperfect gift’.²¹⁴ The best of those advanced is perhaps the difference between the obligations of a donor for a gift (of which there are none), and obligations of a trustee under a self-declared trust, which may be onerous. Yet such considerations do not apply on the facts of *Choithram*, as pointed out above. A further possible justification is to ensure that donors do not voluntarily act unwisely in a way that they will later regret. This, as noted by Arden, is somewhat paternalistic, and seems an odd infraction on the freedom to dispose of your property as you wish. Yet in neither *Choithram* nor *Pennington* was there any attempt by the donor to resile from their gift before their death, nor was it suggested that the gift was unwise. Furthermore, the doctrine of *donatio mortis causa* gives effect to gifts which may be ‘unwise’. Yet another, unmentioned by Arden, is that it may prevent meritless actions brought by claimants on the death of an individual, who claim that the said individual led them to believe that they would be the recipient of a substantial gift. Yet it would only take a marginally more sophisticated claimant to claim that the deceased stated that they would hold whatever it was on self-declared trust for them. Further, it could be expected that robust cross-examination and principles of evidence might stand in the way of such claims. The law need not intrude into the purview of the law of evidence in this area.

On the contrary, there are strong policy reasons which weigh against a rigid application of *Milroy v Lord*. These are founded on the intention of the donor. Such considerations weighed heavily in both *Choithram* and *Pennington* and, it is argued, rightly so. To make such an argument, it is necessary to defend *Pennington* from its academic grapeshot. Some of it, as outlined above, is justified: *Pennington* is not obviously derived from *Choithram*, and in fact takes the concept of unconscionability far further. Yet, with due respect to *Pennington*’s learned critics, some is not justified. Margaret Halliwell’s criticism is largely based on the unpredictability introduced by the decisions.²¹⁵ In reply, it might be said that as long as there are sufficiently clear, sufficiently high criteria for unconscionability, these criticisms fall away. It is conceded that an uncertain and/or low bar would indeed be an unruly beast. But it is submitted that in *Pennington v Waine*, this is not what we have. At paragraph 64 of her judgment, Arden LJ gives a non-exhaustive list of the factors that the court may consider when assessing whether it is unconscionable for the donor to resile from their gift.²¹⁶ Perhaps the most important appears to be that the donor’s agent told the donee that he need take no further action. This is crucial, that all concerned proceeded on the basis that the transfer was effected. It is the rule in *Milroy v Lord* which has the effect of sweeping the carpet from underneath donor and donee. The key problem in all these cases is in fact that donors tend not to assiduously check whether all the formalities have been complied with before their death, and tend not to re-attempt gifts on the possibility that they were not effective. In

²¹⁴ [2002] EWCA Civ 227 [2002] 1 WLR 2075 [62]

²¹⁵ Halliwell, M, “Perfecting Imperfect Gifts and Trusts: Have we reached the end of the Chancellor’s Foot?” [2003] 67 Conv 192

²¹⁶ [2002] EWCA Civ 227 [2002] 1 WLR 2075 [64]

Choithram, the donor was presented with opportunities to do exactly that, but refused on the basis that he had already completed the transaction.²¹⁷ The donor was wrong, at common law. It seems unjust for equity to in effect punish both donor and donee for failing to comply with formalities in such a situation.

Peter Luxton has commended the approach taken by Briggs J in *Curtis v Pulbrook* as treating *Pennington* as an example of proprietary estoppel, on the basis that unconscionability on its own is too uncertain a criterion on which to found equitable intervention.²¹⁸ The mistake made by both Briggs J and Luxton is to fail to treat *Pennington* as genuinely new on its facts. Of course, Briggs J is, we might surmise, concerned to restrict the effect of *Pennington* as much as possible. But this is to restrict it too far. The use of *Pennington* and *Choithram* is on the unusual facts they presented, which do not fit the definition of proprietary estoppel, and deserved to constitute an exception to *Milroy v Lord*. Luxton praises *Re Rose* as likely to lead to greater certainty, in that the intention of donor and donee will not be defeated by chance occurrences, and donors can be sure that even if they have not completed all the formalities before their death, their gift will nevertheless be effective.²¹⁹ This applies just as much to the reasoning in *Pennington* as it does in *Re Rose*, and yet Luxton does not pursue his reasoning to its logical conclusion. Indeed, the decisions in *Pennington* and *Choithram* set the law on the constitution of trusts on a more, not less, principled basis.

Abigail Doggett has taken an unusual approach in that she is in favour of the principle in *Pennington*, but does not believe that it in fact applies on *Pennington's* facts.²²⁰ With all due credit to Doggett, this criticism can be countered by pointing out that unconscionability is used in a markedly different way in *Pennington*, and is not characterised by detrimental reliance as suggested in *Curtis v Pulbrook*. Properly understood, the principle applies. It is nevertheless unfortunate that a better term could not be found to describe the idea than unconscionability, which hangs loosely on the concept. Those who term it a wrong turn are misconceived.

The Supreme Court has not yet considered *Pennington* as an exception to *Milroy v Lord*. Enthusiasts of this area may have to wait, as the nature of the cases means that one is unlikely to get there soon. The value of the gift is rarely worth the time and expense of litigating to the highest court. Tying together the threads of analysis and policy, it has been argued that if and when it comes to consider *Pennington*, it should leave the exception to *Milroy v Lord* standing. Analysing *Pennington* as the operation of a constructive trust means that it does not offend the principle

²¹⁷ *T Choithram International SA v Pagarani* [2001] 1 WLR 1 (PC) 7

²¹⁸ Peter Luxton, Case Comment: In search of perfection: the *Re Rose* rule rationale, *Conv.* 2012, 1, 70-75

²¹⁹ Peter Luxton, Case Comment: In search of perfection: the *Re Rose* rule rationale, *Conv.* 2012, 1, 70-75

²²⁰ Doggett, A., Case Comment: Explaining *Re Rose*: the search goes on? *C.L.J.* 2003, 62(2), 266

stated in *Milroy v Lord* that words of gift cannot be construed as words of self-declared trust, as constructive trusts do not require intent on the part of the settlor.²²¹ It offends the principle that there is no equity in the court to perfect an imperfect gift, but it has been shown that there is no clear reason of policy or principle why this should be so. Policy arguments for the law as it was pre-*Choithram* and *Pennington* are noticeably lacking in persuasive force. On the contrary, there are strong reasons to advocate for the law as it is expressed in those cases as a turn in the right direction. Prime among them is that they give effect to the intentions of donor and donee. Criticisms have centred around the uncertainty that the decision supposedly brings into the law, but as long as unconscionability is understood as a clear and a high bar, in which regard is had to the continuing intention of the donor and donee, and that all continued as though the transfer were effective, then these criticisms can be met. The principles of the constitution of trusts have moved in the right direction.

²²¹ Doggett, A., Case Comment: Explaining Re Rose: the search goes on? C.L.J. 2003, 62(2), 263-266

“NATIVE TITLE AS A FORM OF PERMISSIVE OCCUPANCY AT WILL” : AN ANALYSIS OF THE LEGAL FORMULA IN MABO (NO.2) (1992), THE NATIVE TITLE ACT 1993 AND ITS EFFECT IN AUSTRALIA.

Horaine Henry

The evolution of Australian land law has been marked out by a system of inequalities between settlers and indigenous people. Through structural disparities between settlers and indigenous people, the laws of Australia has consistently denied the indigenous people any social status or power to own land according to their perspective. Irene Watson described the settlers as a ‘killer of laws, land and people’ in Australia,²²² but the Indigenous people, on the other hand, are the first people of Australia. The Native Title is a recognised legal concept used in Australia to bridge a divide between two systems of land law.²²³ The nature of Native Title means it recognise and ‘protects’ a notion of property in accordance to the Native Title Act 1993. However, that legislation is a product of colonialism, which means it representative of a Eurocentric notion of property ownership. The Native Title recognises Indigenous people notion of property as being different, hence, it regards itself as the protector of their notion of land ownership. The way this works in practice is that for Indigenous people to have land rights in Australia, they must first demonstrate that they fit into a framework for land recognition known as the legal formula. The Legal Formula is a set of principles that exist purely as a way for the state to judge Native Title claims to property. This explains the foundations of the state’s Native Title²²⁴ process.

This essay will propose that the Legal Formula favours the settler occupation of Australia, and the Native Title process²²⁵, does not stop the state seizing indigenous land as it considers itself the sovereign owner. The discussion will develop by showing that under the doctrine of ‘sovereignty’²²⁶, the Legal Formula for Native Title in *Mabo (No2) (1998)* is an illusory concept

²²² Irene Watson, Power of the Settlers; the road to demise, Australian Feminist Law Journal, 11:1, 28-45 [1998], p.29

²²³ Native Title Act 1993, Part.2 Division .1, ss.10

²²⁴ Native title is a descriptive set of rights the Indigenous people (Indigenous people) of Australia obtain from the Australian Government rights and access to land and water according to what is perceived to be Indigenous people customs.

²²⁵ The legal formula is a set of principles that confers property rights or ownership to the Indigenous people in Australia. I will refer to this in co

²²⁶ [1992] HCA 23, para 83 (I understood the legal formula to be largely in favour of the idea that Australia (settlers) is a sovereign state).

and the Native Title process representative of an ongoing genocide. Given the aforementioned, the second section will look at the Court's role in the state's Native Title process to examine whether the Legal Formula protects Australia as a settler colony by interpreting the Legal Formula in a way that avoids constitutional disagreements. As such, it will argue that the Legal Formula has a limited capacity to help Native Title applicants.

Legal formula

The Legal Formula for Native Title was the result of *Mabo v Queensland (No 2)* (1998) litigation in which Justice Brennan²²⁷, who is considered to be a non-conformist legalist, heard the claimant's case against the State of Queensland and gave the lead judgement. The issue for the court was deciding whether the Murry Islanders were owners, and legal persons entitled to the use and enjoyment of the land and whether the State had powers to deny or extinguish people's land rights.²²⁸ The High Court of Australia, with the exception of Justice Dawson,²²⁹ largely concerned itself with whether the indigenous people had Native Title. In giving the leading judgement, Justice Brennan described the Legal Formula for Native Title as a "usufructuary" list of rights and principles.²³⁰ The best example covering the main idea²³¹ of the Legal Formula for Native Title within the Torres Strait Islands of 'Australia' was summarised in this way:²³²

*Native Title is ascertained according to the laws and customs of indigenous people who, by those laws and customs have a connection to the land.....the nature of the connection between indigenous people and the land is essential to proving one nativeness.... of which membership depends on an organic link to indigenous people...subject to a recognition of one's nativeness by the elders or other persons enjoying 'traditional' authority*²³³

²²⁷ [1992] HCA 23, para 2-3, Justice Brennan gave the leading judgement of the case

²²⁸ The relationship between the Indigenous people and the Merian people is that they are the first people of Australia

²²⁹ Himself a traditionalist legalist, who in his dissent said that Native Title was a "form of permissive occupancy at the will of the Crown, see para.2

²³⁰ Ibid, para. 52

²³¹ The LF itself is composed of nine rules for claiming indigenous land in Australia

²³² I addressed what is meant by the survival among the settler below.

²³³ Ibid, Justice Brennan at para 83 sets out nine points that represents the status of property ownership in Australia common law.

What that means for the Indigenous people is that within the Torres Strait Islands of Australia the state's Native Title process assumes its own sense of indigenous identity. Therefore, going before the state's Native Title process is to show that you should be considered indigenous owing to some evidence that you identify with indigenous customs. Thus, according to the Native Title Act 1993,²³⁴ land ownership is about how the state sees you as a Native Title applicant. Which means that the nature of the Legal Formula is hybridised in the sense that it seeks validity from the 'traditional authority' on whether the applicants should be considered Indigenous, but ultimately, power over indigenous land ownership lies with the state. Therefore, the extent to which elders or traditional rulers views are sought are determined by the state and so this process is still marked out by dispossession of the right to and organised one's land.

Surviving among the Settlers

Survival inside the Torres Strait Islands mean the Indigenous people are expected to obey a new sense of law and order whereby one's nativesness²³⁵ is somewhat confined to how the state recognise Native Title applicants. Where Justice Brennan said: ...the tides of history washed away any real acknowledgement of traditional law and any real observance of traditional customs....²³⁶ Inside the Torres Strait Islands, indigenous land was deemed to be in its natural state as the Indigenous people were considered to be part of the 'flora and fauna' of Australia. Seventeenth century (17th) philosopher John Locke described the Indigenous people as an agricultural class who were seen as part of the land.²³⁷ For Locke, they lived an 'uncivilised' life and failed to make good use of land.²³⁸ Within the occupied Australia, the state borrowed its sense of authority over land from John Locke's justificatory theory, which means that every person's labour is his own and that by 'mixing' this labour with nature, the result is correctly that person's property. Under his justificatory theory, upon colonisation the person who cultivates the uncultivated land and encloses it does so on behalf of the Crown's ownership, as land is given to mankind (state) in common by God.²³⁹ Locke's views had influenced English common law in the early period of

²³⁴ Native Title Act 1993, Part.2 Division.1

²³⁵ The Legal Formula is constructed as a test of one's nativesness, which means it concerns Indigenous people identity, culture, customs and religion.

²³⁶ [1992] HCA 23, para.50

²³⁷ John Locke, Two Treaties of Government, Cambridge Press, [1963], p.329

²³⁸ John Locke, Two Treaties of Government, Cambridge Press, [1963], p.334

²³⁹ Ibid,p.328

colonisation, and given that Australia was a colony of the Crown, the construction of the Legal Formula is influenced by Locke's idea of property in Australia.

Locke's perspective of property ownership is present in the LF and is actively represented by the state's Native Title process, as under the Legal Formula property is the reward of a sovereign state.²⁴⁰ Therefore, the subordinate positioning of the Indigenous people inside the Torres Strait Islands, means that the Legal Formula does not take in account the way that the Indigenous people governed themselves prior to the 'genocide.' The Legal Formula does not consider the way that land was owned beforehand. For the Indigenous people, Locke's theory constitutes two things: one of individualization, and secondly, the commercialization of property. Each of those are foreign ideas of property, as the Indigenous people access and use of land is communal to indigenous people. Therefore, no Indigenous people could be rendered homeless.

In exploring the Indigenous people perspective, Irene Watson, herself a Aboriginal arguing from the perspective of the Indigenous people said that inside Australia one's nativeness holds little value as Indigenous people are perceived as subjects of the sovereign state.²⁴¹ This she argues is a result of the fact that mechanisms such as the Legal Formula are the resultant product of a history of the state oppressing the Indigenous people and displacing them from their land. Contrary to Locke's perspective, she argues that one issue with surviving inside the Australia is that the Legal Formula fails to tolerate what she described as the first nationalist theory, or Indigenous people laws.²⁴² Watson explains that Indigenous people law is a type of law, which not only constitutes land law, but also embodies everything indigenous. By that, she means that the law of the Indigenous people is supreme to all things inside the settlers. Therefore, where Legal Formula said Australia is considered a sovereign state,²⁴³ in the eyes of the Indigenous people, the Legal Formula lacks mandate as it only created a system for recognising their indigenous rights.²⁴⁴ Furthermore, from the state's Native Title process, the only benefit the Legal Formula has for Native Title applicants is some form of protection against environmental

²⁴⁰ [1992] HCA 23, para.83 [5]

²⁴¹ Irene Watson, *Buried Alive*, Law and Critique 13, Kluwer Law Native Title [2002], p.254

²⁴² *Ibid*,p.268

²⁴³ [1992] HCA 23, para 83 (1)

²⁴⁴ In this sense, I am saying that the LF is in conflict with everything about the Indigenous people as even their system of owning property is not one of positive law.

hazards.²⁴⁵ In seeing the Legal Formula in that way, the positionality of the Indigenous people inside Torres Strait Islands or Australia means they should be construed as an unsound justification for what is no more than a discreet aspect of colonialism.

Colonialist discourse described the Indigenous people as uncivilised,²⁴⁶ which laid the foundations for administrating land ownership. Used as an adjective,²⁴⁷ the idea that the Indigenous people ‘survived’ the genocide is illusory as it is the state’s Native Title process that decides what the markers of civilization are. In this context, it is through the state’s Native Title process that the LF operates as the gauge of one’s nativeness. Thus, the Legal Formula is the master of Indigenous people positionality inside the Australia’s territory as going before the state’s Native Title process is akin to a kind of juxtaposed relationship²⁴⁸ between the Indigenous people and the settlers.²⁴⁹ Therefore, going before the state Native Title process is similar to a type of bargaining whereby the Legal Formula recognise Indigenous people’s property rights, subject to transferring their freedom to the state.

Native Title

In *Mabo (No 2)* (1992), Justice Brennan described one aspect of the LF this way: ‘...the crown retained sovereignty over large sections of Australia... and the acquisition of sovereignty exposed Native Title to extinguishment by a valid exercise of sovereign power...’²⁵⁰ Here, that aspect of the Legal Formula is saying that the state retains the power to quash the Indigenous people property rights through partial or complete extinguishment.²⁵¹ Therefore, the way in which the Legal Formula works in the real world of property ownership is that it allows the state to regulate

²⁴⁵ Irene Watson, *Buried Alive*, *Law and Critique* 13, Kluwer Law Native Title, [2002], p.264

²⁴⁶ Margaret Davies, *Theories in Property, Meanings, histories and theories*, Cavendish Publishing,[2007] p.94

²⁴⁷ I am referring to survival as an adjective to emphasise that the genocide is still a lived experience by saying it is not over Native Title the foundations of the LF are dismantled by Indigenous people laws.

²⁴⁸ I am saying here that the Legal formula forces the Indigenous people into reasoning which means that there is no access to land ownership without engaging with the settlers on their terms.

²⁴⁹ Margaret Davies, *Theories in Property, Meanings, histories and theories*, Cavendish Publishing,[2007] p.98

²⁵⁰ *Ibid*, p 83 (see Native Titles three to four)

²⁵¹ Extinguishment of Title in this aspect of the Legal Formula refers to any rights over the land that was granted previously by the state.

land ownership and control. In other words, within the Australia, the LF may be said to be part of a much broader standard²⁵² for Native Title, which in itself should be understood as a costly process. For Justice Brennan, the LF protects the ‘skeleton of principle’²⁵³, which gives the state’s Native Title process its legitimacy.

However, what is prevalent from the LF is that there is a disconnect between the Legal Formula resulting from *Mabo (No2) (1992)*, and the Indigenous people’s status within formal structures of Australian society. According to that aspect of the Legal Formula, the Australia we recognise today is confirmed as a space that alienates Native Title applicants, therefore the state’s Native Title process lacks merit. Where that aspect of the Legal Formula exists, it means that the type of rights one obtains from the Legal Formula correlates to what Stewart Motha described as marking a ‘common humanity’ of all people.²⁵⁴ He argues that in seeing the Legal Formula in this way, the introduction of the Legal Formula means the state’s Native Title process surrounds a period of enlightenment.²⁵⁵ Prima facie, the Legal Formula provides Native Title applicants with the opportunity to advocate for their title rights and interests. Therefore, the opportunity to advocate for one’s property rights suggests the Legal Formula could be argued to be holding some positive benefits. However, such positive aspects represents a piecemeal as Native Title applications are judged astutely by the High Court. As such, the Legal Formula should be taken as evidence of a continuing ‘genocide’ against the Indigenous people as it only mean that Native Title applicants were being welcomed in ‘Australia’s society’ on a precondition.²⁵⁶ On the contrary, the Legal Formula failed to offer any spiritual or physical property rights that are supported by the institutions of the state.

²⁵² See part two, division one, sections ten to thirteen of the Native Title Act 1993

²⁵³ [1992] HCA 23, para.29. In this paper the skeleton principle is referred to as the foundation of Australian sovereignty

²⁵⁴ MABO, Encountering the epistemic limits of the recognition of difference,p.88-89

²⁵⁵ MABO, Encountering the epistemic limits of the recognition of difference,p83

²⁵⁶ Not even this type of welcoming is supported by the Australian common law. I see the state’s NATIVE TITLE process as an extension of that welcoming.

The state's NATIVE TITLE process

According to Davina Cooper, a feature of the Legal Formula is that property ownership in the eyes of the state's Native Title process alienates the Indigenous people from ideas of kinship.²⁵⁷ For Cooper, this means that indigenous systems of land ownership, which borrow from Watson's idea of 'Indigenous people laws' falls outside the Legal Formula's framework.²⁵⁸ Here, I understood Cooper to mean that going before the state's Native Title process is to do what Watson described as engaging with a process of 'self-determination.'²⁵⁹ In connection with that process of self-determination,²⁶⁰ she argues that the Legal Formula could be construed as akin to some form of restorative justice, because each aspect of the Legal Formula perceives itself as being remedial. However, any such idea is ditched by the fact that Native Title applicants lose Native Title to the point of inconsistency.²⁶¹ Justice Brennan did not define what the LF means by inconsistency, so the state's Native Title process remains the praetor of land ownership even if Native Title applicants are successful in securing titles. Under that structure, whatever the Indigenous people do with the land does not mean much as the state can take it and say it is inconsistent with their interest.²⁶² Consequently, what the Legal Formula does is force the Indigenous people in a system of acceptance whereby going before the state's Native Title process demonstrates that you accept the language of the settlers that Australia is a sovereign state.²⁶³

As such, when Native Titles passed through this system of judgement, it is still the state land as the Native Title process compromise the Indigenous people ability to own land. The way in which that materialises within the state's Native Title process is that Native Title applicants submit

²⁵⁷ Davina Cooper, *Opening Up Ownership: Community Belonging, Belongings and the Productive Life of Property*, p634

²⁵⁸ Irene Watson, *Buried Alive*, *Law and Critique* 13, Kluwer Law International, [2002], p254

²⁵⁹ Irene Watson, *Buried Alive*, *Law and Critique* 13, Kluwer Law International, [2002], p256

²⁶⁰ I should add that the LF in the context of *Mabo (No.2)* (1998) means that the process of litigating for indigenous land rights is itself a form of self-determination.

²⁶¹ [1992] HCA 23, para 83(4). The legal formula sets out that even if Native Title is granted to Native Title Applicants, the state can say that whatever interest the Indigenous people or Native Title applicants Title had on that land may seize where it Indigenous people ownership becomes inconsistent with the state's interests.

²⁶² See Part two, Division one, recognition and protection native title in the NATIVE TITLE Act 1993

²⁶³ This means that when Native Title applicants past through this system of judgement, it is still the state land as the Native Title process compromise the Indigenous people ability to own land.

to a tribunal information about their nativeness,²⁶⁴ and the state then uses the Native Title process to the demise of Indigenous people survival within the . According to 17th century German philosopher Georg Wilhelm Friedrich Hegel²⁶⁵, whose ideas on English common law was also exported to Australia, if one views the Legal Formula as emblematic of a link between property ownership and humanity, this form of ownership of land is underscored by what he coined as the ‘master and slave dialectic.’²⁶⁶ The way that fits in with the Legal Formula is that by appropriating land through the state’s Native Title process, the Indigenous people are considered as gaining recognition beyond the Torres Strait Islands of Australia. As the Legal Formula is inferior to praetor of the state’s Native Title process, where Native Title applicants assert the right to own property, the power dynamic between applicants and the state’s Native Title process is dependent on the ‘master’ and ‘slave’ playing their roles in the Australia. According the Legal Formula, this is what Justice Brennan mean by clause three of the Legal Formula which state’s that Native Title to land is survived by crown’s acquisition of sovereignty and radical title.²⁶⁷ In the eyes of the state Native Title process, and following the Hegelian concept, this evinced the minds of the colonial administration which created the Legal Formula, as historically, the Indigenous people were not considered human.²⁶⁸ Therefore, where the LF is constructed in that way Hegel’s theory means that two sets of land ownership or property rights are borne from the Legal Formula. The irony here is that in the state’s Legal Formula, vis-à-vis the Hegelian correlation between land ownership and humanity, the Indigenous people becomes part of the settlers.

The significance of the legal formula

From the reasoning in *Mabo (No2) (1992)*, the Legal Formula allowed judges to recognise in ‘law’ an unpopular or secondary form of property rights in Australia. A consequence of the Legal Formula is that Native Title applications are judged astutely. Justice Brennan regards the Legal Formula as that which he holds to represent the common law of Australia with regards to land titles,²⁶⁹ but one may also argue that the Legal Formula forces the Indigenous people away from their sense of property ownership. This view is demonstrated by the fact that within the state’s

²⁶⁴ [1992] HCA 23, para.83 (6)

²⁶⁵ His views on land law was influential in the development of English common law, and later exported to Australia

²⁶⁶ Patricia Jowicz Mills, *Feminist interpretations of G.W.F. Hegel*, Pennsylvania State Press, 1996, p2

²⁶⁷ [1992] HCA 23, para 83 (3)

²⁶⁸ Davies, M. *Property: Meaning, Histories, Horizons*, p.98

²⁶⁹ [1992] HCA 23, para 83

Native Title process it is the High Court that communicates the way land is controlled. Therefore, the spirit of the Legal Formula is that within the Australia the Native Title process operates in concert with history²⁷⁰. This means that the form of ownership that results from the set of property principles for claiming indigenous land²⁷¹ is underscored by the legacy of the views of the Australian colonial administration. The Legal Formula confirms that since the state retains sovereign and radical title²⁷² ownership of property or land does not depend on the rights to the land, as the Legal Formula are a body of rules that exist within the state's Native Title process. In other words, it is still the state, through the state's Native Title process, who decides and regulates the Indigenous people relationship with the land.

The fact that access to land is controlled and determined by the Legal Formula does not mean that the Indigenous people's sense of land rights is lost. If anything, that Legal Formula is very much the state paying lip-service to Native Title applicants land claims as the procedure for Native Title disregards the fact that Indigenous people were original owners of property. The Legal Formula does not recognise what Cheryl Harris describes as inalienable rights.²⁷³ Here I have taken Harris to mean that within the LF, where Justice Brennan states: sovereignty over territory cannot be challenged,²⁷⁴ it means that under the state's Native Title process, the Legal Formula treats inalienable rights as property belonging to the settlers. However, the reason one can argue that the Legal Formula perceives inalienable rights as such is because the Legal Formula cannot bring itself to hold the type of relationship that the Indigenous people has with indigenous land. Irene Watson, noted that the Indigenous people holds a 'God like' relationship with the indigenous land.²⁷⁵ The Indigenous people relationship to the land is preserved by a history of indigenous culture which existed before the Legal Formula came into existence, so the Indigenous people' attachment to the land is historical, spiritual and cultural.

²⁷⁰ By this analogy, I am referring to its Lockean past

²⁷¹ [1992] HCA 23, para.83

²⁷² [1992] HCA 23, para.83

²⁷³ Cheryl Harris, whiteness as property(1993)p173

²⁷⁴ [1992] HCA 23, para.83

²⁷⁵ Irene Watson, Buried Alive, Law and Critique 13, Kluwer Law International, [2002], p.254

Justice Brennan states: if the Native Title to any parcel of the waste lands of the Crown is extinguished the Crown becomes the absolute beneficial owner.²⁷⁶ Property ownership is rooted in the state's interests as it is the settlers who grants legal personality to Native Title applicants.²⁷⁷ As such, claiming Native Title inside beyond the Torres Strait Islands of Australia revolves around the sovereign state's interests even though going before the state's Native Title process is akin to a (re)negotiation of power, space, identity and 'sovereignty'. In this context, the Legal Formula, according to Davina Cooper, may be construed as working in the interest of 'political reality'.²⁷⁸ What Cooper means here is that the restrictive nature of the Legal Formula means that there is no genuine equality in the 'relationship' between the Native Title applicants and the state's Native Title process. Therefore, if we consider that Hegel and Locke's works are the foundations of Australian land law, although the LF may be said to have narrowed Native Title applicants' property owning ability, it is western scientific discourses that are furthered by the very nature of the legal formula. For example, the Legal Formula commands that Native Title applicants identity be determined by 'traditional authority'²⁷⁹, among the Indigenous people.²⁸⁰ However, it is the Court itself that decides whether to grant Native Title, not the 'traditional authority' that the Legal Formula speaks of. Therefore, the Legal Formula for Native Title perpetuates a version of property ownership which is inward looking, whereby the characteristics for claiming Native Title are based on a distorted view of indigenous people's concept of property ownership.

The Court's role in the state's NATIVE TITLE process

While there is a great deal to be said about the Legal Formula as a whole, it is notable for the purpose of this section to invite attention to the work of the Court within the state's Native Title process. Where Justice Brennan said: "Native Title to land survived the Crown's acquisition of

²⁷⁶ [1992] HCA 23, para.83 (9)

²⁷⁷ Maitland, State, Trust and Corporation, Moral and Legal Personality, Edited by David Runciman and Magnus Ryan, Cambridge University Press,[2003], p.65

²⁷⁸ Davina Cooper. London and New York: Rivers Oram, [1998] Governing out of order, Space, Law and Politics of Belonging, Review, in James M. Glass, The American Political Science Review, [1999] Vol. 93, No.4 p.951

²⁷⁹ Australian Law Reform Commission, Review of the NATIVE TITLE Act 1993, Issue Paper 45, (2014), see para 38(101) of the Australian Law Commission Report where traditional is defined as meaning a transmission of laws and customs. That definition in itself is not restricted to Indigenous people laws.

²⁸⁰ [1992] HCA 23, para.83 (6)

sovereign and radical title....privileges conferred by the Native Title are unaffected by the Crown's acquisition of radical title.....sovereignty exposed native title to a valid exercise of sovereign power ..."²⁸¹ In shaping the Legal Formula for Native Title, the Court 'adopts an interpretation of native identity which derives from a perspective that the Australia is a sovereign state. However, in the context of the Legal Formula, this element clearly suggests that the LF is fashioned in settler's interests. For others, Brennan's words represent an articulation of the view that the Legal Formula has the capacity to rescue Native applicants from the savages of being the 'aliens' within what one sees as 'Australia, the sovereign state.'

In exploring the position of the court in *Mabo (No2) (1992)*, Sarah Keenan, herself an Australian national writing from the perspective of a critical thinker said that the reasoning, in this case, means the Legal Formula should be read as 'moments of decolonization' in Australia. Moments of decolonization she argues represents the ability of the Indigenous people to assert their presence in opposition to neo-colonial Australia (I.e. the settlers). In the context of her argument, she states that it is not necessary to evaluate and describe all moments of decolonization with Australia, but symbolic events such as the Garindi walk-off, Aboriginal Tent Embassy and the Ampilatwatja walk-off, shows that decolonization is achievable in the settlers.

Keenan suggests that these moments of decolonization extends to the Legal Formula as the decision in *Mabo (No.2) (1992)* was widely regarded as a sort of 'common-sense' justice.²⁸² She argues that in seeing the Legal Formula as a set of principles for claiming a right to land, the Native Title process is justiciable, and as such, the Court as an institution of the state's Native Title process is able to acknowledge the Indigenous people's plight and exercise its legislative presence outside the dominant discourse. For Keenan, such moments of decolonization weakens the ability of the state's Native Title process as an institution of the settlers. In other words, the ability of the Legal Formula to assimilate the Indigenous people into settler territory is weakened and there are elements of the Legal Formula that are redundant in contemporary Australia.

²⁸¹ [1992] HCA 23, para 83(3)

²⁸² By this, I mean that the High Court of Australian had private knowledge of the case which was different to the knowledge of the respondent in the case.

With regards to the Legal Formula, moments of decolonization do not exist inside Australia as Legal Formula sets out that ‘any interests which are inconsistent with the Crown’s interest can be extinguished.’²⁸³ In view of Keenan’s claim, the nature of the LF means it can be considered akin what Watson described as a ‘civilising mission.’²⁸⁴ Watson argues that in the context of the Legal Formula being a symbol of decolonization, within the Australia the state’s Native Title process is situated in a space it (settlers) consider free and open to ‘discover’, “like a virgin awaiting penetration.”²⁸⁵ Thus, under the Legal Formula, the nature of the Indigenous people existence inside Australia is considered customary, and that has been washed away by the inherent rationality of the ‘sovereign state.’ Through shading the Legal Formula in this way, the Court uses the idea of the settlers being the ‘sovereign state’ to politicise the Indigenous people’s idea of property. Where property is politicised by the institutions of the state or the state’s Native Title process, the Court itself constructs the Legal Formula as though decolonising the state’s Native Title process is an abstract pursuit, rendering the Legal Formula for Native Title superfluous.

Considering that Australia is a settlor colony, the boundaries of the Legal Formula for Native Title is itself decided by the state. As such, the Legal Formula which emerged from the decision in *Mabo (No2) (1998)* is not a symbol of decolonization within the Australia as the state’s Native Title process requires the Indigenous people to operate inside the state’s framework. In fact, I would argue that decolonization would centre on dismantling the settlers influence and dismantling the Legal Formula as it is a form of regulation used to control land rights or ownership, and what the state’s Native Title process is permitting the Indigenous people. In essence, the Indigenous people had no say in implementing the state’s Native Title process, or any active role in developing the Legal Formula. Thus, moments of decolonization are effectively arrested decolonization, as the fact the Indigenous people has no input in the state’s Native Title process means that they are hostages to the system in which they are being judged for indigenous land.

²⁸³ [1992] HCA 23, para 83(5)

²⁸⁴ Irene Watson,[2002], p.254

²⁸⁵ Irene Watson,[2002], p.254

Conclusion

This discussion has established that through the Legal Formula for Native Title, the state's Native Title process uses the doctrine of sovereignty as a means of continuing to subjugate the Indigenous people. It has shown that although the decision in *Mabo (No2) (1992)* was a milestone for land ownership in Australia, the Legal Formula continues its Eurocentric relationship to ideas of property. In demonstrating this, the paper has shown that the state's Native Title process continues to deny the Indigenous people their property through the Legal Formula where the doctrine of sovereignty remains the guardian of Eurocentric notions of property.

EXCEPTIONS TO EXCEPTIONALISM: SHOULD THE US SUPREME COURT USE INTERNATIONAL AND FOREIGN LAWS AS AN INTERPRETATIVE AID TO THE US CONSTITUTION?

Julija Stukalina

There has been much debate among US academics, judges and politicians on the subject of whether foreign law and international law should ever be used by the Supreme Court in order to interpret the US Constitution – this exploded into the public consciousness after the seminal case of *Roper v Simmons*, in which Justice Kennedy acknowledged the “stark reality that the United States is the only country in the world that continues to give sanction to the juvenile death penalty”²⁸⁶, and proceeded to cite near-universal international conventions and several other states’ experiences with the issue. In his dissent, Justice Scalia brought several important arguments – the exceptionality of America’s jurisprudence, the court’s lack of legitimacy in bringing these treaties into national law, the methodological difficulties inherent in selecting which parts of the law to consider²⁸⁷. Some have also argued that the controlling principle of constitutional interpretation ought to be *static* originalism -- constitution ought to be interpreted in the same manner as it would have been by a reasonable person living in 1788, thus precluding *any* reference to international law which had developed since then.²⁸⁸ However, both international and foreign law can be of significant use to American jurisprudence – acknowledging their existence leads to better decision-making by allowing judges to examine how particular novel legal ideas can be worked out in practice. Furthermore certain human rights embedded in the Constitution are so fundamental as to be global – it therefore seems arbitrary to restrict their interpretation to only US law. This paper will therefore examine two major aspects of the problem:

- As a matter of precedent, it is possible for Supreme Court justices to utilise international and foreign law in order to support its conclusions, drawing on the long historical tradition of using international law in Supreme Court judgements²⁸⁹. This means that the opponents of using international law and foreign law in constitutional interpretation must prove that a precedent of the court should not be followed, not that a novel introduction into US jurisprudence ought to be rejected.
- It will then rebut in more detail the normative arguments against the total exclusion of foreign and international law, further explain the benefits of reference to such systems, and discuss a basic framework for their potential use in the future.

²⁸⁶ *Roper v Simmons* 543 U.S. 551, 21 (2005) (Kennedy plurality)

²⁸⁷ *ibid.*18-21 (Scalia dissenting)

²⁸⁸ *Scott v Standford*, 60 U.S. (19 How.) 393, 410 (1857)

²⁸⁹ Sarah. H. Cleveland, ‘Our International Constitution’, [2006] 31 Yale Journal of International Law 1

It will particularly focus on the interpretation of the 8th amendment and individual liberty as protected by substantive due process in the 14th Amendment, since these are the areas that have raised the most controversy. The use of international law (mostly focussing on customary law and treaties with near-universal ratification such as the UN Convention on the Rights of the Child) and the law surrounding other nations' constitutions (foreign law) will be examined; whilst the court treats the two interchangeably, they present distinct methodological difficulties.

Can The Supreme Court Use Foreign and International Law?

It is fairly clear that judges are *allowed* to resort to international and foreign law in their interpretation of the 8th and 14th amendments through a logical consideration of the meaning of these two articles, having done so in the past on several occasions – this is because they both embody fundamental values which require significant interpretation of and reference to ‘consensus’ among ordinary people, and they later came to make up crucial elements of human rights that are now considered to be ‘universal’ rather than confined to the USA.

The 8th Amendment prohibits the imposition of ‘cruel and unusual punishments’²⁹⁰ In considering the punishment of statelessness in *Trop v Dulles*, the court developed a doctrine that the amendment should be interpreted in light of “the evolving standards of decency that mark the progress of a maturing society”²⁹¹, and as a “prohibition against inhumane treatment”²⁹². Furthermore, the plurality opinion clearly incorporated some reliance on international perspectives²⁹³; Justice Warren argues that the “international community of democracies” did not countenance removing a person’s statehood as a retribution for a criminal act, because they would be threatened with the prospect of banishment²⁹⁴. Justice Rehnquist subsequently argued in his dissent in *Atkins v Virginia* that the reliance of the plurality on international practice was only a *minority* view; however, the dissent of Justice Frankfurter also accepted the basic idea of interpreting the Constitution using international views, but came to the opposite conclusion – that many countries “still impose loss of citizenship for indulgence in designated prohibited activities”²⁹⁵ Furthermore, the view of the majority in this case makes sense in light of their wording of the test for cruel and unusual punishment – they focus on ideas embodying ‘a mature society’, not this particular one²⁹⁶; and “humane justice” is a

²⁹⁰ US Const. 8th Am.

²⁹¹ *Trop v. Dulles* 356 U.S. 86, 101 (1957)

²⁹² *ibid* 100

²⁹³ Cleveland 71

²⁹⁴ *Trop v. Dulles* 102

²⁹⁵ *Ibid* 126

²⁹⁶ *ibid* 101; Cleveland 71

concept which has its roots in core human rights of all peoples, not merely “parochial” American values.²⁹⁷ Later cases on the eighth amendment did not give international law such a controlling role. However, this is probably due to their subject-matter rather than a clear fault in plurality’s reasoning – *Trop v Dulles* was concerned with statelessness, which could only be enacted at a federal level – therefore, there were no examples of American practice in the form of States’ actions to draw upon, and it made sense to consider the views of other equivalent actors who were similarly capable of banishment to locate the ‘evolving’ standard. By contrast, cases such as *Coker v Georgia*²⁹⁸, *Enmund v Florida*²⁹⁹, *Thompson v Oklahoma*³⁰⁰, *Atkins v Virginia*³⁰¹ and *Roper v Simmons* are largely concerned with the application of the death penalty to varying classes of crimes – this necessitates a less involved reading of international law, as US states rather than nations are the main ‘actors’.

*Coker v Georgia*³⁰² and *Enmund v Florida*³⁰³ both use international law sparingly, referring to general international opinion in footnotes as ‘not irrelevant’³⁰⁴. In *Thompson* and *Atkins* the role of this type of analysis was somewhat clarified, though somewhat reduced from *Trop v Dulles*. These cases used international law to *confirm* a national consensus among US state legislatures that the majority of justices had already identified – to invalidate the death penalty for people under the age of 16³⁰⁵, for the mentally disabled³⁰⁶, and for people under the age of 18, respectively³⁰⁷. Note that this is actually consistent with Justice Scalia’s dissent in *Thompson*, where he claimed that the views of other countries should not be imposed on Americans using the constitution, where there is “not first a settled consensus among our own people”³⁰⁸ – yet he accepts the idea that the practices of other western democracies *can* be relevant in ensuring that American practice is not a “historical accident”³⁰⁹.

