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## **FOREWORD**

Nicholas Hall

It is a privilege to have been entrusted with the compilation of this volume of the Gray's Inn Student Law journal, now in its sixth year. The response to the call for articles this year has been overwhelming, and I have endeavoured to accommodate as many submissions as possible. This edition bears witness to the diverse interests and specialisms of the student membership of the Inn, and editing the Journal has been an education in itself.

I am most grateful to all those who contributed to the production of the Journal. Special thanks must go to the Education Department of Gray's Inn and my peers of the AGIS Committee who have worked hard to maintain the inclusive ethos underpinning the Gray's Inn Student Law Journal. A combined team effort continues to provide students each year with the prospect of engaging academically with the law, developing further an area of interest, and sharing their perspectives on topical legal issues. In addition, it is a unique opportunity offered by Gray's Inn that enables those published to reference their work in legal applications and discuss it further in scholarship and pupillage interviews.

It is my hope that as well as providing interesting and useful reading, this Journal might serve to attract future students to join the community that underlies this publication, and to get involved in the Committee responsible for arranging it.

As with last year's volume, this edition of the journal is available online from the Gray's Inn website and in printed form.

Finally, the real stars of this publication are the dozens of students who took the time to submit work for consideration. Their cooperation and patience is highly appreciated. Thank you all.



## **COUNSEL'S ADVICE TO THE CONSERVATIVE PARTY ON PUTTING INTO EFFECT ITS MANIFESTO COMMITMENT TO REFORM THE HUMAN RIGHTS ACT**

Mark Greaves

### **I. Introduction**

The Conservatives' proposal to reform the Human Rights Act is set out in a Paper entitled 'Protecting human rights in the UK'. This advice will thus first summarise this paper in terms of the guiding principle, the three underlying aims of the reform and the nine key objectives designed to effect those aims. Secondly, each of those nine objectives will be considered in turn. Thirdly, the possibility of withdrawal from the ECHR will be considered, either as a temporary or permanent measure. Fourthly, finally, the essay will consider the problems of the devolution dimension.

### **II. The Conservatives' Paper summarised**

The guiding principle of the Conservatives' reform to the way human rights laws works in Britain is 'to restore common sense and put Britain first'.

The three underlying aims of the reform are 1) to make the Supreme Court supreme in interpreting European Human Rights Convention ('Convention') rights; 2) to make Parliament supreme in legislating on Convention rights; 3) to 'clarify' those Convention rights themselves.

The Conservatives propose nine key objectives to bring about these aims. The nine objectives are: 1) the repeal of the Human Rights Act 1998 ('HRA'); 2) the introduction of a new Bill of Rights that puts the text of the Convention into primary legislation; 3) a clarification of the Convention Rights; 4) breaking the formal link between British courts and the European Court of Human Rights ('ECtHR'); 5) ending the ability of the ECtHR to force the UK to change the law; 6) preventing UK laws from being effectively re-written through 'interpretation';

7) limiting the use of human rights laws to the most serious cases; 8) limiting the reach of human rights cases to the UK; and 9) amending the Ministerial Code to remove ambiguity.

### III. The nine key objectives considered

#### A. Repeal of the Human Rights Act 1998

Parliament may do this, because Parliamentary Sovereignty means that it may do anything. However, as a constitutional statute, HRA may only be repealed impliedly, not expressly.<sup>1</sup>

This measure will not create any conflict with the ECtHR as it is a purely domestic matter.

#### B. The introduction of a new Bill of Rights that puts the text of the Human Rights Convention into primary legislation

This proposal makes reference to the 'original document' of the Convention and thus, taken at face value, suggests that the whole Convention as it stood in 1950, unamended by protocols, would be incorporated into UK law.<sup>2</sup>

It is submitted that, understood as such, this would be inadvisable for two reasons. Firstly, failure to incorporate the protocols would be likely to place the UK in breach of the Convention. Secondly, the incorporation of the additional Articles 1 and 13, which were deliberately left out of HRA, would seem to be inconsistent with the desire 'not [to] introduce new basic rights through this reform' and, as seen in objective 7 (which seeks to limit the use of human rights laws to the most serious cases), to reduce the number of human rights challenges brought against Parliament.

It is therefore submitted that the Convention and protocols, less Articles 1 and 13, be put into primary legislation. If this is done, then there is unlikely to be conflict with ECtHR on this point.

<sup>1</sup> *Thoburn v Sunderland City Council* [2003] QB 151 (at 62-63, *per* Laws LJ)

<sup>2</sup> 'Protecting Human Rights in the UK' (2014), p.5



### C. A clarification of the Convention Rights

Three illustrations of Convention Rights in need of clarification are given, each of which will be considered in turn.

#### i. Alteration of the real risk test in deportation cases

The Conservatives' paper calls for a 'clearer test' than the 'real risk' test used in deportation cases, but does not explicitly state what the test will be.

It is submitted that the desire underpinning the proposal is not merely a test that it is clearer, but one that also raises the threshold. This is submitted since a 'real risk' test is criticised as being 'by no means even a likelihood'<sup>3</sup> and one of the examples given under the heading 'The Case for Change' is the fact that 'foreign nations who have committed very serious crimes in the United Kingdom...have been able to use the qualified rights in the Convention...to justify remaining in the UK.'<sup>4</sup> It is assumed that this refers to cases such as *Chahal v The United Kingdom* and *Othman (Abu Qatada) v The United Kingdom*, and, following from this, the desire of the Conservatives is to make it more difficult to have government action precluded or delayed on human rights grounds.<sup>5</sup>

It is submitted that a 'likelihood' test, as referred to in the paper, is neither clear nor necessarily raises the threshold. In *R v Sheppard*, Lord Diplock described the word 'likely' as 'imprecise...capable of covering a whole range of possibilities from 'it's on the cards' to 'it's more probable than not' and in that case held that it should be understood as 'excluding only what would fairly be described as highly unlikely'.<sup>6</sup>

It is therefore submitted that if the Conservatives do wish to raise the threshold, the test could be altered to the 'balance of probabilities', as this is a clear test that is familiar to judges and applies 'likely' in what Lord Birkenhead described in *Re H (Minors)* as its 'everyday usage...in the sense of more likely than not'.<sup>7</sup>

<sup>3</sup> 'Protecting Human Rights in the UK', p.6

<sup>4</sup> 'Protecting human rights in the UK', p.3

<sup>5</sup> *Chahal v The United Kingdom* (2007) 23 EHRR 413; *Othman (Abu Qatada) v The United Kingdom* [2012] ECHR 56

<sup>6</sup> *R v Sheppard* [1980] 3 All ER 899, at [405]

<sup>7</sup> *Re H (Minors)* [1996] 1 AC 563, at [65]

However, one reservation about this test must be mentioned. This is the point that although judges are familiar with applying this test to past facts, it is somewhat more difficult and novel to apply it in a predictive decision.

This proposal would be different from that adopted by the ECtHR, and thus would be likely to lead to conflict.

- ii. A breach of 'civic responsibilities' limits an individual's capacity to rely on a Convention right

The Conservatives' proposal is to clarify the circumstances when limitations on individual rights can be imposed. The Conservatives' proposal gives, by way of illustration, a suggestion that a 'foreign national who takes the life of another person will not be able to use a defence based on Article 8 to prevent the state deporting them after they have served their sentence.'<sup>8</sup>

The clearest and simplest way of legislating on this point is in a manner similar to the provisions in s.117C of the Immigration Act 2014, whereby it is held (s.117C(2)) that 'the more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal', subject to certain exceptions.

This proposal, particularly when taken with the desire under point 6 to 'prevent UK laws from being re-written through interpretation', is likely to lead to conflict with ECtHR. Under the Convention, Article 8 rights may be interfered with 'in the interests of national security',<sup>9</sup> which suggests that there must be a real and present risk of reoffending *at the time that deportation is considered*, not merely that there has been an offence previously. The conflict is likely to be comparable to that seen over the prisoner-voting issue.

- iii. Certain terms in Convention rights to be more precisely defined

It is proposed that certain terms such as 'degrading treatment and punishment' need clarification. The Conservatives identify 'one case' where 'the simple fact that an individual would have to live in a particular

<sup>8</sup> 'Protecting Human Rights in the UK', p.6

<sup>9</sup> ECHR, Article 8

city in Somalia was deemed put him at real risk of degrading treatment' which is presumably a reference to *Sufi & Elmi v UK*.<sup>10</sup>

It would of course be possible to explicitly legislate as to what 'degrading treatment and punishment' mean in a Bill of Rights rather than allow them to be defined through case law. However, as seen in the consideration of the 'real risk' test, the desire seems to be not merely to 'clarify' but also to restrict the definition to prevent a repeat of the decision in *Sufi & Elmi v UK*.

If this indeed the case, then again it seems difficult to prevent conflict with the ECtHR since they retain the competence to determine those expressions in the Convention. Later in the 'Protecting Human Rights in the UK' document, the Conservatives acknowledge that it 'will remain open to individuals to take the UK to the Strasbourg Court claiming a breach of their Convention rights'.<sup>11</sup> Thus if an individual as a result of the more restrictive meaning of 'degrading treatment' is unable to rely on his Article 3 rights before a UK court, there is nothing to prevent him from applying to Strasbourg for an interim measure against the UK to delay his deportation, while seeking to have the original decision overturned.

Thus this provision may be of little practical benefit as it will be unable to prevent a repeat of *Sufi & Elmi v UK*.

#### D. Breaking the link between British Courts and ECtHR

The link currently in place is the provision in s.2 (1) of HRA that British Courts must 'take into account' Strasbourg rulings. The Conservatives' paper makes it clear that a British Bill of Rights would contain no equivalent provision.

However, taken at face value, the proposal seems to suggest that s.2 will simply be removed but British Judges will not be prevented from taking into account Strasbourg rulings. Were this to be the case, then only the *formal* link would be broken but the change may make no difference in practice. This does not seem to be the extent of the Conservatives' ambitions given their underlying aim (1) to make the Supreme Court supreme in interpreting European Human Rights Convention.

<sup>10</sup> *Sufi & Elmi v UK* [2011] ECHR 1045 [398]

<sup>11</sup> 'Protecting Human Rights in the UK', p.8

It therefore seems preferable, in order to try and effect a *practical* change in the relationship between British courts and ECtHR, to make it explicit that a UK court should only determine a human rights issue in accordance with a Strasbourg ruling *if it agrees with that ruling*. This would still not amount to a preventative measure, but would be likely to give British judges more confidence to depart even from a 'clear and constant line of decision' from Strasbourg. This was something that the Supreme Court refused to do in *R (Chester) v Justice Secretary; McGeoch v The Lord President of the Council & Anor*, where Lord Mance said that there were limits to the possibility of departure 'particularly where the matter has been already to a Grand Chamber once or, even more so, as in this case, twice.'<sup>12</sup>

However, Strasbourg rulings would remain binding on the UK as a state even in this situation. Thus, in order to fully realise the ambition to break the link, the UK would also need to leave the Convention briefly and rejoin with a reservation (under Article 57) against Article 46. This reservation would state, for example, that the UK will give effect to Strasbourg judgments subject to the principles that any ruling against the UK will have binding effect only if the UK Supreme Court agrees. The possibility of this will be considered below at IV.B. 'Temporary withdrawal from ECHR'.

This proposal, both with or without withdrawal from ECHR, inevitably and directly leads to conflict with ECtHR

#### E. End the ability of the ECtHR to force the UK to change the law

The terms of this proposal are unfortunately rather unclear. It is stated that the desire is to prevent the ECtHR from changing UK law, but it is not currently the case that ECtHR judgments oblige the UK Parliament to do anything. Similarly it is proposed that 'every judgment that UK law is incompatible with the Convention will be treated as advisory',<sup>13</sup> but this is not a change that can be affected by the introduction of the Bill of Rights since Strasbourg rulings are binding on the UK, as a state, in international law (under Article 46(1) of the Convention).

<sup>12</sup> *R (Chester) v Justice Secretary; McGeoch v The Lord President of the Council & Anor*,<sup>12</sup> [2013] UKSC 63 [at 25]

<sup>13</sup> 'Protecting Human Rights in the UK', p.6

It seems incompatible with the desire to 'break the link' with ECtHR (considered at III.D above) for the Conservatives to propose Parliament being required formally to consider Strasbourg rulings for the first time when this is not required under HRA. While such a proposal would be possible, it does not seem to reflect the intention behind the reform.

Thus it is suggested that it is not possible for the Conservatives to effect this reform in accordance with the underlying objective to make Parliament supreme through domestic legislation.

If the Conservatives intend to bring reform to the binding nature of ECtHR decisions, then it is necessary for the UK to leave the ECHR and try to rejoin making a reservation against Article 46 of the Convention under article 57. This point will be considered below at IV.B. 'Temporary Withdrawal from ECHR'.

F. Prevent UK laws from being effectively re-written through 'interpretation'

This proposal suggests a removal of the requirement under s.3 HRA to read legislation 'so far as it is possible to do so' in a way which is compatible with the Convention rights.

However, the paper makes no reference to whether the judicial power under s.4 HRA to issue declarations of incompatibility would remain or be removed. Each of these possibilities will now be considered in turn.

It is submitted that it would politically imprudent to remove the s.3 power of interpretation but allow the possibility for the Court to make a declaration of incompatibility to remain in a Bill of Rights. This is because declarations of incompatibility are politically damaging, and would be particularly so where the condemnation of the legislation came from UK judges using the Conservatives' own Bill of Rights.

It is therefore submitted that it is preferable, if there is an intention to remove the possibility of the Courts amending legislation via interpretation, to remove declarations of incompatibility as well.

It is submitted that in order to stress their aim of making Parliament supreme in legislating on Convention rights, it would be preferable to replace s.3 HRA with a declaratory statement of Parliament's centrality in the legislative sphere. Thus a section could be inserted into the Bill of Rights stating explicitly that the Literal rule is to be applied in interpreting

the Bill of Rights, and that an alteration of the legislation to remove incompatibility with Convention rights may only be made by an Act of Parliament.

Such a proposal means that the Courts would more frequently find themselves unable to interpret UK law consistently with the Convention, and thus further conflict with ECtHR would be inevitable.

G. Limit the use of human rights laws to the most serious cases

The key difficulty here is in defining what constitutes a sufficiently serious case. The Conservatives' paper states that 'The use of the new law will be limited to cases that involve criminal law and the liberty of an individual, the right to property and *similar serious* matters'.<sup>14</sup>

The simplest solution would seem to be a restriction on human rights law to criminal cases with a certain maximum sentence, and a monetary limit in civil cases. The difficulties with any proposal in this manner though, no matter where one draws the line, are twofold. The first point is that cases that are not defined as 'serious' may raise very significant human rights issues (as seen in the case of the 'Twitter joke' case);<sup>15</sup> the second point, specifically in relation to civil cases, is that certain cases (particularly those involving children) would normally be considered 'serious' but are not about money.

However, there seems little alternative other than taking matters on a case-by-case basis, which is highly undesirable as inconsistent with the principle of legal certainty.

Any proposal restricting the possibility of relying on a human right will also inevitably lead to conflict with the ECtHR. While the ECtHR does accept the distinction between absolute and qualified rights, it would certainly not accept that the Convention rights could be disapplied if the unlawful infringement was too 'trivial'.

<sup>14</sup> 'Protecting Human Rights in the UK', p.6

<sup>15</sup> *Chambers v Director of Public Prosecutions* [2012] EWHC 2157

#### H. Limit the reach of human rights cases to the UK

The territorial restriction of the Bill of Rights to the UK is primarily designed to prevent human rights cases being brought against the British military abroad.

Although it is certainly possible to prevent a challenge of British forces abroad on human rights grounds in UK courts, this will have little practical impact.

Such a change will not prevent those challenges being taken directly to Strasbourg – whose decisions are binding on the UK, and are intended to remain so.

#### I. Amend the Ministerial Code to remove ambiguity

This change would prove controversial, but certainly could be very easily effected. The Ministerial Code is guidance, not legislation, and thus the Conservatives could amend this even without consulting Parliament.

Currently the Ministerial Code, s.1.2 states that there is an 'overarching duty on Ministers to comply with the law including international law and treaty obligations'. The Conservatives' proposal is presumably to remove or qualify that duty and instead state that complying with UK law is the overarching duty.

This is a matter of purely domestic law and will not, on its own, concern ECtHR. However, changing the code does not change the international law position that the UK must comply with the Convention. The changed code may make it more likely that Ministers will not abide by their international law obligations, and thus may lead to greater conflict with ECtHR in practice.

### IV. The possibility of withdrawal from the ECHR

#### A. The need for agreement from the Council of Europe

The Conservative paper states that 'we will engage with the Council of Europe, and seek recognition that our approach is a legitimate way of applying the Convention... In the event that we are unable to reach that

agreement, the UK would be left with no alternative but to withdraw from the European Convention on Human Rights'.<sup>16</sup>

The Council of Europe seems unlikely to refuse to give agreement. The ECHR does not specify the manner in which human rights laws must be protected, and indeed before 2000 it was legitimate for the UK to have no domestic human rights legislation at all.

However, regardless of its domestic law, the UK must comply with the Convention and with binding ECtHR judgments as a matter of international law.

It will thus not be during the passage of the Bill, but when that Bill of Rights comes to be applied that the conflict with the Council of Europe will emerge.

#### B. Temporary withdrawal from the ECHR

As discussed above the only way that the UK could qualify the international law obligations it accepts under the ECHR and truly 'break the link' would be to leave the ECHR and try to rejoin with a reservation under Article 57 that mirrors the domestic changes in the Bill of Rights.<sup>17</sup>

The reservation would be against Article 46 as discussed above, and also against the need under Article 13 to provide domestic remedies that fulfil the Article 13 effectiveness criterion.

If this reservation was accepted, then the Conservative proposals could be effected in full without the need to leave the ECHR entirely. However, it seems unlikely that the UK would be successful in this approach as it would damage the Convention enforcement mechanism and would likely be struck down by the ECtHR as contrary to the object and purpose of the Convention.

#### C. Withdrawal from the ECHR entirely

If the UK withdrew from ECHR, other international law constraints would remain such as the UN Convention against Torture (UNCAT) ratified in 1988 which prohibits the removal of foreigners at risk of ill-

<sup>16</sup> 'Protecting Human Rights in the UK', p.8

<sup>17</sup> See III.D 'Breaking the link between British Courts and ECtHR'



treatment in similar terms to ECHR, and the UN Convention on the Rights of the Child ratified in 1991.

In addition, it would be unlikely that the UK would be allowed to remain a member of the EU given that that membership of the ECHR is a criterion for EU membership. However, in the unlikely event that that the UK was allowed to remain in the EU, it would thus remain part of the European Charter of Fundamental Rights which is substantially similar to the ECHR.

The common law would also remain, and this has absorbed a number of rights that have been derived from the ECHR. As Dinah Rose QC rightly points out 'Judges abhor a vacuum. If you take their toys away, they'll make up new toys.'<sup>18</sup> In *Osborn v Parole Board*, Lord Reed (with whom the other four of their Lordships agreed) repeatedly stressed that UK domestic law can protect rights through the common law rather than merely through the Human Rights Act, and a similar point was made by Lord Toulson in *Kennedy v The Charity Commission*.<sup>19</sup>

The Conservatives could anticipate and attempt to prevent even common law rights by legislating that judges must ignore common-law rights altogether, but this would risk a constitutional crisis.

It is therefore submitted that this option ought not to be pursued.

## V. The Devolution dimension

The Conservatives' paper states, in relation to possible devolution-related difficulties, 'we will work with the devolved administrations and legislatures as necessary to make sure there is an effective new settlement across the UK'.<sup>20</sup>

However, the issue needs to be considered more fully as there are a number of potential difficulties that the Conservatives paper does not address.

As a matter of strictly legal competence, Parliament in Westminster can lawfully change all the devolution statutes. However, at the level of political reality, this seems inadvisable because of the existence of the Sewel Convention which states [at para. 14] that 'The UK Parliament retains authority to legislate on any issue, whether devolved or not...

<sup>18</sup> Dinah Rose, 'What's the Point of the Human Rights Act?' (October 29 2014)

<sup>19</sup> *Osborn v Parole Board* [2013] UKSC 61; *Kennedy v The Charity Commission* [2014] UKSC 20

<sup>20</sup> 'Protecting Human Rights in the UK', p.6

however...the UK Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature.' In practice, the proposal of the Bill of Rights would trigger the Sewel Convention as in Scotland and Northern Ireland criminal and civil law and the legal system are devolved competences.

It is particularly important, in the case of Northern Ireland, to respect the Sewel Convention because of the commitment in the Belfast/Good Friday Agreement that 'the British Government will complete incorporation into Northern Ireland law of the European Convention on Human Rights (ECHR)'. As was rightly noted by Anthony Speaight QC, the creation a Northern Ireland Bill of Rights as a distinct document is a vital part of the peace process, and this should not be disturbed.<sup>21</sup>

The preferable option therefore is to restrict the UK Bill of Rights to non-devolved functions in Scotland, Wales and Northern Ireland, and to the discharge in England exclusively of all government functions.

The alternative would be for the Bill of Rights to purport to apply to all governmental functions across the UK with a suspensory provision in relation to non-devolved functions pending the agreement of devolved institutions. However, this seems less desirable as it is unlikely that Northern Ireland, Scotland and Wales will all want to match either other's laws on rights.

Although perhaps it is preferable to have identical rights apply throughout a nation state in terms of consistency, the provinces of Canada such as Alberta, Quebec and Saskatchewan include different content in their bills of rights (for example Alberta's Bill of Rights mentions freedom of religion and freedom of the press, whilst Saskatchewan's does not). This asymmetry is not inherently undesirable, and must be tolerated in order for devolution to be effective.

<sup>21</sup> A. Speaight QC, 'Devolution Options', *A UK Bill of Rights? The Choice Before Us* (Commission on a Bill of Rights) (2012)

**SECTION 2 OF THE HUMAN RIGHTS ACT 1998:  
REQUIRING STRASBOURG TO BE THE FLOOR AND  
CEILING OF UK HUMAN RIGHTS DEVELOPMENT?**

Jemma Gordon

'A court or tribunal determining a question which has arisen in connection with a Convention right *must take into account* any...judgment...of the European Court of Human Rights...'¹ This unassuming section of the Human Rights Act 1998 (HRA) is, at first sight, a simple expression by the legislature as to how the judiciary is to interact with Strasbourg case law when adjudicating on Convention rights. However, the 'complexity which...[it] masks is the *weight* which the domestic court is entitled (an indeed obliged) to give'² to such case law. This weight is vital to the development of human rights jurisprudence within the UK and the relationship between the European Court of Human Rights (ECtHR) and domestic courts.

Great debate surrounds whether there has been too much weight given to the judgments of the ECtHR, with domestic courts treating themselves as bound by them. Lord Bingham declared in *R(Ullah) v Special Adjudicator* that 'the duty of national courts is to keep pace with Strasbourg jurisprudence as it evolves over time: no more, but certainly no less'³ or as reformulated in *R(Al-Skeini and others) v Secretary of State for Defence*, 'no less, but certainly no more'.⁴ Referred to as the 'mirror principle', this has been the main judicial trend of judges to their section 2 duty. This essay will analyse the mirror principle as a central approach in domestic law, arguing that it is legitimate for the courts to depart from Strasbourg jurisprudence and identifying the circumstances in which this is the case.

¹ Section 2(1)(a) Human Rights Act 1998 (emphasis added).

² Lord Irvine, 'A British Interpretation of Convention Rights' [2012] PL 237, 238 (emphasis added).

³ [2004] UKHL 26, 20.

⁴ [2007] UKHL 26, 106 (Lord Brown).

## I. The Mirror Principle

Firstly, should the mirror principle be the overriding concern of domestic judges when adjudicating on Convention rights?

### A. Parliamentary Intention

The first declaratory evidence of the mirror principle came in the case of *R(Alconbury) v Secretary of State for the Environment, Transport and the Regions* courtesy of Lord Slynn.<sup>5</sup> He states that 'in the absence of some special circumstances, the court should follow any clear and constant jurisprudence of the European Court of Human Rights'<sup>6</sup> which Lord Bingham later used as his basis in *Ullah*. This 'precedent-like approach to Strasbourg jurisprudence'<sup>7</sup> means that the Strasbourg standard regarding human rights is both the floor and the ceiling regarding human rights development in the UK.

The title of the White Paper preceding the Human Rights Bill was called 'Rights Brought Home',<sup>8</sup> which is what the mirror principle does. Rights provided for in the European Convention on Human Rights (ECHR),<sup>9</sup> as adjudicated by the ECtHR are being protected in domestic courts. It also fulfils the aims of having a quicker and less costly process for rights vindication. It would be contradictory for rights to be 'brought home' but for UK citizens to still have to go to Strasbourg because the domestic courts did not follow ECtHR jurisprudence. And as stated by Lord Slynn, 'there is at least the possibility that the case will go to [the ECtHR]...which is likely in the ordinary case to follow its own constant jurisprudence'.<sup>10</sup>

However, another aim of the White Paper was to ensure a British contribution to the development of human rights jurisprudence within

<sup>5</sup> [2001] UKHL 23.

<sup>6</sup> *ibid*, 26.

<sup>7</sup> Roger Masterman, "Aspiration or Foundation? The Status of the Strasbourg Jurisprudence and the 'Convention Rights' in Domestic Law" in *Judicial Reasoning Under the UK Human Rights Act*, ed. Helen Fenwick, Gavin Phillipson and Roger Masterman (Cambridge University Press, 2007), 75.

<sup>8</sup> Home Office, *Rights Brought Home: The Human Rights Bill* (Cmd 3782, 1997).

<sup>9</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (as amended).

<sup>10</sup> *Alconbury* [2001] UKHL 23, 26.

Europe. Lord Bingham stated during the Parliamentary debates that 'British judges have a significant contribution to make in the development of the law of human rights. It is a contribution which so far we have not been permitted to make',<sup>11</sup> which makes his dicta in *Ullab* all the more puzzling. He is correct in saying that British judges have a contribution to make and by adopting this 'minimalist approach...towards the jurisprudence'<sup>12</sup> the judiciary are denying themselves of this opportunity.

### B. Legal Certainty

Another significant advantage of adopting the mirror principle is legal certainty. Practitioners, academic and lay-people alike all know where they stand in relation to their Convention rights domestically granted to them through the HRA. Development and growth is necessary but 'it is equally important that the [Strasbourg] Court should...recognise the vital need for consistency'.<sup>13</sup> It is an essential requirement for the rule of law to be upheld and if it was disregarded merely because an Act of Parliament explicitly refused to bind a domestic court to an international one then two different legal systems would emerge and individuals would not know which one to abide by.

