

GRAY'S INN STUDENT LAW JOURNAL



VOLUME VIII

EDITED BY

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Association of Gray's Inn Students LONDON · 2016

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FOREWORD

Edward Dean

I have enjoyed editing and compiling this year's volume of the Student Law Journal. Given the incredible number of submissions received, I have had to be particularly judicious in deciding which would make the cut.

The articles below cover a wide range of topics. There is a strong international theme this year, with submissions on the international law aspects of torture and non-proliferation. Constitutional law is also addressed in submissions on reform of the Lord Chancellorship and the conceptual foundations of the jury system. Importantly, cutting-edge developments are analysed; included are submissions on the new Welsh opt-out system of organ donation, medical consent and the state of fertility and parentage law.

I hope that my selection offers readers the opportunity to engage with areas of law they would otherwise not encounter. I also hope that it inspires both current and future members of the Inn to get involved with next year's publication and with the AGIS community more generally. I am grateful for the participation and effort of all of those who submitted articles this year – long may it continue.

TO WHAT EXTENT HAVE OUR COURTS ADOPTED A COHERENT APPROACH TO THE ISSUE OF PROPORTIONALITY?

Thomas Phillips

The argument of this essay is that the courts have failed to adopt a coherent approach to the issue of proportionality. The essay chooses to focus on our courts' approach to proportionality in purely domestic cases. This choice is a result of the author's understanding that the English courts have greater agency in respect of the common law than in respect of European law. Given that the ability to adopt a coherent approach must be premised upon the assumption of agency, it is suggested that a cogent answer to the question at hand must be focused on the common law.

In order to draw its conclusion, this essay seeks to address three distinct, but interrelated, questions in respect of the coherency of the courts' approach towards:

1. The content of proportionality.
2. The relationship between proportionality and *Wednesbury*¹ unreasonableness.
3. The status of proportionality at common law.

The reason for tackling the issues in this particular order is that the author hopes that the discussion of the first two questions will inform the subsequent discussion of the status of proportionality at common law. It will be argued that the courts have adopted an incoherent approach to the issue in all three respects and ultimately that the question concerning proportionality will remain unanswered until the Supreme Court authoritatively grapples with this issue.

TO WHAT EXTENT HAVE OUR COURTS ADOPTED A COHERENT APPROACH TO THE CONTENT OF PROPORTIONALITY?

It is the argument of this essay that although there has been some agreement, the courts have failed to coherently demarcate the content of proportionality at common law. It is argued that, in this respect, there are

¹ *Wednesbury* unreasonableness refers to the test originating in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

two key areas of difficulty. Firstly, our courts have not made clear whether the application of proportionality (in terms of the test to be applied) is uniform or whether it is dependent on the context. Secondly, the courts have taken an incoherent approach to the role played by the four stage test identified in *Bank Mellat v Her Majesty's Treasury*² in the application of proportionality.

In respect of the first area of difficulty, our courts have posited two conflicting approaches to the issue. On the one hand, there has been a tendency to understand proportionality review as a singular doctrine of judicial review which could be applied to all appropriate cases. Support for this view can often be found in recent case-law: Lord Neuberger's judgment in *Keyu v Secretary of State for Foreign and Commonwealth Affairs*³ appears to cast proportionality as a singular concept which is to be contrasted with rationality; Lord Sumption remarks in *Pham v Secretary of State for the Home Department*⁴ that 'English law has not adopted *the principle of proportionality generally*' (emphasis added) and Lord Carnwath, in *Kennedy v The Charity Commission*,⁵ questions 'to what extent *the proportionality test*... has become part of domestic public law.'⁶ (emphasis added).

On the other hand, it has been argued that proportionality is to be applied differently on the basis of the context. Proportionality might have one use as a general ground of review and a different use as a tool for reviewing interference with fundamental rights. Lord Mance, in *Pham*, argued⁶ in favour of this approach:

'It may be helpful to distinguish between proportionality as a general ground of review of administrative action, confining the exercise of power to means which are proportionate to the ends pursued, from proportionality as a basis for scrutinising justifications put forward for interferences with legal rights.'

Lord Kerr in *Keyu*⁷ subsequently cited this passage with approval and Lady Hale's judgment⁸ in the same case also expressed agreement with this distinction.

However, given the alternative approach taken by Lords Neuberger, Carnwath and Sumption, a conceptual difficulty persists. It remains unclear

² The test was identified by Lords Sumption and Reed; *Bank Mellat v Her Majesty's Treasury* [2013] UKSC 39, [20] and [74] respectively.

³ *Keyu v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69, [131]–[134].

⁴ *Pham v Secretary of State for the Home Department* [2015] UKSC 19, [104].

⁵ *Kennedy v The Charity Commission* [2014] UKSC 20, [214].

⁶ *Pham*, [113].

⁷ *Keyu* [280].

⁸ *ibid*, [304].

whether proportionality should be understood as having a uniform application, regardless of context, or whether it is to be applied differently in cases where it is used as a general ground of review than in cases where a fundamental right is in play.

The essay will now turn its attention to the second difficulty, the courts' treatment of the *Bank Mellat* test in respect of proportionality at common law. The case in question, *Bank Mellat*, was decided within the context of European Law. Nonetheless, Lords Sumption and Reed formulated a four-stage proportionality test which they believe could be derived as much from the common law as from European law. The question, which has since been touched upon in the Supreme Court, is whether or not this is the test which would be applicable in a common-law proportionality review. Lord Sumption's formulation of the test was as follows:

'(i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community. These four requirements are logically separate, but in practice they inevitably overlap because the same facts are likely to be relevant to more than one of them.'

Although Lord Reed's formulation of the test was marginally different at the fourth stage, he was quick to note that there was "no difference in substance" between the two tests.

Lords Carnwath and Neuberger, in *Youssef v Secretary of State for Foreign and Commonwealth Affairs*⁹ and *Keyu*¹⁰ respectively, appear to be of the opinion that this test would be the test to apply if proportionality were accepted as a ground of review at common law.

Lord Kerr¹¹ appears to occupy something of a middle-ground on the issue: although he implies the *Bank Mellat* test is suitable in cases concerning an interference with a fundamental right, he argues that the test would be inappropriate if proportionality were to be used as a general ground of review:

'In the first instance, there is no legislative objective and no interference with a fundamental right; secondly, it is difficult to see how the "least intrusive means" dimension could be worked into a

⁹ *Youssef v Secretary of State for Foreign and Commonwealth Affairs* [2016] UKSC 3, [57].

¹⁰ *Keyu*, [133].

¹¹ *ibid*, [281].

proportionality exercise where the decision did not involve interfering with a right.’

Lord Kerr then goes on to explain that he:

‘Envisage[s] a more loosely structured proportionality challenge where a fundamental right is not involved. As Lord Mance said in *Kennedy*, this involves a testing of the decision in terms of its “suitability or appropriateness, necessity and the balance or imbalance of benefits and disadvantages.”’

The author argues that these passages demonstrate both an implicit acceptance of the *Bank Mellat* test in cases involving a fundamental right and an appreciation that a different test will be required in cases which seek to question a normal administrative decision.

At the other end of the spectrum, Lord Mance¹² advocates a more flexible approach to the issue:

‘But the right approach is surely to recognise, as de Smith’s *Judicial Review*, 7th ed (2013), para 11-028 suggests, that it is inappropriate to treat all cases of judicial review together under a general but vague principle of reasonableness, and preferable to look for the underlying tenet of principle which indicates the basis on which the court should approach any administrative law challenge in a particular situation.’

This approach appears to advocate for a more nuanced treatment of the issue which eschews the use of strict ‘tests’ in the application of proportionality and instead requires the courts to undertake an examination appropriate to the individual context of the case in question.

In short, although some support for the *Bank Mellat* test has been expressed in the case law, that approach has been far from unanimous. Given this lack of agreement, the Supreme Court would need to clarify the precise nature of the proportionality test(s) and the role (if any) played by the *Bank Mellat* test before proportionality could be formally adopted as a head of judicial review at common law.

The final point to be made, in respect of the content of proportionality, is that the courts appear to agree on how the relationship between the decision maker and the court should be understood when proportionality is engaged at common law. The view, which is coherently and consistently expressed through the case-law, is that a proportionality challenge allows the court to consider the merits of the decision at stake but that it does not

¹² *Kennedy*, [55].

allow the court to displace the judgment of the original decision maker with its own decision. Lord Reed cogently expresses the view as follows in *Bank Mellat*:

‘An assessment of proportionality inevitably involves a value judgment at the stage at which a balance has to be struck between the importance of the objective pursued and the value of the right intruded upon. The principle does not however entitle the courts simply to substitute their own assessment for that of the decision-maker.’¹³

Lord Sumption agreed with this judgment in *Bank Mellat*¹⁴ itself and Lords Neuberger and Kerr subsequently expressed their agreement in *Keyu*.¹⁵ Given the lack of any evidence to the contrary, it seems safe to assume, that at least in respect of this uncontroversial issue, the courts have adopted a coherent approach to the issue.

TO WHAT EXTENT HAVE OUR COURTS ADOPTED A COHERENT APPROACH TO THE RELATIONSHIP BETWEEN PROPORTIONALITY AND WEDNESBURY UNREASONABLENESS?

The approach which the courts have taken in respect of the relationship between proportionality review and *Wednesbury* review is also lacking in consistency. At the heart of the issue is a disagreement about whether or not the two standards of review are mutually exclusive. At some points the courts have suggested that proportionality review could only become effective at the expense of *Wednesbury*, whereas at other times our courts have taken the view that the two can coexist. Some judgments even suggest that there is no clear boundary between the two doctrines and that there will inevitably be an area of overlap in their application.

The judgment of Lady Hale in *Keyu*¹⁶ sits at one extreme of this debate. She opined that an adoption of proportionality as a further basis of judicial review ‘would be likely to consign the *Wednesbury* principle to the dustbin of history.’ Put in these stark terms, there is no question that Lady Hale believes the two standards of review to be mutually exclusive, the choice is binary: either we have proportionality, or we have *Wednesbury*, we cannot have both. One reading of Lord Carnwath’s judgment in *Youssef*¹⁷ would also put him in this camp. His interpretation that the issue concerns ‘a general move from the traditional review tests to one of proportionality’ appears to imply that proportionality cannot simply be adopted as an

¹³ *Bank Mellat*, [71].

¹⁴ *ibid*, [20].

¹⁵ *Keyu*, [133] and [272].

¹⁶ *ibid*, [303].

¹⁷ *Youssef*, [55]–[57].

additional review test but that its adoption would come at the expense of the traditional tests.

Mark Elliott¹⁸ also argues that ‘Lord Neuberger’s reasoning in *Keyu* presupposes that the choice between *Wednesbury* and proportionality is stark in a way that *Pham* suggested it was not.’ However, this essay does not subscribe to Elliott’s analysis and the author would suggest that Lord Neuberger takes a different approach which is evidenced by paragraph 134 of his judgment:

‘[I]t may be that the position would be more nuanced than this cursory discussion of the appellants’ argument might suggest. The answer to the question whether the court should approach a challenged decision by reference to proportionality rather than rationality may depend on the nature of the issue.’

The inference to be drawn from this passage, in the author’s opinion, is that Lord Neuberger believes that the two tests in question can co-exist and that the adoption of proportionality need not consign *Wednesbury* to the dustbin of history. Lord Kerr, in *Keyu*¹⁹, appears to adopt a similar line of reasoning when he opines that “the very notion that one must choose between proportionality and irrationality may be misplaced.” Further support for this line of thought can be found in Lord Diplock’s judgment in *Council of Civil Service Unions v Minister for the Civil Service*: ‘That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of “proportionality”’.²⁰

A third line of thought is that the dichotomous distinction between the two concepts is false. This view, as I understand it, has been advocated in the academic sphere by Mark Elliot²¹ and Michael Taggart.²² Reduced to its most simple terms, *Wednesbury* review and proportionality review are taken to be labels for overlapping areas of the same fundamental doctrine of review. In both *Wednesbury* and proportionality review the exercise of review is, at the conceptual level, the same what differs is the intensity of scrutiny and the weight to be given to the primary decision maker’s view.

¹⁸ Mark Elliott, ‘How many Supreme Court justices does it take to perform the *Wednesbury* doctrine’s burial rites? A: More than five.’ Public Law For Everyone Blog (27 November 2015), available <<http://publiclawforeveryone.com>>.

¹⁹ *Keyu*, [271].

²⁰ *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.

²¹ Mark Elliott, ‘Justification, Calibration and Substantive Judicial Review: Putting Doctrine in its Place’, UK Const. L Blog (17 September 2013), available <<http://www.ukconstitutionallaw.org>>.

²² Michael Taggart, ‘Proportionality, Deference, *Wednesbury*’ (2008) NZL Rev 423–482.

Elliott²³ argues that Lord Mance’s judgment in *Kennedy*²⁴ demonstrates a level of affinity with this approach and it is the argument of this essay that Lord Sumption’s judgment in *Pham*²⁵ is also in accordance with this approach. In that judgment, Lord Sumption argues that, under the heading of *Wednesbury*, English law has ‘stumbled towards a concept which is in significant respects similar [to proportionality]’. The inference to be drawn is that Lord Sumption’s position falls within this third line of thought in so far as he believes that it would be wrong to draw a clear distinction between the two strands of review. Finally, support for this line of reasoning can be found in *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions*²⁶ where Lord Slynn expresses the view that: ‘trying to keep the *Wednesbury* principle and proportionality in separate compartments seems to me to be unnecessary and confusing.’

The source of this disagreement is arguably more conceptual than anything else. Nevertheless, this disagreement has considerable ramifications at the practical level and it is important that our courts adopt a clear approach to the relationship between *Wednesbury* and proportionality sooner rather than later.

TO WHAT EXTENT HAVE OUR COURTS ADOPTED A COHERENT APPROACH TO THE STATUS OF PROPORTIONALITY AT COMMON LAW?

This final question to be addressed is perhaps the most important – what is the current status of proportionality at common law? Unfortunately, the answer to this question is again far from clear; even a cursory reading of the relevant case-law will reveal that our courts have failed to reach agreement. The author’s argument is that the courts have entertained three distinct answers to this question. The first option is that it is available, both in substance and name, where there is a fundamental right in play, even if it is not available as a general ground of judicial review. The second option is that it is not yet available in name but that it is, in substance, available as a form of judicial review. The third option is that proportionality is available, in general terms, at common law.

The first of these options is, in the view of the author, the most accurate summary of the law as it stands. Although this view has yet to be expressed in the ratio of an authoritative judgment it has commanded fairly extensive judicial support. It is therefore arguable that a claim for a proportionality

²³ Mark Elliott, ‘Common law constitutionalism and proportionality in the Supreme Court: *Kennedy v The Charity Commission*’, Public Law For Everyone Blog (31 March 2014), available <<http://publiclawforeveryone.com>>.

²⁴ *Kennedy*, [55].

²⁵ *Pham*, [103]–[110].

²⁶ *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [51].

review at common law, in the context of a fundamental right, would likely be successful at the level of the Supreme Court. Judicial support for this approach can, most recently, be found in the sole judgment of the court in *Youssef*. In that judgment, Lord Carnwath²⁷ said that: ‘even in advance of such a comprehensive review of the tests to be applied to administrative decisions generally, there is a measure of support of for the use of proportionality as a test in relation to interference with “fundamental” rights’. He cites the judgments of Lord Kerr and Lady Hale in *Keyu*²⁸ and Lord Reed in *Pham*²⁹ as evidence for this view. Further support for the notion can be found in the judgments of Lords Mance and Toulson in *Kennedy*.³⁰ Ultimately, judicial support for this notion is a function of the judgments in *R v Ministry of Defence, Ex p Smith*,³¹ *R (Daly) v Secretary of State for the Home Department*³² and *R v Secretary of State for the Home Department, Ex p Leech*³³ where it is repeatedly argued that a more exacting standard of review in the context of fundamental rights is available at common law as well as through the Human Rights Act.³⁴

The second possibility, which is that proportionality review is available in substance but not name, is most clearly advocated by Lord Sumption in *Pham*:

‘However, although English law has not adopted the principle of proportionality generally, it has for many years stumbled towards a concept which is in significant respects similar... Starting with the decision of the House of Lords in *Bugdaycay v Secretary of State for the Home Department* [1987] AC 514 it has recognised the need, even in the context of rights arising wholly from domestic law, to differentiate between rights of greater or lesser importance and interference with them of greater or lesser degree. This is essentially the same problem as the one to which proportionality analysis is directed. The solution adopted, albeit sometimes without acknowledgment, was to expand the scope of rationality review so as to incorporate at common law significant elements of the principle of proportionality.’³⁵

This passage demonstrates both an understanding that proportionality is not available, *per se*, in matters of purely domestic law and an understanding that the scope of the rationality test is such that a proportionality test is

²⁷ *Youssef*, [56].

²⁸ *Keyu*, [304].

²⁹ *Pham*, [119].

³⁰ *Kennedy* [46]–[52], [133].

³¹ *R v Ministry of Defence, Ex p Smith* [1996] QB 517.

³² *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26.

³³ *R v Secretary of State for the Home Department, Ex p Leech* [1994] QB 198.

³⁴ Human Rights Act 1998.

³⁵ *Pham*, [105].

nonetheless available in substance. This second point is reiterated at the close of his judgment³⁶ where Lord Sumption explains that: ‘it may well turn out that in the light of the context and the facts, the juridical source of the right made no difference’ (the implication being that the result would likely be the same either at common law or under the Convention).

Finally, broader support for the availability of proportionality review at common law can be found in the judgments of Lords Slynn and Mance, in *Alconbury*³⁷ and *Pham*³⁸ respectively. Lord Slynn’s judgment takes the following view: ‘I consider that even without reference to the Human Rights Act the time has come to recognise that this principle is part of English administrative law, not only when judges are dealing with Community acts but also when they are dealing with acts subject to domestic law.’ Lord Mance’s approval in *Pham* is perhaps less emphatic, but it is submitted that it constitutes approval for the view nonetheless. *Pham* concerned the status of British nationality which is, crucially, to be distinguished from a fundamental right. Lord Mance argues that ‘the tool of proportionality is one which would, in my view and for the reasons explained in *Kennedy v Charity Commission*, be both available and valuable for the purposes of such a review.’ Given the case involved the status of British nationality, and not a fundamental right, this passage can be taken as support for the view that proportionality is available as a form of judicial review in cases which do not involve a fundamental right.

This discussion therefore demonstrates the incoherency of our courts’ approach to the status of proportionality at common law. There is evidence to be found in support of three distinct views: that proportionality is available where a fundamental right is in play, that it is available in substance but not name and that it is available as a general ground of judicial review. Although the author has argued that the first view provides the most accurate representation of the law, it is impossible to know for certain in the absence of a clear authority.

CONCLUSION

Our courts have failed to adopt a coherent approach to the issue of proportionality. Conflicting approaches have been put forwards in respect of its functional operation, its conceptual position as a principle of judicial review and its status, or applicability, at common law. On a positive note, the courts have demonstrated a certain self-awareness in this respect and there has been broad agreement that the issue of proportionality is not only one which needs to be resolved, but one which can only be resolved by the Supreme Court in the form of a nine-justice panel. One can only hope that

³⁶ *ibid*, [110].

³⁷ *Alconbury*, [51].

³⁸ *Pham*, [98].

when the time comes, the Court will be able to produce a judgment which clarifies, not complicates, the current state of affairs.

DOES THE CRIMINAL LAW OF JOINT ENTERPRISE CAUSE INJUSTICE?

Henry Moore

Where a man lends himself to a criminal enterprise knowing that potentially murderous weapons are to be carried, and in the event they in fact are used by his partner with an intent sufficient for murder, he should not escape the consequences... *Chan Wing-Siu v The Queen* [1985] AC 168, 177, per Sir Robin Cooke

I: Introduction

The criminal law of joint enterprise is simpler now. The decision of the Supreme Court and Privy Council in the conjoined appeals of *R v Jogee* and *Ruddock v The Queen*¹ has changed the law and reduced the number of routes to a conviction in cases of secondary participation in crime. The new legal framework seeks to avoid injustice by basing the liability of secondary parties on principles of basic accessorial liability.

This essay will argue that the issue of injustice in the criminal law of joint enterprise remains. The broad structure of this essay will be as follows: first, it will distinguish between three different doctrines covered by the joint enterprise label; secondly, it will consider the extent to which injustice is caused by ‘the law of joint enterprise’ itself, as opposed to other factors operating in the criminal justice system; thirdly, it will argue that aspects of the reasoning in *Jogee and Ruddock* are unconvincing and liable to create injustice; and, fourthly, it will explain that the principles of basic accessorial liability can cause injustice in their own right.

II: The meaning of ‘criminal law of joint enterprise’

A. Three meanings of ‘joint enterprise’

The easy answer to the difficult question of whether the criminal law of joint enterprise causes injustice is that there is no law of joint enterprise. ‘Joint enterprise is not a legal term of art’² said Toulson LJ in *R v Stringer*, a comment endorsed by Lord Hughes and Lord Toulson in *Jogee and Ruddock*.³ Of course, the easy answer avoids the important questions of why it is that there has been such controversy surrounding ‘joint enterprise’.

¹ [2016] UKSC 8; [2016] UKPC 7 (*Jogee and Ruddock*).

² [2011] EWCA Crim 1396, at [57].

³ *Jogee and Ruddock*, at [77].

The more helpful approach is to break down the joint enterprise label into the substantive doctrines of law it refers to. This approach was taken in another Court of Appeal judgment on so-called ‘joint enterprise’, *R v ABCD*. This judgment was not only (like *Stringer*) given by a future member of the panel in *Jogee and Ruddock*, but it was approved by that panel. The following helpful passage from Hughes LJ’s judgment was adopted by the CPS Guidance on Joint Enterprise Charging Decisions:

The expressions “common enterprise” or “joint enterprise” may be used conveniently by the courts in at least three related but not identical situations. (i) Where two or more people join in committing a single crime, in circumstances where they are, in effect, all joint principals, as for example when three robbers together confront the security men making a cash delivery. (ii) Where D2 aids and abets D1 to commit a single crime ... (iii) Where D1 and D2 participate together in one crime (crime A) and in the course of it D1 commits a second crime (crime B) which D2 had foreseen he might commit. These scenarios may in some cases overlap.⁴

The first scenario still gives rise to liability in English law. Cases of effective joint principals give rise to factual questions of degree, but they are not generally considered to be an area where the substantive law is liable to cause injustice. Each robber in Hughes LJ’s example is equally culpable as a principal.

The second scenario also still gives rise to liability in English law and is called basic accessorial liability. The language of ‘aiding’ and ‘abetting’ is included, along with ‘procuring’, in s 8 of the Accessories and Abettors Act 1861, which provides that the accessory is to be punished for the same crime as the principal. Hughes LJ’s statement excludes the category of ‘procuring’ because it is relatively rare in a joint venture situation. The 1861 legislation was a codification of the common law,⁵ and, as the Law Commission has acknowledged, ‘it is generally accepted that these specified modes of involvement cover two types of conduct on the part of D, namely the provision of assistance and the provision of encouragement’⁶. Here ‘the mental element is an intention to assist or encourage the commission of the crime’.⁷ As will be discussed in section V below, aspects of basic accessorial liability are controversial and may give rise to injustice.

⁴ ‘CPS Guidance on: Joint Enterprise Charging Decisions: Principal, secondary and inchoate liability’ (2012), para 10 (quoting *ABCD* [2011] QB 841, at [9]).

⁵ *Jogee and Ruddock*, at [85].

⁶ *Participating in Crime* (2007) (Law Com 305), para 2.21.

⁷ *Jogee and Ruddock*, at [9].

The third scenario no longer gives rise to liability in English law, because *Jogee and Ruddock* expunged this category of liability, which was also called ‘parasitical accessorial liability’ or the *Chan Wing-Siu* principle. *Chan Wing-Siu*, from which comes the quote at the start of this essay, was a Privy Council case in 1984, which concerned three men who broke into the victim’s flat armed with knives. One of the men stabbed and killed the victim, which led to murder convictions for all three men. Sir Robin Cooke gave the advice of the Privy Council, upholding the convictions of the secondary parties because their knowledge of the carrying of a knife was evidence of foresight, which sufficed for liability in the context of the criminal enterprise.

B. Overlap between categories of liability

Although *Chan Wing-Siu* no longer applies in English law, there may on some facts still be an alternative route to conviction; the above passage from Hughes LJ’s judgment makes clear that the scenarios could overlap. D2 who foresaw crime B may have assisted or encouraged crime B by continuing to participate in crime A, and his foresight could be evidence from which an intention to assist or encourage crime B could be inferred. Therefore, in some but certainly not all scenario (iii) cases, scenario (ii) liability would also have applied.

This point can be demonstrated by reference to the example of the widely publicised murder of Stephen Lawrence. An argument sometimes marshalled in favour of keeping the *Chan Wing-Siu* principle was that it was able to reflect the culpability of the defendants in *R v Dobson and Norris*,⁸ where the defendants were both convicted of Lawrence’s murder despite the absence of certain evidence that they had used the knife which killed. The *Chan Wing-Siu* principle could have offered a relatively straightforward route to conviction, because it required only foresight of death or serious harm, and evidence of foresight was ample.

On the facts of the Lawrence case, however, Treacy J’s sentencing remarks referred to the knowledge and approval of the defendants, which indicates that basic accessorial liability was available on those facts. This analysis of the Lawrence case comes from the written submissions⁹ of Joint Enterprise: Not Guilty by Association (JENGbA), which intervened in the proceedings in *Jogee and Ruddock*.

The judgment in *Jogee and Ruddock* does not cite the example of Stephen Lawrence, but it does acknowledge ‘that if D2 continues to participate in crime A with foresight that D1 may commit crime B, that is evidence, and

⁸ Unreported, 4 January 2012.

⁹ The analysis is at para 15 of the submissions, published by JENGbA at: <<https://drive.google.com/file/d/0Bxj7944-uHp6S2NuX1ZrY0dVenc/view?pref=2&pli=1>> (accessed 24 February 2016).

sometimes powerful evidence, of an intent to assist D1 in crime B¹⁰. In other words, D2 *may* be liable under basic accessorial liability.

C. The gap left by the change of law

To the extent that the *Chan Wing-Siu* principle did not overlap with basic accessorial liability, the law of joint enterprise now has a gap compared with its former self. The reasoning in *Jogee and Ruddock* states that the *Chan Wing-Siu* principle ‘results in over-extension of the law of murder and reduction of the law of manslaughter’¹¹. As such, the reasoning sees the new gap in the substantive law as being necessary to prevent excessive applications of the law of murder.

It is an important point, however, that the judgment in *Jogee and Ruddock* manages, only in cases of homicide, to fill the gap in the law. In cases where *Chan Wing-Siu* would have led to a murder conviction, it is now instead possible that D2 may be liable by reason of ‘a form of unlawful act manslaughter’¹². This form of liability, which can be called the *Reid*¹³ principle, will be addressed in section IV below.

For the present purposes of defining ‘joint enterprise’, however, it is notable that the *Reid* form of unlawful act manslaughter does not easily slot into any of the categories of ‘joint enterprise’ mentioned by the CPS Guidance. Hughes LJ did, however, say that the three categories were not exhaustive. Now that the *Chan Wing-Siu* form of joint enterprise liability is gone, the gap it left is partially filled by the *Reid* form of unlawful act manslaughter. As such, this essay’s discussion of whether injustice is caused by the criminal law of joint enterprise will also explore whether injustice is likely to result from *Jogee and Ruddock*’s changes to the law.

D. Summary of the current criminal law of joint enterprise

At present, there remain at least two forms of joint enterprise liability in English law. One form, where co-venturers are effectively joint principals, is relatively uncontroversial, and will not be discussed in this essay. The second form arises from the principles of basic accessorial liability, which, this essay will argue, are liable to cause injustice. A third and very controversial form, called parasitic accessorial liability or the *Chan Wing-Siu* principle, has been removed from English law, leaving a gap which is only partially filled by liability for manslaughter in some cases of homicide.

¹⁰ *Jogee and Ruddock*, at [66].

¹¹ *ibid*, at [83].

¹² This description is given in Toulson, ‘Complicity in Murder’ in Baker and Horder (eds), *The Sanctity of life and the Criminal Law: The Legacy of Glanville Williams* (2012), p 244.

¹³ After *R v Reid* (1976) 62 Cr App R 109, which is approved in *Jogee and Ruddock*, at [97].

III: The sense in which the ‘criminal law of joint enterprise’ itself causes injustice

A. The presence of other causal factors

The ‘criminal law of joint enterprise’ does not operate in isolation from other factors in the criminal justice system. Basic accessorial liability and the late law of parasitic accessorial liability must be appraised in light of the substantive law and sentencing rules applicable to the principal offence (without which there cannot be accessorial liability), as well as in light of prosecutorial practice and evidential considerations.

In any particular case where a doctrine of joint enterprise applies, the liability resulting may be thought unjust, but the injustice will have been caused by a combination of factors, and not only by the doctrine of law which makes a secondary party liable. Toulson LJ discussed the question of causation in the context of assistance and encouragement in the case of *R v Mendez*, to which this essay will return in its discussion of basic accessorial liability in section V below. His Lordship said:

Where a victim (V) is attacked by a group, it may well be the case that if any one of the group had not taken part in the attack the outcome would have been the same. If the prosecution had to satisfy a ‘but for’ test in relation to each defendant, the result would be that no defendant had committed the offence, whereas it is proper to regard each as having contributed to it.¹⁴

Applying the test of whether it is proper to regard doctrines of joint enterprise as contributing to injustice, it becomes apparent that injustice is the result of many factors. Even in a straightforward and generally uncontroversial case of effective joint principals, the convictions may be thought unjust where they are murder convictions and there was no intention to kill but only an intention to cause really serious harm. Lord Steyn in *R v Powell and R v English* said, in the context of a parasitic accessorial liability case, that the sufficiency of an intention to cause really serious harm ‘turns murder into a constructive crime’, even though ‘neither justice nor the needs of society require the classification of the case as murder and the imposition of a mandatory life sentence.’¹⁵

It can, therefore, be seen that the application of doctrines of joint enterprise may cause injustice, but nonetheless be only one causal factor among more fundamental problems with the criminal justice system. Because the example of murder was so central to the reasoning in *Jogee and*

¹⁴ [2011] 3 WLR 1 (*Mendez*), at [23].

¹⁵ [1999] 1 AC 1 (*Powell and English*), 15.

Ruddock, the structure of homicide law will be the first of three factors analysed in turn to demonstrate that in an application of a doctrine of the law of joint enterprise, other factors may simultaneously (and sometimes primarily) be causes of injustice. The other two factors considered will be prosecutorial practice and evidential considerations.

i. The structure of homicide law

Lord Steyn's above criticisms of homicide law in *Powell and English* were echoed by Lord Mustill, who gave a short speech supporting the outcome reached Lord Hutton's leading speech, which approved the *Chan Wing-Siu* principle. Lord Hutton's only qualification to this principle was that English's appeal should be allowed because the use of a knife was fundamentally different from the use of wooden posts as part of a joint attack.

Lord Mustill's speech, which was more circumspect in its upholding of the *Chan Wing-Siu* principle, lamented that '[o]nce again, an appeal to this House has shown how badly our country needs a new law of homicide, or a new law of punishment for homicide, or preferably both.'¹⁶ Parliament's response to numerous Law Commission proposals recommending reform, one of which was referred to by Lord Steyn¹⁷, has been to retain and even increase the harshness of murder law. Ormerod and Wilson make the point that the Criminal Justice Act 2003 has actually increased the minimum tariffs for murder. Urging a change of law prior to *Jogee and Ruddock*, they warned that '[m]any of the joint enterprise cases involve the use of knives or weapons taken to the crime and the resulting sentences are therefore commonly in the region of 25 years'.¹⁸

The judgment in *Jogee and Ruddock* could be understood as a response to the clear need for a more restrictive ambit for the law of murder. There was obvious attraction in a solution which engaged the more flexible sentencing regime for manslaughter, 'which carries a *potential* sentence of life imprisonment'¹⁹. The judgment criticises *Chan Wing-Siu* and *Powell and English* for imposing liability for murder rather than manslaughter without considering the policy questions of 'fair labelling and fair discrimination in sentencing'.¹⁹

This criticism may appear surprising, given that in *Powell and English* Lord Steyn directly addressed the problem of fair labelling by saying that '[t]he present definition of the mental element of murder results in defendants

¹⁶ *ibid*, 12.

¹⁷ *Criminal Code for England and Wales* (1989) (Law Com 177).

¹⁸ Wilson and Ormerod, "Simply harsh to fairly simple: joint enterprise reform" (2015) *Crim LR* 3, 12. The authors refer in particular to Sch 21 para 5A of the 2003 Act. ¹⁹ *Jogee and Ruddock*, at [74] (emphasis added).

¹⁹ *Jogee and Ruddock*, at [74].

being classified as murderers who are not in truth murderers'.²⁰ Lord Mustill also addressed the issue of fair discrimination in sentencing by remarking on the need for a new law of punishment for homicide.

The difference between *Jogee and Ruddock* and *Powell and English* can be explained by the decisions' different starting points. The House of Lords treated the doctrine of parasitic accessorial liability as fundamentally a tool necessary to do justice (in other words, necessary to prevent someone 'escaping the consequences' of joining in a criminal enterprise (in line with Sir Robin Cooke's words at the start of this essay). The possibility of injustice was, at least in the view of Lord Steyn and Lord Mustill, caused principally by the structure of homicide law.

By contrast, the Supreme Court and Privy Council – perhaps with a degree of realism in light of Parliament's non-intervention – took the law of murder as a given, and saw the doctrine of parasitic accessorial liability as the cause of injustice because it failed to take account of murder's 'relatively low mens rea threshold'²¹ and the harsh consequences of such a conviction.

In other words, *Powell and English* saw parasitic accessorial liability as a necessary doctrine which could occasionally be party to injustice because of the homicide structure, whereas *Jogee and Ruddock* saw it as a doctrine which was not necessary in the first place because of the homicide structure.

This essay will argue in section IV below that Lord Hughes and Lord Toulson's complete rejection of parasitic accessorial liability is problematic. It should, however, be clear at this juncture that some past injustices in cases of parasitic accessorial liability were at least partly caused by the structure of homicide law. Indeed, the same will be true of some future injustices in the application of basic accessorial liability.

ii. Prosecutorial practice

A consideration of whether a doctrine of law is liable to cause injustice is incomplete without an awareness of whether the doctrine is susceptible to abusive prosecutorial practice. If a substantive doctrine of law is vulnerable to prosecutorial abuse, then that vulnerability may bolster arguments that the doctrine itself causes injustice, but sight should not be lost of the prosecution's causal contribution to that injustice.

Before parasitic accessorial liability was abolished, the publication of the CPS's Guidance in 2012 was designed to limit overcharging. However, the

²⁰ *Powell and English*, 15.

²¹ *Jogee and Ruddock*, at [83].