It is in *Roper v Simmons* that Justice Kennedy most clearly demarcates the role of analysis of international and foreign legal systems from that of state practice. Here, he first concluded that there was a clear trend for states to drop capital punishment for juveniles that had come about since the court upheld such practices in *Stanford v Kentucky*, despite the relative popularity of

²⁹⁷ Cleveland 71

²⁹⁸ *Coker v Georgia* 433 US 584 (1977)

²⁹⁹ *Enmund v. Florida* 458 U.S. 782 (1982)

³⁰⁰ *Thompson v Oklahoma* 487 U.S. 815 (1988)

³⁰¹ *Atkins v Virginia* 536 U.S. 304 (2002)

³⁰² *Coker v Georgia* 596 n.10

³⁰³ *Enmund v. Florida* 769 n 22

³⁰⁴ *Coker v Georgia* n. 10; *Enmund v Florida* n 22

³⁰⁵ *Thompson v Oklahoma* 830 (1988)

³⁰⁶ *Atkins v Virginia* 313 (2002)

³⁰⁷ *Roper v Simmons* 1200 (2005)

³⁰⁸ *Thompson v Oklahoma* 868 n.4 (1988) (Scalia dissenting)

³⁰⁹ *ibid*

‘anticrime’ legislation³¹⁰. In addition to this ‘objective indicia of consensus’³¹¹, he also brought his own judgement to bear on the case through an examination of sociological studies on the adolescent mind, concluding that persons below the age of 18 possessed certain characteristics which rendered them unsuitable for the death penalty.³¹² He then examined the overwhelming international consensus against the juvenile death penalty, noting that only seven other countries imposed such a system in the past 15 years, that the USA and Somalia stood alone in failing to ratify the Convention on the Rights of the Child (which prohibited the juvenile death penalty), and that the practice had also been outlawed by the United Kingdom, whose 1689 English Declaration of Rights inspired the wording of the eighth amendment³¹³. Crucially, Kennedy went on to provide a framework for the application of such a consensus to US jurisprudence -- first, it provides “respected and significant confirmation”³¹⁴ to the justices’ own conclusions, in line with *Atkins* and *Thompson*; and second, it “underscores the centrality of those rights within our own heritage of freedom”³¹⁵ – it shows that the right being protected is highly important to the US constitution (because other nations also value this right highly), and that this particular American consensus is significant in the context of interpreting that right. Much of Justice Scalia’s dissent is premised on his opposition to the majority’s conclusion that there really was a consensus that the juvenile death penalty contravened our standards of decency – he strongly criticises the fact that they counted the 12 states who had no death penalty at all, saying that their actions do not say anything significant about giving under 18s “special immunity”³¹⁶ – he therefore believes that the “views of other countries take centre stage”³¹⁷ in the ruling, which mischaracterises the majority’s conclusions. Therefore, it appears that the use of foreign and international consensus to provide a level of support for the views of Judges and the American people alike is accepted, both by virtue of constitutional doctrine on the eighth amendment, and by consistent practice of the Supreme Court.

The 14th Amendment on Equal protection was used by the very same court to flesh out some substantive limitations on arbitrary government interventions in the private lives of individuals³¹⁸; however, in this case comparative foreign law has played a greater role than use of international instruments. This is particularly evident in *Lawrence v Texas*, where Justice Kennedy referred to the jurisprudence of the European Court of Human Rights in *Dudgeon* to show that the right to a private sexual life is indeed “an integral part of human freedom”³¹⁹; this was used to critique the earlier *Bowers v Hardwick* case, which itself used old traditions of

³¹⁰ *Roper v Simmons* 12 (2005) (Kennedy plurality)

³¹¹ *ibid* 13

³¹² *ibid* 15

³¹³ *ibid* 19-20

³¹⁴ *ibid* 20

³¹⁵ *ibid*

³¹⁶ *Roper v Simmons* 4 (2005) (Scalia dissenting)

³¹⁷ *ibid* 16

³¹⁸ Cleveland 80 (2006)

³¹⁹ *Lawrence v Texas* 539 U.S. 558, 577 (2003) (Kennedy plurality)

Christian morals and Roman law to buttress its conclusion that sodomy was a crime³²⁰. He then goes further by concluding that the USA does not have a *more legitimate or urgent* government interest in restricting this personal choice than the other countries profiled³²¹. Note that here, there is no need to conform to an objective ‘evolving standard of decency’ test. Therefore other legal systems inform constitutional development much more directly, providing one step in a logical argument for an interpretation of an amendment rather than mere ‘confirmation’ of an existing hypothesis – they raise the burden of proof on the executive to show that they have a compelling interest in outlawing this practice. This is logically consistent; as with *Trop v Dulles*, they are comparing actors with a similar level of law-making power to see whether their interests are comparably ‘legitimate’. At the same time, foreign opinion does not make or break the Opinion; Justice Kennedy chiefly relies on *Bowers*’ misapprehension of the historical context surrounding criminalisation of homosexual conduct³²² and that subsequent cases had ‘eroded’ the ruling³²³. Note that the European Convention of Human Rights should be seen as a *foreign* legal system, not an *international one*, because it is a *regional treaty* whose norms are therefore confined to that geographical area – it cannot claim the same level of universality as, say, the International Covenant on Civil and Political Rights. This reliance on comparative law probably stems from the fact that, unlike death penalty, rules on respect for private lives are less well developed at international law³²⁴.

Therefore, consideration of 14th Amendment jurisprudence shows that the supreme court can see use nations’ practice in determining its governments’ legitimate interests, and that not every norm taken into consideration must be universal – widespread endorsement by the liberal democracies is sufficient to establish its relevance.

Should the Supreme Court use International and Foreign Law?

This section seeks to dispel the main criticisms against the use of foreign and international law as a constitutional aid, and to outline the positive contribution that it can make to American jurisprudence.

To explain the negatives -- firstly, neither an ‘exceptional’ view of American law nor an originalist take on the constitution necessarily prohibit incorporating novel legal ideas; but even if they did, both are fundamentally flawed ways in which to perceive US constitutional doctrine. The importance of concerns about democratic legitimacy has been greatly overstated, particularly in view of justices’ reference to extra-legal sources. Finally, the methodological difficulties of consistently resorting to laws outside one’s own system are formidable, but they

³²⁰ *ibid*

³²¹ *Ibid*

³²² *ibid* 7

³²³ *ibid* 14 (Kennedy plurality)

³²⁴ Cleveland, 85 (2006)

can be overcome by creating a clearer framework for the use and relevancy of international law in relation to different articles and amendments. In addition, the US's conscious and significant influence on the development of international law means that it is illogical to refrain from using it.

Exceptionalism

The idea of American exceptionalism was described by Calabresi as believing that the USA was “an exceptional nation with an exceptional purpose in the world”; that is, to be an example of good democratic principles to others.³²⁵ However, firstly the areas in which it is so ‘unusual’ as somewhat inaccurately identified in the article. For instance, Calabresi states that the USA is unique in continuing to enforce capital punishment³²⁶, identifying the reasons as a higher homicide rate, the victory of Richard Nixon and his appointments to the Supreme Court, and the ‘unusual moralism’ of the American people. This is somewhat undermined by the fact that whilst many states do retain the death penalty, there is a clear and growing trend towards abolition – 10 of the 19 states that removed the punishment from their books have done so in the last 30 years³²⁷. Furthermore, the penalty is not widely used amongst all states – the number of death sentences handed down in states dropped by 62% between 1998 and 2000, and Texas accounted for more than a third of total executions since 1976³²⁸. This means that particular policies or personal ideals cannot be said to be an ‘exceptional’ and permanent facet of the American character – morals clearly change through the generations. Many other states may also claim to be ‘particularly moral’ in similar ways -- Calabresi acknowledges that there are other countries in which abortion and gay rights are not “non-issues”³²⁹, and 18% of states still retain capital punishment in law and practice³³⁰. Even if the USA did have unusual views on a certain topic (such as the death penalty), this is not necessarily a reason to discount other countries altogether, as Justice Scalia argues in *Lawrence v Texas* that any reference to foreign law is ‘dangerous dicta’ – their practice may still be used for evidential purposes to determine the empirical consequences of a particular rule as in *Miranda v Arizona*³³¹. Furthermore, merely

³²⁵ Steven G. Calabresi, “A Shining City On A Hill”: American Exceptionalism and the Supreme Court’s Practice of Relying On Foreign Law’ [2006] 86 Boston University Law Review 1345

³²⁶ *ibid* 1405

³²⁷ Death Penalty Information Centre, States With and Without the Death Penalty, <http://www.deathpenaltyinfo.org/states-and-without-death-penalty> (last visited Sept. 21 2015)

³²⁸ Death Penalty Information Centre, States With and Without the Death Penalty, <http://www.deathpenaltyinfo.org/death-penalty-sentences-have-dropped-considerably-current-decade> (last visited Jun. 26 2015)
Calabresi, 1382 (2006)

³³⁰ Death Penalty Information Centre, States With and Without the Death Penalty, <http://www.deathpenaltyinfo.org/death-penalty-sentences-have-dropped-considerably-current-decade> (last visited Jun. 26 2015)

³³¹ Ganesh Sitaraman, ‘The Use and Abuse of Foreign Law in Constitutional Interpretation’ [2009] 32 Harvard Journal of Law and Public Policy 670

claiming that a particular attitude is ‘exceptional’ does not explain why it should continue to be exceptional – this highlights an internal difficulty with the doctrine itself, namely that it is difficult to justify the status of the USA as a beacon of the democratic system to other nations when many universal human rights instruments disagree with them.³³² Therefore, claiming that a policy is uniquely American and therefore cannot be compared with other countries should not be a logical consequence of exceptionalism.

Even the more clearly ‘exceptional’ parts of Americans’ views of their own constitution cannot be used to justify this form of legal isolationism. Stephen Brooks identifies veneration of the constitution and reproduction of its patriotic narrative and the elevation of US sovereignty above international law³³³ -- the former is evident as a frequent daily theme on mainstream radio programs³³⁴ and the latter is most clearly manifested in reluctance to join the International Criminal Court.³³⁵ However, such views ought to belong in the realm of public opinion rather than judicial reasoning – Calabresi highlights the ‘gap’ between the ‘popular culture’ of the USA and that of the legal class, since the former are apparently hostile to attacks on exceptionalism, and the latter seem to embrace it³³⁶. However, it should not be for judges to try constitutional interpretation in the court of public opinion; this is because the American public is not a monolith, it is extraordinarily difficult to quantify what ‘everyone’ thinks, and neither the quasi-religious respect for the constitution nor the US tendency to ignore international law in matters of foreign policy seems to actually have a judicial basis; they exist in the realm of politics and international diplomacy.

Therefore, it is firstly impossible to pin down particular policies and say that this is where the USA departs from the rest of the world, because of the development of morality and the internal inconsistency inherent with both being a guiding light and seeming to head in the opposite direction to human rights jurisprudence. Furthermore, exceptionalism cannot forbid the consideration of all international law for constitutional interpretation, as its political arguments should carry little judicial weight.

Originalism

Some argue against the use of *modern* foreign and international law in the US Constitution because they take an *originalist* view of its provisions – that the meaning of the constitution

Miranda v US 38, 486-884

³³² UN High Commission for Human Rights Resolution – abolition of the death penalty contributes to the enhancement of human dignity and the progressive development of human rights – E/CN4/1997/12 (April 4 1997)

³³³ Stephen Brooks, *American Exceptionalism in the Age of Obama* (Routledge 2013) 97

³³⁴ *ibid* 93

³³⁵ *ibid* 100

³³⁶ Calabresi 1411

was whatever the words would have meant to an ordinary person at the time of its enactment³³⁷. It is quite clear that originalism has at times been offered as a justification for examining international law in interpreting the constitutional provisions on establishing consular courts abroad³³⁸ or in issuing legal tender³³⁹. The major argument is that international law after 1791 is irrelevant – this is known as *static* as opposed to *organic* originalism³⁴⁰. However, this is very difficult to uphold, because 18th century lawyers viewed the institution of international law as a type of natural law, which is very far-removed from the evolution into its current form through positivism and then universal human rights³⁴¹. Furthermore, originalism itself has been largely rejected in relation to the 8th amendment test of *Trop v Dulles*, which requires express consideration of *evolving* standards of decency³⁴², which seems appropriate given that ‘cruel’ is a moral pejorative term that condemns a completely different set of practices depending on its supporting moral code; this implies due consideration of modern rather than 18th century standards from both international and comparative constitutional sources.

Democratic Legitimacy of the Judiciary’s Role

There are two main concerns in terms of the democratic legitimacy of the use of international law in particular to interpret Constitutional provisions³⁴³. Firstly Bickel argues that the principle of democratic governance is violated by unelected and unaccountable judges supplanting their views for those of the electorate – and that international law in particular is created through undemocratic processes such as international negotiations³⁴⁴. However, including an analysis of international law in constitutional interpretation is no more or less counter-majoritarian than the imposition of limitations on the legislature’s decision-making through provisions on individual rights in general³⁴⁵. Justice Scalia mentions in *Roper v Simmons* that the majority’s reliance on the United Nations Convention on the Rights of the Child was disingenuous, since the senate ratified it with an express derogation from the rule against capital punishment for juveniles.³⁴⁶ Courts already utilise non-democratic sources such

³³⁷ A. Scalia *A Theory of Constitution Interpretation* Catholic University of America, 10/18/96.

³³⁸ *In Re Ross* 140 US 453 (1891)

³³⁹ *Juillard v Greenman* 101 US 421 (1884)

³⁴⁰ Keynote Address at the American Society of International Law Annual Meeting; Foreign Legal Authority in the Federal Courts (Apr. 2, 2004) *in* 98 American Society of International Law Proceedings 395, 306; Cleveland, *Our International Constitution* [2006] 31 The Yale Journal of International Law 94

³⁴¹ Gerald L. Neuman, ‘International Law as a Resource in Constitutional Interpretation’, [2006] 30 Harvard Journal of Law and Public Policy 181.

³⁴² *Trop v. Dulles* 356 U.S. 86, 101 (1957).

³⁴³ Cleveland, 101

³⁴⁴ Alexander Bickel *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Yale University Press, 1986)

³⁴⁵ Cleveland, 101

³⁴⁶ *Roper v Simmons* 17 (Scalia dissenting)

as the common law, social science (as in Justice Kennedy’s Opinion in *Roper v Simmons*³⁴⁷), policy concerns, and historical background³⁴⁸. Furthermore, the US is a driving force in shaping and interpreting international law, helping to establish the UN system and international treaties ranging from human rights to international trade³⁴⁹; these decisions were made by validly elected national governments, which are the ultimate manifestation of the will of the people. Some have argued that the *Roper* majority undermined the democratic right of congress to choose which treaties the US is bound by, because they examined a treaty provision to which the USA had made a reservation³⁵⁰. However, the court was actually relying on near-universal treaties such as the Convention on the Rights of the child as strong evidence of a “foreign consensus”³⁵¹ on the issue. They did not claim that the USA was somehow *bound* internationally by that prohibition. Furthermore, other countries’ acceptance of their requirement to be bound by international law comes from an acknowledgement of their existence in a system of global rules and universal human rights that exist whether ‘the people’ approve of those rules or not. The USA cannot exist outside of that system, especially as it has had such a huge influence in shaping it³⁵².

Flawed Methodology

There is some merit to the criticism that foreign and international law can often be misused by the Supreme Court in order to promote their own ideas of what policy direction the USA should take. For instance Justice Scalia emphasised this in his dissent in *Roper v Simmons*, calling the majority’s treatment of international ‘consensus’ a form of ‘sophistry’³⁵³. This is more clearly a problem for foreign than international law, since there is a much higher level of complexity involved – there is broadly one inclusive international legal system, but there are over 100 countries with unique constitutional and political backgrounds to consider. This can pose problems in two main ways identified by Sitaraman in “The Use and Abuse of Foreign Law in Constitutional Interpretation”³⁵⁴. Firstly, one examines the accuracy-based challenge; it is difficult to properly comprehend a foreign decision, because of its location inside a different legal system with its own structure, culture, history, and values³⁵⁵; furthermore, current legal education does not traditionally require training in other nations’ legal methodologies or the science of comparative law³⁵⁶. This reduces the useful application of such rules to the constitution, since their purposes may be misinterpreted. Justice Scalia highlights this problem in *Roper v Simmons*, stating that the court fails to take into consideration whether states who

³⁴⁷ *Roper v Simmons* 15

³⁴⁸ Cleveland, 103

³⁴⁹ Cleveland, 102

³⁵⁰ *Roper v Simmons*, 125 S. Ct 1183, 1225-26 (2005)

³⁵¹ Cleveland 122

³⁵² *ibid* 104

³⁵³ *Roper v Simmons* 543 U.S. 551 (2005)

³⁵⁴ Sitaraman, 653

³⁵⁵ *ibid* 662

³⁵⁶ *ibid* 662

banned the juvenile death penalty actually exercise the prohibition, or how many have death penalties as mandatory for particular crimes without a system in place for mitigation³⁵⁷.

The second challenge is that in eighth amendment cases, judges may use also foreign law selectively by ‘cherry-picking’ provisions and cases which support their argument, or with which they are most familiar³⁵⁸. This is particularly evident in the aggregation of foreign law to prove a particular point (i.e.: that the rest of the world has turned against the capital punishment of juveniles³⁵⁹). Sitaraman outlines that judges may be particularly selective in choosing the denominator³⁶⁰ (i.e.: the total number of courts whose rulings they consider when deciding whether a particular legal view is ‘widespread’); this can be as a result of lack of familiarity with other constitutional systems, or lack of clarity in what constitutes a ‘civilized country’ or “English-speaking world”³⁶¹. This was less of an issue in *Roper v Simmons*, since most nations of the world had already banned capital punishment for under 18s; however, it occurred in *Lawrence v Texas*, where Justice Scalia mentioned in his dissent that the court had ignored the “many countries that have retained criminal prohibitions on sodomy”³⁶² in its analysis of an ‘emerging awareness’ of a right to a private sexual life. This sort of analysis can also invite the problem of *cascades* – when a foreign state’s courts are merely following the judgements of other courts instead of deciding independently what ought to be done³⁶³ – so their decision to, for example, ban the juvenile death penalty, would be reflective of a wish to follow the rest of the international community, rather than their own conclusions about its immorality or its poor impact as a deterrent to crime. However, this is less of an issue than incorrectly judging the sample size of jurisdictions; as will be explained below, there is some merit in following an international consensus due to heightened participation in the international community. Note that looking at the views of multiple nations magnifies all the accuracy-based challenges described above; the more systems are considered, the more room there is to make mistakes.

However, neither of these methodological difficulties are arguments for definitively excluding foreign law as irrelevant – in fact, they appear to necessitate a clearer framework for its

³⁵⁷ *Roper v Simmons* 17 (Scalia dissenting)

³⁵⁸ Sitaraman 663

³⁵⁹ *Roper v Simmons* 23 (Kennedy plurality)

³⁶⁰ *ibid* 685

³⁶¹ *Poe v Ullman* 367 US 497 at 548

³⁶² *Lawrence v Texas* 14 (2003) (Scalia dissenting)

³⁶³ Eric Posner and Cass Sunstein, ‘The Law of Other States’ [2006] 59 *Stanford Law Review* 132

application, as set out by Eric Posner and Cass Sunstein³⁶⁴ in the Jury Theorem³⁶⁵ and further explained in this essay under Part 3.

Arguments for the use of international law

If the use of foreign and international law in constitutional interpretation essentially unobjectionable, it also provides two clear benefits to the jurisprudence surrounding the constitution – the ability to learn from other jurisdictions and recognition of the fundamentality of human rights – the latter particularly applies to international law. Note that the use of international and foreign law signals that the USA wishes to be included in a shared international community of jurisprudence³⁶⁶; however, this only requires very superficial reference to other systems, without the careful aggregation seen in the majority *Roper* opinion.³⁶⁷

Firstly, foreign jurisdictions may have tackled similar problems – therefore, they can be used to provide different lines of analysis and reasoning. As Justice Breyer argued, constitutional judges in liberal democracies often face similar problems³⁶⁸; therefore, where there is more than one textual interpretation of a constitutional provision, other approaches can be useful in establishing which choice is better as a matter of practical application³⁶⁹. Judges can also use foreign decisions to interrogate their own moral compass when interpreting a particularly controversial provision – other constitutional courts’ judgements are particularly useful in this regard because they hold comparable positions in their countries’ judicial hierarchies, providing insights that one cannot obtain from lower court decisions.³⁷⁰ Tushnet compares this to a “general liberal education”³⁷¹ – comparative law helps justices to see solutions that others with a “narrower vision”³⁷² might miss. Constitutions with genealogical ties to that of the US

³⁶⁴ *ibid*

³⁶⁵ *ibid*: A state’s foreign law must reflect a judgment based on information which cannot be found in the American system; the foreign law must address a similar problem; and the foreign court’s judgment must be independent of the cascade effect

³⁶⁶ Sitaraman 661

³⁶⁷ *Roper v Simmons* 21-23 (Kennedy plurality)

³⁶⁸ Stephen Breyer, ‘Reflexions relatives au principe de fraternité, Address to the 30th Congress of the Association of French-Speaking Constitutional Courts’ (June 20, 2003), available at http://www.supremecourt.gov/publicinfo/speeches/viewspeech/sp_06-20-03, last visited Jun. 26 2015

³⁶⁹ *Wickard v Filburn*, 317 USA 111, 125-126; compared three federal wheat-exporting nations to find that the national government had control over wheat regulation in each one; Vicki Jackson, ‘Constitutional Comparisons: Convergence, Resistance, Engagement’ [2005] 119 Harv. L. Rev. 116

³⁷⁰ Vicki Jackson 119

³⁷¹ Mark Tushnet, ‘The Possibilities of Comparative Constitutional Law’ [1999] 108 Yale Law Journal 1236

³⁷² *ibid*

can be instructive in working out the original meaning of the words against their proper historical background³⁷³; at the same time, it is difficult to see how giving the *contemporary* jurisprudence of, say, the United Kingdom can be justified, given their subsequent constitutional evolution from the 18th century, especially in subjects in the purview of the European Court of Human Rights³⁷⁴. Furthermore, these arguments do not necessarily justify using other legal systems to conclude on an ‘evolving standard of decency’, especially when the actual reasoning of those systems is not examined at all³⁷⁵; in order to do that, we must look at the *content* of particular rights provisions of the US Constitution and work out whether international and foreign law might make some relevant contributions.

Secondly, there is a clear link between certain constitutional provisions and other more universal human rights. To some extent, the American constitution attempts to embody global rights and principles which transcend national boundaries³⁷⁶, particularly with regard to the right to assemble, bear arms, and life and liberty³⁷⁷ -- this is an expression of a common mutual interest which underlines the concept of what ‘human dignity’ means.³⁷⁸ It is true that the US constitution is not explicitly aligned with international human rights texts³⁷⁹; but the fact that these texts have been greatly influenced by existing US ideals³⁸⁰ means that their subsequent evolution and case-law can shed some light upon US supreme court jurisprudence. Furthermore, these values are “preconditions for democracy itself”³⁸¹, which means that they should be protected from the decisions of majorities. Whilst there is much debate over the *scope* of fundamental rights that is rightly left to the people’s representatives, their *existence* and their *universality* are not in any real doubt³⁸² -- ignoring the contribution of other legal systems to rights jurisprudence altogether therefore seems somewhat arbitrary. As Justice Kennedy argued in *Roper v Simmons*, acknowledging interpretations of fundamental rights by other countries does not decrease a judge’s loyalty to the *American* constitution – it reaffirms the importance of the eighth amendment by showing that it carries a ‘universal’ component³⁸³.

³⁷³ *Roper v Simmons* 23-24 (Kennedy plurality)

³⁷⁴ *Roper v Simmons* 21 (Scalia dissenting)

³⁷⁵ *Roper v Simmons* 23-24

³⁷⁶ Cleveland 64

³⁷⁷ *Logan v United States*, 144 US 263, 286-89, where it was asserted that certain rights in the constitution such as the right to bear arms were man’s natural and inalienable rights;

³⁷⁸ Jeffrey Toobin, *Swing Shift*, New Yorker (September 12, 2005) at 42

³⁷⁹ Vicki Jackson 118 n. 46

³⁸⁰ Harold H. Koh, ‘International Law as Part of Our Law’ [2004] 98 American Journal of International Law 54

³⁸¹ Sitaraman, 653

³⁸² *ibid* 689

³⁸³ *Roper v Simmons* 24-25 (majority opinion)

The Role of International and Foreign Law

From the above arguments, it is clear that whilst the use of international and foreign law in constitutional interpretation poses democratic and methodological challenges, it has much to offer American jurisprudence. These difficulties can be avoided through clear and non-arbitrary guidelines on such usage, particularly in the case of the 8th Amendment, where judges are most likely to engage in aggregation of foreign sources. The first stage of this inquiry would involve establishing how ‘receptive’ a provision is to non-US rules³⁸⁴ -- this includes how specific or general the text itself is; to what extent foreign law was previously taken into account; the uncertainty of the provision’s interpretation; and the departure of international law from existing domestic views³⁸⁵ -- this ensures that judges avoid superimposing other legal sources unnecessarily, thus stepping outside their democratically mandated role as *interpreters*, not *writers* of the constitution. The second stage should look at the universality of the norm – how many states have ratified a global treaty, or whether the parties to a regional treaty or particular foreign practice share common democratic characteristics with the USA.³⁸⁶ With regard to foreign law, the *Jury Theorem* approach as described above is instructive in overcoming methodological hurdles – the foreign state’s law must contain information that is not found in American jurisprudence; it must be concerned with a problem similar to that before the supreme court; and the judgement ought to be reasonably independent of other nations.³⁸⁷ Thirdly, some weight ought to be given to whether the US government seems to have accepted the norm³⁸⁸ through heavy involvement in its creation – this helps to avoid the possibility imposing international obligations by considering the actions of the political branch with due deference. However, this cannot be definitive, particularly in areas concerning *universal* human rights jurisprudence due to the counter-majoritarian implications of that principle.

³⁸⁴ Cleveland 108

³⁸⁵ *ibid* 109

³⁸⁶ *ibid* 113; for instance, the majority of *Lawrence v Texas* referred to the European Court on Human Rights at p.13.

³⁸⁷ Posner and Sunstein 145

³⁸⁸ Cleveland, 115

Conclusion

In conclusion, international and foreign law is already legitimately used as a tool of interpretation in constitutional provisions such as the 8th and 14th amendment. Furthermore, the potential benefits of accepting this phenomenon in sharing useful ideas and acknowledging the universality of fundamental rights outweigh the purported downsides – exceptionalism and originalism appear unconvincing in the foregoing discussion due to their conceptual flaws and inability to definitely rule out reference to other systems. In particular, exceptionalism appears to be a largely political idea that is difficult to properly apply in a judicial context; static originalism is similarly problematic due to the evolution of international law and the very nature of provisions created to protect subjective concepts such as ‘human decency’. Potential democratic illegitimacy and flaws in methodology are valid criticisms – however, the former should have less of an impact on the discussion at hand, due to courts’ frequent (and necessary) use of other extrajudicial sources. Furthermore, both issues can be overcome through a more principled codification of when and how international rules are most useful – this can be achieved primarily through building some level of deference to the executive, as well as undertaking more in-depth comparative legal methodology in examining the constitutional laws of foreign states.

ARE MIMES NOT PANTOMIMES? A CRITICAL ASSESSMENT OF THE PROTECTION OF TELEVISION FORMATS UNDER UK COPYRIGHT LAW?

Paulo Fernando Pinheiro Machado

Introduction

In Classical Antiquity those not protected under human law were under the direct jurisdiction of the gods, acquiring thus a quasi divine status. That was the case of foreigners, diplomats and orphans. Wronging them was nothing less than an act of sacrilege, whose punishment were not limited by time or space. A similar situation is the one enjoyed by television formats under UK Copyright Law. After the decision of the Privy Council in the *Hughie Green* case, they became a sort of alien figure, like orphans without due care. Acts of sacrilege are almost certain.

The case generated a great amount of controversy in the UK on whether or not television formats are a species of literary or dramatic work and, therefore, could, or not, qualify for protection under the Copyright, Designs and Patents Act 1988 (CDPA 1988).³⁸⁹ Edward Bragiel³⁹⁰ touches a fundamental point when he quotes the defendant in *Tate v Fullbrook*³⁹¹ as saying that a music hall sketch is ‘a mere piece of nonsensical pantomimic buffoonery’. Indeed, television formats of such a kind as ‘Opportunity Knocks’, or ‘Top Gear’, are just that: ‘nonsensical pantomimic buffoonery’. And it is precisely because of that they are protected by the CDPA 1988.

The aim of this article is to present a critical view on the decision of the Privy Council, exploring the two points in its *ratio decidendi* for denying copyright protection to the television format of ‘Opportunity Knocks’, namely that (1) there were no writing scripts and (2) that the format of the show did not have the necessary ‘unit’ among its constituent parts to qualify for protection. The present piece will strongly argue that television formats are a kind of mime and, as such, deserve full protection under the CDPA 1988. This essay will begin by framing the concept of ‘dramatic work’ under UK Copyright Law, and then will proceed to a critical analysis of the *Hughie Green* decision, under the light of the concept of ‘mime’ in literary theory.

The Legal Concept of ‘dramatic work’ under UK Copyright Law

In the UK system the legal concept of ‘dramatic work’ is, one might say, ‘alluded to’ in a somewhat laconian way in s3(1) of the Copyright, Designs and Patents Act 1988: “dramatic work” includes a work of dance or mime’. Bently and Sherman rightly say that the statute actually

389 For a review of the history of the controversy see E. Bragiel, “Torque off Clarkson”: with the Top Gear team all geared up to go, an examination of what rights exist in formats of television shows - Part 1: copyright protection’ [2015] E.I.P.R. 37 (9) 558

390 *Ibid*

391 [1908] 1 K.B. 821

does not provide any definition at all.³⁹² It is up to case law, then, to provide the contours of the legal definition of a dramatic work in the UK.

It is beyond the scope of this essay to analyse all the elements of the legal concept that have been developed by British courts since the adoption of the CDPA in 1988, and the requisites of being (1) 'a work of action', 'with the necessary (2) unity for it to be (3) capable of being performed'.³⁹³ Those three elements were developed in the *Hughie Green* case³⁹⁴ and have generated a large amount of controversy due to its vast consequences, particularly, as will be shown below, the requisite of 'unity'. The analysis will, then, proceed to a general outline of the *Hughie Green* case and its legal consequences.

The Hughie Green case

The *Green v Broadcast Corp of New Zealand* was a paradigmatic case. Mr Green was a famous television personality in the UK and the author and host of the programme 'Opportunity Knocks', a talent contest presented under a somewhat structured format, with catchphrases, introductions and others accessories. The programme was distinct enough to have been broadcast during 22 years in the UK (1956-1978). It happens that, between 1975-1978, a very similar programme, under the very same name, was aired in New Zealand. Mr Green sued in that country for passing off and infringement of copyright and the final decision was taken by the Privy Council in 1989.

The Privy Council held by a majority to dismiss Mr Green's appeal, on the basis that 1) his evidence of having wrote scripts for the programme was scanty; and that 2) the format of a television show lacked the necessary unity to qualify as a 'dramatic work'.³⁹⁵

The only precedent referred to by the Privy Council was *Tate v. Fullbrook*,³⁹⁶ from 1908, in which the Court of Appeal held that, under the Dramatic Copyright Act 1833 and the Copyright Act 1842, in order to qualify for protection the acts of a dramatic work must be capable of reducing into writing and publishing and no copyright subsist in the format of the pieces.

The following passages will present a critical view of the decision held by the Privy Council, in particular in which relates to 1) the amount and nature of the evidence demanded of the plaintiff; and 2) the requisite of 'unity' of a dramatic work to qualify for protection.

³⁹² L. Bently and B. Sherman, *Intellectual Property Law*. (4th edn OUP Oxford 2014) 69

³⁹³ *ibid* 70

³⁹⁴ *UK: Green v. Broadcasting Corp. of New Zealand* [1989] *RPC* 469 (CANZ), 477. On appeal: [1989] 2 *ALL ER* 1056 (Privy Council)

³⁹⁵ *ibid*

³⁹⁶ [1908] 1 K.B. 821

Privy Council's Requisite 1: Written Scripts

The Privy Council held that 'the evidence as to the nature of the scripts and what their text contained was exiguous in the extreme, and accordingly, in the absence of precise evidence as to what the scripts contained the Court of Appeal had been correct to conclude that they were not the subject of copyright'.³⁹⁷ Ongley J went even further to conclude that 'there was really no evidence that any part of the show was reduced to a written text which could properly be called a script ...'.³⁹⁸

It seems indeed that Mr Green did not write a formal script for the programme. Nor could this be expected of him in his particular case, since he was both the author and the presenter of his show. It would make little sense to write a script only to himself, unless he needed to do it in order to produce evidence *a priori* in case he needed to litigate for copyright protection in the future. That might sound strange, but the decision of the Privy Council seems to suggest that such a defensive measure should be taken by authors of television shows, in spite of that not being the custom in trade, of increasing its costs and operating as disincentive to creativity.

Moreover, the exigence of reducing the programme format in a script in writing seems to be very draconian indeed. Under CDPA 1988 s.3 original dramatic work needs to be fixed to qualify for protection. In this particular, s.3(2) holds that 'copyright does not subsist in a dramatic work unless and until it is recorded in writing or otherwise'. It is clear that this 'otherwise' must include 22 years of video recordings, which was the amount of time that Mr Green's show was broadcast in England. This point is indeed confirmed by Halsbury's commentaries on the statute in question:

There is copyright in original dramatic works, and such copyright subsists not only in the actual words of the work but in the dramatic incidents created, so that, if these are taken, there may be an infringement although no words are actually copied. There cannot be copyright in mere scenic effects or stage situations which are not reduced into some permanent form.³⁹⁹

It is perfectly clear that the video recordings of the programme constitute a reduction into a permanent form, not being necessary for Mr Green to produce a detailed reduction in writing of the scrip of his show. In addition to that, having presented the show for more than 20 years under the same format and style should be evidence enough of the recognition by the public of the distinctiveness and ontological substance of it as a dramatic work, that continues to attract attention even more than 35 years after its end, a proof of which is the enormous amount of memorabilia of 'Opportunity Knocks' and of Mr Green himself that can be accessed, for instance, on YouTube.

³⁹⁷ *UK: Green v Broadcasting Corp of New Zealand* - [1989] 2 All ER 1056

³⁹⁸ *ibid*

³⁹⁹ *Halsbury's Laws of England*, COPYRIGHT 23 (5th), 672

It seems, in short, that the Privy Council was somewhat draconian in his treatment of the evidence presented by the plaintiff as to his claim of format copyright. A more balanced assessment, in accordance with the letter and spirit of the statute, would have been welcomed.

Privy Council's Requisite 2: 'Unity'

The core of the decision in the *Hughie Green* case referred to requisite of 'unity', according to which a dramatic work in order to qualify for copyright protection need to present certainty of 'unity', in order to be able of being performed. The Privy Council on this particular held: 'a dramatic work had to have sufficient unity to be capable of performance, and the features claimed as constituting the "format" of a television show, being unrelated to each other except as accessories to be used in the presentation of some other dramatic or musical performance, lacked that essential characteristic'.⁴⁰⁰

The first question that comes to one's mind is what precisely is 'unity' in a dramatic work? Does the Privy Council understand that as 'thematic unity', according to which all the parts of the work should refer to the same theme or subject? Or the Privy Council understands unity in a more restrictive sense, that all dramatic works should have its parts organised and connected in a clear logical structure as the paragraphs of a single discourse? One cannot really say. The Privy Council's decision, therefore, lacks in certainty, the same very element that, ironically, it appointed as faulting in the appellant's case.⁴⁰¹

Whichever the intentions of the Privy Council in its consideration of what constitutes a dramatic work, the requisite of 'unity' is quite a problematic element both in the theory and practice of drama along history. The drafters of the CDPA 1988, however, seemed impressively aware of that problematic when they stated in s.3(1) that a dramatic work also includes 'mime'. The analysis now will proceed into the field of literary theory, in order to search for an understanding of what constitutes a work of mime.

Literary Dramas, Popular Entertainment (mime) and Modernism

Since its origins in the ancient Megaric improvisations, drama has evolved in the West in two parallel developments. On one hand there surged a tradition of academic literary dramas, whose best known examples go from Homer to the masterpieces of fifth-century BC Athens, such as Euripides and Aristophanes. On the other hand there was also a parallel tradition of popular theatre and entertainment, whose development constitutes an impressive continuous through the Middle Ages to the seventeenth century.⁴⁰² The best examples of the latter are the *Dorian mimes*,

⁴⁰⁰ *UK: Green v Broadcasting Corp of New Zealand* - [1989] 2 All ER 1056

⁴⁰¹ Edward Bragiel states that the Privy Council's decision is also 'exiguous' – precisely the other fault appointed in Mr Green's stance. See E. Bragiel, "'Torque off Clarkson": with the Top Gear team all geared up to go, an examination of what rights exist in formats of television shows - Part 1: copyright protection' [2015] E.I.P.R. 37 (9) 558

⁴⁰² R.W. Vince, *Ancient and Medieval Theatre: A Historiographical Handbook* (Greenwood Press Connecticut 1984) 66

the *fabulla atellana* and the *commedia dell'arte*. Needless to say, both traditions are manifestations of a broader socioeconomic cleavage.

The first theoretical approach into what makes a masterpiece of literary drama was conducted by Aristotle in his 'Poetics'. Aristotle was not concerned with popular entertainment in his analysis, but rather in defining and identifying the elements of the best literary dramas, of what constitutes an academic masterpiece, which for him is identified mainly with the epic genre and, in a second position, with tragedy. Even to this day, Aristotle is the pinnacle of the classical-academic value judgements on literary works. It is worth quoting point 8 of the 'Poetics', which seems to be the ideological framework behind the Privy Council's decision:

The unity of a plot does not consist, as some suppose, in its having one man as its subject. An infinity of things befalls that one man, some of which it is impossible to reduce to unity; and in like manner there are many actions of one man which cannot be made to form one action. One sees, therefore, the mistake of all the poets who have written a *Heracleid*, a *Theseid*, or similar poems; they suppose that, because Heracles was one man, the story also of Heracles must be one story. Homer, however, evidently understood this point quite well, whether by art or instinct, just in the same way as he excels the rest in every other respect. In writing an *Odyssey*, he did not make the poem cover all that ever befell his hero - it befell him, for instance, to get wounded on Parnassus and also to feign madness at the time of the call to arms, but the two incidents had no necessary or probable connexion with one another - instead of doing that, he took as the subject of the *Odyssey* and also of the *Iliad*, an action with a unity of the kind we are describing. The truth is that, just as in the other imitative arts one imitation is always of one thing, so in poetry the story, as an imitation of action, must represent one action, a complete whole, with its several incidents so closely connected that the transposition or withdrawal of any one of them will disjoin and dislocate the whole. For that which makes no perceptible difference by its presence or absence is no real part of the whole.⁴⁰³

It is clear that even by the most conservative interpretation of Aristotle one could argue against the Privy Council's understanding and even bringing up of the requisite of 'unity' in the *Hughie Green* case in particular and in its applications for television formats in general. The first objection is that the Aristotelian requisite of 'unity' not only is somewhat broad in scope - as it includes all the myriad of events that took place in the *Odyssey*, for instance - but is in itself a value judgment on what constitutes the best literary dramas, a masterpiece in short. One cannot expect the author of a popular entertainment, such as a TV show, to create not only a masterpiece, but also a masterpiece in all its minimal aspects of formation (e.g. scripts reduced in writing). That sort of evaluation might be better suited for the Royal Academy. But most important than that is the fact that the Privy Council apparently ignores what a work of 'mime' is and, consequently, disregard a whole tradition of popular art.