On the other hand, whilst the mirror principle ensures legal certainty, it prevent the development and expansion of human rights jurisprudence which is particularly felt when situations arise to expand human rights protection beyond that of Strasbourg. If the HRA is to be seen as a constitutional document proclaiming the fundamental rights and freedoms for individuals in the UK, it should be interpreted more expansively, so as to develop a municipal law of human rights<sup>14</sup> and create a 'more exciting, creative and imaginative domestic human rights jurisprudence'.<sup>15</sup> There is no argument against the fact that the case law of the ECtHR should be treated as a 'floor' but it should not also be treated as the 'ceiling', so that 'the Strasbourg standard [is regarded] as the

<sup>11</sup> HL Deb 3 November 1997, vol 582, col 1245.

<sup>12</sup> Helen Fenwick, *Civil Liberties and Human Rights* 4th ed. (Routledge-Cavendish, 2007), 196.

<sup>13</sup> Nicolas Bratza, "The Relationship Between the UK Courts and Strasbourg" [2011] EHRLR 505, 511.

<sup>14</sup> *Runa Begum v Tower Hamlets BC* [2002] EWCA Civ 239, 17 (Laws LJ).

<sup>15</sup> Helen Fenwick, "What's Wrong With s.2 of the Human Rights Act?" *UK Constitutional Law Blog*, <http://ukconstitutionalaw.org> (accessed 9 October 2012).

aspiration rather than the foundation for the development of a domesticated rights jurisprudence'.<sup>16</sup>

### C. Uniformity

A final justification for the application of the mirror principle is the idea that the meaning of an international treaty should be uniform throughout the parties to it.<sup>17</sup> The Convention was introduced to help provide stability throughout Europe and instil common respect for human rights agreed by the parties to be fundamental. this common respect is likely to be undermined if Member States interpret these rights differently.

However, this is a very tenuous argument. Each Member State of the Council of Europe (CoE) has its own unique history, values and cultures. They will all view each of the rights from different perspectives and will interpret accordingly so. It is apparent that 'we cannot commit other Member States...to our interpretation of the [Convention] rights'<sup>18</sup> and it is clear that, other than in the UK, 'no courts in the Member States of the Council of Europe...seek to mirror the jurisprudence of the ECtHR'.<sup>19</sup> It therefore seems illogical to consistently follow rights interpretations made by the ECtHR on the basis of uniformity when no other Member States do so: uniformity cannot be achieved alone. The Convention also states that it is the responsibility of the Member States to 'secure to everyone within their jurisdiction the rights and freedoms' within it.<sup>20</sup> Uniformity is not only unattainable but it is also not required, provided that the standards set by the Conventional have been appropriately met.

Therefore, whilst there are many valid arguments for adopting the mirror principle, it should not be the overriding factor in the judiciary's role to secure Convention rights under the HRA and judges can legitimately depart for Strasbourg jurisprudence.

<sup>16</sup> Masterman, "Aspiration or Foundation? The Status of the Strasbourg Jurisprudence and the 'Convention Rights' in Domestic Law", 75.

<sup>17</sup> *Ullab* [2004] UKHL 26, 20.

<sup>18</sup> Richard Clayton, "Smoke and Mirrors: The Human Rights Act and the Impact of Strasbourg Case Law" [2012] PL 639, 653.

<sup>19</sup> *ibid*, 655.

<sup>20</sup> ECHR Art.1

## II. When is it Legitimate to Depart From Strasbourg Case Law?

### A. Unclear Jurisprudence

Lord Slynn stated that it was for the courts to follow 'clear and constant jurisprudence'<sup>21</sup> but there has been no clarification as to what this constitutes. It seems apparent that Grand Chamber judgments involving the UK constitute 'clear and constant jurisprudence' as the courts 'have not yet so far...ever disagreed with - or failed to apply'<sup>22</sup> such judgments. But the existence of these judgments does not alter the fact that 'Strasbourg jurisprudence is...sometimes unclear'.<sup>23</sup> Such lack of clarity exists in judgments from both the Chamber and the Grand Chamber in cases not involving the UK.

The case law in this instance is unclear because the decision reached by the ECtHR was argued on the basis of foreign law in a foreign legal system. The decision is only binding on the State involved,<sup>24</sup> and so the ECtHR does not consider extensively how it may affect situations in other Member States. Therefore, not only may the issue not obviously apply to the UK but also there is a lack of clarity as to how to incorporate such a judgment into the UK's legal systems which may be significantly different to that which the case was decided on. It should, therefore, be acceptable for courts to depart from Strasbourg case law if necessary in this situation.

### B. The Margin of Appreciation

It is also legitimate for courts to depart from Strasbourg jurisprudence when such jurisprudence was decided on the basis of the margin of appreciation. This doctrine is an attempt by the ECtHR to uphold its aim of subsidiarity and allow Member States leeway on issues when there is no consensus. This doctrine does not exist at a domestic level and 'to rely on Strasbourg cases influenced by it is to import the doctrine

<sup>21</sup> *Alconbury* [2001] UKHL 23, 26.

<sup>22</sup> Brenda Hale, "Argentorum Locutum: Is Strasbourg or the Supreme Court Supreme?" [2012] HRLR 65, 76.

<sup>23</sup> Clayton, "Smoke and Mirrors: The Human Rights Act and the Impact of Strasbourg Case Law", 646.

<sup>24</sup> ECHR Art.46(1).

impermissibly...by the back door'.<sup>25</sup> It has also been stated by the courts that 'if the matter is within the margin of appreciation which Strasbourg would allow to us, then we have to form our own judgment'.<sup>26</sup>

This is logical for two reasons. Firstly, regarding the previous uniformity issue, the doctrine is invoked because there is no consensus or uniformity between states on certain issues. Therefore, in recognition of this, UK courts can come to whatever decision they believe is the correct one, even if this is contradicted by Strasbourg jurisprudence. Secondly, the margin of appreciation doctrine is inherently uncertain. Practice of Member States and whether a consensus will appear is not certain and what was once deemed to be within a state's margin of appreciation may not be so again. UK judges should be free to decide an individual's case according to the situation prevailing at the time, irrespective of previous unclear case law and judgments that may subsequently change many times in the future.

### C. Special Circumstances

Another situation where it is legitimate for judges to depart from Strasbourg is when there are 'special circumstances'<sup>27</sup> or 'strong reasons'<sup>28</sup> to do so. Again, there has been no clarification by the judiciary as to what these circumstances or reasons must be but it seems evident that it applies to situations where the ECtHR jurisprudence is unsuitable as it does not sufficiently appreciate particular aspects of the UK legal system. This was the situation in the cases of *Al-Khawaja and Tahery v UK*,<sup>29</sup> and *R v Horncastle*.<sup>30</sup> In *Al-Khawaja*, the Chamber of the ECtHR stated that the defendant's right to a fair trial under article 6 was breached if he or she had no opportunity to cross-examine a witness whose evidence constituted the sole or decisive evidence against them. *Horncastle* then came before the Supreme Court and the Law Lords were faced with the decision of whether or not to follow the Chamber judgment of *Al-Khawaja*. The Law Lords disagreed with the judgment of the ECtHR,

<sup>25</sup> Fenwick, *Civil Liberties and Human Rights*, 196

<sup>26</sup> *Re G (adoption: unmarried couple)* [2008] UKHL 38, 120 (Baroness Hale).

<sup>27</sup> *Alconbury* [2001] UKHL 23, 26.

<sup>28</sup> *Ullah* [2004] UKHL 26, 20.

<sup>29</sup> (2009) 29 EHRR 1; [2011] ECHR 26766/05 and 22228/06 (Grand Chamber).

<sup>30</sup> [2009] UKSC 14.



stating that this was one of the 'rare occasions where the domestic court had concerns as to whether a decision of the Strasbourg court sufficiently appreciates or accommodates particular aspects of...[the] domestic process'.<sup>31</sup> The case law of the ECtHR in this area had 'developed largely in cases relating to civil law...jurisdictions'<sup>32</sup> and there had not been 'consideration of whether there was sufficient justification for imposing the rule as an overriding principle applicable equally to the continental and common law jurisdictions'.<sup>33</sup> In the opinion of the Law Lords, Parliament had enacted sufficient safeguards regarding hearsay evidence so that the 'sole or decisive rule [was] unnecessary'<sup>34</sup> and so they refused to follow *Al-Khawaja*.

In the meantime, *Al-Khawaja* had been appealed to the Grand Chamber who were then faced with the decision of *Horncastle* to consider. The Grand Chamber agreed with the Supreme Court, stating that hearsay evidence which constituted the sole or decisive evidence against a defendant would 'not automatically result in a breach of art.6(1)'<sup>35</sup> and that 'the safeguards contained...are, in principle, strong safeguards designed to ensure fairness'.<sup>36</sup> The issue was whether these safeguards had been correctly applied, which the Grand Chamber had been so in relation to *Al-Khawaja* but not for Tahery. The cases of *Al-Khawaja* and *Horncastle* illustrate the Supreme Court engaging in dialogue with the ECtHR regarding the interpretation of rights, which is important for several reasons:

#### i. Subsidiarity

Firstly, dialogue is key in assessing the relationship between Strasbourg and domestic courts. As previously stated, the principle of the ECtHR is that of subsidiarity - it is the responsibility of the individual Member States to secure the Convention rights to everyone in their jurisdiction. If there is no dialogue then it 'creates an idea of an alien European human rights' standards being imposed by a distant court'<sup>37</sup> rather than the idea

<sup>31</sup> *ibid*, 11.

<sup>32</sup> *ibid*, 107.

<sup>33</sup> *ibid*, 14

<sup>34</sup> *ibid*.

<sup>35</sup> *Al-Khawaja* [2011] ECHR 26766/05 and 22228/06, 147.

<sup>36</sup> *ibid*, 151.

<sup>37</sup> Fenwick, "What's Wrong with s.2 of the Human Rights Act?"

of a court that reviews actions to make sure that there is no breach of human rights obligations. The line between them is a thin one but without dialogue, domestic courts become merely a passive partner in the protection of human rights.

ii. British Contribution

Dialogue is also important because it 'gives UK courts a voice and a role in norm creation and provides an important check on the power of the ECtHR'.<sup>38</sup> As already stated, one of the aims of the White Paper was to allow British judges the opportunity to engage in the development of human rights protection within Europe. By engaging in dialogue, British judges can identify to the Strasbourg court situations such as that in *Al-Khawaja* where the differences in legal systems allow for different actions to be taken without breaching the Convention. The Strasbourg Court itself stated that it would not 'be correct for the Court to ignore entirely the specificities of the particular legal system concerned'<sup>39</sup> which it can only do if such specificities are highlighted to it.

iii. Legitimacy

A final reason why dialogue is important is that it increases the legitimacy of both the ECtHR and the HRA. The ECHR is a 'living instrument'<sup>40</sup> and if domestic courts adopt 'an overly slavish attitude to the Strasbourg jurisprudence', then the ECtHR will 'be starved of one of the sources of information regarding prevailing 'present-day conditions''.<sup>41</sup> Dialogue is needed so that the ECtHR can decide cases more accurately in line with the current situations in Member States, which are then more legitimate and more acceptable to those states. Legitimacy is also increased if decisions are seen to be the result of reflective shared values.<sup>42</sup> If

<sup>38</sup> Merris Amos, "The Dialogue Between United Kingdom Courts and the European Court of Human Rights" (2012) 61 ICQL 557, 572.

<sup>39</sup> *Al-Khawaja* [2011] ECHR 26766/05 and 22228/06, 146.

<sup>40</sup> *Tyrer v UK* (1979-80) 2 EHRR 1, 31.

<sup>41</sup> Roger Masterman, "Section 2(1) of the Human Rights Act 1998: Binding Domestic Courts to Strasbourg" [2004] PL 725, 732.

<sup>42</sup> Amos, "The Dialogue Between United Kingdom Courts and the European Court of Human Rights", 574.

'deliberate dialogue'<sup>43</sup> is not engaged in and the jurisprudence of the ECtHR merely accepted and applied, then the national values of the UK are not seen to be defended and any resulting HRA judgments seem to be merely repetition of European views rather than an expression of British values within the context of Convention rights.

As discussed, dialogue is a key component for judges to consider when adjudicating on Convention rights but it must be borne in mind that there can be a 'negative impact on norm creation stemming primarily from the creation of uncertainty about who has the final word'.<sup>44</sup> It must also be remembered that in each case heard before the courts there is an individual claiming a violation of their rights and wanting a resolution. Playing judicial 'ping-pong' so as to engage in dialogue does not provide a solution for these individuals and it can be very expensive to fund a case which the Supreme Court wants to use merely so that it does not seem to be a 'Strasbourg surrogate'.<sup>45</sup> Dialogue should not be engaged in for dialogue's sake, it must have a meaningful purpose. Therefore, if an ECtHR judgment 'is not inconsistent with some fundamental substantive or procedural aspect of...[UK] law, and whose reasoning does not appear to overlook or misunderstand some argument or point of principle' then it should be followed by UK courts.<sup>46</sup>

#### D. Where Strasbourg Has Not Spoken

Another situation where it is legitimate for judges to depart from Strasbourg case law is when Strasbourg has not spoken on an issue. In theory this is recognised and accepted - if Strasbourg has not spoken then there is technically no case law to depart from and the normal domestic procedure to resolve the case is employed. It would be 'absurd' for domestic courts not to rule on a particular question merely because it 'had not yet been resolved by the Strasbourg jurisprudence'.<sup>47</sup>

When faced with issues regarding whether UK courts can go beyond Strasbourg, the courts have taken the view that the mirror principle is still to be applied - 'the purpose of the Human Rights Act 1998 was not to enlarge the rights or remedies of those...whose Convention rights have

<sup>43</sup> *ibid*, 577.

<sup>44</sup> *ibid*, 572.

<sup>45</sup> *R(ProLife Alliance) v British Broadcasting Corporation* [2002] EWCA Civ 297, 33.

<sup>46</sup> *Manchester CC v Pinnock* [2010] UKSC 45, 48.

<sup>47</sup> *Rabone v Pennine Care NHS Foundation Trust* [2012] UKSC 2, 112.

been violated'.<sup>48</sup> Lord Hope was in agreement in *Ambrose v Harris*,<sup>49</sup> stating that if the courts went beyond Strasbourg then they would be 'changing...[rights] from Convention rights, based on the treaty obligation, into free-standing rights of the court's own creation'.<sup>50</sup> Domestic courts in France, however, have taken the view that they can, and should, go 'beyond the requirements of the ECtHR...[including] in the absence of pre-existing jurisprudence',<sup>51</sup> stating that 'to refuse to overturn the impugned decisions would be tantamount to accepting to close your eyes until Strasbourg opens them for you'.<sup>52</sup> Lord Kerr in the minority in *Ambrose* agreed with this approach stating that it is not expected that 'all debates about the extent of Convention rights will be resolved by Strasbourg' and that 'as a matter of elementary principle, it is the court's duty to address those issues when they arise, whether or not authoritative guidance from Strasbourg is available'.<sup>53</sup> So is the narrow approach taken by the courts to the expansion of human rights protection the correct one?

i. Parliamentary Intention

Parliament, if it so desired to keep in line with Strasbourg jurisprudence in relation to scope or extent of Convention rights, could have expressed in section 2 that the courts were bound by ECtHR case law. However, a proposed amendment by Lord Kingsland to state this was specifically rejected. It was also made clear during Parliamentary debates that this was not just because Parliament did not want to bind courts to case law that was contrary to the view of the UK but also to allow the courts to 'be free to try and give a lead to Europe as well as to be led'.<sup>54</sup>

The judiciary's position that they are not able to expand the scope or extent of rights beyond Strasbourg seems to be less a case of

<sup>48</sup> *R(Begum) v Headteacher and Governors of Denbigh High School* [2006] UKHL 15, 29.

<sup>49</sup> [2011] UKSC 43, 53.

<sup>50</sup> *ibid*, 19.

<sup>51</sup> Clayton, "Smoke and Mirrors: The Human Rights Act and the Impact of Strasbourg Case Law, 655.

<sup>52</sup> *ibid*, 654; (translated) M. Guyomar, Conclusions of the Conseil d'Etat, Assembly, December 14 2007, *Planchenault* (First Case) and *Minister of Justice v Boussonar* (Second Case) (2008), 87 *Revue Française de Droit Administrative* 100.

<sup>53</sup> *Ambrose* [2011] UKSC 43, 129.

<sup>54</sup> HL Deb 18 November 1997, vol 583, col 515 (Lord Irvine).

parliamentary intention and more a concern of potential 'accusations of excessive activism or of acting without sufficient legal authority'.<sup>55</sup> Such concerns have not previously prevented the courts from expanding the scope of the common law and it seems even more puzzling when contrasted to their approach to section 3 of the HRA, where they have seemingly been determined to read legislation compatibly with the ECHR despite the actual wording of the legislation. Interpretations such as those in *Ghaidan v Godin-Mendoza*<sup>56</sup> and *R v A (Complainant's Sexual History)*<sup>57</sup> are much clearer examples of "judicial activism" and testing the limits of what can be deemed parliamentary intention. If it is legitimate to stretch and manipulate words of statutes so that it can be read compatibly then surely the judiciary should not be concerned about accusations of judicial activism to prevent them from extending the scope of human rights under the HRA, especially as this power has been given to them by Parliament.

## ii. Role of the ECtHR

Another potential reason for the judiciary's disinclination towards a more expansive interpretation of Convention rights under the HRA seems to be the idea that the ECtHR 'is the authoritative body to determine the meaning and effect of Convention rights'.<sup>58</sup> However, as previously discussed, the ECtHR is 'an international court of review'<sup>59</sup> and the responsibility for protecting Convention rights is first and foremost upon the Member States. Therefore the ECtHR cannot be the sole authoritative body to determine the scope of such rights; it has given the national courts the same responsibility. By adopting an 'overly deferential attitude'<sup>60</sup> towards the ECtHR, domestic courts 'are simply agents or delegates of the ECHR'.<sup>61</sup> Domestic judges in the UK are perfectly competent of 'interpreting and explaining the content and meaning of

<sup>55</sup> Masterman, "Aspiration or Foundation? The Status of the Strasbourg Jurisprudence and the 'Convention Rights' in Domestic Law", 78.

<sup>56</sup> [2004] UKHL 30.

<sup>57</sup> [2001] UKHL 25.

<sup>58</sup> Philip Sales, "Strasbourg Jurisprudence and the Human Rights Act: A Response to Lord Irvine" [2012] PL 253, 262.

<sup>59</sup> Masterman, "Aspiration or Foundation? The Status of the Strasbourg Jurisprudence and the 'Convention Rights' in Domestic Law", 78.

<sup>60</sup> *ibid.*

<sup>61</sup> Irvine, "A British Interpretation of Convention Rights" [2012] PL 237, 238.

Convention rights within the sovereign legal systems of the United Kingdom'.<sup>62</sup> By refusing to do so, they are only allowing rights to be protected and enforced in a particular way which does nothing for the development of UK human rights jurisprudence envisioned when the Act was being passed.

### iii. Control Over the Development of Human Rights Jurisprudence

It is true that Member States cannot appeal to Strasbourg if they feel a more generous scope of protection given by the courts is wrong and so in the courts' view 'it is better to err on the side of caution'.<sup>63</sup> However, the government and Parliament have the primary tool of being able to override the court's judgment through legislation if they feel that the more generous scope of protection provided is incorrect. The recent debate regarding the voting rights of prisoners is clear evidence of this, albeit it is not an issue where domestic courts have actually provided a level of protection that Parliament has disagreed with. The clear legislation for the disenfranchisement of prisoners in section 3 of the Representation of People Act 1983<sup>64</sup> cannot be overridden by domestic courts, despite rulings of the ECtHR stating that the blanket ban is a breach of Article 3 of Protocol No.1 of the ECHR: it is outside of the judiciary's powers. Therefore an appeal to ECtHR for Parliament is not only unnecessary but also not required as Parliament can control any expansion of human rights protection itself. In the absence of statutory authority to the contrary, it is for the judiciary to interpret the law including whether the scope of Convention rights should be expanded.

Baroness Hale stated in *R(Gentle) v Prime Minister*<sup>65</sup> that 'Parliament is free to go further than Strasbourg if it wishes, but we are not free to foist upon Parliament...an interpretation of a Convention right which goes way beyond anything...[they] can reasonably foresee that Strasbourg might do'.<sup>66</sup> In *R(Animal Defenders International) v Secretary of State for Culture, Media*

<sup>62</sup> *ibid.*

<sup>63</sup> Jonathan Lewis, "The European Ceiling on Human Rights" [2007] PL 720, 728.

<sup>64</sup> as amended by the Representation of People Act 1985.

<sup>65</sup> [2008] UKHL 20.

<sup>66</sup> *ibid.*, 56.

*and Sport*,<sup>67</sup> she had upheld the mirror principle but her remarks concerning the issue that the courts have not been given 'the power to leap ahead of Strasbourg'<sup>68</sup> were in relation to sections 3 and 4 of the HRA. These sections are concerned with the interpretation of statutes in light of Convention rights and therefore it seems apparent that there is a distinction between interpreting Convention rights where the issue is covered by statute and where it is not. In the former, when exercising their section 3 and 4 powers, the courts must only keep pace with Strasbourg. In the latter, however, the courts arguably can, and should, be able to interpret Convention rights as they wish and be able to go further than Strasbourg provided that it is within what they reasonably foresee what Strasbourg might do.

### III. Conclusion

In conclusion, there are many circumstances where it is legitimate for domestic judges to depart from Strasbourg case law when adjudicating on Convention rights under the HRA. The approach as to ECtHR judgments being a 'floor' is the correct and has not posed many problems; following Strasbourg jurisprudence when clear to do so (as it is in most cases) but engaging in dialogue where such dialogue is necessary. However, the self-imposed limits resulting in Strasbourg jurisprudence also being treated as a 'ceiling' has meant that the judiciary has missed a great opportunity to further develop human rights jurisprudence within the UK. They have relieved themselves of the power to interpret for greater protection than the ECtHR provides and resigned themselves to follow Strasbourg irrespective of whether the circumstances of the case suggest that they should not.

Lord Roger stated in *Secretary of State for the Home Department v AF (No.3)* 'Argentoratum locutum, iudicium finitum - Strasbourg has spoken, the case is closed'.<sup>69</sup> However, this is not the case; 'Argentoratum locutum, iudicium non finitum'.<sup>70</sup> It is to be encouraged that individuals should have their Convention rights upheld before domestic courts but it must be remembered that the ECtHR is a court of review, not a fourth

<sup>67</sup> [2008] UKHL 15.

<sup>68</sup> *ibid*, 53.

<sup>69</sup> [2009] UKHL 28, 98.

<sup>70</sup> Hale, "Argentoratum Locutum: Is Strasbourg or the Supreme Court Supreme?", 76.

court of appeal. Germany treats 'the Convention and the ECtHR jurisprudence as..."interpretation aids" for the determination of the content and scope of the fundamental rights...[under] the Basic Law',<sup>71</sup> and this should be the case in the UK. In many instances this will probably mean following Strasbourg case law but this should be done 'because they have been persuaded by its reasoning' rather than 'because they consider themselves bound by its decisions'.<sup>72</sup>

The judiciary has a unique role in the UK, having the power to decide on and create rights under the common law which Parliament has not legislated for, and this does not change with the existence of the HRA. The HRA is an instrument of great opportunity and, as Lewis expresses it, the courts were 'presented with unusually explicit evidence' of Parliament's desire for courts to go beyond Strasbourg 'and they have not fully taken advantage of it'.<sup>73</sup> Section 2 should be used to allow the development of a human rights jurisprudence unique to the UK and reflective of its culture and values, rather than treated with caution and used as a means to turn ECtHR case law into British jurisprudence.

<sup>71</sup> Clayton, "Smoke and Mirrors: The Human Rights Act and the Impact of Strasbourg Case Law", 655.

<sup>72</sup> Amos, "The Dialogue Between United Kingdom Courts and the European Court of Human Rights", 565.

<sup>73</sup> Lewis, "The European Ceiling on Human Rights", 726.



## TO WHAT EXTENT WILL THE IMMIGRATION BILL (2013) AFFECT UK'S OBLIGATIONS?

Simon Cox

*All children in the UK have the same rights, irrespective of status, and the UK's international and domestic legal obligations stand, regardless of a child's circumstances or those of their parents.*

### I. Introduction

The *Immigration Bill* (as drafted) has the potential to restrict and exclude the rights of children in the UK. If enacted in this format,<sup>1</sup> the result will be damage to the futures of individuals and families, the collective future and value of society, and the UK's international standing and reputation.

