GRAY'S INN STUDENT LAW JOURNAL

VOLUME XIII

Association of Gray's Inn Students

LONDON · 2021

GRAY'S INN STUDENT LAW JOURNAL

VOLUME XIII

EDITED BY

Peter Mitchell

PEER REVIEWERS

Beatrice Baskett
Michael Coumas
Emily Hayward
Rebecca Malczewski
Jana Ward
Yu Jian Woon

CONTENTS

Two Case Comments on *R v Lawrance* [2020] EWCA Crim 971:

EDITOR'S FOREWORD

In his foreword to the first volume of the *Gray's Inn Student Law Journal*, in 2010, the Hon. Michael Beloff QC wrote: 'As befits the Inn which has been the pioneer in so many aspects of education, Gray's Inn students have been the first in the field with a journal of their own whose contributors are all in house.' The journal provides an opportunity offered uniquely to Gray's Inn students not only to engage academically with legal topics that greatly interest them; in addition, it enables those published to demonstrate distinctive evidence of intelligence and commitment to the Bar. The current volume seeks to maintain this tradition by drawing all contributions from current student members of the Inn.

When the Association of Gray's Inn Students (AGIS) elected me as the editor for 2021, to ensure the quality of contributions, I assembled a team of student peer reviewers each with specialist legal knowledge. This approach had not been adopted, at least not formally, by previous editors, who tended either to work alone or as a 'board' of editors or as a sole editor with assistant editors. Nevertheless, the approach ensured that each submission was evaluated by at least one reviewer with extensive knowledge in the relevant legal area. I am therefore grateful to the peer reviewers for their judgement and for their efficient and willing cooperation.

From year to year, this journal bears witness to the diverse interests and specialisms of the student membership of the Inn. This year these range from the legal force of unincorporated treaties and international agreements (the winner of this year's Michael Beloff Essay Prize by Sahar Khan) to the arguably gendered partial defence of loss of control against charges of murder (Miranda Zeffman). Of the two great branches of the law, civil law outnumbers criminal law topics. The winner of this year's Lee Essay Prize, David Lipson, reviews the Jackson reforms of civil litigation, while the article by Beatrice Baskett advocates reform of the scope of liability in negligence claims against the police. Thekla Homata scrutinises the case law of the European Court of Human Rights (ECtHR), asking whether the right to liberty and security is sufficiently protected. Besides this, several civil law essays are characterised by an international outlook. These include two topical discussions of the enforcement of data protection and privacy law in the UK courts, the Court of Justice of the European Union, and the ECtHR, by David Lipson and George Turley. In local government law, an article by Olivia McGonigle analyses problems surrounding the regulatory bases and justifications of the sentence of imprisonment for non-payment of council tax. In corporate law, Michael Coumas examines questions surrounding the liabilities and obligations of shareholders and directors to satisfy the claims of creditors in a range of instances other than fraud. The volume closes with two highly topical comments on *R v Lawrance* [2020] EWCA Crim 971, by Paula Kelly and Oliver Pateman, exposing inconsistency in the law around consent in sexual offence cases and the need for reform.

I have been inspired by the sustained argument and dedication to academic quality shown by the contributors and gratefully acknowledge their cooperation and patience throughout the peer review and editing of the volume. Over the past year, I have received advice and support from the Education Department, notably Nicola Björkman, and from my fellow members of the AGIS committee. My thanks must also go to them. As with previous volumes of the journal, this is published online on the Gray's Inn website and in print. Copies will be placed in the Gray's Inn Library.

NOTE

The journal style for citation of legal authorities is OSCOLA, fourth edition. Legal abbreviations may be found in the Cardiff Index to Legal Abbreviations at < http://www.legalabbrevs.cardiff.ac.uk/>.

WHAT IF ANYTHING IS THE RELEVANCE OF UNINCORPORATED TREATIES, INTERNATIONAL AGREEMENTS AND CONVENTIONS IN ENGLISH LAW?

Sahar Khan (Winner of the Michael Beloff Essay Prize)

Introduction

'Treaty' as a Contract

In the Vienna Convention on the Law of Treaties, a treaty is defined as 'an international agreement concluded between States in written form and governed by international law'.[1] Other names for treaties include Convention and Agreement.[2] In this essay, they are collectively and interchangeably referred to as unincorporated 'treaties', 'obligations', or 'instruments'. Like a contract, a treaty is a voluntary agreement, with terms and potential remedies for breaches,[3] between parties that have privity with each other.[4] Both treaties and contracts give rise to obligations that are recognised and enforceable by law. For instance, a ratified international treaty binds a signatory nation-state on the international plane.[5] However, in the case of a treaty, international recognition does not automatically translate into domestic recognition.

Ratified, but Unincorporated – A Tale of Two Planes

In 'monist' countries like The Netherlands and Germany, treaties that are ratified by their Governments on the international plane are automatically recognised on the domestic plane.[6] In contrast, the UK takes a 'dualist' approach, which is seen as the 'necessary corollary of Parliamentary sovereignty'.[7] As a result, every time an international treaty requires domestic recognition, the treaty-making Executive must seek legislative confirmation.[8]

Relevance by Implication – From an Interpretative Aid to a 'Relevant Consideration'

Nonetheless, some unincorporated treaties, although non-binding, have borne persuasive *relevance* in domestic courts adjudicating on the *process* of justiciable government decision-making. However, determining that an obligation may/must be taken into consideration in the

[1] Vienna Convention on the Law of Treaties (published 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 2(1)(a).
[2] House of Commons Information Office, *Procedure Series: Treaties* (Factsheet No. P14 Ed 3.6, August 2010) < www.parliament.uk/globalassets/documents/commons-information- office/p14.pdf > accessed 30 August 2020.
[3] Curtis J Mahoney, 'Treaties as Contracts: Textualism, Contract Theory, and the Interpretation of Treaties' (2007) 116 Yale LJ 824.
[4] Michael Waibel, 'The Principle of Privity' in Michael J Bowman (ed), *Conceptual and Contextual Perspectives on the Modern Law of Treaties* (Cambridge University Press 2018).
[5] Lord Mance, 'International Law in the UK Supreme Court' (King's College, London, 13 February 2017) < www.supremecourt.uk/docs/speech-170213.pdf > accessed 14 September 2020.
[6] Mario Mendez, 'The Legal Effects of Treaties in Domestic Legal Orders and the Role of Domestic Courts' in *The Legal Effects of EU Agreements* (Oxford University Press 2013) <https://oxford.universitypressscholarship.com/view/10.1093/acprof:oso/9780199606610.001.0001/acprof-9780199606610-chapter-2> accessed 14 September 2020.
[7] *R (on the application of Miller and another) v Secretary of State for Exiting the European Union* [2017]UKSC 5 [57].
[8] Ibid.

process of decision-making risks involving the court in the non-justiciable task of interpreting the *substance* of the obligation.[9] This will be referred to as the *process-substance* issue. Notably, this issue points to the fact that, because *process* sometimes acquires a *substantive* significance, certain unincorporated treaties discussed in this essay have meaningfully shaped the development of the common law.

This essay traces how unincorporated treaties have acquired *relevance* in English common law from (1) the use of unincorporated instruments as interpretative aids in the construction of rights enshrined in the European Convention on Human Rights (ECHR)[10] to (2) the nascent emergence of certain unincorporated treaties as mandatory (not merely discretionary) 'relevant considerations' for policy decisions.[11]

Furthermore, there is an important difference between the use of unincorporated instruments as (1) interpretative aids for the clarification and construction of incorporated ECHR rights and (2) mandatory 'relevant considerations' *in their own right*. Although not perfectly parallel, this difference is coterminous with the difference in contract law between two types of implied terms: (a) the use of a pertinent trade custom/usage to clarify or supplement the meaning of an express obligation,[12] and (b) the act of discovering a new implicit obligation.[13]

No *Relevance* without Compatibility

In light of 'dualism', both types of *relevance* by implication naturally have normative limits. Parliamentary supremacy is the rationale behind the 'dualist' approach. According to the principle of legality, only parliament (an elected body) can override fundamental rights of individual citizens in a democratic polity, through express legislative words.[14] Hence, unincorporated obligations are *relevant* to the extent that they pose no issue of incompatibility with extant rights.

I. Interpretative Relevance – The Construction of ECHR Rights

Reception by Parliament is the main way that international treaties enter English law. In a sense, there are two contracts (and contractual contexts): (i) the international treaty and (ii) the domestic law. Hence, a right or obligation from a ratified international instrument is not transposed from international to domestic law, 'unless and until it has been incorporated into the law by legislation'.[15]

Reception by the judiciary through the common law is the second possible domestic point of

[9] In *R (on the application of SG and others) v Secretary of State for Work and Pensions* [2015] UKSC 16 [90], it was held that 'UK courts have no jurisdiction to interpret or apply unincorporated treaties'.
[10] Interpretative aids are analysed in part II of this essay.
[11] 'Relevant considerations' are analysed in part III of this essay in relation to the case of *Plan B Earth (and others) v Secretary of State for Business, Energy, and Industrial Strategy* [2018] EWCA Civ 214.
[12] *Hutton v Warren* [1836] EWHC J 61, (1836) 1 Meeson and Welsby 466, 150 ER 517.
[13] *Marks and Spencer plc v BNP Paribas Securities Services* Trust [2015] UKSC 72.
[14] *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115 [131] (Lord Hoffman); *R (Morgan Grenfell) v Special Commissioner of Income Tax* [2003] 1 AC 563 [45]; *R (Black) v Secretary ofState for Justice* [2017] UKSC 81; *R (Lumba) v Secretary of State for the Home* [2011] UKSC 12.
[15] *JH Rayner (Mincing Lane) v Department of Trade* [1990] 2 AC 418 [500].

entry for international instruments, referred to in this essay as *relevance* byimplication. However, as the judiciary is entrusted to interpret and enact laws made by Parliament, a treaty without parliamentary confirmation is non-justiciable and without direct effect.[16] With this in mind, it is now important to turn to a Convention that went unincorporated for almost half a century, the ECHR.

In 1951, the UK ratified the ECHR.[17] In the intervening period between ratification and incorporation via the Human Rights Act 1998 (HRA), ECHR claims by British citizens were only justiciable in the Strasbourg Court.[18] Following incorporation of the ECHR into municipal law, those ECHR claims became justiciable in domestic courts.[19] A special class of unincorporated instruments – *inter alia* the United Nations Convention on the Rights of a Child (UNCRC) and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) – have been used as interpretative aids for the construction of incorporated ECHR rights in domestic courts.

The International Context of Domestic Law

In the introduction of this essay, it is recognised that the relevance of unwritten words in the interpretation of written instruments is not foreign to English legal custom. By way of implied terms, context has supplied cogent meaning to contracts. Unincorporated words can be implied into a written instrument because no agreement is a space-time capsule inhabiting a vacuum. It would be prohibitively time-consuming and costly (if not impossible) for a written instrument to expressly encompass every contextually relevant eventuality or reference that may arise in the course of a long-term agreement.[20]

As an international treaty, the ECHR must be interpreted in accordance with the Vienna Convention, which states that account is to be taken of 'any relevant rules of international law applicable in the relations between the parties.'[21] As a result, it is not highly disputed that Convention rights protected in English law by the HRA can also be interpreted in light of international treaties, such as the UNCRC and CEDAW, that apply in a particular sphere.[22]

In *Demir v Turkey*,[23] the European Court of Human Rights (ECtHR) re-emphasised the importance of interpreting the ECHR and constructing Convention rights, in the particular circumstances of a given case, within its expansive International context:

---

[16] *Miller* (n 7) [159].
[17] Council of Europe, 'Chart of Signatures and Ratifications of Treaty 005: Convention for the Protection of Human Rights and Fundamental Freedoms' <www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures> accessed 21 September 2020.
[18] Alice Donald, James Gordon, and Philip Leach, *The UK and the European Court of Human Rights* (Equality and Human Rights Commission, Research Report 83, 2012) <www.equalityhumanrights.com/sites/default/files/83._european_court_of_human_rights.pdf> accessed 12 September 2020; UK Supreme Court, 'The Supreme Court and Europe: What is the Relationship between the UK Supreme Court, the European Court of Human Rights, and the Court of Justice of the European Union?' < www.supremecourt.uk/about/the-supreme-court-and-europe.html> accessed 30 September 2020.
[19] Ibid.
[20] *Globe Motors v TRW Lucas Varity Electric Steering Ltd* [2016] EWCA Civ 396 [64]-[68].
[21] Vienna Convention (n 1) art 31(3).
[22] *R (SG and Others)* (n 9).
[23] (2009) 48 EHRR 54 [85] (emphasis added).

> The Court, in defining the meaning of terms and notions in the text of the Convention, can and must take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European states reflecting their common values. The consensus emerging from specialised international instruments and from thepractice of contracting states may constitute a *relevant consideration* for the Court when it interprets the provisions of the Convention in specific cases.

Furthermore, in line with this very principle, the UK Supreme Court has confirmed the *relevance* of specialised international treaties when interpreting Convention rights protected in domestic law. In *ZH (Tanzania) v Secretary of State for the Home Department*, Baroness Hale quoted another Grand Chamber (ECtHR) case, *Neulinger v Switzerland*,[24] that the Convention 'cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law'.[25]

An Umpire of Statutory Meaning – 'Best Interests' Cases

In English common law, there is a 'strong presumption in favour of interpreting an English statute in a way which does not place the United Kingdom in breach of its international obligations'.[26] This is where the 'persuasive' nature of the *relevance* of unincorporated instruments comes into play and has been seen in particular in cases relating to the UNCRC.

In *Smith v Smith*, Baroness Hale stated that, when 'two interpretations of [certain] regulations are possible, the interpretation chosen should be that which better complies with the commitment to the welfare of children with which this country has made by ratifying the United Nations Convention'.[27] In so doing, Baroness Hale was referring to the 'best interests' principle of the UNCRC. Essentially, in actions concerning children, across public/private social welfare institutions, courts, administrative, and legislative bodies, the best interests of the child shall be a primary consideration.[28] This has been an influential consideration as it has given rise to a category of 'best interest' cases.

'Best Interests' as *Process* and *Substance*

Not only is the 'best interests' principle taken into consideration, but even General Comments from the Committee on the Rights of Children are considered when construing the 'best interests' principle. In *SG*, Lord Carnwath described General Comment No. 14 as 'authoritative guidance to the meaning of Article 3.1'.[29] This drives home the essence of '*relevance* by implication'; it would be an artifice to divorce domestic terms and obligations from the implications and analogues of their context.

---

[24] (2010) 54 EHRR 1087.
[25] [2011] UKSC 4 [21].
[26] *Assange v Swedish Prosecution Authority* [2012] UKSC 22 [122] (Lord Dyson).
[27] [2006] UKHL 35 [78].
[28] United Nations Convention on the Rights of the Child (Resolution 44/25, adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3, art 3.
[29] Committee on the Rights of the Child, General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art 3, para 1), CRC/C/GC/14, 29 May 2013.

General Comment No. 14 describes the 'best interests' principle as a threefold concept whereby (1) a substantive right, (2) a fundamental interpretative legal principle, and (3) a rule of procedure.[30] This conceptualisation in a way highlights the difficulty of the universal *process-substance* issue. The 'best interest' principle is not just procedural, but also a substantive right. This means that '*relevance* by implication' risks the courts interpreting the meaning of a non-justiciable obligation. In this essay, it is suggested that, despite this, the absolute limiting factor is that the construed obligation must not be incompatible with extant fundamental rights (see part III).

More importantly though, the domestic context matters just as much as the international context. Domestic statutory guidance such as the *Framework for the Assessment of Children and Families* explicitly refers to UNCRC principles in guidance for the assessment of Article 17 of the Children Act 1989. Domestic legislation also embodies various principles in the UNCRC. For instance, section 11 of the Children Act 2004 imposes a duty on government bodies to promote and safeguard the welfare of children. This reinforces the compatibility principle discussed in part 4 in that, usually, unincorporated principles possess a degree of ubiquity, which justifies their '*relevance* by implication'.

However, ubiquity does not mean that everything is compatible. The courts assess the quality of authority as has been suggested in cases relating to the United Nations Convention on the Rights of Persons with Disability. In *R (Davey) v Oxfordshire* [31] and *R (Leighton) v the Lord Chancellor*,[32] the Articles of the UNCPRD relied upon, were deemed to be broad and aspirational statement. As a result, it was held that the UNCRPD articles were not of much assistance when seeking to interpret Article 14 of the ECHR.

Article 14 has been carefully considered and explained on numerous occasions by the appellate courts in this jurisdiction and by the ECtHR. Those were considered to be much more fruitful sources of guidance than the general terms of the UNCRPD. In contrast to the UNCPRD, English courts have not hesitated to accord reverence to the CEDAW, which is seen to provide more specific and vivid statements of principle.[33]

II. 'Relevant Consideration' – Towards a Domestic Ground for Judicial Review

More recently (albeit tentatively), an unincorporated instrument may be emerging as something akin to a 'relevant consideration.' This marks a movement closer to a much more proximate domestic ground for judicial review, rather than an interpretative aidthat serves as a proxy for an ether of contextual references. In *Plan B Earth v Secretary of State of Transport*, the Court of Appeal found that a government decision regarding the expansion of Heathrow International Airport was unlawful because it failed to 'take into account' the Paris Agreement, an unincorporated instrument.[34]

[30] Ibid.
[31] [2017] EWCA Civ 1308 [62].
[32] [2020] EWHC 336 [220].
[33] See the 'abortion cases': *R (A and B) v Secretary of State for Health* [2017] UKSC 41 and *Re: Northern Ireland Human Rights Commission v Attorney General of Northern Ireland & Department forJustice* [2018] UKSC 27.
[34] *Plan B* (n 11) [184].

Notably, the *Plan B Earth* Court does not discover an implicit obligation to comply with the terms of the Paris Agreement. Rather, the implicit obligation is to consider the Paris Agreement and demonstrate that consideration as a part of the decision-making process.[35] Hence, the Paris Agreement (and unincorporated instruments like it) do not constitute incorporation through 'the back door'.[36]

Nonetheless, *process*-oriented or *substantive*, the Paris Agreement has meaningfully shaped the development of the common law. Specifically, *Plan B Earth* marks (1) the recognition of the Paris Agreement as 'government policy'[37] and (2) a delay of the Heathrow expansion until the Government revisits the Airport National Policy Statement (ANPS) in accordance with the Planning Act 2008, i.e., by taking the Paris Agreement into consideration.[38] Of course, this is subject to the Supreme Court's further consideration.[39] To understand the question that will come before the Supreme Court, the story behind the Paris Agreement must now be considered.

In November 2016, the United Kingdom ratified the Paris Agreement.[40] The Agreement enshrines a firm commitment to restricting the increase in the global average temperature to 'well below 2°C above pre-industrial levels and [to pursue] efforts to limit the temperature increase to 1.5°C above pre-industrial levels' (article 2(1)(a)). It also includes an aspiration to achieve net zero greenhouse gas emissions during the second half of the 21st century – a 'balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century' (article 4(1)).[41]

These unincorporated obligations are not themselves binding in English law. And each party to the Paris Agreement is able to decide how it will domestically implement these obligations. However, these obligations must be 'taken into consideration'. The reason for this lies in domestic legislation and statutory guidance.

The Statutory Framework

The Planning Act 2008 (PA) replaced the Town Country Planning Act 1980 as the new procedure for the development of nationally significant infrastructure projects.[42] Concurrently, the Climate Change Act 2008 (CCA) was passed, which established the Committee on Climate Change (CCC), an independent public body to advise the Government on matters related to statutory

[35] Ibid [38].
[36] Ibid [226].
[37] Ibid [224].
[38] Ibid [285].
[39] Catherine Howard, Helena Mouratov, 'Heathrow Airport – Plan B Earth case given permission to appeal to Supreme Court' (*Herbert Smith Freehills*, 19 May 2020) <https://hsfnotes.com/realestatedevelopment/2020/05/19/heathrow-airport-plan-b-earth- case-given-permission-to-appeal-to-supreme-court/> accessed 21 September 2020.
[40] Arthur Nelsen, 'UK ratifies Paris Climate Agreement' (The Guardian, 17 November 2016) <https://www.theguardian.com/environment/2016/nov/17/uk-boris-johnson-ratifies-paris- climate-agreement> accessed 21 September 2020.
[41] Department for Business, Energy and Industrial Strategy, *Explanatory Memorandum on the Paris Agreement* (Cm 9338, 2016) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/558185/EM_Paris_Ag.pdf > accessed 21 September 2020.
[42] Planning Act 2008, Introductory text.

carbon reduction targets and greenhouse gases.[43]

Section 5 of the Planning Act 2008 governs the Secretary of State's power to designate national policy statements (NPS) and its content. Section 5(7) requires that a NPS 'must give reasons for the policy set out in the statement'. Section 5(8) stipulates that the 'reasons must (in particular) include an explanation of how the policy set out in the statement takes account of Government policy relating to the mitigation of, and adaptation to, climate change'. In June 2018, the Secretary of State designated the ANPS without taking the Paris Agreement into consideration.[44]

'Government Policy' – Statutory Interpretation

For it to be unlawful not to take the Paris Agreement into account, firstly, it must be established that the Paris Agreement is 'government policy' pursuant to s5(8), Planning Act 2008. While the Divisional Court held that the UK's climate change policy arises from the Climate Change Act 2008 (not the Paris Agreement),[45] the Court of Appeal disagreed because 'Government policy' does 'not have any specific technical meaning' and 'should be applied in their ordinary sense to the facts of a given situation'.[46]

As a result, the Court concluded that government policy is not limited to the Climate Change Act 2008. This 'government policy' was constructed from the reports and ministerial statements in the lead-up to and aftermath of ratification that indicated the need to include the Paris Goals into English law and re-iterated commitment to its goals. The Government's 2017 *Clean Growth Strategy* stated that the Paris commitments meant that the shift to clean growth 'will be at the forefront of policy and economic decisions by the government'.[47]

In the cases discussed in part I with reference to the unincorporated obligation as an interpretative aid, the path of *relevance* between the international and domestic plane is primarily paved by international sources such as the Vienna Convention and Strasbourg case law that are then received through common law. Statutory confirmations of those obligations only secondarily and indirectly influence their construction in English common law.

However, in *Plan B Earth*, the path is paved, not by an international source, but primarily and directly by domestic statutory guidance and/or ministerial documents that mention the Paris Goals. This more proximate route of *relevance* marks the emergence of an unincorporated obligation as the basis of a domestic justiciable ground for judicial review, namely 'relevant consideration'.[48]

The Width of the Secretary of State's Discretion and 'Obvious Materiality'

The decision-maker has an 'obligation to take reasonable steps to obtain information which is legally relevant but one which he is not required (e.g. by legislation) to take into account'.[49] At

[43] Climate Change Act 2008, Introductory text.
[44] *Plan B* (n 11) [3].
[45] Ibid [194].
[46] Ibid [224].
[47] Ibid [209].
[48] *Roberts v Hopwood* [1925] AC 578.
[49] *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977]

face value, it would seem that a relevant consideration is just that: relevant, but not *mandatory*. However, that is not the case in *Plan B Earth* where it has been held that, despite the fact that the Secretary of State has a 'discretion' in these matters, it was mandatory for it to take the Paris Agreement into consideration. Once the Paris Agreement is deemed 'government policy', and hence a *potential* relevant consideration, it must be clarified how it emerges as a *mandatory* relevant consideration.

The 'established principle is that the decision-maker's judgement in such circumstances can only be challenged on the grounds of irrationality'.[50] By a rule of law, it is held that it is irrational to not take the Paris Agreement into account. This is the basis for the 'obvious materiality' test:

> It is well established in public law that there are some considerations that must be taken into account, some considerations that must not be taken into account and a third category, considerations that may be taken into account in the discretion of the decision-maker … [In] the third category … there can be some unincorporated international obligations that are 'so obviously material' that they must be taken into account. The Paris Agreement fell into this category.[51]

Following this, it is stipulated that, if the Secretary of State would have appreciated that he had any discretion, the only reasonable view open to him was that the Paris Agreement was so obviously material that it had to be taken into account.[52]

It seems that an approach that mandates that a decision-maker have regard to the Paris Agreement potentially involves correctly interpreting it or at least its importance (by analogy with the interpretation of policy *Tesco Stores v Dundee City Council*).[53] In another context, even the judgement that the UNCPRD is less relevant than other authorities involved some sort of judgement of its contents being generic.

In *R (Corner House and Others) v Director of the Serious Fraud Office*,[54] it was suggested that the act of the court interpreting an unincorporated provision is questionable. Not only this, but it was also suggested that it would be unfortunate if decision-makers would, as a result, be deterred from giving effect to their understanding of international obligations by fearing that their decisions would be 'vitiated by an incorrect understanding'.[55]

The *process-substance* issue remains an open issue. The only saving grace here may be that any interpretation of meaning must be grounded in domestic statutory guidance and policy. While the issue of the United Kingdom's compliance with a treaty is very much a matter of government policy and practice,[56] if it is the government's policy to give effect to a particular treaty, it would

AC 1014 [1065B].
[50] *R (on the application of Khatun) v Newham London Borough Council* [2004] EWCA Civ 55 [35]; R *(on the application of France) v Royal London Borough of Kensington and Chelsea* 2017 EWCA Civ 429 [103]; *Flintshire County Council v Jeyes* [2018] EWCA Civ 1089 [14].
[51] *Plan B* (n 11) [237].
[52] Ibid.
[53] [2012] UKSC 13.
[54] [2008] UKHL 60.
[55] Ibid [40].
[56] *Ahmed v HM Treasury* [2010] UKSC 2.

be an error of law to not take that treaty into account.[57]

For instance, in two cases, *R v Secretary of State for the Home Department ex parte Launder*[58] and *R v Director of Public Prosecutions ex parte Kebilene*,[59] the court considered the meaning of the state's obligations under the ECHR before it had been incorporated into domestic law. However, incorporation was within a few years' grasp in both cases, and, by that point, there was a general consensus that the ECHR did inform government policy.

III. Compatibility – A Principle-Based Limitation to *Relevance*

One way to prevent any excess of '*relevance* by implication' is to query whether there is a principle-based limitation. Be it contract or public law, the common law strives to develop on the basis of principles in an iterative and piecemeal fashion. Ideally, these principles cohere across disciplines of the law. The fine-grained judicial activity that enables unincorporated words to be read into a contract must not unduly shake the edifice of privity and freedom of contract. In other words, any implied term must not contradict express terms.[60]

Competing Rationales of 'Dualism'

Similarly, recourse to unincorporated treaty obligations must not offend the constitutional principle that underpins the 'dualist' approach, namely parliamentary supremacy. In other words, an unincorporated obligation must be compatible with those fundamental individual rights that can only be overridden by parliament. There can be no *relevance* without compatibility.