⁴⁰³ Aristotle, 'Poetics', in Jonathan Barnes (ed), *The Complete Works of Aristotle*, vol 2 (Princeton University Press Princeton 1995) 2322

Since its origins in Ancient Greece, mime has been constituted mainly by sketches of daily life, with its intrinsic farcical - and at times even obscene - nature. Hence its immense popularity.⁴⁰⁴ Another important feature of the mimes was their use of the popular Doric language.⁴⁰⁵

It is interesting to analyse in brief the structure of the Greek literary theatre. The plays took place in festivals in fixed periods of the year, such as the *Lenaiia* in January and the *Dionysia* in March. The plays were staged in a contest, organised in two main competitions, 'tragedy' and 'comedy'. The latter was closer to the popular entertainment of the mimes, that could take place along the year and also in the provinces ('demes'). The plays had a somewhat fixed structure, in 6 parts, that although the play had a plot, in those 6 parts it was common for the author to introduce elements that had no connection with it. Nor they clearly followed a logic pattern that could represent a 'unity' in the sense that the Privy Council understood it should in the *Hughie Green* case.

The main author of the so-called 'Old Comedy', Aristophanes, was famous for 'being prepared to sacrifice consistency of e.g. character, logic, time, place to the needs of the moment and the episode. Fantasy was an important ingredient of his art.'⁴⁰⁶ This element of liberty and fantasy is crucial, in the sense that it is ever present in works of mime and in the eventually fused mime and literary dramas of our own time and age.

During the Middle Ages the mime tradition was best represented by the *commedia dell'arte*, in which a fixed set of characters improvised a series of sketches for popular delight, a format that lasted unchanged for more than a thousand years. The stages, in fact, had no unity, other than a simple plot, known beforehand to the audience, since the characters were fixed and represented some sort of human archetypes. The fixed plot, in fact, was nothing more than an excuse to improvise a series of sketches that the troupe felt would please a particular audience. If the reader would like to have a sense of how a play of *commedia dell'arte* was staged in the Middle Ages, this essay would strongly recommend the film 'The Seventh Seal', by Ingmar Bergman, which evolves around the life of a troupe in those times.

But what is most important to stress here is the fact that in the late nineteenth century a cultural breakthrough literally took the stage and fused the popular entertainment and the literary academism into the Modernist movement. It is worth mentioning that after Freud and the *avant-guards* of the early twentieth century, whose most conspicuous one was the surrealist movement, the unity of plot, time, space and character in dramas was completely burst out. And the epitome of this development was Beckett and the 'Theatre of the Absurd'. For the purposes of this essay

⁴⁰⁴ M.C. Howatson (ed), *Oxford Companion to Classical Literature* (3rd edn OUP Oxford 2011) 'mime'

⁴⁰⁵ *ibid*

⁴⁰⁶ JACT, *The World of Athens An Introduction to Classical Athenian Culture* (2nd edn Cambridge 2014) 323

it is not necessary to delve into the details of the 'Theatre of the Absurd', but it is surely worthy to quote Beckett himself on his stance on the cleavage in question:

The classical artist assumes omniscience and omnipotence. He raised himself artificially out of Time in order to give relief to his chronology and causality to his development. Proust's chronology is extremely difficult to follow, the succession of events spasmodic, and his characters and themes, although they seem to obey an almost insane inward necessity, are presented and developed with a fine Doistoevskian contempt for the vulgarity of a plausible concatenation.⁴⁰⁷

The French theorist Étienne Decroux, in this sense, states that the main element in mime is that it is an actor-centred theatre in opposition to the 'logocentric' (text-focused) literary academic theatre.⁴⁰⁸ The crucial point here is that mime is a free play, without necessarily representing any particular structure or unity, being more a product of spontaneous improvisation. According to the Oxford Companion to Theatre and Performance: 'Decroux's assertion set the stage for a host of diverse and sometimes contradictory contemporary performance activities. Decroux suggested that the play be rehearsed before it is written, that is, the actors should determine the spoken text and physical text simultaneously, not begin with pre-existing script to interpret'.⁴⁰⁹

A work of mime, therefore, from its origins, is a broad concept of popular entertainment, which has no fixed form and is spontaneous in nature. If mime - or for that sort, any kind of popular entertainment - has a unity it is a unity of purpose and not of content. It is clear, therefore, that a television show, such as the talent context of Mr Green or the motor magazine of Mr Clarkson, is indeed a work of mime, in the sense that it is a broad arrange of sketches that more or less reproduce the daily life, preoccupations and expectations of the popular man and woman, solely devised and performed for his or her entertainment. 'A mere piece of nonsensical pantomimic buffoonery', in short.

The decision of the Privy Council in the *Hughie Green* case, as a consequence, seems to have been quite restrictive, in a way of only recognising as worthy of copyright protection the more academic literary dramas, in spite of the fact that the statute also enshrines 'mime' as dignified for protection. The decision seems not only to ignore the proper concept of mime and popular entertainment in general but also the very history of drama that, in the twentieth century, abandoned all pretensions of unity. To require 'unity' in a dramatic work, whatever its colours, at the very end of the twentieth century, is indeed to be out of time.

⁴⁰⁷ in H. Bloom, *The Western Canon The Books and School of the Ages* (Riverhead Books New York 1994) 463

⁴⁰⁸ T. Leabhart, *Oxford Companion to Theatre and Performance*, D. Kennedy (ed) (OUP Oxford 2010) 'mime'

⁴⁰⁹ *ibid*

Conclusions

The Privy Council's statutory interpretation in the *Hughie Green* case ended up throwing a whole industry of television formats into a legal uncertain no-man's land, without any copyright protection. This essay demonstrated how the concept of 'mime' as dramatic works were ignored by the Privy Council in its decision, by which it narrowed the statutory requisites for dramatic works to qualify for protection into two main jurisprudential constructions: 1) reduction in writing of the scripts and 2) 'unity' of structure.

This essay showed that both conditions are alien to the concept of 'dramatic works' under literary theory, in particular after the Modernist movement in the twentieth century, that abolished all attempts at unity of content and/or structure. The analysis established, furthermore, that television formats are a kind of 'mime' and as such are entitled to full protection under the CDPA 1988. It is hoped that the present article can provide a useful contribution to the debate on the evolution of Copyright Law in the UK, helping to overturn the Privy Council's decision on the *Hughie Green* case, and opening, thus, the way for protection of television formats under UK Copyright Law.

THE REBIRTH OF THE COMMON LAW: COMMON LAW CONSTITUTIONAL RIGHTS AND LEGALITY

Philippe Kuhn

Introduction

In the Human Rights Act (HRA) era, human rights protection in the United Kingdom (UK) has primarily turned on interpreting the ambit of different rights enshrined in the European Convention on Human Rights (ECHR or Convention) 1950. Prior to this, there had only been fledgling attempts at recognising positive human rights at common law.

From 2013 onwards, the UK Supreme Court, beginning with the decision in *Osborn*,⁴¹⁰ seems to have embarked upon a concerted effort to revive what will be called the “common law approach” to human rights protection. In essence, that approach entails the UK courts steadily recognising different rights being protected at common law, independent of any domestic legislative enactment or international law source, and giving effect to those rights through recourse to the presumption applicable to the construction of legislation known as the ‘principle of legality’.

The aims of this article are manifold. First, the pre-HRA position and the dominant approach during the HRA era will be considered to show that *Osborn* was a bold decision. Secondly, the extent of and the motivations behind the revival of such common law rights and invocations of the principle of legality will be examined in considerable detail, so as to be in a position to evaluate the likely objections to the common law approach as well as to make a positive case for it. Thirdly, the common law approach must be viewed in the context of parliamentary sovereignty remaining the pre-eminent doctrine of the UK constitution. Consequently, it has to be analysed whether this approach is faithful to that doctrine, whilst robustly protecting human rights, as the HRA approach has arguably done. Lastly, the implications of the revival of the common law approach in the context of the UK’s uncertain relationship with Europe, the potential repeal of the HRA, and the UK’s role in the Commonwealth warrant examination.

The efficacy of the common law approach ultimately hinges upon the strength of the principle of legality, which is seemingly weaker than the interpretative obligation in s.3 HRA, such that challenges to objectionable delegated legislation or executive policies, rather than to Acts of Parliament, are more likely. It will be shown that the common law approach is to be praised as a necessary exercise of judicial activism that may also be beneficial in the Commonwealth, but that continued parliamentary sovereignty remains a constraint.

Infancy of common law constitutional rights and the principle of legality

In the pre-HRA era, there were three noteworthy decisions on common law constitutional rights and the principle of legality. Before considering each in turn, it must be said that these were solitary high-level observations and that the political branch was probably right to view the

⁴¹⁰ *R (Osborn) v Parole Board* [2013] UKSC 61; [2014] AC 1115.

common law approach as insufficiently developed at the time to be a serious alternative to the enactment of the HRA 1998. The HRA has undoubtedly transformed the manner in which human rights are protected in this jurisdiction and widened the range of rights through which legislation and executive decisions are challengeable.⁴¹¹

Laws J in *Witham*⁴¹² was the first judge to properly examine the mechanism of positive rights protection at common law. The case concerned the increase of court fees by the Lord Chancellor in the purported exercise of his powers under s.130 of the Supreme Court Act 1981 through a 1996 Order. Laws J treated the matter squarely as one to be resolved through the application of the common law right to access the courts and held that the absence of authorisation for derogation from that right meant that the Order was *ultra vires*.

Illuminating observations on how one can intelligibly speak of common law constitutional rights in a system characterised by the supremacy of Parliament were made. His Lordship began by outlining the conceptual problem that the British constitution does not formally recognise a form of law higher than Acts of Parliament,⁴¹³ but then helpfully suggested that constitutional rights are nonetheless discernible by looking at the ‘protection which the law affords [them]’.⁴¹⁴ Specifically, such rights ‘cannot be abrogated by the state save by specific provision in an Act of Parliament, or by regulations whose vires in main legislation specifically confers the power to abrogate.’⁴¹⁵ Evidently, Laws J was relying on the principle of legality subsequently explained in *Pierson*⁴¹⁶ and *Simms*.⁴¹⁷

Laws J’s bold comment that the existence of common law constitutional rights ‘would not be the consequence of the democratic political process but would be logically prior to it’ deserves consideration.⁴¹⁸ The claim seems to be that such rights are already embedded in the fabric of British society, though they are almost of necessity only formally recognised *ex post* by the courts. Thus, so the reasoning goes, Parliament can be taken to legislate in awareness of them and so be presumptively inhibited. Similar sentiments were voiced by Lord Cooke in the HRA era case of *Daly*.⁴¹⁹ Put differently, these rights are intrinsic to the legal system, rather than the gift of Parliament, so they cannot be lightly departed from. Provided one has a high standard of fundamentality, it is hard to fault this logic.

Our attention turns next to the discussion of the principle of legality in the House of Lords decisions of *Pierson* and *Simms*. In *Pierson*, the Home Secretary’s decision to set a higher tariff

⁴¹¹ See esp. *Ghaidan v Godin-Mendoza* [2004] UKHL 30; [2004] 2 AC 557 and *Secretary of State for the Home Department v AF, AN and AE (No. 3)* [2009] UKHL 28; [2010] 2 AC 269.

⁴¹² *R v Lord Chancellor, ex parte Witham* [1998] QB 575 (DC).

⁴¹³ *Ibid*, 581 (Laws J).

⁴¹⁴ *Ibid*.

⁴¹⁵ *Ibid*.

⁴¹⁶ *R v Secretary of State for the Home Department, ex parte Pierson* [1998] AC 539 (HL).

⁴¹⁷ *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115 (HL).

⁴¹⁸ *Witham* (n 3), 581 (Laws J).

⁴¹⁹ *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 (HL), [30] (Lord Cooke).

than recommended for a murderer was challenged. The majority of their Lordships (Lords Browne-Wilkinson and Lloyd dissenting) held that the Home Secretary's decision was *ultra vires* s.35 of the Criminal Justice Act 1991.

A number of points must be made about *Pierson*. Lord Browne-Wilkinson generally approved Laws J's judgment in *Witham* and emphasised that it is now an accepted principle of statutory interpretation that the courts will not readily accept that Parliament intended to confer on the executive very broad powers detrimental to 'the legal rights of the citizens or the basic principles' of UK law.⁴²⁰ In doing so, the principle of legality reasoning implicit in *Witham* was brought to the fore. Lord Steyn's additional sentiments on the principle of legality shed light on the importance of having a presumption of this nature. His Lordship famously observed:

*'Parliament legislates for a European liberal democracy founded on the principles and traditions of the common law and the courts may approach legislation on this initial assumption. But this assumption... can be displaced by a clear and specific provision to the contrary.'*⁴²¹

First, Lord Steyn's remarks indicate a democratic dimension to the principle of legality, namely that it is part of the role of the courts in a well-functioning democracy to caution against legislative interpretations that ascribe intentions to Parliament that flout respect for foundational principles of our legal order. Secondly, his Lordship sets the relatively high threshold of 'clear and specific provision' to displace the principle of legality.

Turning to *Simms*, the applicant prisoners challenged the Home Secretary's policy of blanket exclusion of all professional visits by journalists on the ground that this impaired their common law rights to access the courts and free speech. The House of Lords unanimously held that the Home Secretary's policy was unlawful, with Lords Steyn, Hoffmann and Browne-Wilkinson doing so on common law grounds.⁴²²

First, recognition at House of Lords level that free speech is a common law constitutional right is significant.⁴²³ This is because free speech is undeniably one of the cornerstones of any meaningful human rights regime. Secondly, their Lordships approved the view that common law free speech protection extended at least as far as Art.10 ECHR,⁴²⁴ dispelling the myth that the common law right applies only in special cases.⁴²⁵ Finally, Lords Steyn and Hoffmann clearly endorsed the emerging common law approach and helpfully explained the principle of legality.

⁴²⁰ *Pierson* (n 7), 575 (Lord Browne-Wilkinson).

⁴²¹ *Ibid*, 587 (Lord Steyn).

⁴²² *Simms* (n 8), 127 (Lord Steyn), 132 (Lord Hoffmann),.

⁴²³ *Ibid*, 120 (Lord Steyn).

⁴²⁴ *Ibid*, 126 (Lord Steyn) (citing *Attorney-General v Guardian Newspapers Ltd (No. 2)* [1990] 1 AC 109, 283-284 (Lord Goff)).

⁴²⁵ *Ibid*, 127 (Lord Steyn).

Lord Steyn confirmed that the principle of legality did not depend on ambiguity in the statutory language, underscoring its wide applicability.⁴²⁶ Of more lasting importance, however, was Lord Hoffmann's explanation of the principle of legality:

*'...the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.'*⁴²⁷

Important points emerge from this concise yet penetrating discussion. First, Lord Hoffmann makes plain the political dimension of the principle of legality, this being the courts' way of inhibiting Parliament, without being an absolute *legal* limit on its power. Moreover, the closing comments on British 'principles of constitutionality' are thought-provoking. On one view, this could be taken as an indication of the strength of the presumption. On another view, it could be treated more cautiously as a proud, aspirational statement.

In sum, *Witham* offered an intellectual foundation for the concept of common law constitutional rights, whilst *Pierson* and *Simms* explicated the principle of legality integral to the common law approach. That said, one should not have illusions about the effect of these decisions, for the catalogue of recognised common law constitutional rights was narrow at the time and the common law approach was not put to the ultimate test of directly challenging an Act of Parliament.

The Human Rights Act era

After the entry into force of the HRA in 2000, the common law approach was largely neglected for over a decade. This section will briefly consider the rare cases in the pre-*Osborn* HRA era in which the common law played a material role.

The best example, in my submission, is the case of *Daly* concerning legal professional privilege. The central issue was whether the examination of prisoners' legally privileged correspondence in their absence by prison officers in the course of standard cell searches unlawfully violated their right to privileged legal communications. Their Lordships unanimously

⁴²⁶ *Ibid*, 130 (Lord Steyn); *Pierson* (n 7), 587 (Lord Steyn).

⁴²⁷ *Simms* (n 8), 131 (Lord Hoffmann).

ruled that the blanket policy in the Security Manual was *ultra vires* s.47(1) of the Prison Act 1952.⁴²⁸

Daly is of interest not only because Lord Bingham, who gave the leading opinion, decided the case squarely on common law grounds, but also because his Lordship formulated the principle of legality as only permitting rights to be displaced by ‘clear and express words’⁴²⁹ in legislation and demonstrated the amenability of the common law to a balancing of interests akin to that seen with the qualified Convention rights.⁴³⁰

Another pre-*Osborn* decision that made extensive reference to the common law is *A (No.2)*.⁴³¹ That case raised the important question of whether the Special Immigration Appeals Commission (SIAC) could admit evidence of a third party obtained through his torture in a foreign state. The House of Lords unanimously held that the language of rule 44(3) of the SIAC (Procedure) Rules 2003 was not sufficiently clear to override the exclusionary rule against torture evidence, with Lords Bingham and Hoffmann expressly invoking the principle of legality.⁴³²

Two relevant points are borne out by their Lordships’ opinions. First, it is arguable that the strong reliance on the common law is attributable to the long history of the prohibition of torture at common law.⁴³³ This seemingly reflects a tendency in the early case law of developing the common law approach in respect of principles particularly dear to the British legal system.⁴³⁴ Secondly, the international law position on torture was also given considerable weight, so it cannot be said that the common law alone was dispositive.⁴³⁵

Revival of common law constitutional rights

The revival of the common law approach in the UK is most evident in the cases of *Osborn*,⁴³⁶ *Kennedy*,⁴³⁷ and *A v BBC*.⁴³⁸ The reasoning in those cases will be outlined, before evaluating the motivations behind and the strength of the common law trend.

Starting with *Osborn*, the Supreme Court had to decide whether the Parole Board’s criteria for the grant of an oral hearing to life or long sentence prisoners for the purpose of considering release on licence were permissible. Their Lordships unanimously held that an oral hearing should be granted whenever the common law standard of fairness required this.⁴³⁹

⁴²⁸ *Daly* (n 10), [19], [21] (Lord Bingham).

⁴²⁹ *Ibid*, [5] (Lord Bingham).

⁴³⁰ *Ibid*, [5], [19], [21] (Lord Bingham).

⁴³¹ *A v Secretary of State for the Home Department (No.2)* [2005] UKHL 71; [2006] 2 AC 221.

⁴³² *Ibid*, [51] (Lord Bingham), [96] (Lord Hoffmann).

⁴³³ *Ibid*, [11] (Lord Bingham), [83] (Lord Hoffmann).

⁴³⁴ *Ibid*, [11] (Lord Bingham).

⁴³⁵ *Ibid*, [28]-[45] (Lord Bingham).

⁴³⁶ n 1.

⁴³⁷ *Kennedy v Charity Commission* [2014] UKSC 20; [2015] AC 455.

⁴³⁸ *A v British Broadcasting Corporation* [2014] UKSC 25; [2015] AC 588.

⁴³⁹ *Osborn* (n 1), [64] (Lord Reed).

A number of observations in Lord Reed JSC's leading judgment deserve analysis. First, his Lordship suggested that it follows from the 'very high level of generality' in which the Convention rights are expressed that recourse to a 'substantial body of much more specific domestic law' is necessary.⁴⁴⁰ It is undeniable that the Convention is imprecisely framed, but Lord Reed's analysis overlooks the substantial body of ECHR jurisprudence on the individual Convention rights. Secondly, his Lordship goes as far as contending that the hitherto standard approach of framing human rights issues by reference to the Convention rights and the ECHR jurisprudence amounts to a methodological 'error'.⁴⁴¹ With respect, it is somewhat humorous to describe the dominant methodological approach as such. Reading between the lines, the point Lord Reed actually seeks to make is that it is preferable to first approach cases under the common law. Why this is so was not sufficiently explained in *Osborn* and later cases. A speculative explanation will be offered after having considered *Kennedy* and *A v BBC*. Lastly, his Lordship only briefly considered the relevant ECHR authorities on Art.5.4 and then concluded that a Convention right breach follows from the breach of the common law right, highlighting the methodological shift.⁴⁴²

Next, the Supreme Court in *Kennedy* pressed ahead with the shift to the common law approach. That case concerned a Freedom of Information Act (FOIA) 2000 request for disclosure of information relating to three Charity Commission statutory inquiries. The request had been refused by relying on the absolute exemption under s.32(2) FOIA 2000. In challenging that decision, the applicant argued that it was 'possible' to use s.3 HRA so as to give effect to an alleged right to information under Art.10 ECHR.

Lord Mance JSC, leading the majority (Lords Carnwath and Wilson JJSC dissenting), held that one should start with construing s.32(2) on ordinary common law principles and concluded that a construction that preserved an absolute exemption under FOIA after inquiries had finished was more desirable than having none.⁴⁴³ His Lordship held, however, that s.78 FOIA 2000 establishes that FOIA is not 'an exhaustive scheme' of disclosure.⁴⁴⁴ Accordingly, Lord Mance held that one should turn to the Charities Act 1993 to decide on disclosure, rendering a s.3 HRA reinterpretation of s.32(2) otiose.⁴⁴⁵

Some points of wider significance flow from *Kennedy*. First, Lord Mance stressed that 'the Convention rights represent a threshold protection' only, continuing the explicit endorsement of primary resort to the common law seen in *Osborn*.⁴⁴⁶ Further, the majority agreed that a common law right or principle was at play, with Lord Mance speaking of a 'common law presumption in favour of openness', whereas Lord Toulson invoked an extended 'open justice principle'.⁴⁴⁷

⁴⁴⁰ Ibid, [55] (Lord Reed).

⁴⁴¹ Ibid, [63] (Lord Reed).

⁴⁴² Ibid, [113] (Lord Reed).

⁴⁴³ *Kennedy* (n 28), [29] (Lord Mance).

⁴⁴⁴ Ibid, [6], [34] (Lord Mance).

⁴⁴⁵ Ibid, [35] (Lord Mance).

⁴⁴⁶ Ibid, [46] (Lord Mance); see too [133] (Lord Toulson).

⁴⁴⁷ Ibid, [47]-[48] (Lord Mance), [110] (Lord Toulson).

The third case that solidified the trend in favour of the common law approach was *A v BBC*. Their Lordships had to decide whether an anonymity order to protect the applicant's identity was lawful. The order had been originally made because of the risk of death or ill-treatment upon the applicant's return to his home country as a known sex offender.

The Supreme Court unanimously held that '[i]t is a general principle of our constitutional law that justice is administered by the courts in public, and is therefore open to public scrutiny.'⁴⁴⁸ This amounts to approval of the common law open justice principle previously invoked by Toulson LJ in *Guardian News and Media*.⁴⁴⁹ Their Lordships held, however, that the interests of the media groups as social watchdogs had to be carefully balanced against those of the applicant.⁴⁵⁰ The majority held that open proceedings 'would have subverted the basis of the tribunal's decision to authorise his deportation',⁴⁵¹ but that the open justice principle requires that any media organisation may 'seek the recall of the order'.⁴⁵²

In general terms, *A v BBC* is significant in cementing the *Osborn* trend, with Lord Reed JSC emphasising that 'the starting point in this context is the domestic principle of open justice'.⁴⁵³ That said, the methodological shift remained under-explained. It is submitted that the most plausible explanation is likely to be found in the political context. At the time of the *Osborn* decision, a majority of the government-appointed Commission on a Bill of Rights had expressed a preference for repealing the HRA and replacing it with a British bill of rights.⁴⁵⁴ Since then the Conservatives have made it clear that they seek to follow through with the HRA repeal agenda, with those announcements coinciding with *Kennedy* and *A v BBC*.⁴⁵⁵

It is suggested that there are two main reasons for the revival of the common law approach. First, a more extensive catalogue of common law constitutional rights and fully tested common law principle of legality are bound to provide the courts with the tools required to continue protecting human rights robustly, notwithstanding the precise form of any British bill of rights. Secondly, the common law approach, as an ostensibly domestic one, is less vulnerable to attacks by politicians drawing on growing scepticism over Britain's place in Europe than the HRA approach intimately connected to the Convention and Strasbourg.

There are other possible explanations including that the common law trend is a mere 'reflection of distinctive judicial philosophies' of judges like Lords Reed, Mance and Toulson or that it is

⁴⁴⁸ *A v BBC* (n 29), [23] (Lord Reed).

⁴⁴⁹ *R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court* [2013] QB 618 (CA).

⁴⁵⁰ *A v BBC* (n 29), [49] (Lord Reed).

⁴⁵¹ *Ibid*, [73]-[74] (Lord Reed).

⁴⁵² *Ibid*, [67] (Lord Reed).

⁴⁵³ *Ibid*, [57] (Lord Reed).

⁴⁵⁴ See Ministry of Justice, *Commission on a Bill of Rights, A UK Bill of Rights? The Choice Before Us* (London 2012).

⁴⁵⁵ See Lord Neuberger, 'The role of judges in human rights jurisprudence: a comparison of the Australian and UK experience' Supreme Court of Victoria Conference 2014, 8 August 2014, [11].

an attempt to resurrect the ‘proud traditions of UK constitutionalism’.⁴⁵⁶ Rather than speculate further, the strength of the common law trend will be commented upon instead. Provided a clear trend in favour of the common law approach exists, its longevity may be assumed, so more attention should be devoted to analysing its merits and demerits.

One sceptic of the strength of the common law trend is Richard Clayton QC, who admits that the *Osborn* line of cases proves that the HRA is not exhaustive,⁴⁵⁷ but then submits that these were ‘very unusual and unrepresentative common law rights cases’.⁴⁵⁸ Having regard to the Supreme Court case of *Beghal v DPP*,⁴⁵⁹ post-dating Clayton’s remarks, it is accepted that the common law trend is not unequivocal, but submitted that Clayton understates its strength.

In *Beghal*, the appellant was questioned at an airport under Schedule 7 to the Terrorism Act 2000, which imposes a duty to answer questions asked by authorised officers. She refused to answer, resulting in a criminal conviction under Sch.7 para 18. The appellant questioned the compatibility of Sch.7 with Arts.8, 5 and 6 ECHR, as well as the common law privilege against self-incrimination, but the majority (Lord Kerr dissenting) rejected her appeal.

The methodological approach taken in *Beghal* is striking. To be specific, none of their Lordships considered the Art.8 *Gillan*-type⁴⁶⁰ issue and the Art.5 detention issue arising from Sch.7 through the lens of the common law. This anomaly would seem to lend support to Clayton’s claim. However, two reasons for the Supreme Court’s unexplained refusal to invoke the common law come to mind. First, given that the most contentious issue was respect for the right to privacy, the court may have been reluctant to articulate common law principles in an area in which English law has long lagged behind.⁴⁶¹ Secondly, the court may have found it convenient to deal with the main issues on appeal through the ECHR prism due to the factual similarity to the ECtHR decision in *Gillan*.⁴⁶² In any event, the renewed strength of the common law trend is borne out by Lord Reed’s powerful language in *Osborn*,⁴⁶³ further references to the common law in *Moochan v Lord Advocate*,⁴⁶⁴ and the fact that in *Beghal* itself considerable attention was devoted to the common law privilege against self-incrimination.⁴⁶⁵

⁴⁵⁶ Lady Hale, ‘UK Constitutionalism on the March?’ Administrative Law Bar Association Conference 2014 Keynote Address, 12 July 2014, 15.

⁴⁵⁷ Richard Clayton, ‘The empire strikes back: common law rights and the Human Rights Act’ [2015] PL 3, 3.

⁴⁵⁸ *Ibid*, 11.

⁴⁵⁹ *Beghal v Director of Public Prosecutions* [2015] UKSC 49.

⁴⁶⁰ See *Gillan and Quinton v United Kingdom* (2010) 50 EHRR 1105 (ECtHR).

⁴⁶¹ Contrast *Home Office v Wainwright* [2002] QB 1334 (CA) (affirmed on appeal), denying the existence of a common law right to privacy, and *Campbell v MGN Ltd* [2004] UKHL 22; [2004] 2 AC 457 and *von Hannover v Germany* (2005) 40 EHRR 1 (ECtHR), signifying the width of Art.8 ECHR privacy protection.

⁴⁶² n 51.

⁴⁶³ *Osborn* (n 1), [63] (Lord Reed).

⁴⁶⁴ [2014] UKSC 67; [2015] AC 901, [34] (Lord Hodge), [56] (Baroness Hale).

⁴⁶⁵ *Beghal* (n 50), [60]-[69] (Lord Hughes).

Common law approach – objections

It has been demonstrated that the common law approach was underdeveloped pre-HRA and neglected prior to *Osborn* in the HRA era, and that the renewed common law trend is a strong one. The likely objections to the common law approach can now be assessed.

It is submitted that five main criticisms can be advanced. First, that the catalogue of common law constitutional rights is too incomplete and that, therefore, the common law would offer protection inferior to the HRA. Secondly, it could be said that there is insufficient explanatory case law even for the rights already clearly recognised. This is an objection going to legal certainty. Thirdly, it is arguable that excessive incrementalism by the courts is likely. This objection is similar to the incompleteness objection in that such an attitude would lead to inadequate human rights protection and, if valid, this objection would compound the difficulties flowing from incompleteness. Fourthly, concerns can be raised about undue judicial discretion given the absence of a governing text. Clayton touches on one possible consequence of this when pointing to the difficulty of ‘identification of common law rights’,⁴⁶⁶ but the deeper concern is that human rights protection becomes unprincipled or even whimsical.⁴⁶⁷ Lastly and most importantly, the principle of legality central to common law constitutional rights protection is arguably not robust enough.⁴⁶⁸

Incompleteness objection

Starting with the incompleteness objection, it is sensible to briefly enumerate clearly protected common law constitutional rights. Taking the Convention as the point of comparison, it can be said that Arts.2-6, 10 and (in part) 11 are properly protected at common law. There may be no modern authority recognising the right to life, but this right, like the prohibition of torture,⁴⁶⁹ is no doubt a cornerstone of the British legal system.⁴⁷⁰ Slavery too was described as inimical to the common law long ago.⁴⁷¹ As for Art.5 ECHR, that provision was drafted to reflect the common law’s heartfelt antagonism for arbitrary imprisonment or detention, confirmed by recent UK authorities.⁴⁷² With respect to the right to a fair trial, the common law covers largely the same ground. One has general common law procedural fairness requirements⁴⁷³ and, in addition, specific recognition of common law constitutional rights to access the courts,⁴⁷⁴ oral hearings,⁴⁷⁵ a

⁴⁶⁶ Clayton (n 48), 7-8; see too Dan Meagher, ‘The Common Law Principle of Legality in the Age of Rights’ (2011) 35(2) Melbourne University Law Review 449, 457-459.

⁴⁶⁷ Chief Justice French, ‘Common Law Constitutionalism’ Robin Cooke Lecture, 27 November 2014, 13.

⁴⁶⁸ Clayton (n 48), 9-10.

⁴⁶⁹ *A (No.2)* (n 22).

⁴⁷⁰ See Murder (Abolition of Death Penalty) Act 1965.

⁴⁷¹ See *Somerset v Stewart* (1772) 98 ER 499 (Lord Mansfield).

⁴⁷² See *A and Others v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 AC 68, [36] (Lord Bingham).

⁴⁷³ See, e.g., *Ridge v Baldwin* [1964] AC 40 (HL).

⁴⁷⁴ *Witham* (n 3) and *Simms* (n 8).

⁴⁷⁵ *Osborn* (n 1).

public hearing,⁴⁷⁶ legal advice,⁴⁷⁷ and against self-incrimination.⁴⁷⁸ Similarly, the Art.6(2) ECHR presumption of innocence permeates English criminal law. Moreover, there is ample authority to show that common law free speech protection matches Art.10 ECHR.⁴⁷⁹ Finally, the common law would seem to offer general protection of the right to freedom of assembly found in Art.11 ECHR.⁴⁸⁰

The common law lags behind most notably in its protection of privacy rights, which the Strasbourg court has vigorously defended.⁴⁸¹ Authorities like *Home Office v Wainwright*⁴⁸² baldly state that the common law recognises no general right to privacy, though the law on breach of confidence has been remodelled in the light of Art.8 ECHR.⁴⁸³ Another area in which the common law is plainly deficient is freedom of association, with the common law regarding official trade union industrial action as presumptively tortious.⁴⁸⁴ By contrast, Art.11 ECHR has been held to protect the rights to collective bargaining and to take industrial action.⁴⁸⁵ Lastly, the position of freedom of religion at common law is ambiguous. In the leading case of *Begum*,⁴⁸⁶ no mention was made of the possibility of a common law freedom of religion challenge, whilst disagreement with Strasbourg on religious issues more recently would suggest weaker common law protection.⁴⁸⁷

In the light of the above, the incompleteness objection has considerable force, but it is not fatal. For one, it is conceivable, though practically difficult, that the British courts would reconsider their stance on privacy and association rights if the HRA were repealed. Moreover, advantages unique to the common law approach compensate for this.

Limited explanatory case law objection

Moving on to consider the limited explanatory case law objection, the crux of this criticism is that having only one or two high-level domestic decisions per common law right leads to insufficient guidance for litigants and the lower courts. Lord Carnwath in *Kennedy* seemed to have this in mind when observing that Supreme Court recognition of the open justice principle applying to

⁴⁷⁶ *A v BBC* (n 29).

⁴⁷⁷ *Daly* (n 10), [5] (Lord Bingham).

⁴⁷⁸ *Beghal* (n 50).

⁴⁷⁹ n 15.

⁴⁸⁰ See *Austin v Commissioner of Police of the Metropolis* [2008] QB 660 (CA).

⁴⁸¹ See, e.g., *Dudgeon v United Kingdom* (1981) 4 EHRR 149 (ECtHR) and *von Hannover v Germany* (2005) 40 EHRR 1 (ECtHR).

⁴⁸² [2002] QB 1334 (CA), [40] (Lord Woolf CJ) (affirmed on appeal).

⁴⁸³ See *Campbell v MGN Ltd* [2004] UKHL 22; [2004] 2 AC 457.

⁴⁸⁴ See *Metrobus Ltd v Unite the Union* [2010] ICR 173 (CA), [118] (Maurice Kay LJ).

⁴⁸⁵ See *Demir v Turkey* (2009) 48 EHRR 54 (ECtHR) and *RMT v United Kingdom* [2014] ECHR 366.

⁴⁸⁶ *R (Begum) v Governors of Denbigh High School* [2006] UKHL 15; [2007] 1 AC 100.

⁴⁸⁷ See *Eweida v United Kingdom* (2013) 57 EHRR 8 (ECtHR) (reversing *Eweida v British Airways plc* [2010] ICR 890 (CA)).

inquiries would be a bold step.⁴⁸⁸ It is submitted, however, that this criticism can be met in three ways.

First, several of the decided cases demonstrate that a single decision can offer a lot by way of philosophical grounding for individual rights, with the judicial exposition of the values underpinning a particular right being capable of guiding future courts and litigants. For example, Lord Steyn in *Simms* engaged in a detailed discussion of free speech, observing that this right is both ‘intrinsically’ and ‘instrumentally important’ and that it serves objectives including ‘the self-fulfilment of individuals in society’, the establishment of the truth through ‘the competition of the market’, and political accountability.⁴⁸⁹ Similarly, in respect of the prohibition of torture, Lord Bingham in *A (No.2)* pointed to ‘the cruelty of the practice’, evidential unreliability, and the degradation of the perpetrators of torture.⁴⁹⁰

Secondly, legal indeterminacy can be avoided through comprehensive guidance in a single judgment. The decided cases suggest that this is easier when dealing with rights that are more procedural in nature like the right to an oral hearing or the principle of open justice. Lord Reed’s elaborate judgment in *Osborn* is a good example. His Lordship expounded specific guidelines concerning, *inter alia*, the relative importance of factual issues, the need for independent risk assessment, the testing of officials’ views, and the fairness of final paper decisions.⁴⁹¹ In a similar vein, in the context of open justice, the Supreme Court in *A v BBC* was able to offer a concrete mechanism by which fairness to media organisations could be ensured to the greatest extent – *ex post* challenges.⁴⁹²

Lastly, it is arguable that regard can be had to a corpus of more detailed foreign case law. Specifically, the possibility of gaining helpful assistance on common law constitutional rights from other common law, especially Commonwealth, jurisdictions that have grappled with the same issues and have constitutional arrangements similar to the UK must be acknowledged. To return to *A v BBC* again, Lord Reed endorsed such an approach and noted the Supreme Court of Canada’s developed jurisprudence on open justice issues.⁴⁹³

Excessive incrementalism objection

Having shown that concerns about a lack of explanatory case law are exaggerated, the excessive incrementalism criticism can be assessed. It is true that it is generally accepted in the judiciary that the development of the common law must be a more incremental process than parliamentary law-making.⁴⁹⁴ Still for all, it is arguable that the political climate may serve to overcome typical judicial inhibitions to expand the common law, having regard to *Osborn*, *Kennedy* and *A v BBC*. It could be said in reply that a distinction can be drawn between, on the one hand, rights

⁴⁸⁸ *Kennedy* (n 28), [240] (Lord Carnwath).

⁴⁸⁹ *Simms* (n 8), 126 (Lord Steyn).

⁴⁹⁰ *A (No.2)* (n 22), [11] (Lord Bingham).

⁴⁹¹ *Osborn* (n 1), [2] (Lord Reed).

⁴⁹² *A v BBC* (n 29), [64]-[68] (Lord Reed).

⁴⁹³ *Ibid*, [40] (Lord Reed); see too *A (No.2)* (n 22), [17], [39] (Lord Bingham).

⁴⁹⁴ See *Sutherland Shire Council v Heyman* (1985) 60 ALR 1 (HCA), 43-44 (Brennan J).

traditionally developed at common law free from legislative specification, such as free speech, oral hearings and open justice, and, on the other hand, ones regarded as more politically contestable and, thus, suited to legislation.⁴⁹⁵ For example, Lord Hodge JSC in *Moochan v Lord Advocate*, concerning the legality of the ban on prisoner voting in the Scottish independence referendum, recognised that legislation had long been used to specify the very imprecise common law right to vote.⁴⁹⁶ Like with the incompleteness objection, there seems no option but to partially accept this criticism. Even so, the claim that in many other areas the threat to the HRA will sufficiently catalyse judicial law-making stands to reason, in my submission.

Undue judicial discretion objection

The fourth criticism that the common law approach invites undue judicial discretion is the reverse of the excessive incrementalism objection, yet it is likely that the courts will indeed find themselves criticised on these two opposite grounds. One way in which the discretion criticism can be substantiated is to say that, in the absence of a textual basis, the identification of common law constitutional rights is an unfettered and unpredictable exercise of judicial authority superficially legitimised through terms like ‘fundamental’ and ‘constitutional’.⁴⁹⁷ In my submission, this line of criticism can be met in part by emphasising that assessments of what amount to ‘fundamental’ or ‘constitutional’ rights have almost exclusively been undertaken at House of Lords or Supreme Court level, where judges of the greatest skill sit and decisions based on articulated principles⁴⁹⁸ open to the widest public scrutiny are produced. Another way in which this objection can be framed is to argue that the common law approach is less democratically legitimate than the HRA approach, at least insofar as new rights are to be recognised or existing ones widened, since progressive decisions under the HRA approach generally result from the UK courts following the lead of the Strasbourg court⁴⁹⁹ and Parliament has instructed the courts to ‘take into account’ relevant ECHR jurisprudence in s.2 HRA.⁵⁰⁰ It will be argued below that that the common law approach is in fact more democratically legitimate than the HRA approach strongly influenced by the Strasbourg court. Accordingly, the undue judicial discretion objection can be overcome.

Impotency objection

Lastly, the objection regarding the strength of the principle of legality deserves attention. Clayton, for instance, emphasises that it is rebuttable,⁵⁰¹ citing Lord Bingham’s view in *Gillan* that the provisions of the Terrorism Act 2000 in issue were sufficiently clear and precise to displace the

⁴⁹⁵ See Clayton (n 48), 11 and Hale (n 47), 8 explaining *Osborn, Kennedy* and *A v BBC*.

⁴⁹⁶ *Moochan* (n 55), [34] (Lord Hodge).

⁴⁹⁷ Clayton (n 48), 8; see too Hale (n 47), 8-9.

⁴⁹⁸ See especially *Simms* (n 8), 126 (Lord Steyn), *A (No.2)* (n 22), [11] (Lord Bingham), *Osborn* (n 1), [2] (Lord Reed) and *A v BBC* (n 29), [26] (Lord Reed).