### II. Immigration and public perceptions

The Immigration Bill is unpopular, reflected by widespread criticism over its nature and content.<sup>2</sup> But immigration is a contentious issue, difficult to effectively legislate for<sup>3</sup> and high on the political agenda. Governmental intention is to annually reduce net migration to 'tens of thousands' over the next decade benefitting 'those who work hard and play by the rules'.<sup>4</sup> A former Immigration Minister referred to reducing the 'pull factors'

<sup>1</sup> This essay considers the Bill as it had been drafted. The essay addresses the way that rights could have been affected if some of the subsequent amendments had not been made

<sup>2</sup> The Children's Society, [www.leftfootforward.org](http://www.leftfootforward.org), [www.freemovement.org.uk](http://www.freemovement.org.uk), The Lord Bishop of Leicester (House of Lords debate), Antonio Guterres (UN High Commissioner for Refugees), Migrants' Rights Network

<sup>3</sup> Primary legislation in this area has been enacted 6 times in the past 15 years

<sup>4</sup> Conservative Party, 2014. Available at [www.conservatives.com/Policy/Where-we-stand/Reducing-immigration.aspx](http://www.conservatives.com/Policy/Where-we-stand/Reducing-immigration.aspx) Accessed 7/3/2014

attracting migrants to the UK,<sup>5</sup> although this attraction could partially be explained by 'push factors' in other countries.<sup>6</sup>

Vince Cable's criticism, comparing some of the rhetoric surrounding the Bill to Enoch Powell's 'Rivers of Blood' speech, demonstrates unease at the Conservative stance and these 'rules'.<sup>7</sup> The EU Justice Commissioner contended that UK politicians should be improving welfare and education instead of blaming 'too many foreigners' coming in,<sup>8</sup> but support for the increasingly vociferous United Kingdom Independence Party (UKIP) is an influential factor in the policy arena.<sup>9</sup>

But the UK's identity is a function of its policies. These are not conceived and promoted in a vacuum, as public campaigns influence what goes onto, or comes off the statue book.<sup>10</sup> Fierce public opinion however, does not necessarily achieve the most measured legislation and may produce statutes which fail to meet their intended aims.<sup>11</sup>

Claims that further migration will require huge housing investment, and reports of cuts to public services restricting access to GPs,<sup>12</sup> raise concerns across society about those entering the country, although recent migration growth is predominantly EU citizens exercising legitimate free

<sup>5</sup> H.M. Government, 2013. *Immigration Bill laid in Parliament*. Available at:

[www.gov.uk/government/news/immigration-bill-laid-in-parliament](http://www.gov.uk/government/news/immigration-bill-laid-in-parliament) Accessed 25/2/2014

<sup>6</sup> As an example, Section 377 Indian Penal Code. India's Supreme Court in December 2013, overturned a 2009 decision which had effectively decriminalised homosexuality. The legislation was enacted by the British in the 1860s and refers to "unnatural sex". Large public protests followed the 2013 decision in Delhi and other cities. Other examples can be found of laws which would allow significant abuse, particularly to women, children and minorities, particularly in Asia; notably Pakistan, Iran, Iraq and Afghanistan

<sup>7</sup> Patrick Wintour, *Vince Cable attack on Tories over migrant 'panic' widens coalition rifts*. Accessed 24/2/2014 at [www.theguardian.com/uk-news-2013/dec/22/vince-cable-tories-migration-panic-coalition](http://www.theguardian.com/uk-news-2013/dec/22/vince-cable-tories-migration-panic-coalition)

<sup>8</sup> Viviane Reding, *The United Kingdom and the EU – Inevitably drifting apart?* Mackenzie Stuart Lecture, 2014. Accessed at [www.europa.eu/rapid/press-release\\_SPEECH-14-137\\_en.htm](http://www.europa.eu/rapid/press-release_SPEECH-14-137_en.htm) Accessed 25/2/2014

<sup>9</sup> Christopher Hope, *Mass immigration has left Britain 'unrecognisable' says Nigel Farage*. Available at: [www.telegraph.co.uk/news/politics/ukip/10668996/Mass-immigration-has-left-Britain-unrecognisable-says-Nigel-Farage.html](http://www.telegraph.co.uk/news/politics/ukip/10668996/Mass-immigration-has-left-Britain-unrecognisable-says-Nigel-Farage.html) Accessed 1/3/2014

<sup>10</sup> Examples of public campaigns to legislate have included the Abortion Act 1969, the Vaccine Damage Payments Act 1979 and the Autism Act 2009. Public pressure contributed to the withdrawing of proposals for VAT on books and newspapers and also to withdraw the Shops Bill

<sup>11</sup> As an example, the Dangerous Dogs Act 1991, c.65, amended 1997, c17

<sup>12</sup> Royal College of General Practitioners, 2014. *34 million patients will fail to get GP appointments*. Available at: [www.rcgp.org.uk/news/2014/february.aspx](http://www.rcgp.org.uk/news/2014/february.aspx) Accessed 18/2/2014

movement rights.<sup>13</sup> Whilst the Coalition government has faced significant economic challenges, some argue that the effects of immigration are exaggerated,<sup>14</sup> and superficial consideration of the outcomes of cases can be easily voiced, but difficult to respond to effectively.<sup>15</sup> Negative and uninformed verbiage has no place in any sensible debate.<sup>16</sup>

### III. Children and families – the Government's obligations

In addition to those migrants entering through recognised channels, there are over one hundred thousand undocumented migrant children in the UK.<sup>17</sup> For many, this may be the only home they know and they may only speak English. Some have been trafficked, exploited, or suffered harrowing experiences. But on reaching the UK, many migrant children find themselves in an unwelcome position at the intersection of diverging policies where the protection of children's rights and immigration control are becoming increasingly irreconcilable with each other.<sup>18</sup>

One of the Bill's primary objectives is preventing the misuse of public services, particularly via the National Health Service (NHS).<sup>19</sup> But, the proposed requirement of questioning individuals over their immigration status already sits uneasily with family doctors and health professionals, essentially involving them in immigration control. Is this method of identity proof any different to carrying identity cards,

<sup>13</sup> British Broadcasting Corporation, 2014. *Big increase in net migration to UK*. Available at: [www.bbc.com/news/uk-politics-26367391](http://www.bbc.com/news/uk-politics-26367391) Accessed 2/3/2014; Reuters, 2014. *Immigration rise embarrasses UK's Cameron before election*. Available at: [www.uk.reuters.com/article/2014/02/27/uk-britain-politics-immigration-idUKBREA1Q0TS20140227](http://www.uk.reuters.com/article/2014/02/27/uk-britain-politics-immigration-idUKBREA1Q0TS20140227) Accessed 3/3/2014

<sup>14</sup> Alan Travis, *Immigration report that challenges impact on UK jobs 'blocked' by No 10*. Available at [www.theguardian.com/uk-news/2014/mar/04/government-blocks-immigration-report-british-jobs](http://www.theguardian.com/uk-news/2014/mar/04/government-blocks-immigration-report-british-jobs) Accessed 7/3/2014

<sup>15</sup> John Kerr (Lord) *The UK Supreme Court: The modest underworker of Strasbourg?* Clifford Chance lecture, 2012 Available at [www.supremecourt.uk/docs/speech\\_120125.pdf](http://www.supremecourt.uk/docs/speech_120125.pdf) Accessed 17/12/2013

<sup>16</sup> Sile Reynolds and Helen Muggeridge, *Remote Controls: How the UK border controls are endangering the lives of refugees*. Refugee Council, 2008

<sup>17</sup> Nando Sigona, and Vanessa Hughes, *No way out, no way in. Irregular migrant children and families in the UK*. University of Oxford, 2012

<sup>18</sup> Ibid.

<sup>19</sup> Immigration Bill, 2013, clause 33

previously rejected by Theresa May, the Home Secretary as 'bullying, ineffective and an assault on individual liberty'.<sup>20</sup>

An underlying principle of the NHS is universal access to primary care. This new regime would mean migrants (both irregular and others) will fail to access important services, either deliberately or through limited inability to procure accurate information or legal representation. Whilst amendments to the Bill have been proposed,<sup>21</sup> it is highly likely that some migrants deliberately avoid health services for migrant children or those affecting migrant children indirectly, due not only to financial, but also for cultural or personal reasons.<sup>22</sup>

This has the potential to affect children by worsening existing conditions or delaying diagnosis of serious conditions. For instance, the National Aids Trust raises serious concerns about HIV and the impact on high-risk migrants groups,<sup>23</sup> particularly children and pregnant women. This is undoubtedly discriminatory, it arguably engages Article 2 of the European Convention on Human Rights (ECHR), and could potentially inflict long-term damage.<sup>24</sup>

Landlords must establish the immigration status of those accessing rented property. This may be difficult to prove as documentation can be complex and difficult to validate. The threat of large fines may lead to some landlords resorting to ethnic profiling to avoid minority groups; objectivity giving way to stereotyping and prejudice,<sup>25</sup> with families involuntarily entering clandestine and substandard housing, exacerbating

<sup>20</sup> IPLA, 2013. Immigration Bill. Briefing for House of Commons Committee Stage

<sup>21</sup> ILPA, 2014. ILPA proposed amendments for the Immigration Bill (Part 2) House of Lords Committee 3<sup>rd</sup> March 2014 ff. Available at:

[www.ilpa.org.uk/resources.php/25876/immigration-bill-ilpa-proposed-amendments-for-house-of-lords-committee-stage-commencing-3-march-2014](http://www.ilpa.org.uk/resources.php/25876/immigration-bill-ilpa-proposed-amendments-for-house-of-lords-committee-stage-commencing-3-march-2014) Accessed 1/3/14

<sup>22</sup> Amendments proposed in the House of Lords include prevention of charging for domestic abuse and connected to treating Female Genital Mutilation (FGM)

<sup>23</sup> National Aids Trust, 2013. *Response to the Joint Committee on Human Rights*

<sup>24</sup> United Nations General Assembly, 1950. *Convention on the Protection of Human Rights and Fundamental Freedoms*

<sup>25</sup> ILPA, 2014. ILPA proposed amendments for the Immigration Bill (Part 3) House of Lords Committee 3<sup>rd</sup> March 2014 ff. Available at:

[www.ilpa.org.uk/resources.php/25876/immigration-bill-ilpa-proposed-amendments-for-house-of-lords-committee-stage-commencing-3-march-2014](http://www.ilpa.org.uk/resources.php/25876/immigration-bill-ilpa-proposed-amendments-for-house-of-lords-committee-stage-commencing-3-march-2014) Accessed 1/3/14

their already marginalised position.<sup>26</sup> This blanket restriction on the nation's human capital should be anathema in a developed nation.

A precarious immigration status, financial hardship and limited access to public services damage more than just physical health. This unsatisfactory environment trickles down from parents to children, with potentially decimating results. Increasing mental health issues among the young will affect migrant children disproportionately.<sup>27</sup>

Diverging policies contradict the state's well-established legal obligations to safeguard and promote the welfare of children.<sup>28</sup> Considering the UN Convention for the Rights of the Child,<sup>29</sup> it becomes difficult to select one single area where the Bill infringes the rights granted therein. Its recurring theme - 'Governments must' - unequivocally grants absolute rights, not discretionary or qualified unlike some within the ECHR.<sup>30</sup>

The Home Secretary has confirmed government intent to use primary legislation to ensure judges 'interpret the right to family life properly' respecting Parliament's view.<sup>31</sup> The current mechanism for reflecting the qualified nature of Article 8, the Immigration Rules (2012),<sup>32</sup> has not given the results intended and subsequent case law<sup>33</sup> has 'demolished the Government's attempt to gain exclusive ownership over Article 8'.<sup>34</sup>

Removal of judicial discretion via Clause 14 of the Bill under wide-ranging 'public interest considerations' such as financial independence, will be replaced by an inappropriate 'one size fits all' solution,<sup>35</sup> raising concerns of trespass into the judicial function. A full and fact sensitive

<sup>26</sup> Migrants' Rights Network, 2014. *Immigration Bill briefing for House of Lords: The implications of landlord checks for migrants in the UK*. Available at: [www.migrantsrights.org.uk/files/publications/MRN\\_briefing-landlord-checks-House\\_of\\_Lords-Feb\\_2014.pdf](http://www.migrantsrights.org.uk/files/publications/MRN_briefing-landlord-checks-House_of_Lords-Feb_2014.pdf) Accessed 12/2/2014

<sup>27</sup> Royal College of General Practitioners, 2014. *Rise in mental health issues in the young*. Available at: [www.bbc.co.uk/news/health-25740866](http://www.bbc.co.uk/news/health-25740866) Accessed 22/2/2014

<sup>28</sup> s.55, 2009, c.11

<sup>29</sup> United Nations General Assembly, 1989. *Convention on the Rights of the Child*

<sup>30</sup> op cit., UN, 1950

<sup>31</sup> [www.gov.uk](http://www.gov.uk) Immigration Bill laid in Parliament, 2013

<sup>32</sup> Melanie Gower, *Article 8 of the ECHR and Immigration Cases*. Standard note SN/HA/6355 Available at [www.parliament.uk/briefing-papers/sn06355.pdf](http://www.parliament.uk/briefing-papers/sn06355.pdf) Accessed 2/3/2014

<sup>33</sup> *Ogundimu (Article 8 – new rules) Nigeria* [2013] UKUT (IAC)

<sup>34</sup> [freemovement.org](http://freemovement.org) 2013

<sup>35</sup> Alison Harvey, *Passage of the Immigration Bill* (Legislative comment) *Journal of Immigration, Asylum and Nationality Law*, 28(1), 6-7, 2014

human rights assessment is essential,<sup>36</sup> and is not ousted by the Immigration Rules. The Bill's proposal that 'little weight' is given to the 'right to family life' component where, for example, the migrant's status is 'precarious', is not only discriminatory, but difficult to determine and open to abuse. However, the best interests of children retain primacy over their immigration status (*ZH (Tanzania) v Secretary of State for the Home Department*),<sup>37</sup> a principle supported by the recent restatement of proportionality in *Bank Mellat v Her Majesty's Treasury (No.2)*.<sup>38</sup> This asks 'whether a fair balance has been struck between the rights of the individual and the interests of the community.' The aforementioned fact assessment ensures a *Daly*<sup>39</sup> 'proportionate response' with minimal interference.

But why should relationships and family life which start in difficult circumstances be considered as less 'valuable' than those between citizens born and raised in the UK? Maybe the Government views some children as less important than others? 'Qualifying children', defined in the Bill as UK citizens over seven years old, clearly have more rights than non-qualifying children. This creates 'an extraordinarily narrow space'<sup>40</sup> to consider best interests, although limited opposition arose via the Commons. Proper scrutiny is now under way<sup>41</sup> with a recognition that the Government's obligations to children stand, regardless of family circumstances.

The Bill though is a predictable response to high-profile cases<sup>42</sup> where both domestic immigration tribunals and the European Court of Human Rights (ECtHR) repeatedly thwart the Government. But whilst not all reporting is accurate,<sup>43</sup> the high proportion of successful appeals is unquestionable. Although the Government puts the blame squarely on

<sup>36</sup> *MF (Art 8 – new rules)* [2012] UKUT 00393 IAC

<sup>37</sup> [2011] UKSC 04

<sup>38</sup> [2013] UKSC 39

<sup>39</sup> *R (on the application of Daly) v Secretary of State for the Home Department* [2001] UKHL 26

<sup>40</sup> Refugee Children's Consortium, 2013. *Briefing on Article 8: Public interest considerations* (Clause 14) House of Commons Committee – November 2013. Available at: [www.refugeechildrenconsortium.org.uk](http://www.refugeechildrenconsortium.org.uk) Accessed 8/3/2014

<sup>41</sup> Hansard, 5/3/2014, Column 1373

<sup>42</sup> *Othman v United Kingdom* [2012] 8139/09

<sup>43</sup> *op cit.*, Gower, 2013. A notorious case cited by Theresa May where an illegal immigrant could not be deported because he had a cat. Whilst mentioned, the cat was in no way determinative of the appeal

the ECtHR, there are at minimum deficiencies, and at worst 'administrative chaos',<sup>44</sup> within the Home Office and the UK Border Agency at the repeated inability to establish their decisions as legitimate. An aggressive legislative response may provide a smokescreen to internal failings and avoid the real deficiencies. Judicial interpretation of the 'Immigration Act 2014' will be of huge importance.

#### IV. Executive power and intrusion – a step too far?

Government objectives include reducing illegal immigration, controlling finances, and building a 'just and fair' society. It approaches this with a three-pronged strategy: restricting 'unmeritorious' judicial review claims; reducing the availability of legal aid; and controlling borders.<sup>45</sup> The overarching objective is to strengthen executive power, wresting it back from the judiciary and 'Europe'. Whilst this short-term approach has damning consequences for those affected, playing to the populist media and elements of society feeling threatened by immigration and limited job opportunities, may mean important votes for political parties without a clear majority.<sup>46</sup>

Not as obvious is the shift in constitutional power between executive and judiciary. In recent years the judiciary has entered areas of public life, previously considered non-justiciable, demonstrated by the growth in judicial review<sup>47</sup> often in reaction to inappropriate governmental responses dealing with contemporary political or social issues. Some of these actions sit uneasily with many, demonstrated by the considerable criticism directed towards the responses to the 'war on terror' and the invasion of Iraq.<sup>48</sup> 'Rendition', 'Abu Ghraib', and 'Guantanamo Bay' lay outside public consciousness or vocabulary before the 21<sup>st</sup> century. Whilst the 'cleansing effect of letting in daylight'<sup>49</sup> may help, only time will tell how future generations view the actions of the world's most

<sup>44</sup> House of Commons, Hansard, 19<sup>th</sup> June 2012. Cols. 772, 812

<sup>45</sup> H.M. Government, 2013 H.M. Government 2013. *Judicial Review – Proposals for further reform*. Available at [www.official-documents.gov.uk/document/cm87/8703/8703.pdf](http://www.official-documents.gov.uk/document/cm87/8703/8703.pdf) Accessed 12/1/2014

<sup>46</sup> op cit., Harvey, 2014

<sup>47</sup> op. cit., H.M. Government 2013. *Judicial Review – Proposals for further reform*. Available at [www.official-documents.gov.uk/document/cm87/8703/8703.pdf](http://www.official-documents.gov.uk/document/cm87/8703/8703.pdf) Accessed 12/1/2014

<sup>48</sup> Thomas Bingham (Lord), *The Rule of Law*. Annual Grotius Lecture, British Institute of International and Comparative Law, Lincoln's Inn, 2008

<sup>49</sup> Johan Steyn (Lord), *Deference: A tangled story*. Judicial Studies Board Lecture, 2004



advanced democracies. Supportively? With contempt? Abhorrence? In the aftermath of these events, for many, a suspicious view of migrants has arisen.

#### V. The rule of law

Whilst difficult to define, the rule of law has statutory force<sup>50</sup> and is an underlying principle of the UK's constitution.<sup>51</sup> Lord Bingham's recent restatement<sup>52</sup> avoids a formal mechanistic definition, preferring one which is more responsive, acknowledging the human element therein, and citing the unwritten individual/state bargain as fundamental. Arguably, this bargain, in a democratic state, is analogous with any agreement whereby shifting positions are influenced by external factors. Law, not discretion, is still fundamental, but fairness, morality and equality are adaptive principles, as are security, and deterrent by rules.

Fairness, morality and equality mean different things to different people. Lord Sumption identifies fault lines in areas such as immigration, asylum and deportation, as the instincts of the judiciary are different to those of politicians.<sup>53</sup> This was demonstrated in *R v Secretary of State for Social Security ex parte Council for the Welfare of Immigrants*,<sup>54</sup> where the court did not believe that Parliament's intention was to unreasonably remove benefits from vulnerable individuals. In Lord Steyn's view, 'Parliament must be presumed not to legislate contrary to the rule of law' which 'enforces standards of fairness, both substantive and procedural'.<sup>55</sup>

But Parliament is influenced by unsavoury factors; panic; populism; and hasty decision-making.<sup>56</sup> So increasingly, protection of human rights lies with the judiciary. Many human rights cases involve the rights of minority groups, often those unpopular with the mainstream and unable to harness the machinery of pressure groups. However the ECHR was

<sup>50</sup> 2005, c.4

<sup>51</sup> Used by Lord Steyn in *R v SSHD ex parte Pierson* [1998] AC 539 and Lord Hoffman in *R (Alconbury Developments and Others) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23

<sup>52</sup> Thomas Bingham (Lord), *The Rule of Law*. London: Penguin, 2010

<sup>53</sup> Jonathan Sumption (Lord), *Judicial and political decision-making: The uncertain boundary*. FA Mann Lecture, 2011

<sup>54</sup> [2003] EWCA Civ 364

<sup>55</sup> [1998] AC 539

<sup>56</sup> Philip Sales, *Judges and legislature: Values into law*. Cambridge Law Journal, 71(2), 2012, 287-296



drafted by British lawyers and is largely based on a British understanding of the citizens' rights offering protection from an 'over-mighty' state.<sup>57</sup>

Primary legislation represents an unparalleled force and the judiciary must interpret Parliament's intention (in accordance with Convention rights).<sup>58</sup> However, Lord Steyn argued in *Attorney-General v Jackson*<sup>59</sup> that the judiciary could refuse to give effect to legislation in limited circumstances. It is also significant the Bill received limited Commons scrutiny.<sup>60</sup> Unsurprisingly, some contend: 'not Parliament at its finest'.<sup>61</sup>

Lord Sumption posits that 'the technical and intellectual capacities of mankind have grown faster than its moral sensibilities or its cooperative instincts. Other restraints on the autonomy and self-interest of men such as religion and social convention have lost much of their former force, at any rate in the west'.<sup>62</sup> Although convincing, something has vanished. Whilst rich individuals donate huge monetary sums to development, gone are the 'Mother Teresa' type figures working selflessly with minimal financial resource protecting the world's less fortunate and vulnerable.<sup>63</sup> Protection and concern for others does not mean open geographical borders, but ultimately the Bill is wholly unreflective of the UK's underpinning values.

## VI. Conclusion

The Immigration Bill could severely affect children's rights. Whilst the intention to prevent misuse of public services appears fair, there is potential for abuse and disproportionate responses.

The Bill's underpinning principles extend the balance of power too far in the state's favour, undermining the Convention's status, and the domestic and international rule of law. It also introduces an unwanted, retrogressive dimension to the treatment of individuals; unwarranted in a

<sup>57</sup> David Neuberger, (Lord) (2011) *Who are the masters now?* Second Lord Alexander of Weedon lecture

<sup>58</sup> Jeffrey Goldsworthy, *The Sovereignty of Parliament – History and Philosophy*. Oxford: Oxford University Press, 1999

<sup>59</sup> [2005] UKHL 56; [2006] 1 AC 262

<sup>60</sup> Clause 60, Deprivation of Citizenship. Chair of the Joint Committee on Human Rights wrote to the Home Secretary requesting an explanation of why this was inserted at such a late stage in the Bill's passage through the Commons

<sup>61</sup> op. cit., Harvey, 2014

<sup>62</sup> Jonathan Sumption (Lord), *The limits of law*. Sultan Azlan Shah Lecture, 2013

<sup>63</sup> [www.relief.org](http://www.relief.org)

developed nation. The sad and inevitable consequences are depriving children of health, education and welfare benefits, only because of their unfortunate circumstances.

**BEAMING RIGHTS HOME, INCLUDING SOCIAL RIGHTS: A COMMENT  
ON LORD KERR'S DISSENTING JUDGMENT IN THE BENEFIT CAP  
CASE**

Christoph Futter

English law reports abound with famous dissenting judgments. Now Lord Kerr's dissent in *R (on the application of SG) v Secretary of State for Work and Pensions ('Benefit Cap')*<sup>1</sup> must be added to their number. Lord Kerr suggests an exception to the constitutional rule in *International Tin Council*,<sup>2</sup> the hallmark of the UK's dualist system, whereby international treaties operate only on the international plane but not in domestic law, unless and until incorporated by an Act of Parliament.

Human rights treaties are the objects of Lord Kerr's proposed exception. He says that because human treaties only prescribe rights for individuals, but no obligations, they elude the rationale of *International Tin Council*. That rationale is to protect individuals from an executive which bypasses Parliament and abuses its prerogative powers to negotiate and ratify international treaties that contain onerous obligations. Previous judicial statements had hinted at the possibility of a human rights exception to *International Tin Council*,<sup>3</sup> but Lord Kerr's dissent is the first to assert that its time has come. Rightly so, this paper will argue.

The context is social rights litigation. *Benefit Cap* was a judicial review brought by four claimants, the single mother and her youngest child in two families, against regulations made under the Welfare Reform Act 2012.<sup>4</sup> Those regulations capped the total benefits for couples and single parents with dependent children at £500 per week – by way of a deduction from housing benefit and regardless of the number of children

<sup>1</sup> [2015] UKSC 16; unless indicated otherwise, all paragraph references are to this decision.

<sup>2</sup> *JH Rayner (Mincing Lane) Ltd v DTI* [1990] 2 AC 418 (HL), 499-500; confirmed in relation to the ECHR in *R v SSHD ex p Brind* [1991] AC 696 (HL), 747-748 (Lord Bridge), 762 (Lord Ackner).

<sup>3</sup> *Lewis v AG of Jamaica* [2001] 2 AC 50 (PC) 84 (Lord Slynn); *Re McKerr* [2004] UKHL 12 [51]-[52] (Lord Steyn)

<sup>4</sup> Benefit Cap (Housing Benefit) Regulations 2012 (SI 2012/2994)

in the family. As a result the claimant families, who lived in private rented accommodation in London, lost £75.30 and £55.74 respectively in weekly income and no longer had sufficient means to afford adequate food, clothing, warmth and housing.

The legal issue was whether the regulations unlawfully discriminated against women in contravention of article 14 of the European Convention on Human Rights (ECHR) read with article 1 of the First Protocol to the ECHR (A1P1). The Secretary of State conceded that the regulations (i) interfered with the claimants' peaceful enjoyment of their possessions under A1P1 and (ii) indirectly discriminated against women, who were by far more likely to be single parents than men. However, the Government argued that the regulations were 'not manifestly without reasonable foundation',<sup>5</sup> because they aimed to reduce the budget deficit.

The claimants argued that the government's failure to comply with the UN Convention on the Rights of the Child (UNCRC) should tip the scales in their favour when assessing the proportionality of the scheme under article 14 ECHR. Article 3(1) UNCRC provides that 'in all actions concerning children ... the best interests of the child shall be a primary consideration'. Because the courts have been willing to consider international human rights treaties in the interpretation of the ECHR,<sup>6</sup> the UNCRC was indeed capable of being relevant to the analysis. However, the Secretary of State contested, and the majority of Justices agreed, that child-related considerations were irrelevant to the question of a woman's right to enjoy her possessions without discrimination.<sup>7</sup>

Lady Hale<sup>8</sup> and Lord Kerr<sup>9</sup> disagreed. They argued that the interests of children could not be dissociated from the financial ability of their single mothers to look after them. Lady Hale's judgment in particular is distinguished by its in-depth analysis of the impact of the regulations on the lives of the claimants and follows a long line of Lady Hale's

<sup>5</sup> *Carson v UK* (2010) 51 EHRR 369 [61]

<sup>6</sup> See Maurice Kay LJ's obiter comments in *Burnip v Birmingham City Council* [2012] EWCA Civ 629 [19]-[22] on the relevance of the Convention on the Rights of Persons with Disabilities as an aid to interpreting article 14 ECHR read with A1P1.

<sup>7</sup> [89] (Lord Reed), [146] (Lord Hughes), [131] (Lord Carnwath); however, Lord Carnwath expressed hope that the government would address its international obligations under article 3(1) UNCRC [133].

<sup>8</sup> [223]-[224]

<sup>9</sup> [263]-[267]

celebrated contributions to anti-discrimination law.<sup>10</sup> However, on this occasion it is Lord Kerr's judgment which stands out: he would allow the appeal not only because the regulations contravene article 14 ECHR but also – and in fact primarily – because the government's benefit cap breaches article 3(1) UNCRC itself.

Article 3(1) UNCRC is unincorporated as far as legislation and policy emanating from the Department for Work and Pensions is concerned.<sup>11</sup> By affording the claimants in this case a shield based on article 3(1) UNCRC Lord Kerr clearly departs from *International Tin Council*. Before exploring his reasons, it is worth pausing and reflecting on the implications which Lord Kerr's view, if followed by a future Supreme Court decision, would have on domestic human rights law.