Lord Steyn articulated the rationale for the 'dualist' approach to treaty-incorporation 'as a form of protection of the citizen from abuses by the executive'.[61] Sales and Clement have critiqued this formulation and suggested that the 'true' rationale is that 'the Crown cannot change domestic law by the exercise of its powers under the prerogative, which is a rule reflecting and supporting the sovereignty of Parliament and its primacy as the domestic law-making institution in our constitution'.[62]

The *Raison d'Être* of Parliamentary Supremacy and Dualism

Although the two proposed rationales are viewed as discrete, here, it is argued that there is a strong connection between the two rationales. In order to understand this connection, we must ask, after all, why is Parliament meant to be supreme? Parliament is accorded its supreme position because it derives its legitimacy from the fact that it is meant to be the only democratically elected law-making body in the triumvirate of the English Constitution.[63]

Arguably, Sales and Clement's rationale privileges the supremacy of a democratically elected

[57] *AS (Afghanistan) v Secretary of State for Home Department* [2013] EWCA Civ 1469.
[58] [1997] 1 WLR 839.
[59] [2000] 2 AC 326.
[60] *Marks and Spencer plc v BNP Paribas Securities Services Trust [2015] UKSC 72* [28].
[61] *Re McKerr* [2004] UKHL 12 [50].
[62] P Sales & J Clement, 'International Law in Domestic Courts: The Developing Framework' (2008) 124 LQR 388, 398.
[63] A V Dicey, *Introduction to the Study of the Law of the Constitution* (first published 1885, Macmillan and Co. 1915) xcvii.

parliament *in order to* protect the citizen from potential abuses by a body that has not been democratically elected, the executive. As a result, the *raison d'être* (of the 'dualist' approach) is the protection of existing individual rights at law that are relied upon by citizens of a democratic polity.

On the basis of his analysis of *The Parlement Belge*,[64] *Porter v Freudenberg,*[65] and *Imperial Japanese v P & O Steam Navigation Company*,[66] legal scholar Eirik Bjorge propounded that the 'test for whether the court could base its judgement' on an international instrument is not whether it has 'been incorporated or not'.[67] Instead, 'an unincorporated treaty can be operative so long as it does not deprive British citizens of rights which they would otherwise have had'.[68]

Unincorporated Instruments in the Hierarchy of Direct Effect

This is also in line with the principle of legality, whereby only the use of express words found in legislation can override such fundamental rights, not unincorporated obligations. In fact, when constructing a hierarchy of direct effect, customary international law can be considered as higher than unincorporated obligations (but lower than domestic legislature). Even though customary international law is more readily 'a source of common law rules' than unincorporated treaties, it 'will only be received into the common law if such reception is compatible with general principles of domestic constitutional law'.[69]

As a result, from a normative perspective, any exceptional rule of *relevance* must necessarily mark a line in the sand between, on the one hand, an unincorporated obligation that particularises or clarifies an incorporated right in an *interpretative* manner or even as a 'relevant consideration' in its own right and, on the other hand, one that substantively negates an existing right.

Conclusion

The general 'dualist' rule is that signed and/or ratified international instruments do not enter English law without legislative incorporation. Hence, any such unincorporated instruments are generally non-justiciable in domestic courts and do not have direct effect. Nonetheless, some unincorporated treaties have borne persuasive *relevance* in English law.

More importantly, despite being more relevant to *process* (than *substance*) and more persuasive (than binding), unincorporated treaties have meaningfully shaped the development of the common law.

This is why it becomes important to trace this special '*relevance* by implication' from (1) the use of unincorporated instruments as interpretative aids in the construction of ECHR rights to (2) the nascent emergence of certain unincorporated treaties as mandatory (not merely discretionary) 'relevant considerations' for policy decisions. This essay also identifies an inherent *process-substance* issue whereby, sometimes, it is not possible to adjudicate that an unincorporated

[64] [1879] 4PD 129.
[65] [1915] 1KB 857.
[66] [1895] AC 644.
[67] *The Parlement Belge* (n 64).
[68] Eirik Bjorge 'Can Unincorporated Treaty Obligations Be Part of English law?' [2017] PL 571-591.
[69] *R (Freedom and Justice Party) v Foreign Secretary* [2018] EWCA Civ 1719 [113]-[117].

obligation is *process*-relevant without interpreting its *substantive* meaning. Finally, because the common law progresses on the basis of principle, the normative limit to *relevance* is extrapolated from the *raison d'être* behind the principle of dualism, namely that (3) there is no *relevance* without compatibility.

WITH THE DEMISE OF CIVIL LEGAL AID IN MOST AREAS OF CIVIL LAW, HAVE THE JACKSON REFORMS OF 1ST APRIL 2013 AND THE REQUIREMENTS OF PRACTISING WITH THESE RULES HELPED OR HAMPERED THE QUEST FOR JUSTICE AND THE DEVELOPMENT OF THE LAW? WOULD WE BE BETTER OFF JUST MOVING INTO CONTINGENCY PAYMENTS?

David Lipson (Winner of the Lee Essay Prize)

Introduction

Despite the impact of civil legal aid cuts, the Jackson reforms promoted both access to justice and the positive development of the law in relation to civil litigation. They achieved this by rebalancing costs liabilities between parties, introducing additional methods of funding and encouraging greater procedural compliance by implementing judicial case management powers. Although not successful in every regard, the reforms were crucial in moving from an individualised to a distributive notion of justice in civil litigation. This change was necessary in an age of scarce public resources. Since this shift was the driving force behind the reforms, solely moving to contingency payments would prove inadequate.

I. Overview of the Reforms

Calls for reforming civil litigation procedure arose from the need to reduce costs, quicken the process, discourage unmeritorious claims, rebalance liabilities between parties and maintain access to justice at proportionate cost.[1] Since the preceding Woolf reforms proved inadequate, Jackson LJ was subsequently tasked with reviewing the rules and principles governing civil litigation costs.

The reforms suggested shifting civil litigation from a substantive notion of justice to a distributive one. This move was a reaction to the prevalence of scarce resources in England and Wales following the global financial crisis and subsequent austerity politics. Distributive justice argues that, rather than focusing solely on the interests of the parties in each individual case, a wider concept of justice should be adopted. This is to ensure that limited resources are fairly allocated by the state amongst all litigants seeking to enforce their rights.[2] Under this notion, the rationing of court resources does not undermine the provision of justice but is instead a necessary condition for its achievement, since it prevents excessive time and money being spent on undeserving claims. By contrast, allowing too many resources to be invested in a single case will ultimately result in an unfair allocation amongst the vast pool of litigants. To prevent this, civil procedure must concern itself with society as a whole.

Despite the benefits, the Jackson reforms proved controversial with both the Law Society and the Bar Council initially opposing them. They argued that distributive justice would inevitably deny some litigants access to justice since valid claims may be dismissed due to the supposedly

[1] Chris Shilvock, 'Jackson Cost Reforms: A Summary of the Key Changes to Civil Litigation Costs' (*Mondaq*, 1 May 2013) <www.mondaq.com/uk/real-estate/236810/jackson-cost-reforms-a-summary-of-the-key-changes-to-civil-litigation-costs> accessed 28 August 2020; Ministry of Justice, *Post-Implementation Review of Part 2 of LASPO: Civil Litigation Funding and Costs* (HMSO 2019), 3.
[2] John Sorabji, *English Civil Justice after the Woolf and Jackson Reforms: A Critical Analysis* (CUP 2014) 3.

disproportionate use of time and money.[3] Nevertheless, Jackson LJ argues that the reforms were worthwhile.[4] Although he acknowledges that costs and delays temporarily rose following implementation, he is adamant that civil litigation will become more efficient as lawyers familiarise themselves with the procedural changes.[5] This essay agrees, and will argue that the key changes implemented by the reforms aided the quest for justice and the positive development of the law. The Jackson reforms span beyond the scope of this essay, so the focus will remain on the elements which had the most notable impact upon civil litigation.

II. Rebalancing Costs Liabilities

Prior to his reforms, Jackson LJ observed that costs liabilities between parties were massively in favour of claimants who could litigate essentially risk-free.[6] Under Conditional Fee Arrangements (CFAs), otherwise known as 'no win, no fee' claims, a claimant pays their lawyers nothing if they lose, but pays base costs and a success fee - calculated as a percentage of their usual costs - if they win.[7] However, prior to the reforms, their liabilities were typically passed onto unsuccessful defendants. Since defendants could be liable to pay their own legal fees alongside the claimant's legal fees, success fees and After-the-Event (ATE) insurance premiums, they were liable for huge sums if they lost. Imposing these vast sums on unsuccessful defendants was intended as an economic disincentive for unnecessarily defending, but it instead convinced parties with valid defences to settle due to the risk of high costs. Furthermore, these arrangements provided insufficient incentives for claimants and their lawyers to both restrain the amount of time they spent preparing cases and the costs which they accrued as a result.[8] This substantial power asymmetry was not a recommendation of the Woolf reforms but was instead a response to government retraction of legal aid and the subsequent search for alternative funding methods.[9] It indisputably altered the playing field for the worse.

It was clearly unjust for defendants to litigate at the risk of paying up to four times the cost of the action. To address these lop-sided costs liabilities, success fees and ATE insurance premiums were made non-recoverable from losing parties under Part Two of the Legal Aid, Sentencing and Punishment of Offenders Act (LASPO).[10] This reform is to be commended, since they were both inefficient ways of shifting costs. More defendants can now afford to risk defending, since the liabilities they face in defeat have been substantially reduced. By shifting costs liabilities in order to promote equal footing between claimants and defendants and ensuring that defendants are not

[3] Bott and Co Road Traffic Accident Claims Team, 'A Guide to the Jackson Reforms' (10 February 2020) <www.bottonline.co.uk/blog/guide-to-jackson-reforms> accessed 28 August 2020.
[4] Neil Rose, 'Jackson's Farewell: My Reforms were Worth the Abuse but Costs are Still Too High' (6 March 2018) <www.litigationfutures.com/news/jacksons-farewell-reforms-worth-abuse-costs-still-high> accessed 28 August 2020.
[5] Thomson Reuters Legal Europe, 'The Jackson Reforms: The Transformation of Civil Litigation' (2 September 2016) <www.youtube.com/watch?v=ZjVZ43Us-Lk> accessed 28 August 2020.
[6] Gavin Hall, 'The Jackson Reforms and their Continued Impact upon Personal Injury Claims' (*Farleys Solicitors LLP*, 23 December 2014) <https://www.farleys.com/jackson-reforms-continued-impact-upon-personal-injury-claims/> accessed 28 August 2020.
[7] Sime Stuart, *A Practical Guide to Civil Litigation* (CUP 2019) 15.
[8] Richard Moorhead, 'Costs Wars in England and Wales: The Insurers Strike Back' in Mathias Reimann (ed), *Cost and Fee Allocation in Civil Procedure* (Springer 2011) 117, 121.
[9] Litigation Futures, 'A Guide to the Jackson Reforms and Civil Litigation Costs' (22 October 2018) <www.litigationfutures.com/features/jackson-reforms-a-complete-guide> accessed 28 August 2020.
[10] Legal Aid, Sentencing and Punishment of Offenders Act 2012 ss 44, 46.

discouraged from going to court, this aspect of the Jackson reforms has succeeded in promoting access to justice.[11]

III. Proportionality, Costs and Case Management

The reforms gave judges a more active role in managing their cases, so as to ensure that the time and money resources spent on individual claims are proportionate to the issues at hand. Controlling costs is essential for promoting access to justice, since parties may be dissuaded from bringing claims or defences if costs are unpredictable. Furthermore, consolidating final budgets before they are spent leads to more predictable costs than post-litigation assessment does. By requiring lawyers to issue budget requests to the court, they are forced to consider how the case will progress and what the likely costs will be. Although compelling lawyers to set out what they will spend on a case appears beneficial, this inevitably involves frontload costs.[12]

In particular, procedural non-compliance was a major contributor to disproportionate costs, delays and satellite litigation. Procedural rules had become ineffective in the absence of a strict compliance regime, so Jackson LJ sought to compel litigants to comply with the rules in order to reduce the number of applications for relief from sanctions. His amendments to Civil Procedure Rule (CPR) 3.9 stressed the need to consider the proportionality of costs, enforce compliance with rules and orders, and consider all the circumstances of the case to achieve just outcomes.[13] The amended rule 3.9 intended to allow for the individual idiosyncrasies of each case to be considered, steering between too much and too little court interference whilst reducing the number of successful applications for relief from sanctions.[14]

However, the Jackson reforms provided no guidance over how to balance CPR 3.9(a) and (b). It is therefore arguable that the amendments were meaningless, since it is trite to claim that courts are meant to obey rules, practice directions and orders. From this perspective, the amended rule 3.9 is content-free and merely repeats the overriding objective.[15] However, the fact that Jackson LJ considered it necessary to reiterate these principles is significant.[16] His amendments were actually a coded message for judges to take their case management responsibilities more seriously and to give effect to the overriding objective of enabling the court to deal with cases 'justly and at proportionate cost'.[17] Thus, the Jackson reforms did not develop this part of the law but merely hammered it into the heads of judges and practitioners nation-wide in an attempt to highlight the move to proportionate considerations of justice.

---

[11] Catherine Gleave, 'The Jackson Reforms and the Future of Access to Justice: An Examination' (*LexisNexis*, 13 June 2018) <www.lexisnexis.co.uk/blog/future-of-law/the-jackson-reforms-and-the-future-of-access-to-justice-an-examination> accessed 28 August 2020.
[12] Rachel Rothwell, 'Jackson Reforms: Counting the Costs' (*The Law Society Gazette*, 4 April 2016) <www.lawgazette.co.uk/law/jackson-reforms-counting-the-costs/5054521.article> accessed 28 August 2020.
[13] See Civil Procedure Rule (CPR) 3.9(1)(a)-(b).
[14] Dominic De Saulles, 'Defending the Civil Justice System: The Function of Sanctions' (2017) 36(4) CJQ 462, 482.
[15] Andrew Higgins, 'CPR 3.9: The Mitchell Guidance, the Denton Revision, and Why Coded Messages Don't Make for Good Case Management' (2014) 33(4) CJQ 379, 391.
[16] Adrian Zuckerman, 'The Revised CPR 3.9: A Coded Message Demanding Articulation' (2013) 32(3) CJQ 123, 134.
[17] Masood Ahmed, 'Procedural Non-Compliance and Relief from Sanctions After the Jackson Reforms: Striking the Balance' (2015) 5(1) IJPL 71, 77; see also CPR 1.1.

Imposing a stricter regime for non-compliance has both benefits and drawbacks. On one hand, a harsher regime may prevent courts tolerating inexcusable non-compliance, wasteful procedural wrangling and sloppy cultural practices, which all result from lenient courts failing to effectively manage their cases.[18] Granting the courts greater case management powers seeks to alleviate all of these issues. Nevertheless, the immediate aftermath of the Jackson reforms suggests that enhanced case management may have proven detrimental to efficient civil litigation.[19] Judges were exercising their costs management powers inconsistently, courts became clogged up with applications for time extensions and relief from sanctions, and stricter compliance conformity created a new avenue for procedural litigation, entirely separate from the original issues of the case at hand.

Implementation by the Courts

These consequential issues arose from a lack of guidance over the correct approach for the balancing exercise, in particular what 'proportionality' meant under the revised CPR 3.9. Historically, courts adopted a lenient approach in relation to compliance issues.[20] Jackson LJ expected that a few robust Court of Appeal decisions would work out the boundaries, but there was a shocking inconsistency amongst judges.[21] However, in *Mitchell v News Group Newspapers*, the breaching party's costs recovery was limited to their court fees as a penalty for filing their costs budget six days late.[22] This harsh ruling suggests a drive amongst the judiciary for a new culture of efficiency and rule compliance in civil litigation. It was hoped that once litigants understood that the courts had adopted a firmer line on enforcement, litigation would become more disciplined and contain fewer procedural deviations and disputes. If departures are tolerated, then the relaxed approach which the Jackson reforms intended to change would continue.[23]

Unfortunately, *Mitchell* did not have this effect. It instead incentivised parties to be uncooperative and to challenge even the most trivial of procedural breaches, which used up more court time and money. Furthermore, subsequent cases applied the proportionality test inconsistently. For example, the High Court in *Chartwell Estate Agents Limited* granted relief for a procedural breach, arguing that factors in favour of substantive justice fell within considerations of 'all the circumstances of the case' under CPR 3.9(1).[24] Judges were thus being both too lenient and too harsh following the Jackson reforms, undermining confidence in civil procedure.[25] There was no consistent approach.

The Court of Appeal in *Denton v T H White Limited* ruled that *Mitchell* was correct but had been misunderstood.[26] The court adopted a three-stage test for determining whether to grant relief from sanctions, replacing the strict approach with a holistic one without reverting back to excessive

[18] Zuckerman (n 16) 124.
[19] Marialuisa Taddia, 'Jackson Reforms: Shock Therapy' (*The Law Society Gazette*, 31 March 2014) <www.lawgazette.co.uk/practice/jackson-reforms-shock-therapy/5040610.article> accessed 28 August 2020.
[20] Ibid.
[21] Rothwell (n 12).
[22] *Mitchell v News Group Newspapers* [2013] EWCA Civ 1537.
[23] Ibid [41].
[24] *Chartwell Estate Agents Limited v Fergies Properties* [2014] EWHC 438 QB.
[25] *Denton v T H White Ltd* [2014] EWCA Civ 906 [21].
[26] Ibid [3].

leniency.[27] Firstly, the seriousness of the non-compliance is assessed. Secondly, the judge considers whether there is a good reason for non-compliance. Finally, they consider all the circumstances of the case. This indicates that even serious breaches lacking a good reason do not necessarily prevent the grant of relief from sanctions

Furthermore, the court held that the amended CPR 3.9 factors (a) and (b) were reduced from 'paramount' to 'particular' importance.[28] Although Lord Dyson and Lord Vos suggested that both factors carried greater weight than all other considerations, Jackson LJ denied this and said that they were emphasised simply because previous judicial decisions had failed to address them.[29] He observed that rule 3.9 was meant to introduce a culture of compliance, not a harsh regime of zero tolerance for breaches.[30] This is correct, since non-compliance should only be penalised if it inhibits the overriding objective.[31] Jackson LJ made this very point when noting that including 'at proportionate cost' in CPR rule 1.1(1) and (2) was not intended to make strict compliance an end in itself.[32] Despite acknowledging that *Mitchell* was over-zealous and that its correction in *Denton* is to be appreciated, he observed that the revised wording of the overriding objective in CPR 1.1 had been overlooked and ignored.[33]

Case Management and the Notion of Distributive Justice

Proportionality is about considering whether the ends justify the means, since the proper administration of justice goes beyond the immediate parties and considers all potential future litigants.[34] *Mitchell* made clear that the Jackson reforms reject the paramountcy of substantive justice, as no single claim should expend a disproportionate amount of resources. The facts of *Mitchell* demonstrate this well; the first-instance judge had to vacate a half-day appointment – which had been allocated to deal with asbestos-related claims – in order to deal with the claimant's procedural breach.[35] Too often it is a distant litigant who pays the price for another's non-compliance.

However, not all commentators believe that moving from substantive to distributive justice is satisfactory. For example, Higgins opposes the holistic approach of *Denton*, arguing that additional slack makes it more difficult to instil a culture of compliance; this is because cultural change requires judicial support, years of robust case management and hardship to individual litigants.[36] Additionally, Andrews has argued that sacrificing individual justice for proportionality may undermine the faith of citizens in the system, and that if proportionality is too stringently upheld then justice becomes impossible in any individual case.[37] Unfortunately, since scarce

[27] Ibid [24].
[28] Ibid, [32]
[29] Ibid [32] (Dyson LJ and Vos LJ), [85] – [86] (Jackson LJ).
[30] Ibid [96].
[31] Higgins, 'CPR 3.9' (n 15) 389.
[32] The Rt. Hon. Lord Justice Jackson, *The Reform of Civil Litigation* (Sweet & Maxwell 2016) 21.
[33] Dominic Regan, 'Decline and Fall' (NLJ, 2 April 2015) <www.newlawjournal.co.uk/content/jackson-decline-fall> accessed 28 August 2020.
[34] Sorabji (n 2) 207.
[35] *Mitchell* (n 22) [39].
[36] Higgins, 'CPR 3.9' (n 15) 393.
[37] Michael Woollcombe-Clarke, 'The Law of Legal Costs and Why the Price of Justice is So Disproportionately Expensive' (*Legal Cheek*, 21 November 2016) <www.legalcheek.com/lc-journal-posts/the-law-of-legal-costs-and-why-the-price-of-justice-is-so-disproportionately-expensive/> accessed

resources for courts are the new norm, it is important to ensure that court time and money are not wasted.[38] All that litigants should expect is the reasonable allocation of the resources necessary to achieve reasonable enforcement of their rights.[39] Every citizen is entitled to their day in court, but not their year.

To summarise, case management powers seek to promote compliance and predictable costs in line with the new theory of distributive justice.[40] Substantive justice will be denied in cases where it cannot be achieved at a proportionate cost, since overly individualised justice leads to excessive procedural litigation, costs and delays.[41] Success hinges on the courts' abilities to apply these powers effectively, which is only possible if judges, lawyers and litigants understand their purpose. The courts have yet to identify a consistent position in this regard, which undermines the extent to which this particular reform can be said to promote justice. It is hoped that Jackson LJ's prediction of 'a few robust Court of Appeal decisions' has materialised in the form of *Denton*, which paves the way for a consistent and holistic approach.

IV. Alongside Legal Aid Cuts, Has Justice Been Undermined?

On the very day that the reforms were introduced, severe cuts to civil legal aid were implemented through LASPO Part One which Jackson LJ himself regrets and deplores.[42] The contemporaneity of the Jackson reforms and legal aid cuts has been devastating. For example, the lack of guidance over how to apply the stricter standards for rule compliance to litigants-in-person is worrying, since there are now more of them in courts, lacking legal and procedural knowledge. An overly strict approach risks undermining substantive justice in the name of procedural propriety, but leniency towards litigants-in-person risks undermining the need for greater procedural compliance which the Jackson reforms demanded. Judges are thus caught between a rock and a hard place.

Legal aid cuts have undoubtedly undermined access to justice. If claims still followed the substantive justice approach and were based purely on merit, then most judges would provide ample assistance to litigants-in-person. However, under the new regime, it is possible that judges will increasingly dismiss their claims on purely procedural grounds, which would be a rank denial of justice.[43] Although cases involving litigants-in-person take longer to litigate, and delays are something the reforms sought to alleviate, it is oversimplifying to argue that this new culture of compliance should apply equally to both litigants-in-person and trained lawyers.[44] Access to justice is undermined if litigants-in-person are sanctioned for innocent procedural breaches where they cannot have known any better.

The negative impacts on access to justice which followed the Jackson reforms were not intentional since the reforms presupposed the continuation, rather than the reduction, of legal aid.[45] Although

28 August 2020; see also Neil Andrews, *English Civil Procedure: Fundamentals of the New Civil Justice System* (OUP 2003).
[38] *Denton* (n 25) [45].
[39] Ronald Dworkin, *A Matter of Principle* (Harvard University Press 1985) 92.
[40] Sorabji (n 2) 187.
[41] Sorabji (n 2) 169.
[42] Rose (n 4).
[43] Andrew Higgins, 'Civil Justice in a Shrinking State' (2015) 34(3) CJQ 221, 226.
[44] Ahmed (n 17) 89.
[45] Jackson (n 32) xiii.

it is clear that the demise of civil legal aid has hampered the quest for justice and the development of the law, this should not be equally attributed to the Jackson reforms. It is unfortunate that many saw these cuts as part and parcel of the Jackson reforms.[46]

V. Should We Just Move to Contingency Payments?

This essay has identified problems raised through both promoting distributive justice and case management powers, especially when placed alongside cuts to legal aid. Nevertheless, it would be a mistake to revoke the Jackson reforms and only introduce contingency payments, since their implementation has not been as successful as intended.

The introduction of additional funding methods was an important pillar of the reforms, as Jackson believed that funding methods are beneficial so long as they do not impose adverse costs risks on the opposing party.[47] There was a clear need to introduce further funding means, as the abolishment of recoverable success fees and ATE premiums would potentially discourage more impecunious claimants from litigating. Contingency fees – or damages-based-agreements (DBAs) - were therefore introduced via s 45 LASPO. These are private funding arrangements between a representative and a client whereby the representative's fee is contingent upon the success of the case and is determined as a percentage of the compensation received by the client. Clearly, DBAs offer both risk and reward for participants; clients risk paying higher legal costs to their lawyers in victory but are rewarded by the absence of legal costs if they are unsuccessful. They therefore provide access to justice for parties with strong legal claims but without the ability to independently fund their legal costs, much like CFAs.

However, DBAs are more economically efficient than CFAs since their costs are calculated as a percentage of the damages received by the claimant, rather than as an uplift of base costs. DBAs therefore incentivise lawyers to win high damages for their clients, rather than to drag out their legal costs without necessarily achieving the best outcome for the client.[48] In addition, they are easier for lay-people to understand and offer greater certainty as to their final cost. Since they are beneficial for both clients and lawyers, it seems obvious that they should be incorporated into civil litigation.

Nevertheless, the introduction of DBAs has been underwhelming. Prior to the reforms, Richard Moorhead noted that they would have a limited impact on access to justice, since lawyers respond to economic incentives and so will not take on non-profitable cases.[49] Indeed, few people have entered into DBAs following their introduction, suggesting that they are not as appealing to litigants or lawyers as originally envisaged. There is no point in introducing a new means of funding, and thereby supposedly increasing access to justice, if lawyers are hesitant to offer them. To encourage their use by lawyers, the DBA Regulations should be amended to provide greater clarity.[50] However, Mulheron notes that any amendments to the Regulations will inevitably result

[46] Jackson (n 32) 210.
[47] Jackson (n 32) 59.
[48] John Peysner, 'What's Wrong with Contingency Fees' (2001) 10(1) Nott LJ 22, 39.
[49] Richard Moorhead, 'An American Future? Contingency Fees, Claims Explosions and Evidence from Employment Tribunals' (2010) 73(5) MLR 752, 769.
[50] Ministry of Justice (n 1) 5.

in further satellite litigation, a phenomenon which the Jackson reforms sought to avoid.[51] Nevertheless, a short-term rise in procedural litigation may be necessary if it ultimately encourages lawyers and clients to make use of all available funding options.

Most notably, the government's refusal to amend the DBA Regulations 2013 to allow hybrid DBAs has been a contributing factor to the unpopularity of DBAs.[52] Hybrid DBAs are 'no win, low fee' agreements, whereby an unsuccessful litigant still pays their lawyers a substantially reduced sum to avoid the risk of no payment. The prohibition of hybrid DBAs has disappointed Jackson, who argues that it inhibits access to justice for no sensible reason.[53] There are multiple arguments in favour of implementing hybrid DBAs.[54] Firstly, there is no reason not to allow hybrid DBAs since hybrid CFAs are permitted. Secondly, they are widely used in overseas jurisdictions such as Canada and are the main means of funding in the Netherlands. Thirdly, it is in the public interest to permit as many funding methods as possible. Fourthly, lawyers may want guaranteed reduced fees in defeat, especially for high-stake commercial litigation. Fifthly, hybrid DBAs do not add adverse costs risks to the defendant. It is thus disappointing that they have not been introduced.

To summarise, DBAs have not been implemented as successfully as envisaged. At best, they would have a modest impact on promoting access to justice, since they mitigate but do not resolve access to justice problems.[55] As mentioned, the introduction of hybrid agreements may encourage a wider pool of lawyers to offer them, since they would be able to recuperate some costs, however small.