⁴⁹⁹ See, e.g., *AF (No.3)* (n 2) (following *A v United Kingdom* (2009) 49 EHRR 29 (ECtHR)) and *R (GC) v Commissioner of Police for the Metropolis* [2011] UKSC 21; [2011] 1 WLR 1230 (following *S and Marper v United Kingdom* (2008) 48 EHRR 1169 (ECtHR)).

⁵⁰⁰ *Kennedy* (n 28), [240] (Lord Carnwath).

⁵⁰¹ Clayton (n 48), 9.

principle of legality.⁵⁰² It is certainly correct to acknowledge that the principle of legality is only a presumption, but the better question to ask is how strongly that presumption is normally applied by the courts. There are different high-level judicial statements on this question, but it is submitted that the most helpful decision is the very recent one of the Supreme Court in *Evans*,⁵⁰³ drawing strongly on *Simms*.⁵⁰⁴

In *Evans*, the court had to primarily consider a challenge to the Attorney General's exercise of the executive override power contained in s.53(2) FOIA 2000 in respect of a request by the claimant journalist for disclosure of communications passing between the Prince of Wales and government departments, which had earlier been granted by the Upper Tribunal. The majority of the Supreme Court (Lords Wilson and Hughes JJSC dissenting) held that the s.53 power had been unlawfully exercised and that, therefore, the communications should be disclosed. Lord Neuberger PSC, with whom Lords Kerr and Reed JJSC agreed, decided the case on the ground that the expansive interpretation of s.53 put forward by the Attorney General puts at risk two important constitutional principles, namely (1) the finality of judicial decisions and (2) the preservation of judicial review of executive decisions.⁵⁰⁵ High authority for the fundamentality of those principles was gleaned from *Anisminic v Foreign Compensation Commission*⁵⁰⁶ and *M v Home Office*.⁵⁰⁷ His Lordship accepted that these principles were not inviolable, but put forward the test of whether s.53 was "crystal clear" in saying that a member of the executive can override the decision of a court because he disagrees with it, concluding that it was not.⁵⁰⁸ In my submission, this judgment amounts to an important revival of the principle of legality in UK constitutional adjudication and arguably strengthens the principle, for the 'crystal clear' language test appears to be more stringent than Lord Steyn's 'clear and specific provision' test⁵⁰⁹ or Lord Bingham's 'clear and express words' test.⁵¹⁰

The other two judges in the majority, Lord Mance JSC and Baroness Hale DPSC, decided the case on the different ground that the Attorney General had issued the s.53 certificate 'without any real or adequate explanation' for disagreeing with the Upper Tribunal.⁵¹¹ This may be regarded as a stricter 'cogent reasons' standard of *Wednesbury* reasonableness review, though ostensibly based on the specific words 'reasonable grounds' in s.53(2).⁵¹² Strictly speaking, it could be said that four members of the *Evans* court disagreed with the robust application of the

⁵⁰² *R (Gillan) v Commissioner of Police of the Metropolis* [2006] UKHL 12; [2006] 2 AC 307, [13]-[15] (Lord Bingham).

⁵⁰³ *R (Evans) v Attorney-General* [2015] UKSC 21; [2015] 2 WLR 813.

⁵⁰⁴ *Ibid*, [56] (Lord Neuberger) (citing, with approval, *Simms* (n 8), 131 (Lord Hoffmann)).

⁵⁰⁵ *Ibid*, [51]-[52] (Lord Neuberger).

⁵⁰⁶ [1969] 2 AC 147 (HL).

⁵⁰⁷ [1994] 1 AC 377 (HL); *Evans* (n 94), [53]-[54] (Lord Neuberger).

⁵⁰⁸ *Evans* (n 94), [58] (Lord Neuberger).

⁵⁰⁹ *Pierson* (n 7), 587 (Lord Steyn).

⁵¹⁰ *Daly* (n 10), [5] (Lord Bingham).

⁵¹¹ *Evans* (n 94), [145] (Lord Mance).

⁵¹² See *R (Bradley) v Secretary of State for Work and Pensions* [2009] QB 114 (CA), [97] (Sir John Chadwick).

principle of legality. Lords Mance and Hughes agreed with Lord Wilson, who claimed that Lord Neuberger's construction would contravene the will of Parliament by rendering s.53 largely redundant.⁵¹³ However, the President's judgment does represent the view of the majority within the majority and it is submitted that it is preferable in principle to Lord Mance's approach. This is because even a robust application of the principle of legality does not amount to the courts claiming to have the final word. Instead, it is better regarded as a judicial caution to Parliament, which is at liberty to amend or supplement the legislation in clearer terms. Conversely, the rival 'cogent reasons' test could apply in judicial review generally, regardless of the fundamentality of the right or principle at stake, and it risks distorting the standard of irrationality.

In sum, treating Lord Neuberger's reasoning as the *ratio* of *Evans*, it may be said that the principle of legality is now stronger than previously thought, with *Evans* being the first case in which this principle was successfully invoked against an Act of Parliament.⁵¹⁴ This casts considerable doubt on Clayton's pessimistic conclusion that 'common law rights will ordinarily have less forensic impact than utilising positive Convention rights under the HRA'.⁵¹⁵ That said, so long as parliamentary sovereignty survives, common law constitutional rights and principles cannot enjoy absolute protection from political forces.

Common law approach – merits

It is inadequate to merely respond to certain likely objections to the common law approach, so a few advantages compared to the HRA approach will be suggested. It is submitted that the common law approach can boast of being clearer, likely to be more permanent, more amenable to a positive signalling effect on other common law jurisdictions, and more democratically legitimate than the HRA approach. This section will focus primarily on the common law approach itself, with a direct comparison to HRA provisions following below.

Clarity

Beginning with clarity, the argument, in essence, is that the common law approach rests on a small number of high-level judgments, which makes it far more probable that a definitive legal position in respect of specific common law rights will be reached. This, in turn, makes it easier for lawyers and litigants to ascertain what the law is and how it may develop further.

This advantage is a corollary of British fidelity to the doctrine of precedent to be contrasted with the frequency of inconsistent decisions by the Strasbourg court. This point was convincingly made by Lord Mance in *Kennedy*, lamenting the confusion surrounding a putative right to information under Art.10 ECHR.⁵¹⁶ His Lordship pointed to the issue of common lawyers super-

⁵¹³ *Evans* (n 94), [177] (Lord Wilson), [124] (Lord Mance), [155] (Lord Hughes).

⁵¹⁴ *Ahmed v HM Treasury* [2010] UKSC 5; [2010] 2 AC 534 is sometimes treated as such a case, but it is better described as a case of the relevant Orders in Council being *ultra vires* section 1 of the United Nations Act 1946.

⁵¹⁵ Clayton (n 48), 10; see too Hale (n 47), 8-9, for apparent approval of this criticism.

⁵¹⁶ *Kennedy* (n 28), [90] (Lord Mance).

imposing a strict doctrine of precedent alien to the Strasbourg court upon the ECHR jurisprudence.⁵¹⁷

For the avoidance of doubt, it is not claimed that common law rights reasoning will always be a model of clarity. For instance, there may be dissenting or even concurring judgments that complicate matters.⁵¹⁸ That said, the incremental common law jurisprudence is highly likely to be more determinate than the more dynamic and voluminous ECHR jurisprudence.

Permanence

Moving on to consider permanence, next, the common law approach is more likely to enjoy immunity from any groundswell change to the apparatus of human rights protection in the form of the repeal of the HRA and its replacement with a less generous British bill of rights.

In agreement with Elliott, even though Parliament could, in principle, also abolish or abrogate certain recognised common law constitutional rights, the British courts have grown adept at preserving their powers of judicial review at common law.⁵¹⁹ What is more, by virtue of being ostensibly indigenous rights, a challenge by Parliament to common law constitutional rights may well be less politically feasible than one to the HRA, which is widely associated with a loss of sovereignty.

However, added permanence does come at the expense of some ancillary benefits of the HRA approach. First, the British courts lose the added pressure on the executive that the international law obligations flowing from the Convention generate.⁵²⁰ Secondly and more cynically, with the primary focus on the common law comes more direct responsibility for unpopular decisions. It is arguable that the British courts have hitherto been able to hide behind the Strasbourg court in cases like the control order hearing rights case of *AF (No.3)*⁵²¹ and the data retention privacy rights case of *R (GC)*.⁵²²

Signalling effect

A further advantage, albeit a less obvious one, is that the UK may regain its position as an innovator in human rights protection. In my submission, the British courts are uniquely positioned to have a positive signalling effect particularly in Commonwealth jurisdictions that have inherited much from the British legal system in structural and substantive terms. In other words, a partial return to the age where Britain was a leading exponent of *habeas corpus*, free speech and procedural fairness protections globally is conceivable. By contrast, the UK courts are rather passive at present, largely following the Strasbourg court.⁵²³

⁵¹⁷ Ibid, [46] (Lord Mance); see too Neuberger (n 46).

⁵¹⁸ Ibid, [47]-[48] (Lord Mance), [110] (Lord Toulson).

⁵¹⁹ Mark Elliott, 'A damp squib in the long grass: the report of the Commission on a Bill of Rights' [2013] EHRLR 137, 149; see, esp., *Anisminic* (n 97).

⁵²⁰ Ibid, 145.

⁵²¹ n 2.

⁵²² n 90.

⁵²³ See *R (Ullah) v Special Adjudicator* [2004] UKHL 26; [2004] 2 AC 323, [20] (Lord Bingham).

The countries which are most likely to take note of British court decisions are Australia, New Zealand and Canada, given their especially close historical and legal ties, but common law constitutional rights jurisprudence could be availed of more widely. It is noteworthy that the common law approach is already well-established in Australia,⁵²⁴ especially due to the absence of a federal human rights charter.⁵²⁵ In New Zealand too, there is judicial recognition of this approach.⁵²⁶

It may be legitimately questioned what the exact value of such a “signalling effect” would be. Three potential benefits are identifiable. First, it could be politically valuable in that through yet another aspect of its law the UK’s standing in other countries is elevated. Secondly, from a more instrumental perspective, the emergence of more outward-looking common law constitutional rights jurisprudence may in fact lead to better decision-making. Lord Cooke in *Daly* emphasised that the House of Lords’ decision ‘may prove to be in point in common law jurisdictions not affected by the Convention’,⁵²⁷ but that is merely one side of the coin. In my submission, the common law approach holds most promise in terms of signalling power if the UK courts show mutual respect to other Commonwealth courts and draw on their decisions, where relevant and helpful.⁵²⁸ Put differently, the UK should be both a signaller and a receptor. Evidence of this dialogic approach can be found, *inter alia*, in Lord Reed’s judgment in *A v BBC*, where his Lordship liberally referred to decisions of the Supreme Court of Canada,⁵²⁹ and in *A (No.2)*, with Lord Bingham casting the net even wider by drawing on U.S., Irish, Australian and Canadian authorities.⁵³⁰ Finally, common law constitutional rights discourse could be drawn on as a supplementary source of rights in other Commonwealth jurisdictions that have rights instruments.

Democratic legitimacy

The final advantage to be considered is that of greater democratic legitimacy. This may be a surprising claim, for the common law approach could be labelled a power grab by the British judiciary, whereas the HRA approach could be formally described as sanctioned by Parliament itself.⁵³¹ The democratic legitimacy referred to in this connection is of a different variant, however.

First, the common law approach puts domestic, not potentially different European, values and conditions front and centre. This seemed to resonate strongly with Lord Mance in *Kennedy*, who preferred country-specific regulation of freedom of information, rather than a scheme under

⁵²⁴ See *Re Bolton* (1987) 162 CLR 514, 523 (Brennan J), 518 (Mason CJ, Wilson and Dawson JJ); *Electrolux etc v Australian Workers Union* (2004) 221 CLR 309, 329 (Gleeson CJ); and *Momcilovic v The Queen* [2011] HCA 34; (2011) 280 ALR 221, 245 (French CJ).

⁵²⁵ Meagher (n 76), 455-456.

⁵²⁶ See *R v Hansen* [2007] 3 NZLR 1, 12 (Elias CJ), 80 (McGrath J).

⁵²⁷ *Daly* (n 10), [30] (Lord Cooke).

⁵²⁸ Lord Reed, ‘Is the Supreme Court supreme?’ Lord Irvine Human Rights Lecture, 28 February 2014.

⁵²⁹ *A v BBC* (n 29), [40] (Lord Reed JSC).

⁵³⁰ *A (No.2)* (n 22), [17], [39] (Lord Bingham).

⁵³¹ See generally Neuberger (n 46), [14]-[15].

Art.10 ECHR.⁵³² Secondly, the common law approach rests on the pronouncements of the Court of Appeal and Supreme Court. Leaving aside petty concerns about the Strasbourg court motivated by insularity, well-founded criticisms of that court can be made on institutional grounds, with reforms having been pursued.⁵³³ In particular, it is known that the Strasbourg court has a heavy backlog of cases, entrusts judicial assistants with drafting judgments, and suffers from differential judicial appointment procedures.⁵³⁴ Lastly, even though the common law approach is not expressly approved by Parliament, it is framed in such a way that the powers of the judiciary are not unlimited. Parliament can overcome the principle of legality and abrogate even the most jealously guarded common law constitutional rights, if it expresses itself with abundant clarity.

To elaborate on the final point, the leading decisions clearly suggest that this principle is designed to make Parliament face the ‘political cost’ of flouting constitutional rights or principles and reminds it that its role is performed within a pre-existing constitutional structure that recognises ‘basic principles’.⁵³⁵ More ambitiously, it is submitted that the principle of legality reflects a richer understanding of democracy that posits judicial oversight of Parliament and the executive as integral to a well-functioning democracy. Indeed, there are numerous judicial statements dealing with extreme scenarios in which Parliament may seek to abolish the right to vote or substantially impair ‘judicial review or the ordinary role of the courts’, at which point an entitlement to judicial rebellion is said to exist.⁵³⁶ The principle of legality is, thus, arguably more profound than the interpretative obligation under s.3 HRA, because s.3 reinterpretation can be downplayed as the courts merely obeying a parliamentary command, rather than viewing human rights protection as part of their role by definition.⁵³⁷

HRA and common law approach compared

The similarity of the principle of legality and s.3 HRA as well as the potential existence of a common law equivalent to s.4 HRA declarations of incompatibility remain to be considered.

Beginning with the comparison to s.3 HRA, Lord Hoffmann in *Simms* claimed that s.3 HRA will be an express enactment of the principle of legality.⁵³⁸ It would follow that a repeal of the HRA would be inconsequential on this important front. However, both by reference to important HRA era decisions and the methodology behind the principle of legality, it is submitted that the two powers are rather different and that the principle of legality is highly likely to be a less powerful judicial tool in some cases. First, it is questionable that the courts would have been as

⁵³² *Kennedy* (n 28), [94] (Lord Mance).

⁵³³ See Mark Elliott, ‘After Brighton: Between a Rock and a Hard Place’ [2012] PL 619.

⁵³⁴ Neuberger (n 46), [35] and Lord Hoffmann, ‘The universality of human rights’ (2009) 125 LQR 416, 429-432.

⁵³⁵ *Simms* (n 8), 131 (Lord Hoffmann); *Pierson* (n 7), 575 (Lord Browne-Wilkinson).

⁵³⁶ See, e.g., *Moohan* (n 55), [35] (Lord Hodge); Lord Woolf, ‘Droit Public – English Style’ (1995) PL 57, 68; *R (Jackson) v Attorney General* [2005] UKHL 56; [2006] 1 AC 262, [102] (Lord Steyn), [159] (Baroness Hale).

⁵³⁷ See Geoffrey Marshall, ‘Two Kinds of Compatibility: more about section 3 of the Human Rights Act 1998’ [1999] PL 377.

⁵³⁸ *Simms* (n 8), 132 (Lord Hoffmann).

activist in leading cases like *Ghaidan v Godin-Mendoza*,⁵³⁹ which is considered to have been a permissible use of s.3 HRA,⁵⁴⁰ without the benefit of legislation.⁵⁴¹ Secondly and more fundamentally, Sales is correct in identifying significant methodological differences between the two interpretative tools. Most generally, as Sales submits, the underlying rationale of the principle of legality is a judicial unwillingness to accept that the abrogation of a recognised constitutional right or principle was *truly* intended by Parliament, whereas s.3 HRA accepts that Parliament in a given statute may have intended to breach a given Convention right, but that it has decreed, through the HRA, that the said statute be reinterpreted to give effect to its conflicting intention in the HRA, where ‘possible’.⁵⁴²

It is worth considering the source of the powers challenged in the common law constitutional rights cases in this regard. It must be emphasised that, with the exception of *Kennedy* and *Evans*, all of the challenges were either to mere executive policies or delegated legislation. This greater propensity to interfere in such cases seems attributable to Parliament at the most having conferred general powers upon the executive, rather than enacting its own specific legislative scheme. As for *Kennedy*, the majority led by Lord Mance was moved by ‘the clarity of the absolute exemption in section 32’.⁵⁴³ Under the HRA approach, by contrast, the relevant question would be whether a s.3 interpretation goes against ‘the grain of the legislation’⁵⁴⁴ in the sense of violating a ‘fundamental feature’ of the Act.⁵⁴⁵ Indeed, Lord Carnwath (dissenting) suggested that it would have been ‘possible’ to arrive at a Convention-compatible interpretation of FOIA 2000 in *Kennedy*, despite the clear language of s.32.⁵⁴⁶ In terms of strength, this methodological difference had the effect that a less direct remedy, if any, would be obtained.⁵⁴⁷ That said, the Lord Neuberger’s approach in *Evans* strongly suggests that the principle of legality is not impotent when it comes to challenging primary legislation. As stressed above, the new ‘crystal clear’ language test adds teeth to the principle of legality by requiring a higher standard of clarity, which leads to some convergence between the principle of legality and s.3 HRA as interpretative tools.

Even so, it is conceded that the s.3 HRA interpretative power remains stronger by design than the principle of legality. First, as Sales points out, the principle of legality is one of many common law principles of statutory interpretation, whereas the robust exercise of s.3 HRA powers is buoyed by the clearer legislative imprint under that approach.⁵⁴⁸ Secondly, it would appear that the principle of legality is more amenable to the reading down of legislative provisions than to

⁵³⁹ n 2.

⁵⁴⁰ See, e.g., Alison Young, ‘Ghaidan v Godin-Mendoza: avoiding the deference trap’ [2005] PL 23, 40.

⁵⁴¹ See Neuberger (n 46, [13]) pointing out that the UK courts have been more radical than expected in *Simms*.

⁵⁴² Sir Philip Sales, ‘A Comparison of the Principle of Legality and Section 3 of the Human Rights Act 1998’ (2009) 125 LQR 598, 608.

⁵⁴³ *Kennedy* (n 28), [36] (Lord Mance JSC).

⁵⁴⁴ *Ghaidan* (n 2), [121] (Lord Rodger).

⁵⁴⁵ *In re S (Minors)* [2002] UKHL 10; [2002] 2 AC 291, [40] (Lord Nicholls).

⁵⁴⁶ *Kennedy* (n 28), [222] (Lord Carnwath JSC).

⁵⁴⁷ *Ibid*, [231] (Lord Carnwath JSC).

⁵⁴⁸ Sales (n 133), 610.

the reading in of words to protect common law constitutional rights. As Sales puts it, the methodological premise of the principle of legality is that Parliament has not clearly addressed the abrogation of a recognised constitutional right or principle, making it impermissible for the courts to impute such an intention, the ‘actual language used by Parliament’ being the key manifestation of legislative intent.⁵⁴⁹ By contrast, s.3 HRA may be said to reflect the view that Parliament intended the courts to scrutinise its other enactments by reference to an ‘external body of law’, namely the ECHR jurisprudence.⁵⁵⁰ Still for all, the significance of the methodological bar to reading in words under the common law approach should not be exaggerated, with reading down offering appropriate relief in many cases.⁵⁵¹

Lastly, the implications of the s.4 HRA power falling away with the potential repeal of the Act warrant consideration. It is correct to say that declarations of incompatibility issued under s.4(2) HRA are non-binding, but they have been a surprisingly effective remedy in practice. On one count, 15 out of 18 s.4 declarations had been acted upon by the government and the remaining ones were pending review.⁵⁵² Furthermore, there are no claims so far that the common law recognises a functional equivalent to such declarations, with Lord Hoffmann in *Simms* emphasising the novelty of s.4 HRA catering for situations in which the principle of legality or s.3 HRA are inefficacious.⁵⁵³ The loss of s.4 would, therefore, be lamentable, because s.4 serves to further a constructive dialogue between the courts and Parliament.⁵⁵⁴ At best, it can be hoped that Parliament will continue to take seriously critical judicial pronouncements in the common law constitutional rights context, even where the judges conclude that the principle of legality cannot be availed of due to the abundant clarity of the legislation in issue.

Conclusion

It has been shown that the common law approach was revived rather suddenly by the courts and that this may be attributable to an uncertain political climate in relation to human rights protection. In addition, the common law trend has been described as a strong one that cannot be dismissed as being limited to a very limited array of rights, as it was in the pre-HRA era.

The common law approach may not represent the best possible approach to human rights protection, but its revival can be praised, in particular, for bringing with it a more bounded, clearer jurisprudence forged by the top British courts as well as a catalogue of rights and a mechanism of human rights protection via the principle of legality that should be able to withstand any significant constitutional changes in the UK, such as the repeal of the HRA.

Even though the principle of legality is probably not as robust an interpretative tool as the power under s.3 HRA, given its focus on the clarity of legislative language and the inevitable judicial

⁵⁴⁹ Ibid, 611.

⁵⁵⁰ Ibid, 610.

⁵⁵¹ See, e.g., *AF (No.3)* (n 2), *R (GC)* (n 90), and *Osborn* (n 1).

⁵⁵² Mark Elliott and Robert Thomas, *Public Law* (1st edn, OUP 2011) 752.

⁵⁵³ *Simms* (n 8), 132 (Lord Hoffmann).

⁵⁵⁴ *Hale* (n 47), 9.

restraint involved in the exercise of a common law power, it should be lauded as a welcome judicial innovation that will deliver results similar to the HRA in many cases and that may also prove useful in Commonwealth jurisdictions further afield.

IS THERE A NEED TO ABOLISH THE FLOATING CHARGE? A CRITICAL DISCUSSION ON THE DISTINCTION BETWEEN FLOATING AND FIXED CHARGES.

Ryan Martin

Introduction

In disagreement with Mokal's declaration that the "floating charge should now be abolished,"⁵⁵⁵ it shall be argued that the floating charge should be retained but undergo substantial reform. First, it shall be argued that there is conceptual confusion upon the distinction between the two devices. Second, the nature of the floating charge will be assessed in response to the decision in *Re Spectrum Plus Ltd*⁵⁵⁶ ('*Spectrum*') and practical issues surrounding control. Finally, there will be a critical overview of the issues with priority under the floating charge regime before practical recommendations are made.

The fixed and floating charge distinction

An overview

The fixed charge as a single form of security causes limited practical problems. Gullifer and Payne define a fixed charge as "a security interest which attaches to specific assets either on creation of the charge or, in the case of future property, when the relevant asset is acquired by the chargor."⁵⁵⁷ The issue is with the concept of the floating charge and at what point it can be distinguished from the fixed charge. Goode declares, the distinction remains "conceptually elusive"⁵⁵⁸ and *Spectrum* did very little to clarify the two forms of charge. This leaves the boundary between the two devices unclear⁵⁵⁹ and creates problems when structuring transaction documents and during the insolvency process.⁵⁶⁰

⁵⁵⁵ Riz Mokal, *Corporate Insolvency Law: Theory and Application* (OUP 2005) 219.

⁵⁵⁶ *Re Spectrum Plus Ltd (In Liquidation)* [2005] UKHL 41.

⁵⁵⁷ Louise Gullifer and Jennifer Payne, *Corporate Finance Law* (Hart, 2nd ed., 2015) 288.

⁵⁵⁸ Royston M. Goode, *Legal Problems of Credit and Security* (Sweet & Maxwell, 3rd ed., 2003) 111.

⁵⁵⁹ Mokal 203.

⁵⁶⁰ City of London Society Financial Law Committee, 'Secured Transactions Reform: Discussion Paper 2 - Fixed and Floating Charges on Insolvency'

<<http://www.citysolicitors.org.uk/attachments/article/121/20140219%20Secured%20Transactions%20Reform%20Discussion%20Paper%202%20Fixed%20and%20floating%20charges%20v2.pdf>> (24 February 2014) 4.

The decisions in the Privy Council case of *Agnew v Commissioner of Inland Revenue* ('*Agnew*')⁵⁶¹ and *Spectrum* confirmed Romer LJ's third characteristic in *Re Yorkshire Woolcombers Association Ltd*⁵⁶² that differentiates the floating from the fixed charge upon its ability to allow a company to "carry on business in an ordinary way."⁵⁶³ It is the granting of control over the receivables to the chargor to pay daily expenses such as rent, wages and utility bills⁵⁶⁴ that 'precisely' distinguishes floating from the fixed charge.⁵⁶⁵ The floating charge granting control over the circulating assets allows the company to remain solvent and produce revenue that can then be used to repay the chargee. The "simplicity and flexibility"⁵⁶⁶ of the floating charge in this context supports the retention of the device.

Lord Scott declared in *Spectrum* that a "chargor remains free to remove the charged assets from the security, the charge should, in principle, be categorised as a floating charge,"⁵⁶⁷ an opinion agreed upon by the rest of the Lords to overrule the decision in *Siebe Gorman & Co Ltd v Barclays Bank Ltd*.⁵⁶⁸ Henderson contends that Lord Scott's distinction is "obviously unsatisfactory" because never before had fixed charges been defined negatively by reference to floating charges.⁵⁶⁹ However, to disagree with Henderson and Sevenoaks,⁵⁷⁰ Lord Scott's distinction is critical, particularly when the chargee attempts to enjoy higher priority through manipulating the charge agreement to express a floating charge as a fixed charge.

The decision in *Spectrum* followed Lord Millett's specification in the second stage of his specific methodology test in *Agnew*.⁵⁷¹ The second limb declared that it is critical for the court to ascertain the nature of a charge in relation to the statutory distinction in the specific statute before they can offer practical advice.⁵⁷² The City of London Law Society Financial Committee ('CLLSFC') argues that this creates uncertainty over the effect of secured transactions.⁵⁷³ The courts make this

⁵⁶¹ [2001] UKPC 28.

⁵⁶² [1903] 2 Ch D 284.

⁵⁶³ *ibid* 295 (Romer LJ).

⁵⁶⁴ Gullifer and Payne 297.

⁵⁶⁵ Mokal 203.

⁵⁶⁶ Richard Calnan, "The Reform Of Company Security Interests" (2005) 1 JIBFL 25, 25

⁵⁶⁷ [2005] UKHL 41[107].

⁵⁶⁸ [1979] 2 Lloyd's Rep 142.

⁵⁶⁹ Duncan Henderson, 'Problems in the Law of Property after *Spectrum Plus*' [2006] International Company and Commercial Law Review 30, 31.

⁵⁷⁰ Helen Sevenoaks, 'Financing requirements in the 21st century and the (in)adequacy of the floating charge' (2009) I.C.C.L.R. 20(1), 17-22, 17.

⁵⁷¹ [2001] UKPC 28 [32] (Lord Millett).

⁵⁷² *ibid*; Louise Gullifer and Jennifer Payne, 'The Characterisation of Fixed and Floating Charges' in Joshua Getzler and Jennifer Payne (eds), *Company Charges: Spectrum and Beyond* (Oxford University Press, 2006) 63.

⁵⁷³ City of London Society Financial Law Committee 5.

distinction because it is easier for a floating charge rather than a fixed charge to be set aside in the insolvency process, particularly in relation to s.245 of the Insolvency Act 1986.

Crystallisation

The process of crystallisation is the transformation of a floating charge into a fixed charge,⁵⁷⁴ either through automatic or semi-automatic crystallisation in the charge document⁵⁷⁵ or upon events that signal the end of the ‘ordinary course of business’. The shift from a floating charge to a fixed charge increases the priority of the chargee and attaches a proprietary right to the specific assets. Prior to crystallisation or if the chargor is not aware of crystallisation due to the ambiguity of when the ‘ordinary course of business’ has ceased to exist, a disponent can obtain good title without notice of the previous floating charge.⁵⁷⁶ Gough confirms this is possible because prior to crystallisation the chargee does not have a proprietary interest.⁵⁷⁷ Worthington disagrees, stating the chargee has a proprietary interest before and after crystallisation, with the interest before being a qualified version of a proprietary interest.⁵⁷⁸ Worthington’s assertion affords too much leverage to the chargee; the nature of the floating charge is that a secure (‘fixed’) value cannot be attached to circulating assets to maintain the practical benefit in the ‘ordinary course of business’.⁵⁷⁹

Charged Assets

Following *Spectrum*, uncertainty surrounds what the ‘charged assets’ are and what amounts to control.⁵⁸⁰ The court decided in *Spectrum*, confirming the decision in *Agnew*, for the floating charge, the ‘charged assets’ are the uncollected book debts *not* the proceeds of such debts. There are serious practical implications because the chargee does not have a right to all proceeds from the debts collected by the chargor. In the floating charge situation there are now only two effective ways the chargee can manage the proceeds: collect the debts itself or contractually obligate the chargor to pay the proceeds into a ‘blocked bank account’.⁵⁸¹ The excessive freedom given to the chargor post-*Spectrum* has created a ‘payment on demand’ culture where if the chargee is too naïve as to use the required solutions (above) they will not enjoy the rights of a preferential creditor if insolvency occurs.

⁵⁷⁴ *Evans v Rival Granite Quarries Ltd* [1910] 2 KB 979, 999 (Buckley LJ).

⁵⁷⁵ *Re Brightlife Ltd* [1987] Ch 200.

⁵⁷⁶ *Gullifer and Payne* 290.

⁵⁷⁷ William J. Gough, *Company Charges* (Butterworths, 2nd ed., 1996) 97-101, 341-348.

⁵⁷⁸ Sarah Worthington, *Proprietary Interests in Commercial Transactions* (Clarendon Press, 1996) 81.

⁵⁷⁹ [1903] 2 Ch D 284, 295 (Romer LJ).

⁵⁸⁰ *Gullifer and Payne* 296.

⁵⁸¹ *ibid.*

Control

To reiterate Mokal, control is ‘precisely’ what differentiates fixed and floating charges.⁵⁸² In *Spectrum*, overruling the decision in *Queen’s Moat Houses plc v Capita*⁵⁸³ and to confirm Lord Millet’s approach in *Agnew*,⁵⁸⁴ Lord Walker declared to have ‘control’ over the assets in the form of a fixed security “the assets can be released from the charge only with the *active concurrence* of the chargee.”⁵⁸⁵ Thus a chargee cannot create a fixed charge through offering consent in advance of the agreement to change the nature of the charged asset or to substitute the assets in anyway during the course of the repayment scheme, instead the charge will be floating. Goode, in agreement with the approach of Lord Walker, declares the power of the chargee to intervene is not sufficient itself to create a fixed security, there must be a situation of control where the chargor is “not free to deal with the proceeds as its own pending the bank’s intervention.”⁵⁸⁶ The English floating charge is not simply a fixed interest with a licence to deal like its New Zealand and Canadian counterparts.⁵⁸⁷ Critically, the decision in *Spectrum* does not specify where on the continuum the level of control must be for the charge to be defined as fixed or floating.

To agree with Baird “it is disheartening that no practical guidance was issued by their Lordships and it seems uncertainty still lurks post-*Spectrum*.”⁵⁸⁸ These uncertainties create four serious practical implications for the chargee. First, advanced consent for waterfall payments does not amount to ‘active concurrence’, defining the method as ‘floating’.⁵⁸⁹ Second, the ‘two-account structure’ referred to in *Re Keenan Brothers Ltd*⁵⁹⁰ would require consent for every disposition from the blocked account into the current account.⁵⁹¹ This requirement makes the method expensive and time consuming for the chargee⁵⁹² and the absence of access to cash for daily expenses may put the chargor’s directors in breach of their duties.⁵⁹³ Third, if a sham is found, the courts can in effect ‘decrystallise’ the charge to take the form of a floating charge when it was expressed to be a fixed charge in the agreement.⁵⁹⁴ This could create an undesirable paradox. A fixed device could be interpreted to be a sham, therefore the charge is floating in nature, the new

⁵⁸² Mokal 203.

⁵⁸³ [2004] EWHC 868.

⁵⁸⁴ [2001] UKPC 28 [27].

⁵⁸⁵ [2005] UKHL 41 [138] (Lord Walker) (emphasis added).

⁵⁸⁶ Royston M. Goode, *Principles of Corporate Insolvency Law* (Sweet & Maxwell, 3rd ed., 2005) 257.

⁵⁸⁷ Louise Gullifer, ‘Will the Law Commission sink the floating charge?’ (2003) LMCLQ 125, 135.

⁵⁸⁸ Ken Baird, ‘Spectrum Plus: House of Lords decision – a cloud with a silver lining?’ (2005) 18 *Insolvency Intelligence* 113.

⁵⁸⁹ Alan Berg, ‘The Cuckoo in the Nest of Corporate Insolvency: Some Aspects of the *Spectrum* Case’ [2006] *Journal of Banking Law* 33.

⁵⁹⁰ [1986] BCLC 242.

⁵⁹¹ [2005] UKHL 41 [138] (Lord Walker).

⁵⁹² Geoffrey Yeowart, ‘Why *Spectrum Plus* is Bad News for Banks’ (2005) 24 *International Financial Law Review* 19.

⁵⁹³ Gullifer and Payne 299.

⁵⁹⁴ [2005] UKHL 41.

device could then be void for the want of registration and the chargee could be left unsecured.⁵⁹⁵ Fourth, particularly in the context of machinery and financial collateral, the chargor's right to substitute and dispose of the old charged assets is inconsistent with the required level of consent.⁵⁹⁶

Priority in the insolvency process

The problems with priority of the floating charge are arguably the worst characteristics of the floating charge. Mokal declares, upon priority the "floating charge does a very bad job," suggesting the floating charge is "not a priority-based device at all."⁵⁹⁷ The device ranks behind the liabilities of the preferential creditors,⁵⁹⁸ a percentage of unsecured claims⁵⁹⁹ and expenses of administration and some expenses of liquidation.⁶⁰⁰ This gives secured lenders the incentive to create a fixed, rather than a floating charge.⁶⁰¹ During liquidation the floating chargee can veto some expenses of the liquidator.⁶⁰² However, during administration the floating charge is essentially 'top-sliced' to fund the insolvency process.⁶⁰³ Although, it is now common in administration 'pre-packs' for the administrator's fees to attach to the fixed assets.⁶⁰⁴ To agree with the Law Commission and the Insolvency Service, where there is not a 'pre-pack' the chargee should fund the administration process through the circulating assets (floating charge) because they are set to gain if the corporate rescue method is successful.⁶⁰⁵ Additionally, despite the elimination of the chargee's discretion on the choice of the administrative receiver in court,⁶⁰⁶ outside of court the chargee enjoys the benefit to appoint a receiver and because the chargee funds the administration process they are likely to have considerable influence over the receiver.⁶⁰⁷

⁵⁹⁵ Gullifer and Payne 301.

⁵⁹⁶ *ibid* 302.

⁵⁹⁷ Mokal 189.

⁵⁹⁸ Insolvency Act 1986, Sch B1 paras 70 and 71.

⁵⁹⁹ Insolvency Act 1986, ss40 and 175(2)(b) and Sch B1, para 65(2); Companies Act 2006, s754.

⁶⁰⁰ Insolvency Act 1986, B1 paras 70 and 99; Insolvency Act 1986, s176 ZA; Insolvency Act 1986, Sch A1, para 20.

⁶⁰¹ Gullifer and Payne 303.

⁶⁰² *ibid* 305.

⁶⁰³ *ibid* 304; Richard Calnan, 'Floating Charges: A Proposal for Reform' (2004) 19 *Butterworth's Journal of International Banking and Financial Law* 341; Insolvency Act 1986, Sch B1 paras 70 and 99.

⁶⁰⁴ Gullifer and Payne 304.

⁶⁰⁵ *ibid*; Law Commission, *Company Security Interests: Final Report* (Law Com No. 296, 2005) para 3.166; Insolvency Service, *Encouraging Corporate Rescue - A Consultation* (June 2009) Proposal C.

⁶⁰⁶ Enterprise Act 2002, s. 72A(1).

⁶⁰⁷ Gullifer and Payne 309.

The future of the floating charge

Retention of the floating charge

The floating charge should be retained. Moss declared the floating charge is still “convenient and useful for companies”⁶⁰⁸ after the decision in *Spectrum*. It is the flexibility and the ability of the floating charge to ‘mop up’ the remaining circulating assets that justifies its retention as a security device. Further, the floating charge as it currently exists is favourable towards lenders because if a lender is looking “to take security over every asset possible (the ‘crown jewels’); if a floating charge is the only way to achieve this, then this is the route that they will take.”⁶⁰⁹ Therefore it would be disadvantageous for commercial practice if a device, which is “enormously useful and popular in English financing operations”,⁶¹⁰ is to be abolished.

Within this “policy-driven jigsaw”⁶¹¹ which attempts to balance the wishes of the chargees with that of the chargor, “although it is clear that there is a problem, the solution is much more difficult to identify.”⁶¹² Taking into account international perspectives, the floating charge should not be abolished, rejecting the viewpoint of the United States under Article 9 of the Uniform Commercial Code, which refuses to recognise the floating charge. To agree with Stevens, the American approach has “little application to English charges”⁶¹³ because floating charges in the United States are subject to stricter guidelines⁶¹⁴ and the English floating charges “no more defraud other creditors than do any other rights which are hidden to the outside world, such as those of a beneficiary to a trust.”⁶¹⁵ Neither should the strict approach of Australia be adopted.⁶¹⁶ This approach destroys the two-charge distinction and selects particular assets out of which the levy for insolvency should be paid; arguably this will simply “replace one uncertain test with another.”⁶¹⁷ However, guidance can be taken from the New Zealand legislation upon ‘notice-filing’.⁶¹⁸ Through this process, the floating charge will be registered with Companies House on an online system, making potential lenders aware of charges already encumbered by the chargor, particularly after crystallisation. This stops the floating charge from being ‘invisible’, to combat

⁶⁰⁸ Gabriel Moss, ‘Fictions and floating charges: some reflections on the House of Lords decision in *Spectrum*’ in Joshua Getzler and Jennifer Payne (eds), *Company Charges: Spectrum and Beyond* (Oxford University Press, 2006) 2.

⁶⁰⁹ Gullifer and Payne 310.

⁶¹⁰ Royston M. Goode, ‘Is the law too favourable to secured lenders?’ (1983) 8 *Can. Bus. L.J.* 53, 63.

⁶¹¹ *ibid* 307.

⁶¹² City of London Society Financial Law Committee 5.

⁶¹³ Robert Stevens, ‘Contractual Aspects of Debt Financing’ in Dan Prentice & Arad Reisburg, *Corporate Finance Law in the UK and EU* (Oxford University Press, 2011) 220.

⁶¹⁴ Michael G. Bridge, ‘How far is Article 9 Exportable? The English Experience’ (1996) 27 *Can. Bus. L.J.* 196, 221.

⁶¹⁵ (n 59) 220.

⁶¹⁶ Australian Personal Property Securities Act 2009.

⁶¹⁷ City of London Society Financial Law Committee 8.

⁶¹⁸ New Zealand Personal Property Securities Amendment Act 2001, Sch 1.

the issues associated with the 21-day rule and offer additional protection to the original chargee.⁶¹⁹ The Law Commission has endorsed the adoption of this legislation.⁶²⁰

Work by the Law Commission on company charges effectively stalled in 2005 due to the imminent publication of the Companies Act 2006 and the inability of the Law Commission to decide on the impact of the proposals on insolvency.⁶²¹ The key point made in the 2005 report, a view mirrored by reform option 1 of the CLLSFC's report in 2014,⁶²² was to clarify the distinction between the fixed and the floating charge and amend the procedural issues.⁶²³ The CLLSFC specified to offer clarification "the guidance could cover the extent to which the charge can remain fixed if the chargor can withdraw excess charged assets or substitute charged assets."⁶²⁴ Whilst it is arguable this approach will not tackle the underlying problems of the device, precise guidance will not dismantle the status quo of commercial transactions and retain the commercial flexibility of the device.