House of Commons Justice Committee in 2014 acknowledged the complaints of ‘dragnet’ prosecuting and remarked that ‘the CPS's guidance represents a step forward, but the extent to which the guidance has improved prosecutorial practice in the way that we envisaged it might do, by reducing levels of overcharging, is open to question’.²²

The problem of abusive prosecutorial practice is exacerbated by appeals to broad policy justifications of deterrence. Such justifications are as dangerous as the reasoning that aggressive prosecuting can help the battle against criminal gangs because threatening to press charges against gang members is an effective way of obtaining information about the fellow gang member(s) who committed the principal offence.²³ The Justice Committee, on the contrary, concluded (in the 2012 report which led to the CPS Guidance) that overcharging may ‘deter potential witnesses to an offence who fear that they might be charged under joint enterprise if they come forward’.²⁴

Now that parasitic accessorial liability is gone, it might be thought that there is limited scope for prosecutorial practice to cause injustice in the charging of joint enterprise cases. Such thinking would, however, be misguided, because there remains the tendency of the prosecution to invite extended inferences from voluntary presence or association with gangs. This problem has great relevance to basic accessorial liability cases, and section V of this essay will consider the extent to which any injustice is caused by the substantive law of basic accessorial liability as opposed to prosecutorial practice.

iii. Evidential considerations

Evidential considerations are of great importance in understanding the law of secondary liability. For example, perhaps the strongest reason for punishing an accessory for the same crime as the principal is that a lack of evidence may mean that it cannot be known who the principal offender actually was.

In considering whether the criminal law of joint enterprise causes injustice, it is instructive to have regard to how evidential considerations influence the application of the substantive law. For example, the prosecution’s ability to invite extended inferences from limited evidence is a function of the rules of evidence. It is generally desirable that a jury should have all

²² Justice Committee, *Joint enterprise: follow up*, Fourth Report of Session 2014 HC 310, paras 26 and 14.

²³ The possibility of this prosecutorial practice is mentioned by McBride: <<https://mcbridesguides.files.wordpress.com/2012/09/note-on-r-v-gnango-2011.pdf>> (accessed 24 February 2016).

²⁴ Justice Committee, *Joint Enterprise*, Eleventh Report of Session 2010–12, para 33.

relevant evidence before it, but English law has long recognised that certain lines of reasoning may be attractive to juries but liable to cause to injustice. The law limits, for example, the use of bad character evidence and guides the jury as to the appropriateness of drawing adverse inferences.

In the abstract, a formulation of substantive law may be thought to be an appropriate reflection of moral culpability and responsibility. However, its practical application may nonetheless fail adequately to reflect that culpability, in that evidential considerations may lead to one of two opposing problems: on the one hand, the problem of under-criminalisation where the jury cannot be convinced that the offence occurred (even though in fact the elements were present), and, on the other hand, the problem of over-criminalisation which results when a jury draws such extended inferences that it detects an element which in reality was not there.

The first problem of under-criminalisation was at the forefront of Lord Steyn's mind in *Powell and English*. His Lordship said that '[i]n the real world proof of an intention sufficient for murder would be well nigh impossible in the vast majority of joint enterprise cases'²⁵. Unsurprisingly, in light of the subsequent public outcry about over-criminalisation, Lord Hughes and Lord Toulson in *Jogee and Riddock* were not convinced that a foresight test was necessary, saying that 'its adoption as a test for the mental element for murder in the case of a secondary party is a serious and anomalous departure from the basic rule'²⁶.

Problems of under- and over-criminalisation are, of course, more likely to be minimised if jury directions are clear, but even clear jury directions can be undermined by the possibility that a jury will draw extended and unsupported inference from certain types of evidence. For example, a group of academics, writing before *Jogee and Riddock*, criticised the practical application of the *Chan Wing-Siu* foresight test, arguing that '[i]t is inevitable in complex trials that jurors will infer from membership of a gang, where there is a culture of possession of knives, that all members of the gang must have foreseen the use of a knife with relevant intent.'²⁷

As juries do not give reasons for their verdicts, it is obviously very difficult to assess with any accuracy the extent to which unfair inferences actually did cause injustice under *Chan Wing-Siu*. Similarly, it will not be possible to assess with certainty whether juries are even now drawing unfair inferences under the law of basic accessory liability.

Evidential considerations may thus be one factor causing injustice in a particular application of a doctrine of joint enterprise.

²⁵ *Powell and English*, 14.

²⁶ *Jogee and Riddock*, at [83].

²⁷ Crewe, Liebling, Padfield, and Virgo 'Joint Enterprise: the implications of an unfair and unclear law', (2015) *Crim LR* 4, 252, 255.

B. The relevance of other causal factors to the appraisal of joint enterprise doctrines

A consideration of the broader context of the criminal justice system helps to focus attention on what factors can most fairly be said to cause injustice. Once the broader context is acknowledged, it is possible to focus more meaningfully on the extent to which a doctrine of law is responsible for causing injustice. This essay will now consider *Jogee and Ruddock*'s reasoning and the gap left by the departure of parasitic accessorial liability; it will then explain the ways in which the law of basic accessorial can nonetheless cause injustice, which is a matter of regret in light of its increased prominence after *Jogee and Ruddock*.

IV: The gap created by *Jogee and Ruddock* and the adequacy of the judgment's solution

A. The background to the appeals

By the time *Jogee*²⁸ came before the Court of Appeal, the *Chan Wing-Siu* principle had been supported by the House of Lords not only in *Powell and English*, but also in *R v Rahman*.²⁹ Some judgments in the Supreme Court case of *R v Gnanango*³⁰ also mentioned the parasitic accessorial liability principle without disapproval. *Gnanango* is discussed further below; it did not in the end turn on parasitic accessorial liability.

Jogee was a case in which the defendant and a co-defendant had been drinking and taking drugs and becoming increasingly aggressive. The co-defendant fatally stabbed a man with a knife. The defendant was outside the house where the killing occurred, vandalising a car and shouting words of general encouragement about doing something to the victim. The defendant was convicted on the basis of a jury direction in line with *Chan Wing-Siu*.

The Court of Appeal upheld the conviction, and made clear that it was bound by the authority of *Rahman*, which did not allow for any fine distinction between participating in a crime and encouraging a crime. Encouraging was form of participation, and certainly one which sufficed to engage the *Chan Wing-Siu* principle; the defendant had continued encouraging the co-defendant with foresight of the possibility of murder. After making a minor downwards revision to the minimum sentence, Laws LJ granted permission to appeal. It had, of course, not been possible for

²⁸ [2013] EWCA Crim 1433.

²⁹ [2009] 1 AC 129.

³⁰ [2011] UKSC 59 ('*Gnanango*').

the appellant to invite the overturning of *Chan Wing-Siu* in the Court of Appeal.

The way the prosecution case was argued in the Court of Appeal in *Jogee* raises some points of interest. Laws LJ recorded the Crown's written argument that '[t]he prosecution opening as a whole made it clear that the Crown case against Jogee is put on the basis of continued association *and* encouragement. Both are relied on as part of the factual matrix upon which joint enterprise in this case is founded.'³¹ It is notable that the prosecution invoked the language of 'association' as part of the 'factual matrix' put before the jury. Encouragement is part of the legal test in basic accessorial liability, just as it sufficed under parasitic accessorial liability for crime A to be encouragement. By contrast, mere association is no part of either legal test; it is evidence from which extended inferences are drawn. The role of association will be discussed further in section V below.

Ruddock was an appeal from the Court of Appeal of Jamaica, and it similarly concerned parasitic accessorial liability.

The Supreme Court and Privy Council sat as a panel of five, which included the President and Deputy President of the Supreme Court and the Lord Chief Justice. This is in contrast to the panel of seven which decided *Gnango*. *Gnango* was thought to raise a point of law of general public importance because of the case's implications for the 'scope of potential liability of those who permit themselves to become involved in public order offences'.³² The case concerned two men who had shot at one another, with a bullet of the defendant's opponent (who could not be found) killing an innocent bystander.

The result in *Gnango* was that the defendant was an accessory to murder, having encouraged his own attempted murder and having also triggered the 'transferred malice' principle. The reasoning in *Gnango* makes it difficult to understand whether the case has any clear implications beyond the result on its 'unusual'³³ facts.

Because *Gnango* was ultimately not a case turning on parasitic accessorial liability, it was not seen by Lord Hughes and Lord Toulson to stand in the way of their rejection of *Chan Wing-Siu*. Certainly, their Lordships saw no reason to refer directly to *Gnango*, even though Lord Phillips and Lord Judge CJ in that case had endorsed a statement of parasitic accessorial liability in *ABCD*.³⁴ Lord Hughes and Lord Toulson's approach is perhaps

³¹ [2013] EWCA Crim 1433, at [16] (emphasis in original).

³² *Gnango*, at [1].

³³ *Gnango*, at [1], *per* Lord Phillips and Lord Judge CJ (Lord Wilson agreeing). A majority on the issues of basic accessorial liability and transferred malice is created by Lord Dyson's similar reasoning on those points.

³⁴ *ibid*, at [14].

understandable, given that Hughes LJ in *ABCD* was bound by *Powell and English*, which was a point made by Lord Hughes in argument in *Jogee and Ruddock*.³⁵

It might be thought striking that a mere panel of five could overturn a principle which had been applied several times and endorsed by at least a majority of the panel of seven in *Gnango*. Lord Hughes and Lord Toulson's reason, which contains what must be an oblique reference to *Gnango*, was that '[t]he court has had the benefit of a far deeper and more extensive review of the topic of so-called "joint enterprise" liability than on past occasions.'

B. The result reached in *Jogee and Ruddock*

The decision in *Jogee and Ruddock* abolished the *Chan Wing-Siu* principle and, as such, leaves a gap in the law's ability to respond to unlawful joint ventures. The judgment explains that the change of law was justified for five reasons.

Lord Hughes and Lord Toulson appealed to: (1) the fuller analysis in argument than on previous occasions, (2) the law's controversy, the difficulty of trial judges in applying the law, and the number of appeals, (3) the importance of secondary liability in the common law, (4) the fact that foresight is ordinarily no more than evidence of intention, and its adoption as a mental element results in over-extension of the law of murder and reduction in the law of manslaughter, and (5) the fact that there was a lower threshold for guilt in the case of the accessory than in the case of the principal, which was out of line with the Serious Crime Act 2007.

It can be seen that among these factors, there is some recognition of the need to limit harsh applications of the law of homicide (reason (4)). The reference to the law's controversy (reason (2)) is not expanded upon, but is likely to allude to the kinds of problems outlined in the House of Commons reports on joint enterprise, such as aggressive prosecutorial practice, overcharging, and the relative ease of proving foresight where there is gang membership or weaponry.

The concern of Lord Hughes and Lord Toulson seems to have been to formulate the substantive law in such a way as to reduce its capacity to cause injustice. For example, by taking the law of murder as a fact on the ground, the judgment reasons that with murder law as it stands it cannot be appropriate to have a doctrine of secondary liability whose elements are so easy to prove.

³⁵ Recordings of the proceedings are accessible at: <https://www.supremecourt.uk/cases/uksc-2015-0015.html> (accessed 24 February 2016).

The need to limit the over-extension of the law of murder is a very forceful reason for the change of law. A realistic view of the law of murder is that its reform is a matter for Parliament, which has not shown any signs of acting on recommendations from the Law Commission. The novel point arising from *Jogee and Ruddock* is the statement that a test of foresight results in ‘reduction in the law of manslaughter’. This point concerns what this essay has called the *Reid* principle. This form of liability has been revived by the judgment in *Jogee and Ruddock*, and it merits close attention.

i. The foundations of the *Reid* principle

The rediscovery of the principle articulated in *Reid* can fairly be described as the fruit of Lord Toulson’s analysis of cases prior to the decision in *Chan Wing-Siu*. Almost six years before the decision in *Jogee and Ruddock*, Toulson LJ delivered the Court of Appeal’s judgment in *Mendez*. This was a parasitic accessory liability case in which the House of Lords decision in *Powell and English* was binding.

Nonetheless, Toulson LJ, having mentioned the historical understanding of secondary liability, cited at length the judgment of Lawton LJ in *Reid*, which predated *Chan Wing-Siu*. Lawton LJ took the example of men who went out armed with weapons on a venture that ended in a killing, and said that ‘having started out on an enterprise which envisaged some degree of violence, albeit nothing more than causing fright, they will be guilty of manslaughter.’³⁶ In *Mendez*, Toulson LJ said that *Reid* ‘no longer represents the common law in England and Wales’.³⁷

Lord Toulson’s analysis of *Reid* was developed further in a lecture given while still a member of the Court of Appeal. This lecture was given at a December 2011 conference on the legacy of Glanville Williams, and a volume of some of the lectures was subsequently published³⁸. The statement of principle of Lawton LJ in *Reid* was apparently based on *R v Wesley Smith*, in which a five-judge Court of Appeal upheld a jury direction that ‘[o]nly he who intended that unlawful and bodily harm should be done is guilty of murder. He who intended only that the victim should be unlawfully hit and hurt will be guilty of manslaughter if death results.’³⁹ The lecture concludes from its survey of the law at the time of *Reid* that unlawful attacks which resulted in death would attract at least a manslaughter conviction, and that guilt for murder depended on having the *mens rea* for murder. The qualification to the liability for homicide was that it would not arise if the conduct went altogether anything which the coventurer could have seen. The qualification came from the House of

³⁶ (1976) 62 Cr App R 109, 112 (emphasis added).

³⁷ *Mendez*, at [22].

³⁸ Fn 12 above.

³⁹ [1963] 1 WLR 1200, 1206.

Lords case of *R v Anderson and R v Morris*, which articulated the departure in terms of ‘an overwhelmingly supervening event’⁴⁰.

The lecture said of the liability arising under the principles articulated in *Reid* that ‘[a] manslaughter conviction in such circumstances may be seen as a form of unlawful act manslaughter.’⁴¹ Although Lord Hughes and Lord Toulson do not mention Lord Toulson’s lecture, there is a very similar line of reasoning adopted in the judgment in *Jogee and Ruddock*, which culminates in the re-adoption of the *Reid* principle.

ii. The merits of the *Reid* principle

Given the harshness of the law of murder, it is unsurprising that the Supreme Court and Privy Council were attracted by the alternative of a manslaughter conviction for the secondary party. This appears at first glance to solve the problem of ‘escaping the consequences’ of an illegal venture, which so troubled Sir Robin Cooke in the quote at the start of this essay.

Lord Hughes and Lord Toulson expressly responded to Sir Robin Cooke’s concern about the co-venturer escaping the consequence. Their Lordships said of the man who lends himself to an unlawful venture which results in death that ‘if the law remained as set out in *Wesley Smith* and *Reid* he would be guilty of homicide in the form of manslaughter’.

The *Reid* principle is, therefore, a partial response to the gap that is left by the abolition of the *Chan Wing-Siu* principle. It has the merit of engaging the more lenient sentencing regime available for manslaughter convictions. The result in *Jogee and Ruddock* is testament to the common law’s ability to respond to the concern that a tool designed to do justice had become an instrument of injustice in light of broader considerations operating in the criminal justice system.

ii. Problems arising from the *Reid* principle

Although the result in *Jogee and Ruddock* demonstrates the flexibility of the common law, the revival of the *Reid* principle is likely to cause some problems.

The *Reid* principle subtly shifts the basis of liability away from accessorial liability. This is because unlawful act manslaughter is based on the manslaughterer’s own unlawful act. In other words, it requires a primary wrong. The general test for unlawful act manslaughter is an unlawful act resulting in death provided that the unlawful act was ‘such as all sober and

⁴⁰ [1966] 2 QB 110, 120.

⁴¹ Fn 12 above.

reasonable people would inevitably recognise must subject the other person to, at least, the risk of some harm resulting therefrom, albeit not serious harm.⁴²

Lord Hughes and Lord Toulson paraphrased this test and cited the key authorities on unlawful act manslaughter.⁴³ The focus of *Reid* on the defendant's own unlawful act (which will generally be the unlawful participation by encouragement or assistance) means that the liability is not accessory liability in the sense of being derivative liability. Liability for unlawful act manslaughter can arise whether or not the co-venturer who actually killed did so as a murderer. Indeed, liability for unlawful act manslaughter could arise during an unlawful venture which carried the risk of some harm and *accidentally* resulted in death.

Given that unlawful act manslaughter is not a principle of law which is specifically calibrated for joint ventures, this change of law marks a move away from the joint venture as a distinct normative reason for imposing liability. The unlawful act could have been anything which would have objectively caused some harm, so the fact that there was unlawful participation in a criminal venture is not in itself the core reason for the liability (albeit that those unlawful act manslaughterers who were participating in a criminal venture may obtain harsher sentences to reflect this).

Jogee and Ruddock, relying as it does on *Reid*, has thus created a greater degree of separation between the defendant's participation in the joint venture and their liability for the consequences. Indeed, the abolition of *Chan Wing-Siu* means that in non-homicide cases there will generally be no liability for the unintended but foreseen consequences of a criminal venture.

There is a further reason why the reliance placed on *Reid* is problematic. Unlawful act manslaughter is otherwise known as constructive manslaughter, so it is surprising that Lord Hughes and Lord Toulson give as a reason for changing the rule in *Chan Wing-Siu* that it 'savours, as Professor Smith suggested, of constructive crime'⁴⁴.

The judgment did not acknowledge that Professor Smith's perspective was more nuanced. Toulson LJ in *Mendez* had said that 'Professor Sir John Smith thought that the law was maybe too harsh, but that what he termed "parasitic accessory liability" was *not completely "constructive"*, because it requires an element of culpability with respect to the greater offence; D is assisting or encouraging an activity which he is aware may result in the commission of that offence'⁴⁵.

⁴² *R v Church* [1966] 1 QB 59, 70, *per* Edmund-Davies LJ.

⁴³ *Jogee and Ruddock*, at [96].

⁴⁴ *ibid*, at [83].

⁴⁵ *Mendez*, at [36] (emphasis added).

It is the law's ability to impose liability with respect to the greater offence which has been largely lost as a result of *Jogee and Ruddock*. In English law there is now no longer any recognition of a joint venture as a distinct or *sui generis* basis for liability. In its place is a form of constructive liability reserved exclusively for homicide cases.

C. Whether the change of law was on balance justified

Although the result in *Jogee and Ruddock* demonstrates the flexibility of the common law, it must be remembered that changes of law designed to avoid specific injustices may nonetheless themselves cause more general injustices.

i. The case for keeping parasitic accessorial liability as a distinct basis for liability

Of the five reasons given by Lord Hughes and Lord Toulson for changing the law, the final two were concerned with the test of foresight, which was said to create 'a lower mental threshold for guilt in the case of the accessory than in the case of the principal'.⁴⁶

Such analysis does not adequately capture the basis of liability in *Chan Wing-Siu*. Liability was not based on mere foresight, but foresight *coupled with* continued participation in the venture. D1's primary liability based on intention makes sense. D1 has full control of his own acts and the threshold for liability should usually be his intention when he chose to act as he did. By contrast, D2 is liable for the acts of another, and the *Chan Wing-Siu* approach was ultimately a reflection of the moral culpability of D2 for having continued in a venture foreseeing the possibility of the greater crime which eventuated.

D2's liability has been said to be justified because D2's participation in an unlawful venture changes D2's 'normative position'.⁴⁷ This analysis appealed to the Law Commission in its 2007 report, which recommended retaining the *Chan Wing-Siu* as a reflection of the wrongfulness of embarking on a criminal venture.

The Law Commission's conclusion on this point is not mentioned in the judgment in *Jogee and Ruddock*. The reasoning in the judgment instead draws on the Serious Crime Act 2007, ss 44-46 of which contain inchoate offences of encouraging or assisting offences. Lord Hughes and Lord Toulson reasoned that it was 'worth attention'⁴⁸ that the statute used

⁴⁶ *Jogee and Ruddock*, at [84].

⁴⁷ Simester, 'The Mental Element in Complicity' (2006) 122 LQR 578, 589.

⁴⁸ at [86].

language of intention and not foresight as the mental element for assisting and encouraging.

It is difficult to see how the provisions for inchoate offences offer any clear justification for the removal of the *Chan Wing-Siu* principle. Unlike parasitic accessory liability, liability for an inchoate offence does not depend on the fact of a principal offence having been committed. The participant in a joint venture has occasioned the risk of escalation and, whether or not the ‘change of normative position’ argument is accepted, that individual has by definition positively continued in the venture.

The true basis of liability under *Chan Wing-Siu*, which was perhaps obscured by both the language of ‘parasitic accessory liability’ and ‘joint enterprise’, was the embarkation on a criminal venture. This can be demonstrated by reference to the statement of Sir Robin Cooke which is quoted at the start of this essay. The example of an enterprise resulting in murder was, of course, relevant to the facts of *Chan Wing-Siu*, but the statement about ‘escaping the consequences’ was, when read in context, a broader normative statement about criminal enterprises.

A man lending himself to a criminal enterprise resulting in murder was just one example of what Sir Robin Cooke called the ‘wider principle whereby a secondary party is criminally liable for acts by the primary offender of a type which the former foresees but does not necessarily intend.’⁴⁹

It was not a fair comparison, therefore, for Lord Hughes and Lord Toulson to compare the principal’s mental element with the mental element required under *Chan Wing-Siu*. Liability as a principal (which generally depends on the principal’s acts and recklessness or intention) is structurally different from parasitic accessory liability (which depended on another’s foreseen criminal act along with the secondary party’s continued participation).

Notwithstanding the inapposite comparisons the judgment draws, it does recognise the distinctness of the liability arising from common embarkation on a crime. It acknowledges Australian case law’s adoption of both ‘secondary liability as aider or abettor’ and ‘extended common purpose liability’, which rests on a different ‘jurisprudential foundation.’⁵⁰ Comparisons between different legal systems have limited value when particular doctrines are taken in isolation. What can at least be said, though, is that some other legal systems, not least international criminal law,⁵¹ recognise liability for acts of other which were foreseen when embarking on a criminal venture.

⁴⁹ [1985] AC 168, 175.

⁵⁰ *Jogee and Ruddock*, at [60].

⁵¹ *The Prosecutor v. Duško Tadić*, Case No. IT-94-1-A.

Lord Hughes and Lord Toulson may thus put the point too baldly in the statement that '[w]e prefer the view...that there is no reason why ordinary principles of secondary liability should not be of general application'.⁵² There will sometimes be cases where principles of basic accessorial liability will not reflect what is generally seen to be moral culpability, as shown by the following example given by Lord Mustill in *Powell and English*:

Namely, where S foresees that P may go too far; sincerely wishes that he will not, and makes this plain to P; and yet goes ahead, either because he hopes for the best, or because P is an overbearing character, or for some other reason. *Many would say, and I agree, that the conduct of S is culpable, although usually at a lower level than the culpability of the principal who actually does the deed.*⁵³

Lord Hughes and Lord Toulson's reliance on the *Reid* form of unlawful act manslaughter shows at least some implicit acceptance of the need for a degree of criminal responsibility for a co-venturer when the principal does 'go too far'.

Before the change of law to exclude the *Chan Wing-Siu* principle, the law's response to the scenario given by Lord Mustill was to reflect the differing levels of the parties' culpability in the approach to sentencing (apart from where the crime of murder, to Lord Mustill's dismay necessitated a lengthy minimum sentence). For example D2 (S), who participated in a battery, foreseeing that D1 might inflict grievous bodily harm, could receive a much shorter sentence when convicted of the same crime as D1 (P) who in the end inflicted the really serious harm.

On the law as it stands after *Jogee* and *Ruddock*, the law's response would be to make D2 (S) liable for nothing more than the battery. It might be thought unjust that there is now no vehicle which can reflect the view of Lord Mustill, and many others, that the continued participation signifies some degree of culpability for the greater crime (In these examples, the law of basic accessorial liability is ruled out, as Lord Mustill's example is meant to exclude an intention to assist or encourage).

ii. The case for removing parasitic accessorial liability

Lord Mustill's statement about the secondary party's culpability offers some justification for having the *Chan Wing-Siu* principle, but it also contains the strongest reason for its abolition. The conduct of the secondary party is widely thought culpable, but usually 'at a *lower level* than the culpability of the principal'.

⁵² *Jogee and Ruddock*, at [76].

⁵³ *Powell and English*, 11 (emphasis added).

It is not always the case that a secondary party is less culpable than the principal. An example of a highly culpable accessory is provided by the case of *Gnango*, where Lord Brown said ‘[t]he general public would in my opinion be astonished and appalled if in those circumstances the law attached liability for the death only to the gunman who actually fired the fatal shot’.⁵⁴

In the context of parasitic accessorial liability, however, injustice was certainly caused in some cases by the imposition of the mandatory minimum sentence for murder. The benefit of securing some degree of liability for the culpable co-venturer was, on balance, outweighed by the injustice in some cases of the law’s inability to reflect the co-venturer’s lower level of culpability. This is why the law of joint enterprise, in its parasitic accessorial liability form, can fairly be said to have caused injustice. The injustice caused by parasitic accessorial liability was exacerbated by its susceptibility to prosecutorial overcharging. Because the *Chan Wing-Siu* principle relied on a two-crime structure (setting out to commit crime A, with crime B occurring in the course of the joint enterprise), the prosecution could decide to shoehorn the facts into that two-crime structure by deciding to charge a first offence (crime A).

The example given in JENGBA’s submissions in *Jogee and Ruddock* is of a man being chased by a group of three, one of whom stabs the victim while the other two punch and kick him. Under the old law, the prosecution could seek a conviction on the basis of a joint assault by the three knowing that the principal was in possession of a knife and using it, **or** on the basis that the chase amounted to a violent disorder and the secondary party knew that the principal had a knife and foresaw the real possibility that he may use it with the requisite intent.⁵⁵

Evidence of this prosecutorial practice can be found in *Gnango*. In prosecuting the defendant,

the Crown sought to suggest that there was a joint intention to have an affray, which was crime A, and that the killing by [the defendant’s opponent] was crime B.⁵⁶

The prosecution had put its case in this way to avoid a perceived barrier to finding that the defendant was an accessory to murder under basic accessorial liability. The perceived barrier was that a conviction under basic accessorial liability would have required the conclusion that the defendant encouraged his opponent to commit his (the defendant’s) own murder.

⁵⁴ *Gnango*, at [68].

⁵⁵ Fn 9 above, para 39 (emphasis in original).

⁵⁶ *Gnango*, at [44].

The conclusion in the majority judgments in *Gnango* was that there was no such barrier.

The way the Crown put the case in *Gnango* is indicative of the prosecutorial practice of trying to find a crime A even where there was spontaneous violence which could only artificially be characterised as a joint venture or enterprise. The practice on the specific facts of *Gnango* may well have been justified (particularly given Lord Brown's views on the wrongfulness of the defendant's conduct), but there remains the broader point that the doctrine of parasitic accessorial liability was susceptible to overcharging by the prosecution.

iii. Conclusions on parasitic accessorial liability

There are good reasons to have a doctrine to reflect what Lord Mustill described as the culpable behaviour of the person who participates in crime A foreseeing, but not intending to encourage or assist, crime B. Those good reasons did not justify the continued existence of a doctrine which tended to expand the scope of the injustice caused by English law's unjust law of murder.

It is important to acknowledge the role of other factors, such as prosecutorial practice, in causing injustice. There was, however, a strong case that, on balance, parasitic accessorial liability caused injustice. That is not to say that the law after *Jogee and Ruddock* will not cause injustice. On the contrary, the *Reid* principle is only a partial solution to the gap left by *Chan Wing-Siu*, and, as the next section of this essay will show, the law of basic accessorial liability may itself cause injustice.

This essay's conclusion on parasitic accessorial liability is simply that it did on some occasions cause great injustice; the extent of that injustice will become clearer as the Court of Appeal starts to consider whether to grant exceptional leave to appeal out of time because 'substantial injustice' can be demonstrated, as *Jogee and Ruddock* envisages.⁵⁷

V: Basic accessorial liability

It is not yet clear how, if at all, the loss of the *Chan Wing-Siu* route to conviction will affect the way that the law of basic accessorial liability is applied. It is possible that juries will be influenced by Lord Mustill's intuition about the culpability of the person who participates in crime A foreseeing, but not intending to encourage or assist, crime B. There may thus be greater temptation for juries to draw extended inferences from limited evidence.

⁵⁷ *Jogee and Ruddock*, at [100].

It is therefore worth considering whether the current formulation of basic accessorial liability is liable to cause injustice. This section will analyse basic accessorial liability by taking its conduct and mental elements in turn; it will then conclude by briefly discussing the broader question of whether those elements are an appropriate basis for convicting the accessory of the same crime as the principal.

A. The conduct element

‘The requisite conduct element is that D2 has encouraged or assisted the commission of the offence by D1.’⁵⁸ The breadth of this conduct element is cause for concern.

At the start of section III above this essay cited a statement of causation from *Mendez*. In that case, Toulson LJ rationalised assistance and encouragement in terms of causation, concluding that the ‘approach to causation is influenced by a moral component, whether it is just to consider D culpable for what occurred’.⁵⁹ Toulson LJ developed this further in *Stringer*, where the test for the conduct element of participation was said to be that ‘[i]t is for the jury, applying their common sense and sense of fairness, to decide whether the prosecution have proved to their satisfaction on the particular facts that P’s act was done with D’s assistance or encouragement’.⁶⁰

Lord Toulson’s Glanville Williams lecture in 2011, which contains the analysis of pre-*Chan Wing-Siu* cases adopted in *Jogee and Ruddock*, cited both of these cases to suggest ‘that secondary liability is based on a broad theory of causation’.⁶¹ Lord Hughes and Lord Toulson’s judgment, echoing *Stringer*, states that ‘it is a question of fact and degree whether D2’s conduct was so distanced in time, place or circumstances from the conduct of D1 that it would not be realistic to regard D1’s offence as encouraged or assisted by it’.⁶²

There are problems with an expansive view of encouragement and assistance. The conduct element may catch very remote encouragement or assistance, such as sales of equipment some time before the principal offence, or mere presence if the prosecution is able to put forward evidence leading to an inference of encouragement. An expansive conduct element for an offence is not necessarily problematic in itself, because a mental element may control the appropriate limits of liability; there is room for doubt about whether sufficient control exists in basic accessorial liability.

⁵⁸ *Jogee and Ruddock*, at [8].

⁵⁹ *Mendez*, at [37].

⁶⁰ [2011] EWCA Crim 1396, at [51].

⁶¹ Fn 12 above, p 238.

⁶² *Jogee and Ruddock*, at [12].

Toulson LJ's formulations appeal to the jury's 'common sense and sense of fairness', but it must also be remembered that juries only see the evidence put before them. The jury is susceptible to the drawing of inferences from matters such as gang membership and mere association with others.

Although Lord Hughes and Lord Toulson thought it 'important to emphasise that guilt of crime by mere association has no proper part in the common law',⁶³ the current formulation of basic accessorial liability may allow juries too much scope to draw extended inferences from association. Certainly, this was a point made by JENGBA's interventions in *Jogee and Ruddock*. JENGBA's written submissions comment that the CPS Guidance, which adopts Toulson LJ's remarks in *Stringer*, gives no proper guidance on the role of voluntary presence or supposed gang membership. This creates the concern that such evidence 'can then take on an apparent significance that may, in fact, be wholly disproportionate to its real evidential value'.⁶⁴

The issue of extended inferences from limited evidence may well be caused in part by abusive prosecutorial practice, and may perhaps be remedied in part by clear jury directions and more detailed CPS Guidance. There does, however, remain a concern that the substantive law's formulation of the conduct element in basic accessorial liability is too broad.

B. The mental element

According to *Jogee and Ruddock*, 'the mental element in assisting or encouraging is an intention to assist or encourage the commission of the crime and this requires knowledge of any existing facts necessary for it to be criminal'.⁶⁵

The issue of extended inferences from, for example, supposed gang membership, remains. Foresight is now merely evidence from which an inference of intention can be drawn. The prosecution may simply invite inferences of foresight and then invite an inference of intention, particularly because there is likely to be increased pressure on basic accessorial liability to impose liability on the co-venturer who would have been liable under *Chan Wing-Siu* (in accordance with Lord Mustill's intuition about that co-venturer's culpability).

The formulation of the mental element is, like the conduct element, vulnerable to the danger of disproportionate weight being given to

⁶³ *Jogee and Ruddock*, at [77].

⁶⁴ Fn 9 above, para 28.

⁶⁵ *Jogee and Ruddock*, at [9].

association or mere presence. This is in part due to the superficial attraction of association as a possible principle underpinning liability. For example, in *Gnango*, Lord Phillips and Lord Judge CJ approved Hughes LJ's explanation in *ABCD* of the reason for the imposition of parasitic accessorial liability, which was that the defendant 'associated himself with a foreseen murder.'⁶⁶ Virgo argued that the decision in *Gnango* therefore endorsed the purported 'principle of association' as an underpinning rationale for secondary liability.⁶⁷

The adoption of association as a unifying principle is dangerous and should be avoided, even if that means that the result in *Gnango* is difficult or impossible to explain.⁶⁸ *Jogee and Ruddock* expressly and rightly rejects guilt by association. The question that remains, however, is whether association will in practice be used as disproportionate evidence of assistance and encouragement, and whether such evidence will also lead juries in some cases to draw an unjustified inference that there was an intention to assist or encourage.

C. Broader questions of whether basic accessorial liability causes injustice

The law of secondary liability is a creation of the judiciary. The 1861 Act's codification of the principles has not precluded substantial judicial development of the law, as *Chan Wing-Siu* and *Jogee and Ruddock* show.

A question which is still worth asking is whether the continued existence of a law of basic accessorial liability is appropriate. The Law Commission once recommended the abolition of the law of accessorial liability and its replacement with a comprehensive statutory scheme of inchoate offences.⁶⁹ Now that the complex inchoate offences scheme of the Serious Crime Act 2007 exists, it would be fair to say that statutes do not always import the clarity expected of them.⁷⁰

The Law Commission no longer proposes the abolition of secondary liability, and this might be thought appropriate because of the apparent need to punish both the accessory and the principal of the same offence in cases where it is not clear who the principal actually was.

This must be balanced against the possible injustice of an individual being punished as a principal on the basis of inferences from their apparent

⁶⁶ *Gnango*, at [14].

⁶⁷ Virgo, 'Joint enterprise liability is dead: long live accessorial liability' (2012) *Crim LR* 850.

⁶⁸ Mirfield, 'Guilt by Association: A Reply to Professor Virgo' (2013) *Crim LR* 577.

⁶⁹ *Assisting and Encouraging Crime* (1993) Law Commission Consultation Paper No 131.

⁷⁰ Spencer and Virgo, 'Encouraging and Assisting Crime – Legislate in Haste, Repent at Leisure' [2008] 9 *Archbold News*, 7-9.

association with a principal offender. Indeed, even where there is clear evidence as to who committed a murder, the accessory who only intended to encourage or assist really serious harm is punished as a murderer.

One of Lord Hughes and Lord Toulson's criticisms of *Chan Wing-Siu* and *Powell and English* was the lack of discussion of 'questions about fair labelling and fair discrimination in sentencing'. Such questions still merit attention.

VI: Conclusions

There are a range of factors that can combine to cause injustice in the criminal justice system. Even while parasitic accessorial liability remained, the 'criminal law of joint enterprise' was just one factor in the causing of injustice. Similarly, even after the abolition of parasitic accessorial liability, what is left of 'the criminal law of joint enterprise' will be just one factor in the causing of injustice.

What may help reduce injustice is the abandonment of any use of the label 'joint enterprise' and a corresponding increase in critical analysis of the substantive doctrines of law which that label masks.

Notwithstanding the fact that Lord Hughes and Lord Toulson were able in *Jogee and Ruddock* to avoid certain injustices arising in the application of the law of secondary liability, the conclusion to Lord Toulson's important Glanville Williams lecture is as relevant as ever: 'There remains a pressing case for Parliament to consider what the law should be and to put it on a statutory basis.'⁷¹

⁷¹ Fn 12 above, p 246. (Lord Toulson was at one stage Chairman of the Law Commission.)