In the first instance it would be another judicial insurance policy against any future repeal of the Human Rights Act 1998 (HRA),<sup>12</sup> although it would give direct effect to the ECHR without the constitutional fine-tuning of the HRA. But the current body of human rights treaties is much richer than the ECHR. It also includes the economic and social rights enshrined in the UNCRC itself, in the International Covenant on Economic, Social and Cultural Rights, the European Social Charter, and other treaties.<sup>13</sup> If Lord Kerr's proposed exception to *International Tin Council* became binding precedent, social rights would be *beamed* home (rather than *brought* home by a protracted legislative process) in the very moment that the UK's treaty obligation arises! In the case of existing treaties, the effect would even be retrospective.

Lord Kerr explores two types of arguments in favour of departing from *International Tin Council*. The radical argument is attributed to Alan Brudner<sup>14</sup> and Bharat Malkani.<sup>15</sup> Brudner's argument is that human rights

<sup>10</sup> Bruce Dickson, *Human Rights and the United Kingdom Supreme Court* (Oxford University Press, 2013), 327-333

<sup>11</sup> [216] (Lady Hale)

<sup>12</sup> The phrase 'judicial insurance policy' is borrowed from Philip Murray, 'Case Comment – Procedural Fairness, Human Rights and the Parole Board' (2014) 73(1) CLJ 5, 8, who interpreted recent judicial emphasis on common law rights in this way.

<sup>13</sup> See Appendix 1 in Jeff King, *Judging Social Rights* (Cambridge University Press, 2012), 326 for a full list.

<sup>14</sup> Alan Brudner, 'The Domestic Enforcement of International Covenants on Human Rights: A Theoretical Framework,' *University of Toronto Law Journal* 35 (1985): 219

<sup>15</sup> Bharat Malkani, 'Human Rights Treaties in the English Legal System,' *Public Law* 2011: 554

treaties are 'the legislation of a universal community of rational beings'.<sup>16</sup> As such, they do not require an Act of Parliament to be given direct effect in domestic law. Only treaties which serve contingent interests are in need of transforming legislation. Lord Kerr comments that 'it may safely be said that such a far-reaching approach is unlikely to find favour in the courts of this country'.<sup>17</sup>

Lord Kerr does not specifically deal with Malkani's more nuanced argument based on Part 2 of the Constitutional Reform and Governance Act 2010 (CRGA). Part 2 enables Parliament to prevent, within certain time limits, the ratification of treaties laid before it. Malkani argues that in view of Parliament's enhanced role together with the rule of law presumption in favour of the protection of rights, an omission by Parliament to prevent the ratification of a human rights treaty should be treated as a substitute for transforming legislation.<sup>18</sup> However, Malkani's argument cannot account for human treaties which were ratified prior to the CRGA, including the UNCRC of 1989/1990.

Therefore, Lord Kerr is right to focus on the incremental argument, which scrutinises the rationale for *International Tin Council*. Lord Kerr quotes Lord Steyn, who said in *Re McKerr*, 'The rationale of the dualist theory, which underpins the *International Tin Council* case, is that any inroad on it would risk abuses by the executive to the detriment of citizens. It is, however, difficult to see what relevance this has to international human rights treaties which create fundamental rights for individuals against the state and its agencies.'<sup>19</sup> Lord Kerr agrees and concludes that a justification is 'not easy to find'.<sup>20</sup>

Although compelling, Lord Kerr does not fully respond to the modern defence of *International Tin Council* by Laws LJ in *Roma Rights*<sup>21</sup> and extra-judicially<sup>22</sup> as well as by Philip Sales and Joanne Clement.<sup>23</sup> According to those authors, the true rationale of the rule is respect for

<sup>16</sup> Brudner, 'The Domestic Enforcement of International Covenants on Human Rights,' 231

<sup>17</sup> [253]

<sup>18</sup> Malkani, 'Human Rights Treaties in the English Legal System,' 574

<sup>19</sup> *Re McKerr* [52]

<sup>20</sup> [255]

<sup>21</sup> *European Roma Rights Centre v Immigration Officer at Prague Airport* [2003] EWCA Civ 666 [97]

<sup>22</sup> John Laws, 'Is the High Court the Guardian of Fundamental Constitutional Rights?' *Public Law* 1993: 59, 61-62

<sup>23</sup> Philip Sales and Joanne Clement, 'International Law in Domestic Courts: The Developing Framework,' *Law Quarterly Review* 124 (2008): 388, 398-400

the sovereignty of Parliament and the practical need for Parliament to legislate and appropriate sufficient public funds. They argue that it would be false to assume that human rights impose no detriment on citizens, only benefits, because 'advantages here are burdens there'.<sup>24</sup> Respecting human rights, they say, has an impact on the public purse or curtails freedom to pursue other goals.

Especially in the case of social rights, there is substance to this argument. For example, Jeff King recounts the case of Brazil, where judges were willing to enforce the constitutional right to health without any regard to resource implications. As a result, 40,000 claimants per year (or 0.02% of a population of 200 million) consumed up to 4% of the federal medicines budget. What is more, those claimants were on average better off, thus diverting scarce resources from the cost-effective treatment of the poor.<sup>25</sup>

Some may use the Brazilian experience to counter Lord Kerr's dictum that a justification for the application of *International Tin Council* to human rights treaties is 'not easy to find'. But extreme examples should not serve to throw out the baby with the bath water. The problem in that case was not social rights *per se* (which for the most part are qualified rights), but a judicial approach which failed to take budgetary considerations into account. As King argues, the case for social rights is strong as long as the courts subscribe to a doctrine of judicial restraint. The English judiciary, rooted in a tradition of restraint in public law adjudication,<sup>26</sup> would be well suited to approach social rights in that way. Lord Kerr's conclusion can therefore be sustained.

The claimants in *Benefit Cap* were unsuccessful and the debate about the legal status of human rights treaties in domestic law is of no material use to them. Nevertheless, the general public and the legal community benefit from a dissenting judgment which is likely to reinvigorate the debate on this topic and which one day may be cited as a major stepping stone towards the recognition of social rights in the UK constitution. In an age of increasing inequality and austerity politics,<sup>27</sup> this can only be good news.

<sup>24</sup> *Roma Rights* [97]

<sup>25</sup> King, *Judging Social Rights*, 83-84

<sup>26</sup> *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 KB 223 (HL)

<sup>27</sup> Thomas Picketty, *Capital in the Twenty-First Century* (Harvard University Press, 2014)





## TACKLING TAX EVASION

Ebbe Rogge

### I. Introduction

Tax avoidance and tax evasion have been making news headlines for years. Recently, HSBC, one of the largest banks in Britain, has found itself in the spotlight amidst allegations that its Swiss subsidiary facilitated tax avoidance and possibly even tax evasion. Prosecutors from various countries have raided its offices<sup>1</sup> and its top brass had to answer to the Treasury Select Committee.<sup>2</sup> Even Coutts, the 300-year-old British private bank, is alleged to have assisted their clients in evading taxes.<sup>3</sup>

What exactly is wrong with tax evasion and how does it differ from tax avoidance? Together with other 'white collar' crimes, such as bribery, tax evasion is often more morally ambiguous than 'blue collar crimes', such as murder and rape.<sup>4</sup> For the general public, it may be difficult to regard non-filing or not paying taxes due in the same light as murder, especially when it concerns smaller sums of money: consider the everyday examples of paying the plumber or the nanny cash in hand. The issue is not helped by the fact that it is often difficult to establish the fine line between tax avoidance, which is legal, and tax evasion, which is not. There are, however, several moral issues with tax evasion, such as

<sup>1</sup> Jill Treanor, 'HSBC: Swiss bank searched as officials launch money-laundering inquiry,' *The Guardian*, February 18, 2015, <http://www.theguardian.com/news/2015/feb/18/hsbc-swiss-bank-searched-as-officials-launch-money-laundering-inquiry> (accessed February 28, 2015)

<sup>2</sup> Patrick Wintour, 'HSBC scandal caused horrible damage to reputation, says chairman,' *The Guardian*, February 26, 2015, <http://www.theguardian.com/business/2015/feb/25/hsbc-scandal-horrible-damage-reputation-chairman> (accessed February 28, 2015)

<sup>3</sup> Angela Monaghan and Jill Treanor, 'Coutts' Swiss operation faces German investigation over tax evasion claims,' *The Guardian*, February 26, 2015, <http://www.theguardian.com/business/2015/feb/26/coutts-swiss-operation-german-investigation-tax-evasion-claims> (accessed February 28, 2015)

<sup>4</sup> Stuart P. Green, 'What is Wrong with Tax Evasion?,' *Houston Business & Tax Law Journal*, 9 (2009): 223

stealing, breach of duty to obey the law and cheating.<sup>5</sup> Many countries are going through a period of austerity measures, including the United Kingdom ('UK'). Stealing from or cheating Her Majesty's Revenue and Customs ('HMRC') has a direct impact on the government's ability to deal with the budget deficit, the outstanding national debt and the maintenance of public services.

It is difficult to put any accurate numbers on tax evasion, but for the UK estimated yearly numbers vary between £40bn for both tax avoidance and evasion, according to HMRC, and up to £70bn for tax evasion on its own, according to some private research institutes.<sup>6</sup> At the outset of Parliament, the Chancellor of the Exchequer, George Osborne, announced that he would invest an additional £900m in HMRC to tackle avoidance, evasion and fraud.<sup>7</sup> The point is that, although tax evasion might be perceived to be less morally reprehensible than other criminal offences, its indirect effects upon society are significant. It deprives the government of its financial means to support, for example, national healthcare and education.

What legal means are available to combat tax evasion? First of all, it should be noted that tax evasion is often accompanied by other criminal offences, such as fraud or bribery. Consider, for example, a company running a double account and falsifying invoices, thereby hiding income and misleading HMRC. The most powerful legislation available is the Proceeds of Crime Act 2002 ('POCA'), which includes a wide definition for predicate offences for money laundering. The question here is whether tax crimes should be designated as predicate offences for money laundering and if so, how can this legally be justified? Can money and income originating from a legitimate business become criminal property by not declaring it? In fact, money laundering and tax evasion are each other's opposite: the former tries to convert dirty money into clean money, whilst the latter potentially turns clean money into dirty money by hiding profits from legal transactions.<sup>8</sup> And, given countries'

<sup>5</sup> *ibid* 232

<sup>6</sup> Richard Murphy, *Tax Justice and Jobs: The Business Case for Investing in Staff at HM Revenue and Customs*. Tax Research LLP, March, 2010

<sup>7</sup> HC Deb 12 October 2010 Col 135

<sup>8</sup> Of course, once the money is hidden, it needs to be brought back into the system again. Hence tax evasion on legitimate business first makes clean money dirty which subsequently needs to be laundered.

reluctance to enforce foreign tax laws, how can tax evasion become a predicate offence at an international level? This article seeks to provide some answers to these questions and looks ahead to some of the recently announced proposals by the UK government<sup>9</sup> as well as the Fourth EU Directive on Money Laundering and the propositions by the Financial Action Task Force ('FAFT') on this issue.

## II. Development of legislation and case law

Before the introduction of POCA, the Criminal Justice Act 1988 ('CJA') could be used to confiscate proceeds of criminal activities. It was also used to tackle tax evasion as this creates a pecuniary advantage for the purposes of CJA s71. In *R v Smith*<sup>10</sup> the pecuniary advantage was obtained by smuggling cigarettes past a custom post. Notwithstanding that in this case the cigarettes had been forfeited before they had realised their value and hence very little benefit was derived, the confiscation order had been properly imposed: a debt had been evaded and a pecuniary advantage was created.

This was followed in other cases such as *R v Edwards*<sup>11</sup> and *R v Ellingham*<sup>12</sup>, where the evasion of duty had led to a pecuniary advantage within s71. The main criminal act in those cases is the evasion of excise duty contrary to the Customs and Excise Management Act 1979 s170(2), though sometimes accompanied by other criminal offences such as forgery of official documents. The Criminal Justice Act 1988 s71 served to confiscate the proceeds.

The Criminal Justice Act 1993 and the Money Laundering Regulations 1993 were introduced to ensure compliance with the First EU Directive on Money Laundering. The First Directive was the first EU-wide initiative to prevent the abuse of the financial system for money laundering purposes. The Second EU Directive on Money Laundering was implemented through POCA and Money Laundering Regulations 2003. The Second Directive was intended to plug gaps existing in the First Directive. It also extended the scope of money laundering by taking

<sup>9</sup> Nicholas Watt, 'HSBC scandal: George Osborne signals new tax evasion measures,' *The Guardian*, February 23, 2015 <http://www.theguardian.com/politics/2015/feb/23/hsbc-scandal-george-osborne-tax-measures> (accessed February 28, 2015)

<sup>10</sup> [2001] UKHL 68.

<sup>11</sup> [2004] EWCA Crim 2923.

<sup>12</sup> [2004] EWCA Crim 3446.

into account more related offences. The Third EU Directive on Money Laundering was implemented through the Money Laundering Regulations 2007. The third directive concerned primarily the financial sector as well as specific professions, including accountants, lawyers and notaries, on whom further reporting and related requirements were imposed.

POCA, which implements part of the Second Directive, is particularly important, as it defines money laundering offences<sup>13</sup> in ss327 to 329 and provides their interpretation in s340. Replacing the use of CJA s71, POCA applies to recover tax in cases where the source of income is suspected to be criminal.<sup>14</sup> In *R v K*,<sup>15</sup> one of the most important cases in the context of POCA and tax evasion, it is established, and distinguished from *R v Gabriel*,<sup>16</sup> that the proceeds of cheating HMRC could amount to criminal property within the meaning of the POCA s340(5) even in the case where these profits were derived from a legitimate trade and hence subject to VAT or income tax.<sup>17</sup> The application of POCA for tax evasion thereafter was similar to the application of the CJA. In smuggling tobacco products, in for example *R v White*,<sup>18</sup> the perpetrator obtains a pecuniary advantage by evading paying excise duty, following *R v Smith*.<sup>19</sup> The pecuniary advantage would be determined by the excise duty evaded. Interestingly, because one is required to establish the market value of the smuggled goods to establish the duty, counterfeit products are considered

<sup>13</sup> *mens rea* is essential but can be difficult to establish in this context. See for example *R v Saik* [2006] UKHL 18 and *R v R* [2006] EWCA Crim 1974, or David Ormerod, 'Proceeds of Crime: Conspiracy – Mens Rea,' *Criminal Law Review*, 79 (2007) and David Ormerod, 'Proceeds of Crime: Approach to Appeals against Conviction of Conspiracy to Commit Money Laundering Offences brought on the Basis of the Decision of the House of Lords in Saik,' *Criminal Law Review*, 7 (2008): 567.

<sup>14</sup> The Asset Recovery Agency, which later merged with the Serious Organised Crime Agency per the Serious Crime Act 2007, has the powers with regards to the recovery of tax on income, which is not identified and suspected to be illegal.

<sup>15</sup> [2007] EWCA Crim 491.

<sup>16</sup> [2006] EWCA Crim 229.

<sup>17</sup> *R v Gabriel* merely established that it was possible, see D. C. Ormerod, 'Possession of Criminal Property: Profits of a Legitimate Trade' [2006] Crim LR 853. It was really defined in *R v K*, see also David Ormerod, 'Money Laundering: whether Undeclared Takings of a Legitimate Business Capable of Amounting to 'Criminal Property' where Offence of Cheating Revenue is Alleged' [2007] Crim LR 645.

<sup>18</sup> [2010] EWCA Crim 978.

<sup>19</sup> *R v Smith* (n 10).

to have a non-zero value, see *R v Varsani*.<sup>20</sup> Even products such as heroin for which no legitimate market exists, have a non-zero value based on their black market value, as per *R v Islam*.<sup>21</sup> In each of these cases it was possible to establish the import duty that was evaded.

### III. The debate on tax evasion as a predicate offence

The introduction of POCA was perhaps expected to provide more clarity on tax evasion as a predicate offence for money laundering.<sup>22</sup> But initially the approach of treating tax evasion under POCA was not without its critics. One of the important but critical academic views concluded that:

... the criminal laundering offences under the Criminal Justice Act 1988 and now under the Proceeds of Crime Act 2002 do not apply to the property of a person who is richer by reason of criminal failure to pay tax.<sup>23</sup>

These criticisms were, however, balanced by substantial counterarguments.<sup>24</sup> The first discussion point was how POCA s340(6), which defines what should be regarded as pecuniary advantage, should be read in this context. Does the pecuniary advantage obtained refer to the total amount of tax liability that was evaded or should it, by regarding the advantage as merely the deferral of the tax liability, only constitute the penalties and interest due on the later payment of the tax liability? This makes an important difference especially as in practice the value of the deferral will be almost nothing. Critics argue that the latter is the case.<sup>25</sup> This argument should lead to the conclusion that *R v Smith*<sup>26</sup> was decided incorrectly, as the House of Lords has decided that the whole of unpaid tax is liable to be confiscated. The question is whether this first argument, given existing legislation and case law, can still be accepted by the courts.

<sup>20</sup> [2010] EWCA 1938.

<sup>21</sup> [2009] UKHL 30.

<sup>22</sup> Keith E. Oliver, 'International Taxation: Tax Evasion as a Predicate Offence to Money Laundering,' *International Legal Practice*, 27 (2002): 55

<sup>23</sup> Peter Alldridge and Ann Mumford, 'Tax Evasion and the Proceeds of Crime Act 2002,' *Legal Studies*, 25 (2005): 371

<sup>24</sup> David Ormerod, 'Money Laundering: whether Undeclared Takings of a Legitimate Business Capable of Amounting to 'Criminal Property' where Offence of Cheating Revenue is Alleged' *Criminal Law Review*, (2007)

<sup>25</sup> Peter Alldridge and Ann Mumford (n 23) 367

<sup>26</sup> *R v Smith* (n 10).

Another potential issue with this first argument lies in how events in these cases unfold.

In *R v K*,<sup>27</sup> the proceeds of his shop accounted for in the second till, which were hidden under fruit baskets and on their way out of the country, would only have carried a tax liability a year later when taxes of that year were declared. Is the cheat here the transportation of his income out of the country or only at the point of the purposefully incorrect calculation of annual profits and when lower tax is paid? If the cheat is the former, then it is before the liability is due and perhaps the entire profit of his actions is tainted. But only if you take the latter then a debt has been created and could the pecuniary advantage be regarded as interest due.<sup>28</sup> Hence the first argument becomes more problematic when the cheat has happened well before any tax liability was due.

The second argument hinged on whether criminal property can be identified because without identification of the [criminal] property, there can be no criminal laundering offence'.<sup>29</sup> But the counter argument to this is that 'there is no direct authority requiring proof of specific items of identifiable property'.<sup>30</sup>

Although being able to point to specific items as criminal property would make for good evidence, it would appear to be sufficient to demonstrate that criminal property existed at the relevant point in time. Even if it is no longer possible to identify the criminal property, it can be shown to have existed in some form. The third argument stated that any pecuniary advantage from the cheat is merely a hypothetical benefit. As such, it cannot be concealed and so forth. However, in *R v Smith*,<sup>31</sup> the court has already shown it can regard debt as a property, which can be concealed.

Altogether there are strong counterarguments, in addition to existing case law, which would make it difficult to revert the application of POCA in tax evasion cases. In fact, it is now common practice to apply POCA for tax evasion; the underlying commercial activity may well be conducted in a legitimate manner, the unpaid tax represents a taxpayer's

<sup>27</sup> *R v K* (n 15).

<sup>28</sup> David Ormerod (n 24) 647

<sup>29</sup> Peter Alldridge and Ann Mumford (n 23) 371

<sup>30</sup> Ormerod (n 24) 647

<sup>31</sup> *R v Smith* (n 10).

benefit from criminal conduct and thus subject to confiscation in criminal proceedings.<sup>32</sup>

#### IV. An International Perspective

The focus thus far has to a large extent been on a UK national level, however, the international dimension of the debate on tax evasion and money laundering must also be considered. This inevitably will make the debate more complex. Firstly, tax evasion is not considered a criminal offence in every country. Some countries do not levy tax on income and hence it cannot be a crime to evade it. Secondly, it is a generally accepted principle of international law that one country will not enforce the tax laws of another country.<sup>33</sup> FATF, in its first recommendation, states that all serious offences should be predicate offences,<sup>34</sup> which is implemented in POCA s340(2). The unequal treatment of tax evasion as a criminal offence and the fact that countries do not enforce each other's tax regime make it difficult to fight tax evasion internationally with money laundering laws. National legislation, such as POCA, works well in principle in an international context,<sup>35</sup> just not with respect to tax evasion.

Consider for example the case of Panama, which has strict anti-money laundering regulation, but does not rely on income tax as an important part of its tax revenue and hence does not regard evasion of income tax as a crime. It follows that in Panama, as it uses the principle of dual criminality, will normally not comply with any foreign requests for information concerning tax matters.<sup>36</sup> It is possible to circumvent these

<sup>32</sup> Jonathan Fisher QC, 'When criminal property is not criminal,' 2013 <http://www.jonathan-fisher.co.uk/Latest-News/when-criminal-property-is-not-criminal.html> (accessed February 28, 2015)

<sup>33</sup> This principle dates far back, see for example *Holman et Al' v Johnson, alias Newland* (1775) 1 Cowper 341.

<sup>34</sup> Financial Action Task Force, 'FATF 40 Recommendations,' October 2003, incorporating subsequent amendments until October 2004 <http://www.fatf-gafi.org/media/fatf/documents/FATF%20Standards%20-%202040%20Recommendations%20rc.pdf> (accessed February 28, 2015)

<sup>35</sup> See *Director of the Assets Recovery Agency v Virtosu* [2008] EWHC 149 (QB), where a claim for a civil recovery order under POCA for criminal property, obtained by prostitution and people trafficking in a foreign country, was successful. The principle of dual criminality was met under s241 of the Act.

<sup>36</sup> Bryan S. Arce, 'Taken to the Cleaners: Panama's Financial Secrecy Laws Facilitate the Laundering of Evaded US Taxes,' *Brooklyn Journal of International Law*, 34 (2009): 465

issues. The United States ('US') has Tax Information Exchange Agreements ('TIEAs') with various countries. A TIEA allows the free exchange of tax information, regardless of whether in these countries tax evasion is a predicate offence for money laundering. The US currently has a TIEA with Panama and many other countries, for example Bermuda and the Bahamas. Establishing such agreements works better than trying to harmonize tax laws between the different countries.<sup>37</sup>

This cooperation also occurs within the European Union. This article has highlighted the three relevant directives currently in force; in the next paragraph the upcoming Fourth Directive is discussed in more detail. Finally, consider the example of Switzerland which tried to uphold its banks secrecy laws when the US requested cooperation from UBS, a large Swiss bank, to investigate tax evasion by US citizens.<sup>38</sup> In Switzerland, tax evasion is not regarded as a crime as it takes the view that it is easy for untrained citizens to misreport on tax returns.<sup>39</sup> Tax fraud, which Switzerland considers a crime, is covered in a TIEA between the US and Switzerland, but tax evasion is not. Although the matter came to an agreement, in which bank details would be provided, it was struck down by the Swiss courts but too late to prevent client details going to the US authorities.

## V. The future of fighting tax evasion

A few years ago FATF published its recommendations on international standards for combating money laundering.<sup>40</sup> It has explicitly included tax crimes as predicate offences to money laundering, both in the category of 'smuggling (including in relation to customs and excise duties and taxes)'

<sup>37</sup> Julie Roin, 'Competition and Tax Evasion: Another Perspective on International Tax Competition,' *Georgetown Law Journal*, 89 (2001): 543

<sup>38</sup> Jaclyn H. Schottenstein, 'Is Bank Secrecy Still Bankable?: a Critical Review of Bank Secrecy Law, Tax Evasion and UBS,' *Entrepreneurial Business Law Journal*, 5 (2010): 351 and Niels Jensen, 'How to Kill the Scapegoat: Addressing Offshore Tax Evasion with a Special View to Switzerland,' *Vanderbilt Law Review* 63, (2010): 1823

<sup>39</sup> Jaclyn H. Schottenstein (n 36) 380.

<sup>40</sup> Financial Action Task Force, 'International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation – The FATF Recommendations,' February, 2012 [http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF\\_Recommendations.pdf](http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf) (accessed February 28, 2015)



and as a category on its own 'tax crimes – related to direct taxes and indirect taxes'.<sup>41</sup> A Fourth EU Directive on Money Laundering<sup>42</sup> is being proposed, which incorporates the FATF recommendations, including those relating to tax crimes. This would not only confirm the current practice in the UK to treat tax evasion as such, but it will make it standard practice in the EU. This would address some of the concerns raised in the previous paragraph: at present, tax crimes vary per country, each country has its own definition of tax evasion and each country has its own idea about how it differs from tax avoidance. At least within the EU this will be harmonised.

A more contentious element of the Fourth Directive concerns beneficial ownership. This could create central registers on the ultimate beneficial owners or corporate and other legal entities. It may cover trusts and trust beneficiaries. Although access to these registers may be limited, it could include competent authorities as well as anyone with a legitimate interest. The point is that some of these vehicles may be used for the purpose of tax evasion. It may therefore be of benefit in fighting tax evasion to have such rules adopted throughout the EU.

Additionally, the UK government announced that it is considering to introduce new civil and criminal penalties for those who are involved in aiding and abetting tax evasion and aggressive tax avoidance.<sup>43</sup> Although it could be argued that large financial institutions can easily bear the costs of additional fines, most of the damage will be to their reputation and any possible changes to their license to operate. The argument which the financial institutions will no doubt put forward is whether it can be justified to add to their already increasing regulatory burden. The answer to that question, given the impact of tax evasion on society at large, must be a resounding yes. There is an increased pressure on HMRC to improve the recovery of the proceeds of crime from tax evasion.<sup>44</sup> Given

<sup>41</sup> *ibid* 113.

<sup>42</sup> Commission, 'Proposal for a Directive of the European Parliament and of the Council on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing' COM (2013) 45 Final

<sup>43</sup> Nicholas Watt (n 9).

<sup>44</sup> Her Majesty's Inspectorate of Constabulary, 'An inspection of Her Majesty's Revenue and Customs performance in addressing the recovery of the proceeds of crime from tax and duty evasion and benefit fraud,' Revisit 2013 <http://www.justiceinspectors.gov.uk/hmic/wp-content/uploads/hmrc-proceeds-of-crime-revisit.pdf> (accessed February 28, 2015)

the financial situation of the UK as well as the public mood following recent scandals, it is likely to try and do so more and more aggressively.

## VI. Conclusion

This article highlighted various legal issues in the fight against tax evasion in the UK and internationally. In the UK, tax evasion is successfully used as predicate offence under POCA. Its initial criticism hinged on whether the pecuniary advantage is the interest on the deferred debt created or the whole debt to HMRC. Sufficient arguments can be given favour of the latter, which is also how the law is applied in practice. At an international level, the situation is more complex, firstly due to differences in tax laws per country and secondly because countries do not enforce each other's tax laws. Tax treaties can provide some relief. FATF addressed these issues by explicitly including tax evasion in its recommendation of predicate offences.