Conclusion

The Jackson reforms do not operate properly if isolated into separate components. According to Jackson LJ, they were intended as an interlocking package of reforms to be implemented as a whole.[56] For example, capping success fees at twenty-five percent of damages and raising general damages for personal injury claims by ten percent were intended to benefit claimants by making up for the abolition of recoverable success fees and ATE premiums.[57] Furthermore, enhancing Part 36 arrangements by increasing penalties for parties who fail to accept reasonable offers to settle was intended to encourage out-of-court settlement, itself more common now that costs liabilities have been rebalanced between the parties. Abandoning the whole package of reforms before their impact can be properly assessed, and solely implementing contingency fees, would therefore be a mistake.

The reforms have helped promote justice in an age of scarce public resources. It is undeniable that not all the reforms have proven successful. Courts inconsistently apply the non-compliance regime due to a lack of guidance as to the meaning of 'proportionate'. DBAs are not regularly

[51] Rachel Mulheron, 'The Damages-Based Agreements Regulations 2013: Some Conundrums in the "Brave New World" of Funding' (2013) 32(2) CJQ 241, 242.
[52] Regan (n 33).
[53] Rose (n 4).
[54] Rothwell (n 12); Lord Justice Jackson, 'Fixing and funding the costs of civil litigation' (2015) 34(3) CJQ 260, 264; Ministry of Justice (n 1) 28.
[55] Moorhead (n 49) 753.
[56] Jackson (n 32) 15.
[57] Jackson (n 32) 45.

adopted due to a lack of economic incentives, regulatory confusion and the prohibition of hybrid agreements. Nevertheless, the reforms have rebalanced costs liabilities between parties and paved the way for establishing distributive justice as the dominant consideration in civil litigation. Ultimately, changes in procedural rules do not occur in isolation, but instead require cultural change and time.

THE RIGHT TO LIBERTY AND SECURITY: PROTECTED IN PRINCIPLE BUT NOT IN PRACTICE

Thekla Homata

Introduction

It is axiomatic that without an effective guarantee of the right to liberty and security, the protection of other fundamental human rights becomes vulnerable. However, the modern system of imprisonment grants states considerable power to deprive individuals of their liberty. Nowadays, many detention regimes are characterised by their lack of due process and safeguards which often result in other violations, prominently torture and forced disappearances. In this article, the issue of whether there is an adequate protection of the right to liberty and security, along with when a legitimate restriction of this fundamental right can occur, will be scrutinised.

This article will begin by defining deprivation of liberty along with demonstrating that states can legitimately restrict this right by relying on the exhaustive list of exceptions in art 5 of the ECHR. Section II will examine the immigration detention to demonstrate that even if a situation falls within the grounds of art 5, safeguards are critical in determining whether a state can legitimately derogate. Furthermore, Section III will analyse preventive detention to question the extent to which the right is actually protected. Section IV will explore psychiatric detention to illustrate that even though the presence of safeguards and the lack of arbitrariness are vital, they still don't guarantee that mentally disabled individuals can enjoy the right to liberty on an equal basis with others. The article will conclude that the right to liberty and security is protected in principle but not in practice due to its non-absolute nature which allows some legitimate derogations, that states take advantage of when attempting to justify their actions.

I. Scope of the Right

The right to liberty and security is protected under art 9 of the ICCPR, whilst all regional human rights instruments also guarantee it. For instance, in the ECHR it is set out in art 5, thus emphasising its significance as it is in the beginning of the Convention where most of the pivotal rights are. As Powell rightly displays, the interpretation of art 5 developed by the ECtHR indicates that the security of a person is manifested 'in the procedural mechanisms through which liberty is protected'.[1] Essentially, the right to liberty and security is characterised as two features of the same right, with physical liberty being the substantive aspect whilst security is the means of protection. Therefore, the right to security of person is vital to secure freedom from arbitrary detention by requiring procedural safeguards such as the right to be informed about the detention's cause, to be brought before a judge,[2] to challenge the detention,[3] and a right to compensation if

[1] Rhonda Powell, 'The Right to Security of Person in European Court of Human Right Jurisprudence', (2007) *European Human Rights Law Review,* 649 <https://www.academia.edu/7573902/The_Right_to_Security_of_Person_in_European_Court_of_Human_Right_Jurisprudence> accessed 10 May 2019.
[2] ECHR art 5(2).
[3] ECHR art 5(3).

the article is breached.[4] The right's protection should be examined on the safeguards; the fact that they are required suggests that in principle it is protected to a certain extent.

However, the fact that there is not a common definition for the deprivation of liberty is problematic as it is used by states to overpass this right by arguing that their actions are lawful, which raises issues as to the adequacy of the protection of the right. The deprivation of liberty was firstly portrayed in *Guzzardi v Italy*, where the ECtHR accentuated that the article is concerned with the degree and intensity rather than the restriction's nature or substance.[5] Additionally, the court's view of when art 5 is engaged is rooted in the type, duration, effects and manner of implementation of the measure.[6] The ECHR rather than simply protecting individuals against illegal and arbitrary detention such as the ICCPR, sets out a more restrictive approach. Although any interference with the right is prima facie unlawful, art 5(1) ECHR provides an exhaustive list of grounds upon which detention is justified. In fact, *Merabishvili v Georgia* illustrated that if an instance of deprivation of liberty doesn't fall within the article, it cannot fit by an appeal based on States balancing their interests against those of the detainee.[7] This suggests that there are no other permissible derogations, which portrays that the right is sufficiently protected. The principles were considered in *Öcalan v Turkey,* where the underlying importance of complying with those standards was stressed along with confirming that for a detention to be lawful and consistent with a procedure prescribed by law, it must be in compliance with the substantive and procedural rules of national law.[8] Foster advocates that this reveals that the ECtHR is prepared to take a diplomatic and pragmatic approach even if there are practices that might not necessarily be in conformity with the rule of law.[9] Therefore, it raises questions as to the extent to which the right's enforcement is protected.

II. Immigration Detention

The deprivation of liberty is only authorised under the ECHR if it pursues a specific objective defined in art 5(1). Art 5(1)(f) equips a state with the opportunity to legitimately restrict this right, as it provides for a person's lawful arrest or detention to prevent him from entering a country or when deportations and extraditions are concerned. However, such arrest or detention will be unlawful under art 5 if the state authorities achieved its aims through illegal means or acted in bad faith, which ensures that the right is adequately protected. Consequentially, in *Bozano*[10] the ECtHR held that there had been a violation of art 5 as the applicant's liberty had been compromised in order to effect a disguised extradition, something which was considered unlawful, emphasising that states are not allowed to stretch the principles in order to benefit. Another vital consideration is the existence of measures to ensure that the detention is not arbitrary or unreasonably prolonged. In *Chahal*, there was no violation as the proceedings had to be conducted with due diligence to be acceptable under the convention, and there was an immigration advisory panel to check on potential arbitrariness of detention.[11] This indicates the significance of the safeguards' presence as it plays a major role in determining the legitimacy of

[4] ECHR art 5(4).
[5] *Guzzardi v Italy* (1981) 3 EHRR 333.
[6] Ibid.
[7] *Merabishvili v Georgia* App no 72508/13 (ECtHR, 28 Nov 2017), 45 BHRC 1.
[8] *Öcalan v Turkey* App no 46221/99 (ECtHR, 12 May 2005).
[9] Steve Foster, *Human Rights and Civil Liberties* (2nd edition, Pearson Education Limited 2008).
[10] *Bozano v France* (1986) 9 EHRR 297.
[11] *Chahal v The United Kingdom* (1997) 23 EHRR 413.

a restriction of the right along with hinting how vagueness of the 'brief period' allowed, can be utilised by States to justify their actions.

Administrative detention is based on policy reasons; thus, many states have sought to argue that detention of asylum seekers or those not allocated refugee status is not a deprivation of liberty. As illustrated in *Saadi*, domestic measures allowing the detention of asylum seekers pending the determination of their asylum claims have been declared compatible with paragraph (f) of the Convention.[12] This is because, as Metzer noted, the 'Court needs to retain its legitimacy in the eyes of signatory states by respecting their sovereign right to control their borders and refuse aliens the same rights to liberty enjoyed by their citizens'.[13] In *A v Australia*, the applicant was a Cambodian national, who had arrived in Australia unlawfully by boat in November 1989 and applied for refugee status.[14] In December 1989, the applicant was transferred to Villawood Detention Center, where he remained until he was transferred to Cuuragundi Camp, then Berrimah Camp and then finally to Port Hedland Detention Center in 1991.[15] He did not have access to a lawyer until September 1990, and lost touch with legal representatives in his many moves during 1991.[16] The HRC agreed that Australia had violated art 9 of the ICCPR because he had been subject to arbitrary detention and denied judicial oversight.[17] The Committee stated that Australia should pay compensation, but the Australian Government refused to do so, raising concerns on whether the right is protected if the countries have the flexibility not to be punished. This also portrays that the HRC do not have enough authority, hence, questioning the effect their decisions have, leading to the right's protection being limited in its application. Similarly, in the *Belmarsh* case*,* the ECtHR found a violation of art 5(5) ECHR.[18] The individuals hadn't been paid any compensation for the time they spent in unlawful detention which is one of the guarantees provided to those deprived of their liberty. Compensation is a vital element when evaluating the extent to which the right is protected, thus the fact that states can circumvent their way hints that in practice the right may not be adequately protected.

III. Preventive Detention and Emergency Detention Powers

Preventive detention is concerned with executive power being used to detain in order to prevent future crimes contrary to national interest, which has been a matter of concern lately. As Greer demonstrates, the accusations of predicted criminal conduct refer to imprecise activities allegedly prejudicial to the public that the detainee is likely to become involved unless detained.[19] In *Brannigan,* the Court noticed that to legitimately restrict the right to liberty, a link must exist between the emergency situation and necessity to detain these people to prevent them from threatening the state.[20] Even though they were detained for a longer period, no violation was

[12] *Saadi v United Kingdom* (2008) 47 EHRR 17.
[13] Jonathan Metzer, 'Article 5: Right to Liberty and Security of the Person' <https://ukhumanrightsblog.com/incorporated-rights/articles-index/article-5-of-the-echr/> accessed 30 April 2019.
[14] *A v. Australia*, U.N. Doc. CCPR/C/59/D/560/1993 (30 April 1997).
[15] Ibid.
[16] Ibid.
[17] Ibid.
[18] *A and others v Secretary of State for the Home Department* [2004] UKHL 56.
[19] Steven Greer, 'Preventive Detention and Public Security: Towards a General Model', in Andrew Harding and John Hatchard (eds), *Preventive Detention and Security Law: A Comparative Survey* (Martinus Nijhoff, 1993).
[20] *Brannigan and McBride v United Kingdom* App no 14553/89 (ECtHR, 26 MAY 1993).

found because safeguards were provided and the derogation was linked to a genuine emergency. However, this raises morality concerns; as Sliedregt wrote, it is 'a great injustice, because a person is imprisoned on the basis of bare suspicions before he has been proved guilty'.[21] The fact that individuals are deprived of their liberty based on suspicions, questions whether the protection of this right can be considered adequate. In *Aksoy v Turkey*, there was again an arrest on suspicion and even though the court conceded that such an emergency existed, 14 days was considered too long to detain someone incommunicado.[22] This case illustrates that the threshold for states to legitimately restrict the right is high as the requirements of a valid derogation must still be fulfilled, thus the measures must be a necessary and proportionate response to the emergency confronted. Furthermore, any such deprivation of liberty must not be arbitrary as the right to bring such proceedings is part of customary international law and cannot be derogated from in times of emergency.[23] The fact that safeguards must be put in place illustrates that although states can legitimately restrict this right, it is still protected to a certain extent as a fair balance between individual liberty and national security must be struck.

Indefinite detention without charge, is often seen as a crucial tool by states to deal with emergencies. As McGarrity has pointed out, glamour for tougher 'law and order measures typically follows terrorism events'.[24] Subsequently, the right to liberty is affected in times of emergencies. The ECtHR is prepared to interpret and apply the provisions of art 5 more flexibly as art 15 allows for derogations in times of emergency and a derogation from art 9 ICCPR is also permitted under art 4. Walker, in her detailed examination of the decision on the detention's legality in *Belmarsh*,[25] reaches the conclusion that starting and ending with derogation is not a sufficient range. She advocates that, intermediate restraints on liberty must be placed on the statute book.[26] This point has validity as the main causes of unlawful arrests and arbitrary detentions concern states derogating because of emergencies. Upholding this, Gray conveys that at times of emergency, international human rights instruments give ground to the needs of public security, at the expense of the fundamental human rights.[27] While the law is against the exercise of arbitrary executive power, it also accommodates departures from general principles in times of emergency, highlighting that the right is not absolute and may be in need of further protection.

The extent to which preventive detention could be consistent with existing international human rights law has been debated. As Macken advocates, state's attempts to identify those likely to threaten its security because of terrorism lead to the unfortunate but necessary result that those detained may ultimately be proven innocent.[28] In preventive detention certainty of judgement is traded with effectiveness of action, which as demonstrated in *Lawless* is an acceptable response in exceptional circumstances. In fact, *Lawless* presented the Court with a clear opportunity to

[21] Elies Van Sliedregt, 'A Contemporary Reflection on the Presumption of Innocence' (2009) 80 *Revue internationale de droit pénal* 247-267.
[22] *Aksoy v Turkey* App no 21987/93 (ECtHR, 18 December 1996).
[23] Working Group on Arbitrary Detention, Deliberation No 9, n 21, para 47.
[24] Nicola McGarrity and George Williams**,** *Counter-Terrorism and Beyond: The Culture of Law and Justice After 9/11* (Routledge 2010) 13-29.
[25] *A and others v Secretary of State for the Home Department* (n 18).
[26] Clive Walker, 'Prisoners of "War All the Time"', (2005) 1 EHRLR 50.
[27]Anthony Gray, 'Internment of Terrorism Suspects: Human Rights and Constitutional Issues' [2018] AJHR 307-325 <www.tandfonline.com/doi/pdf/10.1080/1323238X.2018.1523659?needAccess=true> accessed on 2 May 2019.
[28] Claire Macken, 'Preventive Detention and the Right to Personal Liberty and Security under Article 5 ECHR' (2006) 10 IJHR 195.

reject preventive detention, but instead chose to set parameters for those in such detention.[29] A detention that is legitimate at the outset may become arbitrary over time, as the rationale of detention may cease to be relevant. The right to periodic review acts as a safeguard against this, yet Shangeeta raises the question of whether a 'detainee remains such a danger to society as to warrant continued detention'.[30] The ECtHR held, in *James, Wells and Lee*,[31] that the detention may become arbitrary if no reasonable effort is made to rehabilitate offenders and address the risks that they pose to society. Metzer demonstrated that the right to liberty cannot be absolute and even though most of the art is devoted to the conditions under which a person's liberty can lawfully be restricted, all of these permissible forms of detention depend for their legitimacy on the availability of review.[32] Therefore, it is not simple for a person's liberty to be lawfully curtailed as periodic scrutiny of the legality of the detention by an independent court is required, further reinforcing that the right is protected.

IV. Psychiatric Detention

An area that has attracted criticism regarding the right to liberty is the psychiatric detention of persons of unsound mind. Art 5(1)(e) provides for their lawful detention and a clear procedural requirement was set out in *Winterwep*.[33] The ECtHR held that the person must be shown to be of 'unsound mind' through objective medical expertise, the mental disorder must be warranting compulsory confinement, and the validity of the continued detention requires the demonstration of the persistence of the order. Additionally, *Kracke* shows that as liberty and security are foundational values there must be a compelling purpose to justify their curtailment.[34] Given the importance of these rights, convenience, cost and administrative efficiency are not reasons for detention, which indicates that there is a certain protection to the right. However, the statements on psychiatric detention made by the UNHRC and by the UNCRPD do not provide the same interpretation of the law on deprivation of liberty, with an element of vagueness in both. The CRPD suggests that dangerousness cannot be a ground whereupon one's detention is based,[35] whereas the HRC provides the justification based on protecting the person or others from serious harm.[36] Even though they both illustrate that a deprivation of liberty cannot be based solely on that a person has a disability, the distinction to the justification attached to the detention is problematic. Chandler argues the need for clarity and predictability to be established, so that the law restricts the rights to liberty and security with transparent criteria.[37] Therefore, a consistent approach to the regulation of restrictive practices should be upheld to formulate certainty.

---

[29] *Lawless v Ireland* App no 332/57 (ECtHR 1 July 1961).
[30] Shangeeta Shah, *International Human Rights Law* (2nd edition, OUP 2014) 264.
[31] *James, Well and Lee v UK* (2013) 56 EHRR 12.
[32] Jonathan Metzer (n 13).
[33] *Wintwerp v The Netherlands* (1979) 2 EHRR 387.
[34] *Kracke v Mental Health Review Board & Ors* (General) (2009) VCAT 646.
[35] Committee on the Rights of Persons with Disabilities , *Guidelines on Article 14 of the Convention on the Rights of Persons with Disabilities: The Rights to Liberty and Security of Persons with Disabilities* (adopted September 2015) <www.ohchr.org> accessed 12 May 2019.
[36] UN Human Rights Committee (HRC), 'General Comment no. 35, Article 9 (Liberty and Security of Person)', 16 December 2014, CCPR/C/GC/35 <www.refworld.org/docid/553e0f984.html> accessed 14 May 2019.
[37] Kim Chandler, Ben White & Lindy Willmott , 'Safeguarding Rights to Liberty and Security where People with Disability are Subject to Detention and Restraint: A Practical Approach to the Adjudication, Interpretation and Making of Law' (Routledge 2018) 550 <https://0-www-tandfonline-com.wam.leeds.ac.uk/doi/pdf/10.1080/13218719.2018.1467806?needAccess=true> accessed 5 May 2019.

One of the safeguards following arrest and detention is that the individual must be informed of the detention's reasons, which is where problems arise in the context of psychiatric detention as it might be hard for people of unsound mind to fully comprehend them. Chandler illustrates that obligations must be placed on states to support people with disabilities to realise their right to liberty through providing opportunities for habilitation and rehabilitation in an environment that allows access to the community and offers appropriate support.[38] In fact, the requirement for reasonable accommodation is included in art 14 CPRD, which reflects a right-based approach to equality. Therefore, these requirements should be met before utilising restrictive practices or this would amount to a discriminatory result. In practice, the discriminatory threshold that exists is displayed in *Fijalkowska*.[39] Ms Fijalkowska had a diagnosis of paranoid schizophrenia and was detained in February 1998 in a psychiatric institution. Following the end of her treatment, she sought to appeal the initial committal decision but was unable to using domestic remedies. The HRC found a violation of art 9, as she didn't have the possibility to challenge the order while in detention and she should have been assisted or represented in a way to sufficiently safeguard her rights, yet she was not. Interestingly, Ms Fijalkowska's alleged sufficient safeguard was her sister, who was the one who requested the committal order in the first place.[40] This reveals that even though in principle the right to liberty appears to be protected, the right's enforcement is not, as states fail to realise that even if the right is not absolute, arbitrariness is not permissible. However, this argument raises the question of whether such laws are too costly to be implemented. An adequate response to this is Barak's statement that the 'guaranteeing of equal opportunities for the disabled is an expensive endeavour', demonstrating that a society that values human rights and equality is willing to pay that price.[41] Overall, a rights-based approach demands more from statutes that regulate restrictive practices than appropriate procedural safeguards, including a lack of arbitrariness. While they are vital, they still do not ensure that mentally disabled people will secure their rights to liberty on an equal basis with others.

Conclusion

Art 5 of the ECHR provides an exhaustive list on when the right of liberty and security can be legitimately restricted by states, highlighting that only those listed are the permissible situations in which a derogation can occur. However, the significance of safeguards being present in determining whether a derogation from this right is legitimate or not has been illustrated. Through an examination of the three detentions that dominate today's world, immigration, preventive and psychiatric, it has been demonstrated that even though in principle the threshold of a legitimate restriction is high because of the safeguards required, in reality this is not the case. Therefore, the right is protected to a certain extent, however, its enforcement is not adequate, which is proven in the violations where states attempt to justify themselves by relying on the exceptions. As the refugee crisis heightens, so do the issues that asylum seekers are facing when attempting to adequately acquire their rights. Most commonly, torture is an immediate consequence of the arbitrary detention adding to the reasons why urgent action is required by the Courts to pressurise States to provide essential protection to detainees. This can be achieved by strengthening HRC's

[38] Ibid.
[39] *Fijalkowska v Poland* UN Doc CCPR/C/84/D/1061/2002 (26 July 2005).
[40] Ibid.
[41] Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (CUP 2012) 380.

authority, by equipping it with the means to demolish a State's flexibility in not being punished. Accountability should be restored, with the main driving factor being that the protection of human rights should be at the heart of the society, which is why the fight for their adequate protection in practice should be pursued. It is of the essence that any necessary detention should take place in appropriate, sanitary, non-punitive facilities, whilst ultimately ensuring that it is not taking place in prisons. Furthermore, the rights of individuals with mental disabilities should be restored, minimising the significant gap between theory and practice of international human rights law, which leads to discrimination. Detention on mental health grounds is discriminatory where it is based merely on disability, and it should not be justified by a motivation to protect the safety of the individual or others or by an alleged need for care and treatment. Detaining an individual solely due to their disability is illegal and must be abolished rather than being legitimised through regulation and procedural safeguards. The first step in resolving this issue is setting aside the assumption that the individual is fully aware of the circumstances, which is where the problem is rooted. States should attempt through habilitation and rehabilitation to aid the disabled individuals' understanding of their right to liberty. Equal opportunities and the right's adequate protection require costly implementations along with obligations imposed on States, yet, it is a price that a society that appreciates the significance of human rights, should be willing to pay.

PUBLIC PROTECTION: THE CASE FOR FURTHER REFORM POST *ROBINSON v CHIEF CONSTABLE OF WEST YORKSHIRE POLICE* [2028] UKSC 4

Beatrice Baskett

Introduction

The Supreme Court's decision in *Robinson v Chief Constable of West Yorkshire Police* [2018] has brought 'welcome clarification' through outlining the array of circumstances in which negligence claims can be advanced against the police. [1] This article takes the form of three parts. Primarily, analysis of *Robinson* provides insight into the range of situations in which negligence claims are successful.[2] Secondly, it is proposed that the law should prioritise corrective justice, as the principal role of the legal system is to provide redress.[3] Moreover, there is a lack of evidence grounding policy claims.[4] Under the overreaching theme of corrective justice, it will be shown that post-*Robinson* the law remains too narrow for claimants. Finally, two areas of expansion are suggested. General reform should occur through imposing a proportionality test in the final stage of *Caparo* when determining whether it is 'fair, just and reasonable' for liability to be imposed.[5] This will ensure that *prima facie* successful claims are only refused with substantial justification. With regards to the established categories, liability should extend into the context of omissions to prevent the current arbitrary classification between omissions and acts.[6]

I. *Robinson*

Described by the defence lawyers as 'the most important case concerning the police in a generation',[7] *Robinson* has provided clarity to the situations in which a duty of care is owed through: detailing the established categories of liability, clarifying the existing precedent and noting how future novel claims should be determined.[8] Police liability is framed on the understanding that 'public authorities are generally subject to the same liabilities in tort as private individuals'.[9] Inherent to this overreaching concept is that there is no duty owed (absent special

[1] *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4, [2018] AC 736; Ian Skelt, 'An assault on Hill? Police liability in negligence positively narrowed'(UK Police Law Blog, 8 February 2018) < https://ukhumanrightsblog.com/2018/02/12/its-a-fair-cop-supreme-court-clarifies-scope-of-duties-of-care-owed-by-police > accessed 22 January 2019.
[2] *Robinson* (n 1).
[3] Richard Mullender, 'Corrective justice, distributive justice, and the law of negligence', [2001] 17 PN 35, 45.
[4] Law Commission, *Remedies against Public Bodies A Scoping Report* (2006) para 3.52.
[5] Richard Mullender, 'Negligence, Public Bodies, and Ruthlessness' (2009) 72 MLR 961, 977; *Caparo Industries Plc v Dickman* [1990] 2 A.C. 605, 609 para C.
[6] *Michael v Chief Constable of South Wales Police (SC(E))* [2015] UKSC 2, [2015] AC 1732; *Darnley v Croydon Health Services NHS Trust* [2018] UKSC 50, [2018] 3 WLR 1153.
[7] 'Supreme Court restricts Hill "immunity" for police in negligence claim (*Robinson v Chief Constable of West Yorkshire Police)*' (LexisNexisUK Blogs, 27 February 2018) < https://blogs.lexisnexis.co.uk/content/dispute-resolution/supreme-court-restricts-hill-immunity-for-police-in-negligence-claim-robinson-v-chief-constable-of-west-yorkshire-police > accessed 30 January 2019.
[8] *Robinson* (n 1).
[9] Ibid 748 para C.

circumstances): in situations concerning omissions, [10] to 'provide a benefit', [11] and to prevent individuals 'from being harmed by the conduct of a third party'. [12]

The facts of the case were that Mrs Robinson was directly knocked to the ground by police officers during an arrest.[13] It was held that this was a reasonably foreseeable act in which the police directly imposed harm on her.[14] This reasoning can be traced back to *Donoghue* with the notion of proximity featuring in the decision to impose liability.[15] A deontological approach was taken by the court in which her intrinsic worth was recognised and, under a commitment to corrective justice, she was provided with a remedy.[16]

II. Corrective Justice v Distributive Justice

Lord Steyn described negligence law as a 'mosaic' in which the principles and tensions between corrective justice and distributive justice are interwoven.[17] This is demonstrated through judicial analysis which considers how to remedy the harm to the claimant (corrective justice) and then the societal impact of a decision (distributive justice).[18] Distributive justice seeks to fairly allocate 'benefits and burdens in society'.[19] In determining the impact of a decision, a consequentialist viewpoint facilitates an analysis of policy reasoning and the needs of society.[20] Due to their tension, the principle which is ultimately favoured tends to determine whether liability is imposed or denied. Therefore, the issue of incommensurability arises,[21] in which equal co-existence of the principles cannot occur and the law must favour one outcome over the other.

Corrective justice should have priority and 'first claim on the loyalty of the law'. [22] This is because the underlying principle of the justice system is to remedy wrongs.[23] The judiciary are more appropriately placed to determine orthodox rules as opposed to balancing policy issues (containing political choices). The overreaching doctrines of the separation of powers (in comparison to the Government) and justiciability should caution speculative judicial reasoning.[24] The prioritisation of corrective justice is emphasised through the current legal framework. *Robinson* clarified that *Caparo* did not establish a constantly applicable test, but rather factors that will be applied in novel cases, where there are no existing principles.[25] When these factors are considered, 'proximity' and 'foreseeability' are evaluated first.[26] Only once these elements are satisfied, the court considers whether it is 'fair, just and reasonable' for liability to be

[10] Ibid 750, para E.
[11] Ibid 753, para A.
[12] Ibid 749, para D.
[13] Ibid 736, para C.
[14] Ibid 739 para E.
[15] *Donoghue v Stevenson* [1932] AC 502, 581.
[16] Mullender (n 5) 970.
[17] *McFarlane v Tayside Health Board* [2000] 2 AC 59, 83 para C.
[18] *McLoughlin v O'Brien and Others* [1983] 1 AC 410, 423-24.
[19] Mullender (n 3) 35.
[20] Ibid 41.
[21] Ibid.
[22] *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633, 749 para G.
[23] Ibid.
[24] Mullender (n 5) 964.
[25] *Robinson* (n 1) 744 para F; see *Caparo* (n 5).
[26] *Caparo* (n 5).

imposed.[27] This indicates loyalty to corrective justice, as the primary concern is the situation the claimant was in, before wider interests are considered.