Proposals

The extensive reform process needs to be administered through the medium of the Law Commission, not through a test case of the Supreme Court, to clarify the law following *Spectrum*. The work of the Law Commission, taking into account the views of the CLLSFC, should seek reform on the following points.

First, the floating and fixed charge should be clearly defined so lenders and companies are aware of the conceptual difference between the two devices. This should be done through distinguishing the two devices and clarifying the issues regarding the charged assets and control.

Second, clarification is required on how the administration process should be funded. Calnan declares, issues with the insolvency process emanate "from legislation and can be reformed by legislation."⁶²⁵ Therefore as the Law Commission found in 2005, legislative reform must first take place upon the Insolvency Act 1986 before the application of the floating charge to this situation can be truly distinguished.

⁶¹⁹ (n 33) 128.

⁶²⁰ Law Commission Consultation Paper, Registration of security interests: company charges and property other than land (Law Com No. 164, 2002) para. 4.127.

⁶²¹ Law Commission, *Company Security Interests: Final Report* (Law Com No. 296, 2005).

⁶²² City of London Society Financial Law Committee 7.

⁶²³ (n 67) 73, para 3.175.

⁶²⁴ City of London Society Financial Law Committee 7.

⁶²⁵ Calnan 25.

Third, a ‘notice-filing’ system should be introduced which is analogous to the New Zealand system and more transparent than the system adopted under the Companies Act 2006 (Amendment of Part 25) Regulations 2013. To implement this the Law Commission should again attempt to remove the 21-day limit⁶²⁶ and require floating charges to be explicitly mentioned on the charges register to destroy the ‘invisibility’ of the device.

Conclusion

The floating charge should be retained in English law due to the simple fact the practical benefits of the device as a flexible and simplistic commercial device outweigh its conceptual problems. Implementing the reform proposals above, the Law Commission will retain the practical benefits of the device, further distinguish the floating from the fixed charge and clarify the conceptual issues associated with the floating charge.

⁶²⁶ City of London Society Financial Law Committee xi.

STICKS AND STONES WILL BREAK MY BONES AND ONLINE WORDS WILL HURT ME

Patrick Boyers

Introduction

Contemporary society relies heavily on the Internet and spends a significant amount of time working and socialising online. This reliance is evidence of the extent to which the online world has integrated into the offline world. Individuals feel comfortable sharing private details on social networking websites, naïve of the audience that they are engaging.

As a consequence of this increase in sharing and online interaction, a very active online community has been created. It is thought by some, that this online environment reflects the offline world and has been branded “Cyberspace”.⁶²⁷ In the same way that physical and political geographies have constructed the offline world, so has the Internet facilitated the creation of virtual communities.⁶²⁸

To an extent this is correct, however it would be folly to assert that the Internet has produced a perfect replica of the offline world. It cannot be ignored that certain conventions occur only in the online environment and not in the offline environment; and *vice versa*. There are certain characteristics of the online environment that are not shown by the offline environment. It is these characteristics that breed new forms of crime.

Unfortunately, while the Internet presents an unparalleled opportunity to improve the universal quality of life, there are individuals who will seek to use it to the detriment of society; this is the price to be paid.⁶²⁹ One of these uses is an activity that has come to be known as “cyber-harassment”.

The advances that have occurred in the information revolution have stretched the scope of intrusion technologies.⁶³⁰ The Internet makes it much easier for individuals to interfere in the

⁶²⁷ Paul Bocij & Leroy Mcfarlane, ‘Cyberstalking: The Technology of Hate’ [2003] 76 *The Police Journal* 204, 204.

⁶²⁸ William Byasse, ‘Jurisdiction of Cyberspace: Applying Real World Precedent To The Virtual Community’ [1995] 30 *Wake Forest Law Review* 197, 198.

⁶²⁹ Subhajit Basu & Richard Jones, ‘Regulating Cyberstalking’ [2007] 22 *Journal of Information Law & Technology* 1, 5.

⁶³⁰ Brian H. Spitzberg & Gregory Hoobler, ‘Cyberstalking and the Technologies of Interpersonal Terrorism’ [2002] 4(1) *New Media & Society* 71, 72.

lives of others and the opportunities to do so increase as the Internet integrates further into society. There are already a variety of methods in which individuals use the Internet to interfere and antagonise individuals; some examples are trolling, cyber-stalking and revenge porn.

Currently, there is no legislation that specifically identifies and combats ‘cyber-harassment’. This may be due to the prominent opinion that legislation drafted to address offline harassment is flexible enough to encompass online stalking and harassment.⁶³¹ It is the prominence of this opinion that is restricting the legislature and inhibiting forward thinking law making.

The purpose of this article is to outline the characteristics of the Internet that facilitate cyber-harassment and highlight flaws in the current legislation that need to be addressed by legislation creating a new, general offence of ‘Cyber-Harassment’. In order to do this some of the more common forms of cyber-harassment must be identified and the terminology that will be used in the body of the article must be outlined. From here the specific characteristics of the Internet that facilitate cyber-harassment, such as anonymity and proximity, will be considered. Relevant legislation will then be outlined and commentary on the flaws of the current state of the law provided. This article will conclude by providing a summary of the main discussion and reiterate the flaws within the current legislation.

Common Forms Of Cyber-Harassment

It is human nature to explore how creations and innovations can be used both positively and detrimentally, and to be inventive in doing so. This is true for the Internet. Individuals have become inventive in the way that they use the Internet to harass and antagonise individuals, the following being some examples of this.

Trolling

There is no legal definition of trolling as of yet. One of the more comprehensive definitions comes from Bishop who describes it as the sending of provocative messages through a communications platform for the entertainment of the sender, others or both.⁶³² Trolling can occur as an isolated incident or a string of messages. Messages may be personally targeted towards a specific victim or more general in their address.

⁶³¹ Louise Ellison & Taman Akdeniz, ‘Cyber-Stalking: The Regulation of Harassment on the Internet’ [1998] *Criminal Law Review, December Special Edition: Crime, Criminal Justice and the Internet* 29, 33.

⁶³² Jonathan Bishop, ‘The Art of Trolling Law Enforcement: A Review and Model for Implementing ‘Flame Trolling’ Legislation Enacted in Great Britain (1981-2012)’ [2013] 27(3) *International Review of Law, Computers & Technology* 301, 302.

The concept of trolling can be divided further; those who troll and target the trolling towards individual victims for their own gratification are called ‘flame trolls’ whilst those who send messages to entertain others are called ‘Kudos trolls.’⁶³³ These are the terms that shall be used throughout this article to refer to the sending of provocative messages through a communications medium for the entertainment of oneself or others.

Trolling is rapidly growing as an issue and is widely reported in the media. The most highly reported incidents of trolling tend to involve a celebrity being trolled to the entertainment of others; this is a prime example of Kudos trolling. Kudos trolling in this form may not appear particularly harmful, however it is antisocial and has forced a number of individuals off social media websites.

Cyber-Stalking

There is no legislation that specifically defines cyber-stalking, however there is a definition of stalking that many argue stretches to cover cyber-stalking. Section 2A of the Protection From Harassment Act 1997 (“the 1997 Act”) reads that:

(1) A person is guilty of an offence if—

(a) the person pursues a course of conduct in breach of section 1(1), and

(b) the course of conduct amounts to stalking.

The Protection of Freedoms Act 2012 introduced this section into the 1997 Act in order to combat a rise in both stalking and cyber-stalking.⁶³⁴

Cyber-stalking is often part of a blend of harassment that incorporates both online and offline stalking.⁶³⁵ The activities of online stalking that fall under the term of cyber-stalking include persistent messaging on chat rooms and social networking websites, as well as sending persistent ‘friend requests’ under one’s true name or a pseudonym.

⁶³³ *Ibid.*

⁶³⁴ Judith Gowland, ‘Protection From Harassment Act 1997: The ‘New’ Stalking Offences’ [2013] 77 *The Journal of Criminal Law* 387, 395.

⁶³⁵ Hansard UK, HC Deb. 6 May 2014, Vol. 580, Col. 29W.

The House of Commons have provided one of the more comprehensive definitions of cyber-stalking; they are of the opinion that cyber-stalking is the behaviour that occurs when an individual(s) becomes obsessively fixated on another and utilise any form of electronic means to cause life-altering degrees of distress or fear in that person.⁶³⁶ This is the definition that will be adopted for the purpose of this article as it gives a clear, general description of behaviour that amounts to cyber-stalking.

Revenge Porn

Revenge porn is a variation of cyber-harassment that has been addressed most recently by legislation. Section 33 of the Criminal Justice and Courts Act 2015 creates an offence of disclosing private sexual photographs and films with the intent to cause distress. The section itself reads that:

(1) It is an offence for a person to disclose a private sexual photograph or film if the disclosure is made—

(a) without the consent of an individual who appears in the photograph or film, and

(b) with the intention of causing that individual distress.

This serves as an adequate legislative definition of revenge porn, however the introduction of multiple pieces of legislation to address the multiple variations of cyber-harassment could be considered to offend the principle of legal minimalism. Revenge porn is essentially the distribution of sexually graphic images of individuals without their consent.⁶³⁷ This includes images that were originally obtained with consent.⁶³⁸

Cyber-Harassment Generally

All three of the above activities are forms of cyber-harassment. Cyber-harassment is a definition that covers a wide array of activities, each with their own individual characteristics. Ultimately, it is an umbrella definition into which all of the above fall. Unfortunately, there is no general legislative definition that outlines what cyber-harassment is. In some literature there is reference

⁶³⁶ Hansard UK, HC Deb. 6 May 2014, Vol. 580, Col. 28WH.

⁶³⁷ Danielle Citron & Mary Franks, 'Criminalizing Revenge Porn' [2014] 49 *Wake Forest Law Review* 345, 346.

⁶³⁸ *Ibid.*

to ‘cyber-bullying’. This label can be used interchangeably with ‘cyber-harassment’. It has, however, been recognised that the term ‘cyber-bullying’ is most often used to describe activities between adolescents whereas ‘cyber-harassment’ appears to refer to the behavior of adults.⁶³⁹ This article will refrain from doing this as to label the behavior of adolescence as mere ‘bullying’ compared to the ‘harassment’ of adults appears unfair and condescending.

Characteristics Of The Internet That Facilitate Cyber-Harassment

In an attempt to categorise the different forms of crime on the Internet, David Wall devised the ‘elimination test’.⁶⁴⁰ The test identifies three categories of online crime: traditional cybercrimes, hybrid cybercrimes and true cybercrimes. Traditional cybercrime is crime that is merely facilitated by the Internet and no more. Hybrid cybercrime occurs where the Internet provides entirely new opportunities for existing crime. True cybercrime is crime that’s operation is rooted in the Internet and the information age.

There is the opinion that, at first blush, cyber-harassment belongs in the second category (hybrid cybercrime).⁶⁴¹ The contrasting argument is that cyber-harassment has evolved so much that it is now separate entirely from the older, physical counterpart. The aspects identified in the following section are attributes solely possessed by cyber-harassment and show that cyber-harassment is a true cybercrime.

Anonymity

Cyberspace provides near perfect anonymity. It is much easier for someone on the Internet to change his or her persona or front.⁶⁴² This is because when interacting online, people only see what other individuals allow them to see. The anonymity cultivated by the Internet is the result of the amount of control individuals have as to what they publish online. If an individual does not wish for another to know their name, then they may control the publication of their identity.

The anonymity provided by the Internet, and the control that permits it is also conducive to the use of a pseudonym.⁶⁴³ If it is true that an individual can withhold their name, it is also true that they can publish a false name.

⁶³⁹ A. Gillespie, *Cybercrime: Key Issues And Debates* (Routledge Publishing: 2016) 258.

⁶⁴⁰ David S. Wall, ‘The Internet as a Conduit for Criminals’, in April Pattavina (ed.) *Information Technology and the Criminal Justice System* (Thousand Oaks, CA: Sage 2005) 77-98.

⁶⁴¹ Basu & Jones (n3) 14.

⁶⁴² Basu & Jones (n3) 11.

⁶⁴³ Hansard UK, HC Deb. 6 May 2014 Vol. 580, Col. 31WH.

The fact that the Internet offers anonymity and enables the use of a pseudonym particularly facilitates cyber-stalking. The anonymity of online interaction reduces the chance of identification in the case of cyber-stalking.⁶⁴⁴ It is therefore far more difficult to identify a perpetrator who is cyber-stalking than it is to identify an offender who is stalking in the physical world.

The anonymity of the Internet removes the power disadvantage often seen in physical harassment. Where physical harassment occurs there is usually a power disadvantage in one side, usually the weaker victim; in cyber-harassment the power lies in the anonymity.⁶⁴⁵ This shows that the anonymity provided by the Internet permits anyone to cyber-harass anyone and remain unidentified whilst doing so.

Ease Of Dissemination

The Internet makes it far easier to bring material into the public domain. Content can be distributed to a larger audience in a manner that is inexpensive and far more efficient.⁶⁴⁶ An image that has been altered or manipulated can be easily uploaded into the public domain where a wide audience can view it.

Social networking websites now have a function that permits individuals to ‘share’ or ‘re-tweet’ offensive material at the touch of a button. It makes it easy for a person to re-publish material that might not appear offensive to them, but is offensive to others. This is one of the reasons why the increase in the use of social networking websites has facilitated the increase in harassing or bullying conduct online.⁶⁴⁷

Cyber-harassment has a much greater impact than traditional harassment or bullying because of the public nature of the Internet and the ease in which information or offensive material is distributed.⁶⁴⁸ Offline harassment is not as public in its nature as cyber-harassment, which can be viewed by anyone with access to a computer.

⁶⁴⁴ Anju Thapa & Raj Kumar, ‘Cyber Stalking: Crime and Challenge at the Cyberspace’ [2011] 4 *International Journal of Engineering Sciences* 340, 342.

⁶⁴⁵ Lauren Mark & Katherine T. Ratliffe, ‘Cyber-Worlds: New Playgrounds for Bullying’ [2011] 28 *Computers in the Schools* 92, 94.

⁶⁴⁶ Naomi Harlin Goodno, ‘Cyberstalking, A New Crime: Evaluating the Effectiveness of Current State and Federal Laws’ [2007] 72(1) *Missouri Law Review* 125, 129.

⁶⁴⁷ Neal Geach & Nicola Haralambous, ‘Regulating Harassment: Is The Law Fit For The Social Networking Age?’ [2009] 73(3) *Journal of Criminal Law* 241, 241.

⁶⁴⁸ Matthew Ruedy, ‘Repercussions of a MySpace Teen Suicide: Should Anti-Cyberbullying Laws Be Created?’ [2008] 9(2) *North Carolina Journal of Law & Technology* 323, 328.

Proximity

The Internet has made the world a much smaller place. This is a consequence of the emergence of ‘instant messaging’ services such as the Microsoft Network (“MSN”) or Facebook and Twitter. These services connect individuals who are widely dispersed and in a variety of locations.

Unfortunately, individuals can exploit the transnational dynamic created by the Internet both in relation to conversation and other interactions. Individuals who wish to harass someone can acquire personal information or information about the whereabouts of another simply by looking at material posted by that person or people that they know.⁶⁴⁹ They can also message and contact anyone, anywhere in the world at any time.

This element of the Internet can have a significant psychological impact on a victim of cyber-stalking. The uncertainty of an offender’s location can leave victims in a constant state of panic as they wonder about the location of their stalker.⁶⁵⁰

The proximity aspect of cyber-harassment is one of the biggest differentials between offline harassment and cyber-harassment. Usually, physical stalkers have a form of relationship with their victim.⁶⁵¹ As a result, identification is much easier and there is not the same constant terror that comes with cyber-harassment.

Psychosis Of The Offender

As stated above, the Internet offers near perfect anonymity to offenders intending to harass individuals online. The fact that the offender knows that they are anonymous means there is a reduction of accountability. Thus, a toxic disinhibition effect occurs within the offender.⁶⁵² This disinhibition effect allows individuals to overcome their internal inhibitions and moral compass.⁶⁵³ This effect gives the offender the confidence to behave in a much more antisocial manner than they would in the physical world.

It is the ability to send anonymous harassing or threatening communications that allows a perpetrator to overcome any hesitation, unwillingness or inabilities that they may encounter if they were confronting a victim physically in person.⁶⁵⁴ This shows that even the motives of a

⁶⁴⁹ Hansard UK, HC Deb. 6 May 2014 Vol. 580, Col. 32WH.

⁶⁵⁰ Naomi Harlin Goodno (n20) 129.

⁶⁵¹ Bocij & Mcfarlane (n1) 206.

⁶⁵² Hansard UK, HC Deb. 6 May 2014 Vol. 580, Col. 31WH.

⁶⁵³ Naomi Harlin Goodno (n20) 130.

⁶⁵⁴ *Ibid.*

person carrying out cyber-harassment may differ from someone physically harassing an individual.

Another psychological factor to be considered is the dehumanisation of the victim. When a perpetrator harasses an individual online, they cannot see who they are harassing. As a result of this, it is easy for the offender to forget that there is another human being on the other end of the computer. This dehumanisation removes the idea that the victims are actual people who exist with feelings and concerns, and portrays them as subhuman.⁶⁵⁵

This is not something that occurs in offline harassment. Where offline, physical harassment occurs, the perpetrator can see the impact that their harassment is having on their victim. Where an offender can see the consequence of their actions, they may be inclined not to do as much damage as they intended or even cease harassment altogether.

What Is Wrong With The Law?

Offences Against The Person Act 1861

Sections 18, 20 and 47 of the Offences Against The Person Act 1861 (“the 1861 Act”) are provisions that may be useful in combating cyber-harassment. All three of these provisions establish offences that amount to bodily harm against the victim.

With regards to these three provisions, psychiatric illness can amount to ‘bodily harm’ as held in *R v Chan-Fook*⁶⁵⁶ and *R v Ireland*.⁶⁵⁷ In addition, any apprehension of immediate unlawful violence can constitute assault.⁶⁵⁸ Thus, these provisions could, in theory, be used to tackle cyber-harassment.

Unfortunately, sections 18 and 20 require the bodily harm to be ‘grievous’ before a conviction can be secured. It is unlikely that the psychiatric harm caused by cyber-harassment would be sufficient to amount to ‘grievous’. ‘Grievous’ having the same meaning as it did in *DPP v Smith*⁶⁵⁹ in that it means ‘really serious’.

⁶⁵⁵ Albert Bandura, ‘Moral Disengagement in the Perpetration of Inhumanities’ [1999] 3 *Personality and Social Psychology Review* 193-209, 195.

⁶⁵⁶ [1994] 1 W.L.R. 689.

⁶⁵⁷ [1998] A.C. 147.

⁶⁵⁸ *R v Ireland* [1998] A.C. 147.

⁶⁵⁹ [1961] A.C. 290.

Another difficulty with this piece of legislation relates to section 47. It is more than likely that no apprehension of immediate unlawful violence will occur.⁶⁶⁰ If this cannot be considered to have happened then it will not be found that assault occasioning actual bodily harm occurred.

The Protection From Harassment Act 1997

The Protection From Harassment Act 1997 (“the 1997 Act”) is one of the more obvious pieces of legislation that combats cyber-harassment. The 1997 Act creates its own definition of offline harassment, found in section 1, upon which the criminal offence was built, the criminal offence being found in section 2. That same definition is the basis for the statutory tort of harassment contained in section 3 of the 1997 Act. Section 4 of the same legislation creates an aggravated criminal offence building further on the basic criminal offence.

The definition of harassment as outlined by section 1 of the 1997 Act identifies an *actus reus* and a *mens rea* of the offence. The *actus reus* of the offence constitutes pursuing a course of conduct that amounts to harassment, whilst the *mens rea* is having the intention to harass or being reckless as to whether you are likely to have harassed someone. Section 1(2) of the 1997 Act imposes an objective standard of recklessness to assess the *mens rea* by.

A ‘course of conduct’ is defined by section 7(3) as two or more incidents. In *DPP v Lau*⁶⁶¹ the High Court stated that the fewer incidents there are, the less likely it is that the courts will consider the defendant to have pursued a course of conduct. However, the courts have also been prepared to consider a series of events that are closely linked to be a single act within a course of conduct.⁶⁶²

As a consequence of the differing opinion as to what amounts to a course of conduct, there is uncertainty as to when close acts are considered to be a single act.⁶⁶³ This uncertainty is likely to cause a number of problems for the prosecution of cyber-bullying and harassment.⁶⁶⁴

Section 4 of the 1997 Act makes it an offence to pursue a course of conduct that causes an individual to fear, on at least two occasions, that violence will be used against them. The problem with applying this section to cyber-harassment is that the threshold is too high.⁶⁶⁵

⁶⁶⁰ A. Gillespie, ‘Cyber-Bullying and Harassment of Teenagers: The Legal Response’ [2006] 28(2) *Journal of Social Welfare and Family* 123, 125.

⁶⁶¹ [2000] Crim. L.R. 580

⁶⁶² *DPP v Ramsdale* [2001] E.W.H.C Admin. 106.

⁶⁶³ Finch, E., *The Criminalisation of Stalking* (Cavendish Publishing:2001) 222.

⁶⁶⁴ Gillespie, ‘Cyber-Bullying and Harassment of Teenagers: The Legal Response’ (n34) 129.

⁶⁶⁵ *Ibid.*

Lord Steyn said in *Ireland*,⁶⁶⁶ albeit in *obiter*, that the provision requires that the victim fears that the violence *will* occur and not just *may* occur.⁶⁶⁷ As a consequence of this requirement of inevitability, section 4 of the 1997 Act carries with it an incredibly high threshold.⁶⁶⁸ It is difficult to see how a victim can fear that violence *will* definitely occur when the threats themselves are coming over the Internet. Further, it is unlikely that in an instance where the fear of a victim comes to nothing, they can justify a fear that violence will definitely occur on a second occasion.⁶⁶⁹

As a result of such a high threshold there are likely to be issues in the prosecution of cases involving non-contact harassment where section 4 is to be used.⁶⁷⁰ Consequently, there a conviction can be secured under section 4 in a case of cyber-harassment.

The Amendments Of The Protection Of Freedoms Act 2012

Section 111 of the Protection of Freedoms Act 2012 (“the 2012 Act”) inserted section 2A into the 1997 Act. This provision created the offence of stalking. The offence of stalking under section 2A requires the offending behaviour to be harassment of a person; the acts or omissions done to be associated with stalking; and the defendant must know or ought to have known that their behaviour amounted to harassment.

Another change made by the 2012 Act is the imposition of section 4A into the 1997 Act. Section 4A creates a similar provision of stalking that elaborates on the original aggravated offence of harassment. The provisions states that it is an offence to engage in a course of conduct that causes another individual alarm or distress that has an adverse effect on the victim’s everyday life. The *mens rea* of the offence is that the defendant must know or ought to have known that their behaviour would have this effect.

In addition, incidents falling within these provisions of the 1997 Act now attract more severe sentences. It is thought that the introduction of this legislation has increased awareness of stalking as a crime.⁶⁷¹ There is evidence supporting this: between 2012-2013, the number of charges brought under the Protection From Harassment Act 1997 increased by more than 1,000.⁶⁷² The issue with trusting these statistics with regards to cyber-stalking is that usually the charges were not

⁶⁶⁶ [1998] A.C. 147.

⁶⁶⁷ *R v Ireland* [1998] A.C. 147 at 153.

⁶⁶⁸ Gillespie, ‘Cyber-Bullying and Harassment of Teenagers: The Legal Response’ (n34) 130.

⁶⁶⁹ N. Addison & T. Lawson-Cruttenden, ‘*Harassment, Law and Practice*’ (Blackstone Press, 1998) 41.

⁶⁷⁰ E. Finch, ‘Stalking and the Perfect Stalking Law’ [2002] *Criminal Law Review* 703, 710-711.

⁶⁷¹ Hansard UK, HC Deb. 6 May 2014, Vol. 580, Col. 29WH.

⁶⁷² *Ibid.*

just brought for cyber-stalking, there is usually a mixture of online and offline stalking.⁶⁷³ Therefore it is not clear how effective the introductions are at dealing with cyber-stalking on its own.

The Public Order Act 1986

Section 5 of The Public Order Act 1986 (“the 1986 Act”) creates an offence that does not require a course of conduct. Also, it does not require the offender to ‘send’ something. The offence requires the prosecution to show that the accused intended or was subjectively reckless in conducting themselves in a threatening, abusive way.⁶⁷⁴ The offence itself is conduct specific, thus there is no need for harm to occur to a victim for it to apply.

The title of the offence reads “Harassment, alarm or distress’ and looks to keep the word ‘harassment’ separate from ‘alarm or distress’. The fact that these words are listed in the alternative suggests that this legislation views harassment as something separate to alarm or distress.⁶⁷⁵ Further support for this inference can be drawn from Fulford J. in *Southard v DPP*⁶⁷⁶. Fulford J. gave judgment stating that harassment, alarm or distress do not have the same meaning.⁶⁷⁷

This attitude to harassment contradicts the attitude of The Protection From Harassment Act 1997. Section 7(2) of the 1997 Act states that any reference to harassing a person includes alarming the person or causing the person distress. The wording of this definition suggests that the 1997 Act views ‘alarm’ and ‘distress’ as the result of a harassing course of conduct. This shows considerable uncertainty and contradiction within the current legislation addressing cyber-harassment.

The Malicious Communications Act 1988

The Malicious Communications Act 1988 (“the 1988 Act”), as amended in 2001, can also be used to tackle cyber-harassment. The relevant provision of this legislation is section 1. The *actus reus* required to be charged under this offences is the sending of some form of letter, electronic communication or article of any description. The material that is send must be ‘indecent’ or ‘grossly offensive’ before it becomes actionable. The *mens rea* of the offence is that there must be an intention to cause distress or anxiety to the immediate or eventual recipient.⁶⁷⁸

⁶⁷³ *Ibid.*

⁶⁷⁴ Geach & Haralambous (n21) 254.

⁶⁷⁵ *Ibid.*

⁶⁷⁶ [2006] E.W.H.C. 3449 (Admin).

⁶⁷⁷ *Ibid* at [23].

⁶⁷⁸ *DPP v Collins* [2006] U.K.H.L. 40 per Lord Browne [26].

Given the limited nature of the *actus reus* of this offence, this being that the communications must be ‘indecent’ or ‘grossly offensive’, it may be that this provision is not the most appropriate to deal with social networking websites. There is concern that the type of activity used to harass through social networking sites, such as sending a ‘friend request’ or ‘gift’, might not be of the requisite character to secure a conviction.⁶⁷⁹

The Communications Act 2003

Section 127 of The Communications Act 2003 (“the 2003 Act”) addresses cyber-harassment. The *actus reus* of this offence is simply sending a message by means of a public electronic communications network. A public electronic communications network is defined in section 151 as some form of electronic communications network wholly or mainly for the purpose of making electronic communications services available to members of the public. Whilst there is no obvious *mens rea* in the legislation, it can be inferred from the requirement of a message to be ‘sent’ that there must be an intention to send the material.⁶⁸⁰

In considering what constitutes a ‘sent message’ it has been found by the courts that a “Tweet” on “Twitter” constituted a message sent by a public electronic communications network.⁶⁸¹ It can be assumed that a “Post” on “Facebook” would also amount to a sent message by a public electronic communications network, as this is incredibly similar to a “Tweet”.

Section 127 of the 2003 Act is the most common provision used to combat the rise of harassment on social networking websites and therefore it is important that it does not compromise Article 10 of the European Convention of Human Rights (This point hinges on Brexit negotiations). In the DPP’s statement referring to social media prosecutions, it was said that in order for Article 10 to avoid being compromised in the regulation of social media, there must be an imposition of high thresholds.⁶⁸²

Following this statement the DPP published interim guidelines providing guidance to prosecutors. One of the identified categories of communication is communications that are described as grossly offensive, indecent, obscene or false. Cases within this category are subject to one of the aforementioned high thresholds. Prosecutors are advised to continue with cases

⁶⁷⁹ Geach & Haralambous (n21) 250.

⁶⁸⁰ Gillespie, ‘Cyber-Bullying and Harassment of Teenagers: The Legal Response’ (n34) 126.

⁶⁸¹ *Chambers v Director of Public Prosecutions* [2012] E.W.H.C 2157 (Admin).

⁶⁸² Keir Starmer, ‘DPP Statement On Tom Daley Case and Social Media Prosecutions’ (Crown Prosecution Service, 20 September 2012).

<http://blog.cps.gov.uk/2012/09/dpp-statement-on-tom-daley-case-and-social-media-prosecutions.html>

only where the relevant communications are offensive, shocking, disturbing; or satirical, iconoclastic or rude.⁶⁸³

Having such a high threshold for such communication can make it incredibly difficult for any prosecution to come about under section 127 of the 2003 Act. The high threshold is likely to ignore a significant quantity of offensive material on social networking websites e.g. offensive or upsetting messages in a group message on Facebook.

The Criminal Justice and Courts Act 2015

There are two sections within The Criminal Justice and Courts Act 2015 (“the 2015 Act”) relevant to combating cyber-harassment. Section 32(1) makes amendments to the Malicious Communications Act 1988. This amendment increases the maximum penalty. The amendments were brought in to combat the rise of trolling on the Internet, specifically social media.⁶⁸⁴ Prior to these amendments, the most efficient tool the prosecution had to tackle trolling on social media was section 127 of the 2003 Act. However the 2003 Act predated the rise of social media websites and so encountered issues in drafting that made the legislation ineffective.⁶⁸⁵

The second relevant section is section 33(1) which operates to create an indictable offence of revenge porn. The *actus reus* of this offence is the disclosure of private sexual photographs or films without the consent of the individual featured in them. The *mens rea* of the offence is that the offender must have had the intention of causing distress to the individual when they published the material.

This legislation appears to have been deployed effectively, figures published in September 2016 show that just over 200 prosecutions had taken place within a year of the legislation coming into effect.⁶⁸⁶ There is however little information as to the success rate of these prosecutions.

It has been contended that the low maximum penalty means that authoritative guidance is likely to be slow in coming and there is further room for improvement with regards to conviction success rate.⁶⁸⁷

⁶⁸³ The Director of Public Prosecutions, *Interim Guidelines On Prosecuting Cases Involving Communications Sent Via Social Media* (Crown Prosecution Service 2012) [36].

⁶⁸⁴ Hansard UK, HC Deb. 24 March 2015, Vol. 594, Col. 1285.

⁶⁸⁵ Hansard UK, HC Deb. 17 September 2012, Vol. 550, Col. 756.

⁶⁸⁶ Jocelyn Ledward & Jennifer Agate, “Revenge Porn” and s.33: The Story So far’ [2017] 28(2) *Entertainment Law Review* 40-42, 40.

⁶⁸⁷ *Ibid* 42.

What Would New Legislation Look Like?

Equally as important as discussing the many flaws in the current legal framework addressing cyber-harassment is the outlining of possible suggestions as to what new legislation remedying the situation might look like. It would be useful if a new piece of legislation were introduced entitled “The Cyber-Harassment Act” providing a general legislative definition of cyber-harassment upon which criminal offences can be constructed.

There is a consensus that any new definition of ‘Cyber-harassment’ must be broad so as to follow the precedent of the Protection From Harassment Act 1997.⁶⁸⁸ Consequently, the formulation of the *mens rea* to prevent the new offence from becoming too broad would need careful planning.

Where an offence is created that has a broad *actus reus*, it then requires a narrow *mens rea* to limit liability.⁶⁸⁹ Geach & Haralambous suggest that in the case of cyber harassment, the ideal legislation would arise where the wide *actus reus* of the Protection From Harassment Act 1997 is combined with the narrow *mens rea* of the offence under section 1 of the Malicious Communications Act 1988.⁶⁹⁰

In order to create a broad *actus reus* similar to that provided by the 1997 Act, the format of the new legislation should be the same as the 1997 Act. This means that the first section of the new legislation should provide a definition of cyber-harassment and the following sections should create the criminal offences on the basis of that definition. Hypothetically, section 1 of this legislation would appear as:

s. 1 - Prohibition of Cyber-Harassment

(1) A person is guilty of an offence if they use the Internet or any other electronic communication technology;

(a) to cause distress or anxiety to an individual or a group of individuals;

(b) with the intention of causing distress or anxiety to the individual or group of individuals; or

⁶⁸⁸ Michael Salter & Chris Bryden, ‘I Can See You: Harassment and Stalking on the Internet’ [2009] 18(2) *Information & Communications Technology Law* 99-122, 116.

⁶⁸⁹ Geach & Haralambous (n21) 250.

⁶⁹⁰ *Ibid.*

(c) in a way which he ought to have known would cause distress or anxiety to the individual or group of individuals.

(2) For the purpose of this section, the person whose use of the Internet or electronic communication technology is in question knew or ought to have known that it amounts to cyber-harassment of another if a reasonable person in possession of the same information would think that the use amounted to cyber-harassment of another.

From this definition of cyber-harassment a variety of criminal offences can be introduced in the same legislation using the definition as a basis. These different offences can be sculpted to combat the various forms of cyber-harassment. Thus, the legislation would reflect the terminology outlined at the beginning of this article; there would be one broad umbrella definition (section 1) and a number of criminal offences created by the following sections addressing the variations of that definition.

Conclusion

To conclude, cyber-harassment is an offence that has evolved to a point where it is distinct and separate from physical harassment. What makes cyber-harassment different from physical harassment is the anonymity, ease of dissemination, proximity and the psychosis of the offender. It is these characteristics that differentiate cyber-harassment from physical harassment. It is a consequence of these characteristics that cyber-harassment affects more people and causes more damage than physical harassment.

Further reasons to introduce new legislation creating a general offence of cyber-harassment are the flaws highlighted in the current legislation. The current legal framework is riddled with uncertainty and contradiction as well as overtly offending the principle of legal minimalism.

In addition, the thresholds one is required to satisfy in order to secure a conviction are varied and in most cases far too high to be applied to cases of cyber-harassment. Cyber-harassment is such a specific crime one must direct careful consideration towards it when implementing thresholds.

Ultimately, there are a number of convincing reasons as to why a general offence of cyber-harassment would benefit society both educationally and legally. It is hoped that the suggestions for new legislation contained within this article will spark further debate as to action that should be taken. Clearly, there is a strong argument to be put forward to the legislature to introduce legislation creating a new general offence of cyber-harassment.

FOLLOWING *GOW V GRANT* [2012] UKSC 29: TO WHAT EXTENT DOES ENGLISH LAW PROTECT COHABITING COUPLES?

Hollie-Mae Le Cras

There is no regime of financial provision for cohabiting couples when their relationship breaks down.⁶⁹¹ Furthermore, the claimant is forced to rely upon the acquisition of rights arising from a trust or proprietary estoppel.⁶⁹² ‘Moving the law along’ as Lady Hale stated in *Stack v Dowden*⁶⁹³, is imperative.⁶⁹⁴ English legislature offers no support to cohabiting couples in relation to financial provision, where ss 25-28 of the Family Law (Scotland) Act 2006 does.⁶⁹⁵ This was the opinion of Lady Hale in *Gow v Grant*⁶⁹⁶, where she stated that ‘there are lessons to be learned from this case in England and Wales.’⁶⁹⁷ This literature will argue that property law is inappropriate for dealing with cohabitant relationship breakdown. Pursuant to this, it will insist that until the Government adopts the recommendations of the Law Commission⁶⁹⁸ or employs legislation like Scotland’s, English law cannot adequately protect cohabiting couples.⁶⁹⁹ Nevertheless, critics argue that the Law Commission’s imperfect proposals⁷⁰⁰ would still fall short of offering cohabitants the same protections as those enjoyed by married couples.⁷⁰¹

England and Wales has seen a considerable rise in the number of cohabiting couples in recent years.⁷⁰² The number of heterosexual cohabitants has risen from 1.5 million in 1996 to 3.1 million in 2015.⁷⁰³ Similarly, the number of same-sex cohabitants rose from 16,000 in 1996 to approximately 90,000 in 2015.⁷⁰⁴ Despite this staggering rise, there has been no attempt by Parliament to implement statutory rights for cohabiting couples seeking financial provision. There is a long history of statutory protection for married couples upon relationship breakdown, even though marriage has been declining for years.⁷⁰⁵ Graeme Fraser noted that ‘under current

⁶⁹¹ Judith Bray, ‘The Financial Rights of Cohabiting Couples’ [2009] Family Law 1154.

⁶⁹² *ibid.*

⁶⁹³ [2007] UKHL 17, [2007] 1 FLR 1858.

⁶⁹⁴ Don McCue, ‘Cohabitee beneficial interests: Curran v Collins’ [2015] Fam Law 1084.

⁶⁹⁵ *ibid.*

⁶⁹⁶ [2012] UKSC 29.

⁶⁹⁷ *ibid* [44] (Lady Hale).

⁶⁹⁸ Law Commission, ‘Cohabitation: The Financial Consequences of Relationship Breakdown’ (Law Com No 307, 2007).

⁶⁹⁹ Bray (n 1).

⁷⁰⁰ *ibid.*, ‘the qualifying categories proposed by the Law Commission are still too restrictive’.

⁷⁰¹ Bray (n 1).

⁷⁰² Judith Bray, ‘Cohabitation: The long slow road to reform’ [2016] Fam Law 1428.

⁷⁰³ *ibid.*

⁷⁰⁴ *ibid.*

⁷⁰⁵ Bray (n 1) 1152; Matrimonial Causes Act 1973.

cohabitation law it's possible to live with someone for decades and even to have children together and simply walk away without taking any responsibility for a former partner when the relationship breaks down.⁷⁰⁶ He claims that the 'statistics should be regarded by policymakers as a wake-up call that cohabitation is a trend of modern society that is not going away.'⁷⁰⁷ It seems only fitting that this rise in cohabitation should attract protective legal rights. Seemingly, proceedings should take place in the Family Court instead of the Chancery Court, where their Lordships feel compelled to arrive at unjust decisions.⁷⁰⁸ Bridge rightly observes that 'the law that currently applies to cohabiting couples on separation is complex and uncertain, and that it often gives rise to unfair outcomes.'⁷⁰⁹ It will be argued that the law offers only limited protection for cohabiting couples.

It is first important to outline the current law governing cohabitant relationship breakdown and financial provision. Bray offers an excellent discussion regarding the rights of cohabiting couples, which will be referred to throughout this critical analysis.⁷¹⁰ She contends that unmarried couples do not have the right to ownership of each other's property after the relationship fails.⁷¹¹ Without statutory rights, cohabitants are forced to rely on the complex rules of property law which are 'beset with technicalities.'⁷¹² Cohabitants cannot make a general claim in the total assets as married couples can, they may only make a claim for the family home.⁷¹³ Whether or not the claim succeeds depends on whether the family home is jointly owned or owned by just one party.⁷¹⁴ First, the current law relating to cohabitant's property rights in jointly owned property will be considered, followed by their rights in relation to sole ownership of property.

The task for the court in *Stack and Jones v Kernott*⁷¹⁵ was to assess the size of the beneficial share of each parties, as the family home was jointly held.⁷¹⁶ Typically, few cohabitants discuss their intentions regarding a possible relationship breakdown.⁷¹⁷ Thus, the court has grappled with

⁷⁰⁶ 'Cohabiting couple continues to be the fastest growing family type' (*Family Law Week*, 11 November 2015) <<http://www.familylawweek.co.uk/site.aspx?i=ed151096>> accessed 24 December 2016.

⁷⁰⁷ *ibid.*

⁷⁰⁸ In *Stack v Dowden*, Lady Hale [63] and Lord Walker [26] complained that the *Lloyds Bank plc v Rosset* threshold test had set the bar too high.

⁷⁰⁹ Stuart Bridge, 'Cohabitation: why legislative reform is necessary' [2007] *Fam Law* 911; when Bridge was a Law Commissioner in 2007 he argued that just because more people are cohabiting is not itself a reason for reform, but he acknowledged that the present law was inadequate.

⁷¹⁰ Bray (n 1); Bray (n 12).

⁷¹¹ Bray (n 12) 1429.

⁷¹² *ibid.*

⁷¹³ *ibid.*

⁷¹⁴ *ibid.*

⁷¹⁵ [2011] UKSC 53, [2012] 1 FLR 45.