BURYING THE BOMB: THE WIDER LESSONS THAT CAN BE DRAWN FROM THE 2015 IRANIAN NUCLEAR DEAL ON THE LAW ON THE NON-PROLIFERATION OF NUCLEAR WEAPONS

John Churchill

The debate over Iran's nuclear programme and the deal struck last year have thrust a treaty nearing its fiftieth birthday into the public glare. However in light of the new deal concluded with Iran over its nuclear programme, what does the Nuclear Non-Proliferation Treaty of 1968 (hereafter NPT) say, and does it remain effective?

In this article it will be submitted that the non-proliferation Article of the NPT which bans Iran from arming itself with a nuclear weapon is a classic example of the minimalist nuance of international law. The norm remains effective and relevant without relying on legal force and legal consequences alone to enforce compliance. Rather the norms are respected due to their close connection to geo-political realities in which states find themselves, and around which they were constructed, which relegate considerations of legality and illegality to the realm of what is politically possible as much as legally permissible.

Firstly the 2015 agreement (the Joint Co-ordinated Plan of Action, or JCPOA)¹ shall be examined, along with the text of the NPT. In light of this its common meaning and understanding at the time of drafting shall be examined, followed by a brief analysis of the historical motivations for Iran's nuclear programme which reflect broader considerations by states on the merits of nuclear weapons more generally. Finally this article will reflect on the meaning of Article II in respect of the future of Iranian policy, to demonstrate that on the question of non-proliferation, subtle multilateral negotiations rather than dramatic unilateral action are preferred by the NPT and are most conducive to successfully pursuing its objectives through law.

1. THE 2015 JCPOA

The 2015 Iranian nuclear deal involved a temporary compromise on both sides but agreed fundamentally on the centrality of the Nuclear Non-Proliferation Treaty of 1968 as the 'cornerstone' of the nuclear question.² On the one hand Tehran agreed to limit the number of centrifuges it will

¹ Joint Comprehensive Plan of Action by P5+1 (17 July 2015), available <<http://www.state.gov/e/eb/tfs/spi/iran/jcpoa>>.

² *ibid*, page 3, para 4.

install (and these will be the oldest and least technologically capable of enrichment) and reduce its stocks of enriched uranium by 98%.³ Iran also agreed to stop enrichment at the underground facility at Fordow for 15 years (it will become a largely research-based centre), and to limit enrichment at the Natanz plant for 8 years.⁴ Additionally the Arak heavy water plant is to be redesigned to be rendered incapable of making weapons-grade plutonium, and much of the heavy water it has produced will be devoted to medical purposes.⁵ Limits on producing heavy water were imposed for 15 years. Iran agreed to sign up to the IAEA's Additional Protocol that permits inspectors access to any facility in the country, and a system which sees a failure to comply with an IAEA request in the next 15 year period be subjected to a commission of states entitled to take punitive action.⁶ Against all this, the sanctions imposed on Iran's economy which have had a crippling economic effect would be lifted.⁷

2. THE NPT AND ARTICLE II

So what was the 'cornerstone' on which this deal centred, and in particular what was the element within it on which the arguments over an Iranian nuclear weapons programme have focused? The answer is the NPT, a treaty from 1968 created largely through a joint Soviet and American endeavour. The aims of the superpowers were to ensure that nuclear proliferation would not create a plethora of nuclear armed states that it was beyond their capability to control, whilst also offering opportunities to peacefully export nuclear technology for commercial gain.⁸ Although some criticize the NPT for representing superpower hegemony in the nuclear sphere at the expense of less powerful states,⁹ there are cogent reasons why the NPT demonstrates the power of smaller states to influence the international agenda through law.

In Article II many smaller states, by sacrificing the legally and formally significant sovereign rights to attain a nuclear weapon, which they were unlikely to ever acquire due to their economic status, moral antipathy towards nuclear weapon or simply absence of sufficient security concerns,¹⁰ managed to shift a pure non-proliferation treaty to one that served wider goals. By surrendering legally momentous but practically

³ *ibid*, para 7.

⁴ *ibid*, page 7, paras 4–6.

⁵ *ibid*, paras 8–12.

⁶ *ibid*, paras 13–17 and 36–37.

⁷ *ibid*, paras 18–33.

⁸ Walker, "Nuclear Enlightenment and Counter-Enlightenment" 83 (3) [2007] *International Affairs* 431, 435.

⁹ Vital, "Double-Talk or Double-Think? A Comment on the Draft Non-Proliferation Treaty" (1968) 44 (3) *International Affairs* 419, 419.

¹⁰ Ruhle, "Enlightenment in the second nuclear age" [2007] 83 (3) *International Affairs* 511, 513 "achieving nuclear-armed status was not a worthwhile goal...the political and economic opportunity costs....exceeded...immediate security benefits."

useless rights to nuclear weapons the NWS had sufficient bargaining power to create a multilateral system of non-proliferation, secure a system for the export of peaceful nuclear technology (in Article IV), and most importantly obtain some sort of substantive disarmament promise from the nuclear powers (in Article VI). This demonstrates that the NPT was not a treaty that was *traité-loi* in nature where the treaty's obligations are general and non-reciprocal as self-imposed statements of norms created between "standard-creating" parties but rather a *traité-contrat* treaty which is more synallagmatic in according reciprocal rights and duties.¹¹ Article II, the non-proliferation article within the NPT is thus informed by this context when it binds the Non-Nuclear Weapon States (NNWS) as follows:

Each non-nuclear-weapon State Party...undertakes not to receive the transferof nuclear weapons or other nuclear explosive devices or of control...directly, or indirectly; not to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices; and not to seek or receive any assistance in the manufacture of nuclear weapons or other nuclear explosive devices.¹²

3. THE POLITICAL NATURE OF THE LEGAL QUESTION

Article II forbids the acquisition, development, reception or manufacture of nuclear weapons by NNWS signatories. It negatively permits the development of the nuclear cycle to prepare, use, and dispose of fuel which gives a state both nuclear independence and nuclear weapons capability. In its restrictive wording Article II only prohibits weaponisation processes, thereby permitting 'anything not explicitly forbidden', including those 'dual-use' processes needed for nuclear weapons but not exclusively so (for example uranium enrichment is needed both for civil nuclear fuel and for nuclear weapons).¹³ Article II (further buttressed by the Article IV peaceful nuclear use right):

...makes it considerably harder to ascertain...if a state is developing a bomb...given that most of the relevant technology is "dual use".... unless deception or bad faith can be proved, suspicion may...be a subjective judgement dependent on other factors: the country's reputation, its behaviour... international perception... [I]n essence it can often be largely political.¹⁴

¹¹ Joyner, *International Law and the Proliferation of Weapons of Mass Destruction* (Oxford: 2009), 9-10 analysing Bernhardt, "Treaties", in *Encyclopaedia of Public International Law, Vol. IV* (North-Holland; 2000). For more on the *traité-loi* and *traité-contrat* distinction see McNair, *The Law of Treaties* (Oxford; 1961), 743.

¹² Article II NPT.

¹³ Patrikarakos, *Nuclear Iran: The Birth of an Atomic State* (Pangrave Macmillan, 2012) 40 and 69.

¹⁴ Patrikarakos, *Nuclear Iran: The Birth of an Atomic State* (n13) 69-70.

Consequently, absent any conclusive evidence on a bomb's existence or substantive proof on the intent to acquire a weapon, the NPT is inadequate in preventing an NNWS from acquiring nuclear weapon capability.¹⁵ Article II does not place substantive legal constraints upon NNWS' nuclear capability but merely renders the decision on whether to acquire nuclear weapons to the political realm where a prospective Article II breach and the consequences it entails are factored into the overall decision. Moreover a state can, lawfully, leave the NPT and three months later produce a nuclear weapon (as North Korea did in 2002). The political choice whether to acquire weapons when nuclear capability is achieved exists within the boundaries set forth by law in Article II; this has long been the case for other NNWS and now it is true of Iran.

The development of the Arak heavy water facility, which permits plutonium production, and the concealed Natanz enrichment plant which targets uranium enrichment (and is too large for a pilot but too small for civil production), are both dual-use facilities with the potential for creating nuclear weapons that were initially concealed from the international community and the IAEA (International Atomic Energy Agency).¹⁶ The revelation of the Fordow enrichment plant and continued reprocessing activities could all be elements of Iranian nuclear capability permitting enough weapons grade material to be made domestically for a nuclear weapon. Patrikarakos' present analysis of available data concludes that 'Iran has the technological capability [to develop a nuclear weapon]. Only the political decision remains'.¹⁷ This conclusion, however, is insufficient to prove an Article II breach.

Consequently, whilst no conclusive proof of a weapon or intent to acquire a nuclear weapon exists, the IAEA in its desperation to be neutral and technical in the heated nuclear dispute had in its 2014 assessment concluded 'the Agency is not ...[able]...to provide credible assurance about the absence of undeclared nuclear material and activities in Iran, and therefore to conclude that all nuclear material in Iran is in peaceful activities'.¹⁸ Iran's activities have been clandestine, Iran has at best released details of them with great delay to the IAEA in breach of its obligations (and often fought to conceal them) and many of the developments have dual uses. Consequently one may conclude Iran intends to acquire a bomb, yet these suspicions are not conclusive proof capable of placing Iran in breach of international law. They only inform the subjective assessment as to whether Iran intends to get a bomb. The Western view in this regard is influenced by Tehran's flagrant disregard in 1979 for diplomatic immunity

¹⁵ Hilborne, 'The non-proliferation treaty: foundation of disarmament policy' in H.V. Pant (ed) *Handbook of Nuclear Proliferation* (Routledge 2012) 256.

¹⁶ Patrikarakos, *Nuclear Iran: Birth of an Atomic State* (n13), 179.

¹⁷ Patrikarakos, *Nuclear Iran: Birth of an Atomic State* (n13) 287.

¹⁸ IAEA's Report on Iran's NPT Implementation (September 2014), available <<http://www.iaea.org/sites/default/files/gov2014-43.pdf>> 75.

in the Embassy Hostage crisis, and subsequent confrontational politics engendering the perception of Iran as an ‘irrational’ country of ‘mad mullahs’.¹⁹

4. WHY DEVELOP NUCLEAR WEAPONS?

National security is the primary motivation for an NNWS acquiring a nuclear weapon which depends on political perceptions of the state’s place in the international environment.²⁰ Because of an absence of credible security threats and a strong American alliance, in 1968 Iran’s security policy did not require a nuclear weapon (although the Shah said a continued proliferation trend allowing smaller powers to acquire weapons would alter this) therefore signing the NPT had little affect on security policy.²¹ Following the Iran-Iraq War and the implicit international approval or acquiescence in Iraq’s use of biological and superior conventional weapons against Iran, the national view changed on the value of nuclear weapons which could overcome their current military inferiority vis-à-vis Iraq; the nuclear weapons programme was instigated.²² Security concerns trumped the NPT’s legal normative restraint and the political pressures underlining it.

At present given the fall of the Taliban in Afghanistan, Hussein in Iraq and Obama’s emollient Iranian policy, security concerns have lessened. Moreover acquiring a nuclear weapon and destabilizing the region which could lead to local adversaries like Saudi Arabia acquiring a weapon or an American/Israeli attack, weighs against a nuclear weapon in Iran’s strategic kaleidoscope. The unpredictable tumult of a nuclear domino in the aftermath of an Iranian bomb seems a more ominous security threat to Tehran than the current situation.²³ Daesh may threaten Tehran’s Shia clerics thus factoring into security considerations,²⁴ but especially following the evident advantages accrued to Daesh when Iraq’s conventional weapons fell into their hands the potential for Daesh gaining access to nuclear weapons is likely to weigh against rather than for Iran’s nuclear arsenal. The nuclear material obtained by Daesh is, according to the IAEA, unable to pose a threat as a nuclear weapon, moreover the US has stated the acquisition of nuclear weapons would be a factor necessitating the

¹⁹ Patrikarakos, *Nuclear Iran: Birth of an Atomic State* (n13) 128–9.

²⁰ Epstein, ‘Why states Go—and don’t go—nuclear’ [1977] 430 *Annals of the American Academy of Political and Social Science* 16, 17.

²¹ Patrikarakos, *Nuclear Iran: Birth of an Atomic State* (n13) 64–70.

²² Dombey, ‘The Nuclear Non-Proliferation Treaty; Aims, Limitations and Achievements’ (2008) 52 *New Left Review* 39, 58.

²³ Ehteshami, ‘Iran: From power generation to weapons proliferation?’ in Pant (ed) *Handbook of Nuclear Proliferation* (Routledge 2012) 195.

²⁴ Gareth Smyth, ‘Iran fears Isis militants are part of wider Sunni backlash’ (2014) *The Guardian*, available <<http://www.theguardian.com/world/iran-blog/2014/nov/18/sp-iran-sunni-sectarian-problem>>.

involvement of ground troops in the region.²⁵ Consequently Daesh are unlikely to alter Iranian security perceptions in favour of unilateral action by nuclear acquisition.

The second nuclear weapons motivation is generally applicable to NNWS but particularly pertinent to Iran, namely national pride pressuring domestic politicians into acquiring nuclear weapons.²⁶ Iranian hangovers remain from foreign intervention (i.e. Mossadegh's 1953 overthrow and the 1941 Soviet-British invasion). The Shah's allusions to an antediluvian imperial Persian grandeur and the Islamic Republic's claims to Iran's moral purity and superiority feature prominently in the public debate. Moreover a traditionally influential regional role and immense natural resources, have made nuclear weapons and their associations of power alluring.²⁷ Yet whilst Iranian national sentiment over sovereignty and self-sufficiency have long been seen as synonymous with the nuclear programme achieving at least nuclear capability, and vital to popular and political support, the worsening economic situation from prolonged sanctions has marginalized and quietened these voices.²⁸

The Shah wanted Iran to be progressively 'modern', which involved pursuing technological capabilities but disavowing nuclear weapons; similarly, as the victim of biological warfare, the Islamic Republic may advocate national nuclear expertise but feel repugnance over nuclear weapons, especially given their association with the West.²⁹ It remains the Islamic Republic's theological stance that nuclear weapons are 'un-Islamic'.³⁰ These moral and cultural dichotomies on the nuclear question when combined with an Iranian craving for international respect reveal a country that is not as inflexible on the nuclear question as it often portrayed. If multilateral co-operation premised on Iran's sovereignty can bolster its international prestige then nuclear weapons are decreasingly important whilst intimidation and intervention could hamper negotiations and drive Tehran back to the bomb.³¹

²⁵ Mofta, 'Does ISIS have a nuclear weapon?' (2014) *International Business Times*, available <<http://www.ibtimes.com/does-isis-have-nuclear-weapon-islamic-state-supporter-claims-militants-have-dirty-1731890>>.

²⁶ Epstein, 'Why states Go—and don't go—nuclear' (n 20) 21.

²⁷ Huntley, 'Rebels without a Cause: North Korea, Iran and the NPT' (2006) 82 *International Affairs* 723, 734.

²⁸ Patrikarakos, *Nuclear Iran: Birth of an Atomic State* (n13) 285–287.

²⁹ Patrikarakos. *Nuclear Iran: Birth of an Atomic State* (n13) 149 and 117.

³⁰ Inaugural Speech by Ayatollah Khomeini at 16th Summit of Non-Aligned Movement (2012), available <<http://www.leader.ir/langs/en/index.php?p=contentShow&id=9708>>.

³¹ Huntley, 'Rebels without a Cause: North Korea, Iran and the NPT' (n27) 736.

Thus Iran's current geopolitical assessment points away from acquiring a bomb.³² Iran, like other states, sees the short-term and decreasingly important advantages of the Pandora's Box of nuclear weapons as a tantalizing prospect (hence capability), denied by the political climate's reality. In law Iran could withdraw from the NPT and acquire a nuclear bomb within a short period if it chose. It is true that the measures resulting from the deal increase this period in which Iranian nuclear weapons could be acquired by reducing uranium enrichment, decreasing the stockpiles of enriched uranium and temporarily closing or adapting the heavy water plants and enrichment facilities that Iran has developed, as detailed earlier. However the 2015 JCPOA does not make an Iranian nuclear arsenal impossible in law or practice beyond the next 15 year period. If Iran were to choose to do so, then after the specified period in the July 2015 JCPOA expires it could withdraw from the IAEA's Additional protocol, expel the IAEA inspectors and recommence the programme towards nuclear weapon acquisition after withdrawing from the NPT, all within the legal confines of the present settlement. The 2015 therefore acknowledges the potential for Iranian nuclear weapons, all it does is increase the period of notice presently afforded to the international community. However, one must ask that, after the stratospheric investments and trade links established between Iran and the rest of the world in merely the few months following the lifting of sanctions,³³ whether after fifteen years of such prosperity, the consequences of economic and political isolation, all for the sake of nuclear pride, would be too painful for Tehran to contemplate. Would Iran ever reasonably alter course back towards obtaining nuclear weapons once the limits of the current deal expires, even if it appeared possible to do so? It is submitted that the domestic reaction would make such a prospect unlikely indeed. The 2015 JOCPA, like the NPT before it, is not designed to effect radical long-term restraint upon national policies, rather it marks where the outer boundaries of the lawfully possible lie, which are far wider than those narrower state-tailored confines of sensible national policy.

5. CONCLUSIONS

To this end therefore then the NPT adds an increment of legal obligation to an essentially political compact. It reminds all where the lines are drawn in the current nuclear settlement with it being left to each state to remain cognisant of the consequences of altering that settlement. Accordingly it is correct to see Article II not as a substantial constraint *per se* but a normative emphasis upon contemporary international politics given extra-clarity and a further increment of obligation by law. Article II does not have much

³² Dombey, 'The Nuclear Non-Proliferation Treaty; Aims, Limitations and Achievements' (n 22) 59.

³³ Bozorgmehr, 'Iran's Hopes for \$50bn in investment as sanctions lifted (17 January 2016) *The Financial Times*, available <<http://www.ft.com/cms/s/0/569c625c-bd04-11e5-9fdb-87b8d15baec2.html#axzz3ykluoETq>>.

substantive content although there is an irreducible core element of obligation which may be fulfilled with little substantive effort towards non-proliferation. The Article II obligation closely mirrors the political restraints upon a state by reminding all of the dangers of a nuclear domino, which is the predominant factor in ensuring that, for most states, acquiring a nuclear weapon is, on balance, disadvantageous to the national interest. It negatively prevents a state from exercising those nuclear weapon rights but permits indirectly the acquisition of a capacity to exercise those rights. Article II acts as the international community's warning system as to when an NNWS feels the national interest in acquiring a nuclear weapon outweighs the damage caused by a breach of international law and the risk of a domino effect. It emphasizes the line at which a political decision will be taken by the NNWS to breach the accepted settlement on nuclear weapons and international law.

The JCPOA of 2015 is indicative of how international law can provide the framework within which national politicians have the autonomy to determine their own agendas, without permitting so much freedom that international comity and relations are placed in jeopardy. Much still remains legal, but what is outside the confines of international law is demarcated as much by the reality of national pragmatism as by fine-sounding norms with their continuing obsession with the debate between state sovereignty and the needs of the international community.

THE JURY SYSTEM IN MODERN RATIONAL LAW: IS THE JURY SYSTEM AN ABSURD INSTITUTION WHOSE ONLY CLAIM TO LEGITIMACY IS ITS ARCHAIC ROOT?

George Mavrantonis

ABSTRACT

Juries are a historical instrument of delivering justice. As per Vidmar, some argue that juries are an ‘ill-conceived’ and ‘archaic’ institution¹ that costs the public financially much more than trials by judge. Critics add that due to modern law becoming ‘increasingly complex’, laypersons such as jurors, are ‘ill-suited’ to take important decisions of justice.² Others disagree, emphasising that the jury system protects justice and can ensure certainty in convictions. Following a 2010 Ministry of Justice Report by Thomas,³ this paper shall focus on important details that need to be considered in order to make juries effective. For example, case-specific internet researching by jurors has become common-practice in today’s modern technological era. The request for more information to enhance jurors’ understanding of the procedure is also of pivotal significance. Measures need to be taken in order to protect our system from factors that can threaten it. If this cannot be achieved, the cost to justice and the economy will have exceeded the benefit, leaving no other option but to replace juries with professional judges.

INTRODUCTION

Historically, the Magna Carta 1215 enshrined the doctrine of trial by jury. Clause 39 stated that ‘no man shall be seized or imprisoned...or stripped of his rights or possessions...but by lawful judgment of his equals...’. This dogma is based on the fundamental view that it is fairer to be judged by persons with a standing in society similar to that of the defendant’s, rather than by judges – a reflection that the justice system ought to be as transparent and just as possible. The importance of this notion was confirmed in *Bushell’s Case* which arose from a previous case where the trial judge would not accept the jury verdict, and jurors were ultimately fined for contempt of court. It was established that the jurors’ verdict is final and this should be respected by the judge.⁴ More modern *McKenna*, per Justice Cassels, confirmed the fundamental principle that ‘a jury shall deliberate in

¹ Vidmar, *World Jury Systems* (1st edn, OUP 2000) 2.

² *ibid.*

³ Thomas, *Are Juries Fair?* (Ministry of Justice Research Series 1/10, 2010).

⁴ (1670) 124 ER 1006.

complete freedom, uninfluenced by any promise, unintimidated by any threat' and anything less would simply stand as a 'disservice to the cause of justice'.⁵ Jury systems differ vastly from country to country. Jury trials are followed typically by common law jurisdictions, with a few exceptions such as Japan. In the USA, jury trials are deployed widely. In the UK, 'the mother of jury system',⁶ the influence of the jury has been gradually reduced being confined mostly to significant criminal and defamation cases, with approximately 1% of English cases ultimately decided by juries.⁷ The passing of s 44 Criminal Justice Act 2003 further reduced the role of juries by allowing trials without a jury in circumstances of 'jury tampering'. Antithetically, Vidmar argues that the main reason why juries are extensively used in the US is because citizens have shown more trust towards juries rather than judges due to the fact that most US judges are elected, arguably making 'them more susceptible to influence from outside sources'.⁸

THE ROLE OF JURIES TODAY

In criminal cases juries are summoned only in either way or indictable only offences that have been sent (or elected) to the Crown Court. Lower offences tried in the Magistrates' Court do not require juries. The jurors' role is to decide on questions of fact and never on questions of law. In instances where Counsel makes a point of law the jury is requested to temporarily leave the court room in an effort not to confuse jurors with complex legal jargon. Criminal trials consist of the great majority of instances where jurors are summoned in England and Wales and the typical number of jurors is twelve. Conversely, only a handful of juries will attend a civil trial in the County Court and jurors are usually eight. Civil juries occur mostly in cases concerning matters of public interest. A very recent example is the ongoing case of *Beaney and Clayton v. The Metropolitan Police* [2016] regarding a civil claim by two English Defence League (EDL) members against the Metropolitan Police for alleged assault and use of abusive language.

JURY OR NO JURY?

On the one hand, it is argued that the jury system can ensure certainty in convictions. Lord Chief Justice Judge had stated that under such a system 'no one can be convicted of a serious crime...unless...a body of his fellow citizens' has been satisfied by the evidence provided at trial 'that they are sure of [his] guilt'.⁹ His Lordship underlined that the jury system helps to 'ensure the administration of justice as well as the preservation of civil

⁵ [1960] 1 All ER 326, 329.

⁶ Vidmar (2000) 7.

⁷ Thomas (2010) 1.1.

⁸ Vidmar (2000) 7–8.

⁹ Judge, *Jury Trials*, Annual JSB Lecture (Belfast, 16 November 2010) [2].

liberties'.¹⁰ It is consequently contended that the jury system can protect against corruption since it is 'easier to bribe one judge than a number of jurors'.¹¹ Also, greater independence is claimed since jurors do not rely on the state to receive a salary or to advance their career, unlike a judge.¹² The issue of community participation is also vital since jurors are given the opportunity to play part in the delivery of justice.¹³ Gastil and Weiser have emphasised that the jury system will 'spur broader civil engagement beyond voting', since increased electoral participation has been observed by citizens upon completion of their jury service.¹⁴ Per Grieve, it is essential to trust juries because the only way the criminal justice system can 'maintain legitimacy, is for people to ... [be]... part of the decision-making process'.¹⁵

An important argument supporting the system of juries is that a jury gives a verdict of either 'guilty' or 'not guilty' and does not need to provide reasons for its decision. A judge conversely, is required to justify his judgment as per the applicable legal rules. This in turn may allow the introduction of 'commonly-held social sentiments' into the decision-making process by also expressing the values of the broader community into the jurors' verdict.¹⁶ A further argument, mostly for less democratic jurisdictions, is the view that the jury can protect its 'fellow citizens from oppressive laws' by simply refusing to convict. Per Lord Devlin, 'no tyrant... could afford to leave a subject's freedom in the hands of twelve of his countrymen'.¹⁷

On the other hand and depending on the viewpoint, this may not always be the reality. This is illustrated by the so-called Diplock Courts where jury trials in Northern Ireland were suspended as a response to the threat of politically infested jurors during The Troubles.¹⁸ Lord Diplock recognised that the jury system potentially posed a danger to 'perverse acquittals'.¹⁹

Echoing the utilitarian approach of preventing 'unnecessary evils'.²⁰ Jeremy Bentham sustained his significant 'double-trouble' argument. Though not

¹⁰ *ibid*, [6].

¹¹ Duff et al, *Juries: A Hong Kong Perspective* (1st edn, HKU 1992) 4.

¹² *ibid*.

¹³ *ibid*, 6.

¹⁴ Gastil and Weiser, 'Jury Service as an Invitation to Citizenship: Assessing the Civic Value of Institutionalised Deliberation' (2006) 605–606.

¹⁵ Grieve, *In Defence of the Jury Trial*, Politeia Forum (London, 11 December 2013) [16]–[18].

¹⁶ Duff (1992) 5.

¹⁷ Devlin, *Trial by Jury* (8th series, Hamlyn Lectures 1956) 164.

¹⁸ Diplock, *Report of the Commission to consider legal procedures to deal with terrorist activities in Northern Ireland* (Cm 5185, 1972) Ch 2(7)(g).

¹⁹ *ibid*, [37].

²⁰ Draper, 'Corruptions in the Administration of Justice: Bentham's Critique of Civil Procedure 1806–1811' (2004) *Journal of Bentham Studies* 20.

explicitly opposing the jury system, Bentham argued that there is no purpose in progressing ‘presentation before a jury if all available evidence has already been laid before the judge’ at an earlier stage, since this would cause substantial ‘delay, vexation and expense’.²¹ Bentham’s reservations, particularly those on delay and expense, are addressed in a modern context. It has for example been suggested that jury trials are more expensive than bench trials.²² In fact, it is said that the UK would save £105 million per annum²³ if it changed its system, since jury trials, in 1999 values, cost an average of £13,500 compared to £2,500 for a trial by magistrates.²⁴ Jury trials are time-consuming and usually last 10 days or more.²⁵ The social impact is noteworthy since employers are not legally obliged to pay their staff²⁶ when on jury service although a capped amount, typically below average ordinary daily earnings, can be claimed upon completion of jury service.²⁷

A different theoretical argument against jury systems is that of tactics. There is the suggestion that juries may allow parties (both in criminal and civil trials) to gain an ‘unfair tactical advantage’.²⁸ Bogart, although referring to the US system, gives the example of a trial involving a defendant insurance company where juries are said to benefit one party more than the other and award ultimately more damages ‘than do judges’.²⁹

JURIES: REPRESENTATION AND FAIRNESS

The 2010 *Are Juries Fair?* Report looks at traditional commonly held views as regards to juries across England. A multi-method approach was used. This consisted of a case simulation study (using CREST) involving 478 jurors deciding a single case, a large-scale quantitative analysis of outcomes from 551,669 charges between 2006 and 2008 and a post-trial survey of 668 jurors in 62 cases.³⁰ The study as a whole addressed the issues of fairness, racial discrimination, conviction rates, comprehension of legal instructions, jury impropriety and the impact of media and the internet.

²¹ Bentham’s *Scotch Reform* (Annual Review, 1808), cited in Bowring, *The Works of Jeremy Bentham vol. 5* (William Tait, 1843) 71.

²² Bogart, ‘Guardian of Civil Rights, Medieval Relic: The Civil Jury in Canada’ (1999) LCP 316.

²³ ‘Straw on trial over jury reform’ *BBC News* (London, 19 November 1999) [4].

²⁴ ‘Jury plans prompt criticism’ *BBC News* (London, 19 May 1999) [5].

²⁵ Lloyd-Bostock and Thomas in Vidmar (ed) 78.

²⁶ UK Government, ‘Paying Staff on Jury Service’ <www.gov.uk/giving-staff-time-off-jury-service/paying-staff-on-jury-service> accessed 16 December 2016.

²⁷ Papworth, ‘Jury service: civic duty v. family income’ *The Guardian* (London, 25 November 2009) [3]-[5].

²⁸ Bogart (1999) 316.

²⁹ *ibid*, citing Ontario Law Reform Commission, *Report on the use of jury trials in civil cases* (1996) [27].

³⁰ Thomas (2010) 7.

The case simulation study examined whether discrimination that would impact the delivering of justice, exists between juries and defendants, depending on their composition. Thomas concluded that verdicts of ‘all-white juries did not discriminate against BME defendants’.³¹ However, out of the three geographical areas of focus, it has been found that white jurors in Nottingham were ‘significantly more likely to convict’ a white defendant accused of assaulting a BME victim (61%) rather than a white victim (4%).³² It also appears that white defendants face higher chances of being convicted in courts with all-white juries (44%) rather than in courts with mixed juries (34%).³³ The above indicates that at least in cases of racially aggravated offences, race does play a substantial role in jurors’ thinking. Thomas underlines that 76% of participating Nottinghamians ‘thought race was a factor’ in cases involving white juries and BME defendants.³⁴

One of the most significant criticisms against jury systems is that of jurors’ lacking of understanding of their civic duty and to directions given to them by the trial judge. The case simulations indicated that 51% of jurors in Nottingham, 31% in Blackfriars and 32% in Winchester found the judge’s directions ‘difficult to understand’.³⁵ The jurors who took part in the Winchester simulation were then asked the two questions explicitly proposed by the judge previously in order to determine whether the defendant had acted in self-defence.³⁶ Only 31% of jurors identified accurately both questions.³⁷ It is noteworthy that for jurors, the judge’s directions in legal terms made the process of understanding even more difficult.³⁸ In *Hubne and Pryce* a re-trial was ordered because the jury could not understand the directions given.³⁹

It has been shown that offences such as making indecent photos of children, death by dangerous driving and possession of drugs with intent to supply have the highest jury conviction rates. In offences such as manslaughter, attempted murder and GBH, however, the jury conviction rates are substantially lower.⁴⁰ This essay argues that the above findings are a reflection of the continuously developing complexity of the law. In general, offences with higher jury conviction rates such as drug possession with intent to supply (84%), could be considered are legally ‘simpler’ and in many occasions require a lower *mens rea* threshold compared to offences such as attempted murder (47%) with complex *mens rea* requirements. The

³¹ *ibid*, 16.

³² *ibid*, 17.

³³ *ibid*, 25.

³⁴ *ibid*, 18.

³⁵ *ibid*, 36.

³⁶ *ibid*, 36–37.

³⁷ *ibid*.

³⁸ *ibid*, 37.

³⁹ [2014] EWCA Crim 2541

⁴⁰ Thomas (2010) 30.

author will argue that it is beyond logical thinking to accept that laypersons find a potential difficulty in understanding the mere meaning – notwithstanding the core principle– of foundational doctrines such as ‘beyond reasonable doubt’ and legal terminology such as ABH and GBH used by Counsel.⁴¹ Even persons who have voluntarily chosen to study the law frequently fail the foundational criminal law module (46.9%) at the undergraduate level.⁴² Thomas rightly highlights a different point. Offences with the highest conviction rates are those with ‘strong direct [physical] evidence’ against the defendant in contrast to offences with the lowest conviction rates where juries are required to ‘be sure of the state of mind of a defendant’.⁴³

Section 8 of the Contempt of Court Act 1981 maintains the confidentiality of jury deliberations. In *Thompson*, the Lord Chief Justice emphasised that there is a ‘[juror] collective responsibility for ensuring that the conduct of each member is consistent with the jury oath’⁴⁴ and in *Mirza* the common law rule of jury secrecy was reinforced, emphasising that any evidence after jury deliberations and verdict, is inadmissible.⁴⁵ Per Thomas, a large proportion of jurors do not know what to do in situations of improper juror behaviour during deliberations. 48% of jurors answered that they ‘would not know what to do or were uncertain’.⁴⁶ 67% of jurors also stated that they should be given more guidance as to ‘how to conduct deliberations’.⁴⁷ It is crucial that jurors are given more information regarding reporting of jury impropriety in order to safeguard the process of deliberations.

TECHNOLOGY, MEDIA AND THE INTERNET

The impact of today’s modern era of continuous exposure to media and the internet, is inevitable for juries. Under s 2(2) CCA 1981, the media cannot publish content that will cause a substantial risk to seriously impede the course of justice. As per *Attorney-General v Associated & Anor*, such content can potentially affect a jury’s verdict.⁴⁸ Thomas’ study confirms the legitimacy of a ‘fade factor’ in juries. This is the presumption that the further away media reports are from the trial, the less probability exists that jurors will have prejudice.⁴⁹ However, in high profile cases, 35% of jurors

⁴¹ Offences Against the Person Act 1861.

⁴² University of London, *Examination Statistics* (2012) Table 2
<www.londoninternational.ac.uk/sites/default/files/exam_stats_1112.pdf> accessed 18 December 2016.

⁴³ Thomas (2010) 31.

⁴⁴ [2010] EWCA Crim 1623 [6].

⁴⁵ [2004] UKHL 2.

⁴⁶ Thomas (2010) 39.

⁴⁷ *ibid.*

⁴⁸ [2012] EWHC 2029.

⁴⁹ Thomas (2010) 41.

recalled pre-trial media reports as well.⁵⁰ The issue at stake in *Karakaya* was a juror's internet search during deliberations that provided them with information about the case not included in the evidence presented at trial.⁵¹ Although an introductory juror video is presented to jurors informing them about the prohibition of trial-related internet searching, in the study, 5% of jurors in standard cases admitted that they had looked for information about the case during trial whilst 12% admitted doing so in high profile cases. The figures more than double when asked if jurors 'saw reports on the internet' during trial.⁵² We must note however that the findings might be underrepresented since these include only what jurors 'admitted' illegally doing.

A 2013 study by Thomas focused further on evaluating the understanding of jurors' awareness as regards to internet use and jury impropriety. The study did not focus on "why verdicts were reached" due to the limitation of jurors self-reported views.⁵³ The study used post-verdict surveys with former jurors.⁵⁴ It found that 14% had actively searched for information about the judge or the legal teams.⁵⁵ Thomas distinguishes between 'active searching' and 'passive awareness' in juror internet use.⁵⁶ There is a valid argument that 'active searching', as in *Attorney-General v Dallas*,⁵⁷ seems clear. However, taking into account modern technology developments including tweets and RSS feeds, it could be argued that 'passive awareness' can occur much more frequently and its limits are not clear-cut; as per Thomas, this carries a major challenge to law reformers.⁵⁸

The issue of juror lack of understanding can be addressed by two methods. The first is to reduce jury trials only to offences that are legally 'simpler' for laypersons to comprehend, such as possession of drugs with intent to supply with less complicated *mens rea* threshold. The second proposal is that of judges providing jurors with more comprehensive written and oral directions as to their task. Stage One of a UCL Jury Project 2012–2013 study revealed that among jurors who had only received oral and not written directions by the judge, 85% said that 'they would have liked written directions' to assist them at deliberations.⁵⁹ This should include better directions on how a juror should act if they become aware of juror impropriety during deliberations. Media reports are regulated by CCA 1981; what is published generally on the internet, however, is not.