Moreover, in *Robinson*, Lord Reed stated (with agreement from Baroness Hale and Lord Hodge) that policy should not be considered on a 'routine' basis. [28] Although Lord Mance suggested that this blasé description of policy may be somewhat 'unrealistic',[29] an absence of empirical evidence to support policy considerations indicates Lord Reed's comments as the most appropriate approach to adopt.[30] The main policy arguments advanced are: a floodgate of claims will be encouraged,[31] defensive policing,[32] and diversion of finite resources.[33] Firstly, the floodgate argument is often disproved by later events.[34] Comparison to the Canadian jurisdiction adds persuasive support to this statement through the case of *Doe,* in which the existence of a duty of care to warn those susceptible to attack was approved.[35] Whilst this was a vast expansion of liability, the floodgate concern and defensive policing has not materialised.[36] There is no evidence to suggest that this reality would not also be mirrored in the English and Welsh jurisdiction.

It is argued that an increase in liability would result in expense 'from the public purse', in the form of compensation and litigation preparation, diverting resources.[37] Whilst these issues should be considered, a realistic approach is necessary and thus policy reasons should be advanced as risks, rather than definite outcomes presented on 'factual premises'.[38] Additionally some policies favour corrective justice through suggestions that claims can draw attention to 'blind spots' in the law, indicating areas that require amendment.[39] One of the 'Seven Principles of Public Life' is that those in public office must be accountable.[40] Through litigation revealing areas of poor performance it is ensured that the police take responsibility for their actions.

III. Reform

Proportionality and *Caparo*

To prevent an inappropriate narrowing of the law in future scenarios, when novel cases arise, the element of *Caparo* questioning whether imposition of liability is 'fair, just and reasonable' should be applied in accordance with the proportionality principle, as was proposed by Mullender.[41] This

[27] Ibid.
[28] *Robinson* (n 1) 758 para F.
[29] Ibid 764 para B.
[30] Ibid 758 para F.
[31] *McLoughlin* (n 18) 425 para D.
[32] Jonathan Morgan, 'Policy Reasoning in Tort Law: The Courts, the Law Commission and the Critics' (2009) 125 LQR 215, 217.
[33] *X (Minors)* (n 22), 720 para G.
[34] *McLoughlin* (n 18) 425 para D.
[35] *Doe v Metropolitan Toronto (Municipality) Commissioners of Police* (1998) CanLll 14826 (ON S.C.).
[36] Kirsty Horsey, 'Trust in the police? Police Negligence, Invisible Immunity and Disadvantages Claimants' in Janice Richardson and Erika Rackley (eds), *Feminist Perspectives on Tort Law* (Routledge 2012) 91.
[37] *Robinson* (n 1) 755 para D.
[38] Morgan (n 32) 221-222 ; Law Commission (n 4) para 3.52.
[39] Mullender (n 5) 978 ; see *Michael* (n 6) 1785-86.
[40] Committee on Standards in Public Life, 'The 7 Principles of Public Life' (31 May 1995) <www.gov.uk/government/publications/the-7-principles-of-public-life/the-7-principles-of-public-life--2> accessed 25 January 2019.
[41] *Caparo* (n 5); see Mullender (n 5) 977.

is the most appropriate means of reform as it is loyal to the principle of corrective justice, in which a decision to not impose liability only occurs with justification. Policy scaremongering (exaggerating claims with no empirical backing) is limited due to the burden of proof that protection is necessary 'in order to pursue the relevant outcome'.[42] This encourages evidence to be adduced. Practically, this reform would transpose into increased liability in the scope of operational activities, compared to those at a policy level.[43] The latter is more sensitive to discretion by those in public office, and so easier to justify.

Amendments must not be considered in isolation, but with awareness of related fields. The proportionality principle is commonly used in determining human rights breaches.[44] The case of *Osman* provides an example of the principle operating in the scope of a negligence claim.[45] The ECtHR in *Osman* considered Lord Keith's statement in *Hill* that 'the police were immune from action' against article 6 and the 'Right to a Fair Trial'.[46] It was held that a 'blanket immunity' was an 'unjustifiable restriction' inconsistent with the proportionality principle.[47] *Robinson* clarified this as a misinterpretation in which Lord Keith actually confirmed liability for 'negligence … resulting in personal injury', with his statement referring to, absent special circumstances, no duty of care existing for 'the performance by the police of their function of investigating crime'.[48] Furthermore, in *Michael*, the court considered potential breaches of article 2 and article 3 under the Human Rights Act 1998.[49] Whilst claims in private and public law are distinct, having a proportionality test applied across both fields ensures coherence. Moreover, it would allow the court to balance corrective and distributive justice in a consistent manner, with priority correctly falling on the former.

Liability for Omissions

Having outlined how *Caparo* should be applied to novel situations to prevent future decisions being made on an inappropriately narrow basis,[50] it is submitted that the settled category of non-liability for omissions should be re-visited and expanded. The inherent distinction between acts and omissions has come under tension in recent years, with Lord Kerr stating in *Michael* that he does 'not believe that rules relating to liability for omissions should inhibit the law's development'.[51] In support of this it is advanced that, as the law has developed, arbitrary lines have been drawn between acts and omissions. It does not make logical sense that scenarios of similar conduct can have opposite outcomes depending on their categorisation, signalling the need for revision.

The earlier decision of the Supreme Court in *Michael* can be re-analysed with the hindsight of the recent decision in *Darnley.*[52] In *Michael* the victim rang the police reporting that her ex-partner

[42] Mullender (n 5).
[43] Ibid 968.
[44] European Convention on Human Rights, art 2 <www.echr.coe.int/Documents/Convention_ENG.pdf > accessed 31 January 2019.
[45] *Osman v United Kingdom* [1999] 1 FLR 193.
[46] Ibid; *Hill v Chief Constable of West Yorkshire* [1989] A.C. 53, 64 para. A; see ECHR, art 6 (n 44).
[47] *Osman* (n 45).
[48] *Robinson* (n 1) 753 para G, 754 para D.
[49] *Michael* (n 6) 1733 para C; Human Rights Act 1998.
[50] *Caparo* (n 5).
[51] *Michael* (n 6) 1780 para E.
[52] *Darnley* (n 6).

had threatened to kill her.[53] The call-operator, mishearing the threat, conveyed to the emergency control room that the ex-partner was threating to hit the victim.[54] This miscommunication resulted in the call being inappropriately graded and an insufficient response time, in which the police arrived after her death.[55] It was noted by Lord Toulson that the 'tragic murder … might have been prevented if the police had responded promptly'.[56] Comparatively, in *Darnley* an A&E receptionist relayed incorrect information to a patient regarding the waiting time to be seen by a doctor, resulting in the claimant leaving A&E for not wanting to wait.[57] The patient suffered brain damage.[58] It was held that the long-term effects of his injury would not have been as extensive had he received medical treatment when he originally came to the hospital.[59] Both instances thus illustrate a delayed response from a trained professional, resulting in damage being greater than it would have been had a prompt response occurred.

In *Darnley* the receptionist was held to be culpable, indicating that 'organisation[s] can now be liable for the actions of non-medical staff, if misleading information is provided which causes injury'.[60] It can be argued by analogy that the police force are liable for the actions of call-handlers. Both circumstances concern damage caused by incorrect relays of information: the relay of the waiting time in A&E and the relay of the threat being to hit (rather than a threat to kill).[61] It is accepted that in *Michael* false information was not conveyed, but rather an incomplete picture, highlighting why the court categorised the situation as that of an omission.[62] However, there are significant similarities between the cases. The conduct in *Darnley* was categorised as a positive act, while the conduct in *Michael* was categorised as an omission; this led to liability imposed in the former, but not in the latter.[63] Hence, we see similar scenarios being categorised in antithetical manners, reasoned through an arbitrary distinction between acts and omissions.

To provide consistency 'like cases [should be treated] alike'.[64] Taking a unified approach, viewing acts in the same context as omissions, it is proposed that imbalance is currently arising in the law. In the case of *White,* police officers sought compensation for psychiatric harm suffered as a result of the Hillsborough incident.[65] It was denied on the grounds of fairness to other categories of claimants who would not be able to recover damages.[66] This concept can also 'support some pro-liability arguments … where those advancing an action are able to argue that the [current] situation … [that] has arisen is similar to circumstances comprehended by an existing liability rule'.[67] Thus, under the concepts of coherence and fairness, the range of successful negligence circumstances should expand into the category of omissions, in which the claim in

[53] See *Michael* (n 6) 1732 para E.
[54] Ibid.
[55] Ibid para F.
[56] Ibid 1742 para E.
[57] See *Darnley* (n 6) 1153 para D.
[58] Ibid para E.
[59] Ibid para F.
[60] Ibid; Jennifer Hales, 'Supreme Court find A&E receptionist negligent in brain damage case' (17 October 2018) <www.fletcherssolicitors.co.uk/news/supreme-court-find-ae-receptionist-negligent-brain-damage-case/> accessed 30 January 2019.
[61] See *Darnley* (n 6) 1153 para D; *Michael*] (n 6)1732 paras E, F.
[62] See *Michael* (n 6) 1736 para F.
[63] See *Darnley* (n 6) 1154 para B; ibid.
[64] *White v Chief Constable of South Yorkshire Police* [1999] 2 A.C. 455, 507 para A.
[65] Ibid 455 para G.
[66] Ibid 456 para G.
[67] See Mullender (n 3) 47.

Michael is successful, like the claim in *Darnley*.[68] The court in *White* wanted 'to preserve the general perception of the law as a system of rules which is fair'.[69] Currently similar scenarios lead to opposite outcomes and this does not demonstrate fairness or an appropriate commitment to corrective justice.

While it has been stated that 'the categories of negligence are never closed … and it would be open to the court to create a new exception to the general rule about omissions',[70] the main arguments cited against expansion to omissions are: the police should be subject to the same liabilities as individuals,[71] omissions are less culpable than acts,[72] and once expansion into the category of omissions is allowed uncontrollable expansion will occur.[73] The first argument concerns Dicey's 'Equality Principle',[74] advocating that the same responsibilities should apply to all before the law. However, it is illogical that the police, who are provided 'with specialist resources, equipment, and training … [and] are legally entitled to intervene and use force to protect citizens' should be considered in the same way as laymen.[75] Individuals facing imminent threats can reasonably self-protect, but beyond this their sole option is to inform the police and rely on them to take action.[76] Therefore, they are not bodies of equal status and it is unfounded that two groups with different roles, obligations and resources should be governed by the same rules.

Secondly, there are occasions where there is equal culpability between acts and omissions, meriting liability. Often academically cited is the example that 'the mother who deliberately starves her child to death has behaved just as culpably as the mother who deliberately poisons her child'.[77] Whilst this can be rationalised through a parental relationship owing a specific duty, the police too have a specific duty. Section 83 of the Police Reform Act 2002 outlines a specific obligation, in the form of their attestation:

> I.....of.....do solemnly and sincerely declare and affirm that I will well and truly serve the Queen in the office of constable, with fairness, integrity, diligence and impartiality, upholding fundamental human rights and according equal respect to all people; and that I will, to the best of my power, cause the peace to be kept and preserved and prevent all offences against people and property; and that while I continue to hold the said office I will, to the best of my skill and knowledge, discharge all the duties thereof faithfully according to law.[78]

Thus, combining the specific purpose of the police and the previously discussed need for accountability,[79] extension into the area of omissions is supported.

---

[68] See *Michael* (n 6); *Darnley* (n 6).
[69] See *White* (n 64) 511 para C
[70] See *Michael* (n 6) 1761 para F.
[71] Stelios Tofaris, 'Duty of Care in Negligence: A Return to Orthodoxy?' (2018) 77(3) CLJ 454, 456.
[72] Stelios Tofaris and Sandy Steel, 'Negligence Liability for Omissions and the Police' 75 [2016] CLJ 128, 131.
[73] See *McLoughlin* (n 18) 425 para D.
[74] See Tofaris (n 71).
[75] See Tofaris and Steel (n 72) 145-146.
[76] Ibid 146.
[77] Ibid 131.
[78] Police Reform Act 2002, s 83.
[79] See Committee on Standards in Public Life (n 40).

In response to the concern that incremental development of this principle could result in a copious number of claims and a lack of resources to deal with them, it is argued that the extension into omissions should be strict and fact-specific to situations in which conduct fell below an acceptable standard. In *Michael* the police did not do all they could to help and they tragically failed to aid the victim.[80] False information was conveyed and the call was graded incorrectly.[81] Similarly, in the case of *Smith* the police did not even keep a record of the calls reporting the allegations.[82] These are both instances in which conduct is carried out by the police at an unacceptable standard, as opposed to conduct which failed purely on resource-level arguments. *Robinson* clarifies that a duty of care 'is always a duty to take such care as is reasonable in the circumstances'.[83] If this statement is applied when determining liability then analysis of the resources available and the standard of conduct would assist in concluding whether liability should be imposed. However, when there is negligent and un-explainable action, police accountability in the context of omissions is necessary to ensure adequate standards are upheld.

Conclusion

In conclusion, *Robinson* has consolidated the areas and existing precedent in which claimants can successfully advance negligence claims against the police.[84] When these are analysed under a commitment to corrective justice, it is concluded that the circumstances of liability remain too narrow. Introduction of a proportionality test in determining whether it is 'fair, just and reasonable' to hold the police to account and expanding culpability to scenarios of unacceptable behaviour (in the context of omissions) are proposed.[85] These reforms would hold the police to a higher standard of accountability on behalf of members of society who rely on them for protection.

[80] See *Michael* (n 6) 1732 para F.
[81] Ibid.
[82] *Smith v Chief Constable of Sussex* [2008] UKHL; 50, [2009] 1 AC 225, 226 para A.
[83] See *Robinson* (n 1) 762, para D.
[84] See *Robinson* (n 1).
[85] See Mullender (n 5); *Caparo* (n 5).

A CIVIL DEBT WITH CRIMINAL CONSEQUENCES: DOES THE LAW ON NON-PAYMENT OF COUNCIL TAX NEED REFORM?

Olivia McGonigle

Introduction

Failure to pay council tax in England can result in imprisonment. While there are several measures which are required before imprisonment can be imposed, the fact that it remains a possibility, and is frequently used, is cause for concern. Compliance rates with the payment of council tax are 'exceptionally high: 97.1% in England, and 97.4% in Wales'.[1] These figures raise the question: to what extent does imprisonment for failure to pay council tax act as a deterrent for missing payments? This essay will consider the legal position, and then focus on the problems associated with imprisonment, including the cost to the taxpayer, the difficulties magistrates have in the law's application, and the potentially unfair consequences of its use. Finally, the essay will discuss the opportunity for reform. In considering alternative, fairer remedies, the argument for the removal of imprisonment for failure to pay council tax will be advanced.

I. Legal position

In Britain, council tax is defined as 'a tax that you pay to your local authority in order to pay for local services such as schools, libraries, and rubbish collection. The amount of council tax that you pay depends on the value of the house or flat where you live'.[2]

Under Schedule 2 and 4 of the Local Government Finance Act 1992 the Secretary of State can make regulations concerning the recovery of sums for outstanding council tax. Accordingly, the Council Tax (Administration and Enforcement) Regulations 1992 (the 'Council Tax Regulations') were brought into force.[3] These regulations allow councils to collect council tax in monthly payments, and once a demand notice is served, to issue payment reminders ('reminder notices') under regulation 23 if an instalment is seven days late, allowing a further seven days to make payment. If there is no payment a 'final notice' will be made under regulation 33, and a liability order application can be made under regulation 34. All other reasonable options should be taken before a liability order is made.[4]

If there is a failure to pay council tax, local authorities can look to regulation 47 of the Council Tax Regulations and consider the possibility of imprisonment.

---

[1] *R (Woolcock) v Secretary of State for Communities and Local Government, Secretary of State for Justice, and Welsh Ministers* [2018] EWHC 17 (Admin), [2018] 4 WLR 49 [9].
[2] 'Council tax', *Collins Dictionary online*, Harper Collins <www.collinsdictionary.com/dictionary/english/council-tax> accessed 2 October 2020
[3] SI 1992/613.
[4] Department for Communities and Local Government, *Council Tax: Guidance to Local Councils on Good Practice in the Collection of Council Tax Arrears* (June 2013) <www.gov.uk/government/publications/council-tax> para 3.5.

> (1) Where a billing authority has sought to levy an amount by distress under regulation 45, the debtor is an individual who has attained the age of 18 years, and the person making the distress reports to the authority that he was unable (for whatever reason) to find any or sufficient goods of the debtor on which to levy the amount, the authority may apply to a magistrates' court for the issue of a warrant committing the debtor to prison.
>
> (2) On such application being made the court shall (in the debtor's presence) inquire as to his means and inquire whether the failure to pay which has led to the application is due to his wilful refusal or culpable neglect.
>
> (3) If (and only if) the court is of the opinion that his failure is due to his wilful refusal or culpable neglect it may if it thinks fit—
>
> (a) issue a warrant of commitment against the debtor, or
>
> (b) fix a term of imprisonment and postpone the issue of the warrant until such time and on such conditions (if any) as the court thinks just.

In addition, under regulation 47(7) the order in the warrant should not exceed commitment to prison for more than 3 months. It is important to highlight that imprisonment for non-payment of council tax is a last resort, and the court is directed only to make the order if the failure is due to wilful refusal or culpable neglect. King J emphasised that 'the power to commit is plainly intended to be used as a weapon to extract payment, rather than to punish'.[5] The order should be coercive and not punitive. This is a unanimous position held in the relevant authorities concerning regulation 47.[6] Once the time is served the debt is considered unenforceable and the defendant is under no requirement to repay the council tax.

II. Problems

There are challenges surrounding the use of the threat of imprisonment to attempt to enforce the payment of a liability order regarding council tax. This section will consider three main issues: first, assessing the negative financial ramifications for taxpayers in general; second, the difficulties magistrates have when applying the law; and finally, the argument that the consequences, although not the intention, of the regulations have an unfair impact on those who have less means and live in the poorest areas.

Cost to the taxpayer

The UK has an ever-growing prison population.[7] There are substantial costs to the taxpayer when committing an individual to prison. In 2018/19 an average £39,385 was spent for each prisoner

[5] *R (on the application of Wandless) v Halifax Magistrates Court* [2009] EWHC 1857 (Admin), [2010] RVR 6 [24].
[6] *R (on the application of Aldous) v Dartford Magistrates Court and Gravesham Borough Council* [2011] EWHC 1919 (Admin), [2011] ACD 119 [14].
[7] Georgina Sturge, 'UK Prison Population Statistics' (3 July 2020) <https://commonslibrary.parliament.uk/research-briefings/sn04334/> accessed 2 October 2020

in England and Wales.[8] Consequently it is apparent incarceration costs the state significantly more than is reasonably justifiable to attempt to induce the 2.9% of the population who are failing to pay council tax to comply.[9] When reflecting on the effectiveness of the use of imprisonment, Mark Drakeford, the Welsh Minister for Finance at the time, considered 'the additional costs associated with the committal process and with imprisoning someone for non-payment of council tax; the failure of imprisonment to address the underlying causes of the debt and the impact on the future and wellbeing of those who are sent to prison and those closest to them' when discussing reform of the law in Wales.[10] Not only do the costs to the taxpayer significantly undermine the use of incarceration, but it further reveals the somewhat antiquated use of a 'debtors' prison' in order to attempt to coerce those who do not pay their council tax into payment, without fully assessing the wider reasons and ramifications of the failure to pay. As the debt is unenforceable after the sentence has been served, there is little monetary benefit in its use. Increasing the cost through incarceration seems counterintuitive to a scheme that is designed to provide local councils with funds.

The case law has routinely emphasised that commitment to prison should be used only as an incentive to encourage payment. However, it seems that those who have inadequate means are often convicted. This further shows the lack of insight in the use of imprisonment, which causes additional losses to taxpayers when the law is not properly implemented (as appeals are inevitable) and is likely to place those who have failed to pay in an increasingly detrimental position. In *R (on the application of Wandless) v Halifax Magistrates Court* King J questioned how the Justices, who dealt with a defendant with no funds, assets or employment 'were then able to conclude that it was appropriate to commit him immediately to prison – and then for the maximum term available'.[11] There seemed to have been no serious inquiry into the person's ability to pay, with the magistrates failing to properly investigate 'the disposable income available to the Claimant at the relevant times of his failure to pay'.[12] It is essential to consider both the means and the intention of imprisonment when deciding upon its implementation for the failure to pay council tax. Otherwise, it becomes a fruitless exercise that costs local authorities more than would be gained through inducing payment by other means.

There is an additional argument concerning the ineffective and costly use of short-term prison sentences. If the maximum period of imprisonment for the non-payment of council tax is three months, evaluation of the necessity and value in these short sentences should be considered. Theoretically the predominant purpose of the use of imprisonment for failure to pay council tax is to obtain payment, and yet a recent Ministry of Justice report found that 'sentencing offenders to short term custody with supervision on release was associated with higher proven reoffending

[8] Ministry of Justice, 'Costs per Place and Costs per Prisoner by Individual Prison: HM Prison & Probation Service Annual Report and Accounts 2018-19 Management Information Addendum' (31 October 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/841948/costs-per-place-costs-per-prisoner-2018-2019.pdf> accessed 2 October 2020.
[9] *Woolcock* (n 1) [9].
[10] Mark Drakeford, 'Written Statement – Removal of the Sanction of Imprisonment for the Non-Payment of Council Tax' (1 November 2018) <https://gov.wales/written-statement-removal-sanction-imprisonment-non-payment-council-tax> accessed 23 September 2020
[11] *Wandless* (n 5) [35].
[12] *Wandless* (n 5) [32].

than if they had instead received community orders and/or suspended sentence orders'.[13] Consequently, as the use of imprisonment renders the debt unpayable, and is more likely to result in re-offending, there seems little benefit in using incarceration as a deterrent. Following the Scottish Government's successful introduction of a presumption against the use of prison sentences of three months in 2011,[14] there is a palpable benefit in moving away from short term, expensive sentences with respect to the failure to pay council tax.

Difficulties Magistrates Have When Applying the Law

There is apparent difficulty for magistrates' courts in deciding what amounts to wilful refusal or culpable neglect. To establish either requires a 'degree of blameworthiness to attract an imprisonment order' and therefore necessitates an inquiry.[15] In the case of *R v Highbury Corner Magistrates' Court, ex parte Uchendu* the failure to pay a sum of non-domestic rates was considered.[16] The warrant was issued under regulation 16(2) of the Non-domestic Rating (Collection and Enforcement) (Local Lists) Regulations 1989, which has a comparable set of provisions to the Council Tax Regulations when considering culpable neglect and wilful refusal. Similarly, the 'purpose of fixing a period of imprisonment under the regulation is not to exact retributive punishment at all, but rather to influence the ratepayer's future conduct, that is to encourage him, by threat or deterrence, to pay up in the future'.[17] This emphasises the fact that magistrates should consider the effect of the sentences in persuading payment, rather than use it as a punishment. The inquiry into Mr Uchendu's means was described as 'perfunctory', and that it 'was a short one and involved the scrutiny of no documents whatever'.[18] Neglecting to conduct a means assessment was a significant oversight. Furthermore in *R. v Cannock JJ. ex p. Swaffer* [2003] the judicial review was successful as it was held the Justices could not have been satisfied that the applicant had sufficient assets to pay.[19] These and similar cases reveal the problems facing some magistrates' courts when assessing the application of the threat of imprisonment. The failure of magistrates to consider financial means highlights the lack of understanding concerning the use of imprisonment for the failure to pay civil debts as a coercive force.

There are significant failings of magistrates in correctly applying the law and, as a result, imprisonment for the failure to pay council tax is being arbitrarily imposed on vulnerable members of society. This principle was considered further in the case of *Wandless*.[20] Again it was found that the court 'must have ignored the principle of proportionality when imposing the maximum term which they did'.[21] Failing to enquire adequately into the defendant's means led to the imposition of a maximum sentence which was not proportionate. While there was an

[13] Georgina Eaton and Aidan Mews, 'The Impact of Short Custodial Sentences, Community Orders and Suspended Sentence Orders on Reoffending' (Ministry of Justice Analytical Series, 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/814177/impact-short-custodial-sentences.pdf> accessed 13 March 2021.
[14] Scottish Government, 'Reducing Ineffective Short Prison Terms' (17 May 2019) <https://www.gov.scot/news/reducing-ineffective-short-prison-terms/> accessed 13 March 2021.
[15] Stephen Leake, *Archbold Magistrates' Courts Criminal Practice 2021* (Sweet & Maxwell 2020) para 19-140.
[16] *R v Highbury Corner Magistrates' Court, ex p Uchendu* [1994] EWHC (QB), [1994] 158 JP 409.
[17] *Uchendu* (n 16) p. 3.
[18] *Uchendu* (n 16) p. 2.
[19] *R. v Cannock JJ ex p Swaffer* [1997] EWHC (QB), [2003] RVR 114.
[20] *Wandless* (n 5).
[21] *Wandless* (n 5) [36].

enquiry as to means in the case of *R (on the application of Aldous) v Dartford Magistrates' Court and Gravesham Borough Council*, it was 'so hopelessly inadequate as not to meet the requirements of the regulations'.[22] Consequently Ockleton J held 'the magistrates' procedure was not, in my judgment, appropriate to meet the requirements of reg.47'.[23] In order to have a fair and just society the application of the law must be proportionate and uniform. It is clear from these cases that there were repeated misunderstandings regarding the use of imprisonment for the failure to pay council tax, and therefore it is an area of law that could be reformed.

More recently in *R (Woolcock) v Secretary of State for Communities and Local Government, Secretary of State for Justice, and Welsh Ministers* a judicial review was brought specifically concerning magistrates failing to apply 'clear and well-established law'.[24] While the judicial review was unsuccessful, largely because of the difficulties counsel for the appellant had trying to establish that there were systemic issues in the application of these legal principles by magistrates, the point is still arguable that individual failures are sufficiently harmful to remove the use of imprisonment. Hickinbottom LJ accepted that the magistrates had unlawfully imprisoned between nine and 17 of the 95 individuals considered in a 16 month period.[25] While this did not provide adequate evidence for the court to rule that the application of the legal principles themselves were unfair (as individual rogue magistrates' decisions could not undermine the entire system) the discrepancies in the application show the complications in applying the threat or use of imprisonment for the failure to pay council tax. It is for parliament, rather than the courts, to implement these changes, and there is sufficient reason for reform when considering these issues.