The EU is making progress in both implementing FATF's recommendations and in harmonising by making tax crimes a predicate offence to money laundering in the EU through its upcoming Fourth Directive. Tax evasion has a very significant effect on the governments' budgets and hence on public services, reducing outstanding national debt and the deficit. International harmonisation and cooperation in the fight against tax evasion, whether through money laundering legislation or otherwise, is essential.

## EXPLORING THE UNITED STATES' AND UNITED KINGDOM'S TAKEOVER REGIMES

Constantinos Pashiardis

The sale of a company has been described as 'the most significant and emotional point in its history'.<sup>1</sup> This article will primarily attempt to depict the stark contrast in the regulation of management's role during takeovers of public companies between two prominent jurisdictions with sophisticated capital markets, namely the United States and the United Kingdom. Furthermore, this article will explore whether takeover defences in the absence of prohibitory legislation can be legally justified.

At present, the existence of the infamous 'non-frustration rule'<sup>2</sup> precludes UK boards of directors from employing takeover defences. In the UK, as opposed to the US, any action that would render management able to 'divert hostile offers into a negotiated acquisition process'<sup>3</sup> or thwart unsolicited offers altogether is prohibited.

The proper role of management during takeovers has sparked numerous academic debates that continue in the present day. Depicting the essentials of this debate is beyond the scope of this article. Nonetheless, this author stipulates that the unavailability of takeover defences without contemporaneous shareholder approval mandated by the Takeover City Code drastically reduces the negotiating power of a UK board of directors, which in turn has a direct correlation to the premium offered to shareholders.

<sup>1</sup> Michael R. Patrone, 'Sour Chocolate: The U.K. Takeover Panel's Improper Reaction to Kraft's Acquisition of Cadbury' (2011) 8 BYU I.M.L.R. 64, 83 citing Honorable Chancellor Leo E. Strine, Harvard Law School.

<sup>2</sup> The City Code on Takeovers and Mergers (2013), Rule 21.

<sup>3</sup> Albert Saulsbury, 'The Availability of Takeover Defenses and Deal Protection Devices for Anglo-American Target Companies' (2011) 37 Del.J. Corp. L.

Takeovers are undoubtedly bound with the world of corporate governance, with one author describing them as a 'seismic event'.<sup>4</sup> The recent economic crisis, partially attributed to the failure of corporate governance in financial institutions,<sup>5</sup> provides renewed support in favour of a change in the UK takeover regime and logically raises the question 'why is the United Kingdom so married to the idea of the Board Neutrality Rule if its own takeover watchdog unequivocally states that it places companies at a disadvantage?'<sup>6</sup>

Part I of this paper provides background information on takeovers, describing the existing regulatory regime in the UK and the US. Part II subsequently explores the corporate background and the practical availability of defences if the UK were to abolish the non-frustration rule.

### I. The UK and US Takeover framework

Before embarking on an analysis of the UK and US takeover regulatory framework, it is appropriate to have a brief overview of the reasons why takeovers occur. It has been extensively observed that takeovers usually occur in periods of economic recovery and are 'frequently driven by industrial and technological shocks'.<sup>7</sup> Takeovers are conducted for numerous reasons, such as allowing a bidder company to create synergetic gains with the target company, or because the bidder believes that under its management the target company will be able to operate more efficiently, producing more wealth. Additionally, it is considered that takeovers assist in maintaining efficient capital markets by correcting the wrongly-assigned share price and allowing acquirers to take advantage of the difference between the market value of a company and its true value. Furthermore, takeovers are considered to be the 'nuclear threat of

<sup>4</sup> John Armour, Jack B. Jacobs, and Curtis J. Milhaupt, 'The Evolution of Hostile Takeover Regimes in Developed and Emerging Markets: An Analytical Framework' 52 (2011) 52 HLR 220.

<sup>5</sup> Andrew Keay, 'The Duty to Promote the Success of the Company: Is it Fit for Purpose?' (2010) University of Leeds School of Law, Centre for Business Law and Practice Working Paper.

<sup>6</sup> Patrone, (n.1) 83.

<sup>7</sup> Marina Martynova, and Luc Renneboog, 'A Century of Corporate Takeovers: What Have We Learned and Where Do We Stand?' (2008) 32 Journal of Banking and Finance, 2148.

corporate law, the most dramatic of all corporate governance devices<sup>8</sup> by disciplining the potential target's management as the fear of losing their position will work as an incentive and increase the company's performance.

#### A. The United Kingdom

The history of hostile takeovers in the UK can be traced as early as the 1950s. The unprecedented rise of post-war inflation in real estate values,<sup>9</sup> coupled with government imposed dividend restrictions on public companies, led to a reduction in stock prices. As a result of this combination of circumstances, the first bids, which circumvented target's management through direct offers to shareholders, emerged, shocking the City Establishment.<sup>10</sup> The shock was clearly felt by target management, which sought ways to frustrate hostile bids.

The first signs of public outcry against boards' unilateral powers were demonstrated in the takeover battle of Savoy and the battle for British Aluminium, described as the 'the pivotal contest in the history of British takeover regulation'.<sup>11</sup> The ill-founded strategies of the board and its attempts of taking defensive action without shareholder approval were the stepping stones for institutional shareholders to take the forefront in influencing how takeover bids should be regulated. Institutional shareholder activism spawned the *Notes on Amalgamation of British Businesses*, whose underlying rationale was to protect shareholder interests by establishing shareholder primacy along with something which was then seen as necessary: correlative board neutrality.

The Notes' effect was minimal and was quickly followed by the inception of the *Takeover Code* and the *City Panel on Takeovers and Mergers*. The City Panel is a body responsible for overseeing compliance with the Takeover Code by providing a system of 'real-time' guidance in takeovers. The censure and expulsion powers entailed within the Panel firmly reignited the modus operandi of the 'private members' club' of the City of London which, despite not strictly having the force of law behind

<sup>8</sup> John Armour, and David A.Skeel, 'Who Writes the Rules for Hostile Takeovers, and Why? The Peculiar Divergence of US and UK Takeover Regulation' (2007) 95 Geo.L.J 1727, 5.

<sup>9</sup> Mergers Take Over, ECONOMIST, July 4, 1959.

<sup>10</sup> Armour and Jacobs (n 4)

<sup>11</sup> Ibid, 235.

it, made conditional the use of the facilities of the securities markets in the UK.

Moving away from the historic development of the Takeover Code, our emphasis will now shift to an analysis of how board neutrality is manifested within the Code. The BNR derives from General Principle Three<sup>12</sup> which is established through Rule 21:

During the course of an offer, or even before the date of an offer...the board must not, without the approval of the shareholders in general meeting, take any action which may result in any offer being frustrated or in shareholders being denied the opportunity to decide on its merits'.<sup>13</sup>

In essence, this precludes any action that can be characterised as being capable of frustrating the bid unless there is contemporaneous shareholder approval. The rule is not a condemnation of defensive action as such but rather it ensures shareholders are not effectively bypassed by management's decisions. Whether this outcome is desirable, given the fact that contemporaneous shareholder approval would practically mean shareholder rejection of the bid, will be explored later on.

#### B. The United States

In setting the proper context for examining the US regime it should be stated that the discussion will concern the judicial jurisprudence of the state of Delaware where 'more than 50% of all US publicly-traded companies and 63% of the Fortune 500 are incorporated'.<sup>14</sup> Delaware courts are the primary and most influential source of takeover law<sup>15</sup> and 'The Delaware Court of Chancery has been described as the 'most sophisticated and efficient corporate law arbiter'.<sup>16</sup> In the beginning of the 1960s, a shift took place in the primary way through which acquiring corporate control was accomplished. The new vehicle of hostile tender offers replaced the practice of proxy contests in removing the target

<sup>12</sup> The Takeover Code (n.2), General Principle Three.

<sup>13</sup> Ibid

<sup>14</sup> Delaware Division of Corporate Law <<http://corp.delaware.gov/>> accessed (10 August 2014).

<sup>15</sup> Armour and Skeel (n 8).

<sup>16</sup> Ibid, 237.

company board.<sup>17</sup> The structural form of these offers was frequently abusive towards target shareholders<sup>18</sup> and the capital used as consideration for the offer mostly consisted of high interest unsecured securities (junk-bonds). This environment led to the development of a three-limb takeover regulatory regime.

The first limb developed was the Williams Act 1968 enacted as part of federal legislation and, according to its sponsor, 'made the relevant facts known so that shareholders have a fair opportunity to make their decision'.<sup>19</sup> The Act was a step towards reducing instances of shareholder abuse by establishing procedural requirements governing tender offers as well as requiring the disclosure of extensive information about the offer. However, the most important gap left by the Williams Act was the role of target management 'in responding to and particularly, resisting – hostile takeover bids'.<sup>20</sup>

The second limb consists of the notorious Unocal doctrine which is an 'intermediate standard'<sup>21</sup> for assessing defensive board conduct in response to a hostile bid, as defined in *Unocal v Mesa Petroleum Corporation*.<sup>22</sup> The Unocal test is two-fold:

1) The board must show that it is confronted with a legitimate threat to the company's corporate policy and effectiveness, thus providing a board with the power and obligation of diverting hostile offers;

2) That the defensive measures adopted are reasonable in relation to the threat posed.

The Delaware Chancery Court in *Unocal* clearly recognised the natural conflict of interest entailed in takeovers 'the omnipresent spectre that a board may be acting primarily in its own interests rather than those of the corporation and its shareholders'.<sup>23</sup> This conflict is an enhanced manifestation of the principal-agent problem, evident in public

<sup>17</sup> S.L.Hayes & R.A.Taussig, 'Tactics of Cash Takeover Bids' (1967) 45 Harv.Bus.Rev.

<sup>18</sup> Armour and Skeel (n 8) 243.

<sup>19</sup> S.REP. No. 90-550, at 3 (1967).

<sup>20</sup> Armour and Skeel, (n 8), 244.

<sup>21</sup> A middle ground between the two usual standards of review in corporate law, that is, the business judgment rule and the intrinsic fairness test, see R.J.Gilson & Reiner Kraakman,(1989) 'Delaware's Intermediate Standard for Defensive Tactics: Is There Substance to Proportionality Review?', 44 Bus.Law. 247.

<sup>22</sup> 493 A.2d 946 (Del. 1985).

<sup>23</sup> Ibid 954-955.

companies as a consequence of the separation between ownership and control.<sup>24</sup>

The *Unocal* test quickly expanded in the scenario where management is not defending a bid in order to maintain its independence, but where it has decided to subject the company to a change of control transaction or has decided to sell it. Under these circumstances, *Revlon* duties apply where 'the role of directors changed from defenders of the corporate bastion to auctioneers charged with getting the best price for the stockholders at a sale of the company'.<sup>25</sup> Nonetheless, in *Paramount v Time*<sup>26</sup> the court appeared to reignite the board's power of defending the company by clarifying when *Revlon* duties would be triggered. This paved the way for directors to consider factors apart from the monetary value being offered to shareholders.

The court, elaborating in *Unitrin v American General Corp*, stated that 'when a corporation is not for sale, the board of directors is the defender of the metaphorical medieval corporate bastion and the protector of the corporation's shareholders'.<sup>27</sup> Whilst Delaware jurisprudence is continuing to evolve, adapting to the circumstances presented, one thing is clear: 'directors have wide powers to resist a potential hostile takeover as long as they act in good faith'<sup>28</sup> and the measures adopted are proportional to the threat. In the words of Grundfest, 'The takeover wars are over. Management has won'.<sup>29</sup>

The third limb, which is admittedly the one with the least impact, is that State Anti-Takeover Statutes which have undergone three generations of reformulation.<sup>30</sup> State anti-takeover statutes have provided an additional layer of protection against hostile bidders by encouraging closer shareholder involvement. The first generation of takeover statutes, such as the *Illinois* anti-takeover statute, granted the power to evaluate an

<sup>24</sup> Adolf Berle and Gardiner Means, *The Modern Corporation and Private Property* (2nd edn Transaction Publishers 1991).

<sup>25</sup> *Revlon Inc. v. MacAndrews & Forbes*, 506 A.2d 173 (Del. 1986).

<sup>26</sup> 571 A.2d 1140 (Del 1989).

<sup>27</sup> 651 A.2d 1361, 1388 (Del. 1995).

<sup>28</sup> William Magnuson, 'Takeover Regulation in the United States and Europe: An Institutional Approach' (2009) 21 Pace Int'l L.Rev. 205.

<sup>29</sup> Joseph Grundfest, 'Just Vote No: A Minimalist Strategy for Dealing with Barbarians Inside the Gates', (1993) 45 Stan.L.R. 857.

<sup>30</sup> Magnuson, (n 28) 216.



offer's merits to a state official regarding the level of disclosure that had taken place, but was ultimately held to be unconstitutional.<sup>31</sup>

The second generation of anti-takeover statutes had numerous variations imposing significant, and sometimes onerous, requirements to bidders, but these statutes were ultimately upheld<sup>32</sup>. One of these variations came to be known as the 'control share acquisition' statute. Essentially, it required disinterested shareholders to authorise whether the bidder's outstanding shares were to carry any voting rights. Another variation was requiring a supermajority of shareholders to approve the vote, but only if the best price was paid to every shareholder by the offeror. The third generation of anti-takeovers can be described as even more burdensome compared to the previous two. One instance, The Pennsylvania disgorgement statute, requires a bidder to turn in any profit yielded within an eighteen month period<sup>33</sup>.

The different manifestations of Takeover regulation in the UK and the US have now been examined, where the former restricts frustrating action by management, while the latter adopts a wider and more permissive stance. I will now explore whether takeover defences are a legal possibility in the UK if they forego the non-frustration rule.

## II. Takeover Defences in the UK Corporate Context

An analysis on the practical readiness of takeover defences within the UK basic corporate law framework is necessary in order to grasp their operation. Kershaw advances the view that, due to the current state of the UK's corporate law framework, 'adopting or rejecting board neutrality rule makes more than a trivial difference to the defensive capability of the board'.<sup>34</sup> This is concluded by investigating takeover defences and whether they conform to the necessary characteristics of formal availability, effectiveness in practice and compliance with directors' duties under the Companies Act 2006.

The following section will consist of an analysis of the first two characteristics, of board installed takeover defences: poison pills, equity

<sup>31</sup> Edgar v. MITE Corp 457 U.S. 624 (1982).

<sup>32</sup> CTS Corp. v. Dynamics Corp. of America 481 U.S. 69 (1987).

<sup>33</sup> 15 PA. CONS. STAT. ANN. §§ 2571—2576 (West 1999).

<sup>34</sup> David Kershaw, Carsten Gerner-Beuerle, and Mateo Solinas, 'Is the Board Neutrality Rule Trivial? Amnesia About Corporate Law in European Takeover Regulation' (2011) EBLR 559.

restructuring and the sale of important assets (Crown Jewels). The final part of this section will explore the defences' legal compliance.

#### A. Poison Pills

The poison pill defence involves the attachment of a warrant to each outstanding share. When a specified percentage threshold is surpassed by a potential bidder, the holder of the share is granted the opportunity to buy shares of the company at a notable discount, causing share-value dilution to the bidder and thwarting the offer, as the company is no longer an attractive entity. In the UK Company law framework, Kershaw notes the formal availability of the pill in the absence of the non-frustration principle exists albeit requiring specific ex-ante shareholder authorisation.<sup>35</sup> Additionally, subject to s.561(3) Companies Act 2006, there are no difficulties with pre-emption rights as they do not apply in relation to the allotment of shares in exercise of an option. Nonetheless, support for the invalidity of the poison pill is found in its so-called 'discriminatory' function. Pursuant to Principle 5 of the Listing Rules, which require that a company 'treats all holders of the same class of shares that are in the same position equally in respect of the rights attaching to such shares'<sup>36</sup> the activation of the poison pill will discriminate against the bidder who is precluded from exercising his option.

Nonetheless, Kershaw, with whom this author agrees, advances the opinion that there is no discrimination between shareholders, but rather the pill provides the right of purchasing shares based on the understanding that the shareholders will comply with the specified conditions.<sup>37</sup> Simply put, the bidder is not complying with those conditions by crossing the threshold of allowed shareholding and is thus not allowed to exercise his rights. Currently the UK corporate background allows shareholders to remove directors without cause with a simple majority vote.<sup>38</sup> The unfettered right of removal, coupled with the fact that a shareholder meeting can be called by shareholders comprising

<sup>35</sup> Ibid.

<sup>36</sup> L.Rule 7.2. Premium Listing Principle 5.

<sup>37</sup> Kershaw, Gerner-Beuerle and Solinas, (n 34).

<sup>38</sup> Companies Act 2006, s.168.

5% of the general body at any point in time, shows that removing directors is readily facilitated. While the formal availability of the pill may be accepted, the related aspects of the procedure and requirements for the removal of the board of directors significantly hinders its operation.

### B. Equity Restructuring

This defence consists of issuing shares to a friendly-third party. It is likewise a legal possibility in the UK, albeit requiring, as previously shown with poison pills, ex-ante authorisation by shareholders, as well as a waiver of pre-emption rights which are applicable when the consideration for the issuing of the shares comprises only cash.<sup>39</sup> While acknowledging the theoretical success of this defence, Kershaw is sceptical due to the level of informal shareholder control of share issues and the strong ties of institutional shareholders with their pre-emption rights.<sup>40</sup> Any possible abuse by directors will arguably create a backlash by these shareholder groups. In contrast with the operation of the poison pill, equity restructuring defences may be activated before the shareholder meeting to remove the directors takes place. Nonetheless, in practice, since shareholders can dismiss directors at any given time, the actions of directors are curtailed on a psychological level, for they would be knowingly acting against the wishes of shareholders.

### C. Asset Sales

In the Takeover context, assets vested in companies may be the sole reason for initiating a takeover. The rationale underlying this defence is that, if the asset pursued is sold to a third party, the company will be able to fend off the attack. The ability to perform an asset sale usually vests with the board of directors unless otherwise specified in the company's articles of association. The exception to this rule lies where a company is a listed company and the asset sold represents more than 25% of the company value, mandating shareholder approval.<sup>41</sup> Nevertheless, any asset sale up to this percentage is essentially a shareholder-free transaction which, in some circumstances, may be adequate to resist a

<sup>39</sup> Companies Act 2006, s.565.

<sup>40</sup> Kershaw, Gerner-Beuerle and Solinas, (n.34) 574.

<sup>41</sup> Listing Rule 10.

takeover. Reflecting on the previous analysis, the possibility of dismissal will loom in the background following a defending of the company against shareholder wishes.

#### D. Legally Justified

Directors in the United Kingdom are empowered by shareholders, who delegate their authority to the board through the articles of association, whilst directors are subject to fiduciary duties.<sup>42</sup> Common law's approach to corporate decision-making has customarily afforded management a wide discretion which is currently limited by the 'proper purpose' rule of s.171 Companies Act 2006.<sup>43</sup> The duty to promote the success of the company, established in s.172, is a codification of the common law obligation of loyalty in relation to the exercise of corporate power. Commentators hold conflicted views as to which section should prevail in the takeover context, and this debate is augmented due to the absence of a hierarchy in the adherence of these duties. During this analysis it will be made apparent that case law prior to the adoption of the BNR in the Takeover Code has mostly rejected action that can be characterised as defensive. Nonetheless, it is submitted that recent judicial input leaves ample scope to argue that defensive action may be available whilst directors' fiduciary duties are observed.

The 'proper purpose' rule emerged as a clearly separate rule in *Hogg v Cramphorn*,<sup>44</sup> questioning the use of directors' powers in defeating a hostile takeover. Despite the court accepting that the actions were performed in good faith and in a manner that 'would be more advantageous to the shareholders' the law did not 'permit directors to exercise powers delegated to them ...in such a way as to interfere with the majority with the exercise of its constitutional rights'.<sup>45</sup> In this instance these rights entailed partly the right of non-interference with the shareholder's right of accepting or rejecting the bid.

<sup>42</sup> Model Articles for Public Companies, Art.3.

<sup>43</sup> Andrew Johnston, 'Takeover Regulation: Historical and Theoretical Perspectives on the City Code' (2007) 66 C.L.J 422, 443.

<sup>44</sup> [1967] Ch. 254.

<sup>45</sup> Ibid 268.

The following case of *Howard Smith Ltd v Ampol Petroleum*<sup>46</sup> concerned an increase of voting power in favour of a specific shareholder at the expense of others. Lord Wilberforce expressed the view that 'it must be unconstitutional for directors to use their fiduciary powers over the shares in the company *purely* for the purpose of destroying an existing majority or creating a new majority which did not previously exist'.<sup>47</sup> The only exception for interfering with a shareholder's right of response to a takeover offer is if there is 'oppression or similar impropriety'.

These opinions are arguably strict, leaving minor room for manoeuvre. Both Kershaw and Johnston support the view that action that does interfere with the exercise of shareholders' right is possible in the presence of ex-ante or ex-post shareholder approval as well as that 'if the substantial purpose of the board is not to interfere with the shareholders' constitutional rights then the action is lawful'.<sup>48</sup> However, their views diverge when Johnston<sup>49</sup> argues that the current form of the proper purpose rule does not denote a proscription of defensive measures. Conversely Kershaw argues that, due to the inherent solely defensive purpose of some of the defences, the board would be unable to convince a court of the existence of a 'legitimate corporate purpose' and that interference with shareholder's rights was an incidental consequence.<sup>50</sup>

The 'water is muddled' in the case of *Cayne v Natural Resources*,<sup>51</sup> which contrasts with the rationales of *Hogg* and *Howard Smith* of not enquiring into the reasons for the use of the defence. In exercising the power to allot shares for reasons other than raising of capital (takeover defences), Megarry VC expressed the view that the rule in *Hogg* 'must not be carried too far' by favouring an active involvement of the board where the target company is threatened with being 'reduced to impotence and beggary,' describing a fictional scenario where a competitor acquires an equity position in the competing company with the sole purpose of damaging it.<sup>52</sup>

<sup>46</sup> [1974] A.C. 821.

<sup>47</sup> Ibid [838] (emphasis added).

<sup>48</sup> Kershaw, Gerner-Beuerle and Solinas, (n 34) 579.

<sup>49</sup> Johnston, (n 43) 440.

<sup>50</sup> Kershaw, Gerner-Beuerle and Solinas, (n 34) 580.

<sup>51</sup> [1984] 1 All E.R. 225 CA (Civ Div).

<sup>52</sup> Ibid.

Further support of this position is found in *Teck Corp v Millar*,<sup>53</sup> where issuing shares to frustrate a takeover was considered proper as long as it was done with an ultimate purpose in mind which was implemented in good faith for the benefit of the company. What is remarkable is that this case was mentioned in *Howard Smith* with Lord Wilberforce agreeing that it is in line with English authority, thus where 'directors believe that there will be substantial damage to the company's interest if the company is taken over, then the exercise of their powers to defeat those seeking a majority will not necessarily be categorised as improper'.<sup>54</sup>

Moreover, in *Criterion v Stratford Properties*,<sup>55</sup> the board used a defensive mechanism which requires attention due to the court's 'analysis of the purpose behind the exercise of the power in question'.<sup>56</sup> Hart J at first instance, despite holding that the defence was unlawful due to its disproportionality, as a preliminary issue identified the board's right to obstruct the exercise of a shareholder's constitutional right. This would be allowed where 'reasonable directors could legitimately have concluded that the economic damage....justified the company in contingently alienating its assets'.<sup>57</sup> The House of Lords did not rule on the issue of when board controlled defensive action could be lawful, leaving the law in an uncertain state, although Lord Scott's dictum is nonetheless of considerable gravity. If, as a matter of authority, the defences were valid 'there could be no reason why the [poison pill] would not be enforceable'.<sup>58</sup> Nevertheless, Kershaw, commenting on the impact of *Criterion* argues that there is limited scope for its application due to the fact that the situations 'authorising' board defensive action would need to be akin to impotence and beggary which, as he argues, is difficult to conceive due to the other peripheral rules of the Takeover Code.<sup>59</sup>

On the other hand, commentators such as Robinson and Keay advocate that the tentative nature of s.171 and the unclear position as to the precise effects of s.172, absent legal guidance, on its effect on

<sup>53</sup> [1973] 33 D.L.R. (3d) 288.

<sup>54</sup> Ibid at 317.

<sup>55</sup> [2002] EWHC 496 (Ch).

<sup>56</sup> Alan Dignam and John Lowry, *Company Law* (OUP 2010), p.324.

<sup>57</sup> [2002] EWHC 496 (Ch) 166.

<sup>58</sup> [2004] UKHL 28, [30].

<sup>59</sup> Kershaw, Gerner-Beuerle and Solinas, (n 34) 582.

corporate governance could provide directors with immunity.<sup>60</sup> Robinson argues that the more ambiguous the limits of directors' decision making limits are in pursuing the success of the company, the more straightforward it is to justify the use of defences. If a director genuinely believes that the takeover would be detrimental to his company then not only should the director allot shares to defend it but also allowing the bid without any attempt to defend against it would breach s.172.<sup>61</sup> Robinson fathoms the belief that there was instability around a norm of shareholder value prior to 2006 and, after the introduction of the Companies Act 2006, there are even more arguments in support for its departure.<sup>62</sup>

The government's aims for adopting s.172 were clearly in order to 'drive long-term company performance and maximise overall competitiveness and wealth and welfare for all,'<sup>63</sup> with directors not running a company for short-term gains alone. Lord Mandelson's remarks after Cadbury's takeover on the operation of s.172 as being subject to the fast-moving circumstances of takeovers 'where the company's newest shareholders may not have a long-term commitment to the company'<sup>64</sup> support a rejection of the view that 'the proper purpose rule only makes sense if it takes precedence over the bona fide rule'.<sup>65</sup>

Robinson therefore concludes that accepting the view that s.172 is 'the core duty to which directors are subject,'<sup>66</sup> implies that 'directors can act for a proper purpose by promoting the success of the company and hence frustrate a bid provided it is reasonable,'<sup>67</sup> and that this would effectively mirror the Unocal test of the Delaware Courts.

<sup>60</sup> Stewart Robinson, 'A change in the legal wind – how a new direction for corporate governance could affect takeover regulation' (2012) I.C.C.L.R 292, 294, Andrew Keay, 'Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom's 'Enlightened Shareholder Value Approach' (2007) 29 Syd.Law.Rev 600.

<sup>61</sup> Ibid

<sup>62</sup> Ibid 12.

<sup>63</sup> Department of Trade and Industry, Company Law Reform (March 2005), Cm.6456, para.3.3.