⁵⁰ *ibid.*

⁵¹ [2005] EWCA Crim 346.

⁵² Thomas (2010) 43.

⁵³ Thomas, 'Avoiding the Perfect Storm of Juror Contempt' [2013] CLR 486.

⁵⁴ *ibid.*

⁵⁵ *ibid.*, 491.

⁵⁶ *ibid.*, 492.

⁵⁷ [2012] EWHC 156.

⁵⁸ Thomas (2013) 494.

⁵⁹ *ibid.*, 498.

Directed by the Law Commission's recommendations,⁶⁰ the Criminal Justice and Courts Act 2015 makes internet searching illegal. However, this paper shall argue that the new law is too restrictive. Specifically, ss 71(4)(d) and (f) make it a criminal offence for jurors to search information about the law relating to the crime, and court procedure. Per Thomas, courtrooms and deliberation rooms should also be appropriately modified in order to 'control juror use of internet-enabled devices'.⁶¹ The above proposals can help to ensure that jury practices do not impede justice and may reduce the extra burden of cost for re-trials, as in *Pryce*. Nonetheless, in the era of Facebook, hashtags and Google, can one expect that jurors will not research details on the trial *they* are deciding on? Even if so, how can this be legally ensured?

THE OTHER SIDE OF THE COIN: A JUDGE-ONLY SYSTEM?

Critics of the jury system would argue that trials by judge are preferred. To that extent, legal formalists support that judges simply apply the law to the fact in a rational manner. Legal realists maintain that sociopolitical views and psychological considerations can influence judicial rulings. An American 7-year empirical study of judicial decision-making and behaviour in eleven US Courts of Appeal, by Goldman, focused on whether political stimuli can affect judges' choices in line with their decisions.⁶² Goldman, found that in, for example, civil liberties, Democratic-affiliated judges were much more 'liberal' in their voting than Republican-affiliated judges.⁶³ It was also considered that judges in favour of private economic cases tended to oppose federal government tax cases,⁶⁴ suggesting that judges' 'political attitudes and values' affected their voting.⁶⁵ Danziger, researching 1,112 parole rulings over eight Israeli judges, indicated that extraneous variables such taking breaks for a meal could influence judges' decisions.⁶⁶ Sunstein argues that US Supreme Court judges are conformists who follow public opinion and the society's 'emerging awareness'.⁶⁷ Knight, on the other hand, disagrees, arguing that the research methods chosen in empirical

⁶⁰ Law Commission, *Contempt of Court: Juror Misconduct and Internet Publications* (LC340, 2013) [1.21].

⁶¹ Thomas (2013) 501.

⁶² Goldman, 'Voting Behaviour on the United States Courts of Appeals Revisited' (1975) *The American Political Science Review* 494.

⁶³ *ibid*, 497.

⁶⁴ *ibid*, 494–495.

⁶⁵ *ibid*, 504.

⁶⁶ Danziger, Jonathan Levav and Liora Avnaim, 'Extraneous Factors in Judicial Decisions' (2011) *Proceedings of the National Academy of Sciences of the United States of America* 6889.

⁶⁷ Sunstein, *Why Societies Need Dissent* (1st edn, HUP 2003) 193.

studies on judges' decision-making focus 'too narrowly' on the case and the final vote, instead of looking at the evolving law.⁶⁸

CONCLUSION

Jury trials in England and Wales have been restricted to nearly 1% of all hearings. Their number is still significant, and their role important. Juries are a tradition to this jurisdiction's legal justice system. It is argued that the jury system protects justice since an individual shall not be convicted unless twelve of his fellow citizens are persuaded they are certain about his guilt. Conversely, it is claimed that jury trials can cost 5.4 times more than trials by magistrates. However, among others, it has been indicated that a significant proportion of jurors lack full understanding of judges' directions. The use of the internet by jurors stands as an additional significant problem due to its danger of impeding justice. It is maintained, that if all efforts to improve these hazards fail, the solution is to scrap the notion of juries since the cost to justice and the economy would have exceeded the benefit.

⁶⁸ Knight, 'Are Empiricists Asking the Right Questions about Judicial Decision Making?' (2009) *Duke LJ* 1532–1533

THE EVOLUTION OF PROCEDURAL EXCLUSIVITY: IS IT TIME TO STRIKE OUT THE RULE IN *O'REILLY v MACKMAN*?

Siân McGibbon

INTRODUCTION

The famous decision in *O'Reilly v Mackman*¹ created a formalistic distinction in English administrative law in the form of the so-called 'exclusivity principle'; essentially, a claim which involved determination of a public law issue and which fell outside the limited scope of defined exceptions was required to be brought using the procedure established by (what was then) s31 of the Supreme Court Act 1981 and RSC Order 53². The ruling was subject to extensive criticism in the years following its delivery, both in strongly-worded terms from academic quarters³ and in more veiled language from the higher judiciary⁴. However, both the case itself and the principle of procedural exclusivity it established have since fallen into relative obscurity, of little practical consequence except perhaps to the student of administrative law who must continue to trundle through *O'Reilly* and its progeny as one of the more redundant aspects of his reading list. It is true that the exclusionary rule as stated in *O'Reilly v Mackman* is now overgrown with exceptions. Nevertheless, it is a mistake to conclude that this process has involved compromise of the highly important principles and considerations which justified the judgement of the House of Lords in *O'Reilly*. Rather, the court has been careful to protect these principles and create exceptions only where these *do not* undermine the policies underpinning the exclusionary rule, either because these justifications are not applicable, because they are outweighed by conflicting policies, or because the exclusionary rule is not the best means of realising them.

This article will begin by examining the justifications given for the rule in *O'Reilly v Mackman*, followed by the countervailing considerations which have led courts to undermine the scope of the rule itself. It will then be argued that the limitations placed on the rule itself have not had the effect

¹ [1983] 2 AC 237.

² Rules of the Supreme Court 1965 (SI 1965 1776) Ord. 53.

³ See for example: Morris and Fredman, 'The costs of exclusivity: public and private re-examined', [1994] PL 69.

⁴ See for example: *Roy v Kensington and Chelsea and Westminster F.P.C.* [1992] 1 AC 624, per Lord Lowry at 653-655; *Lonrho Plc v Tebbit* [1992] 4 All ER 280, per Sir Michael Kerr at 288; *Chief Adjudication Officer v Foster* [1993] 1 All ER 705, per Lord Bridge at 712.

of undermining the principles underpinning it, but have merely identified cases beyond the scope of these principles themselves. On this understanding, the exclusivity rule continues to perform a useful function in providing a default position against which the justifications for creating an exception on the facts of any given case can be measured. The exclusivity principle and its exceptions provide a framework within which the competing policy objectives can be analysed, and the case law indicates that the courts have grown adept at using this structure to ensure a fair outcome on the facts of any individual case. It will be concluded that to overrule the decision in *O'Reilly* and abandon procedural exclusivity as a concept is not only unnecessary but would be inappropriate in light of the fact that two distinct procedures for bringing claims remain intact following the reforms of the Civil Procedure Rules.

THE RATIONALE OF PROCEDURAL EXCLUSIVITY

The process of judicial review contained in what is now Civil Procedure Rule 54⁵ ensures particular protection for public bodies, notably the requirement for leave to bring a case (for which the claimant must demonstrate that they have a reasonable prospect of success), time limits within which a case must be brought (promptly and within no more than three months at the latest), and limitations on fact finding facilities. These protections reflect the policy considerations at stake in public law cases: leave requirements ensure that public money is not wasted by defending a realistically futile case; the time limits on judicial review ensure the interest in certainty which is particularly strong in public law cases, especially where the case concerns validity of byelaws or decisions which affect the general public or a large section of it. The rationale for procedural exclusivity is that litigants should not be able to evade these protections built in to judicial review procedure.

As is the case with any policy, there are countervailing considerations, arising in a range of cases where for legitimate reasons the claim cannot be brought under the judicial review procedure. Often this occurs where the case also engages private law rights and the claimant lacks the resources to defend his interests in two courts. Alternatively, the claimant may not become aware of the decision/act of the public body which he wishes to challenge until after the expiry of the limitation period. A further example is where public law issue is raised as a defence, in which case the defendant had no choice as to the procedure adopted. Such scenarios are multifarious and it is not possible to produce a closed list of cases in which the issues they raise might apply. A steadily growing list of exceptions, recognising the interests of justice in allowing a claimant to raise public law questions using the ordinary procedure, has arisen following the *O'Reilly* ruling. As a

⁵ Civil Procedure (Amendment) Rules 2000 (S.I. 2000 No. 2092), Rule 54.

consequence, it is often argued that the so-called exclusivity principle no longer has any meaningful content⁶.

Such a conclusion is too hasty; this article will demonstrate that the cases in which it has been justified to allow a public law issue to be raised outside of the judicial review procedure have not undermined the importance placed on ensuring certainty and protection for public bodies. The case law demonstrates that a satisfactory balance has been struck between these competing considerations on a case by case basis, by looking to see whether the *principles* themselves have been violated by failure to raise a question of public law by way of judicial review, rather than by simply assuming that there must be an abuse of process wherever a public law issue is raised in ordinary proceedings.

A RULE MADE TO BE BROKEN?

It is significant to note that *O'Reilly* itself was decided on the basis that the bringing of the actions by ordinary summons was a 'blatant attempt to avoid the protections for the defendants for which Order 53 provides', and therefore on the facts of that case to allow the actions to continue would have constituted an abuse of process. Lord Diplock recognised that this would not always be the situation, and even suggested a number of exceptions, 'particularly where the invalidity of the decision arises as a collateral issue in a claim for infringement of a right of the plaintiff arising under private law', or 'where none of the parties objects to the adoption of procedure by writ or originating summons'. The rationale behind these categories of exception, namely the acknowledgement that there will not in fact be an 'abuse' of process in every situation in which the 'wrong' process is used, would later become the principle which all but eclipsed the rule itself (see *Clark*, discussed below). Diplock went on to recognise that the exceptions he articulated were not exhaustive and that courts would continue to create exceptions. Critics of the decision often present the *O'Reilly* rule as creating a strict, formal divide between public and private law procedure, but it is not clear on a close reading of the case that this is what the House of Lords intended; the Lords were in fact highly sensitive to the fact that there would be a large number of cases in which the general rule they laid down would be inappropriate.

The rationale behind procedural exclusivity was further highlighted even on the same day as the *O'Reilly* judgement was delivered, when the case of *Cocks v Thanet District Council*⁷ came before the House of Lords. This case involved a claim for (*inter alia*) a declaration that the Local Authority was in breach of its statutory duty to provide the claimant with permanent

⁶ See for example: Hickman, '*Clark*: The Demise of *O'Reilly* Completed?' (2000) 5 JR 178.

⁷ [1983] 2 AC 286.

accommodation. Following *O'Reilly*, the court held characterised the claim as a public law case on the basis that that any private law right was conditional on the exercise of a statutory discretion. The reasoning has been harshly criticised as 'artificial' by academics⁸, but such criticisms ignore the delicate nature of the issues the court had to decide. Viewed in the context of social housing, an area of high policy in which a broad discretion of the LA is appropriate, ensuring the protections of the judicial review procedure is justifiable. By contrast, once the LA has exercised its discretion in favour of a particular individual (i.e. determined that he *was* homeless) it is easier to see that these protections become less appropriate and the council can properly be held to account under private law procedure for failing to uphold an individual's interest under the statute. Thus the outcome of the case, notwithstanding criticisms of its academic integrity, remained consistent with the principles underpinning procedural exclusivity and the ruling in *O'Reilly*.

However, the emphasis appeared to shift in *Wandsworth v Winder*⁹, with the creation of a further category of 'exception' to Lord Diplock's general rule. Whilst recognising the important policy justifications for the rule, Lord Fraser held that it would be 'a very strange use of language' to accuse a defendant of abusing the process of the court when he had not had the opportunity to choose the means of bringing the action but merely sought to raise the invalidity of the relevant resolutions as a defence to the claim against him. The subsequent case *Boddington v British Transport Police*¹⁰ pursued this line of reasoning in more depth, with Lord Woolf suggesting positive reasons for allowing the public law issue to be raised as a defence. Significantly, he did not suggest that the rationale for the exclusionary rule had been overstated, but simply emphasised the strength of the countervailing considerations in that particular case. It would be misleading to suggest that this exception, allowing a public law matter to be raised in ordinary proceedings as a defence, undermines the justifications for the exclusionary rule; the primary aim of the rule is to prevent abuse of process, and as Lord Fraser's words make clear where a defendant has had no choice in the form of the claim and therefore cannot be said in any meaningful sense to be abusing the process of the court. Further, it would clearly be harsh to allow someone to be sued or prosecuted on the basis of an unlawful decision which the victim has no means of challenging, and this factor must be weighed against the value of procedural exclusivity.

Further, in *Roy v Kensington & Chelsea FPC* Lord Lowry distinguished two possible approaches to the rule in *O'Reilly*, noting in *O'Reilly* itself it had not been necessary to choose between them (though Lord Diplock for his

⁸ Morris and Fredman, above n 4, at p 80.

⁹ [1985] AC 461.

¹⁰ [1999] 2 AC 143.

part clearly understood his judgement to state general rule). According to the 'broad approach', the rule required the aggrieved party to proceed by judicial review only when private law rights were not at stake, but did not apply generally to preclude in any circumstances bringing an action to vindicate private law rights which may involve a collateral challenge to a public law act or decision. By contrast, the 'broad approach' assumed that the rule applied to *all* cases raising questions of public law, subject to limited exceptions where private rights were involved. The key distinction appears to be that in the former the default position that the judicial review procedure must be used only where private rights law rights are not at stake whatsoever, whereas under the latter interpretation private law rights are only relevant in so far as they fall within exceptions to the exclusivity principle. Though adopting the narrow approach for the purposes of his judgement in *Roy* in order to avoid laying down the proper scope of the general rule (a point which had not been raised in argument), Lord Lowry favoured the latter approach as avoiding a 'procedural minefield'¹¹. The choice was in fact immaterial to the outcome of the case, as even on the narrow approach it was held that the claimant had been perfectly entitled to use ordinary proceedings as private law rights 'dominated' the case (Roy was a general practitioner who had entered an agreement with the defendant committee to provide medical services to the NHS, who claimed that the payments due to him under this agreement had not been paid). However, the outcome was to further restrict the application of the exclusivity rule, as Lord Lowry's endorsement of the broad approach excluded from its scope all cases in which private law rights were at stake. Even so, the justifications for the rule were not undermined as considerations of certainty are of far less significance in cases involving private rights where the relationship is arguably based largely on contract, and where (as in *Roy*) the decision challenged is specific to one individual. In the formation of contract and other private law dealings, public bodies exercise powers available to any other private party. It is therefore more reasonable that they should be held to account for these dealings in the same manner as any private party. Lord Lowry accurately articulated the distinction between the situation in *Cocks* and that in *Roy*; 'Mr Cocks was simply a homeless member of the public [until and unless the council determined that he was not intentionally homeless]...whereas Mr Roy had already established a relationship with the committee when his [case] fell to be considered'. The underlying difference is Mr Roy's right to be paid for the work he had done was one which might arise on the basis of an agreement between any two private parties, whereas the right which Mr Cocks claimed was a consequence of the unique statutory duty placed on the council by virtue of its position as a public body.

¹¹ *Roy v Kensington & Chelsea FPC* [1992] 1 AC 624.

*Mercury v Director General of Telecommunications*¹² then went further along the path started down by *Roy*, as the House of Lords held that the exclusivity principle gives way not only when private law rights are at stake as between two parties to the case, but also when the defendant's decision is capable of affecting the claimant's relations in private law with others¹³. *Mercury* was granted a declaration by way of originating summons against the decision of the Director General of Telecommunications on the basis that the Ord. 53 protections had not been flouted, there was no abuse of the court's process, and that therefore his bringing the proceedings by way of ordinary action was not unsuitable.

The turning point arguably came in *Clark v University of Lincolnshire and Humberside*¹⁴, in which Lord Woolf explicitly recognised that the emphasis had changed since *O'Reilly*. The significant consideration was not to be whether the 'right' procedure had been adopted, but whether the protection provided by the judicial review process had been flouted in circumstances inconsistent with the conduct of proceedings justly and in accordance with the general principles contained in the Civil Procedure Rules. Woolf suggested that these principles should be central to determining what is due process and what constitutes an abuse, rather than wasting time and money by discontinuing an action where these principles have not been violated but on a strict application of the *O'Reilly* rule the case has been brought in the wrong form. This is step forward in terms of explicitly recognising that the interests of justice are not served by striking out an action purely on the basis of technicality, although it should be noted that this does not appear to have in fact occurred even in the immediate aftermath of *O'Reilly*. The implication of *Clark* is that, irrespective of whether a case is brought by judicial review or by ordinary proceedings, the court will in substance apply the same test in order to determine whether it should be allowed to continue – for example in judicial review a delay might have the effect of invalidating a claim under the judicial review procedure, whereas in ordinary proceedings the same delay might lead the court to conclude that bringing the claim under such proceedings where it would not have been permitted under judicial review constituted an abuse of process. In this way, questions similar to those relevant at the permission stage of judicial review can be considered at the summary judgement stage of the ordinary procedure, affording comparable protection to the public body. This more flexible approach should not be understood as undermining the exclusivity principle, but rather as adapting it in response to the entry into force of the new Civil Procedure Rules in 1998 and the greater powers of case management which these entailed¹⁵. Particularly, as Lord Woolf noted, under the CPR 'delay can...be taken into account on an application for summary

¹² [1996] 1 WLR 48.

¹³ *Mercury Communications v. Director General of Telecommunications* [1996] 1 WLR 48.

¹⁴ [2000] 1 WLR 1988.

¹⁵ For an alternative view see Hickman, above at n 7.

judgement under...Part 24 if its effect means that the claim has no real prospect of success'. The CPR was intended to harmonise the two procedures, yet without going so far as to unify them. A more flexible approach to procedural exclusivity is appropriate in view of these changes, but given that two separate systems remain intact it would be going too far to abandon the principle entirely.

A demonstration of the exclusionary rule upheld on this 'flexible approach' to procedure can be found in *Trim v North Dorset District Council*¹⁶. This case highlights ongoing importance of the exclusivity principle, and indicates clearly that the courts still view the policy justifications for the rule as valid. Where there is in fact an abuse of process, the rule will still apply. In the case of *Trim*, the court questioned why Trim had waited so long to bring his claim given that the Council had made it clear that they did not plan to revoke the breach of condition notice. In the absence of a satisfactory explanation for this, there was no good reason to allow Trim to evade the protections of the judicial review process by bringing his claim in the ordinary form.

CONCLUSION

To conclude, the policy justifications at the heart of *O'Reilly v Mackman* principle were sound, and arguably the continued existence of two alternative procedures for bringing claims in public and private law is evidence that the exclusivity corresponds to some extent with legislative intent. It is also misleading to suggest that subsequent jurisprudence has detracted from the principles underpinning procedural exclusivity; in fact, subsequent cases have been careful to respect the policies behind the exclusivity rule and this article has demonstrated that the weight accorded to these has shaped the nature and extent of the exceptions created. However, if the exclusionary rule as formulated by Lord Diplock is interpreted strictly, *O'Reilly* went further than was necessary to protect or justified on the basis of the considerations of avoiding abuse of process. Consequently, numerous exceptions to the supposedly 'general rule' have been created, to such an extent that it has become more accurate to describe the general rule as having changed and cases in which the exclusionary rule applied as 'exceptional'. This is a desirable development as it requires the court to ask whether there is any reason to believe that the bringing of the public law action by ordinary proceedings constitutes an abuse of process, rather than starting from the assumption that there is an abuse of process and requiring this to be rebutted. There are sound practical reasons to view this shift in the underlying assumption as desirable; particularly, in the majority of cases there will not be an abuse of process and it is to the advantage of both parties and the court to limit the

¹⁶ [2010] EWCA Civ 1446.

time and resources expended on the litigation by allowing the action to continue.

On the other hand, it does not follow from this that procedural exclusivity should be struck out as a concept of English administrative law. This article has shown how the rule continues to serve a useful purpose in providing judges with a framework within which to analyse and balance the policy issues at stake. Further, courts have demonstrated that they are increasingly adept at using the rule and its exceptions in this manner. Procedural exclusivity may be criticised as conceptually slack, but in terms of delivering practical justice on real-world facts, procedural exclusivity and its caravan of exceptions is difficult to fault

PRESUMED CONSENT: THE HUMAN TRANSPLANTATION (WALES) ACT 2013

Michael O'Reilly

INTRODUCTION

The Human Transplantation (Wales) Act 2013 (HTWA) is a major legislative change, making Wales the first UK nation to introduce an 'opt-out' or 'deemed consent' system for organ donation.

This paper examines the new opt-out model; associated ethical issues; relevant legislation that is operating concurrently; relevant facts that are likely to raise difficulties and concludes by making several recommendations.

BACKGROUND

For over a decade there has been a UK wide drive to increase the number of organs available for donation. The Human Tissue Act 2004 consolidated existing legislation in England and Wales and established the Human Tissue Authority to regulate the removal, storage, use and disposal of human bodies, organs and tissue. This legislative framework utilises an opt-in system (currently in operation), and presumes that an individual does *not* wish to donate his organs unless he is registered on the Organ Donation Register (ODR). There are various opt-in and opt-out consent systems in use, shown in Appendix 1. Thus the Welsh approach for deemed consent is a major shift in the realm of organ donation and appears to override the basis of traditional medical ethics.

In a report, 'The potential for an opt out system for Organ Donation in the UK, the Organ Donation Taskforce (ODTF) rejected the opt-out system stating: 'The Taskforce concluded that such a system has the potential to undermine the concept of donation as a gift, to erode trust in NHS professionals and the government, and negatively impact on organ donation numbers.'

Despite the ODTF rejection, lobbying on the introduction of a presumed consent system continued in Wales and a public consultation ensued¹. Welsh Government pledged to increase Welsh transplant rates by 25% and produced a White Paper in 2011 proposing a soft opt-out system;

¹ *Options for changes to the organ donation system in Wales* (Welsh Government Consultation Paper, May 2009).

explaining that the current opt-in system was preventing organs from being used because potential donors were not registered on the ODR.²

The Human Transplantation (Wales) Act was overwhelmingly passed by the National Assembly for Wales on the 10th September 2013: 43 Assembly Members in favour, 8 against and 2 abstentions³. It comes into force on 1 December 2015.

THE WELSH OPT-OUT MODEL

At the heart of the Act is a deemed consent system (also known as presumed consent). In Wales a subtype of deemed consent known as *soft opt-out* will be used.

According to the White Paper: The soft opt-out system that is being proposed for Wales is one in which the removal and use of organs and tissues is permissible unless the deceased objected to it during his or her lifetime. Individuals will have a formal mechanism for registering that objection. After death relatives will be involved in the decision making process around donation.⁴

Adults living in Wales for more than twelve months will be faced with a complicated new regime in which they will have three choices:

- a) Join the Organ Donor Register to opt-in;
- b) Inform the Organ Donor Register to opt-out;
- c) Do nothing, which will be understood to mean that one does not have an objection to becoming an organ donor (deemed consent).⁵

The claim for the new legislation is based on a view that more organs will become available, however, there are limitations to the opt-out system being able to significantly increase the number of donor organs available in Wales. These limitations are as follows:

TISSUE MATCHING: EFFECT ON GEOGRAPHIC DISTRIBUTION OF ORGANS

² *Welsh Government Consultation Document Proposals for legislation on Organ and Tissue Donation* (Welsh Government White Paper, 8 November 2011).

³ Boseley, 'Opt-out Organ Donation Scheme Given Go-ahead in Wales' *The Guardian* (2 July 2013).

⁴ *Welsh Government Consultation Document Proposals for legislation on Organ and Tissue Donation* (n 2).

⁵ Welsh Government Television Advertisement on Organ Donation <http://organdonationwales.org/Organ-Donation-is-changing-in-Wales/watch-our-tv-advert/?lang=en>, at 00:18.

The organisation that controls organ donation is a UK wide agency (National Health Service Blood and Transplant). Donors and recipients are matched based on tissue typing. Welsh donors are not specifically matched with Welsh recipients. Depending on tissue typing and suitability, any organ harvested in Wales may be received by a non-Welsh person outside Wales. This inter-nation transfer is reciprocated for kidney and pancreas transplantation only. Table 1, clearly shows that most of the organs transplanted in Wales (kidney and pancreas) originate outside Wales.⁶

Table 1: *Origin of (deceased donor) organs transplanted in Wales: 2013 and 2014 (a two year period):*

Organ	Wales	England	Scotland	NI	Overseas	Total
Kidney	48	120	1	1	1	171
Pancreas	6	19	0	1	0	26
Total	54	139	1	2	1	197

Table 2 confirms that only kidneys and pancreata harvested in Wales are transplanted in Wales. All other organs are sent out of Wales.

Table 2: *Destination of (deceased donor) organs retrieved in Wales 2013 and 2014:*

Organ	Wales	Not Wales	Total
Kidney	52	157	209
Pancreas	6	24	30
Islets	0	12	12
Heart	0	9	9
Lung	0	35	35
Liver	0	92	92
Bowel	0	1	1
Abdominal Wall	0	1	1
Colon	0	1	1
Stomach	0	1	1
Total	58	333	391

⁶ Statistics provided by Mr Phil Pocock, Senior Statistician, NHSBT.

TRANSPLANT CENTRES

The University Hospital of Wales is the only authorised transplant centre in Wales and it is licensed to perform only kidney and pancreas transplantation⁷. It is clear that in order for overall transplant rates to increase in Wales, and for it to be possible to perform transplantation of other organs, such as liver and heart, there would need to be significant investment in transplant facilities. This is not part of the current South Wales Programme which involves a radical restructuring of the current hospital provision in South Wales.⁸

INTENSIVE CARE UNITS (ICU)

The UK has the fewest ICU beds of all developed western countries (0.35 ICU beds and 16.4 donors per million population), and is frequently compared with Spain (0.82 beds and 32 donors) and the USA (2 beds and 25.6 donors). Intensive care is often perceived as the pinch-point for delivering viable donors; if the ratio of organ donors to ICU beds were a valid metric, UK intensive care would be the most efficient of the three.⁹

Difficulties surrounding the relatively low number of ICU beds have been highlighted in various reports.¹⁰ The Abertawe Bro Morgannwg University Local Health Board Action Plan states: A limiting factor to donation from patients that could potentially be admitted from ED¹¹ purely for the purpose of donation is the lack of critical care beds – Wales has the lowest number of beds per head of population in Europe. In the financial climate it is unlikely there will be a significant expansion in the number of critical care beds and so plans to optimise their use need to be in place.¹²

Keeping patients alive solely for the purpose of organ donation poses serious ethical, legal and professional accountability issues which would need to be examined. Such practice was deemed unlawful by the Department of Health in 1994 following the use of elective ventilation.

⁷ UK Transplant Centres.

http://www.organdonation.nhs.uk/about_transplants/transplant_units/.

⁸ The South Wales Programme: Securing the future of hospital services in South Wales and South Powys (15 April 2014).

⁹ Bion et al, 'Will the UK Ever Reach International Levels of Organ Donation?' (2012) 109 British Journal of Anaesthetists 10–13.

¹⁰ Donnelly, 'Warnings over Shortages of Intensive Care Beds' *The Telegraph* (26 January 2014).

¹¹ ED: Emergency Department.

¹² *Taking Organ Transplantation to 2020* (Abertawe Bro Morgannwg University Local Health Board Action Plan 2014).

Despite the practical issues in retrieving organs suitable for transplantation, the main concern centres around the issue of consent amongst other things. The legislation in itself is controversial to the extent that it is not clear how this legislation will work given that clinicians will be expected to make those decisions quickly in an emotionally charged context.

The current requirements for consent to be valid are: voluntariness in a person with capacity who understands what it is for. It may be express, implicit or implied. This approach is supported in the numerous judicial decisions on consent. The Mental Capacity Act 2005 further supports the notion of informed consent.

The MCA is directly relevant to the new Act – ‘It is important to note that interventions before death are governed by the s 5 Mental Capacity Act 2005, rather than the Human Transplantation (Wales) Act’.¹³ This is a point that the general public are not be aware of.

The Law Society Wales raised concerns ‘It is not considered in the paper whether a lack of capacity would require an assumption that the person did not have an opportunity to opt-out. Clinicians will identify those people who lacked capacity to make a decision the paper fails to provide a comprehensive consideration of capacity as it would apply to a soft opt-out system’.¹⁴

Importantly, the BMA in its submission to the pre-Act consultation stated: ‘It is particularly important to make clear that, in relation to the deceased wishes; any deemed consent will have legal precedence.’ and “that families do not have a legal veto over the donation itself’.¹⁵

In the UK, decisions on the treatment of incapacitated patients and the subsequent diagnosis of death are made by physicians. Now in Wales decisions on treatment, the diagnosis of death as well as organ donation in some cases will be made by physicians. It appears that the family are in effect powerless.

Consent was raised again in a recent consultation which closed on 15 January 2015 on *The Human Transplantation (Persons who Lack Capacity to Consent) (Wales) Regulations 2015*¹⁶ which will implement s3(2)(c) and (d) of

¹³ Human Tissue Authority, *Draft Regulations on the Human Transplantation (Wales) Act 2013* (2014) 46, 141.

¹⁴ Law Society of Wales, *Response to Proposals for Legislation on organ and tissue donation*, page 4{2}.

¹⁵ British Medical Association Wales, *Draft Human Transplantation (Wales) Bill and Explanatory Memorandum: Consent to Organ and Tissue Donation in Wales*, page 3(2).

¹⁶ Consultation Document: *Draft Regulations under the Human Transplantation (Wales) Act 2013* No: WG23278 (closed 15 January 2015).

the HTWA on deemed consent and s9(1)(a) and (b) on adults who lack capacity.¹⁷

The new Act has presumed consent at its core but ‘... presumed consent is a fiction. Without the actual consent of the individual, there is no consent.’¹⁸

MENTAL CAPACITY ACT 2005 AND THE HTWA 2013

As noted above, the Mental Capacity Act is central to medical practice in the intensive care setting. When adult patients are unable to make decisions themselves the MCA allows doctors to make treatment decisions on their behalf. Families will be consulted but best interest treatment decisions are made by medical practitioners.

Section 5 MCA states that general legal authority exists if D takes reasonable steps to establish whether P lacks capacity, and, reasonably believes (i) that P lacks capacity in relation to the matter and (ii) that it will be in P’s best interests for the act to be done.

A two-stage test is used to assess capacity, described by the BMA as a functional test.¹⁹

The BMA consultation response to the HTWA points out ‘more detail is needed about the role of clinicians in determining consent and talking to relatives’²⁰ and ‘There is some confusion regarding the situation of adults who lack capacity which needs to be clarified’²¹. These are important comments because of the role of clinicians in consent, decision making and the transplant process, and, also as noted above, the BMA understanding is that deemed consent takes legal priority.

The consultation paper on the proposed Human Transplantation (Persons who Lack Capacity to Consent) (Wales) Regulations 2015 states: ‘these regulations do not set out any form of test of mental capacity and a broad description, such as that set out at section 3 of the Mental Capacity Act

¹⁷ The Human Transplantation (Persons who Lack Capacity to Consent) (Wales) Regulations 2015 (Draft Welsh Statutory Instrument).

¹⁸ Erin and Harris, ‘Presumed Consent or Contracting Out’ (1999) 25 *Journal of Medical Ethics* 363–6.

¹⁹ British Medical Association, *Mental Capacity Act tool kit – Card 4, Assessing Capacity*, page 10.

²⁰ British Medical Association Wales, *Draft Human Transplantation (Wales) Bill and Explanatory Memorandum: Consent to Organ and Tissue Donation in Wales*, page 3(1).

²¹ *ibid*, para 5.

2005, will be relied upon.²² The MCA is therefore operative with the HTWA.

A further important issue is best interest in the context of the acute setting. As it is clinicians who make pre-death treatment decisions, and these decisions must be in the patient's best interest, there would appear to be a conflict if a clinician decides that a patient should receive on-going treatment for the purposes of donation, as noted above. It is difficult to reconcile how this is in that patient's best interest.

HOUSE OF LORDS SELECT COMMITTEE ENQUIRY INTO THE MENTAL CAPACITY ACT

This enquiry dealt with deprivation of liberty under the MCA.²³ It raises significant points about healthcare and the HTWA, and, it points out that there are major deficiencies in the workings of the MCA in practice. As the MCA is integral to the functioning of the new Welsh Act this enquiry raises further significant concerns which are relevant. The main conclusions of the enquiry were:

Under 'Overall Findings':²⁴ 'the overwhelming theme of the evidence was that the Act [MCA] was not well implemented. The principles of the Act which govern the empowering ethos, are not widely embedded, how a best interests decision is to be made – are not widely known, and not adequately or consistently followed. In general, the evidence suggested that these problems were greater in health care than in social care settings'.

'Poor implementation appeared to be a function of low awareness combined with poor understanding of the Act: this was a consistent theme identified across professions, families, carers and the wider public. Health and social care professionals continue to struggle with how to apply the core principles in practice.'²⁵

'The presumption of capacity as set out in the Act ... is widely misunderstood' and 'The present arrangements are unsatisfactory'.²⁶ 'The evidence suggests that tens of thousands of people are being deprived of their liberty without the protection of the law, and without the protection that Parliament intended.'

DEEMED CONSENT

²² *Draft Regulations under the Human Transplantation (Wales) Act 2013* (Welsh Government Consultation Document Number WG23278, 23 October 2014).

²³ House of Lords, *Report of the Select Committee on the Mental Capacity Act 2005* (2013-2014).

²⁴ *ibid*, page 23 para 13.

²⁵ *ibid*, para 14.

²⁶ *ibid* page 24, paras 16–18

The Human Transplant (Wales) Act 2013 (HTWA) permits transplantation in Wales with express consent or, otherwise with deemed consent.

The term ‘deemed consent’ is not defined in s19, Interpretation of the Act, but the scope of its meaning is given at s 4.

Under section 4 consent is deemed to be given to the activity *unless*:

- a) the person is an excepted adult;
- b) a child;
- c) has already given express consent or opted out;
- d) has appointed a representative and if this person is not available then a person in a qualifying relationship will “consent” as summarised in Table 1 of the Act.

In addition to the above exemptions, under s 4(4), deemed consent will not be given where a relative or friend of long standing of the deceased objects on the basis of views held by the deceased objecting to organ donation, and, a reasonable person would conclude that the relative or friend knows that the most recent view of the deceased before death on consent for transplantation activities was that the deceased was opposed to consent being given.

It is important to note that this subsection of the Act permits a clinician to go ahead with retrieving organs if the relatives did not know that the deceased objected *or* if he is not reasonably convinced that they did.

The White Paper states that ‘after death relatives will be involved in the decision making process around donation.’ The Health Minister, Mark Drakeford, has said that families will have a ‘clear right of objection.’²⁷ This is the case, but only if families can convince the clinician that they knew the deceased objected to donation. There is no provision in the Act for families who *themselves* object to the donation to have their views considered. *Relatives have no legal veto*. “In soft opt-out consent countries donation cannot take place without the permission of family members.”²⁸ i.e. relatives can veto.