Arguably the perfect application of the law would prevent these problems from arising, but it is evident this is not happening. In *Soor v Redbridge LBC* it was held the repayment period for unpaid council tax over six years was too long.[26] Similarly, in *Woolcock*, the failings of magistrates 'notably by imposing a condition to a suspended committal order that required the payment of instalments over an unreasonably long period, and making committal orders *in absentia*' was highlighted.[27] In the case of *Aldous* the court failed 'to take into account the effect on the claimant's children of an immediate committal to custody as they imposed it'.[28] The significant period of absence that ensued caused substantial harm to her children, particularly her youngest child, who is autistic. The failure of the magistrates to consider these factors reveals the lack of information they requested and considered when deciding to commit a member of the public to prison. This predominantly impacts vulnerable members of society, who do not always have the means or ability to represent themselves. For example, Mr Stephen Wandless was imprisoned despite the fact that 'immediate imprisonment should be regarded as the last resort for the purposes of enforcing payment'.[29] He was disabled having lost several fingers in an industrial accident at work and was receiving incapacity benefits. The circumstances of individuals who fail to pay council tax, in addition to the wide-ranging consequences that result from prison sentences, should be considered when assessing the necessity of imprisonment.

[22] *Aldous* (n 6) [11].
[23] *Aldous* (n 6) [11].
[24] *Woolcock* (n 1) [43].
[25] *Woolcock* (n 1) [74].
[26] *Soor v Redbridge LBC* [2016] EWHC 77 (Admin), [2016] BPIR 766.
[27] *Woolcock* (n 1) [43].
[28] *Aldous* (n 6) [15].
[29] *Wandless* (n 5) [25].

Potential Unfair Consequences

Imprisonment for failure to pay council tax impacts those predominantly from lower socio-economic backgrounds. The previous Welsh Finance Minister, Mark Drakeford, commented that 'it is right that those who are less able to contribute are treated fairly and with dignity. The sanction of imprisonment is an outdated and disproportionate response to a civil debt issue.'[30] There have been various studies into the fairness of the rates of council tax, and this respectively influences the failure to pay, and therefore on the application of prison sentences. The Resolution Foundation found that 'The regressive nature of council tax is in stark contrast to the progressive structure of income tax: average net council tax is only 2.7 times higher for the top 10 per cent of properties than the bottom 10 per cent, whereas average income tax is 45 times higher in the top income decile than the bottom one'.[31] This highlights the significant difference that paying council tax would mean to one person from a wealthy household compared to a poorer individual. There are several Council Tax Reduction Schemes, which are available in certain circumstances, but these require applications to the local council to assess whether it is possible to qualify for discount or exemption.[32] Not all who are struggling financially are eligible. As stressed in the case law the use of imprisonment should be applied in order to persuade those owing debt, who have the means, to pay the outstanding council tax, but it is not intended to be used as a punishment.[33]

III. Reform

There is a need for reform, and this has been highlighted by the recent change in Welsh policy regarding committal to prison for the failure to pay council tax. Mark Drakeford, the Cabinet Secretary for Finance (as he was then), stated that 'There is little evidence of a relationship between the use of the committal process and collection rates while there is growing evidence that collection levels and arrears are best managed through early engagement with citizens', and made proposals to end committal from 1 April 2019.[34] Similarly, Scotland and Ireland do not use the threat of imprisonment as a form of coercion to enforce the payment of council tax. England could follow suit and amend this outdated law that unfairly penalises those who live in the poorest communities, and ultimately increases costs to the taxpayer. Often alternatives to custody are beneficial for both the potential prisoner and for the state, and these can include community sentences or fines. There would still be a deterrent for those who consider refusing to pay, and these options could provide the opportunity for those who are struggling to meet the payments to work with councils to create meaningful relationships and solutions. Joe Connelly, Head of Programmes at Venture Trust, stresses that 'Alienating, stigmatising and incarcerating those who are often already in difficult life circumstances only exacerbates the problem, creating a

[30] Mark Drakeford, 'Written Statement – Removal of the Sanction of Imprisonment for the Non-Payment of Council Tax' (1 November 2018) <https://gov.wales/written-statement-removal-sanction-imprisonment-non-payment-council-tax> accessed 23 September 2020
[31] A. Corlett & L. Gardiner, *Home Affairs: Options for Reforming Property Taxation* (Resolution Foundation, March 2018) 6.
[32] Citizens Advice, 'Council Tax Reduction – What You Need to Know' <www.citizensadvice.org.uk/benefits/help-if-on-a-low-income/help-with-your-council-tax-council-tax-reduction/council-tax-reduction-what-you-need-to-know/> accessed 1 October 2020.
[33] *Woolcock* (n 1) [17].
[34] Drakeford (n 30).

downward spiral and a feeling of helplessness'.[35] Working with local councils to consider early engagement with the community would enable the high compliance rates of the payment of council tax to continue.

There are arguments concerning the deterrent effect of the use of imprisonment for the failure to pay council tax. The threat of imprisonment may encourage those who would otherwise neglect payments to comply. However, if the overall aim is compliance, it seems the limited number of cases of committal, usually of those from lower socio-economic backgrounds, is not necessarily an incentive to pay. In comparison, the use of fines (which would only be applicable to those who have failed to pay due to wilful refusal or culpable neglect), or community sentences, could be more beneficial. A stringent system set out to assess the means of an individual would be required, and other sanctions could be made available if it were considered necessary to provide a deterrent. Specifically, considering the goal to ensure payment, attachment of earning orders would be particularly effective. This order is available and would provide local councils with the funds they were seeking.[36] In addition, liability orders to take control of goods can be made in circumstances of the failure to pay.[37] In my opinion, these would provide a sufficient deterrent, and an opportunity to recover outstanding sums, if there was wilful refusal or culpable neglect. As has already been highlighted, Wales, Scotland, and Ireland do not use the threat of imprisonment and it is unnecessary to use it in England.

Conclusion

Incarceration rates are growing and the prison system is struggling to cope, so the ability to reform a law that will prevent men and women suffering unduly would surely be advantageous. While the importance of paying council tax is unequivocal, the use of prison sentences to attempt to enforce compliance is ineffective and unwarranted. Whether it is truly a deterrent seems to be unsubstantiated, and the high level of compliance results more from civic duty rather than the threat of imprisonment. There are options to create meaningful progress and further the advancement of justice through removing the threat of prison for the failure to pay council tax. Overall, this would benefit society by reducing the number of people in prison (particularly those serving short term sentences) and create stronger, more connected communities where the local councils are engaged with their residents.

[35] Joe Connelly, 'There is an Alternative to Custody for Woman Offenders – Next Steps to a Brighter Future' (Venture Trust, 16 May 2016) <www.venturetrust.org.uk/news/2016/5/there-alternative-custody-women-offenders-next-ste/#:~:text=Leading%20provider%20of%20%E2%80%98alternative%20to%20custody%E2%80%99%20programmes%2C%20Venture,to%20reform%20behaviour%20or%20keep%20individuals%20from%20reoffending.> accessed 30 September 2020.

[36] *Cross on Local Government Law*, para 16-56 (R 89 December 2020).

[37] *Cross on Local Government Law*, para 16-57 (R 89 December 2020).

DOES THE GOVERNMENT HAVE A RIGHT TO COLLECT NOW THAT WE HAVE LEFT THE EU? THE LAW ON MASS COLLECTION, RETENTION AND SHARING OF PERSONAL TELECOMMUNICATIONS DATA

George Turley

Introduction

As it stands, case law is mixed about whether the UK government has a right to collect, retain and share our personal telecommunications metadata. Furthermore, the courts have not yet considered these questions in relation to metadata and analytics gleaned from social media and wider Internet usage, although the widespread growth of social media usage no doubt indicates that these questions are on the horizon. This makes the precedents set in relation to telecommunications data all the more important.

Questions relating to whether the UK government can collect, retain and share our personal telecommunications data have reached as high as the European Courts, both the CJEU (Court of Justice of the European Union) and the ECtHR (European Court of Human Rights). There are a few similarities between respective judgements, but overall, it is striking that the Courts could deliver such divergent rulings when considering such similar fundamental rights. The CJEU judgment in *Tele2 Sverige v Post- Och Telestyrelsen and Secretary of State for the Home Department v Watson* (henceforth *Tele2 and Watson*) recognises increased scrutiny on governments, protecting the rights of individuals whilst still allowing governments to safeguard the public; the ECtHR judgment in *Big Brother Watch and Others v United Kingdom* (henceforth *Big Brother Watch v UK*) does far less to protect the individual.

Overall, the approach of the CJEU is more sustainable. It is clear that the threat from terrorism and serious crime will not recede in the near future. This shows that any limitation of individual rights for the purposes of safeguarding public security would not be a temporary aberration, but rather a long-term settlement; this must be strictly limited and controlled if rights are not to be lost forever. The CJEU rightly ruled that derogations can only be used to fight the most serious of offences and must be reviewable by the courts.

This poses a problem for campaigners for individual rights as the UK has recently left the jurisdiction of the CJEU. The UK government has already transferred EU law onto the domestic statute book, with plans to refer to CJEU jurisprudence until it is superseded. However, proponents of strengthening individual rights will be worried that individual rights on data collection, retention and sharing will not be entrenched in UK law, separately from EU law, and that the ECtHR offers insufficient protections to fall back on.

I. European Law Concerning Mass Collection, Retention and Sharing of Personal Data

Tele2 Sverige v Post- Och Telestyrelsen and Secretary of State for the Home Department v Watson

Tele2 and Watson is a joint case that came before the CJEU in 2016, following referrals from national courts. The background of *Secretary of State for the Home Department v Watson and Others* (heard in the EWCA) involved the Data Retention and Investigatory Powers Act 2014 (DRIPA 2014), which provided that the Secretary of State could require public telecoms companies to keep hold of all communications data for one year. This data does not comprise the content of conversations, but it could reveal the who, the when, and the where, associated with all communications activity. Under DRIPA 14, UK law enforcement agencies could access this data, provided it was for a purpose expressed in the Act (for example, the prevention and detection of crime, or national security purposes).[1] The background to *Tele2 Sverige AB* from the Swedish Court of Administrative Appeal is sufficiently similar that the cases were joined together. In *Tele2 and Watson*, the CJEU was asked to decide whether domestic laws imposing such a duty are lawful, and whether it is lawful to allow competent national authorities access to collected data for purposes not restricted solely to national security and fighting *serious* crime.

Relevant European law for the Court to consider included art 7 (right to respect for private and family life), art 8 (protection of personal data), and art 11 (right to freedom of expression and information) of the EU Charter of Fundamental Rights (CFR). However, these CFR rights are not absolute; they can be limited on the basis of proportionality, pursuant to art 52 of the CFR.[2] Similarly, Directive 2002/58/EC (the 'e-Privacy Directive') contains traffic and location data protections for users of public communications networks, though art 15(1) allows states to derogate from these duties 'when such restriction constitutes a necessary, appropriate and proportionate measure within a democratic society'.[3]

In *Tele2 and Watson*, the CJEU similarly ruled that the e-Privacy Directive must be read in light of arts 7, 8, 11 and 52(1) of the CFR. Again, the Court ruled that these articles would preclude both the retention, and access by national authorities, of traffic and location data when this was not restricted solely to fighting *serious* crime or to national security objectives. The Court emphasised that only these two objectives could meet the threshold of being 'appropriate', 'limited to what is strictly necessary' and 'proportionate within a democratic society', as required by art 15(1) of the Directive.[4] The Court emphasised that if derogation under art 15(1) were to become the general rule rather than the exception then the safeguards and protections written into the Directive would become meaningless.[5] When the case returned to the EWCA, that court followed the ruling of the CJEU in its entirety.

[1] Data Retention and Investigatory Powers Act 2014, s 1.
[2] Charter of Fundamental Rights of the European Union [2010] OJ C83/02; Robert Schütze, *An Introduction to European Law* (2nd edn, Cambridge University Press 2015) 91.
[3] Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) [2002] OJ L201/37, art 15(1).
[4] *Joined Cases C-203/15 & C-698/15, Tele2 Sverige v Post- Och Telestyrelsen and Secretary of State for the Home Department v Watson* [2016], [2017] QB 771, paras 95, 109.
[5] Ibid para 89.

Big Brother Watch and Others v United Kingdom

Big Brother Watch v UK followed a complaint made by the campaigning group Big Brother Watch and other human rights groups and journalist associations in 2013, with the case heard in the ECtHR in 2017. The groups complained about three different aspects of data collection and sharing in the UK. Firstly, that the Regulation of Investigatory Powers Act 2000 (RIPA) s 8(4) procedure for applying for an interception warrant did not require the applicant to state the 'selectors and search criteria' that it would be using; applicants could apply for warrants without actually disclosing what it was they were intercepting.[6] Secondly, that the UK's intelligence-sharing regime allowed it to accept data interceptions made from non-ECHR-compliant countries, such as the USA. Finally, similarly to *Tele2 and Watson*, that the UK's RIPA Chapter II regime for obliging communications service providers to store data not solely for the purpose of combatting *serious* crime was unlawful according to EU law. The Court was asked to decide whether these three aspects of the UK data collection and sharing regime were compatible with ECHR law.

Relevant law for the Court to consider included art 8 of the ECHR, the right to respect for private and family life. Unlike the CFR, the ECHR has no bespoke right to data protection, however the ECtHR considers data protection when applying art 8.[7] It also included art 10 of the ECHR, freedom of expression. Neither of these rights are absolute rights under the ECHR; art 15 of the ECHR provides that non-absolute rights can be derogated from 'in time of war or other public emergency threatening the life of the nation … to the extent strictly required by the exigencies of the situation'.[8] In addition, the rights themselves contain provisions for derogation, which must be in accordance with the law, necessary in a democratic society, and for one of a number of purposes (among them national security and the prevention of disorder and crime).[9]

As in *Centrum for Rattvia v Sweden*, the ECtHR ultimately found that states could freely choose whether or not to engage in bulk collections of communications data as this fell within their margin of appreciation.[10] The majority also clarified that prior judicial authorisation was not necessary for this to be lawful, citing the Council of Europe Venice Commission report which suggested that strong supervision after the event was sufficient.[11] Therefore a majority of the Court rejected the appellant's argument that the RIPA s 8(4) process was unlawful due to a lack of safeguards at the stage of warrant application. However the Court went on to say that 'where the discretion to intercept is not significantly curtailed by the terms of the warrant, the safeguards applicable at the filtering and selecting for examination stage must necessarily be more robust'.[12] With this in mind, it found that the RIPA s 8(4) process lacked oversight, making interference beyond that which is 'necessary in a democratic society'.[13] This included a lack of safeguarding

[6] 'Big Brother Watch v. The United Kingdom' (*Global Freedom of Expression*, 13 November 2018) <https://globalfreedomofexpression.columbia.edu/cases/big-brother-watch-v-united-kingdom/> accessed 15 September 2020.
[7] *Amman v Switzerland* ECHR 2000-II 245 para 65; *Rotaru v Romania* ECHR 2000-V 109 para 43.
[8] European Convention on Human Rights, art 15.
[9] European Convention on Human Rights, arts 8(2), 10(2).
[10] *Big Brother Watch and Others v United Kingdom* App nos 58170/13, 62322/14, 24960/15, para 314.
[11] Ibid para 377; CDL-AD(2015)011-e Report on the Democratic Oversight of Signals Intelligence Agencies adopted by the Venice Commission at its 102nd Plenary Session (Venice, 20-21 March 2015).
[12] *Big Brother Watch v UK* (n 10) para 346.
[13] Ibid para 388.

for journalists' confidential materials, which meant that the ruling of overreach in a democratic society also applied to art 10 complaints.[14]

The Court also found that EU law (the same law as discussed in *Tele2 and Watson*) requires that 'any regime permitting the authorities to access data … limits access to the purpose of combating a 'serious crime', and that access is subject to prior review by a court or independent administrative body'.[15] Since the RIPA Chapter II regime allowed access for the purpose of combatting crime in general, the Court found that RIPA did not meet the standard of 'in accordance with the law' that is set out in art 8.[16] Finally, the Court also clarified that individuals caught up in a data collection 'trawl' do not need to be notified, since the UK Investigatory Powers Tribunal's complaints system was already fit for purpose.[17] Overall, the ECtHR's approach in this case contained some similarities to, however more differences from, the CJEU's approach in *Tele2 and Watson*.

II. Balancing Individual Rights with Public Security

There are a number of aspects of the two judgements that differ substantially. In some respects, the ECHR can be seen as offering a baseline level of protection; Professor Iain Cameron (an author of the Venice Commission report) points out that the CJEU has clarified before that it wishes to set higher standards than those coming out of the ECHR.[16] Strikingly, in *Tele2 and Watson* the CJEU ruled that bulk data collection could only be permissible for two reasons, imposing strict limits on when it can occur. In *Big Brother Watch v UK*, however, the ECtHR allows states the free choice of whether to engage in bulk collection activity under their margin of appreciation (albeit setting standards of oversight).[17]

Here, the CJEU has correctly pointed out that derogation under art 15(1) cannot become the general rule, otherwise there would be no point in having written protections for individual rights into the e-Privacy Directive.[18] This point is a key safeguard against an overbearing state, and most citizens would have a reasonable expectation of this. For example, most citizens would not expect to be surveilled by the state whilst on the phone, much less to be subsequently charged with a *minor* misdemeanour on the basis of phone records. Indeed, it is likely that before the Snowden revelations most citizens did not know that this level of surveillance was possible. The ECtHR ruling fails to provide robust protections against this outcome, leaving too much in the hands of the state; individual rights would be better protected by outlawing bulk surveillance, except in specific circumstances. As Mana Azarmi and Greg Nojeim (Center for Democracy and Technology) point out, the ECtHR essentially blesses bulk collection (albeit telling the UK that its processes are currently unlawful).[19]

In *Tele2 and Watson* the CJEU explicitly stated that access by national authorities must be via review, whereas in *Big Brother Watch v UK*, the ECtHR explicitly stated that such prior review is not necessary.[20] Professor Cameron rightly suggests that these two approaches are difficult to

[14] Ibid para 387.
[15] Ibid para 196.
[16] Regulation of Investigatory Powers Act, Ch II.
[17] *Big Brother Watch v UK* (n 18) para 177; Iain Cameron, 'Regulating Signals Intelligence' (*Strasbourg Observers*, 13 July 2020) <https://strasbourgobservers.com/2020/07/13/regulating-signals-intelligence/> accessed 16 September 2020.

reconcile.[21] As the CJEU had interpreted this review as necessary in its *Tele2 and Watson* judgement from 2016, the ECtHR's judgement of what is 'in accordance with [EU] law' in *Big Brother Watch v UK* should arguably have included this review requirement. However, the ECtHR chose to forgo this, in favour of emphasising that oversight of the process should be considered in the round (i.e., sufficient oversight could come at a later stage of the process). [22] If access of retained data required judicial supervision, the process may be slower and more cumbersome for the UK government, but would be more balanced overall. This is because individuals would have a guarantee that the law was being complied with and their rights respected in every instance.

With these points in mind, ECtHR rights will not protect ordinary people in the UK from potentially having the entirety of their telecommunications data collected and stored by the UK government, and shared around agencies. The ECtHR will also not be in a position to rule against similar collection of Internet metadata in the future, given the precedent it has set. The Grand Chamber of the ECtHR handed down its judgement in an appeal from Big Brother Watch, in May 2021, but the Court declined to volte-face and strengthen its level of personal data protections. The personal data rights of individual UK citizens have therefore taken a step backwards, with bulk surveillance in the UK blessed by the ECtHR. This is because UK courts, from the EWCA upward, can now diverge from CJEU jurisprudence with ease.

Conclusion

In the area of mass collection, retention and sharing of personal data, the ECtHR has proven that it is not strong enough on individual rights. *Tele2 and Watson* strikes a better balance in the context of today's modern world, where data from communications is just as important from a privacy perspective as communications themselves. It is stronger on bulk collection law (explicitly stating that bulk collection is unlawful – but there are exceptions – rather than leaving states free to collect) as well as review by courts for sharing. The CJEU jurisprudence could have been stronger still on individual rights, and these developments may yet take place in the future. Likewise, the ECtHR declined to strengthen its approach against indiscriminate government collection when Big Brother Watch appealed to the Grand Chamber. In the absence of a stronger line against indiscriminate government collection, retention and sharing, the ECHR does not provide sufficiently robust protections for individual rights in a digital age.

The UK will continue to consider CJEU jurisprudence after the end of its transition period away from the EU, but the protections delivered in *Tele2 and Watson* will not be entrenched and could easily be superseded. Moreover, protections from the ECHR are not sufficient to fall back onto. For these reasons, the UK government should update its conception of personal data privacy rights. The ruling in *Tele2 and Watson* provides a blueprint for how the UK could construct a regime that allows for heightened levels of metadata surveillance in specific, limited circumstances, and subject to judicial review at all stages. The UK should follow this blueprint by updating the Investigatory Powers Act 2016 with more robust protections. Debates about oversight for government surveillance of personal data will likely heighten in line with increased public scrutiny of social media (and other Internet) data scraping and analytics. The government can head this debate off by implementing strong legislation at this early stage, including Internet data privacy rights within its reforms.

WITH GREAT POWER COMES GREATER RESPONSIBILITY: EXPANDING THE OBLIGATIONS OF SEARCH ENGINE OPERATORS

David Lipson

Introduction

'Data autonomy' is an increasingly popular term in everyday discourse. Under the General Data Protection Regulation (GDPR), data subjects (anyone identifiable via a data identifier such as a name, location or physical characteristic) were granted rights against anyone seeking to either process or manage the processing of their personal data, known as processors and controllers respectively. Although processing is a broad term, it essentially covers anything that affects personal data, such as collection and storage. Duties were therefore placed upon both processors and controllers to be more transparent in their use of personal data.

The 'right-to-be-forgotten', introduced by the Court of Justice of the European Union (CJEU) in the *Google Spain* case,[1] is a recent judicial development of data subjects' rights to object to and request erasure of online data processed by Search Engine Operators (SEO), such as Google, Bing or Yahoo.[2] The right enables data subjects to request that SEOs deindex, or remove access to, webpages containing their personal data as a response to name-based searches when their privacy and data protection rights override the interests of other internet users.[3] This new right makes SEOs potentially liable for their own processing of a data subject's data, rather than from a third-party webpage publisher's processing.

The creation of this right shows a recognition that SEOs are crucial for promoting the accessibility of online information, and that any harm to data subjects resulting from webpages spreading their personal data often occurs due to the webpage being indexed. Harm becomes a consequence of both the original website's publication and the webpage's accessibility.[4] After all, without search engines or specific web addresses, locating information online would be like locating a specific grain of sand in a desert.

However, since SEOs must only ensure '*within the framework of their responsibilities, powers and capabilities*' that their processing is compatible with both the Data Protection Directive and the GDPR, the scope of their controller obligations remains limited in two key respects.[5] Firstly, it is unclear whether their duties extend beyond reacting to web addresses they are notified of (*ex post* action), since imposing pre-notification duties (*ex ante* action) may go beyond their existing 'framework of responsibilities, powers and capabilities'. Secondly, it is unclear whether their duties can extend beyond deindexing the results of name searches to include, for example, the deindexing of images across all searches.

---

[1] Case C-131/12 *Google Spain v AEPD and Mario Costeja Gonzalez* [2014] QB 1022.
[2] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 (General Data Protection Regulation) [2016] L 119/1, art 17 and 21.
[3] *Google Spain* (n 1) [81].
[4] Aleksandra Kuczerawy and Jeff Ausloos, 'NoC Online Intermediaries Case Studies Series: European Union and Google Spain' (Interdisciplinary Center for Law & ICT (ICRI), KU Leuven, 18 February 2015) 22 <https://ssrn.com/abstract=2567183> accessed 18 January 2021
[5] *Google Spain* (n 1) [38].

This essay will argue that both of these developments should be implemented to give proper effect to the right-to-be-forgotten. To achieve this, the law must either remove the prohibition on 'general monitoring obligations' (GMOs), identify such duties as 'permissible specific monitoring obligations' or implement a 'notice-and-stay-down' regime to delisting requests. Each of these terms will be defined in due course.

I. The Arguments for Search Engine Operator Proactivity

Current Obligations are Weak

The Article 29 Working Party, an independent European body that deals with issues relating to privacy and personal data protection, accepts limiting SEO obligations to specific *ex post* action on name-based searches alone.[6] This is problematic since such obligations are easily bypassed. Delisting webpages which result from only name-based searches does not effectively reduce accessibility since the relevant information can still be located through more indirect search terms. For example, deindexing webpages containing lewd photos in response to searching 'Boris Johnson prostitute photos' is futile if 'UK prime minister prostitute photos' still locates them. A greater degree of proactivity from SEOs is therefore required.

Data subjects currently play whack-a-mole with constant re-uploads of content they object to. The promotion of one's data protection rights is a Sisyphean task when SEOs are purely reactive and not proactive. Controller obligations should include deindexing uploads of 'equivalent meaning': uploads which barely differ from the content originally giving rise to the data subject's claim.[7] Uploads of equivalent meaning, as well as future uploads containing the same information as the original deindexed webpage, should be proactively removed after a single instance of notification. Requiring repeated notification of every individual web address that a data subject wishes to deindex does not effectively promote the right-to-be-forgotten as envisaged by *Google Spain*.[8]

Judicial Support for Reform

Existing limitations contrast with various courts' support for requiring online service providers such as Facebook and Google to block the reappearance of unlawful content. For example, Stephens J in *AY v Facebook (Ireland)* was receptive to obliging Facebook to block repeated uploads of naked pictures of a minor by using PhotoDNA technology.[9] This obligation is desirable, since such controllers should be required to remove re-uploaded identical photos or

---

[6] Article 29 Data Protection Working Party, *Guidelines on the Implementation of the Court of Justice of the European Union Judgment on 'Google Spain and Inc v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González' C-131/12* (2014) 6 <(http://collections.internetmemory.org/haeu/20171122154227/http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2014/wp225_en.pdf)> accessed 18 January 2021.

[7] Julian Blake, '(Thumb)nail in the Coffin for the Prohibition on Monitoring?' (Panopticon, 3 October 2019) <https://panopticonblog.com/2019/10/03/thumbnail-in-the-coffin-for-the-prohibition-on-monitoring/> accessed 18 January 2021.

[8] Anya Proops, 'Mosley v Google: RIP' (Panopticon, 18 May 2015) <https://panopticonblog.com/2015/05/18/mosley-v-google-rip/> accessed 18 January 2021.

[9] [2016] NIQB 76 [12].

posts without being notified of every subsequent upload.[10] A higher court may have imposed this obligation had the case not settled.

Furthermore, in *Mosley v Google* the claimant wanted Google to proactively block access to sexual images of him across all search types, since he was stuck repeatedly notifying Google of uploaded images of him engaging with prostitutes.[11] Although Mitting J did not confirm whether such an order would contravene the prohibition of GMOs under Article 15 E-Commerce Directive (ECD), he refused to strike out the claim. He instead said that it was viable, raised questions of general public interest and was capable of belief.[12] He even supported bypassing the ECD's intermediary shields, arguing that Google possessed the technology to block child pornography with ease.[13] Unfortunately, this case also settled prior to full hearing.

Finally, the CJEU has previously refused to rule out imposing *ex ante* obligations on search engines in relation to deindexing material from name-based searches, noting that an operator would be required '*at the latest* on the occasion of the request for de-referencing to adjust the list of results …'.[14] Although this does not necessitate proactivity on the part of search engines, it implies that the CJEU sees reactivity as an SEO's very last option and therefore favours a more proactive approach.

It is unsurprising that no court has yet implemented these reforms, since the litigation strategies of both Google and Facebook have stultified any opportunities. Both companies have deep pockets and either exhaust opponents into submission or make settlement agreements.[15] Although the settlements in *AY* and *Mosley* both resulted in each platform accepting voluntary monitoring obligations, it is clear that neither platform wants to be *legally obliged* to do so.