<sup>64</sup> Mandelson, Mansion House Speech (March 1, 2010) <<http://web.bis.gov.uk/News/Speeches/mandelson-mansion-house>, accessed August 10 2014.

<sup>65</sup> Alistair Alcock, 'An Accidental Change to Directors' Duties?' (2009) 30 CL 362, 366.

<sup>66</sup> Gower and Davies: *Principles of Modern Company Law* (8th edn Sweet & Maxwell, 2008) p.506.

<sup>67</sup> Robinson (n 60).

### III. Conclusion

This paper has depicted the significant divergence in the regulation of takeover defences in the two most prominent capital market jurisdictions, namely the US and the UK. In addition, this paper has explored the United Kingdoms' background legal rules and has arrived at the conclusion that the use of takeover defences is theoretically available and may be legally justifiable, albeit the current form of the Takeover rules make the most potent defences moot.



## THE EXTENT OF A COMPANY'S GENERAL MEETING'S CORPORATE DECISION-MAKING POWERS

*Scope of the Duomatic principle and section 239 of the Companies Act 2006*

Kelvin Hong

This article seeks to ascertain the extent of a company's general meeting's corporate decision-making powers.<sup>1</sup> Specifically, this article will explore the scope of a general meeting's power to validate corporate decisions via the *Duomatic*<sup>2</sup> route and the limitations on the general meeting's statutory power imposed by the 'rule of law' device contained in section 239(7) Companies Act 2006 to ratify wrongful acts of company directors. This article argues that there are five distinct categories that are instrumental in defining the boundaries of a general meeting's corporate decision-making powers: (A) *ultra vires* acts (B) *intra vires* acts tainted by improper means (C) creditor adverse acts (D) fraudulent acts and (E) acts involving oppression of the minority shareholders. It is noteworthy that categories (B) to (E) are exceptions to the general rule that *intra vires* acts can be taken via the *Duomatic* route and are deemed ratifiable under section 239.

This article will proceed by analysing each of the aforementioned categories in turn in the contexts of both the *Duomatic* principle and section 239(7). In effect, it will be shown that categories (A) to (D) are well-established categories whereas the existence of category (E) is doubtful.

Before this article proceeds to discuss the limitations on the general meeting's corporate decision-making powers, it is imperative to first outline the significance of the *Duomatic* principle and the nature of the 'rules of law' referred to in section 239(7). In essence, the *Duomatic* principle is an instrument capable of being used to make corporate decisions whereas section 239 provides a possible remedial route to ratify wrongful decisions already made by company directors.

<sup>1</sup> Note the division of power between the board of directors and the general meeting as per the company's constitution.

<sup>2</sup> Re *Duomatic Ltd* [1969] 2 Ch 365

In effect, the *Duomatic* principle dispenses the need to comply with formalities stipulated by law, for instance, notice requirements<sup>3</sup> and circulation of members' statements,<sup>4</sup> in relation to the process of shareholders exercising their collective decision-making rights via the general meeting. The '*rules of law*' in section 239(7) refer to both the common law and equitable rules on ratification developed by the English courts. These are mechanisms to limit the general meeting's power to ratify acts of directors in order to protect the interests of certain stakeholders.

## I. Ultra Vires Acts

### A. Duomatic

The corporate capacity of a company is defined in its articles of association in addition to any resolution passed and agreement entered into by the company as outlined in section 17 Companies Act 2006. A decision taken by way of unanimous consent of the members is valid only if the decision in question is *intra vires*; see *Salomon v Salomon Ltd.*<sup>5</sup> However, if the decision in question lies beyond the corporate capacity of a company (thus, *ultra vires*) then it cannot be made valid by virtue of the unanimous consent of the members; see *Re New Cedos Engineering*.<sup>6</sup>

As seen from a string of cases, *ultra vires* acts usually pertain to acts in breach of statutory mandatory rules which cannot be overridden by the *Duomatic* principle. For example, this includes unlawful distribution by the company in breach of section 830 Companies Act 2006 (see *Precision Dippings*)<sup>7</sup>, reduction of capital beyond the permitted gateways<sup>8</sup> in breach of section 658 Companies Act 2006 (see *Re RW Peak*)<sup>9</sup> and, at an EU level, failure to acquire approval of both parties to a cross-border merger in breach of a mandatory rule<sup>10</sup> (see *Re Oceanrose Investments*).<sup>11</sup>

<sup>3</sup> Companies Act 2006 sections 307 - 313

<sup>4</sup> Ibid. sections 314 – 317

<sup>5</sup> [1897] AC 22

<sup>6</sup> [1994] 1 BCLC 797

<sup>7</sup> [1986] Ch 447

<sup>8</sup> Ibid. 3 sections 684 and 690

<sup>9</sup> [1988] 1 BCLC 193

<sup>10</sup> R13 Companies (Cross-Border Mergers) Regulation 2007

<sup>11</sup> [2008] EWHC 3475 (Ch)

## II. Section 239(7)

Similarly, the general meeting cannot ratify *ultra vires* acts of directors. This is illustrated in the case of *Aveling Barford* which involved an unauthorised distribution of capital which the courts have held to be *ultra vires* and cannot be validated via shareholders' ratification.<sup>12</sup>

## III. Improper Means

### A. Duomatic & Section 239(7)

As a rule of thumb, *intra vires* acts can be validly made via the *Duomatic* route and are ratifiable by the general meeting. An exercise of a director's power within its prescribed capacity<sup>13</sup> (*intra vires*) for an improper purpose (outside the directors' authority) can, as a general rule, be made valid via the *Duomatic* route and be ratified by the general meeting; see *Grant v UK Switchback Railways Co.*<sup>14</sup>

However, this general rule is subject to the caveat where the unanimous consent of the members or the approval of the general meeting was obtained by improper means. With regard to the *Duomatic* principle, a decision taken by the unanimous consent of the members is valid only if shareholders who have been said to assent to the act had 'the appropriate or full knowledge' of the relevant matter; see *Queensway Systems Ltd v Walker*.<sup>15</sup> The failure to communicate the necessary knowledge on the matter to be decided upon by the general meeting amounts to an improper means of attaining the members' assent and thus invalidates the decision taken by the purported unanimous consent of the members. Similarly, in relation to section 239(7), the deliberate act of omitting facts concealing an act of breach of directors' duties in a resolution passed by the general meeting amounts to an improper means and was held to be unratifiable in the case of *Kaye v Croydon Tramways*.<sup>16</sup>

<sup>12</sup> (1989) 5 BCC 677 at 682

<sup>13</sup> Ibid. 3 section 17

<sup>14</sup> (1888) 40 Ch D 135

<sup>15</sup> [2007] 2 BCLC 577

<sup>16</sup> [1898] 1 Ch 358

#### IV. Creditor Adverse Acts

##### A. Duomatic

In addition, an *intra vires* decision made via the unanimous consent of the members of the general meeting is valid so long as the decision is not 'likely to jeopardise the company's solvency or cause loss to its creditors'; see *Bowthorpe Holdings Ltd v Hills*.<sup>17</sup> Hence, while solvent, the general meeting's power is limited insofar as it does not make decisions which could adversely affect the company's financial position which, in the long run, might affect the financial interests of creditors when the company becomes insolvent and is unable to repay debts owed to its creditors; see *Re Horsley & Weight*.<sup>18</sup>

##### B. Section 239(7)

The aforementioned limitation also extends to curb the general meeting's power to ratify acts of directors. When the company becomes insolvent, the interest of the creditors 'intrudes' as their investments (and not the shareholders') now become at risk of being irrecoverable<sup>19</sup>. Accordingly, the directors' primary duties to the company<sup>20</sup> becomes duly displaced by an indirect duty<sup>21</sup> to the company's creditors, enforceable only by the liquidators on behalf of the creditors via statutory mechanisms;<sup>22</sup> see *West Mercia Safetywear Ltd v Dodd*s.<sup>23</sup> Thus, when the company becomes insolvent, the general meeting's power to ratify acts of directors effectively ends.

<sup>17</sup> [2003] 1 BCLC 2261

<sup>18</sup> [1982] Ch 442

<sup>19</sup> *Kinsela & Anor v Russell Kinsela Pty. Ltd (in liq.)* [1986] 4 NSWLR 722 at 730

<sup>20</sup> *Ibid.* 3 sections 33 and 172(1)

<sup>21</sup> *Yukong Line Ltd of Korea v Rendsburg Investments Corp of Liberia* [1998] 2 BCLC 485

<sup>22</sup> As set out in the Insolvency Act 1986.

<sup>23</sup> [1988] BCLC 250

## V. Fraudulent Acts

### A. Duomatic & Section 239(7)

Furthermore, an *intra vires* matter agreed unanimously by the members of the general meeting is valid provided that the decision in question is condoned with honest intentions or where the element of fraud is absent; see *Parker and Cooper Ltd v Reading*.<sup>24</sup> On the other end of the spectrum, a decision made via the *Duomatic* principle is not valid if the decision taken pertains to acts of fraudulent or dishonest nature, for instance, acts constituting a fraud on creditors (see *re Halt Garage*<sup>25</sup>) or fraud on the company (see *Atwood v Merryweather*<sup>26</sup>). Similarly, fraudulent acts of directors are not capable of being ratified by the general meeting as a matter of preserving the equitable rule of law under section 239(7); see *Rolled Steel Products*<sup>27</sup> and *Madoff Securities International*.<sup>28</sup>

An incidental issue that arises out of this category turns on the difficulty of classifying the English court's ratio in the case of *Cook v Deeks*<sup>29</sup> which arguably could be characterised either as the present category of 'fraudulent acts' and<sup>30</sup>/or the 'oppression of the minority' category in the succeeding section. Essentially, this issue turns on the debate on whether or not the 'oppression of the minority' category constitutes a '*rule of law*' as per section 239(7).

## VI. Oppression of the Minority

### A. Duomatic

Lindsay J did contemplate a rule limiting the scope of the *Duomatic* principle against oppression of the minority shareholders as observed in the case of *Re RW Peak*:

<sup>24</sup> [1926] Ch 975

<sup>25</sup> [1982] 3 All ER 1016

<sup>26</sup> (1867) LR 5 Eq 464

<sup>27</sup> Ibid. 13

<sup>28</sup> [2011] EWHC 3102

<sup>29</sup> [1916] 1 AC 554

<sup>30</sup> See theory expounded by Peter Loose, Michael Griffiths and David Impey. *The Company Director. Powers, Duties and Liabilities*, 11<sup>th</sup> ed. (Jordan Publishing Limited, 2011), 392.

I would reject the applicability of the *Duomatic* principle even where (the act was *intra vires*) *rather than*, as it could have been (...) of a director implementing a decision he was acceding to (...) under the *persuasion* of his fellow-director and *majority shareholder*.<sup>31</sup>

However, the authority on this area of law is insufficient and undeveloped to amount to a limitation on the *Duomatic* principle. The significance of this limitation, even if it exists, is arguably redundant given that the *Duomatic* principle requires the unanimous consent of the members in which the minority shareholders can dissent in order to protect their own interests.

#### B. Section 239(7)

The basis for supporting the existence of an equitable '*rule of law*' against minority oppression is traced in the speech of Lord Buckmaster in the case of *Cook v Deeks* which involved the misappropriation of company's assets by the directors who also have a controlling interest in the company's general meeting:

*Even* supposing it be not *ultra vires* of a company to make present to its directors, it appears (...) that directors holding a majority of votes *would not be permitted* to make a present to themselves. This would be to allow a *majority* to *oppress* the *minority*.<sup>32</sup>

However, the aforementioned premise is undermined by the subsequent speech by Lord Russell in the case of *Regal (Hastings) Ltd v Gulliver* stating that the directors in breach of their duties, who also have a controlling interest in the company,<sup>33</sup> 'could have protected themselves by a (subsequent) resolution (...) in general meeting.'<sup>34</sup> In a snapshot, this area of law remains uncertain and unresolved.

It could be argued that even if the courts did contemplate a '*rule of law*' against minority oppression in *Cook v Deeks*, this defect in the general meeting's ratification power has been 'cured' subsequently by the

<sup>31</sup> Ibid. 9 at 604

<sup>32</sup> Ibid. 29

<sup>33</sup> Len Sealy and Sarah Worthington. *Cases and Materials in Company Law*, 10<sup>th</sup> ed. (Oxford University Press, 2013), 348.

<sup>34</sup> [1967] 2 AC 134 at 150A

statutory disenfranchisement of the directors in breach from voting and forming the required quorum as effected in section 239(4) overruling the court's decision in *North-West Transportation v Beatty*.<sup>35</sup> This position of dismissing the minority oppression category is supported by Wedderburn who argued 'fraud lies in the nature of the transaction than in the motives of the majority'<sup>36</sup> which purportedly characterises the case of *Cook v Deeks* as a judgment that hinges on the fraudulent acts of the directors. This analysis effectively distinguishes *Regal (Hastings)* from *Cook v Deeks* and it explains the judgment delivered in the former where the transactions entered into by the directors were fraud-free for the honest purpose of furthering the interest of the company and were not deliberately designed to misappropriate corporate benefits.

In addition, to argue so would mean that acts of minority oppression no longer is subject to the absolute non-ratifiable rule but can now be ratified provided that a higher standard of majority votes (excluding the votes cast by the directors in breach and the relevant parties) is met in order to render the ratification effective. The disenfranchisement effect is seen as a balancing tool to protect the interests of the minority shareholders without absolutely restricting the ratification powers of the general meeting as seen in the preceding categories of acts.

## VII. Conclusion

A decision taken by unanimous consent of the members of the company is valid insofar as it involves *intra vires* decisions which were consented to by proper means, does not affect the company's state of solvency or cause loss to its creditors and are made with honest intentions. In parallel, the '*rules of law*' referred to in section 239(7) involve breaches which the general meeting cannot ratify at all where the act in question is *ultra vires*, obtained by improper means although it is *intra vires*, made when the company is already insolvent or is fraudulent in nature. Given the statutory tool of section 239(4) and the lack of clarity and development by the English courts, the oppression on the minority shareholders category is, as argued, non-existent.

<sup>35</sup> (1887) 12 App Cas 589 (PC)

<sup>36</sup> Kenneth Wedderburn, "Shareholders Rights and the Rule in Foss v Harbottle", *Cambridge Law Journal* 93 (1958): 96.





## WHO'S TO BLAME? A CALL FOR REFORM OF FAULT BASED DIVORCE

Luke Tattersall

*The battle for divorce reform which dominated family law during the latter part of the 20th century appears to have been abandoned...it is long overdue to be placed back on the Parliamentary agenda.<sup>1</sup>*

The current system of divorce law in England and Wales, rooted in 18th century ideals, is thoroughly outdated. This paper therefore calls for wide spread reform and simplification making the law fit for purpose. In doing so it will: (I) analyse the grounds for divorce, showing how they are misleading, incite parties to war and are overtly rigid – mapping poorly onto personal relationships; (II) consider the adult-centric nature of divorce and what improvements can be made to protect and uphold the welfare of children – specifically in relation to divorces which appear non-contentious; and (III) consider how despite divorce being *de jure* legalistic it is in fact substantively administrative, addressing how this can be acknowledged through reform.

### I. Grounds for Divorce: 'The Five Facts':

Section 1(1) of the Matrimonial Causes Act 1973 (MCA) states that the only ground for divorce in England and Wales is that the marriage has 'irretrievably broken down'. However, s1(2) stipulates that this can only be proved by evidencing one of five facts. The Act states that if a fact is proven then a decree of divorce will be granted, resulting in a situation where all couples are forced to shoehorn their petition into one of five facts, chiefly: adultery, unreasonable behaviour, desertion and separation for two or five years. This section will address failings relating to the grounds of divorce, showing how they are unfit for purpose and exacerbate an already painful process.

<sup>1</sup> M Welstead, 'Divorce in England and Wales: Time for Reform' [2012] 24 *Denn LJ* 21.

### A. Adultery

Adultery is one of only two grounds which provide for 'instant' divorce – meaning that couples do not have to wait two to five years; it has therefore proven to be one of the most popular grounds with over 75% of petitioners relying on either adultery or unreasonable behaviour.<sup>2</sup> Petitions can be launched by only one party to the divorce, which are then accepted or challenged by the respondent before receiving judicial approval. This leads to severe problems; firstly, the breakdown of a marriage will rarely be one sided, it will in reality be a culmination of events over a period of time in which both parties are culpable but the law fails to reflect this. Secondly, the claim of adultery may be a complete fabrication as couples are forced to use one of five facts; the petition may simply be an expedient means by which to obtain a divorce – resulting in 'innocent' parties having to agree to a fictitious petition just to obtain a decree. The process is worsened by the MCA stipulating that the court must ensure the fact is true;<sup>3</sup> in practice this does not occur. Petitions based on a concocted lie, necessary to navigate an outdated legal system, are being given judicial imprimatur.

The current law compounds an already difficult process by forcing couples to make accusations against one another simply to obtain a divorce. Research shows that the majority of separations are in fact just consensual couples having to transverse an archaic process, leading the Law Commission to comment that 'whatever the client's reason for wanting a divorce, the lawyer's function is to discover the ground'.<sup>4</sup> The law complicates the situation by stating that couples who continue to cohabit for up to six months after finding out about adultery cannot rely upon the ground.<sup>5</sup> This is an absurd position for the law to take; forcing couples to act hastily in order to utilise the ground for divorce – it is counterintuitive to couples attempting to save their marriage or maintain a stable environment for young children. The law incites parties to war rather than encouraging reconciliation or a 'calm and civilised end to the relationship'.<sup>6</sup>

<sup>2</sup> R Deech, 'Divorce - A Disaster' [2009] FL 1048, 1050.

<sup>3</sup> MCA s1(3).

<sup>4</sup> Law Comm, *The Ground for Divorce* (No 192, 1990) 2.9.

<sup>5</sup> MCA s2(1).

<sup>6</sup> Welstead (n1) 33.

The Marriage (Same Sex Couples) Act 2013 introduced inequality into the law vis-à-vis adultery as a ground for divorce. The Act states that same-sex couples cannot commit adultery and therefore cannot rely on the ground;<sup>7</sup> this is based upon an archaic conception of what constitutes sex, chiefly vaginal penetration. Lucy Crompton suggests the Act shows a 'heterosexual obsession with penetration' and highlights the 'legislator's squeamishness' by failing to acknowledge gay sex.<sup>8</sup> Justice Coleridge, commenting extra-judicially, stated that 'the Same-Sex Marriage Act has simply imported out-of-date legislation into same-sex relationships without a backward glance',<sup>9</sup> however, the situation is worse than this. Rather than merely importing an already failed system, by withholding adultery as a ground of divorce the Act has created an absurdity in which a 'gay petitioner will be able to rely on straight sex in their adultery petition, but a straight petitioner will not be able to rely on gay sex in his or hers';<sup>10</sup> the UK's divorce law has become devoid of reason. Many commentators have suggested replacing adultery – which focuses on vaginal penetration – with the concept of 'sexual intimacy' in order to gain equality before the law, however, there are alternatives.

This paper calls for an abolition of the five facts, focusing instead upon the concept of irretrievable breakdown. If two adults wish to bring their relationship to a close they should be able to do so without making accusations against one another or filing fictitious papers with the courts. If one party challenges the divorce, irretrievable breakdown will be proved on the civil standard of balance of probabilities before a judge; this approach has the added benefit of removing any inequalities before the law.

## B. Separation for two to five years

Living apart for two years with consent, or five years without consent, are the only non-fault based grounds requiring no accusations to be made,<sup>11</sup> however, they are also the least used grounds of divorce. This paper suggests that the separation based facts are discriminatory to the poor

<sup>7</sup> Schedule 4 s3(1).

<sup>8</sup> L. Crompton, 'Where's the Sex in Same-Sex Marriage?' [2013] FL 564, 569.

<sup>9</sup> P. Coleridge, 'Lobbing a Few Pebbles in the Pond: the Funeral of a Dead Parrot' [2014] FL 168.

<sup>10</sup> Crompton (n9) 570.

<sup>11</sup> MCA s1(2).

and fail to help reconcile those marriages which can be saved whilst failing to offer a realistic and viable end for couples who are sure that their marriage is over.

The MCA s 1(2)(d) states that couples must have 'lived apart' for two or more years; this has subsequently been interpreted narrowly. The court in *Mouncer*<sup>12</sup> ruled that a couple who had separate bedrooms, separate cars and who looked after their domestic affairs separately were not classed as 'living apart' as they ate together. Mr and Mrs Mouncer had de facto separate lives but had stayed together for the children; their case has led the Law Commission to comment that 'separation under the MCA can be extremely difficult to achieve without substantial resources of one's own or the co-operation of the other spouse...the law allows for separation under the same roof but in practice it is impossible to achieve, requiring couples to co-operate in a most unnatural and artificial way'.<sup>13</sup>

Economic resources become apparent when considering the separation grounds as *Mouncer* shows that couples must de facto live apart for the law to allow them to access divorce. The author suggests it is unjust for the law to provide a civilised no-fault ground which, in practice, is denied to the majority of the population; the Act creates a socio-economic bar to divorce. 'A young mother with children living in a council house is obliged to rely upon fault whether or not she wants to, irrespective of the damage it may cause'.<sup>14</sup>

Even if parties do have the resources to live apart, statistics suggest that two to five years is simply too long to wait. We therefore have a position in which couples will find it near impossible to prove that they have 'lived apart' if they have co-existed in the same household, equally, there are large sectors of society who do not possess the financial resources to live apart, and more still who deem two to five years to be too long; explaining why so many parties choose to rely on fault-based grounds, even if they have no basis in fact.

Following the removal of the 5 facts as stated above, this paper advocates for a nine-month waiting period from the start of the divorce process to when the decree is granted. It is hoped that this will provide sufficient time to allow the parties to come to terms with the reality of

<sup>12</sup> *Mouncer v Mouncer* [1972] 1 All ER 289.

<sup>13</sup> Law Comm (n4) 2.12.

<sup>14</sup> *ibid* 2.12.

divorce and start to deal with the practicalities of living arrangements, child care and financial provisions. Furthermore, it is the author's belief that nine months is a sufficient amount of time for couples to contemplate the realities of divorce and decide whether they have made the right decision, or instead try and reconcile their differences. Whilst the argument of course exists that two autonomous adults may know immediately, without having to wait 9 months, that they wish to divorce, this paper supports the Law Commission's recommendation that 'it does not seem unduly intrusive to require a period of delay before granting, what is, in effect, a license to remarry...the period is primarily designed to provide convincing proof that the breakdown is irreparable'.<sup>15</sup>

## II. Divorce as an Adult-Centric Process: Upholding the Welfare of Children

Divorce in England and Wales is a wholly adult-centric process despite the profound impact it has upon children's lives. 'The only opportunity given to consider the interests of children is provided by s41 MCA, this requires the court to consider the proposed arrangements for the upbringing and welfare of children'.<sup>16</sup> However, as this paper will show, section 41 in practice offers little if any judicial oversight vis-à-vis the welfare of children. Douglas, Murch, Scanlan and Perry conducted valuable research into the welfare of children in divorce cases; they were 'surprised at how little attention was paid to the interests of children...in over half the cases judges asked no questions about the children and researchers found that most cases lasted no more than ten minutes...with one judge averaging four'.<sup>17</sup>

Whilst it is clear that the interests of children are by no means paramount during divorce proceedings, this paper's contention is specifically with divorces that appear non-contentious. In such instances, couples are required to fill out a form - 'a statement of arrangements' - detailing the provisions for children. Douglas found that there was a lack of detailed answers; the form was filled in with 'the minimum information' and there is 'nothing to prevent the petitioner from giving

<sup>15</sup> *ibid* 5.25.

<sup>16</sup> G Douglas, 'Safeguarding Children's Welfare in Non-Contentious Divorce' [2000] MLR 177, 178.

<sup>17</sup> *ibid* 181.

false or misleading answers'.<sup>18</sup> The problem is made worse as three quarters of petitioners interviewed during Douglas' research said 'they could recollect the form but remember the solicitor having filled it out' and '13% of petitioners thought the form had been completed whilst they were not actually present'.<sup>19</sup> Research showed that 'the court could be misled by the way in which solicitors completed the form for clients...framing information in ways which they know are most likely to pass District Judges' for instance 'omitting that a child will be left alone at home after school whilst the parent is working'.<sup>20</sup> Douglas and her colleagues also interviewed family judges and solicitors who expressed concerns, stating that the form has 'several weaknesses', specifically how 'information about possible violence and child protection issues are not sought on the form'.<sup>21</sup> The situation is exacerbated by the MCA giving no indication of the sort of factors that might prompt a court to exercise its powers, leading Douglas to suggest that judges are acting 'with some sort of sixth sense which allows them to spot troublesome cases'.<sup>22</sup>

This paper suggests that the statement of arrangements is intrinsically flawed in upholding the welfare of children in divorce petitions that appear non-contentious – agreeing with the Law Commission's assessment that 'at best, the form appears symbolic'.<sup>23</sup> The time has come for a wholesale redesigning of the procedure in consultation with family lawyers and judges. The form needs to be redrafted so as to extract the information needed to ascertain problematic cases vis-à-vis the welfare of children. Whilst being more detailed the form should also be accompanied by a signed statement that all information is true, co-signed by a solicitor.

An emerging trend in family law following the House of Lords' ruling in *Gillick*<sup>24</sup> and the implementation of the European Convention on Human Rights, via the Human Rights Act 1998, has been a greater emphasis on the wishes and feelings of children in the law. Currently, English divorce law has 'no procedure to ensure that the wishes and

<sup>18</sup> *ibid* 182.

<sup>19</sup> *ibid* 187.

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

<sup>21</sup> *ibid* 188.

<sup>22</sup> *ibid* 189.

<sup>23</sup> Law Comm (n4) 2.9.

<sup>24</sup> *Gillick v West Norfolk and Wisbech Area Health Authority* [1985] 3 All ER 402.

feelings of children are taken into account'.<sup>25</sup> Lord Irvine, commenting extra-judicially, stated how the law must stay 'fully in tune with the increasing contemporary awareness that a child is a person in his or her own right...the divorce process must now have regard to the interests and views of children'.<sup>26</sup> Whilst this paper is conscious of the realities of the situation, chiefly courts being an intimidating environment and divorce proceedings being largely adversarial, we nevertheless believe that there is scope for child-consultation. The Family Justice Review Report, conducted in 2011, suggested that 'children should be given age appropriate information...and be supported to make their views known...older children should be offered a menu of options'; district judges who were canvassed suggested that 'a welfare officer might be an appropriate person to talk to a child'.<sup>27</sup> This paper is in full agreement, a child's wishes and feelings – sensitive to age – could be conveyed by a support worker who would convey them to the judge overseeing the proceedings; this would give children a legal voice without them having to appear in court.