⁷¹⁶ Bray (n 21).

⁷¹⁷ *ibid.*

various approaches for determining the parties' intentions.⁷¹⁸ If an express intention has not been made, the principle in *Stack* is followed, where Baroness Hale stated that 'equity follows the law.'⁷¹⁹ Therefore, where legal title is held jointly, the beneficial interest must be divided equally. Contributions of the parties are then ignored.⁷²⁰ Whilst this approach is seemingly straightforward, there was some difficulty applying it in *Fowler v Barron*.⁷²¹ In this case, the parties' contributions were unequal, and the woman had not paid towards the purchase price of the property. At first instance, it was found that there was a resulting trust and because the woman had not made capital contributions, the beneficial interest failed. This judgment was based on the Court of Appeal's judgment in *Stack*, as the judge did not have the benefit of the House of Lord's judgment.⁷²² When the case was appealed, Arden LJ heard the case in light of the House of Lords' decision and found that the judge erred in applying the test for a resulting trust, instead of a common intention trust following *Stack*.⁷²³ As the tenancy was held in joint names, the woman was awarded a 50% beneficial share, despite her lack of quantifiable contribution.⁷²⁴

Where the court finds that exceptional circumstances have been demonstrated, there must be further analysis by their Lordships as to ascertain the intention of the parties. Following the decision in *Jones*, the court has the flexibility of two approaches for determining intention. Their lordships can either infer the parties' intention or impute their intention.⁷²⁵ Both approaches involve 'drawing inferences' from the parties' behaviour which was not necessarily intended to be associated with the family home.⁷²⁶ In *Jones*, the legal title to the property was held in joint names, and the parties lived there together for eight years until Mr Kernott left.⁷²⁷ Once he had moved out, Mr Kernott failed to make further payments on the jointly owned home.⁷²⁸ Over fourteen years later, he returned to claim a 50% share in the family home.⁷²⁹ However, the court were troubled by the facts of the case and awarded a 90:10 beneficial share in favour of Ms Jones.⁷³⁰ There has been much academic discussion regarding the 90:10 split which the High Court and Supreme Court favoured, in contrast with the 50:50 split favoured by the Court of Appeal.⁷³¹

⁷¹⁸ *ibid.*

⁷¹⁹ *Stack* (n 3) [54] (Lady Hale).

⁷²⁰ *ibid.*

⁷²¹ [2008] EWCA Civ 377, [2008] 2 FLR 831.

⁷²² 'Fowler v Barron [2008] EWCA Civ 377' (*Family Law Week*)

<<http://www.familylawweek.co.uk/site.aspx?i=ed1166>> accessed 26 December 2016.

⁷²³ *ibid.*

⁷²⁴ *ibid.*

⁷²⁵ *Bray* (n 12) 1430.

⁷²⁶ *ibid.*

⁷²⁷ *ibid.*

⁷²⁸ *ibid.*

⁷²⁹ *ibid.*

⁷³⁰ *ibid.*

⁷³¹ *ibid.*; Mark Pawlowski and Sarah Greer, 'Imputation Fairness and the Family Home' [2015] *Conveyancer and Property Lawyer* 512; Brian Sloan, 'Keeping up with the Jones case: establishing

The High Court and Supreme Court reached their decision by finding that Mr Kernott's failure to make payments on the property for fourteen years was unequivocally linked to the beneficial interest.⁷³² However, it is unclear why they chose to quantify the shares in a 90:10 ratio and not another division.⁷³³ The Supreme Court considered two approaches: (1) 'inference'; and if that was inconclusive (2) 'imputation.'⁷³⁴ Both require the court to look at the parties' conduct throughout the relationship and find some inkling as to how they would want to share the property.⁷³⁵ Inference involves objectivity where the courts draw conclusions from parties' conduct in relation to financial matters.⁷³⁶ Contrariwise, imputation involves the court guessing what the intentions of the parties 'as reasonable just people would have been had they thought about it at the time.'⁷³⁷ Greer and Pawlowski claim that imputation does not disregard the parties' intention to impose a just outcome according to the court, rather it achieves a fair result by filling in gaps in relation to how beneficial shares were intended to be divided.⁷³⁸ For joint ownership cases, imputing the intentions of the parties leads to abundant uncertainty as to the outcome of the case and high litigation costs, there must be empathy for cohabitants in this position.⁷³⁹ It seems an essential requirement that there is a clearer basis for which claims can be made.⁷⁴⁰ The complicated and uncertain approaches are unsuitable for cohabiting couples and it certainly cannot be said that they are adequately protected in relation to financial provision.

Where the family home is held in the sole name of one party, the law accompanying cohabitant relationship breakdown is more complex and subsequently less adequate. The claimant must prove that they qualify for a beneficial share in the family home before the court will quantify the share ratio.⁷⁴¹ Since *Lloyds Bank plc v Rosset*⁷⁴² the courts have adopted a two-fold test whereby a common intention constructive trust must first be established, before quantification of the share can be considered.⁷⁴³ Evidence of a common intention constructive trust can be either expressly or impliedly.⁷⁴⁴ In *Rosset*, Lord Bridge stated that one must find an agreement between the

constructive trusts in "sole legal owner" scenarios' (2015) 35(2) Legal Studies 226; John Mee, 'Inferring and Imputing in Essex [2012] Conveyancer and Property Lawyer 167.

⁷³² Bray (n 35).

⁷³³ *ibid.*

⁷³⁴ *ibid.*

⁷³⁵ *ibid.*; the court rarely hears cases where parties' have constantly split their contributions in proportions, as in *Midland Bank plc v Cook* [1995] 4 All ER 562, where the court found a 50:50 share of beneficial interests. Even though the couple was married, the courts used property law principles as a third party was involved.

⁷³⁶ Bray (n 12) 1431.

⁷³⁷ *Jones* (n 25) [47].

⁷³⁸ Pawlowski and Greer (n 41) 1.

⁷³⁹ Bray (n 46).

⁷⁴⁰ *ibid.*

⁷⁴¹ *ibid.*

⁷⁴² [1991] 1 AC 107.

⁷⁴³ Bray (n 46).

⁷⁴⁴ *ibid.*

parties, based on ‘evidence of express discussions between the partners, however imprecise their terms may have been.’⁷⁴⁵ Not only could the terms of an agreement fall short of a common intention to distinguish shares, but Lord Bridge failed to highlight the likely eventuality that the cohabitants had no sort of discussion.⁷⁴⁶ In *James v Thomas*,⁷⁴⁷ the claimant stated that ‘whenever the parties discussed carrying out improvements to the property and matters relating to business, the defendant would say to the claimant “this will benefit us both”’⁷⁴⁸; using this as evidence of a discussion about property.⁷⁴⁹ However, Lord Chadwick held that this comment was intended to mean that improvements to the family home would have made them both more comfortable, or their quality of life together would be improved.⁷⁵⁰ This case illustrates the difficulties and uncertainties for cohabitants seeking a beneficial share in a solely owned home. A stark comparison can be drawn between the ineffective framework for cohabiting couples and the high level of protection for marriage and civil partnerships.⁷⁵¹ There is not an acceptable level of protection for cohabiting couples, and it is advocated that a reformation of the law is crucial.

The effect of the decisions in *Stack* and *Jones* on claims in solely owned property have hardly influenced subsequent judgments. There have been indications from the judiciary that it would be prepared to welcome a more realistic approach for cohabitant claims in the family home.⁷⁵² Obiter comments in *Stack* advocated that Lord Bridge’s strict regime of proving common intention should no longer be a deciding factor.⁷⁵³ Lord Walker stated that the law had ‘moved on’⁷⁵⁴ from the strict principles laid down in *Rosset*, and claimed that their Lordships ‘should move it a little more in the same direction.’⁷⁵⁵ In his Lordship’s opinion, a wider range of contributions such as those towards a shared household could prove an implied common intention.⁷⁵⁶ Concurring, Lady Hale found that Lord Bridge in *Rosset* had set ‘that hurdle rather too high in certain respects.’⁷⁵⁷ This appeared to have altered the law in relation to cohabitants claiming a beneficial share in the family home.⁷⁵⁸ However, subsequent cases are proof of lost opportunities for their Lordships to show that the law had indeed ‘moved on.’⁷⁵⁹ Lewison J in

⁷⁴⁵ *Rosset* (n 52) 132 (Lord Bridge).

⁷⁴⁶ Bray (n 46).

⁷⁴⁷ [2007] EWCA Civ 1212, [2008] 1 FLR 1598.

⁷⁴⁸ *ibid* [11].

⁷⁴⁹ Bray (n 46).

⁷⁵⁰ *James* (n 57) [33] (Lord Chadwick).

⁷⁵¹ Bray (n 12) 1432.

⁷⁵² *ibid*.

⁷⁵³ *ibid*.

⁷⁵⁴ *Stack* (n 3) [26] (Lord Walker).

⁷⁵⁵ *ibid*; Bray (n 61).

⁷⁵⁶ Bray (n 61).

⁷⁵⁷ *ibid*; *Stack* (n 3) [63] (Lady Hale).

⁷⁵⁸ Bray (n 61).

⁷⁵⁹ *Stack* (n 64); Bray (n 12) 1433.

*Geary v Rankine*⁷⁶⁰ cited *Jones* as the authority for his judgment.⁷⁶¹ It was a sole ownership case where the Ms Geary had not made capital contributions, but had made significant non-capital contributions to Mr Rankine's business. If the law had indeed 'moved on' from *Rosset*, Ms Geary could rely on an inferred intention from the conduct of the parties.⁷⁶² Despite her contributions to the business and the role she had played in running it, it was not held to be relevant to the issue and her claim failed. It can be argued that inferring intention from conduct is difficult and it is not surprising that the judiciary employed a very similar approach to Lord Bridge.⁷⁶³ In *Abbot v Abbot*⁷⁶⁴, a Privy Council case concerning a married couple, Lady Hale stated that 'the parties' whole course of conduct in relation to the property must be taken into account in determining their shared intentions as to its ownership.'⁷⁶⁵ The judiciary's 'appetite for reform... has not yet been supported by a successful claim for a share in sole owned property by a cohabitant other than by proof of express discussion or capital contributions.'⁷⁶⁶ This is evidenced in *Capehorn v Harris*⁷⁶⁷ where the Sales LJ stated:

*'in relation to assets acquired by unmarried cohabitees or partners, where an asset is owned by one person but another claims to share a beneficial interest in it a two-stage analysis is called for to determine whether a common intention constructive trust arises.'*⁷⁶⁸

His interpretation again seemed to echo Lord Bridge's judgment in *Rosset* 24 years prior.⁷⁶⁹ These sole ownership cases which came after *Stack*,⁷⁷⁰ and others such as *Aspden v Elvy*,⁷⁷¹ *Re Ali*⁷⁷² and *Graham-York v York*,⁷⁷³ demonstrate that the law has not moved on and the strict two-fold test laid down by Lord Bridge still applies.⁷⁷⁴ In spite of judicial comments made in *Stack* and *Jones*, the law has not moved on from *Rosset*. Views have changed slightly regarding quantification of shares. However, the courts still follow Lord Bridge's implied and express

⁷⁶⁰ [2012] EWCA Civ 555, [2012] 2 FLR 1409.

⁷⁶¹ Bray (n 61).

⁷⁶² *ibid.*

⁷⁶³ i.e. focussing on the express agreement of the parties or drawing inference from capital payments; Bray (n 12) 1433.

⁷⁶⁴ [2007] UKPC 53, [2008] 1 FLR 1451.

⁷⁶⁵ *ibid* [19] (Lady Hale).

⁷⁶⁶ Bray (n 12) 1433.

⁷⁶⁷ [2015] EWCA Civ 955.

⁷⁶⁸ *ibid* [16] (Sales LJ).

⁷⁶⁹ Bray (n 76).

⁷⁷⁰ *Geary v Rankine* and *Capehorn v Harris*.

⁷⁷¹ [2012] EWHC 1387, [2012] 2 FLR 807.

⁷⁷² [2012] EWHC 2302, [2013] 1 FLR 1061.

⁷⁷³ [2015] EWCA Civ 72, [2016] 1 FLR 407.

⁷⁷⁴ Bray (n 76).

evidence test for finding common ownership.⁷⁷⁵ The House of Commons' Briefing Paper⁷⁷⁶ concurred that there has been no desire to modify the law contrary to the comments made by Lady Hale and Lord Walker in *Stack*.⁷⁷⁷ The 'good deal of uncertainty and high possibility of litigation costs'⁷⁷⁸ evidences how the law does not offer adequate protection to cohabiting couples in relation to financial provision. Neither have the cases post-*Stack* and *Jones* brought us any closer to a solution.

Other jurisdictions have adopted cohabitant financial provision schemes, whereby cohabitants are given rights, albeit rights distinguished from married couples.⁷⁷⁹ For the purposes of this discussion, the most important jurisdiction to consider is Scotland. The Family Law (Scotland) Act 2006 allows the court to make an order for payment of a capital sum from a cohabitant to their ex-partner.⁷⁸⁰ Section 28 considers whether the respondent has been economically advantaged by the claimant's contributions, and whether the claimant is now economically disadvantaged.⁷⁸¹ Therefore, the Scottish court must balance the contributions of both cohabitants and discover whether the claimant has made contributions which have left them economically disadvantaged.⁷⁸²

Pursuant to this, in *Gow*, a couple who met late in their lives decided to move in together.⁷⁸³ Mr Grant encouraged Ms Gow to sell her home in Edinburgh and move in with him.⁷⁸⁴ The proceeds of the sale were enjoyed by both parties jointly, including an investment in timeshare properties.⁷⁸⁵ After the couple split, the price of Ms Gow's house had increased in value by approximately £40,000.⁷⁸⁶ The Supreme Court held that she had been disadvantaged by the sale of her house and by the investment in timeshare properties.⁷⁸⁷ She was awarded £38,000. Lady Hale found that there were 'lessons to be learned from this case for England and Wales.' In her judgment, she gave a detailed argument for reform in English law and found practical problems in the Scottish system which could be relevant to a scheme for England and Wales.⁷⁸⁸ She stated that

⁷⁷⁵ *ibid.*

⁷⁷⁶ Catherine Fairbairn, "Common law marriage" and cohabitation (HC 2016, 03372).

⁷⁷⁷ *Bray* (n 76).

⁷⁷⁸ *Stack* (n 3) [27] (Lord Walker).

⁷⁷⁹ Scotland, Spain, New Zealand and Australia; Francis Burton, 'Formalised Cohabitation: A critical and comparative study of an element of English Law in a normative regime' (PhD thesis, Liverpool John Moores University 2015).

⁷⁸⁰ *Bray* (n 12) 1434.

⁷⁸¹ *ibid.*

⁷⁸² *ibid.*

⁷⁸³ *Bray* (n 12) 1435.

⁷⁸⁴ *ibid.*

⁷⁸⁵ *ibid.*

⁷⁸⁶ *ibid.*

⁷⁸⁷ *ibid.*

⁷⁸⁸ *Burton* (n 89) 202.

‘as researchers comment “the Act has undoubtedly achieved a lot for Scottish cohabitants and their children.” English and Welsh cohabitants and their children deserve no less.’⁷⁸⁹ Subsequently, if Ms Gow had brought her case before the English courts, she would have failed as she could not hold a statutory or common law right to make the claim.⁷⁹⁰

In *Gow*, Lady Hale made various comments about the Law Commission’s proposal and stated that a similar remedy for cohabitants should be adopted in England and Wales.⁷⁹¹ She found that section 28 of the Scottish Act did not extend far enough to protect all cohabitants upon relationship breakdown. She instead proposed to ask the question:

*‘where they were at the beginning of their cohabitation and where they are at the end, and then to ask whether either the defender has derived a net economic advantage from the contributions of the applicant or the applicant has suffered a net economic disadvantage in the interest of the defender or any relevant child.’*⁷⁹²

It is contended that Lady Hale’s suggested approach and modification of section 28 should be welcomed by the English Government and judiciary. To further highlight the significant distinction between the protections allocated to cohabitants under Scottish law and English law, one can look to *Whigham v Owen*.⁷⁹³ In this case a couple cohabited for 27 years and bore three children. Ms Whigham could rely on non-economic contributions to the care and running of the family and family home.⁷⁹⁴ The court found that it was unnecessary to establish a link between Ms Whigham’s contributions and Mr Owen’s wealth after the breakdown of the relationship.⁷⁹⁵ As with Ms Gow, if Ms Whigham had brought her claim before the English courts, it is likely that she would have failed.⁷⁹⁶ A stark comparison can be drawn from the English case *Burns v Burns*⁷⁹⁷, whereby the facts were surprisingly similar, although Ms Burns received nothing.⁷⁹⁸ It is recommended that England and Wales adopt a similar approach to Scotland. The Scottish 2006 Act rightly overlooks the status of the relationship and concentrates on economic disadvantage. England could also learn from the similar approaches in Commonwealth countries such as Australia and New Zealand.

⁷⁸⁹ *Gow* (n 6) [56] (Lady Hale).

⁷⁹⁰ Bray (n 93).

⁷⁹¹ *ibid.*

⁷⁹² *ibid*; *Gow* (n 6) [54] (Lady Hale).

⁷⁹³ [2013] CSOH 29.

⁷⁹⁴ Bray (n 12) 1436.

⁷⁹⁵ *ibid.*

⁷⁹⁶ *ibid.*

⁷⁹⁷ [1984] Ch 317.

⁷⁹⁸ Bray (n 104).

Douglas advocates that the Scottish legislation is not perfect, and highlights many of the current problems with it.⁷⁹⁹ However, it is suggested that England adopts a similar approach and perhaps adapts any legislation accordingly. In *Gow*, Lady Hale put forward a coherent and practical modification to section 28 which could be incorporated into English Law. She rightly observed that England could learn from Scottish legislation, which is underpinned by her desire for judicial reform in *Stack*. It is clear to say that even with strong recommendations from the Law Commission and academics, there has been little progress in relation to the law regarding cohabitants and financial provision.⁸⁰⁰ English law offers such limited protection to cohabitants even where they have spent many years together, had children and functioned as a traditional family unit. Instead, cohabitants are forced to rely on the complex rules of property law. Where cohabitants can prove an implied trust, they are entitled to little more than a share of the family home. The Government's failure to implement legislation like Scotland, or adopt the recommendations of the Law Commission is absurd. It appears that it is clinging on to the traditional concept of marriage and ignoring all evidence of social change.

⁷⁹⁹ Morven Douglas, 'Quantification of claims under section 28(2) (a) and (b) of the Family Law (Scotland) Act 2006 - Where are we now?' [2016] Family Law Bulletin 3, 6.

⁸⁰⁰ Bray (n 12) 1437.

JUDICIAL DETERMINATIONS THROUGH SPORT: THE APPLICATION OF EU CASE LAW TO SPORT AND IN RELATION TO THE DEVELOPMENT TO THE JURISPRUDENCE OF THE EU.

Victoria Alicea

Sport and the European Court of Justice have had quite an interesting relationship over the last few decades. With sport becoming much more prominent within the European Union community, sporting matters are getting the recognition within the jurisprudence of the courts. With known and situated cases dealing with sport, the courts have given an impact of practical means through these different rulings. With notorious cases such as *Bosman*⁸⁰¹, *Dona Mantero*⁸⁰² and *Meca Medina*⁸⁰³, which were all heard within the European Courts of Justice, it is case law such as these that have helped to bring attention to sport. Though, not having an immediate impact until the 1970's, sport in the European Courts of Justice was a rarity, but today has heard many a number of cases in regards to athletics. Being written into law, from instruments including the White Paper and more recently, Article 165 of The Treaty on The Functioning of The European Union, or TFEU, sport is increasingly making its mark in European Union relations as well.

Though, the relationships between sport and the law can sometimes be misconstrued and even debatable, the question as to whether or not the concept of sports law actually exists or whether it is simply Sport and the Law also has to be taken into effect. If cases can be heard then there could be an argument for the justification of there being a specialization that can be recognized as sports law in itself. It is also through case law that the European Courts of Justice have been able to adjudicate and provide justifiability to any sporting matters, which have been heard before the judges. Though some may have been more effective than others, resulting in either substantial or minimal changes, regardless the European Courts of Justice have had an impact of practical means within the sporting world and culture itself.

Before evaluating the case law of the Court of Justice and its applicability in regards to the adjudication of sporting matter, it is important to review the European Courts of Justice themselves. Created in 1952 as a staple for the European Coal and Steel Community or simply ECSC⁸⁰⁴, coinciding with The Treaty of Paris, many treaties and legal matters have followed since then. With numerous treaties later following including the Treaty of Lisbon, which has given the

⁸⁰¹ C-415/93

⁸⁰² C-13/76

⁸⁰³ C519/04 P

⁸⁰⁴ Civitas, 2015. *Court of Justice of The European Union*.(s.l: Civitas)

< <http://www.civitas.org.uk/eufacts/FSINST/IN5.php> >

court an ability to extend its boundaries in European Union Law, to the Treaty on The Functioning of the European Union, which currently holds the mentioning of sport in one of its articles⁸⁰⁵. The Courts have seen many changes consisting of one judge per member state, or European Union Country, there are also another nine members of the court who hold the title of advocate general. It is in turn their duty to present their legal opinions as to the cases that have been heard in the Courts of Justice. Through Article 13 of the Treaty of The European Union and the Treaty of The Functioning of The European Union, it is inscribed here the duties and governing guidelines in which the court is supposed to follow⁸⁰⁶. With cases being heard from a majority of areas the European Unions flexibility within the legal atmosphere is impressive as to the different area, which they cover. These different sectors go on to include annulment actions, which are filed in cases where European Union Law has gone against treaties, direct lawsuits from individuals to organisations, and actions taken against the European Union when they do not apply the law of the union itself.

However, in regards to sporting cases, the Courts do not have their own sector for these matters. Instead, they look to merging and finding ways to incorporate sport into European Union Law. According to Gardner, when the Treaty of Rome was scribed in 1957, there was no mention or acquisition of sport into the treaty whatsoever⁸⁰⁷. After a few decades it was not until the early case of *Dona v. Mantero*, which was not heard in front of the European Courts of Justice until the 1970's.

However, in regards to sport, European Court of justice does not have a separate sector for sports within its legal boundaries and flexibilities. However, they do hear cases within the genre of sport. Yet, it is within the determination of the courts to figure out if sport can apply to European Union Law, which it has been found in some cases can. With crossovers of sorts into freedom of movement, financial activities and human rights issues, the European Court of justice has been able to apply legal jurisprudence through sport cases, merging both sport and the law as one. With no real involvement into sports until the 1970's⁸⁰⁸, there have been a standout number of cases in which there has been a significant impact on sporting activity through the decisions made. However, it is also to be noted that European Union has dealt with a long list of sports cases since then as well. With ruling in competition law and freedom of movement, these cases such as *Bosman*, *Mantero* and *Meca Medina* have helped to establish a rapport between the communities of sport and European Union legislation.

⁸⁰⁵ Treaty on the Functioning of the European Union,2012

⁸⁰⁶ Treaty on European Union,1992

⁸⁰⁷ Boyes,, S., Gardiner, S., O'Leary, J., Welch, R. *Sports Law*.(4th ed.,Routledge,2012) 147

⁸⁰⁸ Parrish, R.. "Sports Law and Policy in the European Union".[2003] Manchester University Press.

With treaties such as that of Amsterdam, focusing on sports as a social significance as well as a way of bringing people and the communities together⁸⁰⁹ along with other instruments, sports has been recognized within the EU for a period of time now. Constantly being enhanced and changed, most recently as of 2011⁸¹⁰, the European Union has begun to put more of a focus on sport, acknowledging its importance within society along with its crossover into competition law as well. Prior to TFEU and the Lisbon Treaty, the White Paper in 2007, created a guideline for the way in which the EU wanted to go about the issue of sporting within the community. It is within the White Paper where it addresses that sporting activity is applicable within European Union Law. Taking into account the specificity of sport, which can go on to include competitions for men and women along with diversity among sports governing bodies being recognized. These can be found within the different case laws, which have been heard by the European Courts of Justice⁸¹¹. Following the White Paper, came the Treaty of The Functioning of The European Union or TFEU. Specifically within Article 165 of TFEU, Sport and its specificity or its specific nature within the European Union have been acknowledged with a focus on the promotion of its social and educational values. Comparable to that of organisations such as the World Anti Doping Agency or simply WADA or even FIFA, the article promotes fairness and the integrity ethically and physically of those athletes who are competing.

However, of interest to note in the article is how it does not promote the harmonization or creating of common legislation across the member states for sporting activities⁸¹². Thus, with no harmonization among the member states in regards to activities in sport, there is no unity in regards to legislation upon the matter. An issue that must be brought up though is the question of whether or not sports law is an actual sector of law or whether it is just sport and the law. With sport being incorporated into the law, it can be viewed as a specialization, similar to that of media or environmental law. However, some argue that sports law is a non-existent area in the legal field and one that is not acknowledged by many as noted by Parrish.

In the words of Edward Grayson,

“no subject exists which jurisprudentially can be called sports law . As a sound bite headline, shorthand description, it has no concept of law exclusively relating to sport. Each area of law applicable to sport does not differ from how it is found in any other social or

⁸⁰⁹ Treaty of Amsterdam, 1999.

⁸¹⁰ Communication From The Commission To The European , The Council , The European Economics and Social Committee and The Committee of The Regions, 2011

⁸¹¹ White Paper, 2007

⁸¹² Treaty on the Functioning of the European Union, 2012

*jurisprudential category*⁸¹³.

Thus, if sports law is not an area of law in itself, then for the European Court of justice to hear any cases on the matter would bring about a sense of confusion as they would have to figure whether or not the sporting matters could fall into others areas. These could be either competition, labour or employment law, as mentioned before through uses such as freedom of movement. This also includes sporting events as economic activities where it is applicable. Examples of these can go on to include world wide sporting events which include numerous sponsors and countries such as the Olympics, Wimbledon, the FIFA World Cup and any other international sporting competitions. Due to the gross revenue that these generate, it falls within the scope of economic activity. This concept can be viewed within the case of *Meca v. Medina*, which will be discussed in further detail later.

With the court being able to merge sports and either any of the other area of law, it bridges the gap between the two and in turn giving legal justifiability to matters in sporting.

Yet, though there may not be a field of sports law, it is apparent that sport has been acknowledged and recognized within European Union Law. This helps to give legal recognition and a justification of sorts and establishing that sports has a place within the legal community. Though the debate is still in question, as to whether or not sports law exists, it is apparent that the European Courts of Justice recognise sports importance, through adjudication. Through competition, employment and labour law as well as taking into consideration issues such as doping and economic activity, the European Union has done what it can to apply as much of its governance as legally possible in regards to sporting matters. This can be observed through the various case law, which has been adjudicated within the Court of Justice.

In regards to case law of the European Union and Sports Law there are commonalities amongst the cases which are brought forth. Many of them happen to deal with issues of nationality discrimination and freedom of movement issues. It is important to note that the European Courts of justice only have so much power as to sporting matters because Sport is not in itself a legal entity. Looking over some of the famous cases that have been adjudicated in the court, sport has been viewed as an economic activity at both semi and professional levels whether it be in football, tennis, cycling or another sport. Thus with sport as a economic activity, placing them along with other economic activities that go on within the member states of the European Union, many cases were able to fall under jurisprudence. Notably, this legislation includes the Treaty of the EEC also known as the Treaty Establishing The European Economic Community.

⁸¹³ Parrish, 7

It is within Articles 7, 48 and 49 which describe freedom of movement of workers and discrimination that the courts derived their decisions from. Alongside the EEC were the articles of the Treaty of Rome in 1957, which were used to adjudicate a number of the sports cases which were heard. Specific articles pertaining to this treaty happened to include Article 2, dealing with the economic activities of the European Union, including the establishment of the common market along with a stabilized and balanced market shared amongst the member states. Though some treaties names were eventually changed and with articles being used for other cases, it is apparent that these two treaties in themselves were the instruments that were able to provide practical means through legislation. This, having been done through reviewing and determining resolutions for sports cases brought up against the European Court of Justice.

Though there are a plethora of cases that have made their way past appeals and brought forth to the court, in regards to sport there are only a number, which stand out, and having developed a relationship between sport and the law. Yet, though there may be an establishment of a connection of sorts, it is not completely one that was solid from the start. With case law that derives from the prior, sport and the law within the context of the European Courts of Justice at first tended to repeat itself but eventually evolved.

Beginning with one of the most famous cases in sports law, and one of the first to be heard in front of the European Courts of Justice, after the inception and writing of the Treaty of Rome in 1957, is that of *Walrave v. Koch*⁸¹⁴. With the case revolving around the issue of discrimination against two cyclists, with one being a “pacemaker”, who both happened to be under the protocols of the UCI or Union Cycliste Internacional. The question of concern was in regards to whether or not a pacemaker and their cyclist should be of the same nationality⁸¹⁵. With discrimination as the motive for summoning the case, as well as issues in regards to freedom of movement within the European Union, it had to also be determined as to whether or not the Union Cycliste Internacional could be rendered on the same level as that of a European Union member state.

However, the UCI was at that time and currently an international organization. Thus, if the organization was rendered to be equivalent of that of a member state, this would result in the Union Cycliste International’s guidelines and regulations having to be accountable and held under the jurisprudence of European Union law. This would go on to include all of the European Union’s legal treaties and instruments, including the Treaty of Rome. Eventually, being determined by the European Courts of Justice that the Union Cycliste Internacional was subjected to The Treaty of Rome and created an impact for the sporting world. After originally

⁸¹⁴ C-36/74

⁸¹⁵ Rochefoucauld, E., 2015. *Collection of Sports-Related Case-Law*.(s.l.: Olympic.org)

< http://www.olympic.org/Documents/Reports/EN/en_report_264.pdf.>

filing against the Union Cycliste Internationale as well as the Dutch and Spanish cycling associations, it was later appealed to the Utrecht District Court, being located within the Netherlands. However, it was then that the case was referred to the European Courts of Justice.

The final determination for the case was that sport had relevance within the courts and community law if it was rendered and proved to be that of an economic activity, following under the guidelines of Article 2⁸¹⁶. It is under this article in which the European Union seeks to establish a common market and promote the development of well balanced economic activities amongst the different member states⁸¹⁷.

The second important decision to be determined from the case was that of the court finding in favor for the UCI conducting discriminatory actions. Though it was found that the UCI did not violate any articles within the EEC Treaty or the European Economic Community, it was determined that indeed the Union Cycliste Internationale did violate Articles 48 and 49 of the Treaty of Rome, falling under the scopes of community law⁸¹⁸. The decisions of *Walrave v. Koch*⁸¹⁹ were very important as it was not just one of the first cases to be heard within the European Courts of Justice in regards to sport, it went on to establish something much greater. It was an example of how not just public authorities and governing bodies were subject to community law but also private organisations that were providing services within the European Union. As sporting competitions are known to generate a gross amount of revenue, with sport being engaged in such a high professional level,⁸²⁰ it is within the borders of the European Union and thus constitutes an economic activity.

With the case of *Walrave v. Koch*⁸²¹, though the ruling helped to establish that sports could be placed within the realm of legal intervention, it was the beginning of sport cases being taken to the ECJ. The case was a milestone, acting as a pathway of sorts as there were no previous sports cases that had been heard before. The case paved the way for sports and the law within the practical means of the European Union as was noted through the applicability of the Treaty of Rome. The ECJ had to blend together the current legislation with the sports issue which was being raised in front of them and were able to find a solution through the legislation at the time.

⁸¹⁶ The Treaty of Rome, 1958

⁸¹⁷ The Treaty of Rome, 1958.

⁸¹⁸ Rochefoucauld, E., 2015. *Collection of Sports-Related Case-Law*. (s.l.: Olympic.org)

< http://www.olympic.org/Documents/Reports/EN/en_report_264.pdf.>

⁸¹⁹ C-36/74

⁸²⁰ Evald, J., Halgreen, L. *Sports Law in Denmark*. (2nd ed. Kluwer Law International, 2014)

⁸²¹ C-36/74

After the ruling was finalised, there came upon the European Courts of Justice, the case of *Dona v. Mantero*⁸²². Revolving around Italian nationals, the case involved a football club manager (Mantero) and a person who was working for him (Dona) to recruit players that were not of Italian citizenship outside of Italy to hopefully play for an Italian football team. Eventually, Mr. Dona tried to recuperate fees owed to him but was not successful thus bringing a case against Mr. Dona⁸²³. With Mantero filing a claim against Dona, citing acting abruptly in order to maintain players of other nationality, he went on to use citations. These were from the Italian Football Federation, claiming that a limitation was placed on those who could play in competition, with them having been of Italian nationality. After going to the European Courts of justice and the ruling of *Walrave v. Koch*⁸²⁴ being upheld, it was also determined that as sport may be considered to be an economic activity, it can also be applied to the levels of semi professional as well as professional football players⁸²⁵. This was through the applicability of Articles 7, 48 and 49 of the European Economic Community Treaty. Further to that, the respective articles detailed discrimination in regards to nationality, which are to be voided, and issues in regards to the free movement of workers. The Advocate General, Alberto Trabucchi inherently gave his opinion on the matter of sporting rules having validity as long as they in turn had an economic element composed of them⁸²⁶.

The ruling of *Walrave v. Koch* was used to find the ruling in *Dona v. Mantero*, displaying the prior key issues of discrimination amongst players as well as the secondary issues freedom of movement. Though being some of the earliest cases of sport adjudicated within the European Courts Of Justice, *Walrave and Mantero* did pave the way for sporting issues and activities to be heard within a legal context. With the rulings that were upheld in both cases such as *Markakis v. ASBL Federation Royale Belgie de Societes de Basketball*⁸²⁷ used these same rulings to reach conclusions in their own cases. However, it is important to note that these first two cases focused predominantly on issues of discrimination and freedom of movement. With the European Court of Justice being able to apply the treaties towards theses examples of case law, they in turn were able to add justifiability to *Walrave and Mantero*, exemplifying that sport should be a non discriminatory matter. It was also found that sport can also constitute as an economic activity at both the semi professional and professional levels and that in regards to freedom of movement, there is an applicability with which sport falls into. Along with those matters that were established, was also the notion that these did not just apply to public authorities but also that of private sporting organisations operating within the European Union. With discrimination as to sporting contexts, it is apparent that the European Courts of Justice have attempted to apply it to the most practical means that they have been able to do.

⁸²² C-13/76

⁸²³ Boyes, Gardiner 150

⁸²⁴ C-36/74

⁸²⁵ Boyes, Gardiner 150

⁸²⁶ Boyes, Gardiner 150

⁸²⁷ [1992] Brussels Court of First Instance, Belgium

It is of importance to note that in regards to human rights, which discrimination can fall under, the European Union does now address these issues along with other human rights issues in the Charter of Fundamental Rights⁸²⁸. Of notable importance as well, is the revolving issue as to whether or not sport is an economic activity in itself. Referring to *Walker v. Crystal Palace*⁸²⁹, originally heard in England, it was rendered that a player does carry out an economic activity, as they have signed a contract to participate in an activity which in turn gains a significant revenue. Workers were also able to fall under the Workers Compensation Act, due to the contracts that they had signed themselves and the sporting activity in which a player participates can be seen and constituted as an economic activity as well⁸³⁰. With this decision being upheld in the court, sport was not just a pastime, which could be watched for pleasure, but instead transitioned into a fully-fledged economic realm, where athletes could now be viewed as financial pawns of sort tasked to carry out a performance that generates large sums of profit. Though sport is known to generate gross sums of revenue, it can create problems amongst players and coaches. Issues such as finance's and viewing players as servants of sorts carrying out financial services are just some.

This, in turn, can prevent the athletic competition of sport and instead turning it is not a competition of financial means. This does not look out for the best interest of the players and restricts their freedom of movements and basic rights. This happened within the case of *Bosman*⁸³¹, which would not just incorporate these issues of discrimination and freedom of movement once again, but would in turn have major effect on football clubs and leagues. It was the impact through this case and the legal intervention of the European Union that would cause a stir in the sporting community.

Details of the *Bosman* case revolved around the issue of a Belgian football player who wanted to be transferred to another club, though the issue of fees had impended this procedure. It was up to the courts to decide whether or not Articles 48, 85 as well as 86 of the Treaty of Rome, were applicable to the case brought before them. Dealing once again with issues of freedom of movement, along with abuses of the common market as noted in respective Articles 85 and 86, the case would later be found in favour of the petitioner. The ruling included that players of football clubs had the right to move freely after their contracts had ended with the clubs at which they had been signed. There was also the new ruling in which European Football clubs could

⁸²⁸ Charter of Fundamental Rights of The European Union, 2009.

⁸²⁹ [1910] 1 KB 87

⁸³⁰ Bogaert, S.. *Practical Regulation of the Mobility of Sportsmen in the EU Post Bosman*.(Kluwer Law International, 2005)

⁸³¹ C-415/93

now hire European players without there being a substantial limit of sorts, completely disregarding the “3+2” rule which was in place prior to the Pre-Bosman ruling⁸³².

The Bosman ruling was significant in the way that it gave players a new flexibility of sorts with their clubs and did not restrict them when their contracts had ceased with their clubs. They could now move to clubs where they wanted to, whether it be in England, France or any one of the other member states, without having to worry about the new club having to pay a transfer fee. It also lifted the discrimination barrier and allowed more European players to join different leagues, without having the stipend of only a certain allowance of non nationals to play on a specific footballing team. However, an issue that occurred post-Bosman, was that of the financing of teams or sorts. Many smaller teams benefited from the transfer fees of their players, whilst larger clubs within organisations such as the Premier League were free of paying these costs, ultimately pushing smaller clubs into deficits. As noted, by Binder and Findlay, amongst the domestic leagues within football, leagues such as the premier league mentioned before had grown to become stronger thus increasing the level of interest and competition along with more awareness for the game globally⁸³³.

However, though the aftermath of *Bosman* may have created difficulties for smaller clubs and allowed more of a freedom to athletes within the football system, the European Court of Justice applied only legal adjudication which was justified towards the case, which were the articles within the Treaty of Rome, coming to the conclusions that they did. *Bosman* goes on to become another example of how the Courts can have so much of an impact as to justifiability within sport. Though, the decision may have harmed smaller clubs, the courts decision was founded under reasons which were in turn violations against *Bosman* and any other player who wished to transfer to another team, thus restricting their right to freedom of movement within the European Union. Yet, the ruling was not initially perceived well by FIFA and was only later changed after consolidation with the commission, making significant amendments to the FIFA regulations for the Status and transfer of players⁸³⁴. With the organization of FIFA, which is global these changes made during *Bosman* would only apply to those members who would wish to transfer between member states and those who hold residency within the European Union itself.

⁸³² Fordyce, T., 2005. *10 Years since Bosman*.(United Kingdom: BBC)

< <http://news.bbc.co.uk/sport1/hi/football/4528732.stm>.>

⁸³³ Binder, J. and Findlay, M. “The Effects of the Bosman Ruling on National and Club Teams in Europe”. [2012] *Journal of Sports Economics*, 13(2), pp. 107-129

⁸³⁴ Gardiner, 2003,162

As noted by Siekman, as long as sport is an “economic activity, European Law in principle is applicable to it”⁸³⁵. As this is the case noted by the aforementioned examples of case law within the European Union. If a sporting matter is brought within the jurisprudence of the the European Court of Justice, since there is no sector of Sports Law, which is applicable under European Union Law, it must be determined whether or not the case has the elements of an economic activity. The court can only go so far past its boundaries as there is no legal sector that has written legislation for sports law in itself. Instead treaties such as those mentioned before must merge with the matters of sport in order for justiciability to be provided in these matters.

However, from what the court has been able to determine, sport can be constituted as an economic activity, which has been proven in a number of cases through the issues of freedom of movement, goods of service, constituting economic activities and issues of discrimination based off of nationality. Thus, being able to fall within the legal scope of the courts European Union. However, with current legislation including sport as being fundamental to society and encourages the promotion throughout the member states⁸³⁶.

Though, current legislation notes that sport is an important aspect to society as well as education, there still is no set definitive legislation for sport within the EU, as there is for criminal or trade law. With acknowledgment from the court and with rulings having significant effect upon sporting society, there is no concrete law for these matters, questioning the specificity of sport in itself. With no concise legal framework having been put in place, and the only statues and legislation being heard on a case-by-case basis, as noted by UEFA, there in turn comes about a “destabilizing effect on sport creating a sense of ambiguity and legal uncertainty”⁸³⁷.