²⁷ Roderick, ‘Bigger Role for Families in Deemed Consent Law’ *BBC News*, 16 April 2013.

²⁸ Shepherd et al, ‘An International Comparison of Deceased and Living Organ Donation / Transplant Rates in opt-in and opt-out Systems: A Panel Study’ (2014) 12 *Journal of Biomedical Semantics* 131.

Neither the Act nor the Regulations refer to a soft opt-out system, nor do they refer to relatives being allowed to negative consent or to stop donation. The new Welsh system does not appear to be a soft opt-out system at all.

If a strict legal approach is taken and the wishes of families are ignored, even if only on rare occasions, this may bring the system into disrepute and make more people opt-out which would clearly be a retrograde step.

In view of the House of Lords enquiry into the working of the MCA the question must arise about how wise it is to introduce deemed consent on top of the loss of pre-death consents on the part of families who appear to be sidelined with no effective legal protections.

CONSENT – EXCEPTED ADULTS

s 5(3)(b) refers to an adult who has died and who for a significant period before dying lacked capacity to understand the notion that consent to transplantation activities can be deemed to be given. There is no guidance on the meaning of significant period other than that it means what a reasonable person would deem to be inappropriate for consent to be deemed.

This section raises issues regarding the care of certain categories of patients who lose capacity by virtue of illnesses such as severe brain injury or dementia. Some patients with long term illness that has affected their capacity may be suitable to donate but if it is decided that they have lost the ability to understand that consent may be deemed they will be excluded from donating.

It is not clear what is to be deemed a significant period in relation to consent for transplantation in this situation. The BMA comment on this point is ‘many patients lose capacity shortly before death – for example following a road traffic accident. These people, who previously had capacity, should not be treated as lacking capacity for the sake of this legislation’.²⁹

There are categories of long term medical conditions in which it is clear that there is an inability to understand that consent may be deemed. These would include life-long conditions such as severe learning difficulties. However, a person with a neurological condition such as Alzheimer’s disease may be able to give consent prior to the onset of the illness.

There will be a reduction in the number of organs available for transplantation under this section because relatives themselves will not be able to consent, as they can under the current system.

²⁹ BMA, *HTWA Pre-Act Consultation*, page 3.

EU DIRECTIVE 2010/45/EU ON STANDARDS OF QUALITY AND SAFETY OF HUMAN ORGANS INTENDED FOR TRANSPLANTATION

Preamble: Paragraph 19: Altruism is an important factor in organ donations. To ensure quality and safety of organs, organ transplantation programmes should be founded on the principles of voluntary and unpaid donation. This is essential because the violation of these principles might be associated with unacceptable risks. Where donation is not voluntary and / or is undertaken with a view to financial gain, the quality of the process of donation could be jeopardised because improving the quality of life or saving of life of a person is not the main or the unique objective.

Article 13: Member States shall ensure that donations of organs from deceased and living donors are voluntary and unpaid.

Article 14: Consent Requirements: The procurement of organs shall be carried out only after all requirements relating to consent, authorisation or absence of any objection in force in the Member State concerned have been met.

It is difficult to reconcile deemed consent with voluntary donation. Deemed consent is not a true form of consent, and it is impossible to know whether a person's failure to join the opt-out register was intentional; a mere oversight; confusion over register options; due to the embarrassment and shame of appearing not to want to help people requiring donor organs or even complete ignorance of the opt-out system. Despite campaigns people frequently don't do what a government thinks they should do e.g. get vaccinated, screened for disease or vote.

The government has introduced a target (25% increase in transplantation); the directive states that where donation is not voluntary (deemed) the process of donation could be jeopardised because improving quality of life and saving of life is not now the main or unique objective. In the current NHS environment targets directly influence medical treatment and doctor behaviour, and, satisfying this target may become the main objective for harvesting organs. This would mean that the emphasis on acquiring organs changes from altruistic reasoning to satisfying the NHS target set by government.

The legislation may be in breach of the directive because: deemed consent cannot be described as voluntary; relatives have been sidelined and cannot object and the main objective is possibly not to save life but to satisfy a target.

The directive also refers, in Article 14, to the absence of any objection in force. The Welsh Act does not recognise objection by the family.

ANCILLARY ISSUES

Internal Stressors: The intensive care environment is highly charged with constant pressure on staff and resources because of large volumes of clinical work, management requirements and financial shortages. Added to this are External Stressors such as, ever changing policy, targets, legislation and political interference. Doctors are also subject to Professional Stressors such as annual appraisal and a five yearly revalidation cycle which is mandatory in order to maintain their licence to practice.³⁰

There is clearly a risk, that in the face of such organisational changes and pressure on budgets, valuable systemic improvements that have led in recent years to significant increases in the number of organs made available for transplantation might be lost.³¹

The reasons for performing kidney transplant operations on two men at the same hospital using kidneys taken from a donor who died from an unidentified form of meningitis have not been revealed at this point. However, unless shown otherwise it may be reasonable to assume that the pressures noted above were a contributory factor.³²

Another issue to note in view of its relevance to the Mental Capacity Act is the outcome of the review into the *Liverpool Care Pathway* (end of life care). “The review panel strongly recommends that the use of the Liverpool Care Pathway be replaced.”³³

SAFEGUARDS FOR RELATIVES

As noted above, it has been repeatedly stated that the family will be consulted on whether they know that the deceased was opposed to donation. The clinician must be satisfied that the relative does know these wishes and if he is not convinced that the relatives’ know that the deceased objected to donation he may make a decision in favour of donation, thereby deeming consent. This will be based on a reasonableness test.

³⁰ General Medical Council, *An Introduction to Revalidation* <<http://www.gmc-uk.org/doctors/revalidation/9627.asp>>.

³¹ Nuffield Council on Bioethics, *Human Bodies: Donation for Medicine and Research* (October 2011) page 19, para 81.

³² BBC Wales News, 18th November 2014, on the inquest into the deaths of Robert Stuart and Darren Hughes: “Dawn Chapman, a specialist transplant nurse at UHW, told the inquest that five transplant centres had declined the donor’s kidneys before they were offered to them under a fast-track scheme which happens when five or more centres reject an organ, or it has been out of the body for more than six hours.”

³³ Department of Health, *Independent review of the Liverpool Care Pathway: More Care, Less Pathway* (15 July 2013), *Conclusion: Guidance for Care For The Dying*, page 47(3.3).

If a dispute between a family member and a clinician arises there is no arbitration or appeal process described in the Act.

The question arises about the new system being a soft opt-out system at all.

RELIGIOUS BELIEFS

The Act makes no allowance for religious affiliation and belief and it is clear that this omission may lead to great distress and disagreement in the pre-death period in any relatives with a religious affiliation that opposes transplantation. It is not inconceivable that some religious affiliations may advise their members to opt-out *en masse*. If organs are donated using deemed consent from any individual whose religious conviction is opposed to organ donation it would bring the system into disrepute.

EXPERIENCE IN OTHER COUNTRIES

During the consultation comparisons were made to donation rates in other countries in justification for introducing an opt-out system. Much of this ‘evidence’ was at odds and nothing presented indicated that opt-out systems alone increased donation rates.

A Royal College of Surgeons comment helps to address this: ‘A number of countries have a system of presumed consent, including Spain, but very few use the system in practice. In Spain presumed consent has been part of statute for 10 years prior to the organisational changes without any effect on rates of donation. The US does not have presumed consent legislation. Both have impressive rates of organ donation and both have seen a rapid increase in a relatively short period of time. Sweden switched to a presumed consent system in 1996 but continues to have very poor rates of organ donation (10 pmp)³⁴ and attempts to introduce presumed consent legislation in Brazil and France led to a backlash against organ donation. And it seems a little unfair to blame the low rates of organ donation in the UK on the families of the recently deceased when the evidence suggests that there are fundamental problems within the medical profession in the UK.’³⁵

Two important issues should be noted with regard to Spain which has a very successful transplantation system; firstly, Spanish doctors did not overrule the wishes of families when the opt-out legislation was introduced and, they still don’t; secondly, their success is attributed to organisational and hospital system changes as opposed to changes in the law.

³⁴ DMP: Donors Per Million Population.

³⁵ Bramhall, *Presumed Consent for Organ Donation: A Case Against* (2011) 93 *Annals of the Royal College of Surgeons England* 270–2

The issue of the limited number of ICU beds has been raised above and, it has been noted that Spain has twice the number of ICU beds that the UK has but Wales has the lowest number in the UK. Those that are available at the Welsh transplant centre (University Hospital of Wales, Cardiff) are under increasing pressure due to organisation change (The South Wales programme).

TARGET AREAS FOR INCREASING DONATION

Nearly a quarter of people waiting for a kidney transplant are from the BAME community and they comprise less than 2% of people on the organ donor register. The figures in Table 4 reflect this and the reasons given are cultural and religious belief based.³⁶

Table 4: *Black, Asian and Minority Ethnic Community [BAME]:*

Year: 2012–13

UK BAME donors	53	UK: Total Donors	1156
Wales BAME donors	1	Wales: Total Donors	51

The Organ Donation Taskforce made a point that this section of the community should be made more aware of donation issues and encouraged to join the ODR. A further potential difficulty for some may be that they will not accept an organ that has been harvested without explicit consent.

CONCLUSION

There are many issues surrounding the introduction of this legislation; the main one relating to consent.

The legislation is flawed in relation to consent. The term ‘deemed consent’ is misleading because it is not actual consent; it is a fiction.

Deemed consent is otherwise known as presumed consent. To presume, is to suppose something is the case on the basis of probability.³⁷ The probability that a person chose not to opt-out intentionally is impossible to calculate, and, without this knowledge it is impossible to state that the harvesting of a person’s organs is a voluntary donation or a gift.

³⁶ NHSBT, ‘Campaign: Tackling Shortage of Organ Donors from BMA Groups on Target’ (29 November 2011).

³⁷ New Oxford Dictionary, 1998.

The probability that consent can be presumed falls further when the other issues involving the NHS environment; targets, mental capacity; religion and other issues outlined above are added into the mix. In this regard it is possible that there is conflict with the transplant Directive (2010/45/EU).

Potential effects of this involuntariness have been pointed out and ‘it is questionable whether families (whose decision-making role has been marginalised under the new legislation) will be as content to see their relatives’ organs and tissue removed on a deemed consent basis, (where there is no way of knowing whether the patient’s silence was intentional or a mere oversight) as they would be with evidence of express consent.’³⁸

The use of deemed consent also poses a danger as to whether there is potential that this approach will be used in other clinical contexts and, we may be at risk of diminishing the concept of consent in healthcare.

The Mental Capacity Act is integral to the operation of the new Act and it would have been helpful if this relationship had been given more precise detail in the body of the Act itself. In view of the House of Lords enquiry there is a clear and urgent need for more education about and awareness of the Mental Capacity Act on the part of healthcare workers and the general public.

It seems that those with long term reduced capacity because of illness who did want to be donors, or whose family would have consented, will be unable to donate and these organs will be lost.

It is likely that there will be confusion about the three options available: opt-in, opt-out or do nothing and, it is difficult to see how every adult in Wales will understand the options.

As now, under deemed consent, organs harvested in Wales will not be used exclusively for Welsh patients. They will be transplanted according to the best tissue match and nationality is not relevant to this system. If there is an increase in the organ harvest the whole population of the UK would benefit. At the moment it is impossible to give accurate figures but it seems impossible that any donation increase in Wales alone would meet the Welsh Government target of a 25% increase for Welsh recipients. On this point it seems odd that Wales would choose this system in isolation of the other home countries, in particular, England.

There is no protection for families whose wishes are contrary to those of the medical team, and, I believe that if this legislation goes ahead there

³⁸ Hayes, ‘Deemed Consent for Organ Donation in Wales’ (2013) Cardiff Law School Blog.

should be a system in place that supports concerned families and to enable court protection or intervention if needed. This may be of particular importance if there is a divergence of views between family members.

The Act makes no allowance for religious belief and it is clear that this omission may lead to great distress in relatives whose religious belief opposes donation and transplantation. It is not inconceivable that some religious groups may advise their members to opt-out en masse. If organs are donated using deemed consent from any individual whose religious belief is opposed to organ donation it would bring the system into disrepute.

Donation rates have generally been increasing and the need for such radical legislation seems unjustified on this ground. It is recognised that opt-out donation systems alone do not increase transplantation rates (such as: Sweden and Brazil, and, in Spain the increase only came after major structural reform). There are major structural deficiencies in Wales (such as low ICU bed availability) which ought to be addressed in the first instance.

The Law Society Wales submission to the consultation process raises significant concerns: ‘The Welsh Government must satisfy itself that the legislation it proposes is compatible with current criminal and human rights legislation.’³⁹ In view of these concerns and the difficulties outlined in this paper it is clear that an independent body should be established to monitor organ donation in Wales.

In light of the foregoing the Welsh Government’s wisdom in introducing this radical, complex legislation must be questioned.

³⁹ Law Society Wales, Response to Proposals for Legislation on organ and tissue donation: ‘Capacity’, page 4.

A PRINCIPLED REFORM OF THE LORD CHANCELLORSHIP

Fraser Peh

INTRODUCTION

Prior to the Constitutional Reform Act (CRA) 2005, the anomalous cross-institutional nature of the office of Lord Chancellor had for decades been well documented and frequently questioned, for it was obvious that such a role was incongruous in a modern democracy, making its position difficult to defend.¹ But perhaps due to the relative obscurity of its incongruity within the present constitutional arrangements, the plight of the modern post-CRA office, namely the overlap of constitutional and executive roles vested in one person holding jointly the offices of Lord Chancellor and Secretary of State for Justice, has scarcely been highlighted.

This article argues that the overlap has had a severe impact on the exercise of the Lord Chancellor's constitutional functions, producing a dire outcome: the diminution of the Lord Chancellorship. Hence, the case for reform is stated as not just desirable, but necessary. In order to rectify the existing difficulties, this article proposes a principled approach towards reforming the office of Lord Chancellor. It will be contended that the present constitutional arrangements must be reconfigured such that the office of Lord Chancellor is preserved, but separated from the office of Justice Secretary. Only by doing so can the Lord Chancellor adequately fulfil his appropriate role within the constitution.

THE LORD CHANCELLOR'S CONSTITUTIONAL FUNCTIONS

Section 1 of the CRA seeks to preserve the Lord Chancellor's 'existing constitutional role' in relation to the 'existing constitutional principle' of the rule of law.² Primarily, it is the role of the judiciary to uphold and enforce the rule of law, since it is the rule of law which prevents the government from abusing its powers, and which ultimately stops a democracy from becoming into an elected dictatorship.³ The Lord Chancellor's role in relation to upholding the rule of law is largely to ensure that judicial independence is observed, but also to ensure that the government decides and takes executive action in accordance with the rule

¹ Woodhouse, *The Office of Lord Chancellor* (Hart Publishing 2001) 12.

² *ibid*, s 1.

³ Lord Woolf, 'The Rule of Law and a Change in the Constitution' (2004) 63(2) CLJ 317, 321.

of law.⁴ In effect, the Lord Chancellor reinforces the principle of the rule of law by protecting judicial independence, thus making his commitment to the latter principle doubly important.

Section 3 of the CRA imposes a statutory duty on the Lord Chancellor and all ministers to uphold the independence of the judiciary.⁵ The Lord Chancellor, unlike his ministerial colleagues, is additionally required to have regard to the need to defend that independence.⁶ Given its complex and multi-faceted nature, judicial independence is suitably seen as a means firstly to uphold the rule of law and the separation of powers, and secondly to maintain public confidence in the justice system. Since any perceived encroachment on judicial independence could undermine the rule of law and interfere with the separation of powers, these two important constitutional principles support the need for judicial independence and provide it with a theoretical footing.⁷ Judicial independence also underpins the requirement of judicial neutrality and is therefore crucial to the judiciary fulfilling its responsibility to the public and, equally importantly, for the public to gain confidence in the honesty and fairness of the decisions of the courts, and more widely in the system of government as a whole.⁸ Given the fundamental importance of this principle, the Lord Chancellor's function of 'defending and preserving the independence and integrity of the judiciary' in the working of the constitution takes on an even greater significance.⁹

Finally, the Lord Chancellor is responsible for the court system and is under a duty to ensure that it is efficiently and effectively run.¹⁰ In so doing, he must have regard to the need for the judiciary to have the support necessary to enable them to exercise their functions.¹¹ With the Lord Chief Justice (LCJ) responsible for the day-to-day decision-making concerning the judiciary and the courts, the Lord Chancellor's responsibilities are essentially systemic.¹² The Lord Chancellor establishes the framework for the organisation of the courts, provides and allocates resources and staff for the administration of justice, and sets the pay, pensions and terms and conditions of judicial service.¹³ The Lord Chancellor's responsibility for supervising and adequately funding the court system thus establishes an

⁴ Constitution Committee, *Relations between the executive, the judiciary and Parliament* (HL 2006-07, 151) para 26; Constitutional Reform Bill Committee, *Constitutional Reform Bill [HL]* (HL 2003-04, 125-I) para 67.

⁵ CRA 2005, s 3(1).

⁶ *ibid*, s 3(6).

⁷ Woodhouse, *The Office of Lord Chancellor* (n 1) 16.

⁸ Woolf, 'The Rule of Law and a Change in the Constitution' (n 4) 321, 324.

⁹ Lord Hailsham, 'The Office of Lord Chancellor and the Separation of Powers' (1989) 8 CJQ 308, 311.

¹⁰ Courts Act 2003, s 1.

¹¹ CRA 2005, s 3(6).

¹² Gee, 'What are Lord Chancellors for?' [2014] PL 11, 14.

¹³ Explanatory notes to the CRA 2005, para 37.

institutional structure within which judges can work independently of government to perform their paramount responsibility of upholding the rule of law.

DIMINUTION OF THE OFFICE OF LORD CHANCELLOR

Despite the Lord Chancellor now playing several vitally important roles in the constitution, the office has in fact been weakened as a result of significant changes in recent years, causing a wholly undesirable state of affairs.

Bungled reforms 2003–07

On 12 June 2003, the then Prime Minister Tony Blair announced several constitutional reforms,¹⁴ of which the abolition of the Lord Chancellor was regarded as the most contentious, controversial and widely criticised element.¹⁵ There was no public consultation, let alone any advance warning of these changes to anyone outside government.¹⁶

Shortly after the announcement, it became clear that the elimination of the Lord Chancellor's office by press release was virtually impossible, since hundreds of statutes made reference to the Lord Chancellor.¹⁷ In the interim, the new Secretary of State for Constitutional Affairs would simultaneously exercise the Lord Chancellor's constitutional functions.

Negotiations between the judiciary and the government soon commenced over the principles relating to the transfer of the Lord Chancellor's judiciary-related functions.¹⁸ On 26 January 2004, Lord Falconer announced that an agreement had been reached with the Lord Chief Justice, Lord Woolf, and these provisions were set out in a joint document described as the concordat.¹⁹

The Constitutional Reform Bill was introduced into the Lords on 24 February 2004, and its proceedings are notable for the government's U-turn in eventually deciding to retain the office of Lord Chancellor despite its initial plan to abolish it.²⁰ This concession arose from the Lords' refusal

¹⁴ UK Government, 'Modernising Government – Lord Falconer appointed Secretary of State for Constitutional Affairs' (10 Downing Street Press Notice, 12 June 2003).

¹⁵ Bingham, 'The Old Order Changeth' (2006) 122 LQR 211.

¹⁶ Beatson, 'Reforming an Unwritten Constitution' (2010) 126 LQR 48, 54.

¹⁷ Kennedy, *Just Law* (Random House 2011) 133.

¹⁸ See Lord Windlesham, 'The Constitutional Reform Act 2005: Ministers, Judges and Constitutional Change: Part 1' [2005] PL 806, 819–21.

¹⁹ Department for Constitutional Affairs, *The Lord Chancellor's Judicially-Related functions: Proposals* (January 2004).

²⁰ For a comprehensive summary of the parliamentary proceedings, see Gay and Kelly, Research Paper 05/05 'The Constitutional Reform Bill [HL] – the office of Lord

to budge on the issue of at least keeping the Lord Chancellor's title, even if the role had changed so drastically. The Bill received Royal Assent on 24 March 2005, nearly two years after Blair's initial announcement.

On 29 March 2007, Blair abolished the Department of Constitutional Affairs (DCA) and announced the creation of a Ministry of Justice (MoJ). The government again viewed this as merely a change in the machinery of government, without any constitutional significance, and again did not consult the judiciary before making their decision.²¹ As part of restructuring the Home Office, the new MoJ took on not only the responsibilities of the DCA, but also the criminal justice functions of the old Home Office, such that it had responsibility for the justice system, courts and legal aid, as well as prison and probation services, and criminal law and sentencing policy.²²

Consequently, the Lord Chancellor's responsibilities as Secretary of State were significantly modified. The combined role led to concerns over the exercise of the Lord Chancellor's core statutory function of guarding judicial independence, since the competition amongst all the various financial and resource demands within a single budget could lead to the interference with the independent administration and adequate funding of the court and legal aid systems, due to the overwhelming requirements of the politically controversial and resource-intensive prison and probation services.²³ The amalgamation of responsibilities concentrated in one individual thus raises questions about the potential conflict and incompatibility between the Lord Chancellor's statutory duties for the judiciary and the Justice Secretary's responsibility for criminal justice policy. But it goes further than that. It also indicates the domination of the latter over the former – a concern of great constitutional importance leading possibly to disastrous ramifications.

Consequent decline of the Lord Chancellorship

Chief among the unfortunate consequences of these reforms is the thorough institutional undermining of the office of Lord Chancellor, with the Justice Secretary's executive functions threatening the Lord Chancellor's constitutional responsibilities. Although the traditional Lord

Chancellor' (House of Commons Library, 12 January 2005) 22-42; Le Sueur, 'From Appellate Committee to Supreme Court: A Narrative' in Blom-Cooper et al (eds), *The Judicial House of Lords 1876-2009* (OUP 2009) 76-90; Lord Windlesham, 'The Constitutional Reform Act 2005: The Politics of Constitutional Reform: Part 2' [2006] PL 35, 3957.

²¹ Beatson (n 16) 55.

²² See Appendix 7 to Constitutional Committee, Relations between the executive, the judiciary and Parliament (HL 2006-07, 151).

²³ Constitutional Affairs Committee, *The creation of the Ministry of Justice* (HC 2006-07, 466) paras 11, 15; Beatson (n 16) 55.

Chancellor's executive role had gradually over many years come to dominate his constitutional role,²⁴ these recent changes have made the imbalance even more conspicuous. Since the 1970s, the Lord Chancellor's Department had gradually accumulated additional responsibilities, resulting in the reorientation of its officials towards the executive.²⁵ However, it was only with the creation of the MoJ that the Lord Chancellor became in charge of a department responsible for, among other things, criminal justice policy. Although the increasing policy orientation of the Lord Chancellor's office preceded its combination with that of Justice Secretary,²⁶ the overt manner in which the Justice Secretary's executive policy-related responsibilities and the Lord Chancellor's constitutional judiciary-related functions are vested in the same person has had the effect of marginalising the latter. Because ministerial policy is accorded priority over less politically pressing issues, there is a real risk that important constitutional matters will not be articulated.

In 1978, Underhill observed that the gradual erosion of the Lord Chancellor's office was not a cause for concern in a then politically and constitutionally stable Britain, but presciently warned that that trend might prove to be a dangerous development in less fortunate times.²⁷ It is a matter of regret that such fears have since materialised.

First, the decline of the Lord Chancellor's office has resulted in judicial independence being imperilled. The imprudent merger of constitutional and executive functions to be exercised by one person has resulted in the Lord Chancellor's new additional duties replacing the judiciary and the administration of justice as his most important responsibilities.²⁸ Regardless of the individual office-holder's support or sympathy, his role has been structurally diminished, reducing his influence on judiciary-related issues.²⁹ The traditional Lord Chancellor was only responsible for representing the judiciary in cabinet and protecting its independence and the interests of justice. By contrast, the modern Lord Chancellor's additional executive responsibilities 'makes political interference with the judiciary almost inevitable and removes a critical safeguard against unchecked political power'.³⁰

²⁴ Woodhouse, 'The Office of Lord Chancellor' [1998] PL 617, 630.

²⁵ Gee (n 12) 19.

²⁶ *ibid*, 20.

²⁷ Underhill, *The Lord Chancellor* (Terence Dalton 1978) 201.

²⁸ Lord Judge, 'Constitutional Change: Unfinished Business' (London, 4 December 2013) <<http://www.ucl.ac.uk/constitution-unit/constitution-unit-news/constitutionunit/research/judicial-independence/lordjudgelecture041213/>> accessed 16 March 2014.

²⁹ *ibid*.

³⁰ Hoar, 'Why we need a Lord Chancellor' (20 May 2010) <<http://francishoar.wordpress.com/2010/05/20/why-we-need-a-lord-chancellor/>> accessed 16 March 2014.

The shrunken Lord Chancellorship has effectively been absorbed into the Justice Secretary's extensive ministerial portfolio, such that the Lord Chancellor is no more than a 'secondary occupation' to the Justice Secretary.³¹ The burden of these extra, overtly political, responsibilities thus entrenches the office within the executive camp. This also has the effect of silencing the concerns of the judiciary. With the judiciary not having a voice in cabinet, the legal system becomes vulnerable to the 'vagaries of politics and policy'.³²

Second, the occlusion of the Lord Chancellor's constitutional functions threatens to infringe the concept of the separation of powers. This doctrine, as it applies under the British constitution, must be examined carefully. While it is comparatively weak as between the legislature and the executive,³³ there is a complete separation between the exercise of judicial powers on the one hand and legislative and executive powers on the other hand.³⁴ The separation of powers protecting judicial independence exists solely 'to prevent the rise of arbitrary executive power'.³⁵

At present, the Lord Chancellor's statutory duty of preserving the interests of justice and the integrity and impartiality of the justice system stands in direct conflict with the Justice Secretary's ministerial responsibilities for criminal law and sentencing policy. The concurrent appointment of the Lord Chancellor and the Justice Secretary thus offends the separation of powers to the extent that it incorporates within the executive important constitutional judiciary-related duties. Since the office-holder's ability to fulfil those duties is inhibited, thereby resulting in increased executive power. This problem is further complicated by the difficulty of disentangling the responsibilities attaching to one office from the other.³⁶

The existing constitutional landscape is blotted with many far-reaching implications. Blair's reforms, while solving some problems, have created other – arguably more damaging – ones, the most significant being the demotion of the Lord Chancellor's office from prominence to obscurity. The traditional Lord Chancellor, although occupying an unconventional position, was largely able to maintain judicial independence and preserve

³¹ Sedley, 'Beware Kite-Flyers' (2013) 35(17) *London Review of Books* 13 <<http://www.lrb.co.uk/v35/n17/stephen-sedley/beware-kite-flyers>> accessed 16 March 2014.

³² *ibid.*

³³ In this regard, Bagehot's description of the nearly complete fusion of executive and legislative powers holds true.

³⁴ Lord Steyn, 'Democracy, the Rule of Law and the Role of Judges' (Attlee Foundation Lecture, 11 April 2006) <<http://www.attlee.org.uk/wp-content/uploads/Transcript-Steyn.doc>> accessed 16 March 2014.

³⁵ *ibid.*

³⁶ Gee (n 12) 20.

the interests of justice. By contrast, the modern Lord Chancellor is placed in a constitutionally inappropriate spot, hidden and neglected at the expense of the Justice Secretary, and rendered unable to fulfil his proper constitutional functions. It would not be a stretch to say that the office of Lord Chancellor has descended from an anomaly to anonymity.

REFORMING THE LORD CHANCELLORSHIP

Retention of the office

The diminution of the Lord Chancellor's office has led some to suggest that it should be abolished, since the role barely subsists in the modern constitutional settlement. Many of the Lord Chancellor's constitutional functions are not actually exclusive, so the argument runs, but are also imposed on other figures in government, Parliament and the civil service; consequently, there is no longer a need for a Lord Chancellor, since ostensibly his constitutional duties can be collectively exercised by those other officials.³⁷ This line of reasoning is unconvincing, for it fails to appreciate the Lord Chancellor's unique and valuable constitutional roles both as a link between the executive and the judiciary, and as a buffer protecting the judiciary from executive interference.³⁸ Hence, it is suggested that the Lord Chancellor's office should be retained because the values of the traditional office essentially enable the modern Lord Chancellor to successfully carry out his proper constitutional duties, in particular defending judicial independence, within government.

Variouly described in terms of a link, bridge, buckle or hinge,³⁹ the Lord Chancellor plays a central coordinating role by providing a channel of communication between the executive and the judiciary. The Lord Chancellor is the judiciary's advocate and representative in relation to politicians, and speaks for the judiciary in cabinet.⁴⁰ But it works both ways. He also acts on behalf of the government in explaining to the judiciary resource constraints and political realities.⁴¹ Thus he is well placed to

³⁷ O'Brien, 'Does the Lord Chancellor really exist?' (*UK Constitutional Law Blog*, 26 June 2013) <<http://ukconstitutionallaw.org/2013/06/26/patrick-obrien-does-the-lord-chancellorreally-exist/>> accessed 16 March 2014.

³⁸ See Stevens, *The Independence of the Judiciary: The View from the Lord Chancellor's Office* (Clarendon Press 1993) 3.

³⁹ See Oliver, 'Constitutionalism and the Abolition of the Office of Lord Chancellor' (2004) 4 *Parliamentary Affairs* 754, 760; Malleon, 'The Effect of the Constitutional Reform Act on the Relationship between the Judiciary, the Executive and Parliament', Appendix 3 to Constitution Committee, *Relations between the executive, the judiciary and Parliament* (HL 2006-07, 151) 62.

⁴⁰ Hailsham (n 9) 314; Dawn Oliver, 'The Lord Chancellor as Head of the Judiciary' in Blom-Cooper et al (eds), *The Judicial House of Lords 1876-2009* (OUP 2009) 105.

⁴¹ Lord Woolf, 'Judicial Review – The Tensions between the Executive and the Judiciary' (1998) 114 *LQR* 579, 582.

facilitate mutual understanding between the two sides, as well as relay any concerns from one side to the other.

The Lord Chancellor's connective role enables him to ensure that the judiciary's views are heard, while simultaneously preventing any political encroachment on their independence. Being the device by which the executive and the judiciary are joined together, the Lord Chancellor is in a position to separate the politics from the interests of justice, and keeps each within their proper sphere. In this way he promotes communication between the two branches whilst maintaining judicial independence.

It is possible to argue further that in order for the Lord Chancellor to be able to defend judicial independence within government, he *must* act as a link between the judges and the executive, since improper external pressure by the latter poses a significant threat to the exercise of the judicial function of standing between the executive and the citizen.⁴² The Lord Chancellor's statutory obligation would be rendered effectively meaningless if he was unable, for whatever reason, to speak for the judiciary in cabinet. Safeguarding that independence within government demands the Lord Chancellorship to bridge the gap between the two branches.

The Lord Chancellor's duty to defend judicial independence is additionally facilitated by his function as a constitutional buffer protecting the judiciary from interference by the executive.⁴³ By operating as a 'lightning conductor',⁴⁴ the Lord Chancellor prevents open collisions, alleviating conflicts and easing tensions between the judiciary and the executive.⁴⁵ In this role, the Lord Chancellor is seen as a bulwark against political intervention in the judicial process, keeping the government at an appropriate distance from the judges. This allows the judiciary to defend its corner without having to engage itself directly, thus preserving judicial independence.⁴⁶

The sword and shield metaphor accurately describes the Lord Chancellor's utility in this capacity. As a barrier he protects the judiciary from inappropriate political intrusion. He also fends off improper political attacks and holds the executive at arm's length from the judiciary.⁴⁷ Only when the Lord Chancellor occupies this intermediary role is he able to effectively safeguard judicial independence. The ability to simultaneously bring together and keep apart the different branches of government

⁴² Lord Steyn, 'The Case for a Supreme Court' (2002) 118 LQR 382, 394.

⁴³ Woodhouse, 'The Office of Lord Chancellor' (n 25) 621-22.

⁴⁴ Woolf, 'The Rule of Law and a Change in the Constitution' (n 4) 320.

⁴⁵ Oliver, 'The Lord Chancellor as Head of the Judiciary' (n 41) 107-108.

⁴⁶ Stevens, 'Should the Lord Chancellor have a political as well as judicial role?' (Hailsham Memorial Essay Prize 2002).

⁴⁷ Maleson (n 39) 61.

encapsulates the value of the Lord Chancellor's office.⁴⁸ This in turn facilitates the execution of the Lord Chancellor's constitutional duty to safeguard judicial independence, upon which the rule of law and the interests of justice depend.

It is true that in acting as a link and buffer between the executive and the judiciary, it was not always easy to determine whether the traditional Lord Chancellor was exercising his role as head of the judiciary or as a member of the cabinet or even both, because the lines of separation between these two roles were particularly indistinct.⁴⁹ The better view is that the link and buffer roles are neither judicial nor executive roles, but are in fact part of a separate, constitutional, role. It bears noting that the traditional Lord Chancellor's office was a unique one remarkable for its adaptability, such that it comprised several independent institutions, each with its distinct rationale and importance, but which faded into one another.⁵⁰ While the traditional Lord Chancellor had roles in the three branches of government, it does not necessarily follow that he only had those three roles. Rather, the old Lord Chancellor's office encompassed executive, legislative, judicial and constitutional responsibilities.⁵¹ In attempting to compartmentalise and separate the various functions, the CRA inadvertently overlooked the constitutional role and, by lumping it with the executive role, failed to place it satisfactorily within the new settlement. We have already seen the consequences.

Modification of the office

The importance of the modern Lord Chancellor's statutory duties and the values of the traditional Lord Chancellor's constitutional role support the retention of the Lord Chancellor's office. However, the constitutionally inappropriate arrangements of the status quo mean that the Lord Chancellorship cannot be kept in its present form. The fundamental constitutional complications currently facing the Lord Chancellorship mean that it is imperative that it be adapted to remain relevant and effective going into the future, so that the interests of justice are not compromised. In this respect, this article rejects Gee's contention that modern Lord Chancellors are effective 'political guardians' who at once develop and deliver government policy on the administration of justice, *and* protect judicial independence within government.⁵² This article also disagrees with the recent House of Lords Constitution Committee Report that combining the two offices gives the Lord Chancellorship additional authority.⁵³ Their

⁴⁸ *ibid.*

⁴⁹ Oliver, 'The Lord Chancellor as Head of the Judiciary' (n 41) 98, 100, 108–109.

⁵⁰ Underhill (n 27) xiii; Woodhouse, *The Office of Lord Chancellor* (n 1) 13.

⁵¹ Woodhouse, *ibid.* In the constitutional scheme of things, hence excluding ceremonial, ecclesiastical and other functions.

⁵² Gee (n 12) 13, 26.

⁵³ Constitution Committee, *The office of Lord Chancellor* (HL 2014-15, 75) para 133.

recommendations do not address institutional difficulties and are therefore unsatisfactory. Instead, coherent and systematic reform of the office of Lord Chancellor calls for separate roles for the Lord Chancellor and the Justice Secretary.

Notwithstanding any advantages in combining the two roles,⁵⁴ there is a grave danger in conflating the responsibilities of each office-holder and lumping them into one. In suppressing the supervision of the rule of law and judicial independence under the guise of practicality and supposed greater political influence, the Lords Constitution Committee Report fails to tackle the issue directly. If important constitutional principles are to be protected and prevented from further erosion, combining the roles is simply not conceivable.