II. The Potential Framework for Reform

Having identified how the right-to-be-forgotten should be expanded, this essay will consider how reform could be implemented through existing legal frameworks. Firstly, conceptual similarities between the data protection and other online intermediary liability regimes will be identified. Secondly, the prohibition of GMOs will be considered. Finally, notice-and-stay-down will be assessed as an alternative to notice-and-takedown.

Data Protection and Intermediary Liability

Although the right-to-be-forgotten is not an example of intermediary liability, the two frameworks for establishing legal liability are conceptually similar since Google is an intermediary of sorts.[16] To demonstrate, intermediary websites such as the Pirate Bay do not create illegal copies of media

[10] Blake (n 7).
[11] *Mosley v Google* [2015] EWHC 59 (QB), [2015] 2 CMLR 22.
[12] Ibid [25].
[13] Ibid [54].
[14] C-136/17 *GC et al v Commission Nationale de l'informatique et des libertés* [2019], [2020] 1 WLR 1949, [2020] 1 All ER (Comm) 866 [78].
[15] Barry Sookman, 'Is Google a publisher according to Google? The Google v Equustek and Duffy cases' (*Barry Sookman*, 10 October 2017) <https://www.barrysookman.com/2017/10/10/is-google-a-publisher-according-to-google-the-google-v-equustek-and-duffy-cases/> accessed 18 January 2021.
[16] Aleksandra Kuczerawy and Jeff Ausloos, 'From Notice and Takedown to Notice and Delist: Implementing Google Spain' (2016) 14 Colo. Tech. L.J. 14(2), 219, 236.

but instead facilitate access to them. Similarly, Google indexes webpages created by separate publishers which contain data subjects' personal data. The difference is that the right-to-be-forgotten holds SEOs liable for their own processing, rather than for the activities of the third-party webpages.

The current *ex post* limitation to the right-to-be-forgotten is arguably in place because of the ECD's intermediary shields - legal provisions eliminating legal liabilities of intermediary service providers under certain conditions.[17] Although the High Court previously held that the shields did not extend to search engines, it remains uncertain whether they are excluded from data protection considerations.[18] For although Article 1(5)(b) ECD states that it does not apply to the data protection framework, Article 2(3) GDPR notes that it is 'without prejudice' to the application of the ECD. Furthermore, the Northern Ireland Court of Appeal has argued that Article 1(5)(b) does not exclude data protection matters from the intermediary shields.[19] The crucial point is that *if* the ECD applies to data protection matters, then so does Article 15's prohibition of GMOs.

General Monitoring Obligations

A GMO is an arrangement whereby an entity inspects or examines information randomly, or by reference to a particular class of information, as opposed to focusing on specific instances brought to their attention.[20] These arrangements are currently prohibited by Article 15 ECD, on the basis that they discourage innovation and impinge upon the fundamental rights of internet users. As a SEO, Google argues that expanding its controller obligations in the recommended manner would constitute the imposition of a GMO. However, this essay argues that this is not the case.

The courts have struggled to identify a boundary between specific and general monitoring. In a trademark law context, the CJEU in *L'Oréal v eBay* introduced an 'awareness' threshold requiring intermediaries (such as eBay) to implement measures that identify and prevent trademark infringements, imposing liability when the service is 'aware of facts or circumstances on the basis of which a diligent economic operator would have identified the illegality' but fails to address it.[21] Such measures require operators to end existing infringements and *prevent further ones*.[22] However, these measures do not necessarily require the active monitoring of each customer's data, thus respecting the prohibition of GMOs.[23] This suggests that measures exist which prevent further infringements but do not constitute GMOs.

Applying this framework to a data protection context, successful deindexing claims should be sufficient to make SEOs 'aware' and thus obliged to prevent further infringements on a proactive basis. This would not necessitate a GMO under the previously mentioned definition, since the

[17] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce' / 'E-Commerce Directive') [2000] OJ L178/1, arts 12-15.
[18] *Metropolitan International Schools v Designtechnica* [2009] EWHC 1765 QB [112].
[19] *CG v Facebook Ireland & McCloskey* [2016] NICA 54 [95].
[20] Nicholas Caddick QC and Gwilym Harbottle, *Copinger and Skone James on Copyright* (Sweet & Maxwell 2019) 21.166.
[21] C-324/09 *L'Oréal v eBay* [2009] All ER (EC) 501 [120], [124].
[22] Ibid [122].
[23] David Erdos, 'Intermediary Publishers and European Data Protection' (2018) 26(3) International Journal of Law and Information Technology 189, 203.

monitoring would not be random but would instead be focused on specific instances of data protection infringement of which the data subject had notified the controller.

Furthermore, AG Szpunar has argued that monitoring for identical data uploads from any uploader need not constitute a GMO, since such content can be identified without actively filtering all information disseminated via an SEO's platform.[24] This concept of 'equivalency' should be promoted in a delisting request context. For example, where User B uploads photos which the data subject has previously notified the operator of in response to User A, this should be 'equivalent' enough to not require another separate web address notification by the data subject. Under this line of argumentation, both *Mosley* and *AY v Facebook* would be examples of 'permissible specific blocking of content', rather than GMOs, since monitoring filters would only be looking for particular images uploaded by any internet user.[25] Much like with child pornography, technology exists which can locate such images with ease.

The Digital Single Market Directive

Copyright law's online intermediary regime provides another possible avenue for reform. Like the deindexing regime, it involves tripartite arrangements where the claimant opposes an online operator's facilitation of third-party publications. The recent Digital Single Market Directive (DSMD) promotes a shift away from strict prohibitions and towards greater online intermediary responsibility. This suggests that the European legislature is becoming more receptive to imposing greater obligations on online intermediaries by undermining previous safeguards.[26] Although the DSMD specifically applies to copyright law's intermediary liability framework, it illustrates the viability of imposing obligations akin to general monitoring in the data protection regime.

Most notably, Article 17 DSMD would require online service providers to proactively monitor and filter content. It would also bypass the intermediary shields of the ECD in certain circumstances by imposing *ex ante* obligations to protect the commercial interests of copyright holders, therefore adopting a liability framework similar to that proposed for the data protection regime.[27] The idea is that where online service providers innocently communicate a copyright-protected work, and therefore infringe the holder's right, they face no liability so long as they make best efforts 'in accordance with industry standards of professional diligence' to remove the content they are informed about.[28] Once provided with notice from the right-holder, they must act expeditiously to disable access to the content and make best efforts to *prevent future uploads*.[29] This regime does not impose GMOs from the outset but instead demands heightened scrutiny from operators notified of such requests. If such obligations are viable in intellectual property claims, they are viable in data protection claims.

---

[24] AG Szpunar in C-18/18 *Eva Glawischnig Piesczek v Facebook Ireland* [2019], [2020] 1 WLR 2030 [61], [108].
[25] Erdos (n 23) 203.
[26] Aleksandra Kuczerawy, 'To Monitor or Not to Monitor: The Uncertain Future of Article 15 of the E-Commerce Directive' (*Ku Leuven CiTiP*, 10 July 2019) <https://www.law.kuleuven.be/citip/blog/to-monitor-or-not-to-monitor-the-uncertain-future-of-article-15-of-the-e-commerce-directive/> accessed 18 January 2021.
[27] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market [2019] OJ L130/92, art 17(3).
[28] DSMD (n 27) art 17(4)(b).
[29] DSMD (n 27) art 17(4)(c).

Critics argue that this would constitute a GMO since it requires monitoring the activities of all user uploads, irrespective of the fact that Article 17(8) DSMD specifically reads that it 'shall not lead to any general monitoring obligation'.[30] Although numerous commentators wrote an open letter arguing that copyright infringements should not be put in the same category as offences such as child pornography with regards to the obligations they impose, this essay proposes that data protection delisting requests should be.[31] Specifically, greater *ex ante* obligations should apply to SEOs due to the autonomy interests of data subjects. If Google was unlawfully communicating images of Mr Mosley to the public, then under Article 17(4) DSMD the copyright holder (presumably, the photographer) could order Google to remove and proactively monitor re-uploads. However, Mr Mosley (as a mere data subject) lacks the same influence. It is nonsensical that a photographer would potentially possess more control over the dissemination of the image than Mr Mosley, subject to public policy exclusions.

Notice and Stay-Down

Notice-and-action is an umbrella term for the various responses that an entity may be required to take once notified of unlawful content. Different categories of unlawful online content require different policy responses in respect of notice-and-action procedures.[32] The current right-to-be-forgotten resembles the notice-and-takedown procedure prevalent in the intermediary liability regime, which requires parties to take steps to remove unlawful content of which they are directly notified. However, it has already been shown that notice-and-takedown is not sufficient for promoting an individual's right-to-be-forgotten, since requiring a data subject to continually notify the data controller of re-uploads renders it useless. This essay supports introducing a notice-and-stay-down procedure, which requires SEOs to proactively identify and deindex recurring uploads which they have been notified of. Under this model, notification imposes an ongoing obligation on the intermediary to prevent further infringements. This approach matches what the claimants sought in both *AY v Facebook* and *Mosley* above.

Notice-and-stay-down is currently implemented for instances of online child pornography.[33] This stricter regime is appropriate, since child pornography inflicts greater societal harm than intellectual property right infringements and is easier to detect through filtering mechanisms. This bears some resemblance to Mr Mosley's situation, where the sexual images that he sought to deindex were detectable through photo-recognition technology. Although requiring automatic delisting of content which infringes a data subject's data protection rights would be too stringent on SEOs, since it is not always clear without initial notification exactly which content should be deindexed, notice-and-stay-down is a proportionate remedy.

---

[30] Aleksandra Kuczerawy, 'Dear European Commission – Academics Express Concern about Monitoring Obligations in the Proposed Copyright Directive' (*Ku Leuven CiTiP*, 1 December 2016) <https://www.law.kuleuven.be/citip/blog/dear-european-commission-academics-express-concern-about-monitoring-obligations-in-the-proposed-copyright-directive/> accessed 18 January 2021.

[31] Sophie Stalla-Bourdillon and others, 'Open Letter to the European Commission – On the Importance of Preserving the Consistency and Integrity of the EU Acquis Relating to Content Monitoring within the Information Society' (*SSRN*, 30 September 2016) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2850483> accessed 18 January 2021.

[32] Christina Angelopoulos and Stijn Smet, 'Notice and Fair balance: How to Reach a Compromise between Fundamental Rights in European Intermediary Liability' (2016) 8(2) Journal of Media Law 266, 270.

[33] Ibid 290.

Angelopoulos supports retaining the prohibition of GMOs and opposes implementing notice-and-stay-down procedures in a copyright context, since they place disproportionate demands on intermediaries. She writes that 'the identification of new postings of content previously notified as unlawful to the intermediary requires the implementation of systems for the monitoring of all user-submitted information … [and] screening out illegal content cannot occur without filtering the totality of content'.[34] Nevertheless, her argument can be countered on three grounds.

Firstly, the forthcoming DSMD promotes a notice-and-stay-down approach for copyright infringements. If it is successfully implemented, this would undermine arguments that GMO prohibitions must be retained at all costs.

Secondly, and more importantly, by accepting the viability of notice-and-stay-down for child pornography offences, Angelopoulos acknowledges that sometimes an individual's needs outweigh those of the intermediary. The central question is how serious one thinks data protection infringements are and how far SEOs should go to counter the harms caused by their indexing. Although Angelopoulos does not think that copyright infringements should impose further obligations on intermediaries, this should not be determinative of the matter in a data protection context since copyright infringement is a lesser harm.

Thirdly, although this essay makes no comment over the balancing exercise in right-to-be-forgotten claims, it is only in situations where the balance is deemed in favour of the data subject, rather than internet users in general, that any deindexing duties are imposed on search engines. When the balancing exercise rules in favour of the data subject, the ease with which these filtering mechanisms could be implemented should not be considered overly burdensome. The individual autonomy of data subjects necessitates imposing burdens on search engines, as is done for child pornography.

To summarise, deindexing claims should lie somewhere between intellectual property infringements and child pornography on the scales of the severity of the offence and the appropriate redress mechanisms. Any reform must either demarcate the boundary between permissible specific monitoring and general monitoring or abandon the prohibition of GMOs in a data protection context. Either option would be in line with current developments in copyright law, which recognise the need for greater responsibility from internet service providers.

Conclusion

Both the Data Protection Directive and the ECD were adopted for the online world of 2000, yet by comparison the online world of today is unrecognisable. Although the GDPR was implemented in 2018, its relationship with the ECD leaves things essentially unchanged. Retaining a prohibition of GMOs in a data protection context has been problematic for greater promotion of the right-to-be-forgotten, since controllers consistently argue that further obligations equate to GMOs.

This essay has identified that there is appetite for reform at an English, Northern-Irish and EU-level. Furthermore, forthcoming enhanced obligations for online service providers in a copyright

[34] Ibid 288.

context demonstrate the viability of requiring online service providers to be more proactive when dealing with infringements. Development of the right-to-be-forgotten will remain stagnant until the existing limitations are overcome.

'RARE, SEVERE, UNPRINCIPLED AND CONFUSED': A NEW DAWN FOR PIERCING THE CORPORATE VEIL?

Michael Coumas

Introduction

In 1985, Frank Easterbrook and Daniel Fischel criticised the doctrine of 'piercing the corporate veil' as 'rare, severe, unprincipled and confused'. To them, making shareholders and directors satisfy the claims of creditors in this way was unfair, and would remain that way until the law was clarified and reformed. In the English context, the position on the doctrine is now clear following the judgment in *Prest v Petrodel*.[1] It would therefore be an exaggeration to assert that the position in English law is 'confused'.

Clear though it may be, the law remains unprincipled and is far from fair, echoing the rest of Easterbrook and Fischel's apprehensions about the American experience. Lord Sumption did not consider key cases outside the ambit of fraud when devising his two-pronged test in *Prest*, which has unduly restricted the instances in which veil-piercing can be said to arise.

Further, English courts allowing creditors to 'pierce the veil' is undoubtedly a rare occurrence. Each case is fact-sensitive,[2] and courts are not necessarily always engaged in veil-piercing *per se*.[3] The effects of veil-piercing, when it does happen, are also arguably severe. This is because the starting point for bodies corporate employing a scheme of limited liability ('LL'), i.e., that the shareholders ('SHs') will not be required to contribute financially to meet the company's debts,[4] is overridden.[5] This is demonstrated by the cost implications to companies in the current law, with particular regard to the ability of multi-corporate group enterprises ('MCGs') to raise capital in the ways that they do. MCGs are an apt example because in practice, the doctrine of veil-piercing is often invoked by corporate or class action claimants to make parent companies in a corporate network liable for the liabilities of a subsidiary. Parent companies are also usually the dominant SH in each subsidiary, meaning the assets of the parent are inaccessible for claims against subsidiaries if the latter are undercapitalised.

Section I explores further the question of whether veil-piercing can be said to be rare, severe, unprincipled or confused, and whether the current legal position is desirable. Section II then examines the capital-raising cost implications for MCGs. The essay will conclude that the law after *Prest* is singularly incapable of dealing with the negative external costs which flow from the employment of MCG structures. The 'genuine ultimate purpose' approach to liability under the veil-piercing doctrine, proffered by corporate governance scholars such as Dr Marc Moore, is to be preferred as it is based on a functional and more principled assessment of the case law.

[1] [2013] UKSC 34, [2013] 2 AC 415.
[2] Alan Dignam and John Lowry, *Company Law* (9th edn., OUP 2016), 32.
[3] *Chandler v Cape* [2012] EWCA (Civ) 525, [2012] 1 WLR 3111 [62].
[4] Eilís Ferran & Chan Ho, *Principles of Corporate Finance Law* (2nd edn., OUP 2014), 15.
[5] Dignam and Lowry (n 2) 29.

I. The State of the Law

Rare, Severe, Unprincipled and Confused?

This essay does not agree with Easterbrook and Fischel's view that the whole area of LL—in the English context at least—is 'confused'.[6] However, it is clear that instances of so-called veil-piercing are rare, severe and unprincipled.[7] English law has developed a restrictive principle, traceable to the cause célèbre of *Salomon v Salomon*.[8] In this case, the House of Lords ('HL') found that business creditors of a company were not prejudiced simply because one SH of that company effectively owned all the capital and took all profits.[9] Lindley LJ had argued in the Court of Appeal[10] ('CA') that the 1862 Companies Act was not designed to extend LL to those companies with fewer than seven SHs.[11] While the company in this case did consist of seven SHs in total, his Lordship described six of them as being 'dummy signatories' and held that the corporate form was being abused to perpetrate a fraud on the creditors.[12] Indeed, Alan Dignam and John Lowry suggest that the HL would have upheld the CA's decision had they been able to refer to Hansard,[13] which of course remained unavailable until just under a century later in 1993.[14] The HL nevertheless concluded that the reasons for which SHs hold their shares are irrelevant, so long as the company is properly incorporated under the statutory requirements.[15] 'Thus was the legal structure of modern business born'.[16]

Courts have since been reluctant to make SHs and directors contribute to the liabilities of their company, except if the company is a 'sham'.[17] Specifically, the 'Cape plc litigation' set out the circumstances in which a court will pierce the corporate veil. Slade LJ in *Adams v Cape*,[18] for example, used Lord Keith's dicta in the Scots case of *Woolfson v Strathclyde*[19] to conceptualise all previous instances of veil-piercing which did not involve fraud as being reliant on statutory and contractual interpretation.[20]

This significantly limited the applicability of the doctrine. Outside of cases of fraud—long said to 'unravel everything'[21]—liability could only extend to SHs or directors if mandated by statute or a contractual term. Clear examples include the rule against preferential payments to creditors in the Insolvency Act 1986, or where the company's members have made personal guarantees in

[6] Frank Easterbrook and Daniel Fischel, 'Limited Liability and the Corporation' (1985) 52 University of Chicago Law Review 89, 89-92.
[7] Ibid.
[8] [1897] AC 22.
[9] Ibid [45] (Lord Herschell).
[10] *Broderip v Salomon* [1895] 2 Ch 323.
[11] *Salomon* (n 8) [337].
[12] Ibid [340].
[13] Dignam and Lowry (n 2) 21.
[14] *Pepper v Hart* [1993] AC 593.
[15] *Salomon* (n 8) [30].
[16] *Prest* (n 1) [90] (Baroness Hale).
[17] *Gilford Motor v Horne* [1993] Ch 935.
[18] [1990] Ch 433.
[19] 1978 SC (HL) 90.
[20] Ibid [96].
[21] *Lazarus Estates Ltd v Beasley* [1956] 1 All ER 341, 712 (Lord Denning MR).

relation to the company's liabilities. Indeed, the Privy Council in *Lee v Lee's Air Farming*[22] pierced the corporate veil to entitle a widow to compensation under the New Zealand Worker's Compensation Act 1922, which made her husband an 'employee' as well as a SH and director.

This approach was unsatisfactory because it excluded cases that did not arise from contractual or statutory interpretation. In the MCG context, this includes situations where a parent company acts for all intents and purposes as the 'head and brains' of a subsidiary.[23] Although this issue was addressed in *Chandler v Cape,*[24] where a tort claim was successfully established against the UK-incorporated parent company of a South African subsidiary to access the assets of the former, Arden LJ concluded that this was a case of joint tortfeasors and therefore did not involve technical veil-piercing.[25] In keeping with Easterbrook and Fischel's criticism, instances of veil-piercing are clearly limited and so can be described as 'rare'.

Lord Sumption restated the law in this area in *Prest*, rightly moving on from the confines of statutory and contractual interpretation. While his Lordship refused to confine himself to the Matrimonial Causes Act 1973,[26] his test has limited the circumstances in which veil-piercing can arise to the largely synonymous cases of 'concealment' and 'evasion'.[27] Cases in the former category capture instances where a company has been interposed between the creditors and the company's controller, often to avoid debts due.[28] 'Evasion' describes the case law on using the corporate form as a means of escaping pre-existing legal obligations, e.g. contract covenants.[29] These two situations do not move the law forward from being 'fraud-exclusive'. The only 'silver-lining' is that the judgment has helpfully condensed vast swathes of case law relating to abuse of the corporate form into two principles. In this regard, the principle is therefore far clearer than it had been before.

However, as both evasion and concealment in reality have the same function as the traditional 'sham' doctrine, it might be tempting to argue that the law is still 'confused'. Lord Sumption maintained that the concealment rule 'does not involve veil-piercing at all',[30] which is similar to Arden LJ's assertion in *Chandler* that veil-piercing is not a tort. To Easterbrook and Fischel, these dicta are unhelpful and contribute to a problematic 'jurisprudence by metaphor'.[31] Indeed, Beatson LJ stressed the difficulty of incrementally developing this area of common law as a result of these judgments.[32] Having said that, linguistic simplicity *per se* does not lead to just outcomes in 'hard cases'.[33] It is possible to read complexity into even the clearest of judicial pronouncements.[34] If there is to be valid criticism of Lord Sumption's test, it must therefore be found elsewhere.

[22] [1961] AC 12.
[23] *Apthorpe v Peter Schoenhofen Brewing* (1899) 4 TC 41.
[24] *Chandler* (n 3).
[25] Ibid [62].
[26] S 24.
[27] *Prest* (n 1) [28].
[28] Ibid.
[29] Ibid.
[30] Ibid.
[31] Easterbrook and Fischel (n 6) 89-90.
[32] *Antonio Gramsci Shipping v Recoletos Ltd* [2014] Bus LR 239, 258.
[33] Hrafn Asgeirsson, *The Nature and Value of Vagueness in the Law* (Hart Publishing 2020) 3.
[34] Ibid 3-4.

One such criticism, aside from arguably restricting the availability of veil-piercing even more than *Adams*, is that the test in *Prest* suffers from principled inconsistency. Indeed, the doctrine has been described as 'a temple built on faulty foundations'.[35] Moore has suggested that earlier cases of veil-piercing which employ more open-ended tests like 'substantial justice' have been ignored.[36] Two years post-*Salomon*, for example, *Apthorpe v Peter Schoenhofen Brewing*[37] pierced the veil between a US-domiciled parent company that was 'head and brains' of an English subsidiary. More recently, Southwell J in *Creasey v Breachwood Motors*[38] pierced the veil to satisfy the debts of a judgment creditor, as 'substantial justice would be done by doing so.'[39] However, both courts and academics have 'explained away' this grey area. Payne views *Creasey* as based on the 'intention to use the corporate structure to deny the plaintiff some pre-existing legal right',[40] i.e., Lord Sumption's 'evasion' limb in *Prest*. However, Moore aptly identifies 'Southwell J explicitly rejected evidence by counsel for the plaintiff imputing fraudulent intention on behalf of [the defendants].'[41] Therefore, Lord Sumption missed an opportunity to widen the restrictive test for veil-piercing in a way that is internally coherent.

Is the Current Position Desirable?

The judicial willingness to employ the doctrine therefore remains conservative. This is despite what Dignam and Lowry call the 'interventionist period' from 1966, where the HL freed themselves from the unqualified conception of *stare decisis*,[42] to 1989, where courts were more willing to 'pull off the mask' of separate corporate personality ('SCP') and see 'what truly lies beneath'.[43]

Denning LJ, whose rulings championed this period, unravelled SCP for reasons ranging from flagrant tax avoidance in *Littlewoods Mail Order Stores v IRC*,[44] to finding that a group of companies in reality functioned as a 'single economic unit' in *DHN Food Distributers v Tower Hamlets LBC*.[45] Denning LJ's ruling in *DHN* created speculation as to whether piercing the veil was a general, fraud-exclusive rule, or if it applies on an *ad hoc*, functional basis. The latter approach is preferable because it captures a wider range of circumstances for veil-piercing. For example, where debtors make use of the corporate form solely to advance a purpose otherwise unavailable to them, to the detriment of their creditors. Indeed, Moore suggests SCP should depend on the 'genuine ultimate purpose ('GUP') of the company's activity, in relation to its business enterprise.'[46]

[35] Marc Moore, 'A Temple Built on Faulty Foundations: Piercing the Corporate Veil and the Legacy of *Salomon v Salomon*' (2006) JBL 180, 202.
[36] Ibid, 194-195.
[37] *Apthorpe* (n 23).
[38] [1993] BCLC 480.
[39] Ibid 496.
[40] Jennifer Payne, 'Lifting the Veil: A Reassessment of the Fraud Exception' (1997) 56(2) CLJ 284.
[41] Moore (n 35) 202.
[42] *The Practice Statement* [1966] 3 All ER 77.
[43] Dignam and Lowry (n 2) 33.
[44] [1969] 1 WLR 1241.
[45] [1976] 1 WLR 852.
[46] Moore (n 35) 198.

Ferran and Ho are sceptical of this view, arguing that the closeness of companies in a group and centrality of management does not justify piercing the group structure.[47] While it is true that courts should be conscious of the benefits of LL, the law ought not to facilitate prejudicial activity by company owners against creditors. Moore's GUP rule would have allowed the courts to employ a balancing act between the public policies of freedom to benefit from LL and ensuring that the corporate form is not abused by debtors seeking to escape pre-existing liabilities to creditors.

However, Slade LJ in *Adams* stunted the development of Denning LJ's *ad hoc* 'enterprise approach' in *DNH*, stating 'the court does not have a general discretion to disregard the veil on grounds of justice',[48] and 'whether or not this is desirable, the right to use a corporate structure in this manner is inherent in our corporate law.'[49] This is despite the fact that the veil in *DHN* was pierced for the benefit of the parent company, who claimed against Tower Hamlets Council for compensation following a compulsory purchase order made over land owned by its subsidiary.[50] The approach advocated in *DHN*, and reformulated by Moore, is thus more desirable than the current position adumbrated by Lord Sumption.

II. Implications for the Cost of Capital-Raising for MCGs

As the risk of 'debtor opportunism' in abusing the corporate form is higher in the MCG context,[51] it will be useful to illustrate the difficulties of the current position compared to the benefits of the *ad hoc* GUP formulation with concrete examples from this area.

Cost-efficiency

To Hansmann and Kraakman, companies consist of a nexus of contracts which are designed to benefit the company's debtors and creditors by partitioning company assets both 'affirmatively and defensively'.[52] While affirmative asset partitioning protects the company's creditors who get priority on insolvency and in liquidation, defensive asset partitioning limits the company's exposure to claims by business creditors against the personal assets of the company's owners.[53]

Hansmann and Kraakman use the concept of asset partitioning to describe the cost-savings of LL companies in monitoring, risk-bearing and share transfers, which would be unavailable if SHs were exposed to joint and several, or 'unlimited', liability.[54] If a company's liabilities are limited, defensive asset partitioning (as defined above) is at its strongest in relation to the veil that lies between the company and SHs.[55] The same goes for the company-director veil, which Talbot has described as 'thinner' in nature due to being more readily pierced by the courts using statutory provisions contained in the Companies Act 2006 or the Insolvency Act 1986.[56]

---

[47] Ferran & Ho (n 4) 30.
[48] Ibid 31.
[49] *Adams* (n 18) [544].
[50] *DHN* (n 45) [860].
[51] Henry Hansmann and Reinier Kraakman, 'The Essential Role of Organisational Law' (2000) 110 Yale LJ 387, 398-405.
[52] Ibid 390.
[53] Ibid 392-397.
[54] Easterbrook and Daniel Fischel (n 6) 94-95.
[55] Hansmann and Reinier Kraakman (n 51) 395-96.
[56] Lorraine Talbot, *Critical Company Law* (2nd edn, Routledge 2016), 33-35.