Referring back to the issue of whether or not there is a sports law or sport and the law, it is apparent that through The European Courts of Justice, there is no sports law just economic activity with a focus in sport and the specificity of sport in sorts being acknowledged and accepted through recent legislation. With the cases of *Walrave, Dona v. Mantero, Walker V. Crystal Palace* along with that of *Bosman*, it is within theses cases where the European Union has been able to apply justiciability as much as it can. Though some may have had more of an impact than others, it is apparent that the European Union’s effect on sport is continually growing as most law comes about. As sport grows so will legislation and with the potential of more cases being

⁸³⁵ Siekmann, R., 2012. *The Specificity of Sport: Sporting Exception in EU Law*. (s.l: hrcak) <hrcak.srce.hr/file/138868.>

⁸³⁶ Treaty on the Functioning of the European Union, 2012

⁸³⁷ UEFA, 2015. *UEFA’s position on Article 165 of the Lisbon Treaty*.(s.l.: UEFA)

<http://www.uefa.org/MultimediaFiles/Download/uefaorg/EuropeanUnion/01/57/91/67/1579167_DO WNLOAD.pdf>

heard in front of the European Court of Justice, there is a possibility that matters in relation to sport could expand. However, as legislation is currently set up, sporting matters can be viewed as economic activities, thus giving legal applicability to those issues within the European Union. Though this may narrow the net of sport and the law to issues of economic guidelines, freedom of movement, discrimination and goods of service; sport still has legal relevancy and if that is all the Court of Justice can provide, then it is what sport is going to have to merge itself with.

INFRINGEMENT OF RIGHTS OR ENHANCED NATIONAL SECURITY: CONSIDERING THE UNIMAGINABLE.

Anastasiya Sattarova

The atrocities of the past few years have made me re-think my position in relation to the value of my human rights. How much is one prepared to sacrifice for the safety of their country and those close to them? I have always thought that the rights possessed by all human beings are sacred and I still remain of this opinion. However, the Earth is not occupied by a few, there are millions of us divided by oceans, forests and “as far as an eye can see” land. We were all brought into this imperfect world, wrecked by wars, bureaucracy and greed with only a few expectations to contribute and survive. The struggling classes manage to adapt to the changing nature of government, following a dynamic exchange of “giving and receiving” and giving and giving...

It is this giving nature, the trait of humanity within us that makes us so charitable nowadays, aiming to contribute to other communities in order to achieve peace, reduce poverty, eliminate hunger and save lives. So, why cannot we consider a similar approach when strengthening our national security?

It is this thought that led me to compromise my ideals and to consider ideas which others only can deem to be “beyond crazy”. During my research, I stumbled upon the notion of implantable technology and *uberveillance*⁸³⁸ - an omnipresent electronic surveillance facilitated by technology that makes it possible to embed surveillance devices into the human body. On the surface of it the idea can appear to be “bonkers”; yet there is a lot of sensible and logical substance which underlies it, this comes hand in hand with years of biomedical research and experience of current use.

This paper aims to lay foundation for further discussion on the issues of the human implant, or biochip as some may know it. The whole of the paper would be delivered in a number of articles examining the notion from different perspectives with a view to provide consideration for the adoption of such a notion within the United Kingdom and beyond. With this in mind, this first article will be an initial one introducing readers to the notion of the human biochip, its potential benefits and associated concerns.

For the purpose of this work I will aim to concentrate on one particular type of implantable technology - the Radio Frequency Identification (RFID) implant (chip), which is already widely used within the USA and to a lesser degree in countries like Germany, Sweden and the United

⁸³⁸ MG Michael and K Michael, ‘Uberveillance: Definition’ in S Butler (ed), *Fifth Edition of the Macquarie Dictionary* (Australia's National Dictionary, Sydney University 2009) 1049.

Kingdom⁸³⁹. In putting this idea forward, I accept that not everybody will share my views and enthusiasm for such technology, I am also fully aware as to the legal challenges and procedural difficulties that may undermine the implementation of such a scheme. Yet, I beg you to carry on reading, be imaginative, and think outside of the box - as so many people do these days. I am asking you not to be self-centric and open your horizons and for those who are in positions of power...please consider our options.

The human microchip in a nutshell

So, human RFID chip, what is it? Designed and used during the Second World War as part of the IFF (Identification Friend or Foe) system, RFID comprises of four different components: a computer microchip, an antenna coil and a capacitor, all enclosed within a glass capsule.

Computer chip

The proposed microchip is capable of storing a unique encrypted identification number 10 -15 digits long. Some biochips are capable of storing data but for the reasons discussed below such chips are not recommended for human identification. Every chip has its own unique ID number which is etched by laser onto the surface of the chip before its assembly. Once the number is encoded it is permanent and cannot be changed in any way. Communication between the chip and the reading device occurs with the help of the electronic circuitry necessary for the transmission of the ID to the reader.

Antenna Coil

This is simply a coil of fine copper wire wrapped around a tiny iron core. Such an antenna may be used for receiving power and sending signals to and receiving signals from the reader.

⁸³⁹ R Stein, 'Implantable Medical ID Approved by FDA' (*The Washington Post*, 14 October 2004) <<http://www.washingtonpost.com/wp-dyn/articles/A29954-2004Oct13.html> > accessed 30 March 2017; Council on Ethical and Judicial Affairs, 'Report of the Council on Ethical and Judicial Affairs: Radio Frequency ID Devices in Humans' (CEJA Report 5-A-07 2007) <<https://epic.org/privacy/rfid/ama-report.pdf>> accessed on 29 March 2017.

Sweden: M Nilsson, 'I'm among the first Swedes with a microchip' (*The Local*, 18 November 2014) <<http://www.thelocal.se/20141118/swede-operates-microchip-into-body>> accessed on 23 March 2017;

Germany: S Griffiths 'Would YOU be microchipped? Kaspersky implants chip in man's hand that could one day be used to pay for goods and even unlock his home' (*Mail Online*, 03 September 2015) <<http://www.dailymail.co.uk/sciencetech/article-3221287/Would-microchipped-Kaspersky-implants-chip-man-s-hand-one-day-used-pay-goods-unlock-home.html>> accessed on 23 March 2017;

United Kingdom: S Fishwick, 'Biohackers: meet London's living synths who are implanting microchips into their own bodies' (*Evening Standard*, 29 October 2015) <<http://www.standard.co.uk/lifestyle/esmagazine/biohackers-meet-londons-living-synths-who-are-implanting-microchips-into-their-own-bodies-a3101646.html>> accessed on 23 March 2017.

Tuning Capacitor

This also performs the function of an energy storage device; it stores the small amount of electrical charge transmitted by the reader (less than 1/1000 of a watt) during the power transfer phase of the reader communication session. Once the biochip has power it then will wait in a dormant but powered state for any further data communication. If required, the reader then sends a request that causes the biochip to become active and it validates the request from the reader, if the request is correct the implant responds by sending back the encrypted unique identification number encoded on it. As the chip and the reader communicate via radio waves, the capacitor has to be tuned to the same frequency as the reader.

Glass Capsule

The glass capsule acts like a shield protecting the microchip, antenna coil and capacitor. It is made of biocompatible materials, like soda lime glass for example, and its small size is estimated to be 11 mm in length and 2 mm in diameter - roughly the size of an uncooked grain of rice. After assembly, the capsule is hermetically sealed, preventing any bodily fluids from reaching the microchip or any other part of the implant. As the glass, being a smooth material, is susceptible to movement, developers tend to attach to one end of the capsule polypropylene polymer sheath, or other similar material, which is compatible with the bodily tissue fibres, therefore resulting in the permanent placement of the biochip.

Such implant is *passive* in nature, meaning that it has no battery or any other long term energy source of its own, it has got an expected life span in excess of 99 years and does not require any maintenance.

The proposed RFID implant would be able to pass to the reader an *encrypted* unique ID number. Authorities who scan the chip with the reader would have an algorithm for the decryption of the code which in its turn would also give them access to personal data only at the allowable access level (only pertinent to their sphere of work). In this way, the chances of creating a method of new cyber theft is minimized, as the perpetrator would not only need a decoding algorithm but also a valid access code to access the database.

The whole communication process would occur in a matter of milliseconds. In order to determine the ID number, the reader has installed the software to decode the received signals and pass them on to the client computer to allow verification of the ID. The likely location for reading devices is where any transaction or security requirement is present, i.e. Point of Sale terminals, Passport control and ticket barriers. Outside of this it would also be possible to locate readers onto mobile communications masts and even onto any other telemetry network transponder location.

The method of implantation of the human RFID chip would resemble that of the injection of common vaccines using a hypodermic syringe without the need for anaesthesia.

Benefits

One must accept that in order to derive the most benefit out of the notion – it should be introduced on a compulsory basis, not just within one’s own country but globally. Adopting a “pick and mix” approach would add further uncertainty to an already unstable state of affairs and paranoia these days is hardly healthy for anybody.

Having said this, I do recognise that global compulsion is an unrealistic prospect as it would require international co-operation and acceptance, which may not be feasible due to political, cultural and religious differences. Therefore, starting at a lower level, it would be wise to consider *compulsory* microchipping within one single State. Assuming the international acceptance and willingness of other States for global placement of the required reading devices, the notion would be able to operate on the inter-state level even if the other States had not implemented it themselves.

The biochip has a vast unexplored potential within the national domain, but it can also be positively utilised internationally as a measure of global security and in inter-state investigations.

National security and policing

It is important to understand that the biochip is first and foremost a tracking device, allowing government agencies to determine the location of an individual person. This could be of significant benefit to national security services and the police who would be able to locate any particular individual more effectively, leading to a rapid response in cases of a missing person or suspected kidnapping. It would give parents peace of mind for the safety and security of their children. I know that as parents we are often not in a position to make decisions for our children when they reach legal age and their decisions become their own. However, we are responsible for protecting them and giving them a safe place to live and grow up in the earlier stages of their lives and if that safety risk led to the unimaginable – would you not rather take this step and sleep better at night than one day find out that they are never coming back and you may continue in your life with a million unanswered questions?

The biochip can also be an answer in more serious cases. Significant benefits can be derived in homicide cases, where agencies would be able to utilise the benefits of the biochip in order to narrow down the list of potential suspects by detecting, by using their ID numbers, the individuals who were in close proximity to the victim at the estimated time of death.

As far as criminal investigations go, the biochip should not be viewed negatively, as its location tracking capabilities can be utilised by police in order to prove innocence, such as to confirm an alibi, as well as guilt of a suspect. The European Court of Human Rights has confirmed such view *an der Velden v. The Netherlands*, no. 29514/05, decision of 7 December 2006 where it was highlighted that the retention of DNA profiles in the national database can be used to prove innocence as well as guilt.⁸⁴⁰

⁸⁴⁰ *Van der Velden v. the Netherlands* no. 29514/05, 7 December 2006

Immigration and refugee control

Immigration and boarder services is another area that can see vast improvements with the use of a human implant. By implanting the biochip at the point of entry into a country, this would help the authorities to monitor immigration and the flow of refugees.

In the case of immigration, the biochip would be inserted at the point of entry into the country and activated within the border control system for the duration of a visa. The biochip reader would then be able to send out an alert to the relevant authorities if a person had over-stayed their granted period of stay and was remaining within the territory of a country illegally. This would allow the relevant authorities to locate and deport illegal immigrants more effectively therefore minimising the strain on national resources. At the point of exit, the biochip would be scanned and the border control system would update its records accordingly.

A similar approach can be adopted in monitoring of refugees upholding the States responsibility to offer asylum to those seeking to escape persecution in other countries derived from Article 14 of the Universal Declaration of Human Rights 1948. Providing that biochipping is implemented as a national measure, the State would be able to apply it to refugees under Article 2 of the Convention Relating to the Status of Refugees 1951 which requires them to conform to the laws, measures and regulations of the country in which they find themselves.

Security of information

With the current levels of financial fraud and cases of identity theft – the biochip could offer a safe and secure solution. Indeed, with the introduction of the human biochip, both passport and national insurance cards could be abandoned, as well as bank cards. Every transaction would be completed by a simple reader scan of the individual in question. This is not a new idea and is fairly similar to the current use smart cards operated by the travel operators or “contactless” technology introduced within the banking sector.

Medical sphere

The benefits of the basic biochip in the medical sphere have already been proven in the United States where patients with diabetes and Alzheimer’s disease are offered, on a voluntary basis, to be microchipped. Not only does this allow medical personal to give them the right type of treatment, but in the case of the latter it can also provide family members with a sense of security knowing the whereabouts of the patient.

In the United States the use of RFID tags on patients has been approved by the U.S. Food and Drug Administration department and has further been endorsed by the American Medical Association in its *Report of the Council on Ethical and Judicial Affairs: Radio Frequency ID*

Devices in Humans noting that the introduction of the biochip can improve the coordination of care, reducing or completely eliminating possible adverse drug events and other medical errors.⁸⁴¹

The proposed human implant could be used in order to identify the patient (when one is unconscious for example), the unique ID number would also give medical personnel access to the basic necessary information about the patient such as blood type, any known allergies or illnesses like diabetes or asthma which would then allow them to administer the right treatment at the first point of contact.

The legality

So, what about the law and our human rights I hear you ask me...Well, I believe this question came some 30 years too late. State practices have already expanded in the use of surveillance technology to include heat-seeking, the interception of telecommunications, closed-circuit television (CCTV), body scans at airports and high security buildings, smart-cards, e-passports and many others.⁸⁴² Indeed, the current state of governmental surveillance over their citizens could be summarised no better than that put forward by the Information Commissioner, who noted that individuals:

*[L]eave electronic footprints behind with the click of mouse, making a phone call, paying with a payment card, using 'joined up' government services or just walking down a street where CCTV is in operation. Our transactions are tracked, our interactions identified and our preferences profiled—all with potential to build up an increasingly detailed and intrusive picture of how each of us lives our life.*⁸⁴³

The judiciary is more willing to consider and be open to the idea of States using modern scientific techniques in the criminal justice system providing that a State would strike a balance between the potential benefits of their use and important private life interests⁸⁴⁴.

Despite the fact that States carry wide ranging obligations under international and regional (European) human rights law, as far as privacy rights are concerned their obligation is uniform: states parties must refrain from violating such obligation under the relevant international instrument and in restricting this right, "...States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure

⁸⁴¹ Council on Ethical and Judicial Affairs, 'Report of the Council on Ethical and Judicial Affairs: Radio Frequency ID Devices in Humans' (CEJA Report 5-A-07 2007) <<https://epic.org/privacy/rfid/ama-report.pdf>> accessed on 29 March 2017.

⁸⁴² Constitution Committee, 'Chapter 2: Overview of surveillance and data collection' in *Surveillance: Citizens and the State*, Second Report, Session 2008-2009 (London, The Stationery Office Limited on the authority of the House of Lords 2009) <<http://www.publications.parliament.uk/pa/ld200809/ldselect/ldconst/18/1804.htm>> accessed on 22 March 2017.

⁸⁴³ *Ibid.*, [at 43].

⁸⁴⁴ *S and Marper v United Kingdom* [2008] ECHR 1581, [at 125].

continuous and effective protection of Covenant rights.”⁸⁴⁵ European case-law has further reaffirmed such a view by upholding and emphasising the significance of the doctrine of the margin of appreciation. Hence, States can impose a limitation on an individual’s right to privacy, providing that the measure limiting this right is proportionate to the legitimate aim pursued⁸⁴⁶ and in accordance with the principles of legality, necessity and proportionality.⁸⁴⁷

In addition, international privacy provisions provide that everyone has the right to the protection of the law against unlawful or arbitrary interference with their privacy. This consequently means that any surveillance schemes must be operated on the basis of a publicly accessible law, which itself must comply with international human rights law and a State’s own constitutional regime.⁸⁴⁸

In his Opinion in Joined Cases C-203/15 and C-698/15 the Advocate General noted that in matters related to the processing of personal data and the protection of privacy, Member States are not precluded from imposing an obligation on the providers of electronic communications services to retain all data relating to communications effected by the service users. Such a finding is subject to the conditions laid down at paragraph 263 of the Opinion, requiring the presence of legislative and regulatory measures ensuring adequate protection against arbitrary interference with an individuals’ rights. The Advocate General has further noted that, the obligations imposed on the service providers “...must observe the essence of the rights recognised by Articles 7 and 8 of the Charter of Fundamental Rights” and that they must be “...proportionate, within a democratic society, to the objective of fighting serious crime.”⁸⁴⁹

Therefore, one may conclude that providing there is national legislation that caters for the right of privacy, such as the Human Rights Act 1998 in the case of the UK, then there would be circumstances under which the State could be justified for limiting the right in question providing that the measure is proportionate to the State’s objective.

Conclusion

We live in the Digital Age, where smart and mobile technology has become a way of life, especially in the more technologically advanced States. It is precisely these States that are pioneering the rise of bioengineering, a combined science of biology and engineering looking at the possibilities of enhancing human bodies and our everyday life through the use of “implantable” technology, such as the biochip.

⁸⁴⁵ CCPR/C/21/Rev.1/Add.13 at [6]

⁸⁴⁶ *Gaughran v Chief Constable of the Police Service of Northern Ireland* [2015] UKSC 29, [at 38].

⁸⁴⁷ A/HRC/27/37

⁸⁴⁸ A/HRC/14/46

⁸⁴⁹ Advocate General’s Opinion in Joined Cases C-203/15 *Tele2 Sverige AB v Post-och telestyrelsen* and C-698/15 *Secretary of State for Home Department v Tom Watson and Others* (19 July 2016) [at 263] <<http://curia.europa.eu/juris/document/document.jsf?text=&docid=181841&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=239943>> accessed on 17 March 2017.

The notion of the human implant is not a new one and has been around for decades. Yet, it is only now that we are opening up our horizons and discovering the real potential for the concept to be utilised by Member States to harvest its benefits, not just within national domains, but much more widely at an inter-State level.

Research into the area of biochipping has been and remains a continuous process. However, one witnesses a complete lack of legal consideration given to this concept. This paper aims to begin to fill this vacuum and lay down the foundation for further discussion, especially as the introduction of the notion would directly concern many legal areas, not least those of human rights.

One thing is certain - the future for human microchipping is irreversible - in one form or another the day will come where Member States will resolve to the notion either as a safeguarding measure or for medical purposes. So, the real question currently standing before us is not "if the notion is to be introduced" but "when the notion is to be introduced."

It appears that international participation on this matter would be crucial in order to gain final clarification with regard to the position of the notion within the international legal arena. Undoubtedly, with more Member States resorting to the use of biotechnology, debate over the use of human microchips will intensify, forcing researchers, academics and legal professionals to consider the legal effect of the concept and measures necessary for its introduction and effectiveness. Until then - the world is watching and so are the States.

CASE C-157/15 (G4S SECURE SOLUTIONS): A CRITICAL DISCUSSION ON THE ISLAMIC VEIL AS A HUMAN RIGHT

Zara Kayani

The aim of this article is to critically discuss how the full-face veil is a freedom of right of the individual and how a possible ban of the veil in the United Kingdom could hinder several elements of the Human Rights Act 1998. To assess the legality of the ban of the full-face veil; it must be prescribed by law, have a legitimate aim (such as it is important for security purposes) and be necessary. It could be argued that a legitimate reason for banning the full-face veil would be for identification purposes or in trial matters. However, alternatively it could be said that banning the veil is an act of discrimination against Muslim women. Furthermore, this article will pay particular attention to some other European Union Member States that have recently adopted legislation concerning the wearing of the veil.

The basis for covering

Over recent years, the veil that many Muslim women wear on their heads has made headlines all over the world. In some countries, the veil has been banned in public schools. In some countries, it is being adopted into legislation. In some countries, the wearing of the veil has triggered a national debate for it to be banned. So, when a symbol has created such conflict, would it be easier to remove it? Some may argue yes, others will say no as it is the individual's right to choose whether they wear the veil. Some Muslim women wear the veil because they believe that God has made it an obligation upon believing women to observe the veil. This is supported by the following statement:

“And tell the believing women to reduce [some] of their vision and guard their private parts and not expose their adornment except that which [necessarily] appears thereof and to wrap [a portion of] their head covers over their chests and not expose their adornment except to their husbands...”⁸⁵⁰

This is a powerful *ayah* (verse) from the Holy Quran which explains the reasons why a Muslim woman appears covered and guards her modesty. This has had a very controversial impact in today's society. The above *ayah* from the Quran is known as the verses of hijab and some Islamic scholars have held the consensus that the wearing of the hijab is mandatory. The literal meaning of the word *hijab* is to veil, to screen or to cover. Many Muslim women who observe the veil do so through their own personal choice and see this as their right rather than a burden upon them. The wearing of the veil is no way a means of oppression but rather a source of protection and expression of religious identity for an individual.

⁸⁵⁰The Holy Quran, Surah Al-Nur(Light) 24:31

However, many people hold the view that the wearing of the veil is liberating a woman from expressing her identity and thus obstructing her from adapting to the “*norms and values*” set out by the society we live in.

The veil has created an outburst of political attention over recent years, leading to contemporary debates focusing on proposing new laws that ban the wearing of the full-face Islamic veil. It is important to mention at this point, that the full-face Islamic veil that will be referred to throughout this article and in general context relates to the veil that covers the face otherwise known as the *niqab* or *burqa* and not relating to the *hijab* which is the headscarf covering.

As it currently stands, there is an ongoing national debate around the banning of the veil and whether this should only be incorporated in workplaces or also in public spaces. In March 2017, the European Court of Justice made a ruling that headscarves can be banned in the workplace and that this would not constitute discrimination. The decision comes from the case of “*Case C-157/15 G4S Secure Solutions*” concerning a Muslim woman Samira Achbita who was employed as a receptionist by G4S on the 12th February 2003. At the time of her employment, there was an unwritten rule within G4S that prohibited the employees from wearing any visible signs of their political, philosophical or religious beliefs in the workplace.

In and around April 2006, Ms Achbita informed her employers of her intention to wear the Islamic headscarf during working hours. The management of G4S responded by informing her that the headscarf would not be acceptable as this was a clear visible sign of her displaying her religious beliefs, contrary to the position of neutrality adopted by G4S. After a period of absence, due to sickness, on the 12th May 2006 Ms Achbita informed her employer that she would be returning to work and would be wearing the Islamic headscarf. On the 29th May 2006 an amendment was approved by the G4S council to their workplace regulations and came into force on 13th June 2006. This provided that “*employees are prohibited, in the workplace, from wearing any visible signs of their political, philosophical or religious beliefs and/or from engaging in any observance of such beliefs.*”

Ms Achbita was dismissed from work on the 12th June 2006 due to her continuance in wearing the Islamic headscarf at work. This dismissal was challenged in the Belgian courts. The Court of Cassation in Belgium queried into the interpretation of the EU directive regarding equal treatment in employment. The Belgian Court’s aim was to find out whether prohibiting wearing the constituted direct discrimination. The Court of Justice held that under this directive, equal treatment means that there must be no direct or indirect discrimination based on the grounds of religion. However, what it has not done is include a definition of religion. Therefore, the concept of religion must be interpreted as covering both the facts of having religious belief and the freedom of persons to manifest that belief in public.

The Court of Justice found that the G4S internal rule regarding visible signs covers any manifestation of such beliefs without distinction and therefore treats all employees in the same way as G4S require all their employees to dress neutrally. However, national courts have to ensure that this policy of neutrality is applied equally to all employees. It was held that the prohibition of the Islamic headscarf does not constitute to direct discrimination of religion or belief within the meaning of the directive.

It is important to understand that those who have liberal instincts will have a different notion as to how to protect and promote freedom of choice. Some believe that the veil is a form of expression and rightly, a freedom of choice. Others adopt a different belief on the opposite end of the spectrum and consider the veil as confining one from truly expressing themselves as they are weighed down by a religious identity. Therefore, they are seeking to impose laws and regulations and justifying this on the grounds that it protects the equal rights of women.

Currently, the United Kingdom has not incorporated the banning of the veil into their law as it is held that it is “*not British*” to tell people what to wear⁸⁵¹. However, there has become a growing and increasing trend of a variety of national laws being proposed in other European countries to ban the full-face veil in public places. With some countries banning the full-face veil, this is creating a momentum which is inspiring other countries to consider adopting the banning of the full-face veil in their respective laws.

Islamic debates in Europe: a growing trend

France

France, on the 11th of April 2011, became the first country to ban the full face Islamic veil in public places. The National Assembly voted to approve a ban on veils that cover the face. Under the ban, no woman, either a French citizen or a foreigner residing in France, is allowed to leave the comfort of their home wearing the full veil which covers their face. With certain exceptions, a woman in France who is seen covering her face publicly i.e on the streets, in parks or on public transport is subject to a fine of €150 and has to take a lesson in citizenship. The Senate approved the legislation in a unanimous vote. Furthermore, the French Constitutional Court held that the ban on the full-face veil does not infringe civil liberties but made a small but significant change. Namely that this law will not apply to any public place of worship as this could violate a person’s religious freedom.

In his journal article, “*French prohibition on veiling in public places: rights evolution or violation*” Ryan Hill looked at the ban on face covering garments in public places and whether its intention

⁸⁵¹ Allegra Stratton, “*Copying French ban on burqa would be un-British, says minister*” Sunday 18 July 2010 <Accessed 18 May 2017> <http://www.guardian.co.uk/uk/2010/jul/18/burqa-ban-unbritish-immigration-minister>

was to target forms of Islamic dress specifically rather than religious symbols. Hill further considered the extension of the ban to all public places rather than just state-run institutions. The article also looked at whether the ban could be justified⁸⁵².

Belgium

In July 2011, Belgium became the second country to have a law in force that banned the full-face veil. The use of the burqa, the niqab and the veil has been completely banned in Belgium. This has been extended to public spaces including streets, parks, roads and any building that is used for the purpose of serving the public. If anyone is seen or caught violating this law, then there is a possible prison sentence of up to 7 days.

Netherlands

In November 2016, the Netherlands supported the ban on the Islamic full-face veil in public places such as schools and hospital and on public transport. This rule which was backed by Dutch MPs, was approved by 132 members of the 150-seat house. However, in order for it to become a law, the bill must be approved by the Dutch Senate. Describing the Bill, Prime Minister Mark Rutte stated that this Bill will see offenders being fined up to €410. The ban of the full-face veil is part of the new coalition government's programme.

Spain

Currently, there are no plans in place for a national ban in Spain. However, Barcelona has announced a ban on the full Islamic face veil in certain public places such as municipal offices, libraries and public markets. A smaller town in Catalonia, that is in the north-eastern region, has also imposed the ban. Barcelona's city council claims that the ban is targeted at any head wear that obstructs identification and is not on the grounds of religious belief.⁸⁵³ In their article "*Human Rights: Freedom of religion or belief- interference with*", Arribas and Oliva looked at a Spanish Supreme Court ruling on the 14th February 2013. This looked at whether banning the wearing of face-covering garments in public places breached the right to religious freedom of Muslim women⁸⁵⁴. Furthermore, El Pais, a prominent newspaper, stated that any ban that may be imposed by the government should be justified on the grounds that it is necessary for security concerns.⁸⁵⁵

⁸⁵² Ryan W.Hill, (2013) *the French prohibition on veiling in public places: rights evolution or violation*
⁸⁵³ *ibid*

⁸⁵⁴ Santiago Canamares Arribas and Javier Garcia Oliva.(2013) *Human rights: freedom of religion or belief - interference with*. O.J.L.R. 2013, 2(2), 476-477

⁸⁵⁵ "Afrontar el debate" El Pais 5 June 2010 <Accessed 10 May 2017>

http://www.elpais.com/articulo/opinion/Afrontar/debate/elpepiopi/20100605elpepiopi_2/Tes

Germany

Currently in Germany there is no ban on the Islamic veil. In fact, in September 2003, the Federal Constitutional Court ruled in favour of a teacher who wanted to wear an Islamic scarf to school. This is in stark contrast to other European Union Member States.

Does banning the veil in the United Kingdom infringe elements under the Human Rights Act 1998?

If the United Kingdom were to create legislation that banned the veil, it is important that thorough research is done as to whether the new legislation would be compatible with the Human Rights Act 1998, and what the purpose of the new legislation would be.

In order to understand what the terms “*civil liberties*” and “*human rights*” mean, one would need to look at this in line with the passing of the Human Rights Act 1998⁸⁵⁶. The purpose of the Act was to ensure that our domestic law complies with the standards that are laid out in the European Convention on Human Rights. The introduction of the Human Rights Act 1998 has enabled individuals to take their human rights cases straight to the domestic courts, as opposed to the previous manner of taking their case to Strasbourg to argue their case in the ECHR⁸⁵⁷. This was costly and time consuming and the domestic law has made this easier.

Human rights are primarily individual rights, which will be claimed by the individual. Therefore, in principle what the Human Rights Act has achieved is setting out the fundamental rights and freedoms of each individual in the United Kingdom. This enables each individual to have access to freedom of rights, such as a right to private and family life (Article 8), freedom of thought conscience and religion (Article 9), freedom of expression (Article 10) and freedom from religious discrimination (Article 14). The above articles mentioned under the Act are all relevant as to how the potential ban of the veil in the United Kingdom could hinder certain articles under the European Convention of Human Rights, and will be explained more in depth below.

Right to private life

Article 8 of the Human Rights Act protects the right to respect for a person’s private life⁸⁵⁸. Firstly, it is important we understand exactly what the term “private” means. When we talk about the right to privacy, we generally regard this as a right to be left alone or to be able to enjoy a particular space. Article 8 provides the right to a private life⁸⁵⁹. The right to private life means the right to

⁸⁵⁶ Foster, S (2011) *Human rights and civil liberties*. 3rd edition. Harlow: Pearson Education Limited. p4

⁸⁵⁷ *ibid*

⁸⁵⁸ Stone, R.(2012) *Textbook on Civil Liberties & Human Rights*. 9th Edition. London: Oxford University Press. P217

⁸⁵⁹ Article 8 of the Human Rights Act [1998] c.42

make choices about one's life. If someone chooses to wear the veil, then evidently it is their right to wear it. Article 8(1) clearly states that "*Everyone has the right to respect for his private and family life, his home and his correspondence*"⁸⁶⁰.

The right to private life also covers personal autonomy. This means that one has the right to make decisions on how they choose to lead their lives. If a Muslim woman wants to wear the burqa and the hijab in accordance to her religious faith, culture and personal convictions then she should be able to wear it when she chooses to, either publicly or privately.

Further, Article 8 is a qualified right⁸⁶¹, this means that any interference by a public authority with this right is justifiable if it is in accordance with the law. In addition, it is also justifiable if it is necessary in a democratic society in the interests of national security; public safety, the economic well-being of the country, the prevention of disorder or crime, the protection of health or morals or the protection of the rights and freedoms of others.

Therefore, the justification of placing a restriction on the veil would be if it was for reason such as having it to remove it for identification checks, or there was a risk that the wearing of the veil was necessary for the protection of health i.e Vitamin D deficiency due to lack of skin being exposed to sunlight.

Freedom of thought, conscience and religion

Article 9(1) and (2) of the Human Right Act [1998] states that

1. *Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.*
2. *Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.*

The purpose of Article 9 is to guarantee that one is able to think as they wish and they are able to have religious or non-religious beliefs without being persecuted for this or without undue

⁸⁶⁰ Article 8(1) of the Human Right Act [1998] c.42

⁸⁶¹ Stone, R.(2012) *Textbook on Civil Liberties & Human Rights*. 9th Edition. London: Oxford University Press. P217

interference⁸⁶². Article 9 clearly gives the right for one to have the freedom of thought and religion, so why should a Muslim woman be questioned on her religious beliefs and why should she be targeted because she wishes to act in accordance to her religious faith and dress accordingly⁸⁶³. If this Article gives you the right to have freedom of thought and religion, then surely by telling someone they cannot wear the veil or in the alternative, wear the crucifix, is removing the purpose of the right and it is no longer a freedom.

Under this article, whether you are a Christian, a Muslim or even an atheist, it inhibits your right to manifest your religion or belief in worship, teaching or even in practice in public or in private⁸⁶⁴. However, even though this aspect of Article 9 allows a qualified right of interference, this can be justified. This was supported by the case of *R (on the application of X) v Headteachers and Governors of Y School* [2007]. In this case, X claimed that Article 9 was breached by the school as the school refused to allow the Muslim girl to wear her *niqab* to school, even though previously her three sisters were able to do so. The school agreed to pay for tuition at another school for the pupil where the veil was allowed, however the claimant refused this offer and claimed the refusal of wearing the *niqab* in school constituted a breach under Article 9. However, the school were able to justify this under Article 9(2) and that the prohibition of the *niqab* was in the interests of public safety, or the protection of the rights and freedom of others⁸⁶⁵.

But simply asking a woman to not wear the veil in public, is not a justification; in fact it is hindering her rights to practice her religion freely. In *R v D* [2013], D was free to wear the *niqab* that covered her face during the trial, however an exception was made when giving evidence and D could not give evidence whilst wearing the *niqab*. D's Muslim faith meant that she was not able to reveal her face in the presence of men who were not members of her immediate family.

Article 9 of the Human Rights Act gave D the right to manifest her religious beliefs. However, some restriction *could* be placed by the courts if, to an extent it was to interfere with the courts duty to conduct a fair trial to all the parties involved. In addition, the courts were required to determine the extent to which D was allowed to wear her *niqab* during the proceedings. It was held that D had the right to manifest her religious beliefs and that the courts could not act in a way which was incompatible with the convention rights⁸⁶⁶.

⁸⁶² *Dubowska and Skup v Poland* [1997] 24 EHRR CD 75

⁸⁶³ *R. (on the application of Begum) v Denbigh High School Governors* [2004] EWHC 1389

⁸⁶⁴ *Azmi v Kirklees MBC* [2007] IRLR 434

⁸⁶⁵ *R (on the application of X) v Headteachers and Governors of Y School* [2007] EWHC 298

⁸⁶⁶ *R v D* [2013] Eq. L.R. 1034

Freedom of expression

Article 10 of the Human Rights Act is regarding freedom of expression. Article 10 quotes that “*everyone has the right to freedom of expression...*”⁸⁶⁷ As an individual, one should be able to hold opinions and be able to express these freely without the interference of the government. For many Muslim women, the veil is a form of expression. It is a form of expression as it is allowing them to express their faith and belief. However recent banning in countries such as France has resulted in this being hindered. In one of the recent cases of *S.A.S v France*⁸⁶⁸, the claimant is a French national and a practicing Muslim. She has complained that she was fined for wearing the niqab. This case is currently pending before the Grand Chamber of the European Court of Human rights as the claimant argues that under Article 19 the banning of the veil violates the right to freedom of expression, the right to freedom of religion or belief and the prohibition on discrimination.⁸⁶⁹ It is evident that the wearing of a religious symbol is a form of religious expression as well as manifesting one’s religious beliefs.

In order to ban or place a restriction on the full-face veil, it must have a legitimate purpose such as that it is to protect certain public interests i.e national security or public safety. In addition to this, it must further be demonstrated that it is necessary for that given purpose. An example of where it would be legitimate would be for the purposes of public safety i.e to show one’s face in certain places or to show one’s face for identification purposes. Although public safety could be a legitimate purpose for imposing restriction on freedom of expression through the wearing of the veil, it would not allow such restrictions to be in place because some members of the society disapprove of it.

Freedom of religious discrimination

Under Article 14 of the Human Rights Act “*any discrimination based on grounds such as ethnic, religious or belief... shall be prohibited*”⁸⁷⁰. This is a clear indication that no matter what religion you follow, one should not be discriminated either in their work practice, or in their everyday life. In *Azmi v Kirklees Metropolitan Borough Council* [2007], Mrs Azmi claimed unfair dismissal for religious discrimination as she refused to remove her veil that covered her face as she worked with male colleagues. Even though the courts found that Kirklees Council were not directly or indirectly discriminatory, this was nonetheless an important case as it showed for the very first time that it is possible that an employer can be held liable on the grounds of discrimination against an employee in regard to beliefs (such as the wearing of the veil).

⁸⁶⁷ Article 10(1) of the Human Rights Act [1998] c.42

⁸⁶⁸ *S.A.S v France* (no. 31955/11)

⁸⁶⁹ Article 19 of the Universal Declaration of Human Rights

⁸⁷⁰ Foster, N (2012-2013) *EU Treaties & Legislation*. Oxford

In *Cherfi v G4S Security Services Ltd* [2011] Mr Cherfi, a Muslim, was employed as a security guard in 2005. He worked at a client's site in Highgate. Every Friday at lunchtime he left the site to attend Finsbury Park Mosque for Friday prayer. In October 2008, G4S told Mr. Cherfi he was no longer able to leave the site at lunchtime, as G4S were contractually obliged to make sure there were a certain number of security guards available throughout operating hours. G4S had offered to change Mr Cherfi's contract so that he would be on a shift pattern from Monday to Thursday, giving him an option of working either on a Saturday or a Sunday rather than working on Fridays. However, Mr Cherfi refused to work on the weekend and also stopped working on Fridays, taking them off as either sick leave, annual leave or authorised unpaid leave. In March 2009, G4S told Mr Cherfi that this arrangement could not continue. Therefore, Mr Cherfi was dismissed. He claimed that G4S Security were indirectly religiously discriminatory⁸⁷¹.

It is pivotal to mention at this point and under this article, that the banning on wearing the full-face veil must not violate the International Human Rights Law in respect of the right to equal treatment. Elaborating further, this means that it should respect our basic human rights without discrimination on the grounds of race, religion, colour, sex etc.

Conclusion

So, if the United Kingdom were to ban the veil what are the implications of this? Not only does it hinder several elements under the Human Rights Act as explained above. It also will be seen as morally wrong as Britain prides itself as being a multicultural society where all religions are allowed to be practised. The veil is a woman's identity which should not be taken away from her. Yes, it may affect certain situations such as right to a fair trial, or during court proceedings where the need for the woman's identity to be revealed is necessary, then the removal may be acceptable for the short period⁸⁷². It is important to remember that if public bodies such as schools and universities decide to ban the veil, it is possible that there could be a violation under Articles 8, 9, 10 and 14 of the Human Rights Act if it has not been justified accordingly. All in all, it is unlikely that the United Kingdom will be able to ban the veil completely; it is a right of choice. It is for a Muslim woman, to choose whether she wants to wear one as a representation of her faith, her culture and most importantly her identity⁸⁷³.

⁸⁷¹ *Cherfi v G4S Security Services Ltd* UKEAT/0379/10/DM

⁸⁷² *R v D* [2013] Eq. L.R. 1034

⁸⁷³ *Sahin v Turkey* [2005] (44774/98)

EXPLORING THE RELATIONSHIP BETWEEN COPYRIGHT AND FREEDOM OF EXPRESSION

Kin-Hoe Loi

In the US Supreme Court case of *Harper & Row Publishers v Nation Enterprises*, Justice O'Connor stated that the 'Framers (of the US Constitution and its Amendments) intended copyright itself to be the engine of free expression'.⁸⁷⁴ In America, the First Amendment of the Constitution guarantees freedom of expression, much in the same way Article 10 of the European Convention of Human Rights (hereafter, ECHR) guarantees it in the UK. In the UK Court of Appeal case of *Ashdown v Telegraph Group Ltd* however, it was held that in exceptional cases, the enforcement of copyright could conflict with freedom of expression.⁸⁷⁵ Lord Philips MR commenting on the nature of copyright stated, 'Copyright is antithetical to freedom of expression. It prevents all, save the owner of the copyright, from expressing information in the form of the literary work protected by the copyright.'⁸⁷⁶ There is an obvious tension between copyright laws and freedom of expression and it is well documented.⁸⁷⁷

Intellectual property rights have roots in natural law, specifically Lockean moral desert theory.⁸⁷⁸ This theory takes the view that property can be justified as a reward for creating new works from existing ideas and works in the public domains. Today, intellectual property rights are enshrined as a fundamental human right in the ECHR. The European Court of Human Rights (ECtHR) in the Swedish 'Pirate Bay' decision⁸⁷⁹ held that "intellectual property benefits from the protection afforded by Article 1 of Protocol No. 1 to the Convention".⁸⁸⁰ The court in this instance was referring to the proprietary interests of copyright holders, thus establishing that copyright as an intellectual property right is protected by the ECHR. Freedom of expression as a human right is more straightforward as it is found in Article 10 of the ECHR. Consequently, this becomes a question of whether one human right enhances or inhibits another human right. Human rights often can come into conflict with each other; for example freedom of expression and the right to respect for private and family life.⁸⁸¹ However, as a modern democratic society, it is accepted that

⁸⁷⁴ 471 US 539, 558 (1985)

⁸⁷⁵ [2002] Ch 149 (CA).