Moreover, the political views of the particular Lord Chancellor/Justice Secretary in office are not to be underestimated. Since 2007, the division of responsibilities between the Home Office and the MoJ has been described as a ‘good cop, bad cop’ situation with the incumbent Home Secretary adopting a tough approach towards crime and the incumbent Justice Secretary espousing a more conciliatory outlook emphasising the rule of law.⁵⁵ The Lord Chancellor, tasked with upholding the value of justice in cabinet, acts as a counter-balance to the role of the Home Secretary who is responsible for public security interests.⁵⁶ The appointment of Chris Grayling in 2012 arguably disturbed the hitherto workable, if at times uneasy, equilibrium. Known for being a ‘political enforcer’⁵⁷ and picked for his experience as shadow Home Secretary, it is unsurprising that he is favourably disposed to the ‘hawkish’ Home Office position as opposed to the traditionally ‘dovish’ Lord Chancellor’s position.⁵⁸ This has been borne out by his plans to reduce the legal aid budget, curtail judicial review and radically reform human rights laws, all of which have been criticised on the grounds that they will undeniably have a profound and damaging impact on the justice system and the rule of law.⁵⁹

⁵⁴ Constitution Committee, *The office of Lord Chancellor* (HL 2014-15, 75) paras 131-32.

⁵⁵ O’Brien, ‘The Blunkett Test’ (*Constitution Unit Blog*, 5 September 2012) <<http://constitution-unit.com/2012/09/05/the-blunkett-test/>> accessed 16 March 2014.

⁵⁶ Memorandum by the Working Party chaired by Lord Alexander of Weedon, Written Evidence, Constitutional Reform Bill Committee, *Constitutional Reform Bill [HL]* (HL 2003-04, 125-II) para 56.

⁵⁷ Sedley, ‘Beware Kite-Flyers’ (2013) 35(17) *London Review of Books* 13 <<http://www.lrb.co.uk/v35/n17/stephen-sedley/beware-kite-flyers>> accessed 16 March 2014.

⁵⁸ O’Brien, ‘Does the Lord Chancellor really exist?’ (*UK Constitutional Law Blog*, 26 June 2013) <<http://ukconstitutionallaw.org/2013/06/26/patrick-obrien-does-the-lord-chancellor-really-exist/>> accessed 16 March 2014.

⁵⁹ See Gibb, ‘Angry barristers to strike as ‘significant’ legal aid cuts are confirmed’ *The Times* (London, 28 February 2014) <<http://www.thetimes.co.uk/tto/law/article4019180.ece>> accessed 16 March 2014.

Accordingly, it is quite plausible that an individual's political views might skew the balance away from the interests of justice and the rule of law, contributing to one's inappropriateness to hold the very office meant to uphold those values.

In order to remedy the existing difficulties, it is proposed that the office be retained in a modified form by separating it from the office of Justice Secretary, such that the two offices are held by different individuals. This involves a reconfiguration of the present constitutional settlement, in which the person who is appointed Lord Chancellor will not exercise any executive functions. This is a necessary reform which will do much to ameliorate the questionable prevailing arrangements. The Justice Secretary will continue as the political head of the Ministry of Justice, with his portfolio being no different from any other ministerial post.⁶⁰ Accordingly, there will be no need for a corresponding statutory provision stipulating any specific experience required of the Secretary of State. The Lord Chancellor will continue to play a vital constitutional role in the new settlement, fulfilling his statutory duties by facilitating communication across branches of government while keeping them separate.

Further, it is suggested that future Lord Chancellors shall be statutorily required to be legally qualified. In a new constitutional settlement where the Lord Chancellor would not also be another ordinary minister with executive responsibilities, there is no reason for the person who is appointed Lord Chancellor to suffer from the actual and potential pitfalls that beset a non-legally qualified individual. However, an institutional change in itself is insufficient, because the existing requirements do not prevent a non-legally qualified person being appointed. It is inconceivable that an individual without any practical legal experience will be able to act in the link and buffer roles and ensure the integrity of the justice system. The importance of the specific and distinct constitutional role should therefore be effectuated by amending the CRA to make more stringent the qualifications required of the office-holder. Thus it is additionally proposed that the new Lord Chancellor must appear to the Prime Minister to be qualified by 'substantial legal experience'. Although this revised requirement still leaves the Prime Minister with some measure of discretion, it at least rectifies the existing blanket provision.⁶¹ It is undesirable to specify too precisely the experience required, for doing so might unduly restrict the pool of potential candidates. The purpose of this suggestion is merely to make considerable experience in the law a requisite condition to hold office; enumerating particular legislative details are beyond the scope of this article.

⁶⁰ It is acknowledged that there may be difficulties concerning the division of responsibilities between the MoJ and the Home Office. However, this reform is only concerned with separating the constitutional and executive roles, and not the apportionment of ministerial duties within government.

⁶¹ CRA 2005, s 2(2).

Although the Lords Constitution Committee recognised the advantages of a legal or constitutional background, the reason they did not consider it essential was largely because of perceived practical and political drawbacks.⁶² Consequently, their recommendation that the benefits of such a background nevertheless ‘should be given due consideration’⁶³ rings hollow and appears to be redundant. The better view is that the difficulties faced by a non-lawyer Lord Chancellor far outweigh any apparent positives. First, a professional politician with no legal background or experience in the courts will necessarily have a limited association with the legal system, and might therefore have a less intuitive understanding of the judiciary’s role within it. Consequently, such an individual might not be so willing to step in when the judiciary’s interests are infringed, compared to previous Lord Chancellors steeped in the law.⁶⁴ Second, the successful execution of the Lord Chancellor’s custodial role in maintaining the court system and his protective role of the judiciary requires a close link with the judiciary, and specifically necessitates an effective working relationship with the LCJ. Particularly in matters where they have joint responsibility, there is potential ‘scope for mischief’ if the Lord Chancellor is guided by the LCJ, in effect becoming no more than a rubber stamp.⁶⁵ The lack of a legal background thus directly impacts on the Lord Chancellor’s ability to properly carry out his important responsibilities.

CONCLUSION

This article has established the inappropriate nature of the existing constitutional arrangements, where the office of Lord Chancellor is combined with the office of Justice Secretary, such that the two offices are held jointly by one individual. Having had its origins in the ill-conceived reforms of 2003-2005, in which the government retreated from its initial proposal to abolish the Lord Chancellor and combined it with the Secretary of State, the situation was exacerbated in 2007 with the creation of the MoJ, which effectively gave the Lord Chancellor responsibility for criminal justice policy. The result is the dominance of the executive role over the constitutional role, undermining the latter and causing the diminution of the office of Lord Chancellor. Consequently, the office-holder’s ability to fulfil the Lord Chancellor’s constitutional role is institutionally impaired in what is a thoroughly disagreeable situation.

⁶² Constitution Committee, *The office of Lord Chancellor* (HL 2014-15, 75) paras 107–109.

⁶³ *ibid*, para 109.

⁶⁴ Gee notes that Kenneth Clarke rebuked the Home Secretary and the Prime Minister after they were felt to have been excessively critical of a judicial decision: see (n 12) 23.

⁶⁵ Rozenberg, ‘Chris Grayling, justice secretary: non-lawyer and ‘on the up’ politician’ *The Guardian* (London, 4 September 2012) <<http://www.theguardian.com/law/2012/sep/04/chrisgrayling-justice-secretary-non-lawyer>> accessed 16 March 2014.

In response to the existing constitutional predicament, this article has propounded a cogent and rational solution, and suggested that the office of Lord Chancellor should be retained, albeit modified, by separating it from the office of Justice Secretary. Retaining the office would preserve the traditional Lord Chancellor's valuable link and buffer roles; separating it from the Justice Secretary would free the Lord Chancellor from its executive shackles, allowing the Lord Chancellor to defend judicial independence within government, as a member of cabinet. Ensuring that an individual with a legal background held office would also considerably alleviate the difficulties faced at present. It is to be hoped that these proposed reforms would herald a move towards a new constitutional settlement in which the office of Lord Chancellor rightfully regains a prominent place in law and government.

THE DEMINSE OF ‘DOCTOR KNOWS BEST’: DEVELOPMENT OF THE LAW ON CONSENT FROM *SIDAWAY TO MONTGOMERY*

Charley Turton

Lord Templeman’s judgment in *Sidaway v Bethlem Royal Hospital* implies that the process of obtaining consent is unavoidably collaborative, treading the middle ground between two unacceptable extremes:

I do not subscribe to the theory that the patient is entitled to know everything nor to the theory that the doctor is entitled to decide everything.¹

A critical review of the law of consent to medical treatment in the 20th and 21st centuries reveals why neither position is acceptable: case law highlights the potential difficulties in both. This essay will assess shifting attitudes to the doctor-patient relationship through the eyes of the court: from ‘doctor-knows-best’ deference in *Bolam v Friern Hospital Management Committee* (1957)² to a modern collaborative approach in *Montgomery v Lanarkshire Health Board* (2015)³, with particular emphasis on a doctor’s duty to disclose information at the decision-making stage of medical care.

THE ‘REASONABLE DOCTOR’ STANDARD CULMINATING IN *SIDAWAY*

The patient’s consent to treatment is required by law in England and Wales as a defence to trespass to the person⁴. This was confirmed in *Chatterton v Gerson*,⁵ the first reported case to consider the doctor’s advisory role in the context of obtaining legal consent. Bristow J, however, stated that a doctor’s failure to advise of risk falls under his general duty of care and therefore, once the patient is informed ‘in broad terms of the nature of the procedure which is intended, and gives her consent,’⁶ the cause of action lies in negligence rather than trespass to the person. This categorisation of the duty to advise as an aspect of a doctor’s general duty to his patient was

¹ *Sidaway v Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital* [1985] AC 871 (HL) 904.

² *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582 (QB).

³ *Montgomery v Lanarkshire Health Board (General Medical Council intervening)* [2015] UKSC 11, [2015] 2 WLR 768.

⁴ *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1 (HL) 72; *Re T (Adult: Refusal of Treatment)* [1993] Fam. 95, [1992] 3 WLR 782 (CA) 102.

⁵ *Chatterton v Gerson* [1981] QB 432, [1980] 3 WLR 1003 (QB).

⁶ *ibid*, 443.

confirmed by Hirst J in *Hills v Potter*⁷ who doubted whether the distinction ‘between advice on the one hand and diagnosis and treatment on the other’ was a practical distinction worth making.⁸ There is a fundamental flaw in this approach which was recognised by the United States Court of Appeal⁹ and the Supreme Court of Canada¹⁰ in 1972 and 1978 respectively and led to the adoption of a doctrine of ‘informed consent’, which the House of Lords declined to follow in the case of *Sidaway*. The reasoning behind their Lordships’ rejection of ‘informed consent’ lies in contemporary attitudes to the patient-doctor relationship.

At this point it should be noted that adult patients with capacity have an absolute right to choose whether or not to give consent. *Re T (Adult: Refusal of Treatment)*¹¹ confirmed that this right exists ‘notwithstanding that the reasons for making the choice are rational, irrational, unknown or even non-existent’.¹² This absolute right is difficult to reconcile with *Sidaway*, in which the majority held that the degree of disclosure required to enable the patient to decide whether to give consent to treatment must ‘primarily be a matter of clinical judgment’.¹³ Their Lordships rejected the arguments made in *Canterbury v Spence*¹⁴ and *Reibl v Hughes*¹⁵ for a more patient-centric system of joint decision-making between doctor and patient.

Canterbury found that all patients have the right to be informed of ‘material risks’ before giving consent. A risk was held to be material ‘when a reasonable person, in what the physician knows or should know to be the patient’s position, would be likely to attach significance to the risk’.¹⁶ *Reibl* emphasised that the individual patient may have subjective beliefs, opinions and priorities which affect their decision to consent. Without knowledge of these subjective factors, the physician’s use of ‘clinical judgement’ in disclosing information is flawed.¹⁷ Lord Diplock rejected this argument on the basis that it would be ‘flying in the face of reality’ to expect a doctor to disclose to his patient all the possible risks of a procedure or else to discern which risks the particular patient would attach significance to. Instead he advocated the traditional test devised in *Bolam*, namely that a doctor will not be in breach of his duty of care ‘if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art.’¹⁸ The standard is therefore that of the ‘reasonable

⁷ *Hills v Potter* [1984] 1 WLR 641 (QB).

⁸ *ibid*, 652.

⁹ *Canterbury v Spence* (1972) 464 F 2d 772 (United States Court of Appeal).

¹⁰ *Reibl v Hughes* [1980] 2 SCR 880, 114 DLR (3d) I (Supreme Court of Canada).

¹¹ *Re T (Adult: Refusal of Treatment)* [1993] Fam. 95, [1992] 3 W.L.R. 782 (CA).

¹² *ibid*, 102.

¹³ *Sidaway*, 900.

¹⁴ *Canterbury v Spence*.

¹⁵ *Reibl v Hughes*.

¹⁶ *Canterbury v Spence*, 787.

¹⁷ *Reibl v Hughes*, 13.

¹⁸ *Bolam*, 587.

doctor'. As Lord Diplock noted, the *Bolam* test has the advantage of self-renewal, since the standard updates itself in accordance with contemporary medical opinion. The test prioritises the 'objective of restoring the patient's health'¹⁹ above the patient's subjective individuality.

THERAPEUTIC PRIVILEGE AND 'INFORMED CONSENT'

*Chatterton*²⁰ shows some awareness of the idiosyncrasies of the particular patient but only in the context of 'therapeutic privilege':

In what he says any good doctor has to take into account the personality of the patient, the likelihood of the misfortune, and what in the way of warning is for the particular patient's welfare.²¹

The patient's 'welfare' in this judgment is framed in terms of medical beneficence – adopting the improvement of the patient's health as the overriding objective – and not within the context of individual rights.

The doctor's therapeutic privilege is fundamentally incompatible with 'informed consent', since it justifies the withholding of information, yet it has been consistently accepted by the courts from *Sidaway* to *Montgomery* and even in *Canterbury*: why is this? The answer lies in patient autonomy. The doctor's therapeutic privilege allows her to withhold information when, 'in the reasonable exercise of medical judgment she considers that it would be detrimental to the health of her patient to do so'.²² The approach is one of nonmaleficence: that doctors should in the first instance refrain from harming the patient. Contrast this with the positive doctrine of beneficence and the limits of therapeutic privilege reveal themselves: information can only be withheld where there is potential for it to cause direct harm *in itself* and never with the indirect purpose of preventing the patient from making the 'wrong' decision. Analysis of therapeutic privilege reveals how finely balanced are the doctor's duty to promote the medical interests of the patient and the patient's right to make informed decisions.

THE PROBLEM WITH *BOLAM*: EXPERT OPINION VS PATIENT AUTONOMY

Patient autonomy is something which Lord Diplock's judgment in *Sidaway* seems to overlook. He argues that:

The only effect that mention of risks can have on the patient's mind, if it has any at all, can be in ... deterring the patient from undergoing

¹⁹ As identified by Lord Templeman in *Sidaway*, 904.

²⁰ *Chatterton v Gerson*.

²¹ *Chatterton v Gerson*, 444.

²² *Montgomery*, 792 (Lord Kerr).

the treatment which in the expert opinion of the doctor it is in the patient's interest to undergo.²³

This deference to the 'expert opinion' of the doctor is the underlying flaw in the law of consent in England and Wales as it stood in 1985. A common theme of medical paternalism runs through the case law of the period from *Bolam* to *Sidaway*. Simply put by Bristow J in *Chatterton*: "The fundamental assumption is that [a doctor] knows his job and will do it properly."²⁴ The paradox of applying the *Bolam* test is that medical negligence litigation has the fundamental aim of rebutting this presumption of competency, yet the test places an implicit trust in the medical profession as a whole. Laskin CJC found in *Reibl* that to apply the *Bolam* standard to the doctor's advisory duty would be 'to hand over to the medical profession the entire question of the scope of the duty of disclosure.'²⁵ The tenor of this comment is judicial nervousness about allowing doctors to wholly self-regulate, but Lord Bridge dismissed these fears in *Sidaway*, arguing that the principle in *Bolitho v City and Hackney*²⁶ (see below) would allow the courts to intervene where disclosure of a risk was so obviously necessary to the patient's decision that no prudent medical man would fail to make it.²⁷

Attitudes towards the 'prudent medical man' have undergone a major overhaul in the thirty-one years since *Sidaway* and this is reflected in subsequent case law. *Bolitho*, cited above, made an important qualification of the *Bolam* test by confirming the court's discretion to find negligence even where the defendant acts in accordance with a contemporary body of medical opinion *if* 'the professional opinion was incapable of withstanding logical analysis'.²⁸ In the wider social context, the unquestioning confidence and implicit trust patients once placed in doctors is no longer commonplace, explaining why the *Bolam* test sits uncomfortably alongside modern conceptions of patient rights. The Bristol Royal Infirmary Inquiry²⁹, announced in 1997, had widespread implications both for good medical practice and the law. The public inquiry found that abnormally high death rates in infant recipients of open heart surgery had been due to a culture among doctors 'characterised by a type of professional arrogance - an arrogance born of indifference...The medical profession acted with good intentions as they saw it.'³⁰ Professor Ian Kennedy's Final Report found a lack of respect and honesty within the doctor-patient relationship

²³ *Sidaway*, 895.

²⁴ *Chatterton v Gerson*, 444.

²⁵ *Reibl v Hughes*, 13.

²⁶ *Bolitho v City and Hackney Health Authority* [1998] AC 232, [1997] 3 WLR 1151 (HL).

²⁷ *Sidaway*, 900.

²⁸ *Bolitho*, 243.

²⁹ Public inquiry into children's heart surgery at the Royal Bristol Infirmary 1984-1995

³⁰ Kennedy, quoted in *Doctors 'arrogant' over organ stripping*, BBC News, Health Section (Wednesday 10 May 2000) <<http://news.bbc.co.uk/1/hi/health/743221.stm>> accessed 19 February 2016.

and called for a system ‘whereby the patient and the professional meet as equals with different expertise.’³¹ The report prompted enactment of the NHS Reform and Health Care Act 2002, which aimed to redress the imbalance of power between the medical profession and the public. The Act subjected regulatory bodies including the General Medical Council to the scrutiny of the Council for the Regulation of Health Care Professionals, which had power to refer ‘unduly lenient’ decisions to the High Court³². The traditional attitude of ‘doctor-knows-best’ eroded and emphasis on patients’ rights grew to take its place.

MONTGOMERY: INTRODUCING ‘INFORMED CONSENT’ TO ENGLISH LAW

In 2015 the case of *Montgomery* recognised that the doctor’s duty to disclose information to a patient at the decision-making stage of care is not amenable to the *Bolam* test: ‘The doctor’s advisory role cannot be regarded as solely an exercise of medical skill’.³³ There are two reasons for this. The first is practical: the patient has beliefs and priorities of which the doctor may be unaware, which are just as instrumental to the decision-making process as the doctor’s objective weighing of medical factors: the ‘reasonable doctor’ cannot account for the informational needs of a unique individual. The second is more conceptual: since 1985 the meaning of the patient’s ‘best interests’ has aligned itself with the patient’s right of autonomy as opposed to the patient’s ‘physical or mental condition’ as Lord Diplock stated in *Sidaway*. Arguably the ‘objective of restoring the patient’s health’³⁴ is no longer paramount.

Diagnosis and treatment require the weighing of factors which are known to the doctor: the process is primarily an objective application of scientific principles with the ultimate objective of restoring the patient’s health. There is no reference to obtaining consent in the original Hippocratic Oath: ‘I will devise and order for them the best diet, according to my judgment and means; and I will take care that they suffer no hurt or damage.’³⁵ Compare this doctor-centric approach to the modern oath, which puts the patient in context: ‘I will remember that I do not treat a fever chart, a cancerous growth, but a sick human being, whose illness may

³¹ Kennedy, *Learning From Bristol: The Report of the Public Inquiry into Children’s Heart Surgery at the Royal Bristol Infirmary 1984-995*, presented to Parliament by the Secretary of State for Health by command of Her Majesty July 2001

<http://webarchive.nationalarchives.gov.uk/20090811143745/http://www.bristol-inquiry.org.uk/final_report/the_report.pdf> accessed 5 February 2016, 438.

³² NHS Reform and Health Care Act 2002, ss 25–29.

³³ *Montgomery*, 792.

³⁴ *Sidaway*, 904.

³⁵ Hippocrates, trans. by Ludwig Edelstein, *The Hippocratic Oath: Text, Translation, and Interpretation* (Baltimore: Johns Hopkins Press, 1943) quoted at

<<http://www.pbs.org/wgbh/nova/body/hippocratic-oath-today.html>> accessed 21 March 2016.

affect the person's family and economic stability.³⁶ *Montgomery* reflects this modern awareness of patients as subjective beings, recognising social and economic change:

...patients are now widely regarded as persons holding rights, rather than as the passive recipients of the care of the medical profession. They are also widely treated as consumers exercising choices.³⁷

In 2015 such observations appear trite. Patients' rights came to the fore long before *Montgomery*: the NHS Plan 2000 placed increased emphasis on patient choice and created the NHS Patient Advice and Liaison Service with the intention of putting doctors and patients on a more equal footing. The influence of the Human Rights Act 1998 prioritised individual patient autonomy. As early as 1985 the General Medical Council amended its guidelines to include 'features of the standard of medical care *which the public are entitled to expect* from a registered medical practitioner'³⁸ (emphasis added). It was not until *Montgomery* in 2015 that the courts officially acknowledged its existence in English law and yet 'informed consent' has featured in GMC guidance since 2008. *Consent: Doctors and Patients Making Decisions Together*³⁹ anticipates Lord Kerr's judgment in *Montgomery* by cautioning doctors, 'You should not make assumptions about the clinical *or other factors* a patient may consider significant, or a patient's level of knowledge or understanding of what is proposed'⁴⁰ (emphasis added). Taking *Montgomery* in isolation, therefore, we might be inclined to agree with Justice Windeyer's indictment in 1970 of 'Law, marching with medicine, but in the rear and limping a little.'⁴¹ Is this a fair assessment of the development of the law of consent post-*Sidaway*?

PEARCE AND CHESTER: THE TRUE TURNING POINT?

Arguably there are two important earlier cases which together made more of an impact on the law of consent than *Montgomery*. *Pearce v United Bristol* (1999)⁴² and *Chester v Afshar* (2005)⁴³ cast significant doubt on the doctor-centric standard set in *Sidaway* and may even have imported 'informed consent' into English courts via the back door.

³⁶ Lasagna, 1964, quoted at <<http://www.pbs.org/wgbh/nova/body/hippocratic-oath-today.html>> accessed 21 March 2016.

³⁷ *Montgomery*, 789.

³⁸ Walton, 'Foreword by the President', *General Medical Council Guidance: Professional Conduct and Discipline: Fitness to Practice*, 1985 <<http://www.gmc-uk.org/guidance/archive.asp>> accessed 29 January 2016.

³⁹ General Medical Council, *Consent: Doctors and Patients Making Decisions Together* (2008) <http://www.gmc-uk.org/Consent___English_1015.pdf_48903482.pdf> accessed 10 January 2016.

⁴⁰ *ibid*, 11.

⁴¹ *Mount Isa Mines v Pusey* [1970] HCA 60, 125 CLR 383 (High Court of Australia).

⁴² *Pearce v United Bristol Healthcare NHS Trust* [1999] PIQR P53 (CA).

⁴³ *Chester v Afshar* [2004] UKHL 41, [2005] 1 AC 134 (HL)

Lord Woolf MR stated in *Pearce* that the responsible doctor will inform the patient of any risk ‘which would affect the judgment of a reasonable patient’ so that he or she ‘can determine for him or herself as to what course he or she should adopt’⁴⁴. He continued:

Obviously the doctor, in determining what to tell a patient, has to take into account all the relevant considerations, which include the ability of the patient to comprehend what he has to say to him or her and the state of the patient at the particular time, both from the physical point of view and an emotional point of view.⁴⁵

Many have argued that Lord Woolf inadvertently created a new test: that of the ‘reasonable person in the patient’s position’ as opposed to the ‘reasonable doctor’, thereby departing from *Sidaway*. The focus certainly seems to be more patient-orientated than that of *Sidaway*. However, the Court of Session in its 2013 decision in *Montgomery* doubted whether, ‘if it were the intention of the Master of the Rolls [in *Pearce*] to refine or qualify what was decided in *Sidaway*, that this would be done otherwise than in a reserved judgment.’⁴⁶ The fact that Lord Woolf gave his judgment *ex tempore* in *Pearce* perhaps indicates that he had no intention of disagreeing with the test in *Sidaway*, but the way he emphasises the patient’s right to choose is significant: *Pearce* demonstrates that even when judges purport to be applying the *Bolam* test, in reality they must apply the ‘reasonable patient’ test alongside it, because the ‘reasonable doctor’ does not withhold information which the ‘reasonable patient’ would consider significant. Lord Woolf essentially confirms Lord Scarman’s dissenting viewpoint in *Sidaway*, which stated: ‘The doctor’s duty arises from his patient’s rights.’⁴⁷ Far from being at odds, the former flows from the latter.

Pearce therefore anticipates *Montgomery*. Arguably the law did not move very far at all in the intervening years between the ‘reasonable person in the patient’s position’, as identified in *Pearce* in 1999, and the ‘particular patient’ whose right to informed consent is officially recognised in 2015. *Montgomery* is significant in so far as it clarifies the position once and for all, and confirms the standard of informed consent in the law of England and Wales.

Another important turning point was that of *Chester v Afshar* in which the House of Lords found that the claimant, Mrs Chester, could not satisfy the test of causation in relation to Dr Afshar’s failure to warn of the risk of *cauda equine* syndrome, yet allowed her claim to succeed on the basis that the doctor’s negligence was so closely connected to the claimant’s right to

⁴⁴ *Pearce*, 59.

⁴⁵ *ibid.*

⁴⁶ *NM v Lanarkshire Health Board* [2013] CSIH 3, 2013 SC 245 [26].

⁴⁷ *Sidaway*, 888.

give informed consent. This judgment has since come under considerable criticism⁴⁸, but the case cemented the patient's right to information when giving consent. Lord Steyn declared: 'in modern law medical paternalism no longer rules and a patient has a *prima facie* right to be informed by a surgeon of a small, but well established risk.' Arguably, *Chester* introduced the standard of informed consent without expressly overruling *Sidaway*. The fact that their Lordships felt able to overlook the general principle of causation in order to find for Mrs Chester indicates that the duty to disclose information such as risk is distinct from the doctor's general duty of care.

THE IMPACT OF STRASBOURG: ENSHRINING PATIENT RIGHTS

The patient's 'interests' in Strasbourg case law extend beyond the purely medical. In *Glass v United Kingdom*⁴⁹ and *Tysiac v Poland*,⁵⁰ the involvement of the patient in the decision-making process was not treated as part of the doctor's legal duty of care, but simply something that *must* be present in order to protect the patient's right to physical and moral integrity under Article 8 of the ECHR. In *Tysiac*, a breach of Article 8 was found on the basis that Polish procedures did not provide the patient with sufficient protection in the event of a disagreement between doctor and patient over what constituted 'exceptional circumstances' justifying abortion. The court asked whether 'an individual has been involved in the decision-making process, seen as a whole, to a degree sufficient to provide her or him with the requisite protection of their interests'⁵¹. The patient's human rights are clearly designated as a matter for the individual and the court, not as a matter for the medical professional. In the case of *Glass* the court was particularly influenced by the fact that doctors had recognised the potential need to obtain a court order, yet had failed to do so.

Strasbourg case law in this area highlights a particular advantage of prioritising patients' rights over the 'reasonable doctor' standard: that of clarity. According to Rebecca Bailey-Harris, 'The autonomy approach, by virtue of its very absolutism, has the advantage of certainty...the moral judgement has already been made.'⁵² Giving patients all the relevant information they need to come to an informed and balanced judgment essentially puts doctors in the clear. It is for the patient to decide whether to give consent based on their own subjective criteria and any decision left to the court will be a finding of fact as to whether or not that right of autonomy has been infringed.

⁴⁸ See for example, Tamsyn Clark and Donal Nolan, 'A Critique of *Chester v Afshar*' (2014) 34 OJLS 659–92.

⁴⁹ *Glass v United Kingdom* (App no 61827/00) 39 EHRR 341.

⁵⁰ *Tysiac v Poland* (App no 5410/03) (2007) 45 EHRR 947.

⁵¹ *Tysiac*, [115].

⁵² Bailey-Harris, 'Patient Autonomy – A Turn in the Tide?' in Michael Freeman and Andrew Lewis (eds), *Law and Medicine: Current Legal Issues Volume 3* (OUP 2000).

The potential conflict between a patient's medical interests on one hand and their right to autonomy on the other is thrown into relief by so-called 'end of life' cases. When the doctor's overriding objective of restoring the patient's health is no longer attainable, the requirement for consent takes on paramount importance. In 1993 Airedale NHS Trust sought a declaration from the courts that it might lawfully withdraw life-sustaining treatment from Tony Bland, a victim of the Hillsborough disaster in a persistent vegetative state. The issue was whether any other person, even a doctor, has the right to violate the physical integrity of another human being without their consent. It is necessary for the court to decide what is in the patient's best interest, with input from the medical profession and the relative's family. Individual autonomy is a matter in which the court must be the final arbiter, not the medical profession: it is sacrosanct and no doctor can take it away.

The Human Rights Act 1998 directed the minds of the medical profession to essential priorities by underlining the inviolability of human life by an outsider. In *Airedale*⁵³ Lord Hoffman highlighted the potential for tragedy when, 'the duty to act with kindness and humanity comes into conflict with the absolute prohibition on the violation of the person', but suggested that 'English law unequivocally resolves this conflict by giving priority to the latter principle'.⁵⁴ Following *R (Nicklinson) v Ministry of Justice*⁵⁵ it is still the case that the law prohibits assisted suicide. The HRA is therefore helpful in so far as it enables the medical profession to anticipate how their actions might be legally construed, yet at the time of its enactment it essentially codified general principles that already formed part of good medical practice. The British Medical Association published this report on the impact of the HRA in 2000:

The main difference is the language which should be used to describe the decision making process, with terms such as "rights" and "proportionality" gradually being introduced into the medical lexicon. Decision-making also needs to be approached and documented in an increasingly formal way so that doctors not only take account of the human rights aspects of the decisions they make but are also seen to have done so.⁵⁶

The Act was treated as an incentive to document decision-making process more carefully: formalising rather than radicalising medical practice.

⁵³ *Airedale NHS v Bland* [1993] AC 789, [1993] 2 WLR 316 (HL).

⁵⁴ *ibid*, 832.

⁵⁵ *R (on the application of Nicklinson and another) v Ministry of Justice* [2014] UKSC 38.

⁵⁶ Committee on Medical Ethics, British Medical Association, *The impact of the Human Rights Act 1998 on medical decision making* (2000)

<<http://www.cirp.org/library/legal/BMA-human-rights>> accessed 12 March 2016.

THE ROLE OF THE LAW IN GOOD MEDICAL PRACTICE

The function of the law is not to prescribe what constitutes good medical practice. Such an approach produces conflicts of a political nature between the legal and medical professions⁵⁷ in which the courts are wary of allowing doctors to wholly self-regulate and doctors feel persecuted. Michael A Jones argues that *Sidaway* encouraged physicians to treat ‘consent’ as a strict medico-legal requirement rather than a collaborative process doctors and patients go through together.⁵⁸ The Bristol Inquiry reported the effect of this in practice:

‘We were saddened to hear a recently-qualified doctor describe ... how, as part of his training, he was sent ‘to consent’ patients.’⁵⁹

The danger of prescribing a standard of ‘consent’ too rigidly at law is that it becomes an isolated box-ticking exercise rather than a fundamental of good medical care. Alasdair MacLean suggests that there is no need for the legal standard of a doctor’s duty to disclose information to surpass, or even equal, that of his ethical duty: the law sets a ‘minimally acceptable’ standard which is superseded by the ‘higher standards of professional ethics and the aspirational duty of the ethical ideal’.⁶⁰ MacLean’s comments are appealing in the abstract: they follow the recommendations of the Bristol Inquiry which found that the duty to involve patients in a dialogue of information when seeking consent is ‘an ethical, as well as a legal, principle ... We do not advocate more forms. We advocate more communication.’⁶¹ However it is extremely doubtful whether an ‘ethical ideal’ could thrive in the shadow of modern medical negligence litigation and the mutual distrust it fosters between doctor and patient. Lord Woolf’s *Access to Justice Report* (1996) bemoaned ‘the climate of mutual suspicion and defensiveness which is all too prevalent in this area of litigation.’⁶² One positive aspect of *Montgomery* is its potential to effect the ‘de-mechanising’⁶³ of patient consent. The law as it stands now seems to recognise the point made by Lord Woolf, that ‘the doctor/patient relationship is a uniquely personal and sensitive one’⁶⁴ and is therefore not amenable to the same legal standards as diagnosis or treatment.

⁵⁷ *S v S* [1970] 3 All ER 107 (HL) 111: ‘We have too often seen freedom disappear in other countries not only by coups d’état but by gradual erosion: and often it is the first step that counts.’ (Lord Reid).

⁵⁸ Jones, ‘Informed Consent and Other Fairy Stories’ (1999) 7 MLR 103.

⁵⁹ Kennedy (n 31), 295

⁶⁰ MacLean, ‘From Sidaway to Pearce and Beyond: Is the Legal Regulation of Consent Any Better Following a Quarter of a Century of Judicial Scrutiny?’ (2012) 20 MLR 108.

⁶¹ Kennedy (n 31), 296.

⁶² Lord Woolf MR, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1996) [5].

⁶³ Forster, ‘The Last Word on Consent’ (2015) 165 NLJ 8.

⁶⁴ Woolf, *ibid*, [36].

THE FUTURE OF THE LAW OF 'INFORMED CONSENT'

Informed consent requires a balance to be struck between the patient's right to consent autonomously and the doctor's primary objective of restoring health. The law must tread a middle ground between two undesirable positions: one ethically unacceptable, in which the physician has all the power, and one fundamentally impractical, in which the patient's knowledge must match the doctor's in order to produce a totally transparent process of giving consent. This compromise will necessarily be fraught with difficulties. Carl E Schneider has rightly noted that a doctor cannot prevent patients from making 'snap decisions': sufficient knowledge does not necessarily result in 'informed' choices.⁶⁵ Informed consent is perhaps more of an ideal than an achievable reality, especially where resources are scarce and the NHS is subject to time constraints and financial limits: how far can we realistically expect doctors to engage in an onerous process of joint decision-making with patients?⁶⁶ In the future, medical negligence litigation is likely to be more nuanced, with claims focussing on the manner and the circumstances in which information is relayed. The *Montgomery* judgment still contains some leeway for doctors by retaining 'therapeutic privilege' and there is the potential for claims relating to misapplication or abuse of that privilege. The role of the law in relation to this particular aspect of patient care is to safeguard fundamental rights. In doing so it must recognise the uniqueness of both the individual *and* the doctor-patient relationship.

⁶⁵ Schneider and Farrell, 'Information, Decisions and the Limits of Informed Consent' in Freeman and Lewis (eds), *Law and Medicine: Current Legal Issues Volume 3* (OUP 2000).

⁶⁶ See *Airedale NHS v Bland*: 'The resources of the National Health Service are not limitless and choices have to be made.'

SHOULD THE PENALTY RULE BE ABOLISHED?