The late Professor Lynn Stout identified a further cost-efficiency of using the corporate form: namely, that it provides 'intergenerational efficiency'.[57] This means assets are 'locked in' the company, so that SHs are protected from the possibility that each will withdraw their interests in the assets to pursue short-term goals.[58] Stout argues this shifts wealth to the future, so that non-adjusting creditors (i.e., those who are involuntary and did not have the chance to bargain themselves security interests) are able to benefit.[59]

Taken altogether, the benefits of LL are clear and so Lord Sumption's restrictive test in *Prest* can be seen as safeguarding economic goods. However, the law must balance the good with the bad. Costs external to transactions between the company and its adjusting creditors must be accounted for if we are to develop sustainable corporate governance.

External Costs

Easterbrook and Fischel aptly recognise justifications for piercing the veil, despite the clear private benefits of LL. While a debtor company is free 'to be as risky as possible' insofar as it is reflected in the price voluntarily accepted by adjusting creditors, the cost of excessive risk-taking might be shifted to involuntary creditors.[60] These kinds of 'creditor' are not able to risk-adjust their position in the same way as trade and finance creditors.[61]

This is a particular problem in MCGs, where undercapitalised subsidiaries are being set up in jurisdictions with developing human rights and health and safety regulation.[62] As mentioned above, because the parent company tends to be the dominant SH in each subsidiary, they benefit from LL. This means that their financial contributions to the liabilities of the company do not exceed the nominal value of their shares or any amount unpaid.[63] Therefore, if the subsidiary pollutes the local environment or negligently commits wrongdoing towards its employees, the parent is unreachable by claims from these involuntary creditors while standing to profit from the activities of the subsidiary and the cost-efficiencies of the MCG structure.[64]

Possible Solutions

Unlimited liability could rein in abuses by MCGs of LL and SCP. Although Easterbrook and Fischel argue that joint and several liability would increase individual SH risk, raise share price and ultimately divest shares of their fungible nature,[65] Ferran and Ho have pointed out that 'absolute liability' is only one way for unlimited liability to operate.[66]

---

[57] Lynn Stout, 'The Corporation as Time Machine' (2015) 38 Seattle University Law Review 685, 687.
[58] Ibid 699-670.
[59] Ibid 698.
[60] Easterbrook and Fischel (n 6) 104.
[61] Ibid 105.
[62] Ibid, 113.
[63] Insolvency Act 1986, s 74(2)(d).
[64] Talbot (n 56) 70.
[65] Easterbrook and Fischel (n 6) 96-97.
[66] Ferran & Ho (n 4) 20.

Hansmann and Kraakman have suggested assigning SH liability on an unlimited *pro rata* basis, so that the personal liability of each investor for the tort judgment would never be more than that represented by their portion of total ownership.[67] In turn, the price of shares would reflect negative externalities imposed on involuntary creditors without entirely eradicating the benefits of asset partitioning,[68] and shares will remain fungible in a fluid market so investors can diversify their portfolios and absorb losses.[69] While at first glance this would seem to prevent parent companies from offloading hazardous activities through undercapitalised MCG entities within developing jurisdictions,[70] in reality the practice of arbitrage, and the use of wholesale investment vehicles such as swaps, would make the price of unlimited shares 'identical to those in a LL regime'.[71] In other words, the capital market is likely to manoeuvrer and legally draft its way out of the intended consequences of such a regime without paternalistic regulation.

Instead, case law post-*Prest* has the potential to prevent abuses of the corporate form, especially by parent companies in cross-border MCGs. although Lord Sumption failed to rectify the principled inconsistency of the doctrine of veil-piercing, a beacon of hope resides in tort cases which appear to 'outflank' general corporate law. Despite Arden LJ's contention in *Chandler* that the doctrines of joint tortfeasors and veil-piercing are separate and distinct, on a functional view they achieve the same outcome—namely, of restricting LL where it detriments (especially involuntary) creditors.

Viewing the doctrine from an economic perspective, it can be seen that making UK-domiciled parent companies contribute to undercapitalised subsidiaries' liabilities where a duty of care can be established is equivalent to re-characterising corporate groups as 'single economic entities' in the *DHN* way. Lord Sumption moved away from Slade LJ's explanation for Denning LJ's veil-piercing in *DHN* as being based solely on 'statutory interpretation',[72] which can be seen as re-opening the door that had been closed since *Adams* of adopting the GUP rule. Indeed, Baroness Hale in *Prest* expressed doubt as to 'whether it is possible to classify all the cases in which the courts [have been] prepared to disregard [SCP] neatly into cases of concealment or evasion.'[73] Most recently, Lord Briggs in *Vedanta Resources v Lungowe*[74] held that a successful tort claim against a UK-domiciled parent did not fail simply because the jurisdiction of the Zambian subsidiary would be more appropriate, especially since 'there is real risk that substantial justice will not be obtainable in the jurisdiction.'[75] This can be described as a judicial U-turn from the restrictive days of *Adam* from an economic perspective.

[67] Henry Hansmann and Reinier Kraakman, 'Towards Unlimited Shareholder Liability for Corporate Torts' (1991) 100 Yale LJ 1879, 1892-1894.
[68] Ibid 1880-82.
[69] ibid 1904.
[70] ibid, 1881.
[71] Talbot (n 56) 87.
[72] *Prest* (n 1) [52].
[73] Ibid [92].
[74] [2019] UKSC 20, [2020] AC 1045.
[75] Ibid [88].

Conclusion

Prest summarised the legal starting point for cases of veil-piercing, which has clarified the law. Further, if we accept veil-piercing has the same economic effect as claims for tortious negligence, it is possible to achieve fairer outcomes than by using *Prest* alone.

However, MCGs' wrongdoing goes beyond exploitation of the corporate form. For example, it is disturbingly common practice to outsource labour to cheap contractors in developing jurisdictions.[76] For instance, the largest single contractor of Apple Inc, Foxconn, has often been subject to criticism for employment law violations.[77] While the Labour Contract Law of China provides that no more than 10% of a work force can be temporary,[78] in 2019 it was found that more than half of the workers in Foxconn's Zhengzhou plant were on temporary contracts.[79] This allowed Foxconn to meet peak periods of demand without taking on longer term costs.[80] The consequence is that the legal relationship between MCGs and the workers employed by the local businesses to whom they outsource is entirely severed from a legal perspective.[81] Indeed, had these corporate structures been employed by the MCGs in the cases of *Chandler* and *Vedanta*, the outcomes may have very different for the class action claimants.[82]

This essay argues the courts should pursue an enlightened approach to liability, adopting the GUP rule by making use of *DHN* and *Prest* as a starting point. This will allow the courts to re-characterise groups as 'single economic entities', depending on the genuine purpose of its business activities. This is similar to the position in Albania, where groups are defined as a single unit if there are 'real relations of influence and control', the definition of which includes outsourcing.[83]

[76] Talbot (n 56) 70.
[77] Louise Lucas, 'Apple and Foxconn Broke Chinese Labour Law to Build New iPhones' *Financial Times* (Hong Kong, 9 September 2019) 1-3.
[78] Labor Contract Law of the People's Republic of China (29 June 2007), Articles 41 and 62.
[79] 'iPhone 11 Illegally Produced in China' (*China Labour Watch*, 8 September 2019) <https://3on4k646b3jq16ewqw1ikcel-wpengine.netdna-ssl.com/wp-content/uploads/2021/06/Zhengzhou-Foxconn-English-09.06.pdf> accessed 10 September 2021.
[80] Lucas (n 77).
[81] Talbot (n 56) 71.
[82] Ibid.
[83] Janet Dine, 'Stopping Jurisdictional Arbitration by Multinational Companies' (2014) 11(2) European Company Law 77, 78-79.

LOSS OF CONTROL MANSLAUGHTER: TIME FOR (MORE) REFORM?

Miranda Zeffman

Introduction

In May 1989, after ten years of being beaten and raped, Kiranjit Ahluwalia killed her husband. She was unsuccessful in pleading the partial defence of provocation – for which a constituent requirement was a sudden and temporary loss of control – because she had waited for several hours before responding to his threats and had therefore had the chance to cool down.[1] Six years earlier, Robin Melletin – who killed his wife after she mocked his sexual prowess – easily satisfied this same requirement because he had wasted no time at all in reacting.[2] His plea of provocation was successful and he was convicted of manslaughter. By the time of Ahluwalia's arrest, he had already been released from prison.

Provocation was abolished on 4th October 2010. Its abolition was the product of decades of feminist activism, including a series of high-profile appeals which sought to overturn the murder convictions of women who had killed their abusers.[3] The Government asked the Law Commission to review partial defences to murder in 2003, and the damning final report – which branded the law of murder 'a mess'[4] – led to the passing of the Coroners and Justice Act 2009 (CJA). This replaced provocation with a new partial defence called loss of control.

The aim of this essay is to show that this reform was inadequate. The majority of the feminist issues associated with provocation have been left unresolved, and female defendants – particularly those who have killed abusive partners – are still being unfairly convicted of murder. This essay will elucidate three major problems with loss of control. The first is that the loss of control requirement favours the way in which men tend to react to provocation, whilst effectively precluding abused women from relying on the partial defence. The second is that there is still no clear definition of what it means to be provoked, and the third is that the concept of loss of control is vague and ill-founded in respect of medical science. The essay should illustrate that further reform is needed if the new partial defence is to be accessible to female and male defendants alike.

I. The Concept of Loss of Control is Sexist

The old partial defence of provocation involved a three-part test: firstly, there had to be provocation; secondly, the defendant had to have lost his or her control as a result; and thirdly, the defendant's actions must have resembled those of a reasonable man. In the 1949 case of *R v Duffy,* which involved a woman killing her abusive husband, Devlin J gave his classic definition of provocation as:

[1] *R v Ahluwalia* [1992] 4 All ER 889.
[2] *R v Melletin* [1985] 1 WLUK 884.
[3] *R v Ahluwalia* [1993] 96 Cr App R 133; *R v Thornton* [1996] 1 WLR 1174; *R v Humphreys* [1996] Crim L R 431.
[4] Law Commission, *Partial Defences to Murder* (Law Com No 290, 2004) para 2.74.

> … some act, or series of acts done (or words spoken) … which would cause in any reasonable person and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his or her mind.[5]

Devlin J's qualification of the concept of loss of control – that is, that it should be sudden and temporary – favoured the way in which men tend to react to provocation and effectively excluded women from the ambit of the partial defence. Male defendants are likely to 'snap [or] explode'[6] upon being provoked – in other words, lose control suddenly and temporarily. By contrast, women – and particularly abused women – may have a 'slow-burn' reaction that builds over the course of days, months, or even years.[7] This is because domestic abuse is a form of 'cumulative provocation'[8] that intensifies over time and, accordingly, prompts a gradual response. Even when there is a particular event that causes a woman to 'snap', she is unlikely to retaliate in the moment for reasons of self-preservation. Ahluwalia, for example, was 'tipped … over the edge'[9] when her husband burned her face with an iron; however, she did not fight back until he was asleep out of fear that he might injure or kill her.

Unsurprisingly, the Law Commission specifically recommended that the loss of control requirement be abandoned. It was characterised, variously, as 'unnecessary'[10], 'undesirable'[11], and – most damning of all – 'beyond reform by the courts'.[12] Central to the Law Commission's critique of the concept was its complete mischaracterisation of women's reactions to trauma, such that it was 'difficult or impossible' for them to satisfy the requirements of the partial defence.[13] Particular attention was paid to the plight of women suffering domestic abuse. 'Such cases clearly call for the jury's consideration of a partial excuse, despite the element of premeditation', it wrote. 'The premeditation will typically reflect no more than [the defendant's] reasonable fear that an immediate and direct confrontation with the abusive partner will lead to violence being inflicted on her.'[14] It is curious, then, that the Government decided not only to retain the concept of loss of control, but also to actively centre it by naming the new partial defence in its honour. The one modification – that a defendant's loss of control no longer had to be sudden – was presumably designed to accommodate women like Ahluwalia, who had been provoked by sustained domestic abuse and waited for some time before reacting. Some commentators view this modification optimistically, claiming that it represents a new understanding of what it means to lose control

---

[5] [1949] 1 All ER 932.
[6] Susan SM Edwards, 'Loss of Self-Control: When His Anger is Worth More than Her Fear' in Alan Reed and Michael Bohlander (eds), *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (Routledge 2011) 79, 88.
[7] Jeremy Horder, 'Reshaping the Subjective Element in the Provocation Defence' (2005) 25(1) OJLS 123, 129.
[8] Celia Wells, 'Battered Woman Syndrome and Defences to Homicide: Where Now' (1994) 14 LS 266, 271;
The Centre for Women's Justice, 'Women Who Kill: How the State Criminalises Women We Might Otherwise be Burying' (17 Feb 2021) <www.centreforwomensjustice.org.uk/women-who-kill> accessed 8 April 2021.
[9] Krishna Khakhria, 'Kiranjit Ahluwalia: The Woman Who Set Her Husband on Fire' *BBC News* (4 April 2019) <www.bbc.co.uk/news/uk-47724697> accessed 4 April 2019.
[10] Law Commission, *Murder, Manslaughter and Infanticide* (Law Com No 304, 2006) para 5.17.
[11] Ibid para 5.17.
[12] Ibid para 5.34.
[13] Ibid para 5.18.
[14] Ibid para 5.24.

and moves 'well beyond the notion of an angry outburst being the paradigm for loss of control'.[15] Their optimism might be misplaced. Arguably, the modification is largely inconsequential because the requirement that a defendant's loss of self-control be sudden was, in the first place, tautological. In the words of Norrie, 'How else does one identify a loss of self-control, except as a moment of departure from being in control?'[16] If losing control – by definition – happens suddenly, it follows that the only way to remove the association of suddenness with this partial defence is to do away with the concept of loss of control altogether. It is perhaps revealing that many women who have killed their abusers are still finding themselves unable to escape murder convictions. Early this year, the Centre for Women's Justice released its long-awaited research study exploring the fate of women who have killed abusive men.[17] They sampled twenty female defendants, fourteen of whom had faced trial after the CJA came into force. Of these fourteen, just one had successfully secured a manslaughter conviction. This was on the basis of diminished responsibility, not loss of control. None of the women attempting to rely on loss of control was successful.

II. There is No Clear Definition of What It Means to Be Provoked

A further problem with the new partial defence lies in its definition of what it means to be provoked. The law has never clearly defined provocation, with the old partial defence reading as follows:

> Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man.[18]

Accordingly, almost anything could be left to the jury for consideration, provided that there was sufficient evidence of it having occurred.[19] Male defendants who had killed their female partners, sometimes after subjecting them to years of abuse, were able to escape murder convictions on the basis of such low-level provocation as 'nagging',[20] mocking,[21] and 'cuckolding.[22] In 1991, after kicking his wife to death, Joseph McGrail successfully pleaded provocation because – in the words of the presiding judge – 'she would have tried the patience of a saint'.[23] If anything, the definition of provocation became looser over time. In *R v Davies*, the court held that words or acts amounting to provocation were 'not excluded because they emanated from someone other

[15] Jonathan Herring, 'The Serious Wrong of Domestic Abuse and the Loss of Control Defence' in Reed and Bohlander (eds) (n 6) 65, 67.
[16] Alan Norrie, 'The Coroners and Justice Act 2009 – Partial Defences to Murder: (1) Loss of Control' [2010] Crim LR 275, 288.
[17] The Centre for Women's Justice (n 8).
[18] Homicide Act 1957, s 3.
[19] *R v Acott* [1996] 4 All ER 443 (HL).
[20] *R v Hampson* [2001] 1 Cr App R (S) 84.
[21] *R v Melletin* [1985] 1 WLUK 884.
[22] *R v Mawgridge* [1707] Kel 119, 136-7.
[23] Julie Bindel, 'Why Are Women Treated So Badly When It Comes to Murder?' *The Spectator* (20 February 2021).

than the victim'.[24] The court in *R v Doughty*[25] ruled that a crying baby could constitute provocation, thereby ignoring previous indications that an act would not count as provocation if it had been caused or exacerbated by the defendant himself.[26] Despite this broad definition, domestic abuse was one type of provocation for which courts had little time. Sara Thornton – who lost her first appeal against her murder conviction just two days before Joseph McGrail was sentenced – was told by the presiding judge that she could have walked away from her abuser or gone upstairs.[27] Likewise, when June Grieg killed her husband in 1979 following systematic abuse and torture, Lord Dunpark told her – presumably with a straight face – that she could have just requested a separation.[28] What he might have said to Kiranjit Ahluwalia – who, despite barely speaking English, had approached her GP for help, repeatedly run away and obtained two court injunctions – we cannot know.

The CJA sought to solve the problem of how to define provocation by introducing two qualifying triggers. Now, a defendant's loss of control will only be valid for the purposes of the partial defence if it:

> … was attributable to D's fear of serious violence from V against D or another identified person,[29]
> or
> … was attributable to a thing or things done or said (or both) which (a) constituted circumstances of an extremely grave character, and (b) caused D to have a justifiable sense of being seriously wronged.[30]

In some ways, the qualifying triggers constitute a step in the right direction. The first is ostensibly designed for use by female defendants who kill out of fear of abuse. The second goes further than the old partial defence by underlining the severity of the provocation required. The CJA also attempts to solve the particularly rife problem of women's sexual infidelity being classed as provocation by stating that 'the fact that a thing done or said constituted sexual infidelity is to be disregarded'.[31]

Unfortunately, the qualifying triggers have also proven highly problematic. A dominant concern among feminist critics is that the terms 'serious' and 'violence' in the first qualifying trigger are ambiguous. Edwards, for example, has expressed concern that the courts will take a 'restrictive' view of what constitutes violence such that it only includes physical acts.[32] She argues that the CJA ought to have explicitly stipulated that violence could be both physical and psychological, thereby taking care to include victims of all types of domestic abuse within its ambit. The term 'serious' could also be problematic because widespread misunderstandings about the realities of domestic abuse might lead judges and jurors to underestimate the significance of a given action. Heather Osland, for example, was so attuned to her abusive husband's mood swings that she could

[24] [1975] QB 691.
[25] [1986] 83 Cr App R 319.
[26] [1973] A All ER 152 (PC).
[27] *R v Thornton* [1996] 1 WLR 1174.
[28] *HM Advocate v Grieg* (May 1979).
[29] Coroners and Justice Act 2009, s 55(3).
[30] Ibid s 55(4).
[31] Ibid s 55(6)(c).
[32] Edwards (n 6) 79, 91.

tell – based on the way in which he exited his car – what he might do when he entered the house.[33] A jury might fail to understand why Heather, on the sight of her husband laughing loudly as he shut his car door, feared serious violence. The fear-based trigger, then, has been 'inadequately constructed' because it does not leave scope for consideration of 'the impact of fear on … an abused woman's thinking or behaviour'.[34] Ambiguity aside, the overarching problem with creating a qualifying trigger based on fear is that as long as the loss of control requirement is preserved, it is almost meaningless. Women relying on the qualifying trigger of a fear of serious violence will still have to prove that they lost their self-control, and the 'typological template'[35] of a loss of self-control is still crafted in men's image. Losing control is 'explosive'[36] – it connotes frenzy, passion and uncontrollable rage. Indeed Brookbanks, writing several years before provocation was abolished, commented that 'it is difficult to visualise the idea of a loss of self-control without some mental appeal to rage or an extreme state of anger'.[37] It goes without saying that this is simply not how most women – or, indeed, most men – are likely to react to someone from whom they fear serious retaliation.

The CJA's attempt to preclude sexual infidelity from being used as a qualifying trigger has also fallen somewhat short. In *R v Clinton*[38], the very first case to be tried under the new provisions, the Court of Appeal allowed the defendant to use evidence of his partner's sexual infidelity when explaining how he was provoked into killing her. It held that 'sexual infidelity is not subject to a blanket exclusion'[39] and, whilst it may not be relied upon on its own, it can be taken into account when it is 'integral to and forms an essential part of' the wider context in which a defendant was driven to lose control.[40] Arguably, this is persuasive: in some cases, including those involving female defendants, sexual infidelity is the last straw within a much wider picture of humiliation, disrespect or degradation. The relevant factor in *Clinton* wasn't that his wife had been unfaithful, so much as the fact that she taunted him with graphic details of her sexual acts in much the same way as she had mocked his suicidal thoughts. The question of whether *Clinton* was wrongly decided is outside the scope of this essay, but the important takeaway is the extent to which the two qualifying triggers leave themselves open to judicial interpretation. According to Sorial, the qualifying triggers have a 'lack of clarity and the potential for inconsistent applications of the law'.[41] Where there is too much room for judicial interpretation, there is a risk that pre-reform understandings of loss of control – which were plagued by gendered double standards and a misunderstanding of domestic abuse – will creep back into the courtroom. Sorial finds evidence of this in *R v Heywood*,[42] in which the defendant killed his partner's new lover. Although the jury rejected the partial defence of loss of control and the defendant was found guilty of murder, Aitkens LJ saw fit to reduce his sentence by two years because 'in our view, there was the greatest possible provocation in the non technical sense'.[43] Comments like this might be behind Edwards' view that 'habituated gendered thinking will continue to impress on the construction of what is a

[33] Ibid 93.
[34] Ibid 94.
[35] Ibid 92.
[36] Warren J Brookbanks, 'I Lost It – Rage and Other Excuses' (2006) 31 Alternative LJ 186, 187.
[37] Ibid 189.
[38] [2012] 1 Cr App R 26.
[39] Ibid [37].
[40] Ibid [39].
[41] Sarah Sorial, 'Anger, Provocation and Loss of Self-Control: What Does 'Losing It' Really Mean?' (2019) 13(2) Criminal Law and Philosophy 247, 252.
[42] [2011] 2 Cr App R (S) 71.
[43] Ibid [410].

"qualifying trigger" … such that the fearful woman facing or anticipating abuse may still find herself outwith the reach of the law's protection'.[44]

III. The Concept of Loss of Control is Vague and Ill-Founded

The final major problem associated with the new partial defence is that the concept of loss of control is ill-founded in respect of medical science. Emerging research suggests that it is a complete mischaracterisation of the relationship between emotions and action. As Sorial puts it, 'Emotions do not undermine reason … nor do they compel people to act in ways they cannot control'.[45] Her thesis is supported by Marcia Baron, who contends that the concept of loss of control might not be 'doing any real work other than creating a convenient but perhaps illusionary impression … that something happens to the agent who kills in the heat of passion'.[46] Whether or not Sorial and Baron are correct, it is troubling that such a poorly understood concept should form one of the constituent elements of a partial defence to murder. If the concept of loss of control is not properly understood – if, as the Law Commission suggests, it is 'not a question which a psychiatrist could address as a matter of medical science'[47] – how can it be accurately used? How can we properly determine whether a defendant has fulfilled the requirements of the partial defence? Arguably, we cannot. Perhaps this is why, as Brookbanks puts it, 'loss of self-control, uncritically presented, becomes a given' provided that the defendant claims to have 'lost it' or '[gone] into one'.[48] In other words, a defendant who claims to have 'seen red' or 'exploded' is giving evidence of his loss of control without even having to explain what such metaphors mean. Male defendants, then, have often been able to satisfy the requirements of loss of control simply by 'talk[ing] in recognised and commonly shared idiom'.[49] Seen through this lens, the preservation of the concept of loss of control is doubly insulting to female defendants. Not only must women fit their reactions to provocation within the typological template of the angry male defendant, but this template might – in any case – be little more than a convenient excuse for people who have simply decided to 'give vent to anger … in circumstances in which they can afford to do so'.[50]

Although there is growing consensus about the ambiguity of the concept of loss of control, there is less agreement about how to address it. Mitchell proposes expanding the concept, with the courts having to recognise that 'the individual's normal thinking process had been seriously disrupted by the provocation/trigger'.[51] Brookbanks calls for a 'framework of scientific inquiry'[52] that is better equipped to evaluate claims of loss of control. This essay contends that any future reforms must go further. The problem is not that the concept of loss of control has been poorly construed or wrongly interpreted: rather, the concept is inherently flawed. It is not possible to

[44] Edwards (n 6) 79.
[45] Sorial (n 41) 247, 248.
[46] Marcia Baron, 'Gender Issues in the Criminal Law' in John Deigh and David Dolinko (eds), *The Oxford Handbook of Philosophy of Criminal Law* (Oxford University Press 2011) 15.
[47] Law Commission, *Partial Defences to Murder* (Law Com No 290, 2004) para 3.28.
[48] Warren J Brookbanks, 'I Lost It – Rage and Other Excuses' (2006) 31 Alternative LJ 186, 187
[49] Susan SM Edwards, 'Loss of Self-Control: The Cultural Lag of Sexual Infidelity and the Transformative Promise of the Fear Defence' in Alan Reed and Michael Bohlander (eds), *Criminal Law: A Research Companion* (Routledge 2019) 82, 91.
[50] Law Commission, *Partial Defences to Murder* (Law Com No 290, 2004) para 3.28
[51] Barry Mitchell, 'Loss of Self-Control under the Coroners and Justice Act 2009: Oh No!' in Reed and Bohlander (eds) (n 6) 39, 47.
[52] Brookbanks (n 48) 186, 187.

reinterpret it to such an extent that the very essence of its meaning – that of unbridled anger and uncontrollable emotion – is entirely stripped away. Even if it were possible to completely strip the concept of its meaning, what would be the point? Why hold onto it in the first place? This was the argument made by Judy Jackson, Tasmania's Minister for Justice, when she introduced the 2003 Bill that would abolish provocation in the Australian state. 'The suddenness element of the defence is more reflective of male patterns of aggressive behaviour', she said. 'The defence was not designed for women and … it is better to abolish the defence than to try to make a fictitious attempt to distort its operation to accommodate the gender-behavioural differences'.[53]

Conclusion

This essay has argued that loss of control is unfit for purpose as a partial defence to murder. The CJA reforms did not go far enough and, as a result, female defendants – particularly those who have killed their abusers – are still being unfairly convicted of murder. The main problem lies in the decision to retain the concept of loss of control, but other issues – for example, the ambiguity of the qualifying triggers – are similarly concerning.

A fuller discussion of possible reforms is outside the scope of this essay, but it is interesting to consider the possibility of a reasons-based approach. This type of approach, put forward by the Victorian Law Reform Commission (VLRC), would see a defendant sentenced on the basis of what provoked him into acting.[54] In the eyes of the VLRC, the fact that somebody has lost his self-control does not necessarily make him any less accountable for what he has done. This position raises compelling philosophical questions about why this partial defence to murder exists in the first place. Mitchell has spoken at length about the 'search for a rationale'[55] behind loss of control manslaughter, concluding that the question of why it exists – why the law should show sympathy to those who cannot control their emotions – is 'uncomfortably difficult to answer'.[56] Perhaps any ideas for future reform should begin here.

[53] Tasmania, *Parliamentary Debates,* House of Assembly, 20 March 2003, 60.
[54] Victorian Law Reform Commission, *Defences to Homicide: Options Paper* (2003)7.24 – 7.25.
[55] Mitchell (n 51) 39, 47.
[56] Ibid 47.