⁸⁷⁶ *Ashdown* (n 1) [30]

⁸⁷⁷ Jonathan Griffiths, *Copyright and free speech : comparative and international analysis* (Uma Suthersanen ed, Oxford : Oxford University Press 2005)

⁸⁷⁸ Daniel J. Gervais, 'Intellectual Property and Human Rights: Learning to Live Together' in Paul L.C. Torremans (ed), *Intellectual Property and Human Rights* (Kluwer Law International BV 2008) 3

⁸⁷⁹ *Neij and Sunde Kolmisoppi v. Sweden* No. 40397/12, (ECtHR 19 February 2013)

⁸⁸⁰ *Neji* (n 7) 11.

⁸⁸¹ ECHR, Art 8; see also *Campbell v MGN Limited* [2004] UKHL 22

although the rights may occasionally conflict, society is still better off having all of them together. Human rights work best as a complete package in tandem and accordingly, this article will then argue that intellectual property rights, specifically copyright laws, enhances the right of freedom of expression.

To understand the extent in which copyright enhances or inhibits freedom of expression, one needs first understand the way in which the two rights interact and the conflict between them. In the first instance of the *Ashdown* case, Sir Andrew Morritt V-C in judgment explained the relationship as such:

*“Copyright does not protect ideas, only the material form in which they are expressed. It is therefore a restriction on the right to freedom of expression to inhibit another from copying the method of expression used by the copyright owner even though there may be open to him a host of other methods of expression of the same idea. It must follow that intellectual property rights in general and copyright in particular constitute a restriction on the exercise of the right to freedom of expression.”*⁸⁸²

This direct judicial admission of the conflict between copyright and freedom of expression is a relatively new development. Courts both in Europe and America have traditionally been very reluctant to consider the freedom of expression defence to copyright law, regarding any possible conflict as having been resolved internally already within the legislative legal boundaries of copyright law.⁸⁸³ These internal balancing mechanisms include the idea/expression dichotomy, and the limitations and exceptions to copyright law. There is academic support for the view that there is no conflict due to the ‘inbuilt limits of the idea/expression, originality requirement, exceptions and term’,⁸⁸⁴ which leave enough space for people to express themselves freely. Another argument against including the defence of freedom of expression to copyright law is that copyright law’s purpose is to promote values which include but are not limited to free speech.⁸⁸⁵

Is copyright really ‘antithetical to freedom of expression’? It is easy to see how copyright infringes upon and limits freedom of expression but are there justifications for the exclusionary right? One of the more important and relevant justifications is that copyright can promote freedom of

⁸⁸² [2001] Ch 685 (ChD), [12].

⁸⁸³ Christophe Geiger and Elena Izyumenko, 'Copyright on the Human Rights' Trial: Redefining the Boundaries of Exclusivity Through Freedom of Expression' (2014) 45(3) IIC 316

⁸⁸⁴ Estelle Derclaye, 'Intellectual Property Rights and Human Rights' in *Intellectual Property and Human Rights* (2008) 142.

⁸⁸⁵ Greame B. Dinwoodie 'Copyright and free expression: engine or obstacle' in Raquel Xalbarder (ed.), *Copyright and Freedom of Expression: Proceedings of the ALAI Study Days*, (Chicago-Kent College of Law 2008) 253

expression by providing incentives for the creation of new expressions.⁸⁸⁶ This is a utilitarian and economical approach, the underlying theory of which is that knowledge is a public good. It also is inexhaustible, as the use of knowledge by one does not limit or leave less for others to use, and that it is non-excludable as it is not possible to prevent others from reproducing the knowledge, independently or otherwise. Finally, it recognizes that the initial cost of knowledge production is usually high. Not allowing content creators to protect their work will lead to free-riding and eventually, stifle the amount or quality of public goods being produced.⁸⁸⁷ Of course, allowing copyright holders exclusionary rights may lead to artificial monopolies in expressions and result in poorer users having limited access to ideas. This just serves once again to highlight the need for balance.

The Horizontal and Vertical Effects

Another obstacle legal regimes face in acknowledging the conflict between copyright and freedom of expression is the way freedom of expression has conventionally been understood to apply.⁸⁸⁸ Freedom of expression has traditionally been understood as arising in the context of government and citizen, also known as the vertical effect, as freedom of speech is normally protected against infringement by the state and not against private individuals.⁸⁸⁹ This is in line with the free speech justification that freedom of expression is necessary for democracy. It allows individuals to gather the necessary information to make informed and rational choices in a functioning democracy, as free debate about political leaders and parties exposes their strengths and weaknesses.⁸⁹⁰ Another rationale for the vertical effect being prevalent understanding is that copyright is granted and enforced by government via statute.⁸⁹¹ It follows then that the government enforcing the exclusionary right infringes the freedom of expression of its citizens. This argument is not without contention and opponents,⁸⁹² including Angelopoulos who argues that as the State is involved in copyright enforcement, it is obliged to ensure that national legislation protects free speech at both a vertical and horizontal level.⁸⁹³

⁸⁸⁶ Patrick Masiyakurima, 'Fair Dealing and Freedom of Expression', in Paul L.C. Torremans (ed), *Intellectual Property and Human Rights* (Kluwer Law International BV 2008) 88

⁸⁸⁷ Uma Suthersanen, 'Towards an International Public Interest Rule? Human Rights and International Copyright Law' in Jonathan Griffiths (ed), *Copyright and Free Speech* (Oxford : Oxford University Press 2005) 101

⁸⁸⁸ Michael D. Birnhack. 'Copyright and Freedom of Expression in the UK' (2003) (24) Entertainment Law Review

⁸⁸⁹ Christina J. Angelopoulos. 'Freedom of Expression and Copyright: The Double Balancing Act' (2008) (3) Intellectual Property Quarterly 328, 330

⁸⁹⁰ Masiyakurima (n.14), 88; For more on Freedom of Expression and Democracy, see <https://www.article19.org/pages/en/freedom-of-expression.html>

⁸⁹¹ Copyright, Designs and Patents Act 1988.

⁸⁹² Barendt, Copyright and Free Speech Theory in Jonathan Griffiths (ed), *Copyright and Free Speech* (Oxford : Oxford University Press 2005).

⁸⁹³ Angelopoulos (n.16), 331.

The horizontal level infringement of freedom of expression happens when modern democracies adopt an increasingly market-orientated economy and thus, the main source of threat to freedom of expression comes from the private sector.⁸⁹⁴ This is due to the market becoming ‘conspicuously oligopolistic through mergers and acquisitions in the media and entertainment sector’⁸⁹⁵, resulting in massive media conglomerates owning significant amounts of copyrighted material. In his book about the dangers of overzealous copyright, Professor Kembrew McLeod talks about culture being increasingly ‘fenced off and privatized’,⁸⁹⁶ adding that if 15 years ago software companies were able to restrict access to their proprietary information the way they do today, the Internet of today would not exist.⁸⁹⁷ Proving his own point, Professor McLeod actually has the trademark to the phrase ‘freedom of expression’ in America, which he applied for as a media prank.⁸⁹⁸ The question then is whether the right to freedom of expression can be ‘invoked directly against other citizens’.⁸⁹⁹ This matters as once a private person (legal or natural) owns copyright in a significant work of public interest, it implies control over the relevant segment of public discussion. The owner can control the expression and the use of the work, and by extension, its meaning. Accordingly, freedom of expression in copyright claims should also apply when in cases when the copyright is held privately. This is especially important in light of the extensions to copyright law in both the UK⁹⁰⁰ and the US.⁹⁰¹

Internal and External Conflict

A common judicial response to claims that copyright infringes freedom of expression is the idea that the tension between the two rights is successfully reconciled within existing copyright legislation.⁹⁰² This can be seen in both *Harper & Row’s* ‘copyrightable expression and

⁸⁹⁴ Birnhack (n.15), 21.

⁸⁹⁵ Angelopoulos (n.16), 331.

⁸⁹⁶ Kembrew McLeod, *Freedom of Expression: Overzealous Copyright Bozos and Other Enemies of Creativity* (2005), 8.

⁸⁹⁷ *ibid*, 36.

⁸⁹⁸ McLeod (n 23) 118

⁸⁹⁹ P.B. Hugenholtz, ‘Copyright and Freedom of Expression’ in N. Elkin-Koren and N.W. Netanel (eds.) *The Commodification of Information*, (2002) 247

⁹⁰⁰ See, The Duration of Copyright and Rights in Performances Regulations 1995 (SI 1995/3297), implementing Council Directive No.93/98/EEC, to harmonise the duration of copyright throughout the European Economic Community.

⁹⁰¹ See, No Electronic Theft Act (NET), 1997; Sonny Bono Copyright Term Extension Act, 1998;

Digital Millennium Copyright Act, 1998 (DMCA).

⁹⁰² Kevin Garnett QC, *The Impact of the Human Rights Act 1998 on UK Copyright Law* in Jonathan Griffiths (ed.) *Copyright and Free Speech*, (Oxford: Oxford University Press 2005) 173

uncopyrightable facts and ideas⁹⁰³ and in *Ashdown*'s 'only the form of the literary work that is protected by copyright'⁹⁰⁴. Known as the idea/expression dichotomy, it is just one of the many internal balancing mechanisms in copyright law when faced with freedom of expression claims, others of which include the substantial part requirement, the fair dealing or permitted act provisions, the public interest defence and the discretionary denial of an injunction.⁹⁰⁵

In America, the argument that copyright law should give way to free speech, as it is known in the US, has been raised several times but it has been systematically rejected.⁹⁰⁶ In the leading case in the area, *Harper & Row Publishers v Nation Enterprises*, this argument was once again rejected. The Supreme Court rejected the argument based on the internal balancing mechanisms of copyright law, namely the idea/expression dichotomy and the fair use defence, refusing to acknowledge that there existed a conflict between free speech and copyright, as copyright itself was the 'engine of free expression'.⁹⁰⁷ It is instructive to look at the reasoning underlying this refusal. The American Constitution, which is regarded as the 'supreme law of the land',⁹⁰⁸ explicitly gives the American Congress the authority to enact copyright laws.⁹⁰⁹ The first amendment of the Constitution prohibits Congress from making any law that abridges the freedom of speech and press.⁹¹⁰ The argument goes that the framers enacted both the authority to Congress to pass copyright law and also the first amendment. The constitution cannot contradict itself, implying that the framers did not recognise this as a conflict.⁹¹¹

Ashdown was not the first time that English courts have considered the matter of freedom of expression and copyright. In *Hubbard v Vosper*,⁹¹² Lord Denning MR remarked that, 'the law will not intervene to suppress freedom of speech except when it is abused.'⁹¹³ Freedom of expression has been recognised at English common law, long before the HRA came into force.⁹¹⁴ *Ashdown* was however the first time that the English judiciary examined the relationship between copyright law and freedom of expression after the Human Rights Act 1997 came into force in October 2000, incorporating the ECHR, and giving freedom of expression explicit status in English law. In *Ashdown*, the court defined its task as solving the problem of how the two rights, both of which are qualified, fall to be balanced when they are in conflict. The court

⁹⁰³ *Harper & Row*, 471 US 539, 560

⁹⁰⁴ *Ashdown* (n 1) [31].

⁹⁰⁵ Garnett (n.29), 172

⁹⁰⁶ Birnhack (n.15), 13

⁹⁰⁷ *Harper & Row*, 471 US 539, 558

⁹⁰⁸ US Const., Art. VI, section 2

⁹⁰⁹ US Const., Art I, Sec. 8, Cl. 8

⁹¹⁰ US Const., Amend. I

⁹¹¹ Birnhack (n 15), 14

⁹¹² [1972] 2 QB 84

⁹¹³ [1972] 2 QB 84, 96-97

⁹¹⁴ See for example *Attorney General v Guardian Newspapers Ltd* [1990] 1 AC 109, 283-284

acknowledged that the rights in play were freedom of expression as per Article 10 of the Convention and copyright as a property right recognised by article 1 of the First Protocol.⁹¹⁵ This is an important point which will be addressed below. The court then found that generally, the incorporation of the ECHR into English law will not impact copyright law but in rare circumstances, freedom of expression can prevail over copyright. The examples given were when it is the form of a copyrighted document and not the content which is of public interest, or when information of great public interest is contained in a document which was produced in the past, not relating to a current event.⁹¹⁶

This balancing of two equal rights approach has been endorsed by the ECtHR, both in the Swedish ‘Pirate Bay’ case and also in the *Ashby Donald*⁹¹⁷ case. The ECtHR held in both instances that using a copyrighted work can amount to exercising one’s right to freedom of expression, even if the usage is profit motivated and is legally an infringement of copyright.⁹¹⁸ The court in both cases also recognised that the issue at hand was the need to balance two competing rights both protected under the Convention, as it emphasised that “intellectual property benefits from the protection afforded by Article 1 of Protocol No. 1 to the Convention”.⁹¹⁹ This brings the European experience regarding the relationship between copyright law and freedom of expression, very similar to the American experience.

Europe and consequently the UK, now have copyright and freedom of expression protected as human rights, emanating from the same document, much in the same way copyright and free speech are both recognized by the US Constitution. The difference is that unlike the definitive language of the American First Amendment, Article 10 of the ECHR has inbuilt restrictions which allow curtailing of the freedom of expression if allowed for by national legislation, and for the protection of the rights of others as necessary to preserve a democratic society.⁹²⁰ Also, as compared to the US Constitution, the ECHR is a very recent piece of legislation, ensuring that the problem faced by American interpreters in trying to figure out the meaning of a document written over two centuries ago will not be faced by their European counterparts.⁹²¹

This is an externalization of the conflict between freedom of expression and copyright. The internalization of the conflict has proven to be inadequate for protection of freedom of expression and perhaps unsurprisingly, for to safeguard a right, we must first openly acknowledge it. By recognizing copyright as a human right, it allows for the two conflicting interests to meet as

⁹¹⁵ Ashdown (n 1) [24]-[25]

⁹¹⁶ Ashdown (n 1) [43]-[46]; Publication of information where the subject matter is a current event may be permitted under Section 30(2) of the CDPA 1988.

⁹¹⁷ *Ashby Donald v France* No.36769/08 (ECtHR 10 January 2013)

⁹¹⁸ Geiger (n 10) 316.

⁹¹⁹ Geiger (n 10) 322.

⁹²⁰ See ECHR, Art. 10(2).

⁹²¹ Birnhack (n.15), 17

equals on a new battleground – that of human rights.⁹²² Paradoxically, the elevation of copyright to that of a human right simultaneously elevates and enhances freedom of expression.

Copyright as a Human Right – Enhancing Freedom of Expression

Human rights have equal value and legal weightage by definition, they do not cancel out or overrule each other.⁹²³ As mentioned at the start, they can and often do come into conflict but they work best in tandem, with the primary objective being the enhancement and enforcement of human rights as a whole.

Externalizing the conflict between freedom of expression and copyright, and requiring them to compete as equal human rights has several advantages over the internal conflict, which has proved to be an ‘inadequate means of defending freedom of expression’.⁹²⁴ The first is as mentioned, it makes them equal. This serves to address fears that copyright durations and the bundle of rights that copyright holders enjoy have been overextended. Secondly, it allows for more flexibility. It moves the power of deciding on the balance from the legislative body to the judiciary. This is because the externalization of the conflict through the HRA makes it a constitutional, statutory interpretation issue and the courts will have the prerogative in finding the balance.⁹²⁵

The third advantage and arguably the most important one, is that which also been alluded to above. The ECHR, and by extension the HRA is well equipped to handle the delicate balance between the two contradicting rights. Article 10(2) contains the inbuilt balancing mechanisms of the right. Article 1 of the First Protocol also has its own qualifier, which allows for the State to enforce any laws it deems necessary (copyright legislation) in accordance with the general interest. Combined with the principle of proportionality, which has been held to read as that ‘every "formality", "condition", "restriction" or "penalty" imposed in this sphere must be proportionate to the legitimate aim pursued’⁹²⁶, it allows for the human rights framework to be the most suitable and satisfactory way of reaching a balance.

The counterpoint to this as argued by Geiger and Izyumenko, is that recognition of copyright as a human right means that any potential free use infringement of copyright is now capable of being examined as an interference with an ECHR protected right. This might lead to more rigorous protection of copyright and intellectual property rights as they have been elevated to human rights

⁹²² Angelopoulos (n.16), 351

⁹²³ Paul L.C. Torremans, ‘Copyright (and Other Intellectual Property Rights) as a Human Right’ in Paul L.C. Torremans (ed), *Intellectual Property and Human Rights* (Kluwer Law International BV 2008) 213.

⁹²⁴ Angelopoulos (n.16), 351.

⁹²⁵ Angelopoulos (n.16), 352.

⁹²⁶ *Handyside v the United Kingdom* No.5493/72 (ECtHR 7 December 7 1976).

status.⁹²⁷ Alternatively, there is the fear that giving freedom of expression status as a human right means that it will always trump copyright, giving users *carte blanche* over protected intellectual property.⁹²⁸ Also, it must be mentioned that Article 1 of the First Protocol protects intellectual property and not copyright specifically. Thus means that trademarks, patents and all other forms of intellectual property can now be recognised as a human right. While this article will not discuss this point, it is certainly worth taking note of as the implications of that are quite substantial.

Copyright as a human right is not a novel idea. René Cassin, who was one of the founding fathers of the current human rights regime supported the idea,⁹²⁹ arguing that as creativity was common to all mankind, it deserved to be recognized alongside other universal human functions as a human right. It is recognized as part of the human rights framework in several international conventions, including Article 27(2) of the Universal Declaration of Human Rights, which reads, ‘Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author’.⁹³⁰ It is also found in Article 15 of the International Covenant on Economic, Social and Cultural Rights,⁹³¹ which uses the same wording as the UDHR which was drafted in 1948. However, even then, the need for balance was recognized. Article 27(1) reads, ‘Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits’⁹³², highlighting once again the need to balance the two interests, to reconcile the antithetical claims.⁹³³

Conclusion

Copyright enhances freedom of expression by working alongside it and striking a balance between its two conflicting interests. This finding of the balance means that sometimes, copyright interests will trump the right to freedom of expression and vice versa. It does not mean that copyright is greater or subservient to freedom of expression. The stronger copyright is, the stronger freedom of expression becomes as well. Both areas of law are concerned with preserving the same fundamental equilibrium, the need to give content creators an incentive to create and to reward them for their work, while ensuring that the public are able to have appropriate access to the created works.⁹³⁴ Understood in this way, it becomes apparent that the conflict between them disappears once they are on the same levelled playing field and they work together, enhancing each other in the process.

⁹²⁷ Geiger (n 10) 333

⁹²⁸ Angelopoulos (n.16), 352

⁹²⁹ Gervais (n.5), 14

⁹³⁰ UDHR Art. 27.

⁹³¹ ICESCR Art. 15

⁹³² UDHR Art. 27

⁹³³ Angelopoulos (n.16), pg 351

⁹³⁴ Torremans (n.50) 197.

MIGRATION AND THE RIGHT TO EDUCATION: THE CASE OF TIGERE: *R (ON THE APPLICATION OF TIGERE) V SECRETARY OF STATE FOR BUSINESS, INNOVATION AND SKILLS* [2015] UKSC 57

Markus Findlay

The case of *Tigere*⁹³⁵ was an appeal before the Supreme Court in July 2015 that examined the right to education, its social and economic value, and the extent to which access to student loans can be limited to young people according to their immigration status. The following note will outline the facts of this case before examining its legal and political significance.

Background

The appeal was brought by Ms Beaurish Tigere (“T”), a Zambian national, who has been in the UK since the age of 6. T is lawfully resident here with Discretionary Leave to Remain, and in 2018 she will be entitled to apply for Indefinite Leave to Remain, as long she doesn’t commit any serious criminal offences. Her appeal challenged Regulations that prevented her, and many others in her situation, from accessing a student loan enabling her to take up a secured university place.

T was born in 1995 and came to the UK in 2001 with her parents. Her father had been granted a student visa and T and her mother came with him as his dependants. T’s father later left but she and her mother remained in the UK after their visas had expired. T entered the education system and excelled, she gained seven GCSEs and three A levels at A*, A, and C; she was also Head Girl of her secondary school in York. T, like many of her peers, aspired to continue her education and applied to university receiving 5 unconditional offers. Her first choice was Northumbria University where she hoped to read international business management.

On applying for a loan from Student Finance England to fund the course she discovered she was ineligible due to her immigration status. Due to Government Regulations introduced in 2012, those with ‘Discretionary’ and ‘Limited’ Leave to Remain are treated as international students, irrespective of how long they have lived in the UK, and therefore have to self-fund higher education courses, for which fees are several times the amount charged to domestic students. Despite initial attempts to continue education with the help of a commercial student overdraft facility and assistance from her mother, T was forced to withdraw from university due to the financial pressure.

⁹³⁵ *R (on the application of Tigere) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 57

Specifically, T was denied a student loan due to two rules within the 2012 Regulations. First, the requirement to have Indefinite Leave to Remain (“the settlement rule”), and second, the requirement to have been lawfully ordinarily resident in the UK for three years prior to the beginning of the academic year (“the residence rule”). T challenged these rules on human rights grounds, claiming that the settlement rule breached her right to education under Article 2, Protocol 1 of the European Convention on Human Rights (“ECHR”), and that the residence rule breached her right to be free from discrimination under Article 14 of the same convention.

As Lady Hale stated in the opening paragraph of the leading judgment, *“This case is about the criteria for eligibility for those loans, which exclude young people who have been settled here for many years in the factual sense but are not so settled in the legal sense.”*

Decision and Reasoning

The Supreme Court decided in favour of T by 3-2, but only on the first ground of her appeal that the settlement rule breached her right to education. The residence rule on the other hand was held not to be incompatible with her right to be free from discrimination.

All Justices addressed the need to balance the right to education with the need to allocate finite resources appropriately with the taxpayer in mind. Lady Hale, with Lord Kerr agreeing, emphasised the significance of education and the special protection given to it by the ECHR: *“So fundamental is the role that education plays in the furtherance of human rights in a democratic society that the article should not be given a restrictive interpretation”* (para 23). The sentiment that education reinforces the values of human rights and democracy in society underpins Lady Hale’s judgment, yet she also challenges the Secretary of State’s decision by putting it in its constitutional context, stating *“there is no evidence that the Secretary of State addressed his mind to the educational rights of students with DLR/LTTR when making these regulations, which were laid before Parliament subject to the negative resolution procedure”* (para 32). Lady Hale is explicit here that the Secretary of State neither considered the rights of the group in question nor the sovereign will of Parliament in making his decision.

Ultimately though, Lady Hale’s decision is informed by a practical analysis of T’s particular immigration status: *“The reality is that even though she does not yet have ILR, her established private life here means that she cannot be removed from the UK unless she commits a serious criminal offence and she will almost inevitably secure ILR in due course. She is just as closely connected with and integrated into UK society as are her settled peers.”* (para 35). If delaying T’s access to a student loan is denying T her right to education, then perhaps the case is a matter of justice delayed is justice denied. This judgment simply accelerates the inevitable and in doing so has allowed T and those in her situation to fulfil their aspirations without undue delay.

Lord Hughes agreed with Lady Hale that the appeal should be allowed, but disagreed with her on whether the student loan scheme could have adopted an “exceptional case discretion” to include those such as T. Lord Hughes is firmly of the view that this a decision for the Secretary of State to make and one that “*could not result in any infringement of Convention rights*” (para 68).

Lord Sumption and Lord Reed, dissenting, held that the test was whether the student loan system was “*manifestly without justification*”, the same test applied to all other state benefits cases in both the UK and Strasbourg courts, and that the majority had not advanced a single reason in support of abandoning it. Furthermore, in their assessment of *Ponomaryov* (cited throughout the judgment) the present case would have been most unlikely to succeed at Strasbourg (para 79).

Significance

The case of Tigere is significant for reasons that are worth highlighting.

First, the charity Just for Kids Law, who intervened in the case, have estimated that around 600-1000 students a year have been affected since the Regulations were first introduced in 2012.⁹³⁶ The case will no doubt prevent significant emotional and psychological harm amongst this group. The impact of the regulations has been described in detail by Alison East of Coram Children’s Legal Centre who Lady Hale cites at paragraph 9 of her judgment:

“Our experience ... suggests that young people find not being able to go to university, when that would be a natural educational progression alongside their peers, incredibly difficult. They have worked hard to do well at school and at college, and aspire to achieve the best they can. ... Seeing their friends and peers go to university when they cannot, and being aware of being held back for as long as ten years in pursuing qualifications that are essential in a competitive job market, inevitably causes these young people to feel marginalised. ... They feel that it is deeply unfair as they are not asking for a grant of money but only to be loaned the money which will allow them to progress, alongside their peers, into well-paid work so that they can pay that loan back.”

Second, the judgment is significant for highlighting the research of Professor Ian Walker on the general economic benefits of higher education to the State, the individual, and that of the group in question. Lady Hale cites Walker’s findings at paragraph 11 and 12:

⁹³⁶ ‘Supreme Court Judgment Re-opens Door to University Education to Hundreds of British-educated Teenagers’ (*Just For Kids Law*) <<http://www.justforkidslaw.org/uncategorized/supreme-court-judgment-re-opens-door-to-university-education-to-hundreds-of-british-educated-teenagers>> accessed 8 January 2017.

“the average net financial benefit of a degree to the individuals concerned is of the order of £168,000 for men and £252,000 for women. The benefit to the government is even larger, of the order of £264,000 from men graduates and £318,000 from women.”

“The implication is that there would be sizeable gains to the Exchequer in the long run to extending student loans provisions to this relatively small group.”

The case of *Tigere* is a reminder of the value of education, both to individuals in providing them with knowledge and skills that they can draw from in their professional and personal lives, but also to society, in economic terms and as a means of promoting democracy and human rights. The added value of providing higher education to young people with immigrant backgrounds is also considered by this case. Opening access to higher education to this group reduces social marginalisation and increases participation in areas of society that were previously out of reach.

Mark Baldwin

The 2015 litigation over the hit single “Blurred Lines” in the case of *Williams v Bridgeport Music Inc* has sent shockwaves through the music industry⁹³⁷. By holding that the 2013 song, written by Pharrell Williams et al, copied elements from Marvin Gaye’s 1977 hit “Got To Give It Up”, the court at first instance appeared to extend copyright protection from identifiable content in an original work to the drawing of inspiration, influence and a general “feel”. This essay argues that the protection given to music under copyright is too generous, and looks at reducing the duration of copyright protection as a partial solution to mitigate the impact of this judgment. It will consider this from an American perspective because of the jurisdiction of the case, but the principles apply equally in the UK and EU.

At the time of writing, the Blurred Lines decision is under appeal on technical and procedural grounds. In connection with this appeal, over 200 musicians have filed a collective amicus brief to the court to highlight the negative impact on the creative arts of the judgment’s widening of copyright protection⁹³⁸. If this judgment is upheld, any music which pays homage to earlier artists could be exposed to litigation in the US for breach of copyright⁹³⁹. Since new music always draws from some earlier influence, this would have a chilling effect on the creation of new music.

When considering the effect of copyright law, it can be instructive to take a purposive approach. In the US, copyright exists “to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”⁹⁴⁰. A temporary monopoly is granted on exploitation of creative works. The aim is explicitly not to create permanent proprietary rights in intellectual property⁹⁴¹.

⁹³⁷ Holland, C. (2016). “Blurred Lines” in the World of Copyright: What Does the Latest Appeal Mean for The Music Industry? *Syracuse Journal of Science and Technology Law*. September 29, 2016. [Online]. Available at <http://jost.syr.edu/2016/09/29/blurred-lines-in-the-world-of-copyright-what-does-the-latest-appeal-mean-for-the-music-industry/> [accessed 28 October 2016]

⁹³⁸ Gardner, E. (2016). "Blurred Lines" Appeal Gets Support From More Than 200 Musicians. *The Hollywood Reporter*. August 30, 2016. Available at <http://www.hollywoodreporter.com/thr-esq/blurred-lines-appeal-gets-support-924213> [accessed 28 October 2016]

⁹³⁹ Abbots, G. (2015). A case of Blurred Lines between style and substance? *Ent. L.R.* 2015, 26(4), 148-150 at 149.

⁹⁴⁰ United States Constitution, Article I, Section 8

⁹⁴¹ The Economist (2010). Leader: *Copyright and wrong: Why the rules on copyright need to return to their roots*. 8 April 2010. Available at <http://www.economist.com/node/15868004> [accessed 28 October 2016]. This article applies to UK law, under which copyright derives from the same principles

In its current form, The Berne Convention⁹⁴² aims to incentivise creativity by providing copyright protection for the lifetime of the author plus two generations of descendants⁹⁴³. This aim, while a generous incentive, is arguably no longer necessary or compatible with the purpose of copyright, nor tenable in the digital age, for both economic and cultural reasons.

Considering the economic perspective, the promotion of progress in the arts and sciences is justified by its perceived value to society. Reducing the duration of copyright protection would restore the link between this social value and the actual remuneration to creators. Digital technology has reduced the perceived value of music to consumers⁹⁴⁴, and the rise of subscription services such as Netflix and Spotify produces minimal returns for even the most successful artists⁹⁴⁵. These factors have reduced the available revenue for musicians across the board, but not prevented new music from being made.

Surely the progress of useful arts is more effectively promoted if the smaller pool of revenue can be divided between currently active creators and their dependants, rather than accruing to artists' descendent generations after their death. Shortening the duration of copyright protection would certainly help. In most cases, creative works enjoy only a brief window of sales of a few years⁹⁴⁶, after which copyright protection tends to deter distribution and diminish access to those works⁹⁴⁷. Removing protection from older works would therefore cause little genuine economic loss.

Considering the cultural perspective, reducing copyright durations would also encourage appropriation of content into new creative works. Such creative recycling allows familiar ideas to be expressed in new ways, which is a central way in which the useful arts are developed. The

as in the US: see for example NEN (2012). *Copy rights and wrongs: History of Copyright*. Copyright NEN © 2011-2012. Available at <http://www.copyrightsandwrongs.nen.gov.uk/ipr-and-copyright/history-of-copyright> [accessed 5 November 2016]

⁹⁴² The Berne Convention for the Protection of Literary and Artistic Works

⁹⁴³ European Council Directive 93/98/EEC of 29 October 1993 at (5)

⁹⁴⁴ Happonen, P. (2016). The Consumption and Perceived Value of Music in the Digital Age: Adolescents and Young Adults as Music Consumers. Available at <https://www.theseus.fi/bitstream/handle/10024/106990/The%20Consumption%20of%20Music%20The%20is.pdf?sequence=1> [accessed 28 October 2016]

⁹⁴⁵ Dredge, S. (2015). How much do musicians really make from Spotify, iTunes and YouTube? *The Guardian*, 3 April 2015. Available at <https://www.theguardian.com/technology/2015/apr/03/how-much-musicians-make-spotify-itunes-youtube> [accessed 28 October 2016]

⁹⁴⁶ Harford, T. (2015). Copyrights and wrongs. 6 October 2015. Available at <http://timharford.com/2015/10/copyrights-and-wrongs/> [accessed 28 October 2016]

⁹⁴⁷ Heald, P. (2013) How Copyright Keeps Works Disappeared. *Illinois Program in Law, Behavior and Social Science Paper No. LBSS14-07*. Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2290181 [accessed 28 October 2016]

works of William Shakespeare⁹⁴⁸, Walt Disney⁹⁴⁹ and Andy Warhol⁹⁵⁰, for example, all openly built on pre-existing source material, often from contemporary sources, to make some of the most loved and influential works of their times which are still appreciated today.

Under US⁹⁵¹ and EU⁹⁵² law, creative works are currently protected by copyright for 70 years after the death of the author. Various studies support the view that this period is too long. Proposals cited in the Gowers Report in 2006 suggested optimal terms of 21 years and 7 years⁹⁵³, and Pollock's 2009 mathematical analysis⁹⁵⁴ balancing revenue against 'cultural decay' proposed a term of 15 years.

A reduction in the term of copyright to even the longest of these terms would allow a reasonable period for exclusive exploitation of creations while releasing works for re-appropriation before they 'disappear'⁹⁵⁵, stimulating the creative arts both culturally and economically.

With this change, the broader impact of the Blurred Lines judgment could be mitigated. Even if this judgment survives its appeal, many works of contemporary relevance, including the works of Marvin Gaye (who died in 1984⁹⁵⁶), would enter the public domain. Development of their influence by artists like Pharrell Williams into new popular forms would carry a financial incentive rather than risk of litigation. This seems to better serve copyright's stated purpose.

⁹⁴⁸ Masnick, M. (2011). Would Shakespeare Have Survived Today's Copyright Laws? *Techdirt*, 15 February 2011. Available at <https://www.techdirt.com/articles/20110215/11165113112/would-shakespeare-have-survived-todays-copyright-laws.shtml> [accessed 28 October 2016]

⁹⁴⁹ Crockett, Z. (2016). How Mickey Mouse Evades The Public Domain. *Priceonomics*, 7 January 2016. Available at <https://priceonomics.com/how-mickey-mouse-evades-the-public-domain/> [accessed 28 October 2016]

⁹⁵⁰ Kamholz, R. (2013). Andy Warhol and His Process. *Sothebys* 10 November 2013. Available at <http://www.sothebys.com/en/news-video/blogs/all-blogs/21-days-of-andy-warhol/2013/11/andy-warhol-and-his-process.html> [accessed 28 October 2016]

⁹⁵¹ Copyright Term Extension Act 1998

⁹⁵² European Council Directive 93/98/EEC of 29 October 1993

⁹⁵³ Keegan, V. (2009). Shorter copyright would free creativity. *The Guardian*, 7 October 2009. Available at <https://www.theguardian.com/technology/2009/oct/07/shorter-copyright-term> [Accessed 28 October 2016]

⁹⁵⁴ Pollock, R. (2009). Forever minus a day? Calculating optimal copyright term. *University of Cambridge*. Available at http://rufuspollock.org/papers/optimal_copyright_term.pdf [accessed 28 October 2016]

⁹⁵⁵ Heald, P. (2013). *Ibid.*

⁹⁵⁶ Biography.com (2015). *Marvin Gaye Biography*. [Online.] Available at <http://www.biography.com/people/marvin-gaye-9307988> [accessed 28 October 2016]

Reducing the length of copyright protection will not solve all the issues raised by the *Blurred Lines* case. However, the case gives a valuable opportunity to reflect on where overly broad copyright protection can take us, and to review whose benefit we want copyright law to serve.

ISLE OF WIGHT COUNCIL V PLATT [2017] UKSC 28

Philip Jones

Judgment in the case of *Isle of Wight Council v Platt*⁹⁵⁷ was given on 6th April 2017, with considerable interest from the media following. This note will explore both the factual nature of the case and its procedural history, before discussing its legal ramifications.

Background

The dispute centred on the ever contentious and controversial area of children being taken out of state schools by their parents for holidays during term-time. Mr Platt, the Respondent, took his daughter out of school for such a holiday. He had asked the school for permission to do so, and had been refused thereof. He was subsequently warned that he would be issued with a fixed penalty notice for taking his daughter on holiday out of term-time without permission.

Mr Platt was issued with a fixed penalty notice of £60, which he refused to pay. He was then issued with another, requiring him to pay £120, which he also refused to pay. He was subsequently prosecuted under s. 444(1) Education Act 1996, and pleaded Not Guilty in the Isle of Wight Magistrates' Court. Under section 444(1) of the Education Act 1996, if a child of compulsory school age "fails to attend regularly" at the school where he is a registered pupil, his parent is guilty of an offence.⁹⁵⁸ The Magistrates ruled in favour of Mr Platt. At the close of the prosecution case, they held that there was no case to answer. They explained:

*"the question we have to ask ourselves is whether [the daughter] was a regular attender. Before the holiday with Dad, her attendance was 95%. Afterwards it was 90.3%. ... The document supplied on refusal of leave stated that satisfactory attendance is 90-95%".*⁹⁵⁹

Isle of Wight council appealed to the High Court by way of case stated. Therein, the Magistrates certified the following question for deliberation by the High Court:

*"Did we err in law in taking into account attendance outside of the offence dates (13th April to 21st April 2015) as particularised in the summons when determining the percentage attendance of the child?"*⁹⁶⁰

⁹⁵⁷ [2017] UKSC 28.

⁹⁵⁸ *ibid*, at [1].

⁹⁵⁹ *ibid*, at [6].

⁹⁶⁰ *ibid*.

The High Court answered that question in the negative. It was more concerned with a slightly different point of law under s.1 Administration of Justice Act 1960, namely whether, under s.444(1) as above, the daughter's attendance outside the specified period was relevant to the question of whether the offence had been committed by Mr Platt.

Thus, where the Magistrates had assumed they were *required* to determine the percentage attendance of the child, the High Court made no such assumption. The question on appeal to the Supreme Court was the meaning of "fails to attend regularly" under s. 444(1) Education Act 1996.

In the Supreme Court

Giving the judgment with which the other four justices agreed, Lady Hale held that the meaning of "regularly" was "in accordance with the rules prescribed by the school."⁹⁶¹ Her Ladyship considered this definition of "regularly" alongside two others: "at regular intervals" and "sufficiently frequently". Her Ladyship considered that the former could produce absurd results, and was therefore not correct. Her Ladyship considered the latter, above all, to be far too uncertain to found a criminal offence. On the agreed facts, it was held that the fixed penalty notice was properly issued, and, having failed to pay it, Mr Platt should have been convicted (unless he could establish one of the statutory exceptions). The case was returned to the Magistrates with a direction to proceed to the effect that Mr Platt's previous submission of no case to answer had been rejected.

In reaching the judgment, Her Ladyship, whilst exploring the law from 1870 - 1944, drew on the case of *Osborne v Martin*⁹⁶², in which Hewart CJ observed that:

*"It was never intended that a child attending the school might be withdrawn for this or that hour to attend a lesson thought by the parent to be more useful or possibly in the long run more remunerative. The time-table and discipline of a school could be reduced to chaos if that were permissible."*⁹⁶³

Further, Her Ladyship alluded to what Salter J had pointed out: that parents were not obliged to take advantage of the free education provided by the state, but if they did, they had to take it as a whole.

⁹⁶¹ *ibid*, at [48].

⁹⁶² (1927) 91 JP 197.

⁹⁶³ *ibid*, at p. 197.

These two observations were given credence in Her Ladyship's judgment when dismissing the considered definition of 'sufficiently frequently', particularly on the point of unauthorised absences affecting the school timetable:

"It is not just that there is a clear statistical link between school attendance and educational achievement. It is more the disruptive effect of unauthorised absences. These disrupt the education of the individual child. Work missed has to be made up, requiring extra work by the teacher who has already covered and marked this subject matter with the other pupils. Having to make up for one pupil's absence may also disrupt the work of other pupils. Group learning will be diminished by the absence of individual members of the group. Most of all, if one pupil can be taken out whenever it suits the parent, then so can others. Different pupils may be taken out at different times, thus increasing the disruptive effect exponentially."⁹⁶⁴

This sheds light on the Supreme Court's consideration of the wider area with which the particular question facing it dealt.

Ramifications

Whatever a school's rules requiring attendance are, they must be followed for a parent to comply with s. 444(1) as above. This could, of course, result in a one day unauthorised absence of a child without any lawful excuse (such as sickness) resulting in an offence. However, minor trivial breaches of this kind should continue to be dealt with by a sensible prosecution policy as directed by the Supreme Court: fixed penalty notices. If such cases are prosecuted, they should, in the words of Lady Hale, be dealt with by an absolute or conditional discharge if appropriate.

⁹⁶⁴ *ibid*, at [40].