Phoebe Whitlock

‘A blatant interference with freedom of contract’ is how Clarke LJ described the penalty rule.¹ In English contract law, if a clause is a genuine pre-estimate of loss suffered by the innocent party on breach, then the court will uphold it as a liquidated damages clause.² Clauses that include an excessive sum which penalises the breaching party, however, can be deemed invalid as a penalty clause.³ This is done through the court’s use of its own discretion⁴ to establish whether the specified sum is a genuine forecast of the probable loss.⁵ Lord Dunedin provided a useful definition of the distinction between the two:

‘The essence of a penalty is a payment of money stipulated as *in terrorem* of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage.’⁶

These differences have become crucial in the further development of the law and arguments for and against retaining the ‘penalty rule’. These arguments will be set out below and a comparison will be made with Australia, another common law jurisdiction. Finally, I will reach the conclusion that the penalty rule is outdated and should be replaced, or at the very least, significantly reformed.

HISTORY OF THE PENALTY RULE

Common law contract theorists have placed a significant emphasis on the development of remedies, because the medieval writ system framed causes of action in terms of remedies sought.⁷ The concept of a ‘penalty clause’ originally formed part of the court’s equitable jurisdiction, but by the end of the 18th century it had become a common law rule.⁸ This history is conveniently summarised by Lords Neuberger and Sumption:

¹ *Cavendish Square Holding BV v Talal El Makdessi* [2013] EWCA Civ 1539, [44].

² *Cellulose Acetate Silk Co. Ltd v Widnes Foundry (1952) Ltd* [1933] AC 20.

³ *Jobson v Jobson* [1989] 1 WLR 1026.

⁴ *ibid*, per Lord Nicholls LJ at 1040.

⁵ *Dunlop Pneumatic Tyre Company v New Garage & Motor Co* [1915] AC 79, per Lord Dunedin at 86.

⁶ *ibid*, citing *Chydebank Engineering and Shipbuilding Co v Don Jose Ramos Yzquierdo y Castaneda* [1905] AC 6, at 86.

⁷ Ibbetson, *A Historical Introduction to the Law of Obligations* (OUP 1999) ch 1.

⁸ De Waal, ‘The Law on Penalties After *ParkingEye v Beavis*’ (Hardwicke Chambers 2015) available <<http://www.hardwicke.co.uk/insights/articles/the-law-on-penalties-after-parkingeye-v-beavis>>.

The penalty rule in England is an ancient, haphazardly constructed edifice which has not weathered well, and which in the opinion of some should simply be demolished, and in the opinion of others should be reconstructed and extended.⁹

There is no need to go into that ancient history in any great detail here, as we are concerned with the law's current position and not the historical trends. It is enough to say that there is a long history of reported and unreported case law, including *Peachy v Duke of Somerset*,¹⁰ where the court has used its equitable jurisdiction to provide relief against penalties.¹¹

LORD DUNEDIN'S FOUR RULES OF CONSTRUCTION

In *Dunlop*, the House of Lords held that the disputed clause was not a penalty, but merely a genuine pre-estimate of the potential loss to be suffered by Dunlop upon breach. In order to assist in the future, Lord Dunedin laid down four rules of construction to help commercial entities distinguish between a penalty clause and a liquidated damages clause. This was later endorsed by the Privy Council¹², has been regularly approved by the Court of Appeal¹³ and was summarised in Cheshire, Fifoot and Furmston's Law of Contract:¹⁴

- a. The conventional sum is a penalty if it is extravagant and unconscionable in amount in comparison with the greatest loss that could possibly follow from the breach.
- b. If the obligation of the promisor under the contract is to pay a certain sum of money, and it is agreed that if he fails to do so he shall pay a larger sum, this larger sum is a penalty.
- c. Subject to the preceding rules, it is a canon of construction that, if there is only one event upon which the conventional sum is to be paid, the sum is liquidated damages.
- d. If a single lump sum is made payable upon the occurrence of one or more or all of several events, some of which may occasion serious and others mere trifling damage, there is a presumption (but no more) that it is a penalty.

⁹ *Cavendish Square Holding BV v Talal El Makdessi* [2015] UKSC 67, per Lord Neuberger and Lord Sumption (with Lord Carnwath concurring) at [3].

¹⁰ (1824) 1 Stra 447, reprinted in White and Tudor, *Leading cases in equity* (Sweet and Maxwell 1928) 255.

¹¹ Loyd, 'Penalties and Forfeitures: Before *Peachy v The Duke of Somerset*' [1915] 29 Harvard LR 117.

¹² *Phillips Hong Kong Ltd v Attorney-General of Hong Kong* (1993) 61 BLR 49.

¹³ *Cenargo Ltd v Izar Construcciones Navales SA* [2002] EWCA Civ 524, *Murray v Leisureplay plc* [2005] EWCA Civ 963.

¹⁴ Michael Furmston, *Cheshire, Fifoot and Furmston's Law of Contract* (OUP 2007) 787–8.

Lord Dunedin's rules have 'achieved the status of a quasi-statutory code in the subsequent case-law'¹⁵ but this does not mean that they cannot lead to ambiguous situations. The Supreme Court, in *Cavendish* and *ParkingEye*, said that Lord Dunedin's four-stage test was a useful tool for simple cases but could not be applied to more complex cases.¹⁶ Further criticisms will be addressed below.

CURRENT POSITION OF THE LAW: *CAVENDISH SQUARE HOLDING BV v TALAL EL MAKDESSI*

The current position of the law was recently restated and modified by the Supreme Court in *Cavendish Square Holding BV v Talal El Makdessi*, joined with *ParkingEye Limited v Beavis*.¹⁷ In *Cavendish*, the respondent sold his advertising company to the appellant but retained a substantial shareholding. An additional clause contained a restrictive no-compete covenant with a stipulation that its breach would allow Cavendish to withhold future instalments of the purchase price and would also compel Makdessi to sell his shares to Cavendish at a discount. Makdessi accepted that he had breached the covenant and by extension his fiduciary duties, but argued that the withholding of the purchase price and forced sales were unenforceable penalty clauses.

By comparison, *ParkingEye* was a consumer contract and would now be governed now by the Consumer Rights Act 2015. At the time, however, it was governed by the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCR 1999). In that case, Beavis appealed an £85 charge for contravening parking terms in a car park operated by ParkingEye. The appellant argued that this charge was an unenforceable penalty and, further or alternatively, that it was unfair and invalid under the UTCCR 1999.

The Supreme Court held by a majority that the provisions in the *Cavendish* case were not penalties as they were primary contractual obligations so the rule was not engaged. Moreover, in *ParkingEye*, the Court held that the charge was not an unlawful penalty (Lord Toulson dissenting), taking account of the amount due and the fact that ParkingEye had a legitimate interest in levying the charge on overstayers. The Court also reformulated the *Dunlop* test:

The true test is whether the impugned provision is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation.¹⁸

¹⁵ *Cavendish*, per Lords Neuberger and Sumption at [22].

¹⁶ De Waal, 'The Law on Penalties After *ParkingEye v Beavis*' (n 8).

¹⁷ [2015] UKSC 67.

¹⁸ *Cavendish*, per Lords Neuberger and Sumption at [32].

The Court additionally held that the penalty rule only applies to secondary obligations and that the legitimate interest of the parties could extend beyond the damages they were entitled to. Finally, the Court held that the rule only applies to clauses which impose a sanction for breach. Consequently, the test can now be stated in three stages:

1. Does the clause engage the penalty rule? If yes,
2. Is any legitimate business-interest protected by the clause? and if so,
3. Is the provision made in the clause extravagant, exorbitant or unconscionable or is there some wider commercial or socio-economic justification for the clause?

These new principles mean that the party in breach cannot argue that a secondary charge payable on breach of agreement is a penalty and unenforceable because it is not a genuine pre-estimate of loss.¹⁹

APPLICABLE STATUTORY PROVISIONS

The Unfair Contract Terms Act 1977 (UCTA 1977) applies only to liability arising in the course of a business and penalty clauses are beyond its remit. The other applicable statutory provisions are the CRA 2015 or the UTCCR 1999. The CRA 2015 places a duty on the court to consider the fairness of contractual terms even where neither party raises the issue,²⁰ but the Act only applies to consumer contracts. The UTCCR 1999, however, based on an EU Directive, states that a standard term in a contract between a commercial supplier and a consumer will not be binding if it requires him 'to pay a disproportionately high sum in compensation'.²¹ While helpful, this is also unsatisfactory, as there are few statutory provisions relating to penalty clauses between two commercial entities.

THE CASE FOR RETENTION

The case for retaining the penalty clause rule can be broken down into three main categories according to the theory to which they subscribe: utilitarian, orthodox and efficient breach.

First, under utilitarian theories, the most basic and fundamental function of contract law is to facilitate the making of, and the reliance upon, contracts.²² This is a function that penalty clauses are well placed to perform. The application of this principle to a real world situation is embodied by Lord Woolf in *Philips Hong Kong Ltd v Attorney-General of Hong*

¹⁹ De Waal, 'The Law on Penalties After *ParkingEye v Beavis*' (n 8).

²⁰ Section 71, CRA 2015

²¹ UTCCR 1999, sch 2, para 1(e).

²² Smith, *Contract Theory* (OUP 2004) 396

*Kong*²³ when he stated that ‘the court has to be careful not to set too stringent a standard and bear in mind that what the parties have agreed should normally be upheld’, not least because ‘any other approach will lead to undesirable uncertainty especially in commercial contracts’.²⁴ The penalty rule facilitates certainty by encouraging adherence to contractual obligations.

Second, the orthodox view, drawing on rights-based theories of contract, sees breach of contract as a wrong done to the other party.²⁵ Penalty clauses operate as a deterrent to ensure compliance with contracts; as Lord Dunedin said in *Dunlop*, ‘The essence of a penalty is a payment of money stipulated as *in terrorem* of the offending party.’²⁶ As a deterrent, penalty clauses could be effective in preventing breach if the amount stipulated in the clause is greater than the cost of completion. Whilst this may only be effective in some cases, it is better than some unknown alternative options.

Finally, the efficient breach theory supposes that some breaches are economically efficient and others are not. The argument could therefore be put that a penalty payment made before the act of breach could also be efficient. At the moment, however, penalties are only payable on breach.²⁷ In practice, this is actually a semantic distinction.²⁸ The Law Commission has criticised this in its working paper ‘Penalty Clauses and the Forfeiture of Monies Paid’²⁹ and recommended the abolition of this arbitrary distinction. This approach was not adopted, however, and the House of Lords, in *Export Credits Guarantee Department v Universal Oil Products Co*,³⁰ confirmed that the penalty rule only applies to breach.³¹

THE CASE FOR ABOLITION

In *Cavendish*, The Court of Appeal found the clauses to be penalties, but also created the impression that the process of evolution of the penalty rule might, and possibly should, lead to its abolition.³² Some academics, such as Gullifer, have argued that there is no reason at all to retain the common

²³ (1993) 61 BLR 49.

²⁴ *ibid*, 59.

²⁵ *Contract Theory* (n 22) 389

²⁶ *Dunlop Pneumatic Tyre Company v New Garage & Motor Co* [1915] AC 79, citing *Clydebank Engineering and Shipbuilding Co v Don Jose Ramos Yzquierdo y Castaneda* [1905] AC 6, at 86.

²⁷ Treitel, *An Outline of The Law of Contract* (OUP 2004) 402.

²⁸ *Alder v Moore* [1961] 2 QB 57.

²⁹ Law Com No 61 (1975) 26.

³⁰ [1983] 1 WLR 399.

³¹ Poole, *Textbook on Contract Law* (OUP 2014) 392.

³² Peel, ‘Unjustified penalties or an unjustified rule against penalties?’ (2014) 130 LQR 365.

law penalty clause doctrine³³. I will set out three reasons below for its abolition: freedom of contract, concerns with the definition of a genuine pre-estimate of loss and public policy.

First, the main reason for the abolition of the rule is to protect freedom of contract; parties should be allowed to contract how and as they please. Hatzis says commercial parties must be assumed to have weighed the benefits and detriments of the clause and signed the contract anyway.³⁴ If a Court were to refuse to enforce a validly negotiated contract, then that would be a paternalistic course of action which infringes on their freedom of contract.

Second, there are concerns as to the definition of a genuine pre-estimate of loss. Lord Dunedin's judgment in *Dunlop*³⁵ raises the issue of whether the clause is a genuine pre-estimate of loss. It should be an estimate made at the time of contracting and interpreted objectively by the court. The objective interpretation also takes account of reasonableness, in the sense that the more reasonable a clause, the more likely it is to be held as a genuine pre-estimate. This application is distinguished in *Cavendish Square Holding BV v Talal El Makdessi*³⁶ where the Supreme Court held that clauses in an extensive commercial contract may still be penalties.

Paradoxically, however, it has also been held that the sum that is reasonable is open to negotiation. In *Murray v Leisureplay Plc*³⁷ the Court of Appeal held that the clause was not a penalty. The sum may have been generous but was not unconscionable and may have taken into account the difficulty in obtaining alternative work of equal value. The onus of showing that the specified sum is a penalty lies upon the party who is sued for its recovery.³⁸ In my opinion, the onus lies in the wrong place; it should be the party who is claiming recovery under a potentially onerous and unenforceable clause who should prove that it is a valid liquidated damages claim. Accordingly, Harris argues that the Court should revise the terms to adjust the price paid on breach downwards.³⁹ The penalty rule should, therefore, be abolished, or at the very least significantly reformed, because of the potential that some cases may be decided wrongly through the court's attempts to define what is an objective pre-estimate of damages, made subjectively at the time of the contract being made.

³³ Gullifer, 'Agreed Remedies' in Burrows and Peel (eds), *Commercial Remedies: Current Issues and Problems* (OUP 2003).

³⁴ Hatzis, 'Having the Cake and Eating it Too: Efficient Penalty Clauses in Common and Civil Contract Law' [2003] 22 Int Rev L and Economics 381.

³⁵ [1915] AC 79.

³⁶ [2015] UKSC 67.

³⁷ [2005] EWCA Civ 963.

³⁸ *Robophone Facilities Ltd v Blank* [1966] 1 WLR 1428, 1447.

³⁹ Harris et al, *Remedies in Contract and Tort* (CUP 2002) 147.

Finally, the retention of the penalty rule is contrary to public policy, as the court cannot be seen to justify private punitive charges. Consumers are now protected by the CRA 2015 and Lord Toulson in *ParkingEye* said he would have allowed Beavis' appeal under this legislation. Commercial parties, however, do not enjoy the same statutory protection. In 2002, a Law Commission Report proposed that small businesses should have the same protections as consumers, but this was withdrawn after a critical response in 2005.⁴⁰ This is an issue, because the penalty rule assumes that:

In a negotiated contract between properly advised parties of comparable bargaining power, the strong initial presumption must be that the parties themselves are the best judges of what is legitimate in a provision dealing with the consequences of breach.⁴¹

This should be upheld by the courts. Peel broadly agrees and argues that if after *Cavendish*, the test is now commercial justification, then surely the fact that two large commercial entities have negotiated and agreed on the clause should be enough and therefore there is no need for a rule.⁴² This is a paternalistic argument,⁴³ with economically rational contractors arguing that penalty clauses act as a deterrent where breach is desirable and lower the parties' costs⁴⁴ and rightly so; these clauses should not be enforced because they would hamper efficiency.⁴⁵

THE AUSTRALIAN POSITION

The principle of penal obligation also exists in the French and German civil codes; both also allow judicial discretion in setting penal damages⁴⁶ and, through British colonisation, the obligation also exists in many of the Commonwealth's legal systems. In Australia the position on penalty clauses is similar to that of the position of the Court in *Dunlop*.⁴⁷ The new law that has been set out in *Cavendish*, however, now advocates a more flexible test,

⁴⁰ Morgan, 'The penalty clause doctrine: unlovable but untouchable' [2016] 75 Cambridge LJ 11.

⁴¹ *Cavendish*, per Lords Neuberger and Sumption at [35].

⁴² Peel, 'Unjustified penalties or an unjustified rule against penalties?' (2014) 130 LQR 365, 370.

⁴³ Morgan, *Great Debates in Contract Law* (Palgrave Macmillan 2012) 22.

⁴⁴ *ibid*, 226.

⁴⁵ Saprai, 'The Penalties Rule and the Promise Theory of Contract' (2013) 26 Canadian J Law and Jurisprudence 443, 444.

⁴⁶ Loyd, 'Penalties and Forfeitures: Before *Peachy v The Duke of Somerset*' [1915] 29 Harvard LR 117, 118.

⁴⁷ Macknay, 'Penalties and protecting legitimate interests: differences between the United Kingdom and Australia' (Herbert Smith Freehills, 2015) available <<http://www.herbertsmithfreehills.com/insights/legal-briefings/penalties-and-protecting-legitimate-interests>>.

even though the penalties rule in Australia applies more broadly and bites more frequently.⁴⁸

Nevertheless, the main difference is whether the penalty is payable on breach of contract or not. The Court of Appeal applied *Dunlop in Euro London Appointments Ltd v Claessens*⁴⁹ and held that, as the clause was not a penalty, it was not payable on breach of contract. By contrast, the penalty clause rule was attacked in the High Court of Australia in *Andrews v Australia and New Zealand Banking Group Ltd*;⁵⁰ the Court held that as a matter of Australian law, the penalty clause jurisdiction is not limited to cases where a sum of money is payable upon breach of contract.⁵¹ In other words, a contractual clause which imposes an obligation to pay an agreed sum, even if there is no breach, may constitute a penalty⁵². Peel argues that this brings into 'sharper focus the lack of any clear rationale for this distinct common law rule of intervention.'⁵³

Although the root of the penalty clause rule is the same and the position *pre-Cavendish* nearly identical, the Australian position is not a desirable one and should not be adopted here. This is because it does not place the same emphasis on freedom of parties to contract as they wish and allow them to prioritise other interests over the avoidance of loss, as the English position does. For example, a company may contract knowing that the bargain is bad but may still prioritise fulfilling the bargain over the avoidance of loss; this may be for a number of reasons, including the fact that this bad bargain may lay the foundations for a more lucrative commercial relationship.

Morgan argues that the Supreme Court should have abolished the law on penalty clauses in *Cavendish*, or at the very least abolished it in commercial cases. He remains unconvinced by the arguments put forward by the Supreme Court that the doctrine is too well entrenched in English law, the Commonwealth and European legal systems for judges to sign its death warrant.⁵⁴ Their main argument for not doing so is that 'this is not the way in which English law develops'.⁵⁵ Ibbetson supports this with his observation that judicial law can never bring itself to abolish whole doctrines of its own creation,⁵⁶ irrespective of the position in other jurisdictions.

⁴⁸ *ibid.*

⁴⁹ [2006] EWCA Civ 385.

⁵⁰ [2013] BLR 111.

⁵¹ Mckendrick, *Contract Law: texts, cases and materials* (OUP 2014) 912.

⁵² *Andrews v Australia and New Zealand Banking Group Ltd* [2013] BLR 111.

⁵³ Peel, 'Unjustified penalties or an unjustified rule against penalties?' (2014) 130 LQR 365, 369.

⁵⁴ Morgan, 'The penalty clause doctrine: unlovable but untouchable' [2016] 75 Cambridge LJ 11, 13.

⁵⁵ *Cavendish*, per Lords Neuberger and Sumption at [36].

⁵⁶ Ibbetson, *A Historical Introduction to the Law of Obligations* (OUP 1999) 301.

CONCLUSION

In *Cavendish* and *ParkingEye*, the Supreme Court concluded that it would be inappropriate for the judiciary to abolish the penalty clause rule. They did, however, make it looser and abolished the dichotomy between the penalty and genuine pre-estimate of loss that *Beavis* relied upon⁵⁷. This essay has considered both sides of the argument and has firmly reached the conclusion that there is in fact no reason for retaining the penalty clause rule. This is for two reasons, which fall into line with a more orthodox view of contract law. First, the rule fails to take account of the parties' right to contract freely. Second, it does not allow for efficient breach. These are two significant flaws which cannot be ignored as they erode the parties' freedom.

Overall, the case for retention is based on the principle of commercial certainty and the rule could escape abolition by being significantly reformed and altered to improve its position. Unfortunately, abolition is not currently on the legal reform agenda and so there may be another century-long interlude before another significant penalty clause case emerges. The only appropriate course of action to maintain contractual freedoms, therefore, is to abolish the penalty clause rule forthwith.

⁵⁷ De Waal, 'The Law on Penalties After *ParkingEye v Beavis*' (n 8).

A CRITICAL ASSESSMENT OF THE LAW ON ASSISTED REPRODUCTION AND LEGAL PARENTAGE

Grace Wright

INTRODUCTION

The birth of the first IVF baby in 1978 prompted significant ethical and scientific debate, leading to the establishment of the Warnock Committee in 1982. The role of the Committee was to investigate ‘recent and potential developments in medicine and science related to human fertilisation and embryology’, and to ‘consider what policies and safeguards should be applied.’¹ Since Louise Brown’s birth, modern medicine has rapidly advanced in the field of fertility law, supporting the transformation of the traditional family unit. The publication of the Warnock Report in 1984 formed the basis behind the Human Fertilisation and Embryology Act 1990 (“the 1990 Act”). The 1990 Act was updated by Parliament by the Human Fertilisation and Embryology Act 2008 (“the 2008 Act”). The 2008 Act instigated an increased focus on recognising non-biological parentage, reforming the traditional understanding of ‘family’ as ‘a group of persons related to each other by blood or marriage’.² The most significant change introduced is the extension of the definition of legal parentage to incorporate the non-birth partner in a lesbian couple under ss 42–48. Corresponding with this, a child’s need for ‘a father’ as outlined in s 13(5) of the 1990 Act is amended to simply a need for ‘supportive parenting’ under s 14(2)(b) of the 2008 Act.

The 2008 Act, however, has been criticised for placing excessive weight on recognising alternative family forms at the expense of biological heritage. Andrew Bainham, for example, argues that whilst it is important to give lesbian partners responsibility towards a child, to award them legal parentage is ‘to distort and misrepresent kinship’.³ This paper will firstly discuss the rigidity of the definition of legal fatherhood under the 1990 Act and the implications this had in depriving men of legal fatherhood. It will then address the recognition of a second female parent in lesbian relationships and the resulting exclusion of the biological father under the 2008 Act. It will be argued that the 2008 Act strikes an appropriate balance between the biological and social understanding of what it means to be a

¹ Department of Health and Social Security, *Report of the Committee of Inquiry into Human Fertilisation and Embryology* (Cmnd 9314, 1984) available <http://www.hfea.gov.uk/docs/Warnock_Report_of_the_Committee_of_Inquiry_in_to_Human_Fertilisation_and_Embryology_1984.pdf> 1.2 (The Warnock Report).

² Hale et al, *The Family, Law and Society: Cases and Materials* (OUP 2009) 1.

³ Bainham, ‘Arguments About Parentage’ (2008) 67 Cambridge LJ 322.

parent. It will be suggested, however, that moving away from the traditional two-parent model to allow the legal recognition of a third parent in particular familial situations could be a way to ensure that all parties' interests are fully accommodated and a hierarchical structure of interests is avoided.

THE CONFERRING OF LEGAL PARENTAGE

The traditional understanding of what it is that makes a person a parent is genetics, epitomised in the widely known proverb that 'blood is thicker than water'. There has, however, been a substantial shift away from this view in recent decades due to the changing sociological backdrop of the UK; a rise in divorce and step-families, adoption, surrogacy and infertility treatment using donor gametes has resulted in increasing numbers of children being 'parented' by those who are not their biological parent.

The conferring of legal parentage gives a person certain status in respect of the child: for example, entitlements of intestacy are determined in accordance with legal parentage and legal parents have financial obligations to maintain the child. However, it is only when granted 'parental responsibility' that a person acquires 'all the rights, duties, powers, responsibilities and authority which by law the parent of a child has in relation to the child and his property'.⁴ The real significance of legal parentage is arguably the meaning that it holds for the parent – it provides formal recognition of the role they play in the child's life and cements their personal identity as a parent. The courts have repeatedly recognised the emotional value the status of legal parent holds for individuals, such as in the cases of *Re R (A Child) (IVF: Paternity of Child)*⁵ and *R v E and F*.⁶

The courts have, however, also recognised that modern day parentage is such a complex and multi-faceted concept that it is not possible to capture all the parental relationships a child may have in their life under the umbrella of 'legal parent'. Fertility law specialist Natalie Gamble argues that 'the different policy approaches driving fertility law and family law make them difficult bedfellows, and when they both come into play in court it can often feel like trying to mix oil and water'.⁷ In fact, the effect is the opposite of Gamble's argument: the rigidity of the statutory scheme governing fertility law is balanced by the power of the courts to apply discretionary remedies from family law at a wider level to ensure that a party's interests are not unfairly compromised.

LEGAL FATHERHOOD UNDER THE 1990 ACT

⁴ Children Act 1989, s 3(1).

⁵ [2003] EWCA 182, [5].

⁶ [2013] EWHC 1418 (Fam), [3].

⁷ Gamble, 'Lesbian Parents and Sperm Donors: *Re G and Re Z*' [2013] Fam Law 1429.

s 28 of the 1990 Act sets out the definition of ‘father’ in relation to children conceived via artificial insemination. Under s 28(2), a woman’s husband is the legal father of any child born as a result of fertility treatment using donated sperm. s 28(3) extends this provision to include unmarried couples as long as implantation or insemination occurs ‘in the course of treatment services provided for [a woman who bears a child] and a man together’. In *Leeds Teaching Hospitals NHS Trust v Mr and Mrs A and Others*, a strictly literal interpretation of s 28 denied legal fatherhood to Mr A in favour of the biological father Mr B who was held to be the father at common law.⁸ Mr and Mrs A were a white couple but Mrs A gave birth to mixed raced twins following a catastrophic clinical error by the fertility clinic in which her eggs were mistakenly fertilised with Mr B’s sperm. Dame Elizabeth Butler-Sloss deemed that ‘the present situation where the sperm of a man has been placed in the eggs of a woman by mistake was not...in Parliament’s mind when it passed section 28’.⁹ Despite recognising that the situation fell outside the ambit of the Act, however, she declined to allow any flexibility for this exceptional case, holding that Mr A could not be the legal father under the Act as he had not consented to the insemination of his wife’s eggs by another man’s sperm under the scope of s 28(2). The court declined to apply s 28(3), holding that this section was not intended to include husbands: if so, it would make s 28(3) cover a larger group of people than s 28(2) which would be contrary to usual Parliamentary drafting style. The key rationale behind the judgment was the importance of ‘preserving the reality of [the twins’] paternal identity,¹⁰ rather than opting to ‘distort the truth’.¹¹ ‘Truth’ is seen as analogous with biological reality and the rights of the twins to know their genetic heritage is prioritised, even though this means failing to give the family unit in which they will be raised legal recognition.

Re R (A Child) (IVF: Paternity of Child) highlighted that s 28(3) of the 1990 Act was not drafted with sufficient precision: the lack of clarity in the section caused difficulty for the House of Lords in determining whether B was the legal father of R.¹² B and the legal mother D underwent fertility treatment as a couple using donor sperm. The relationship subsequently ended but D proceeded with treatment without informing the clinic of the change in her relationship status. Lord Walker identified two difficulties resulting from the ‘rather compressed wording’ of s 28(3).¹³ First, the often lengthy duration of fertility treatment makes it difficult to fix the point at which ‘togetherness’ needs to apply. Second, in a situation involving IVF with donor sperm, the section’s wording is not strictly accurate as ‘the

⁸ [2003] EWHC 259 (QB).

⁹ *ibid*, [22].

¹⁰ *ibid.*, [56].

¹¹ *ibid*, [57].

¹² [2003] EWCA 182.

¹³ *ibid*, [23].

infertile male partner does not receive any positive treatment of any kind'.¹⁴ Lord Walker interpreted s 28(3) to mean that the male partner's conduct 'must be such as to make his partner's treatment something of a joint enterprise'.¹⁵ The House of Lords therefore held that B was not the legal father of R, rendering her legally fatherless. The decision seems to conflict with earlier parts of Lord Walker's judgment in which he recognised that there are clear 'material and non-material benefits afforded to a child with a legally determined father as compared to one who is fatherless'.¹⁶ The decision also does not sit comfortably with the 1990 Act itself given the emphasis on 'the recognised need for a father' in s 13(5). Interestingly, Lord Walker stated that a possible effect of s 28(3) was to 'discourage the unsuitable and irresponsible from embarking on such treatment'.¹⁷ In rendering R legally fatherless, however, the court prioritised the rights of the legal mother who recklessly proceeded with implantation without notifying the clinic of the change in her position. Both *Re R* and *Leeds Teaching Hospitals* involved errors in the assisted reproduction process through no fault of the potential fathers'. Depriving both men of legal fatherhood through rigid interpretations of the 1990 Act thus allowed the lives of R and the twins to be underscored by the errors surrounding their conceptions rather than creating a secure basis for their futures.

The 2008 Act seeks to address the lack of clarity in s 28(3) by removing the test of treatment 'together' completely and replacing it with a need for 'agreed fatherhood conditions'.¹⁸ The conditions prescribe a rigid contractual approach, requiring written notice of consent by both parties to the man being treated as the father of any resulting child. The change is an appropriate response to the difficulties faced by the courts in interpreting s 28(3) of the 1990 Act, providing a clearer framework which enables the courts to secure the interests of the child and the potential father more effectively. Paradoxically, the greater degree of certainty offered by s 37 makes the courts more willing to use discretion in order to ensure the fairest outcome for all parties: the courts can be confident that they are not departing excessively from the statutory scheme when implementing judicial discretion as Parliament's intentions are much more apparent. This approach was implemented in *X v Y & Bartholemen's Hospital Centre for Reproductive Medicine* in which the fertility clinic accepted full responsibility for losing the consent forms needed under s 37(1)(a) and (b) to make X the legal father of Z.¹⁹ The court was able to conclude that X had signed the consent forms before commencing treatment and as such he was Z's father. The rigid fatherhood provisions allowed the court to be clear that Parliament's intentions were to make a man in X's position the

¹⁴ *ibid*, [25].

¹⁵ *ibid*, [26].

¹⁶ *ibid*, [3].

¹⁷ *ibid*, [2].

¹⁸ Human Fertilisation and Embryology Act 2008, s 37.

¹⁹ [2015] EWHC 13 (Fam).

legal father of any resulting child. As a result, the court could adopt a common sense approach to ensure that an administrative error did not affect Z's family unit for the rest of her life.

A SECOND FEMALE PARENT

The most significant change brought about by the 2008 Act is the recognition of legal parentage in relation to the second woman in a lesbian civil partnership or relationship under ss 42–44. This change is in line with other legislative changes giving increased recognition to gay couples.²⁰ Even before the legislative changes under the 2008 Act, the courts tried to ensure that the rights of the lesbian non-birth partner were accounted for. A clear example of this is in *Re G (Children) (Residence: Same-Sex Partner)* in which the respondent CW had acted as a 'social and psychological' parent to the children of her same-sex partner.²¹ As the case falls under the 1990 Act, she was not their legal mother. Given that she was not biologically related to the children, the court granted a residential order in favour of the biological mother. Baroness Hale recognised 'the vulnerability of someone in CW's position', and this is clearly something that the 2008 Act seeks to address.²² The court was, however, still able to take steps towards securing a balance of the parties' interests by allowing the children to reside with their biological mother whilst still benefiting from a contact order enabling them to maintain a relationship with their 'psychological' parent CW.

Similarly, in *Re E and F*, the court upheld the rigid requirements of the 2008 Act regarding the conferring of legal parentage on a second woman whilst still ensuring the rights of AB through alternative remedies.²³ AB was the ex-partner of the biological mother CD and had fulfilled a parental role for the first 17 months of E and F's lives. However, Mr Justice Cobb rejected AB's application to be declared a legal parent of the twins under s 42(1) of the 2008 Act, holding that the requirements for AB to become a parent were not satisfied because there had not been informed consent via signed and submitted parental consent forms pre-treatment as specified by s.44. However, as in *Re G*, he acknowledged that this was 'not the end of the story' for AB as she could still have a meaningful bond with the twins.²⁴ To enable this, he exercised his discretion to direct that 'AB's application for contact shall be listed before me for directions as a matter of urgency'.²⁵ Making effective use of alternative options outside of the Act ensures that the rigidity of the legislative framework does not lead to neglect of the non-birth partner's interests.

²⁰ For example, the Adoption and Children Act 2002 and the Civil Partnerships Act 2004.

²¹ [2006] UKHL 43, [35].

²² *ibid*, [45].

²³ [2013] EWHC 1418 (Fam).

²⁴ *ibid*, [15].

²⁵ *ibid*, [100].

EXCLUSION OF THE BIOLOGICAL FATHER

Despite granting legal recognition to modern family forms, the 2008 Act remains traditional by enforcing the idea that a child should only have two parents. In order to uphold this idea alongside the new recognition for lesbian couples, the biological father is expressly excluded under s 45(1) if a second woman is to be treated as a parent under the Act. The 2008 Act does not, therefore, fit comfortably with Lord Nicholls' determination in *Re G* to 'decry' any tendency to depart from the prioritising of a biological parent.²⁶

In *Re G and Re Z*, the applicants were a homosexual couple who had provided sperm for two lesbian couples.²⁷ Mr Justice Baker held that the policy underpinning the reforms in the 2008 Act was 'an acknowledgement that alternative family forms without fathers are sufficient to meet a child's need'.²⁸ The wording of s 45(1) leaves no room for judicial discretion: 'Where a woman is treated by virtue of section 42 or 43 as a parent of the child, no man is to be treated as the father of the child.'²⁹ As a result, the court held that S and T 'are not to be treated in law as the parents of, respectively, G and Z for any purpose'.³⁰ Natalie Gamble concurred with the court's understanding of Parliament's intention, arguing that the Act provides explicitly that 'men in such circumstances like these should not be treated as parents'.³¹ Whilst the Act leaves little scope for interpretation regarding the exclusion of the father in such circumstances, it does not prevent the exercise of judicial discretion in order to secure the interests of biological fathers by looking for solutions elsewhere within family law. In this case, the court granted leave to S and T to apply for s 8 contact orders under the Children Act 1989.

Counsel for the respondents submitted that 'the legislation can and does achieve the goal of recognising that partners of the same sex can both be parents without as a consequence entirely shutting out the biological fathers'.³² Certainly, this is a success of the 2008 Act. However, there remains a strong argument that the Act goes too far in recognising lesbian partners, prioritising the interests of the non-birth mother over that of the biological father and indeed, the interests of the child in knowing his or her biological heritage. Bainham identifies that in Baroness Hale's famous speech on different kinds of parenthood in *Re G*, two out of the three forms of parenthood centre on the child's conception and gestational care:

²⁶ *Re G*, [2].

²⁷ [2013] EWHC 134 (Fam).

²⁸ *ibid*, [71].

²⁹ Human Fertilisation and Embryology Act 2008, s 45(1).

³⁰ *Re G and Re Z*, [113].

³¹ Gamble, 'Lesbian Parents', 1427.

³² *Re G and Re Z*, [78].

‘genetic parenthood’ and ‘gestational parenthood’.³³ Bainham concludes that although both social and biological parents are important, ‘the mistake is to assume that they must be treated identically’.³⁴ With this conclusion, Bainham clearly supports the argument that the 2008 Act does go too far in treating a lesbian partner as equivalent to a biological parent.