### III. Divorce as an Administrative Process:

The divorce process in England and Wales is 'primarily an administrative one, it rarely involves spouses appearing in court. The forms are filled out by the petitioner or their lawyer and sent to the court where a judge will check them before granting a decree'.<sup>28</sup> James Munby – President of the Family Division – this year expressed his opinion that divorce is 'essentially a bureaucratic, administrative process, albeit one conducted by a district judge'.<sup>29</sup>

This paper posits that as we already have de facto divorce on demand, with couples simply having to base their petition on a fact which in reality is never verified, it would make no substantive difference if uncontested divorces were dealt with administratively by the court, rather than being overseen by a district judge. The Family Justice Review Report

<sup>25</sup> Douglas (n16) 178.

<sup>26</sup> HL Deb June 1996, vol 573.

<sup>27</sup> Family Justice Review Report (Nov 2011) 6.

<sup>28</sup> Welstead (n1) 23.

<sup>29</sup> (Judicial Press Office, 29 April 2014) <<http://www.judiciary.gov.uk/wp-content/uploads/2014/05/munby-press-conference-290420141.pdf>> accessed September 2014.

in 2011 concurred, stating 'the current process requires judges to spend time in effect to do no more than check that forms have been filled in correctly, with accurate names and dates...to change it would make no difference to the ease or difficulty of obtaining a divorce'.<sup>30</sup>

This paper suggests that such reform would free up family judges, making them available for matters which require their urgent attention. Court administrative staff, processing divorce petitions, would be able to flag up any statement of arrangement forms concerning children to a judge if they *prima facie* required further scrutiny. Such reform would streamline the process in the '98% of cases where divorce is uncontested'<sup>31</sup> providing a more progressive system, acknowledging the reality that we live in a divorce society and that the process, despite being *de jure* legalistic, is substantively administrative.

#### IV. Conclusion

It has been evidenced how divorce law in England and Wales is in dire need of reform. This paper advocates for the removal of the five facts, replacing them with the simple concept of irretrievable breakdown as the only ground for divorce. This would avoid couples having to shoehorn their claims, making accusations and filing fictitious papers with the courts – the current law needlessly incites parties to war. Couples not wishing to make accusations must live apart for two to five years before filing for divorce. The author suggest that this is an unrealistically long period and one which operates discriminatorily *vis-à-vis* the poor. It is this paper's recommendation that a waiting period of nine months from the date of launching a petition is more realistic; giving parties time to come to terms with their decision and plan for the practicalities of life ahead. The divorce process needs reconceptualising from a wholly adult-centric model to one which recognises contemporary changes in the law, acknowledging that children are people with rights and wishes and that, sensitive to age, these can be taken into account.

In recognising the role of children in the divorce process, this paper has aimed to highlight the complete failing in upholding child welfare in non-contested divorces. The statement of arrangements form needs

<sup>30</sup> Family Justice Review (n27) 173.

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



redrafting so as to provide more relevant information, highlighting potentially problematic cases to the court; furthermore the form must contain a signed declaration vis-à-vis its truthfulness. Lastly, in reforming divorce law, it is time to accept that despite divorce being de jure legalistic, it has become de facto administrative. Non-contested divorce petitions should be dealt with administratively by the courts, with judges becoming involved only in cases which require further scrutiny concerning the arrangement of children. Rightly or wrongly 'divorce is a significant area of national life. With a little effort, we can get it right'.<sup>32</sup>

<sup>32</sup> Coleridge (n9).



## POWERS OF ATTORNEY: A LICENCE TO STEAL?

Charlie Greenwood

Lasting powers of attorney ('LPA's') and their restraints are a pertinent topic both in a social and legal context. The Mental Capacity Act 2005 ('the Act'), which came into force in 2007, replaced enduring powers of attorney with LPA's, and they have proved to be popular – in 2012, 210,000 LPA's were registered in the UK.<sup>1</sup>

In this article, the adequacy of restraints on attorneys under property and financial affairs LPA's will be considered, along with the potential risks of abuse. Furthermore, practical suggestions for those drawing up LPA's on how to help clients reduce the associated risks will be outlined, in the hope that any inadequacies of the current legal position can be minimised.

### I. Restraints on attorneys

Both statutory provisions in the Act and restrictions specified in the LPA itself restrain the authority of attorneys under LPA's. Sections 1 and 4 of the Act deal in particular with these duties, which include assuming a person has capacity until it is established they do not; not treating a person as unable to make a decision unless steps to help them have been taken; and before making a decision, having regard to whether any action can be undertaken in a less restrictive way to the donor's rights.<sup>2</sup>

Perhaps the most important overarching restraint on attorneys is to act in the best interests of the donor.<sup>3</sup> This requires an objective consideration of all of the relevant circumstances, including for example past wishes of the donor and any guidance provided in the LPA.

<sup>1</sup> Jonathan Rayner, "Phenomenal growth" in power of attorney registrations', (*Law Society Gazette*, 4 October 2012), <http://www.lawgazette.co.uk/67620.article> (date accessed 28 June 2014)

<sup>2</sup> Mental Capacity Act 2005, s 1

<sup>3</sup> Mental Capacity Act 2005, s 1(5) and s 4

Other statutory limitations include the restriction of an attorney to make gifts of the donor's property except to certain people on certain special occasions,<sup>4</sup> and ensuring the donor cannot confer a wider gift-making authority on the attorney than that set out in the Act.

In addition to statutory restraints, the donor may expressly impose binding limitations on the authority of attorneys in the LPA. For example, a donor may specify that his attorney cannot act until he lacks capacity (as attorneys have the power to act even when the donor still has capacity) and how capacity should be assessed. Additionally, a common way of protecting against fraud is to state the attorney must keep financial accounts and submit them to any person chosen by the donor.

Furthermore, an LPA forms a fiduciary relationship, and this by its very nature creates a mixture of duties and restraints. As an example, an attorney cannot make any unauthorised profit when administering the donor's assets.<sup>5</sup> Further still, attorneys have the usual duty of care towards the donor created by the law of agency, and they are legally required to have regard to the Act's Code of Practice.<sup>6</sup>

The registering of LPA's provides another initial safeguard against abuse and fraud – an LPA must name persons to be notified of any application to register the LPA (but not the attorney)<sup>7</sup> or if no persons are named, must include two comprehensive LPA certificates.<sup>8</sup>

An alternative check on the power of an attorney comes from the Court of Protection and supporting Office of the Public Guardian. The Court has wide-ranging powers to decide on issues relating to the operation of an LPA, and attorneys must comply with any direction the Court gives, such as how an attorney should use his powers under an LPA and having to produce financial records.

<sup>4</sup> Mental Capacity Act 2005, s 12

<sup>5</sup> P Bartlett, *Blackstone's Guide to The Mental Capacity Act 2005*, (2nd Edition, OUP 2008)

<sup>6</sup> See the Department for Constitutional Affairs, 'Mental Capacity Act 2005 Code of Practice' (2007), <http://www.justice.gov.uk/downloads/protecting-the-vulnerable/mca/mca-code-practice-0509.pdf>

<sup>7</sup> Mental Capacity Act 2005, Sch 1, para 2(1)(c)

<sup>8</sup> Lasting Power of Attorney Regulations 2007, Reg 7

## II. The risks of wrongdoing

Even though there seems to exist substantial regulation and safeguarding, the risks of wrongdoing are significant due to the nature of the relationship and difficulty in preventing financial abuse. As highlighted by the Law Society's practice note on LPA's, the main broad area of concern is abuse of power by attorneys.<sup>9</sup> This risk is prevalent due to LPA's being predominantly based on trust with minimal intervention by public authorities.

There is a real possibility that an attorney has the power to exploit the finances of a donor who has lost capacity. In *Re Harcourt*,<sup>10</sup> an attorney withdrew daily sums of money and neglected to pay the donor's care home fees. At the more extreme end of the scale, in a recent case an attorney incurred a loss of £150,000, including withdrawing £72,000 of the donor's money to set up a reptile breeding business.<sup>11</sup>

Fraudulent activity is another major area of risk – the case of *Re DP* highlights an attempt by an attorney to cash an investment bond owned by the donor and to transfer the proceeds into his own name.<sup>12</sup>

## III. Are these restraints adequate?

Whether the numerous restraints placed on an attorney are adequate to protect the donor from wrongdoing lies at the crux of this matter. It is undeniable that there is a tension here – on the one hand, if unnecessarily wide powers are conferred on an attorney and not restrained effectively, there is the danger of an untrustworthy attorney acting fraudulently and causing considerable damage to the donor's interests; on the other, an unduly restrictive definition may prevent the attorney from acting effectively when needed.<sup>13</sup>

Arguably, the restraints are never going to be fully effective due to the trusting relationship of LPA's, and this difficulty is compounded due to the body that receives complaints about attorneys, the Office of Public Guardian, only having power to investigate irregularities when someone

<sup>9</sup> Law Society, 'Lasting Powers of Attorney' (8 December 2011), <http://www.lawsociety.org.uk/advice/practice-notes/lasting-powers-attorney>

<sup>10</sup> *Re Harcourt; The Public Guardian v A* (CA, 31 July 2012)

<sup>11</sup> *The Public Guardian v C* [2013] EWHC 2965 (COP)

<sup>12</sup> *Re DP* [2014] EWCOP 7, [2014] All ER (D) 200 (Jun)

<sup>13</sup> PLC, Powers of Attorney, <http://www.practicallaw.com>

makes a complaint. In turn, common sense dictates that some attorneys will perhaps always get away with abusing the system, slipping under the radar of protection and legislation.

This said, the other side of the argument suggests the combination of restraints are as good as they could be, and will ever be, in difficult circumstances. According to the Office of Public Guardian, they received 3,653 referrals complaining about attorneys (and deputies) in 2012 – a figure representing only 1.7% of LPA's referred that year. Furthermore, the power of the Court cannot be underestimated when a complaint is referred, and on top of the statutory and LPA-prescribed restrictions available to a donor, the effectiveness of registering an LPA before use in safeguarding donors is considerable.

#### IV. Court of Protection appointed deputies – a safer alternative?

It is against this background that the suggestion of an alternative is proffered. The Court has wide powers as to a person's property and affairs, and this power can be conferred on a deputy appointed by the Court of Protection.<sup>14</sup> If a deputy is appointed, the powers conferred are as limited in scope and duration as possible without sacrificing effectiveness and practicality.<sup>15</sup>

In terms of restraints, deputies are subject to the same provisions of the Act as attorneys. However, there are extra controls in place. For example, a deputy does not have the power to make a decision on behalf of a person who still has capacity in relation to that matter,<sup>16</sup> and cannot make decisions that are within the scope of a valid LPA.<sup>17</sup>

Furthermore, an advantage of deputies is in the giving of security – a form of insurance deputies are usually required to have in order to restore any loss to an individual's estate due to wrongful acts or omissions.<sup>18</sup>

There is an argument to suggest that these stricter restraints equal a safer alternative. However, the risks of wrongdoing are just as prevalent for a deputy and are materially unaffected by stricter restraints. In practice, a determined court appointed deputy could financially abuse a

<sup>14</sup> Mental Capacity Act 2005, s 16(1) and s 16(2)

<sup>15</sup> Halsbury's Laws, (5<sup>th</sup> Edition, 2011) vol 75, para 734

<sup>16</sup> Mental Capacity Act 2005, s 20(1)

<sup>17</sup> P Bartlett, *Blackstone's Guide to The Mental Capacity Act 2005*, (2nd Edition, OUP 2008)

<sup>18</sup> Discussed in detail in *In the matter of H* [2009] WTLR 1719

donor with the same amount of ease as an attorney. Although a basic 'vetting' procedure does exist for deputies, arguably no procedure can comprehensively rule out the chance of fraudulent behaviour.

V. Minimising the risks

To minimise these risks of abuse for clients, there are a number of steps those drawing up LPA's can take. For example, the suitability of the attorney should be discussed carefully with the donor – the appointment of a sole attorney provides more scope for abuse than a joint appointment. Any issues of capacity should be discussed diligently, and if a third party purports to give the donor's instructions, the donor's written confirmation should be sought.<sup>19</sup> Protection can be built-in when drafting an LPA to include external supervision of an attorney – for example by stating an attorney must produce accounts to a third party. If possible the donor should be seen alone and made aware of the serious nature of an LPA. Donors should also be informed of the risks of abuse, particularly that the attorney could misuse the power in a number of different ways.

VI. A licence to steal?

To conclude, although the restraints placed on attorneys (and deputies) under a property and financial affairs LPA are not perfect, they never will be. The combination of statutory and built-in restraints, registration safeguards, powers of the Court, and practical steps lawyers can take are adequate in a system that by its very nature perhaps encourages fraud, abuse and wrongdoing.

LPA's are not a licence to steal, and remain an extremely useful mechanism enabling people to appoint someone to make decisions on their behalf in the future when they may lack capacity.

<sup>19</sup> T Aldridge QC, *Powers of Attorney*, (10<sup>th</sup> Edition, Sweet & Maxwell 2007)





## DOES THE LAW ON ASSISTED SUICIDE NEED REFORMING?

Mary Brodie

*It is not a question of whether legalisation will happen but when it will happen –  
Lord Falconer*

### I. Introduction

On 23 June 2014, news reported that Debbie Purdy, a right-to-die campaigner died at the age of 51 after having Multiple Sclerosis (MS) for 20 years. This is an example of how assisted suicide features regularly in the public eye. It is present with high profile cases such as that of *Nicklinson and others* in 2014,<sup>1</sup> and with other countries enacting new laws like Belgium extending their euthanasia laws to include those under 18 in February 2014. It can also permeate the public consciousness through other forms of media, for instance when *Coronation Street* brought up this sensitive topic with the story of Hayley Cropper who ended her life when she was in the final days of pancreatic cancer. It is a subject that leaves the population divided because of its sensitive nature and the many strong arguments from both sides. Lord Falconer's bill, a bill for the legislation of assisted suicide, hopes to be the first legislation enacted that allows assisted suicide in England and Wales.

Lord Falconer's bill is not the first bill of its kind in the UK with Lord Joffe's right to die bill in 2005 having tried to achieve the same objectives. Lord Joffe's bill was blocked by the House of Lords after a seven hour debate, peers voting 148 to 100 against it.<sup>2</sup> In 2012, Lord Falconer, a labour peer, created a private member's bill on the legislation of assisted suicide. This bill ran out of time in the last parliament and

<sup>1</sup> *R(Nicklinson and others) v Ministry of Justice* [2014] UKSC 38

<sup>2</sup> Helene Mulholland and Agencies, 'Lords Block Right to Die Bill' in *The Guardian* Friday 12 May 2006, [www.theguardian.co.uk](http://www.theguardian.co.uk) (accessed 23/08/2015).

consequently did not pass its third reading in the House of Lords. Lord Falconer retabled the assisted dying bill with the first reading on 4 June and the second reading is yet to be scheduled. A YouGov poll found that 82% of people in England and Wales support this bill, so it is possible that it will succeed where Lord Joffe's failed.<sup>3</sup> Lord Falconer said that 'it is not a question of whether legalisation will happen but when it will happen.'<sup>4</sup> This essay will begin by analysing how the law currently deals with assisted suicide and then analysing Lord Falconer's bill to determine whether it is necessary to reform the current law.

## II. The Current Law

The Suicide Act of 1961 decriminalised the act of suicide. However, the act of assisting suicide is still considered a serious crime where 'a person who aids, abets, counsels or procures the suicide of another, or an attempt by another to commit suicide, shall be liable on conviction on indictment to imprisonment for a term not exceeding fourteen years.'<sup>5</sup> There have been no prosecutions under this statute although *R v Hough*<sup>6</sup> was thought to possibly fall within the Suicide Act. The defendant had regularly visited an elderly lady and they had many discussions about suicide. Hough then brought her the drugs and sat with her while the victim attempted suicide and when unconscious placed a bag over her head to ensure she was dead. Lord Lane C.J commented that 'it was a crime, whether labelled as assisting suicide or attempted murder. In terms of gravity it could vary from the borders of cold blooded murder down to the shadowy area of mercy killing or common humanity.'<sup>7</sup> It was decided that this was attempted murder because the victim was not in acute pain and there was no original desire to end her own life. It seems that there is scepticism about having prosecutions under the Suicide Act when it could also be another less controversial crime.

<sup>3</sup> YouGov/Dignity in Dying Survey Results, <http://www.dignityindying.org.uk/assisted-dying/public-opinion/> (accessed 23/08/2015)

<sup>4</sup> 'Lord Falconer to Press on Assisted Suicide Law', 7<sup>th</sup> May 2013, *BBC News* (accessed 23/08/2015)

<sup>5</sup> Section 2(1), Suicide Act 1961

<sup>6</sup> *R v Hough* [1984] 6 Cr App R (S)

<sup>7</sup> [1984] 6 Cr App R (S) at 407

A feature of this statute is contained in Section 2(4) of the Suicide Act 1961 which is that 'no proceedings shall be instituted for an offence under this section except by or with the consent of the Director of Public Prosecutions.' This is important in these cases because they are of a sensitive nature and it may not be in the public's interest to prosecute. In *R(Purdy) v DPP*<sup>8</sup>, Debbie Purdy wanted to know how the DPP would exercise this discretion. She did not seek immunity for her husband but wanted to know what the guidelines were for deciding who to prosecute. The only information that existed at the time was a report by the DPP about the reasons for not prosecuting the parents of Daniel James who was taken to Switzerland for assisted suicide.<sup>9</sup> This report did not provide enough general information that Purdy could apply to her case. As a response to this the Crown Prosecution created a code that would be used to decide who should be prosecuted for this offence.

The code highlights that firstly there must be enough evidence supporting a prosecution for assisted suicide and then the CPS will have to consider if it is in the public interest. This was recognised by the House of Lords in *Purdy* where Lord Hope stated that 'it has long been recognised that a prosecution does not follow automatically whenever an offence is believed to have been committed.'<sup>10</sup> Each case is considered individually but there is a list of factors that would argue in favour or against prosecution with some being more influential than others. There are 16 factors that will encourage a prosecution, for instance if the victim was under 18 years of age; if they did not have the mental capacity to make their own informed decision; the suspect was motivated by some form of gain or if the victim was physically able to commit suicide by themselves. There are 13 factors which make a prosecution less likely. These include if the suspect was wholly motivated by compassion; if the suspect had tried to dissuade the victim from the act and if the victim had reached the decision by themselves.<sup>11</sup>

Recently, in *R(Nicklinson and others)*, one of the appeals regarded altering this report for more clarity, in particular about those who were

<sup>8</sup> [2009] UKHL 45

<sup>9</sup> Decision on Prosecution-The Death by Suicide of Daniel James, *CPS Report*, 09/12/2008, [http://www.cps.gov.uk/news/articles/death\\_by\\_suicide\\_of\\_daniel\\_james/](http://www.cps.gov.uk/news/articles/death_by_suicide_of_daniel_james/) (accessed 23/08/2015)

<sup>10</sup> [2009] UKHL 45 at 44

<sup>11</sup> Policy for Prosecutors in Respect of Cases of Encouraging or Assisting Suicide, *CPS Report* Feb/2010, [https://www.cps.gov.uk/publications/prosecution/assisted\\_suicide\\_policy.html](https://www.cps.gov.uk/publications/prosecution/assisted_suicide_policy.html)

not emotionally attached to the person but this was rejected. There were three reasons put forward by the Divisional Court that the Court of Appeal and Supreme Court were unable to convincingly answer. These were firstly, that it would go beyond the meaning of law in the context of rule of law by removing any flexibility the DPP had by the code being made more specific. Secondly, it would be impractical for the DPP to create guidelines that could cover all people who commit assisted suicide not for a loved one like a carer or doctor. Thirdly, it would require the DPP to cross a constitutional boundary in laying down a scheme that could determine the probability that an individual would or would not be prosecuted.<sup>12</sup> It seems unlikely that the issue of assisted suicide can be resolved by further clarification of the DPP's policy because of these reasons.

Although there have been no prosecutions, the DPP has never said outright that they will not prosecute someone before the act. This has meant that the terminally ill have sought ways to prove innocence for their assister before they pass away. There have been different attempts to use defences to justify the offence of assisted suicide and stop those who are helping being liable. Diane Pretty sought judicial review because the DPP refused to give an undertaking that her husband would not be prosecuted for assisting her suicide. Pretty unsuccessfully argued her case in the domestic courts and took it to the European Court of Human Rights in *Pretty v UK*<sup>13</sup> where it was argued that this was contrary to the ECHR.<sup>14</sup>

Pretty tried to argue that the right to life under Article 2 could also infer a right to die. The court decided that 'a right to die is the antithesis of the right guaranteed by article 2 and would extinguish the benefit on which it is supposedly based.'<sup>15</sup> The next article argued was Article 3, that by keeping her alive it was making her suffer inhuman and degrading treatment. The court said that 'the primary obligation [of Article 3] is negative: the state must not inflict torture or inhuman or degrading treatment or punishment on its citizens' and therefore this article was not engaged. Article 9 was argued that it violated her freedom of thought,

<sup>12</sup> *R(Nicklinson and others) v Ministry of Justice* [2014] UKSC 38 at 248.

<sup>13</sup> *Pretty v UK* [2001] AC 2346/02

<sup>14</sup> Human Rights Act 1998

<sup>15</sup> *Pretty v UK* [2001] AC 2346/02 at 807

conscience and belief but the court decided that because it was not a religion or belief that this article would not apply. Pretty argued that the law discriminated against her because an able bodied person would be able to commit suicide while she couldn't. This came under Article 14 but the court argued that this could not be engaged because 'the borderline between the two categories of individuals would often be a very fine one' and therefore it was not applicable.<sup>16</sup> The final and most successful article argued was Article 8, the right to a private life. It was decided that this article was invoked but that the ban on assisted suicide was 'properly prescribed by law, served a legitimate aim and was both necessary and proportionate to that aim.'<sup>17</sup> This case was rejected by the European Court of Human Rights on all counts which left the UK to decide whether or not to prosecute. In the case of *R(Nicklinson and others) v Ministry of Justice* they also attempted to use the Human Rights Act to permit assisted suicide but this failed on the same reasons as given in *Pretty*.

The other defence that was argued was that of necessity which was used in *R(on the application of Nicklinson) v Ministry of Justice*.<sup>18</sup> This would relieve all liability from the crime as in *Re A (Children)*<sup>19</sup> that justified the death of one conjoined twin to save the other. *Re A* and *Nicklinson* were distinguished because 'the very point of *Nicklinson* is about *taking* life, not saving it, and it thus seems different from *Re A (Children)*,' and there was no external threat to Nicklinson so there was no imperative to act.<sup>20</sup> The other problem with this defence is that the different competing values must be considered which should be the role of democratic institutions and is not the constitutional role of the courts.<sup>21</sup>

The courts have been very strict in the legal application of Section 2(1) Suicide Act 1961.<sup>22</sup> As seen in *Nicklinson* and *Pretty* they do not provide any defences for the act of assisted suicide and are not willing to

<sup>16</sup> Yogi Amin and Anne-Marie Irwin, 'Physician Assisted Suicide', British Journal of Neuroscience Nursing, vol 7, no. 2, (April/May 2011)

<sup>17</sup> Jon Whitfield QC, 'Suicide etc.', Westlaw UK [www.westlaw.co.uk](http://www.westlaw.co.uk), 7 January 2014 (accessed 27/04/2014)

<sup>18</sup> *R(on the application of Nicklinson) v Ministry of Justice* [2012] EWHC 2381

<sup>19</sup> *Re A (Children)* [2001] Fam 147

<sup>20</sup> Findlay Stark, 'Necessity and Policy in *R (Nicklinson and others) v Ministry of Justice*', Edinburgh Law Review, no. 105 (2014)

<sup>21</sup> Findlay Stark, 'Necessity and Policy in *R (Nicklinson and others) v Ministry of Justice*', Edinburgh Law Review, no. 106 (2014)

<sup>22</sup> Section 2(1), Suicide Act 1961

give prior exemptions to anyone. However, the CPS is more lenient with the practical application of the law with no prosecutions as yet under Section 2(1) Suicide Act 1961. The DPP's extensive guidelines provide clarity as to who might be culpable for this offence and anyone doing it purely for compassion is unlikely to be prosecuted. A problem with legislating on assisted suicide is that it may put pressure on the DPP to prosecute people who assist suicide for those who are not covered by the legislation. This would remove their discretion which appears to be fairly used without the need for legislation.

### III. Lord Falconer's Bill

Yale Kamisar wrote many legal works on the subject of assisted suicide and thought 'that it was impossible to draft a statute that could adequately protect vulnerable individuals without being hopelessly cumbersome.'<sup>23</sup> Kamisar was writing over 60 years ago and many countries have enacted assisted suicide legislation since then. Lord Falconer's bill aims to 'enable competent adults who are terminally ill to be provided at their request with specified assistance to end their own life.'<sup>24</sup> By looking at the criticisms of Lord Joffe's bill and seeing if Lord Falconer has changed them, it may be possible to determine whether Kamisar can be disproved and England and Wales can be provided with a piece of legislation that will be passed through.

The first issue with the bill is the concept of a terminal illness. This is described in Lord Falconer's bill as an 'inevitably progressive condition which cannot be reversed by treatment' and as a consequence they are reasonably expected to die within six months.<sup>25</sup> This can be a difficult burden to place on doctors where diagnosis is shown to not be an exact science. Evidence from Oregon, where similar assisted suicide legislation is enacted, shows that 27% of physicians are not confident they can give a six month prognosis and in another survey in the US 70% of patients who were diagnosed with having six months to live managed to live

<sup>23</sup> Yale Kamisar, 'Some non-religious views against proposed 'mercy killing' legislation' in *Minn Law Review*, no.42 (1958), pp. 96-1042.

<sup>24</sup> The Assisted Dying for the Terminally Ill Bill (London, 2005)

<sup>25</sup> Lord Falconer's Assisted dying bill ,HL bill 23 55/3

longer.<sup>26</sup> This requirement would put unnecessary pressures on doctors to attempt to guess a person's death where predicting someone's exact death is beyond modern medicine. There are also people who wish to have assisted suicide but do not fit this requirement. The fact that someone has more than six months to live may not make their situation any less unbearable but in fact the prospect of longer to live may make it more unbearable.

In the Netherlands a person qualifies for assisted suicide if the doctor 'holds the conviction that the patient's suffering is lasting and unbearable.'<sup>27</sup> This does not require that the suffering be physical or that the patient be terminally ill. This has the opposite effect to Lord Falconer's Bill with many people being able to meet this definition. The definition of who is entitled to assisted suicide may seem like a technicality but it is the main criteria that has to be fulfilled. A law that permits too few to apply will prevent those who really deserve and desire assistance being able to have it. However, the bill must have safeguards, such as the six month prognosis, to stop the crushing effect of anyone with a serious illness being able to seek assisted suicide. This crushing effect will be an issue because having this option may cause all of those within the definition to feel pressured that when diagnosed they should consider assisted suicide instead of considering the possibility of recovery. It may also be unworkable to have a wide definition because it will be difficult for any professional to accurately decide whether a person fits the description and may lead to a more subjective approach.