CASE COMMENT ON *R v LAWRANCE* [2020] EWCA Crim 971
BLURRED LINES

Paula Kelly

I. Summary

In *R v Lawrance*,[1] the Court of Appeal considered whether a lie by a defendant that he was infertile constituted deception that vitiated ostensible consent given by the complainant. The Court found that it did not and distinguished it from recent case law on deception that fell beyond the scope of s 76 of the Sexual Offences Act 2003 (SOA).

II. Facts

The complainant and the appellant met and exchanged sexually explicit messages on a dating website. In one conversation the complainant referred to sexual intercourse that she had had with another man, which prompted the appellant to ask if that man had used a condom. The complainant said that he had not as 'he had the snip years ago', i.e., a vasectomy. The appellant responded: 'so have I'.

The appellant and complainant eventually met in person. After spending an evening together, they returned to the complainant's house. The complainant made clear to the appellant that she did not want to risk becoming pregnant and sought confirmation that he had undergone a vasectomy. He reiterated that he had done so. The complainant gave evidence that it was on the basis of this assurance that she had consented to sexual intercourse with the appellant twice without any contraception. After he left her house the following day, the appellant sent the complainant a message stating: 'I have a confession. I'm still fertile. Sorry.' The complainant consequently became pregnant and had a termination. The appellant was charged with rape contrary to s 1 SOA.

III. Trial

It was the prosecution's case that the complainant's ostensible consent had been negated by the defendant's deception and that even genuine belief on his part in her consent was unreasonable. The appellant did not give evidence at trial. His case was that the complainant had in fact consented. He also disputed her evidence that a further conversation about a vasectomy had taken place at her home.

At the conclusion of the trial, the judge directed the jury on the elements of rape and summarised the effect of s 74 SOA, which defines consent, in the following terms:

> A complainant consents to having sexual intercourse if she agrees by choice to the penetration and has the freedom and capacity to do so.

He compared deception about a vasectomy to deception about condom use and directed the jury that:

[1] [2020] EWCA Crim 971, [2020] 1 WLR 5025.

> if the man has deceived the woman into believing that he has had a vasectomy when he has not done so it would again be open to you to determine that, if she would not otherwise have agreed to have sexual intercourse with the man she did not consent to the penetration.

The judge provided a written route to verdict to the jury in which he directed them to ask themselves the following:

> i) Whether they were sure that the appellant falsely represented to the complainant that he had had a vasectomy. If yes:
> ii) Whether they were sure that she did not consent to the appellant penetrating her vagina with his penis because she relied upon that false representation and would not otherwise have agreed to be penetrated by him. If yes:
> iii) Whether they were sure that the appellant did not reasonably believe that she consented to him penetrating her vagina with his penis.

The jury found the appellant guilty.

IV. Context

The case came after several judgments given in the past ten years that have considered the effect of deception on consent to sexual activity that does not fall under s 76 SOA.

It is a longstanding tenet of English law that not all deception can vitiate consent to sexual activity. Common examples of deceptions that do not render sexual activity criminal include lies about one's political views, religion, and wealth.

S 76 SOA provides for two circumstances in which deception is conclusively presumed to vitiate consent, namely deception as to the nature and purpose of the sexual act and impersonation of an individual known personally to the complainant:

> 76 Conclusive presumptions about consent
> 1. If in proceedings for an offence to which this section applies it is proved that the defendant did the relevant act and that any of the circumstances specified in subsection (2) existed, it is to be conclusively presumed—
>   a. that the complainant did not consent to the relevant act, and
>   b. that the defendant did not believe that the complainant consented to the relevant act.
> 2. The circumstances are that—
>   a. the defendant intentionally deceived the complainant as to the nature or purpose of the relevant act;
>   b. the defendant intentionally induced the complainant to consent to the relevant act by impersonating a person known personally to the complainant.

S 76(2)(a) largely concerns sexual acts that are misrepresented as medical procedures. The paper[2] accompanying the bill cited *Flattery*[3] – in which the defendant deceived the complainant by mispresenting sexual intercourse with him as a surgical operation that would cure her from fits that she was experiencing – and *Williams*,[4] which was a case of a choirmaster who induced a young chorister into having sex with him by deceiving her into believing that it was a medical procedure that would create an air passage to improve her voice.

Therefore, the High Court in *Assange v Swedish Prosecution Authority*[5] held that s 76 SOA had no application where a complainant had consented to sexual intercourse on the condition that the partner used a condom and the partner failed to do so at all or for the entirety of the act. In that case, the complainant had not been deceived about the sexual nature of the intercourse. However, the court held that deceptive conduct was not confined to s 76 SOA and could be taken into account for the purposes of s 74 SOA, which defines consent to sexual activity:

> a person consents if he agrees by choice, and has the freedom and capacity to make that choice

The court held that such deception would deny the complainant a free choice and thus it could not be said that the complainant consented nor that the partner had a reasonable belief in consent.

R (on the application of F) v DPP[6] followed soon after: a complainant issued a judicial review of the Crown Prosecution Service's (CPS) decision not to prosecute her former partner for rape. He deliberately failed to withdraw before ejaculation, despite this being a condition of her consent. In a judgment delivered by the then Lord Chief Justice, the court emphasised that the failure on the man's part was not accidental and that he had informed her after penetration that he would ejaculate inside her vagina 'because you are my wife and I'll do it if I want'. The court held that *Assange* underlined the centrality of 'choice' to consent, noting that the issue 'must be approached in a broad common-sense way'.[7] It held that the circumstances complained of would constitute rape.

The Court of Appeal relied on the Lord Chief Justice's guidance on common sense in upholding a conviction for six counts of assault by penetration contrary to s 2 SOA in *R v McNally*.[8] The case involved a female defendant, McNally, who digitally penetrated the female complainant. The complainant believed that McNally was in fact a boy. As in *Assange* and *R (on the application of F)*, s 76 SOA had no application. In particular, s 76 (2) (b) SOA did not apply as the defendant had not impersonated someone known personally to the complainant. The prosecution proceeded under s 74 SOA. The Court of Appeal rejected the appellant's submission that deception as to sex or gender was akin to that about wealth or religious views and held that while the act of digital penetration was the same 'in a physical sense' whether perpetrated by a male or female, the

[2] Home Office, *Setting the Boundaries: Reforming the Law on Sex Offences* (July 2000) 10.
[3] (1877) 2 QBD 410.
[4] [1923] 1 KB 340.
[5] [2011] EWHC 2849 (Admin).
[6] [2013] EWHC 945 (Admin).
[7] Ibid [26].
[8] [2013] EWCA Crim 1051.

'sexual nature … on any common sense view [was] different' in this case and the complainant was denied free choice.[9]

It was another application for judicial review of the CPS's decision not to prosecute in a complaint of rape and other offences in 2018 that set the limit of deception for s 74 SOA. The claimant in *Monica v DPP*[10] was an environmental activist who was involved in the 'Reclaim the Streets' protest movement in the late 1990s. She engaged in a sexual relationship with a man who was, unbeknownst to her, an undercover police officer who had infiltrated the movement. The complainant was clear that she would not have engaged in any sort of relationship with the man in question if she had not been deceived about his true identity. Yet, the court agreed with the CPS's assessment that the deception could not vitiate her consent under s 74 SOA and thus constitute rape. *McNally* was distinguished as an identity or impersonation case that related to a fundamental aspect of the perpetrator's identity, i.e., sex. Crucially, the deceptions in *Assange* and *R (on the application of F)* were characterised as being such that 'directly related to the sexual act' or 'put the victim's health at risk as a consequence of it'.[11] The undercover police officer's deception was found not to be connected to the sexual act and therefore did not negate the complainant's consent.

V. The Court of Appeal Judgment

The appellant in *Lawrance* appealed his conviction on the ground that a lie about fertility could not, as a matter of law, vitiate consent and was distinguishable from *Assange*, *R (on the application of F)* and *McNally*. He submitted that the complainant was not deceived about something directly related to the sexual act but about its consequences, i.e., the risk of pregnancy. Therefore, it was instead akin to *R v B*,[12] in which the appellant's failure to disclose his HIV positive status was not sufficient to negate the consent the complainant had given to sexual intercourse.

The respondent submitted that the conviction was safe as no material difference could be drawn between *Assange* and the present case, as the deception was indeed closely connected to the sexual act and deprived the complainant of exercising her free choice in line with s 74 SOA. Further, the trial judge correctly distinguished the present case from *R v B* and express deception about HIV status would be capable of vitiating consent.

The Court of Appeal overturned the Crown Court's decision and quashed the appellant's conviction for rape. It held that deception about having undergone a vasectomy was not closely connected to the nature or purpose of the act but instead was about the 'risks or consequences associated with it', i.e., pregnancy and, therefore could not negate consent.[13]

In reaching that decision, the Court reviewed the case law and emphasised that the test for deception that negates consent is not a 'but for' test.[14] It cited *Monica v DPP*[15] as an example of

[9] Ibid [26].
[10] [2018] EWHC 3508 (Admin).
[11] Ibid [78].
[12] [2007] 1 WLR 1567 (CA).
[13] *Lawrance* (n 1) [37].
[14] Ibid [34].
[15] [2019] QB 1019.

deception being used to secure sexual consent that did not meet the threshold of criminal liability. The Court distinguished the present case from *Assange*, *R (on the application of F)* and *McNally* and held that the complainant had consented 'without imposing any physical restrictions', unlike the women in *Assange* and *R(on the application of F)*, and that the appellant's deception did not relate to the 'physical performance of the sexual act'. She was deceived about 'the nature or quality of the ejaculate, and therefore of the risks and possible consequences of unprotected intercourse', but not about penile penetration or ejaculation itself.[16] As such, she was not deprived of her freedom to choose to engage in the sexual intercourse that took place.[17] The Court also remarked that the logical conclusion of the prosecution's case was that a woman who deceived a man about her fertility who would not have otherwise consented would be liable for a sexual offence.[18]

VI. Comment

Not all deception can vitiate consent, but the Court of Appeal has unfortunately confused an area of law that had benefited from recent and much needed clear guidance. In its recognition that the freedom to make a choice entails making an informed choice, the courts in *Assange* and *R (on the application of F)* afforded greater protection to the individual's sexual autonomy. This was in line with the objectives of the SOA.

The court in *Lawrance* erred in holding that the complainant had not imposed any physical restrictions in the way that the women in *Assange* and *R (on the application of F)* had. The women in the latter cases had not consented to semen, including sperm; the complainant in *Lawrance* consented to semen but not sperm.

This oversight seems to have led the court to make an artificial distinction between deception that is closely related to the sexual act and deception about the consequences of it, by viewing the precondition upon which consent was given in isolation from the motivation or intended effect of it. The Court rightly acknowledged that deceit about marital status, wealth, etc, is beyond the boundaries of criminal law, but a falsehood about a vasectomy that poses a risk to another's physical health falls firmly outside of this category. Like the condition imposed by the complainant in *Lawrance*, the conditions upon which the women in *Assange* and *R (on the application of F)* gave their consent to sexual intercourse would have had the effect of reducing or eliminating the risk of pregnancy and/or transmission of sexual disease. The principle articulated in *Monica* that deception that puts the complainant's health at risk as a consequence of the sexual act negates consent was not considered by the court in *Lawrance*. Had it done so, the court may have reconsidered its conclusion that upholding the conviction would trigger a sea-change in the law by making women liable for deceiving men about their own fertility. Such a deception would not pose a risk to the male partner's health.

If any case were to be distinguished, *McNally* would be the obvious candidate, but the court provides no commentary on the logic of its inclusion beyond a bald assertion that, 'a lie about fertility is different … from engaging in sexual activity having misrepresented one's gender'.[19]

[16] *Lawrance* (n 1) [37].
[17] *Lawrance* (n 1) [38].
[18] *Lawrance* (n 1) [37].
[19] *Lawrance* (n 1) [36].

Lawrance renders the law on deception that vitiates consent unsatisfactory and unclear. It will fall to the Court of Appeal or Supreme Court to rectify this, whether that be by reasserting the position reached in *Monica* or by making the retrograde step of confining deception that vitiates consent to that in s 76 SOA.

CASE COMMENT ON *R v LAWRANCE* [2020] EWCA Crim 971
HE'S LYING IN BED: CONSENT BY DECEPTION

Oliver Pateman

Introduction

The decision of the Criminal Division of the Court of Appeal in *Lawrance* in July 2020 is the latest addition to the jurisprudence surrounding the meaning of 'consents' in s 74 of the Sexual Offences Act 2003 (SOA).[1] The application of the law in this case provides further indication that significant changes to the SOA are required in order to clarify the law, to protect sexual autonomy and to avoid arbitrary distinctions between different kinds of similarly deceptive conduct. This decision has implications for the interpretation of the word 'consents' for all offences created under ss1-4 SOA.

I. Facts

The male appellant met the female complainant online in 2014. They exchanged sexual messages and telephone calls, in the course of which the complainant spoke of a sexual encounter with another man. When the appellant asked if the man had used a condom, she denied it, because 'he had the snip years ago'. The defendant responded, 'so have I'.[2] This was a lie.

The appellant and complainant met in July of that year. They went to the complainant's home having spent the evening together. The appellant affirmed twice on that night that he had a vasectomy. They then had sex twice without the use of contraception.[3] The following morning, the appellant sent a message to the complainant confessing that he was still fertile. The complainant later discovered that she was pregnant and underwent a termination.[4]

At trial, the prosecution alleged that the appellant had falsely represented to the complainant that he had a vasectomy. The Crown's case was that the complainant's consent was vitiated by the appellant's deception. Had the victim known that this representation was false, she would not have agreed to unprotected sex, but would have insisted on his wearing a condom. Even if the appellant had believed that she had consented, such a belief was unreasonable. On this basis, the appellant was convicted of two counts of rape against the complainant in the Crown Court at Nottingham.[5]

The defendant was granted leave to appeal against his conviction on the basis that the false representations made to the complainant about his fertility were not sufficient in law to vitiate the complainant's consent, or to deprive her of freedom of choice.

II. Legal Background

[1] *R v Lawrance* [2020] EWCA Crim 971, [2020] WLR 5025.
[2] Ibid [3].
[3] Ibid [4].
[4] Ibid [5].
[5] Ibid [7].

The relevant statutory provision is s 1 of the Sexual Offences Act 2003. Under that act,

1) A person commits the offence of rape if,
    a) He (A) intentionally penetrates the vagina, anus or mouth of another person (B) with his penis,
    b) B does not consent to the penetration
    c) A does not reasonably believe that B consents
2) Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents.[6]

The issue in this case was therefore whether B had consented to the penetration. The definition of 'consents' is found in s 74: 'a person consents if he agrees by choice and has the freedom and capacity to make that choice'.[7]

Furthermore, s 76 sets out two 'conclusive presumptions about consent' to deal with cases of sex and deception. If it is proved that,

a) the defendant intentionally deceived the complainant as to the nature or purpose of the relevant act [or]
b) the defendant intentionally induced the complainant to consent to the relevant act by impersonating a person known personally to the complainant [,]

then B is conclusively presumed not to have consented to the relevant act.[8]

The court found that the instant case did not fall within the ambit of s 76 on the grounds that this section is designed to deal with 'deceit as to identity and the medical cases'.[9] In these cases, A will either impersonate somebody else, or claim that penetration is something other than a sexual act, such as a surgical procedure.[10] The Court of Appeal traced the history of these provisions back to the Irish case of *Dee* in 1884, in which the court held that, 'consent in such cases does not exist at all, because the act consented to is not the act done. Consent to a surgical operation or examination is not consent to a sexual connection or indecent behaviour. Consent to connection with a husband is not consent to adultery.'[11]

S 76(2) put these well-established categories of case on a statutory footing.[12] The circumstances under which deception as to nature or purpose will vitiate consent are a closed category, the rationale for which is that the complainant did not consent on the grounds that they did not realise at the time that what they were doing was sexual at all or constituted sexual activity with the wrong person.

That was not the case in *Lawrance*, in which both parties knew and understood that they were in fact having sex and were under no misapprehension as to the other's identity. However, in some

[6] Sexual Offences Act 2003 (SOA) s 1.
[7] SOA s 74.
[8] SOA s 76.
[9] *Lawrance* (n 1) [26].
[10] *R v Flattery* (1877) 2 QBD 410.
[11] *R v Dee* [1884] 14 LR Ir 468.
[12] *Lawrance* (n 1) [27].

circumstances, a deception which is sufficiently closely connected to the relevant act can negate a complainant's freedom to choose within the meaning of s 74. The question in this case therefore was whether the appellant's lie about his fertility was such as to deprive the complainant of the 'freedom' to make a 'choice'.

Such a deception must be closely connected with the nature or purpose of the act and relate to sexual intercourse itself rather than the broad circumstances surrounding it.[13] Perhaps some of the confusion around the application of this section has derived from the use of the phrase 'nature or purpose' which reflects the language of the very different s 76. In deciding whether the deception is sufficiently closely connected with the sexual act, the Court in *Lawrance* adopts the reasoning of the Divisional Court in *R(F) v DPP*, that the evidence relating to 'choice' and 'freedom' to make any particular choice 'must be approached in a broad common-sense way'.[14] However, having adopted this approach the Court also endorsed the reasoning in *Monica* that an appeal to common sense 'does not relieve a court from the obligation of identifying the boundaries within which a jury will be asked to bring to bear its common sense'.[15]

III. Decision

The Court held that the deception in the instant case fell outside of those boundaries. A deception as to fertility was insufficiently closely connected with the sexual act for the matter to be left to the jury. It was different from lies about wearing condoms, withdrawal or gender on the grounds that the deception related not to the physical performance of the sexual act, but to the risks or consequences associated with it. The appellant's lie therefore did not deprive the complainant of the freedom to choose and did not vitiate her consent.

It was clearly right that the Court did not use s 76 to resolve the case. This should be construed very narrowly, as it effectively deprives a defendant of his only line of defence on a serious criminal charge; a 'conclusive presumption' is tantamount to a finding of guilt.[16] In declining to extend the scenarios covered by s 76, the Court also gave effect to Parliamentary intentions regarding the two well-established common law bases under which deceit will vitiate consent. This is especially true in the light of the report of the Home Affairs Committee at the time which stated that, s 76 is 'confined to two very specific (and indeed unusual) situations involving deception and impersonation'.[17]

Lawrance is a highly significant case on the meaning of consent under s 74. This is a notably complicated section to interpret, combining as it does the nebulous concepts of 'freedom', 'capacity' and 'choice'. The extent to which A's lie will operate on B's state of mind such that their 'choice' is no longer 'free' is a very difficult, almost philosophical, problem that the courts have continually grappled with.

These problems are compounded further by the fact that, as the court noted,

[13] *R (on the application of Monica) v DPP* [2018] EWHC 3508 (Admin), [2018] All ER (D) 69 [72].
[14] *R (on the application of F) v DPP* [2013] EWHC 945 (Admin), [2014] QB 581 [26].
[15] *Monica* (n 13) [80].
[16] *R v Bingham* [2013] EWCA Crim 823, [2013] 2 Cr App Rep 307 [20].
[17] Home Affairs Select Committee, *Sexual Offences Bill* (HC 2002-03 639) para 34.

> deceit and deception are very slippery concepts which, at one end of the spectrum, may result from a clear short lie, through more obscure utterances, obfuscation or evasion, to conduct designed to convey an unspoken false impression. In this area it is difficult to draw clear principled lines which could distinguish a deceit resulting from one course from another.[18]

The court therefore held that it makes no difference to the issue of consent whether there was an express deception or a failure to disclose; the relevant question is whether the appellant's lie was sufficiently closely connected to the performance of the sexual act.[19]

IV. Problems

However, as a corollary to the extremely broad range of conduct which may constitute deception, the close connection test is drawn very narrowly. B's decisions relating to things inextricably linked with sex, such as running the risk of pregnancy, are insufficiently closely connected to negate consent. This highly constrained close connection test has yielded artificial distinctions, as noted by the trial judge in *Lawrance*.

The courts have demonstrated that some conduct *is* sufficiently closely connected to the relevant act as to deprive B of a free choice. These include the case of *McNally*, in which A's deception as to their biological sex negated B's apparent consent to digital penetration,[20] and *Jheeta*, in which A deceived B that a police officer required her to perform sexual acts with her partner.[21] Most similar to *Lawrance* (in that the cases are closely related to B's desire not to become pregnant) are *Assange*, in which A's deception about using a condom negated B's apparent consent to sex,[22] and *R(F) v DPP* in which A's deception about whether he would withdraw before ejaculation was also held to negate consent. However, although the court explicitly noted B's wish not to become pregnant in the latter case, they also clarified that neither ejaculation nor pregnancy are relevant to proof of the offence itself.[23] These cases were decided on whether B's apparent consent was negated.

As we have seen, a lie about fertility is incapable of negating apparent consent. This is also true of deceit relating to A's status as an undercover police officer,[24] and A's HIV status, though infecting another person with HIV may be taken to have caused grievous bodily harm.[25] Similarly, deceptions as to wealth or employment were held (obiter) to be 'obviously' insufficient to vitiate consent in *McNally*,[26] and other examples of insufficiently deceitful conduct concerning political or religious views, or marital status, were given in *Lawrance* itself.[27]

However, all these deceptions are capable of being similarly morally opprobrious, and one might expect all of them to be potentially capable of depriving B of a free choice and thereby negating

[18] *Lawrance* (n 1) [40].
[19] Ibid [41].
[20] *R v McNally* [2013] EWCA Crim 1051, [2014] QB 593.
[21] *R v Jheeta* [2007] EWCA Crim 1699; [2008] 1 WLR 2582.
[22] *Assange v Swedish Prosecution Authority* [2011] EWHC 2849 (Admin), 108(44) LSG 1, DC.
[23] *R (F) v DPP* (n 14).
[24] *Monica* (n 13).
[25] *R v B* [2006] EWCA Crim 2945, [2007] 1 WLR 1567.
[26] *McNally* (n 20) [25].
[27] *Lawrance* (n 1) [34].

consent. *Setting the Boundaries*, the Home Office report which led to the introduction of the SOA, suggested that the law on sexual offences should protect sexual autonomy and be as clear as possible.[28] These artificial distinctions yielded by the courts' interpretation of s 74 suggest that these goals are not being met.

More confusion arises on further examination. Following the courts' interpretation of s 74, the use of a condom or withdrawal are relevant to the issue of consent, while circumstances such as fertility, which might lead to B's insistence on the use of a condom or withdrawal, are not. As David Ormerod has noted, the message here is that a complainant's sexual autonomy is afforded less protection where she is deceived about her partner's need to use a condom than about whether he was actually wearing one.[29] Similarly, the women in both *R(F) v DPP* and *Lawrance* wanted to avoid pregnancy. In spite of the fact that withdrawal is a less effective means of ensuring this than trusting that a sexual partner has had a vasectomy, the first is rape and the second is not. Such results cannot be said to offer clear, predictable protection of sexual autonomy.

Finally, the SOA offers extremely robust protection through s 76 against liars who would deceive B into 'medical procedures' or adulterous relationships through impersonation, but very little against liars who, through their deception, expose B to the risk of pregnancy or disease. It is unclear why the law takes such a strong line against lies of the former kind but not the latter.

V. Reform

The SOA must work a delicate balancing act between protecting sexual autonomy and ensuring that the law does not reach too far into the realm of private morality. In the run of sexual offences, it does this well. However, as *Lawrance* demonstrates, the application of the law can lead to bizarre inconsistencies as well as increased worry and anguish for victims; a lack of coherence, certainty and predictability in this area leads to more 'not guilty' pleas and appeals against conviction.

In its closing remarks, the court invited further consideration of these issues and recommended reform, suggesting that the issues raised in this case require debate as a matter of social and public policy.[30] The court also echoed the remarks of Latham LJ in *R v B* that this should take place outside of a court of law. Where the boundaries in sexual relationships should be set is a political question *par excellence*. The courts are, naturally, hesitant to extend the law too much for fear of over-criminalising hitherto lawful conduct.

It is clear that deceptive sexual relations can be harmful. Nevertheless, as Matthew Gibson has convincingly argued, they represent a different sort of wrong to incapacitated or coercive sexual relations, with which the SOA is principally designed to deal.[31] Indeed, this is recognised in the SOA itself; under s 34(1), it is an offence to procure sexual activity with someone with a mental

[28] Home Office, 'Setting the Boundaries' (*National Archives*, 2000) <https://webarchive.nationalarchives.gov.uk/%2B/:/www.homeoffice.gov.uk/documents/vol1main.pdf%3Fview%3DBinary> accessed 29 March 2021.
[29] David Ormerod, 'Rape and Deception (Again)', (2020) 10 Crim LR 877-88.
[30] *R v Lawrance* (n 1) [42].
[31] Matthew Gibson, 'Deceptive Sexual Relations: A Theory of Criminal Liability' (2020) 40(1) OJLS <https://doi.org/10.1093/ojls/gqz031> accessed 29 March 2021.

disorder by deception.[32] Sex by deception with a woman was also an offence under the old law, chargeable as 'procurement of a woman by false pretences' under s 3(1) of the SOA 1956. This offence was not carried over into the new SOA. These provisions suggest that, in the past, Parliament has recognised that obtaining sex through deceit is conduct worthy of independent criminalisation.

Further analogies have been made with economic crime by Rebecca Williams, who argues that the law ought to protect sexual autonomy in a similar way to personal property.[33] This is an intuitive and attractive proposal, which would see a suite of offences introduced to criminalise the vitiation of consent by stealth, force, pressure, deception and abuse of trust, aligning with theft, robbery, blackmail and fraud.[34] Both the SOA and property offences seek to police 'unwanted transactions', though in Williams' view personal property benefits from more comprehensive and nuanced protection.[35] This proposal must also recognise that there is now an objective test for 'dishonesty' in the context of protecting personal property, and no requirement that the defendant must appreciate that he has done something wrong.[36] This reflects the broad approach to species of 'deception' taken in *Lawrance*.

Conclusion

The decision of the Court of Appeal in *Lawrance* clarifies the law on ss 74 and 76 SOA 2003, and the 'close connection' test attempts to draw the boundaries for s 74. It also removes artificial distinctions between different types of deceptive conduct capable of negating B's consent.

However, although *Lawrance* makes a reasonably good job of clarifying the SOA, its application appears to yield contradictory, nonsensical and sometimes baffling results. *Lawrance* is the latest indication that the SOA needs reform in order to protect sexual autonomy and provide clarity where consent to sex has been obtained by deception.

[32] Ibid.
[33] This is taken from a presentation for an online webinar on *Lawrance*. A recording of the webinar is available at: <https://www.youtube.com/watch?v=TBR3jlWR69Y&ab_channel=UCLLaws>. See also Rebecca Williams, 'Economic and Sexual Autonomy' (*UCL Faculty of Laws*, 11 August 2020) <www.ucl.ac.uk/laws/sites/laws/files/ucl-consent-to-sex_williams.pdf> accessed 29 March 2021.
[34] Williams, 'Economic and Sexual Autonomy' (n 33).
[35] Ibid (e.g: Montague Withnail, 'I mean to have you even if it must be *burglary*').
[36] *Ivey v Genting Casinos UK Ltd* [2017] UKSC 67, [2018] 2 All ER 406 [74].