Looking at *Re G Re Z* more closely enables a possible alternative conclusion to be drawn. One of the applicants, S, was also the biological and legal father of F as she was born under the 1990 Act. Both F and G therefore have the same biological parentage and are being raised in the same lesbian family unit. The effect of the 2008 Act is that F has a legal father whereas her brother G’s second legal parent is his biological mother’s civil partner. The distinction the 2008 Act draws between the legal parentage of the two siblings is thus rather artificial given that they will be brought up identically. As Baroness Hale observed in *Re G*, whilst the conferring of legal parentage grants an individual legal standing, ‘it does not necessarily tell us much about the importance of that person to the child’s welfare’.³⁵ Legal parentage might be valued enormously by an individual but the most significant factor is clearly whether they are able to play a parental role in the child’s life. As was the case in *Re G Re Z*, this is something that the court retains a significant amount of discretion to control, balancing out the rigidity of the Act where appropriate to guarantee the interests of the biological father. However, despite the arbitrariness of the distinction in practice, no doubt for S on a personal level, the distinction drawn between his status as a legal father of his daughter F but not of his son G seemed frustrating and unfair.

CONCLUSION

Parliament responded appropriately to the problems arising in respect of legal fatherhood under the 1990 Act, improving the clarity of the fatherhood provisions in the 2008 Act. The amendment clarified Parliament’s intentions and thus making the courts more willing to exercise discretion to ensure fairness where necessary. The 2008 Act also offers newfound security to lesbian families. The courts have sufficient discretion to use alternative remedies within family law to acknowledge the interest of the biological father and the interest of the child in forming a relationship with his or her biological father. This ensures an adequate protection of parties’ interests.

There is, however, a difference between being merely adequate and achieving a true balance of interests. A way forward could be the recognition of a third legal parent. Parental responsibility can be conferred

³³ Bainham, 8–9.

³⁴ *ibid*, 13.

³⁵ *Re G*, [32].

on more than two individuals and so the idea of three parents is certainly not a novel concept. Even the biological understanding that a child can only have two genetic parents now has a gloss on it following the implementation of the Human Fertilisation and Embryology (Mitochondrial Donation) Regulations 2015.³⁶ The Regulations allow children to be born via the medical technique of mitochondrial donation. Whilst from a medical point of view the mitochondrial donor is not related to the child as all the genetic information remains stored in the nucleus of the birth mother's egg, the child could not have been created without the involvement of all three people. In the case of lesbian families, recognising the birth mother, the birth mother's female partner and the biological father as legal parents could provide a modern and fairer solution to parentage in such circumstances. Notably it remains far more difficult for same-sex male couples to be conferred with legal parentage than it does for lesbian parents as gay fathers must use a surrogate to have a genetic child, meaning that it is only possible for one partner to be the legal father. As Gamble acknowledges, 'the structures are now in place for lesbian parents conceiving together but gay dads often find it a lot more difficult'.³⁷ Given the limited practical impact legal parentage actually has on who a child considers to be his or her parent, the primary effect of such a reform would be to place all parties involved in such circumstances on an equal footing, cementing the parental bond between all parties and the child and drawing them closer together as a co-operative parenting unit.

³⁶ The Regulations were approved by the House of Lords on 24th February 2015.

³⁷ Gamble, Same-Sex Parents (BBC Radio 4 2014) available <<http://www.bbc.co.uk/programmes/b04htrnw>>.

SHOULD TORTURE BE PERMISSIBLE WHEN THERE IS A TICKING TIME BOMB?

Dilan Yaslak

The international position on torture represents a central and defining feature of a liberal democracy. Characterised as a first generation right, the absolute prohibition against torture is a *jus cogens* norm, namely an agreement between all states in the international community that torture cannot be permitted under any circumstances, including ticking time bomb scenarios (TTBS). Yet, while these liberal democracies perceive the prohibition as a legal and cultural norm and publicly condemn states that torture, in recent years, torture has become endemic. In fact, it is those states with a reputation for justice, human rights, accountability and the rule of law that systematically practice torture behind a façade of democratic legality. After analysing the TTBS itself, this paper proceeds to scrutinise the utilitarian, Kantian and slippery slope arguments that consider the permissibility of torture in TTBS. An analysis of these justifications will demonstrate that the prohibition against torture is fundamental in determining the boundary between the values of a liberal democracy and state tyranny, and in particular in upholding human dignity. Consequently, it will be submitted that the absolute nature of the prohibition should be maintained.

Although, numerous treaties forbid torture,¹ the absolute right is importantly embedded into Article 1 of UNCAT² and Article 3 of the ECHR.³ Signatories to both Conventions have an unqualified positive and negative duty to refrain from and prevent torture. However, problems have arisen under the articles as to the distinction between torture and cruel, inhuman or degrading treatment (CIDT). It has been argued that the latter is not the same as torture and in *Ireland v UK*,⁴ the European Court of Human Rights (ECtHR), when considering the use of stress and duress tactics,⁵ struggled with the definition. Such methods were categorised as CIDT within Article 3 ECHR as the ECtHR declared that there was a certain severity threshold to be met for an act to be described as torture.

¹ Geneva Conventions, art 3; Universal Declaration of Human Rights, art 5; International Covenant on Civil and Political Rights, art 7; United States Constitution, Amendment 8; Canadian Charter, art 12; New Zealand Bill of Rights Act, s 9.

² UN Convention against Torture and other Cruel, Inhuman, Degrading Treatment or Punishment, art 1.

³ European Convention on Human Rights, art 3.

⁴ (1978) 2 EHRR 25.

⁵ Also known as torture-lite and includes, inter alia, wall-standing, hooding, subjection to noise and deprivation of sleep, food and drink.

Nevertheless, torture-lite methods clearly fall within Article 1 UNCAT and even under the ECHR; subsequent ECtHR cases⁶ have weakened the distinction. Evidently, the severity threshold for torture is met when torture-lite methods are used for long periods of time and in combination with each other, for ‘there is no...little torture without more torture.’⁷ Accordingly, *Ireland* would not be decided in the same way today and for present purposes, torture-lite is classified as torture. The discussion, moreover, will be confined solely to interrogational torture since this is where the current resurgence of interest lies. The ‘War on Terror’ has stimulated the international pace for interrogational torture and, while it will be acknowledged that the challenges faced by the world have changed, it is argued that human rights values must not.

In a world committed to national and transnational justice, the political mantra ‘we never condone or co-operate in torture’ has become meaningless. Yet, rather than making torture nationally or internationally legal, democracies have either narrowed the definition of torture through domestic legislation,⁸ or have defended its use primarily on the basis of TTBS. The question arises, therefore, as to whether torture should be brought out of this hypocritical dark room and made permissible in TTBS, or whether its absolute nature of its prohibition should be maintained.

The TTBS has been advocated by many academics and there have been countless variants of the scenario proposed. One example is Shue’s account, namely, ‘...a fanatic, willing to die rather than collaborate in the thwarting of his own scheme, has set a...device to explode in...Paris. There is no time to evacuate the innocent people...the only hope of preventing tragedy is to torture the perpetrator, find the device and deactivate it.’⁹ Although, TTBS is the main focus, since those who have justified torture in demoralising the values of a liberal democracy have done so on this basis, it should be emphasised that the scenario contains many false assumptions. TTBS have been designed to represent a dilemma involving the dignity and security of an individual perceived as guilty and that of numerous victims. Yet, it attempts to persuade the supporter to

⁶ *Selmouni v France* (2000) 29 EHRR 403, where the court held, at [101], that ‘having regard to the fact that the Convention is a “living instrument which must be interpreted in light of the present day conditions”, the court considers that certain acts which were classified in the past as “inhuman or degrading treatment” as opposed to torture could be classified differently in the future...’ See also *Chitayev v Russia* (2008) 47 EHRR 1 and *Gafgen v Germany* (2011) 52 EHRR 1.

⁷ Rejali, *Torture and Democracy* (Princeton University Press 2009) 453.

⁸ States can define torture within their domestic legal system in terms they choose but have to abide by the internationally recognised definitions. For this reason, Talal Asad criticises international treaties for assuming definitions of torture as universal when they have actually emerged from a European liberal understanding – Asad, ‘On Torture or Cruel, Inhuman and Degrading Treatment’ in Das et al (eds), *In Social Suffering* (University of California Press 1997).

⁹ Shue, ‘Torture’ (1978) 7 *Philosophy and Public Affairs* 124.

violate a jus cogens norm and surrender essential dignities on the basis of uncertain risks. The scenario assumes that a guilty person¹⁰ with the required information is arrested, that torture is the only solution and that torture will work in the time available to elicit accurate information. Noticeably, however, the time and effectiveness components run counter to each other, the likelihood of accurate information is low and, as Scarry accurately summarises, ‘...in a world where knowledge is...imperfect, we are suddenly granted the omniscience to know that the person...holds...crucial information about the bomb...’¹¹ Manifestly, the absolute nature of torture’s prohibition should be maintained and should not succumb to a flawed scenario. Nevertheless, although TTBS are unlikely to arise, such cases still need to be evaluated in order to analyse the justifications for the permissibility of torture.

The acceptability of torture in TTBS was primarily discussed through utilitarianism. The theory understands torture as an economic exchange of costs and benefits and determines the boundary between the values of a liberal democracy and state tyranny on the basis of consequentialism. According to this perception, when benefits outweigh disadvantages, an action becomes morally justified. It follows that torture is permissible in TTBS for the benefits of torturing are high – countless innocent lives are saved – while the costs – violating one individual’s human dignity – are low. Thus, on a utilitarian view, the absolute nature of torture’s prohibition is valued only insofar as it promotes utility. As soon as the prohibition ceases to encourage maximum aggregate happiness, it becomes derogable. Such a view was adopted by the Israeli Landau Commission, which permitted torture in TTBS on the understanding that, ‘everything depends on weighing the evils’.¹² On the utilitarian cost-benefit analysis, therefore, torture is the lesser of two evils.

The unacceptability, however, of allowing torture to become derogable is illustrated by the very theory that uses TTBS to justify its permissibility. Critically, utilitarianism lets a numbers game with no inherent limit determine whether a fundamental human right should be violated. Inevitably, the dangerous question arises as to where the line can be drawn to prevent state tyranny, if such a line can be drawn at all. As Luban accurately described, ‘once you accept that only the numbers count, then

¹⁰ In the absence of full certainty, the risk of torturing an innocent person is morally unacceptable and yet the apprehended individual is assumed guilty before any legal process that establishes their guilt. This is most evident in the US treatment of detainees in Guantanamo Bay and clearly violates the right to a fair trial (an essential right in democratic countries respecting the rule of law (Article 10 UDHR).

¹¹ Scarry, ‘Five Errors in the Reasoning of Alan Dershowitz’ in Levinson (ed), *Torture: A Collection* (OUP 2004) 284.

¹² *Report of the Commission of Inquiry in the matter of Interrogation Methods of the General Security Service Regarding Hostile Terrorist Activity*, First Part (Jerusalem 1987) First Part, para 3.16.

anything...becomes possible.¹³ It would undoubtedly be acceptable for utilitarians to torture 699 suspects if 700 lives were saved. The question then becomes how many individuals would be too many to torture? It would also be permissible for utilitarians to torture innocent individuals, children and the mentally impaired as long as the consequences justified such action. Allhoff demonstrated this by stating, ‘...it is worse to torture a guilty person and an innocent one than to torture only a guilty one, but...this...could be justified if there are enough people at risk...’¹⁴ Although Allhoff claims that torturing the innocent is worse, he overlooks the democratic value of the equality of human rights in protecting the dignity of all. An individual’s status is irrelevant in the prohibition of torture and should also be immaterial in analysing its permissibility in TTBS. Nevertheless, utilitarianism ignores innocence not because of democratic values, but because it has no effect on maximum utility. Thus, as long as results are the only basis for public morality, it becomes possible to justify anything. Moreover, utilitarianism is indifferent to the fact that the state who tortures fails to be accountable, fails to respect the rule of law and most importantly fails to protect liberties, including respect for human dignity. The prohibition of torture and international human rights in general is rooted firmly in human dignity. Even one individual’s dignity is something that cannot be counterbalanced in a cost-benefit analysis because the disadvantages of torture are incommensurable. To do so undermines the spirit of human rights. In order to uphold the values of a liberal democracy and prevent state tyranny, it is essential, therefore, to maintain the absolute nature of torture’s prohibition.

Furthermore, even if torture’s absoluteness was determined by a cost-benefit analysis, the short-term utilitarian consequentialist view is impoverished once the long-term costs and benefits of torturing are considered. It is important in comparing short and long-term effects to distinguish between Act and Rule utilitarianism. Whereas the former thinks that short-term results excuse torture in TTBS, the latter believes that rules that lead to the greatest good will have better consequences than accepting exceptions in individual circumstances. Thus, the prohibition of torture is supported unless the greatest good is not achieved in the long-term. Nevertheless, Rule utilitarianism is not that different from Act utilitarianism. In the latter’s assessment, a rule that allows torture in TTBS leads to the greatest good and consequently, no matter which view is taken (torture as an exception or as a rule), torture is permitted. Either way, however, the justification is undermined once it is acknowledged that torture dilutes democratic values and causes widespread repercussions of routine state brutality beyond TTBS. While torturing may save hundreds, every individual in a torturous state becomes vulnerable to having their

¹³ Luban ‘Liberalism, Torture and the Ticking Bomb (2005) 91 Virginia Law Review 1425, 1444.

¹⁴ Allhoff, *Terrorism, Ticking Time-Bombs and Torture* (University of Chicago Press 2012) 141.

human rights denied and the very torture used to enhance security can be used to terrorise them. Clearly, the benefits no longer outweigh the costs and maximum utility is not a possibility.

Conversely, the Kantian theory argues that individuals should not be treated as a means to an end but rather as ends in themselves. Kantianism takes the view that utilitarianism ignores the unqualified dignity that individuals deserve by permitting torture, for torture is the greatest form of disrespect and violates human autonomy simply to acquire information. Moreover, Kantians claim that states are to ‘act only on that maxim whereby you can allow it to become universal law.’¹⁵ Yet, as the jus cogens status of torture highlights, societies do not want torture to become universally employed and so Kantianism concludes that in determining the boundary between democratic values and state tyranny, the absolute nature of the prohibition on torture should be maintained. This appears to indicate that supporters of the Kantian theory and utilitarians are at opposite ends of the spectrum. If the arguments made are examined closely, however, it can be seen that when it comes to the question of the permissibility of torture in TTBS, some Kantians adhere to the Utilitarian outlook. In fact, as Ginbar illustrates¹⁶, the Kantian theory which opposes the consequentialist justification, appears to surrender when it comes to TTBS and takes the view that the tragedy justifies sacrificing other moral considerations. Arguably, this latter viewpoint is analogous to Act utilitarianism, in that treating the tortured as a ‘thing’ rather than a person with values, is defended (exceptionally) by an appeal to the common good. Yet, as previously emphasised, any appeal to the common good to violate an absolute right cannot be permissible under any circumstances and undermines the values of a liberal democracy. The common good lies not in torturing to save lives but in being protected from a state that tortures, even if only in TTBS. Evidently, it is clear that torture cannot be justified under the utilitarian or the latter Kantian stance, since upholding the prohibition has benefits far beyond those states can achieve by torturing, treats individuals as a means rather than an end and is fundamental in determining the boundaries of a liberal democracy and state tyranny. Rather, one should adopt the strict Kantian view which looks to the intrinsic worth of humans with all the rights and dignities that that moral worth entails.

Additionally, it follows from the strict Kantian position that torture should not be permissible in TTBS simply because it is morally reprehensible. The universal prohibition of torture rests primarily on the moral effects of torture on the tortured and the state. Moral integrity, autonomy and a person’s inviolability are the key to human dignity and the equality of all.

¹⁵ Kant, *Grounding for the Metaphysics of Morals* (Hackett Publishing Company 1993, translated by James Ellington) 30.

¹⁶ Ginbar, *Why not torture terrorists?* (OUP 2008).

Since it is the aim of torture to break down the individual, respect for dignity is the cornerstone of the prohibition. From the perspective of the tortured, torture is intrinsically wrong because it violates his physical and mental integrity, his right to security and negates his autonomy. The entire world of the tortured is destroyed and he becomes a mere puppet in the hands of the torturer,¹⁷ as is apparent from the torture survivor Amery, who explains that, ‘twenty-two years later, I am still dangling over the ground by dislocated arms...’¹⁸ One only has to remember Abu Ghraib to understand why the absolute prohibition of torture is fundamental in determining the boundary between the values of a liberal democracy and state tyranny. The sense of indignity and injustice that torture creates brutalises the societies individuals live in and leads it to hurtle into an abyss of amorality. It is therefore vital that the absolute prohibition is maintained.

On the other hand, supporters of torture in TTBS do not dispute or deny the immorality of torture but rather assert that it is the lesser of two evils, making it morally justifiable. The argument claims that failing to torture violates the human dignity of the civilians who will die and accordingly, some supporters’ insist that the torture cease once the requisite information is obtained. Nevertheless, torture is once again placed on the balancing analysis that it has been urged that it should not be placed on. According to Allhoff, ‘if we care about dignity, then we should care about maximally preserving it.’¹⁹ However, if one were to adopt a utility analysis, then even on this perception torture is not the lesser of two evils, for the moral benefits still outweigh the costs. As Statman argues, ‘the moral danger of torture is so great and the moral benefits so doubtful, that...torture should be considered as prohibited absolutely.’²⁰ Within this context, an issue of rights conflict arises, namely whether the freedom from torture or right to life should prevail. It appears that TTBS provide a sense of emergency that results in states reducing civil liberties to enhance the right to life. The point is clearly put by Gross who states that, ‘...when life is at stake, respect for dignity runs a poor second.’²¹ Such arguments, moreover, disregard the inalienability of all the human rights provided for by multiple international conventions. Both the right to life and freedom from torture are absolute rights which cannot be derogated from and their worth cannot be determined by balancing it against the other. Such balancing exercises raise questions of whom international human rights are aimed at and neglects the democratic value of equality. While TTBS provide the dilemma of rights conflict, a state that chooses to torture unacceptably disregards the

¹⁷ Those supporting torture in TTBS do not care for the torturer either. Hence, from a Kantian perspective, the torturer’s human dignity is also violated because they become a means to an end.

¹⁸ Amery, *At the Mind’s Limits* (Indiana University Press 1980) 33.

¹⁹ Allhoff (n 14) 184.

²⁰ Statman, ‘The Prohibition against Torture’ (1997) 4 *Mishpat u-Mimshal* 161.

²¹ Gross, ‘Regulating Torture in a Democracy: Death and Indignity in Israel’ (2004) 36 *Polity* 367, 386.

rule of law and the protection of human dignity. It is this inherent morality that cannot be counterbalanced against other rights and is central in maintaining the absolute nature of torture. A democracy which prizes all the qualities of human dignity cannot subsequently undermine those democratic values in TTBS. Any failure to uphold the absolute prohibition will undermine the boundary between the values of a liberal democracy and state tyranny and should not be permitted.

It is crucial, moreover, that the absolute nature of torture is maintained in order to prevent its widespread use. Unsurprisingly, once permitted, torture in TTBS becomes a precedent for torture in non-TTBS and a tyrannical state emerges. The USA's war on terror began with this justification but has now developed into a scenario with no element of immediacy. As Mayerfeld pointed out, 'Guantanamo Bay is the hellish incarnation of the slow-fuse bomb justification of torture'²² and the torture at Abu Ghraib had nothing to do with TTBS. Thus, it quickly becomes the case that a situation 'close enough' to TTBS is justified and torture 'soon becomes a well-traveled road',²³ where indefensible human rights abuses prevail. Both Israel²⁴ and the USA are strong examples of torturous states that have neglected the vital democratic values of accountability, the rule of law and the protection of civil liberties. Noticeably, the Israeli case of *Abd al-Rahman Ghaneimat*²⁵ exemplifies this point. In that case, the state admitted that Ghaneimat was subjected to prolonged sleep deprivation, shackling and hooding and yet the Supreme Court held that even after two months, torture was still necessary for the procurement of information. Additionally, the UK and US practice of extraordinary rendition and diplomatic assurances are further demonstrations of torture extending beyond the accepted parameters.²⁶ Extraordinary rendition is the process of deporting individuals to other states 'with the promise that they won't be tortured and the certainty that they will.'²⁷ It is in essence a process of cross-border torture that is not a TTBS and is antithetical to democratic values. Extraordinary rendition is a violation of international law and the ECtHR has made it clear that diplomatic assurances cannot be relied on to

²² Mayerfeld, 'In defense of the absolute prohibition of torture' (2008) 22 Public Affairs Quarterly 110, 120.

²³ Rejali (n 7) 457.

²⁴ In *The Public Committee against Torture in Israel v Government of Israel et al* (1999), the Israeli Supreme Court attempted to use the defence of necessity to limit torture to TTBS. An examination of the practice of torture in Israel reveals, however, that torture has gradually become routine.

²⁵ *Abd a-Rahman Ghaneimat and the Public Committee against Torture in Israel v Minister of Defence et al* (1996).

²⁶ Rendition programmes are found in the USA where torture is outsourced to various states such as Canada, Italy, Syria, Egypt, Jordan and Morocco. Likewise, the UK has consistently rendered individuals to Libya.

²⁷ Chazelle, 'How to Argue Against Torture' (Princeton University 2009) available <<http://www.cs.princeton.edu/~chazelle/politics/torture09.html>>.

overcome international obligations.²⁸ Therefore, contrary to what is claimed by utilitarians, maximum dignity is achieved not by torturing, but by states complying with their negative international duties.

A further illustration of the slippery slope argument is the justification of interrogational torture in preventing other crimes. If the device in Shue's example is replaced with drugs or a kidnapped child, keeping all the other factors in place, the justifications for torture in TTBS extend to these criminal activities. Luban crucially asks, 'why not torture in pursuit of any worthwhile goal?'²⁹; the case of *Gafgen v Germany*³⁰ provides the answer. In *Gafgen*, an individual who had murdered a child was threatened³¹ with the infliction of torture in the hope that he would disclose the child's whereabouts (the police were unaware that the child was dead). This was a clear TTBS in the kidnapping context and while a violation of Article 3 ECHR was found, the German courts in their own decision displayed a tolerance towards those who may not comply with the absolute prohibition.³² It is a dangerous misconception to believe that torture can be limited and separated from tyranny. Evidently, permitting torture in TTBS leads to a cheapening of that rationale in various ways. Countless occasions of torture which have been justified by invoking TTBS have remained under that guise and have resulted in much wider damage to liberal democracies than was originally foreseen or considered acceptable. Hence, the use and acceptance of torture is fundamental in determining the boundary between the values of a liberal democracy and state tyranny.

It is not only the case that torture leads to undesirable consequences, but also that no line can be drawn in practice to prevent these effects. In dealing with the slippery slope argument, Dershowitz has argued that the floodgates are already open and that torture is used widely in democracies.³³ For this reason, Dershowitz contends that in order to determine the boundary between democratic values and state tyranny, torture in TTBS needs to be permitted and legalised through a system of judicial torture

²⁸ *Saadi v Italy* (2009) 49 EHRR 30. The ECtHR stated that whether a state had complied with its international legal obligations under Article 3 ECHR when receiving a diplomatic assurance will be determined on a case-by-case basis. Similarly, the UN has warned the UK about unreliable and ineffective diplomatic assurances.

²⁹ Luban (n 13) 1443.

³⁰ (2011) 52 EHRR 1.

³¹ In *Campbell and Cosans v UK* (1982) 4 EHRR 293, the ECtHR found that a threat to torture constitutes CIDT under Article 3 ECHR if it is 'sufficiently real and immediate'. However, as has been submitted, *Gafgen* serves to highlight the point that the difference between CIDT and torture has been significantly weakened.

³² The German courts found Daschner guilty of instructing a subordinate to commit an offence and the subordinate police officer guilty of coercion. Nevertheless, the court refrained from imposing a punishment and illustrated an understanding in TTBS for violations of absolute human rights.

³³ Dershowitz, *Why Terrorism Works* (Yale University Press 2002).

warrants.³⁴ Such institutionalisation would, in his view, curtail the slippery slope and uphold accountability and the rule of law. The point was similarly put by Gross, who wrote that ‘legal rigidity in the face of severe crises [like the TTBS]...is...detrimental to...the rule of law.’³⁵ Although it is acknowledged that the continuous practice of torture hidden behind a veil of legitimacy is harmful, it is submitted that the institutionalisation of torture in TTBS will further weaken respect for the rule of law and human dignity. Institutionalisation creates an infrastructure that normalises torture and undermines the values of a liberal democracy more than any process of hypocrisy. In fact, in *Ireland v UK*³⁶ the ECtHR expressed deep concern that tolerance of prohibited acts would lead to an ‘administrative’ practice of torture. Thus, Dershowitz’s untenable assumption that absolute rights cannot exist overlooks the fact that absolute human rights are the guardian of democracy and not vice versa. On a utilitarian cost-benefit analysis, the infrastructure necessitated by the torturing state and its negative consequences, outweighs the gains associated with torturing in TTBS. Once the wall of immunity is erected around officials, the institutions serve to protect the state, rather than individuals and the democratic values that Dershowitz purports to uphold are subjugated. Therefore, the only solution is the maintenance of the absolute prohibition by the international community.³⁷

Additionally, an analysis of the arguments supporting torture in TTBS reveals the erroneous assumption that torture extracts the information required to defuse the device. Enthusiasts of torture in TTBS are supporters precisely because of the immediacy of the impending device. Yet, it is this imminence that ensures that effective torture cannot be carried out in the time postulated and thus advances the argument that the absolute nature of torture should be maintained. Information gained by torture will be unreliable and invaluable since the tortured will say what the torturer wants to hear. In fact, torture may prevent the acquisition of information altogether and this was seen in the case of Abu Zubaydah who provided information to interrogators freely but shut down when he was tortured by the CIA. Moreover, it is increasingly forgotten that the tortured may rather die than disclose information. During the ‘war on terror’, the

³⁴ The practice of judicial warrants would make torture legal insofar as a warrant was issued. However, any system of judicial warrants would have severe implications. A failure to gain a warrant will not necessarily translate into refraining from torture. Indeed, when time is of the essence as in TTBS, it is a reasonable expectation that judges would invariably issue warrants in order to avoid the risk of being blamed. Thus, judicial warrants compromise judicial integrity and allows the judiciary – a pillar of liberal democracy – to be complicit in the abuse of human dignity.

³⁵ Gross, ‘The Prohibition on Torture and the Limits of the Law’ in Levinson (ed), *Torture: A Collection* (OUP 2004) 237.

³⁶ (1978) 2 EHRR 25.

³⁷ The United Nations Optional Protocol to the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (2002) is a good initiative in monitoring the practice of torture.

world's perception on terrorism and torture changed and Shue's example contains exactly the point that supporters of torture fail to realise, namely that the fanatic is willing to die rather than collaborate in the thwarting of his scheme. Nevertheless, some take the view that even if one case of torture is successful then the endeavour has been worth it. To demonstrate this, the Abdul Murad case has been consistently invoked. There, Murad disclosed information that thwarted the World Trade Center bombings after the Filipino police tortured him. In doing so, however, academics continuously disregard the fact that Murad's torture lasted for sixty-seven days, meaning that this was not a TTBS. Also, if the police had focused primarily on decrypting a computer they had acquired, then the information would have been obtained without violating fundamental human rights. Hence, the cases demonstrate that methods other than torture are effective in gaining accurate information in TTBS and so there is no rational justification for its permissibility. As Arrigo rightly questions, 'can we put (only)...terrorists into the torture chamber and put out at the other end timely and true knowledge...? Can just a little bit of torture...cause just a little bit of harm to a democratic society?'³⁸ Undoubtedly, the answer is no. A society that upholds democratic values cannot postulate the mere possibility of gaining uncertain information in deciding whether to violate a jus cogens norm. Ultimately, the result is that of unreliable evidence gathered by a tyrannical state that has failed to respect human dignity and the rule of law.

In conclusion, when a step is taken back to review the reasons why torture was absolutely prohibited, it becomes clear that even in the face of terrorism and our changing notions of torture, such reasons still stand today. The unanimous international agreement that torture is wrong, whenever and for whatever reason, continues to prevail in the legislation. The only problem is that the legislation is not reflected in domestic application. In this context, transnational justice has become increasingly important. The case of Binyam-Mohammed demonstrated the flow of ideas and judgments from the UK to the US courts. This pursuit of justice across borders is essential in safeguarding democratic values and bringing those liable to account. Any utilitarian, Kantian or moral argument that supports the permissibility of torture in TTBS allows torture to morph into an instrument of power and disregards the inviolability of human dignity. Liberalism and democracy is an ongoing process and international and transnational law should uphold vital democratic values by retaining its strict stance. The right of freedom from torture is so fundamental in determining the boundary between the values of a liberal democracy and state tyranny that its absolute nature should be maintained.

³⁸ Arrigo, 'A Utilitarian Argument Against Torture Interrogation of Terrorists' (2004) 10 Science and Engineering Ethics 543, 545.

DAVIES v DAVIES: ALL WORK AND NO PLAY

Luke Tattersall

The case of *Davies v Davies*, which began in 2012, recently came to a close in late 2015 with the High Court ruling in the claimant's favour.¹ The following note will set out the complex factual nature of the case before proceeding to consider the legal ramifications of the High Court's judgment.

BACKGROUND

The dispute centred around a family farm in Wales. The defendants, Mr and Mrs Davies, were the owners of Henllan Farm, a successful farming business specialising in milking pedigree cows. They had three daughters, one of whom, Eirian Davies, brought a claim against her parents for a beneficial interest in the farm arguing proprietary estoppel.

From the age of 17, Eirian Davies worked on the family farm, putting in long hours for no financial reward. The court at first instance found that Eirian had worked for no pay up until the age of 21 and thereafter had been paid only a negligible sum.² The background of this case is factually complex and spans from 1984 to 2012, during which time there were numerous personal disagreements, resulting in Eirian leaving the farm.

As the claim related to proprietary estoppel, the courts were concerned to establish the nature of any assurances which had been made to Eirian, the extent to which she had relied upon them and the subsequent detriment that followed as a result.³ In 1985 Eirian's parents told her that the farming business would be hers one day and as a result she remained on the farm whilst her two sisters left to pursue other careers. In 1989 Eirian had an argument with her parents and ceased living on the farm, but nevertheless continued working. In 1998, her parents affirmed their previous assurances, telling Eirian that she had a long-term future on the farm. Eirian subsequently moved into the main Farm House under the impression that she was a partner in the farming business, having signed a partnership agreement. It became apparent, however, that her parents had not signed the partnership agreement as agreed, meaning that Eirian had

¹ *Davies v Davies* [2015] EWHC 015 (Ch).

² *Davies v Davies* [2013] EWHC 2623 (Ch).

³ *Dilhyn v Llewelyn* [1862] EWHC Ch J67; *Jennings v Rice* [2002] EWCA Civ 159.

no formal interest in the farm.⁴ In 2001 Eirian left to pursue a job on another farm as a reproduction specialist.⁵

Eirian remained in alternative employment for a period of 6 years from 2001 to 2006. In 2007 her parents enticed her back to the farm on the basis that she would have a rent free home, and in 2008 she was made a shareholder in the farm.⁶ In 2009 Eirian's parents encouraged her further by presenting a draft copy of their will which showed that the farm would be left to Eirian upon their death, however, the will was never executed.⁷

Mr and Mrs Davies made assurances in public that the farm would belong to Eirian one day whilst at the opening of a new milking parlour.⁸ Furthermore, Mrs Davies made similar assurances to guests that the farm was for Eirian's future and that she hoped her daughter would be as happy on the farm as her and her husband had been for 50 years.⁹ In 2012, Eirian got into a heated argument with her parents when it became apparent that their will stated that the farm would be placed into a trust and that the residue would be split between all three daughters in equal shares. Eirian ceased working on the farm and her parents subsequently attempted to evict her, at which point she initiated proceedings seeking a beneficial interest.¹⁰

The case of *Davies* attracted significant media attention and Eirian Davies was dubbed the 'cowshed cinderella'.¹¹ Based upon the court's findings, such statements are not unfounded as Eirian was found to have frequently worked from 8am to 9pm on the farm for close to 20 years between 1984 and 2012, receiving only accommodation and limited pay.¹² The judge at first instance noted that Eirian Davies's skill and hard work was instrumental in the success of the family's farming business, valued at £7 million.¹³

THE LEGAL IMPLICATIONS OF DAVIES

Unsurprisingly, based upon the information set out above, the court found that Mr and Mrs Davies had made assurances to Eirian that the farm would be hers one day. What is significant about *Davies v Davies*, however, is the attention paid to the concept of detriment. The court emphasised that the

⁴ *Davies v Davies* [2014] EWCA Civ 568, [8].

⁵ *ibid*, 15.

⁶ *Davies* (n 1), [11].

⁷ *ibid*, 15.

⁸ *ibid*, 9.

⁹ *ibid*.

¹⁰ *Davies* (n 2).

¹¹ De Bruxelles, 'Victory for Cowshed Cinderella' (2015) *The Times*, available <<http://www.thetimes.co.uk/tto/news/uk/article4365814.ece>>.

¹² *Davies* (n 1), [11].

¹³ *ibid*.

level of detriment could only be ascertained by a holistic analysis, examining all the circumstances of the case.¹⁴

The judge ruled that the detriment which Eirian Davies suffered was not solely financial as regards to not being paid, or being paid a negligible sum, for the work she completed. The detriment also involved working long hours, undertaking manual labour such as milking and herding the livestock and carrying out general veterinary practices.¹⁵ Furthermore, the judge noted how the fact that Eirian Davies could have worked shorter hours elsewhere for more money and in a more congenial environment, away from a difficult working relationship with her parents, also constituted detriment.¹⁶ What is significant is the broad and expansive interpretation of detriment, suggesting that in future practitioners will be able to rely on *Davies* as an authority for arguing that activities which may appear to be occupational norms could constitute detriment, and that detriment can only be understood when examining the facts of the case as a whole.

The case of *Davies* also serves to highlight the discretionary, and arguably unpredictable, nature of remedies in proprietary estoppel claims. In the instant case, Eirian Davies was awarded one-third of the estate, equating to £1.3 million. The logic of the award was clearly that Mr Davies, Mrs Davies and Eirian Davies had all contributed to the success of the farming business and as a result a 1/3 share reflected that, if in a somewhat simplistic way. The case of *Davies* is relatively uncommon in the sense that the proprietary estoppel claim was brought whilst both of Eirian's parents were alive, whereas typically such claims are brought by claimants dissatisfied with a will. There is a high likelihood that if the claim had been brought after Mr and Mrs Davies's passing, the court would have satisfied the assurances made to Eirian Davies by awarding her the whole, or a significant majority, of the estate. In the instant case, however, equity required that the interests of the parents be considered.

Furthermore, the sum of one-third was arrived at by considering the positions of the three interested parties (not counting the two daughters who were beneficiaries under the will). However, given the very significant contribution which Eirian Davies made to the success of the farm by frequently working 100 hours a week and offering specialist veterinary expertise,¹⁷ it is plausible that a different judge could have exercised his or her discretion differently by awarding Eirian a greater share of the equity. *Davies* demonstrates the somewhat heavy-handed and blunt nature of equitable remedies arising from proprietary estoppel and highlights the difficulty faced by practitioners in arriving at a suitable sum when negotiating settlements.

¹⁴ *ibid*, [29].

¹⁵ *ibid*, [40].

¹⁶ *ibid*, [10].

¹⁷ *ibid*, [11].