An acceptable definition must be reached or it must be accepted that there can never be a definition to cover all of those who desire assisted suicide without making the group too wide. Section 3 of Lord Falconer's bill outlines how the declaration from the patient would be formed and who would witness it. There must be one neutral witness to the signing of the declaration by the patient. Then there must be two declarations from the attending doctor and an independent doctor who must confirm they are terminally ill, have the capacity to make this decision and that this was decided voluntarily without any coercion. This has not changed extensively since the last bill and there were many different issues that

<sup>26</sup> 'Memorandum by the Disability 'Rights Commission, Thursday 2 December 2004', in the Assisted Dying for the Terminally Ill Bill (London, 2005), p. 228.

<sup>27</sup> 1(b) Section 2, Termination of Life on Request and Assisted Suicide (Review Procedures) Act, 1 April 2002.

rights groups had with this. It is thought that instead of two doctors who must make the decision it should be a doctor, psychiatrist and possibly a solicitor. The doctor should confirm the terminal illness, to the best of their ability. The psychiatrist should be given multiple chances to meet with the patient to work out if there is a condition like depression which could be solved by medication and that they have the capacity to make this decision. Finally, a solicitor who would have to analyse all the evidence to ascertain whether there has been any coercion.

When Lord Falconer's bill reached the committee stage in the House of Lords on 7 November 2014 an amendment was tabled by Lord Pannick that was voted in by unanimous support. This requires a judge in the Family Division of the High Court to confirm that a terminally ill patient has reached 'a voluntary, clear, settled and informed' decision to control the time and manner of their death. This amendment is going part of the way to amend the bill to the satisfaction of the rights groups. Changing the bill to also include a psychiatrist would mean having the three separate opinions from different fields which would ensure that from all possible angles, medically, emotionally and legally the patient has come to their own decision.

There is a 14-day waiting period in section 4(2)(d) of the bill between creating the declaration and being able to receive the assistance which can be shortened to six days if the patient may die within a month. This shortened period is new since Lord Joffe's bill where the waiting period was considered too long for those whose illnesses do not afford much time. This waiting period before being able to commit suicide is very important because it gives the patient time to reflect, consult family and not end their lives as a hasty decision. One key argument that the 14-day period should be extended is that anti-depressants take two-four weeks to take any effect.<sup>28</sup> Often people making this decision are prescribed antidepressants and this waiting period does not give enough time to see if their feelings can be changed with medication. This is important because it has been shown that it is not pain but thoughts about the condition and its impact on others that is the main reason people take their lives. The Disability Rights Commission found that in 5% of cases there is only a slight alleviation in the pain with the correct drugs and

<sup>28</sup> NHS Choices anti-depressants <http://www.nhs.uk/chq/Pages/2459.aspx?CategoryID=73> (accessed 27/04/2014).



they are able to control pain for 95% of people.<sup>29</sup> In a study in Oregon, where physician assisted suicide is legal they focused on the reasons for people choosing an assisted death. The top results were 'Loss of autonomy (97%), being less able to engage in enjoyable activities (86%) and loss of dignity (92%)' while inadequate pain control was only the reason in 10.2% of cases.<sup>30</sup> This shows that it is normally not the pain in dying that drives people to assisted suicide and therefore the waiting period for anti-depressants cannot be overlooked.

There is also the issue of legislating and creating a system of assisted suicide that many of the physicians are against. In a recent survey of the Royal College of Physicians 67.7% of doctors said that they do not agree with legislating on assisted suicide and 10.2% of those said they agree with assisted suicide legislation but that the final act should not be done by doctors.<sup>31</sup> The British Medical Association is also opposed to assisted suicide.<sup>32</sup> This may be a practical problem for the idea of legislation with many in the medical profession being able to refuse to perform any end of life procedure, as is their right.

Lord Falconer's bill has made key changes since Lord Joffe's including the need for annual reports; a Chief Medical Officer to oversee it which was something many people advocated for with the last bill and introducing the need for permission from the High Court Judge. There are some key areas which could still benefit from alterations including the waiting period and also having a psychiatrist who is a part of the declaration. The issue of defining terminal illness embodies a main problem of legislating assisted suicide. It permits only a specified group to be legally assisted which is difficult to define and may leave those deserving outside of the groups covered while presuming that those inside the group should consider it.

<sup>29</sup> 'Memorandum by the Disability Rights Commission, Thursday 2 December 2004', in the Assisted Dying for the Terminally Ill Bill (London, 2005), p. 225.

<sup>30</sup> 'A Matter of Facts', in Dignity and Dying, [www.dignityindying.org.uk](http://www.dignityindying.org.uk), p. 25 (accessed 27/04/2014).

<sup>31</sup> RCP reaffirms position against assisted dying, 27 November 2014, [www.rcplondon.ac.uk](http://www.rcplondon.ac.uk) (accessed 27/04/2014).

<sup>32</sup> BMA Ethics, [www.BMA.org.uk](http://www.BMA.org.uk) (accessed 27/04/2014).

#### IV. Conclusion

There is mounting pressure from the public for the House of Lords and Commons to pass this law but it may not be in the public's interest to enact it at this time. England is in a time of austerity with many changes affecting those with a terminal illness. The NHS is under increasing pressure, for instance on 15 January 2014 it was announced that 25 different cancer treatments would no longer be available on the NHS with the chairman of the Cancer Drugs Fund admitting there are likely to be further cuts.<sup>33</sup> Universal Credit is being introduced from February 2015 with a view to it becoming the new benefits system. This scheme of combining all the different benefits has been shown to be detrimental to those claiming disability benefits. 230,000 severely disabled people who do not have another adult to assist them will receive between £28 and £58 less in benefits every week and one in ten families with disabled children expressed fears that they will no longer afford their own home.<sup>34</sup> There is also a worrying number of 913,138 people have received emergency supplies from the Trussell Trust food bank in 2014.<sup>35</sup> This may not be a good time for a new bill to be put through that may put pressure on those who feel they are a burden which would be exacerbated by the current economic climate.

Even though people are requesting a bill that excludes liability for those assisting suicide I do not think that this is entirely necessary. The DPP has produced factors which decide if a prosecution is appropriate and so far no one has been prosecuted for the assisted suicide of a loved one. As seen from the criticisms of Lord Falconer's and Lord Joffe's bill it is almost impossible to have a compromise between the views of supporters and opposers to create a bill that pleases all. I think that a bill of this sort should become a part of law but not in the near future. England and Wales needs to make sure that there is good health care and treatments available to everyone and benefits for disabled people and their families that are more secure. Only when such changes are made

<sup>33</sup> 'NHS Chief: 'Further cancer cuts likely'', 15 January 2015, [www.bbc.co.uk](http://www.bbc.co.uk) (accessed 27/04/2014)

<sup>34</sup> 'Universal Credit: Disabled people 'to lose out' 17 October 2012, [www.bbc.co.uk/news](http://www.bbc.co.uk/news) (accessed 01/02/2014).

<sup>35</sup> <http://www.trusselltrust.org/foodbank-figures-top-900000> (accessed 23/08/2015)

will it be possible for people to choose assisted suicide without any external pressures making sure it is their real choice.



## INDIVIDUALS WITH PERSONALITY DISORDERS AND THE LAW

Hannah Williams

### I. Personality Disorder as a Mental Disorder

It is clear that personality disorder (PD) is regarded by the law as a mental disorder, notwithstanding the explicit removal of PD<sup>1</sup> by the reform of the Mental Health Act 1983 (MHA) in 2007.<sup>2</sup> This is evident from case law such as *R(B) v Ashworth Hospital Authority*<sup>3</sup> and the MHA Code of Practise<sup>4</sup> which expressly states it. Despite this, in *Ashworth* Baroness Hale acknowledged it was not an 'exact science' and that diagnosis is not 'clear cut.'<sup>5</sup>

Academic and clinical opinion remains undecided. *Blackburn* suggests early categories such as 'moral imbecile' in the Mental Deficiency Act 1913 have shaped the later Mental Health Acts<sup>6</sup> to be based around antisocial deviance from which PD is inferred.<sup>7</sup> Arguably, clinical psychiatry specifically avoids classing a recognisable group of behavioural traits as a medical disorder. Some conclude that what the law regards as PD is mere variation or exaggeration of normal personality dimensions<sup>8</sup> and so not a mental disorder. Yet, on the other end of the academic spectrum, *Fine* and *Kennett* submit that psychopathic offenders are impaired to the extent of not being moral agents and so excused of

<sup>1</sup> Then called 'psychopathic disorder'. Defined in s. 1(2) MHA 1983 as "... 'psychopathic disorder' means a persistent disorder or disability of mind (whether or not including significant impairment of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the person concerned ..."

<sup>2</sup> Now defined as "any disorder or disability of the mind" as in s. 1 MHA 1983

<sup>3</sup> [2005] UKHL 20, [2005] 2 A.C. 278

<sup>4</sup> Department of Health, *Code of Practise: Mental Health Act 1983* (2008) Chapter 3.3, 19

<sup>5</sup> *R(B) v Ashworth Hospital Authority* [2005] UKHL 20, para 31

<sup>6</sup> Mental Health Acts of 1959 and 1983

<sup>7</sup> R Blackburn, 'Personality disorder and psychopathy: Conceptual and empirical integration' [2007] *Psychology, Crime & Law* 8

<sup>8</sup> *Ibid.*, 7

criminal responsibility.<sup>9</sup> For one hundred and fifty years these arguments over definition, classification and management of PD have continued,<sup>10</sup> with a consensus no closer. Therefore, PD should not be considered a mental disorder for the purposes of the MHA.

For some years the PCL-R<sup>11</sup> has internationally been used for determining the existence of PD,<sup>12</sup> yet this and other models attract wide criticism for being too 'self-sealing' (when assessing patients assessors commonly see what they are supposed to see) as assessments.<sup>13</sup> Of course, many of those detained under the MHA tend to be admitted when their behaviour becomes socially unacceptable.<sup>14</sup> However, compared to other well-recognised mental disorders, *Walker* and *McCabe* summarise the concept of PD as fraught with ill-defined terms and 'bundled' into statute which will take 'half a century to recognize and remedy.'<sup>15</sup> Indeed, for some personality disordered individuals their common mask of sanity questions whether psychiatry will ever be able to recognise it correctly.<sup>16</sup> This fundamentally undermines PD as a legitimate mental disorder, especially a mental disorder to be governed by the MHA.

However, it is argued that even if PD is considered a mental disorder in clinical terms, by its nature it should not come under the MHA. The Richardson Committee (amongst others), recognised the very broad nature of PD and that even with the ICD-10 and DSM-IV categorisations, a wide range of PD would be encompassed under the MHA, many of which are relatively minor.<sup>17</sup> Therefore, there are primary policy issues in PD being legally considered a mental disorder in modern democracy, these being; the prevention of discrimination and the political

<sup>9</sup> C Fine & J Kennett, 'Mental impairment, moral understanding and criminal responsibility: Psychopathy and the purposes of punishment' [2004] *Int'l J.L. & Psychiatry* 432

<sup>10</sup> H Prins, 'Psychopathic Disorder - Concept or Chimera' [2002] *J.M.H.L.* 248

<sup>11</sup> Psychopathy Checklist (Revised)

<sup>12</sup> M Gosling, 'Severe personality disorder and its implications for the release of lifers and determinate sentence prisoners' [2006] *Crim.Law.* 2

<sup>13</sup> P E Mullen, 'Dangerous and severe personality disorder and in need of treatment' [2007] *BJP* 5

<sup>14</sup> Bartlett, 'The Test of Compulsion in Mental Health Law' 328

<sup>15</sup> N Walker & S McCabe, 'Crime and Insanity in England, Vol. 2' in Prins, 'Psychopathic Disorder - Concept or Chimera' 261

<sup>16</sup> H Howard, 'The Confinement of Personality Disordered Individuals: Questions of Justice and Safety' [2001] *J.C.L.* 7

<sup>17</sup> J M Laing, 'Rights Versus Risk? Reform of the Mental Health Act 1983' [2000] *Med.L.Rev.* 7

or social misuse of psychiatry.<sup>18</sup> Indeed, the label of mental disorder carries life-long stigma and so should be given with caution. Further, there are concerns of the stigma with DSPD, psychopathic and high risk personality disordered individuals impacting detrimentally to mild PD sufferers who are not a risk.<sup>19</sup>

## II. The Mental Health Act 1983

Since the Mental Health Act 1983 (MHA) came into force a more legalistic approach has been introduced to the Mental Health System (MHS).<sup>20</sup> Additionally, there has been a strong therapeutic purpose of the act since its beginnings.<sup>21</sup> The main purpose of the MHA is to ensure those with a 'serious mental disorder' are treated if 'necessary' regardless of their consent.<sup>22</sup> However, clearly the fact that an individual has a mental disorder does not, of itself, mean that, 'any action can or should be taken' under the MHA regarding them.<sup>23</sup>

Arguably, psychiatric detention and treatment should be prohibited on any but freely consenting patients.<sup>24</sup> However, this would undoubtedly be an undesirable restriction for society. Psychiatric detention is intrusive and restrictive by its nature even when given to a voluntary patient, and when correctly used compulsory psychiatric detention is necessary for society and the patient.<sup>25</sup> Nevertheless, the net should not be cast too wide. Considering that around 10% of the UK population are predicted to have a type of PD,<sup>26</sup> to include PD would be too broad. Further, the broad criterion of the MHA since the 2007 reform means that it would be difficult for a personality disordered individual to *not* be detained under the MHA. It is argued in this essay that this is incompatible with

<sup>18</sup> H Kennedy, 'A general theory of mental disorder and consolidated mental disability legislation: commentary on the Mental Capacity and Guardianship Bill 2008' [2008] *MLJ* 6

<sup>19</sup> J M Laing, 'Detaining the Dangerous: Legal and Ethical Implications of the government's proposals for high-risk individuals' [2002] *J.C.L.* 5

<sup>20</sup> B K. Puri, R A. Brown, H J. KcKee, I H. Treasaden, *Mental Health law* (2<sup>nd</sup> ed Hodder & Stroughton Ltd, 2012) 8

<sup>21</sup> *Ibid.*, 9

<sup>22</sup> Mental Health Bill [HL] 2006 Explanatory Notes para 5

<sup>23</sup> *Ibid.*, 24

<sup>24</sup> P Bartlett, 'The Test of Compulsion in Mental Health Law: Capacity, Therapeutic Benefit and Dangerousness as Possible Criteria' [2003] *Med.L.Rev.* 329

<sup>25</sup> *Ibid.*

<sup>26</sup> Mental Health Foundation, 'Personality Disorders' <http://www.mentalhealth.org.uk/help-information/mental-health-a-z/P/personality-disorders/> (accessed 31/03/2014)

the purpose of the MHA which is to only select mentally disordered individuals of which detention is necessary.

### III. Risk and Dangerousness

Regardless of whether PD is considered a mental disorder, it should not come under the MHA because risk to self and risk to others are inappropriate criterion for PD. This highlights the acutely contentious question of the relationship between PD and violence.<sup>27</sup> If present, then arguably it justifies overriding the autonomy of individuals for the protection of society.<sup>28</sup> Yet, morally, for capacitous patients to be detained involuntary without having committed an offence it must be for their own good and not for society.<sup>29</sup>

Further, there is the fundamental issue of the reliance upon prospective risk assessments.<sup>30</sup> To ensure compliance with the ECHR there are rigorous requirements for the methods of risk assessment. The diagnostic criteria must be clear and assessment tools reliable in order to ensure justice and due process. However, the ability of clinicians to predict confidently the possible dangerousness of personality disordered individuals is doubted. In particular, clinicians tend to over predict and overestimate risk.<sup>31</sup> Perhaps judicial review could justify any initial wrong assessment; however the judiciary are likely to heavily rely upon expert evidence.<sup>32</sup> Worryingly, it could be possible for high risk personality disordered individuals to be detained in civil proceedings.<sup>33</sup> Moreover, *Mullens* provides a powerful argument that PD group risk statistics of violence cannot simply be moved onto individuals. Fundamentally, PD is diagnosed on the basis of previous behaviour;<sup>34</sup> this means the risk assessments of violence are circular to the diagnosis of PD. He suggests that the margins of error for the risk assessments predicting personality

<sup>27</sup> G Richardson, 'Balancing autonomy and risk: A failure of nerve in England and Wales?' [2007] *Int'l J.L. & Psychiatry* 72

<sup>28</sup> *Ibid.*, 73

<sup>29</sup> Howard, 'The Confinement of Personality Disordered Individuals' 7

<sup>30</sup> Bartlett, 'The Test of Compulsion in Mental Health Law' 347

<sup>31</sup> Laing, 'Detaining the Dangerous' 9

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*

<sup>34</sup> P E Mullen, 'Dangerous and severe personality disorder and in need of treatment' [2007] *BJP*



disordered individuals' dangerousness<sup>35</sup> are so wide that their use for detention is unethical.<sup>36</sup>

Arguably, even the self-risk criterion of the MHA is inappropriate for PD. In this context the classic biomedical ethical conflict between respect for patient autonomy and the demands for beneficence applies<sup>37</sup> and it is submitted that medical paternalism here is not justified. Undoubtedly, there is instinctive unease in not intervening if there is grave risk of deterioration or suicide. However, the very nature of PD means it would be difficult for it to be governed by this criterion.

The MHA Code of practise<sup>38</sup> outlines factors clinicians should consider in deciding whether to detain mentally disordered patients because of risk to their own health or safety. These include: self-harm, jeopardising their own health accidentally and the patient's skill at managing their condition.<sup>39</sup> These factors largely coincide with the ICD-10 descriptions of PD.<sup>40</sup> This suggests that the criterion of the MHA makes it possible for the whole range of PDs to come under it. Therefore, in reality because of the definition of PD, it is difficult for a personality disordered individual to *not* be detained under this criterion. Ironically, this undermines the purpose of the MHA criterion which is to select from those with a mental disorder only those whom are so at risk that they need detention. Under the current MHA, detention means not only forcible confinement but also possible treatment with exceptionally powerful chemicals or even force-feeding.<sup>41</sup> Indeed, these methods are extremely intrusive and have as their objective fundamental change to the individual.<sup>42</sup> Therefore, detentions are not appropriate for most PDs which are central to the very person of the individual and because most types of PD are not 'severe' and individuals live reasonable, crime free lives.<sup>43</sup> Yet, detention is possible and even likely, for all types. Individuals with PD have a greater general tendency towards self-harm and self-

<sup>35</sup> Including those as; the MacArthur Classification of Violence Risk, HCL-20 and the PCL-R

<sup>36</sup> Mullen, 'Dangerous and severe personality disorder' 4

<sup>37</sup> Richardson, 'Balancing autonomy and risk' 72

<sup>38</sup> Department of Health, *Code of Practise: Mental Health Act 1983* (2008)

<sup>39</sup> Code of Practise para 4.6, in K Keywood, N Allen & N Glover-Thomas, 'Workbook on Mental Health Law' [2014] 45

<sup>40</sup> ICD-10 Version for 2010 Chapter V: Disorders of adult personality and behaviour (F60-F69)

<sup>41</sup> As held in *R(B) v Ashworth Hospital Authority* [2005] UKHL 20

<sup>42</sup> Bartlett, 'The Test of Compulsion in Mental Health Law' 331

<sup>43</sup> Department of Health and Home Office, *Managing Dangerous People with Severe Personality Disorder: Proposals for Policy Development* [1999] 7

neglect than those with other mental disorders.<sup>44</sup> Arguably, a failure to protect vulnerable individuals from a known risk of harm could mean a state breach of their Article 2, 3 and 8 rights of the ECHR. However, whether this obligation includes a duty to actually detain a patient is still unknown.<sup>45</sup>

Moreover, many argue that capacity holds minimal practical significance in deciding compulsory treatment for a personality disordered individual under the MHA.<sup>46</sup> This is because the factors of PD mean a personality disordered individual's consent is likely to be overridden. They are prone to not respond well to crisis, and delay in engaging and developing motivation for treatment<sup>47</sup> making them vulnerable to forcible detention and treatment. However, it is argued these are not the actual criterion of the MHA or valid reasons for the deprivation of liberty. Further, due to the common symptoms of PD being the same as the criterion of self-risk (as discussed above), again there are obvious problems in achieving accurate risk assessments. Therefore, this undermines the attempts to ensure that only personality disordered individuals who should be detained under the MHA actually are.

### III. Treatment

It is submitted that PD is not a mental disorder which is appropriate to be compulsory admitted for treatment. Personality disordered individuals are unlikely to benefit from available treatment<sup>48</sup> and so should not come under the MHA.

In *Hutchinson Reid v UK*<sup>49</sup> the ECtHR accepted that Article 5(1)(e) allows for the detention of a mentally disordered individual as long as it is

<sup>44</sup> For example, the rates of deliberate self-injury without intent to die are extraordinarily high among borderline individuals (63%–80%), A L Chapman, 'Borderline Personality Disorder and Deliberate Self-Harm: Does Experiential Avoidance Play a Role?' [2011] *Suicide and Life-Threat Behav.* 35: 388–399. 1

<sup>45</sup> Keywood, Allen & Glover-Thomas, 'Workbook' 45

<sup>46</sup> Laing, 'Rights Versus Risk?' 11

<sup>47</sup> Mental Health Act 1983 Code of Practice 2008, 323-324

<sup>48</sup> S Giordano, 'For the protection of others. The value of individual autonomy and the safety of others' [2000] *CSEP* 314

<sup>49</sup> [2003] 50272/99 ECHR 94

necessary to prevent harm to others.<sup>50</sup> There was no need for the provision of treatment to justify detention. However, the treatability issue has arisen in the UK due to the application of involuntary powers to psychopathy,<sup>51</sup> suggesting there is wide unease with this low legal standard. Therefore, it is likely the ECtHR gave this low standard for political reasons.<sup>52</sup> Indeed, the Expert Committee which advised ministers in 1999 argued the MHA should only authorise the overriding of patient autonomy if there is 'a health intervention of likely efficacy available.'<sup>53</sup> The MHA itself has a strong, historic therapeutic purpose.<sup>54</sup> Further, it is argued the removal of the treatability requirement of the MHA in the 2005 reform was not significant because the requirement itself was not particularly restrictive.<sup>55</sup>

The initial problem here is whether personality disordered individuals can be treated. Despite the lack of evidence for a blanket assumption of non-treatability,<sup>56</sup> neither is there clear evidence that treatment is even helpful.<sup>57</sup> No effective drug has yet been discovered.<sup>58</sup> Admittedly, the usual psychological interventions on offer target traits of PD, such as anger-proneness, impulsivity or social avoidance.<sup>59</sup> However, perhaps this is because of the purposes of the 2007 reform, rather from their proven effectiveness with PD. Alternatively, the effectiveness of group psychotherapies and CBT<sup>60</sup> are doubted.<sup>61</sup> Therefore, after detention the further violation of autonomy is imposed by treatment without any likely additional gain.<sup>62</sup> To detain individuals whom it is known treatment does not affect would undermine the legitimacy and purpose of the legislation.

<sup>50</sup> G Richardson, 'The European convention and mental health law in England and Wales: Moving beyond process?' [2005] *Int'l J. L. & Psychiatry* 131

<sup>51</sup> Kendell 2002, in Richardson, 'The European convention and mental health law' 131

<sup>52</sup> Richardson, 'The European convention and mental health law' 132

<sup>53</sup> Expert Committee 1999 para 5.98, in Richardson, 'The European convention and mental health law' 131

<sup>54</sup> Laing, 'Detaining the Dangerous' 9

<sup>55</sup> Richardson, 'The European convention and mental health law' 132

<sup>56</sup> R Blackburn, 'What works with mentally disordered offenders' [2004] *Psychology, Crime & Law*, 10:3, 297-308, 304

<sup>57</sup> Giordano, 'For the protection of others' 314

<sup>58</sup> Ibid.

<sup>59</sup> Blackburn, 'What works with mentally disordered offenders' 304

<sup>60</sup> Cognitive Behavioural Therapies

<sup>61</sup> Anonymous 1991, Ravndan and Vaglum 1991, Stein and Brown 1991 in Giordano, 314

<sup>62</sup> Giordano, 'For the protection of others' 314

Moreover, it is unjustified and harmful to the individual, and problematic for the hospital employees and other patients.<sup>63</sup>

Moreover, the MHA wording suggests that in order to protect others, it is 'necessary' that the patient 'should receive this treatment' (S3 (iii)).<sup>64</sup>

Clearly, it can be necessary for the protection of society that an individual be detained, but there is little coherence in why for the protection of society an individual should be treated.<sup>65</sup> Rather, it seems unjustifiable and unethical according to the Principle of Beneficence that treatment be enforced on patients for the protection of society,<sup>66</sup> especially where treatment is unlikely to be effective.

Further, under the MHA a mental disorder is sufficiently severe to deprive a person of the legal capacity to consent to treatment.<sup>67</sup> The MHA is the mechanism by which clinicians are enabled to make decisions on an individual's behalf.<sup>68</sup> However, personality disordered individuals usually do have legal capacity when they come into contact with the MHS<sup>69</sup> yet their decision-making autonomy is removed. In fact, often little respect is given for their competence or capacity.<sup>70</sup> Whereas, for the minority that do not have capacity, they could be treated in their best interests under Sections 5 and 6 of the Mental Capacity Act 2005.<sup>71</sup>

## II. Personality Disordered Offenders and Diversion

Reforming the Mental Health Act Part II states that, 'public protection is one of the Government's highest priorities'<sup>72</sup> for the MHA. Yet, it is

<sup>63</sup> J Peay, 'Sentencing psychopaths: is the "hospital and limitation direction" an ill-considered hybrid?' [1998] *Crim.L.R.* 1

<sup>64</sup> Giordano, 'For the protection of others' 314

<sup>65</sup> Giordano, 'For the protection of others' 312-313

<sup>66</sup> Ibid., 313-314

<sup>67</sup> Richardson, 'Balancing autonomy and risk' 72

<sup>68</sup> Ibid.

<sup>69</sup> J Peay, 'Personality disorder and the law: some awkward questions' [2011] *Philosophy, Psychiatry and Psychology*, 18 (3). pp. 231-244, 5

<sup>70</sup> Richardson, 'Balancing autonomy and risk' 76

<sup>71</sup> P Fennell, 'Best Interests and Treatment for Mental Disorder' [2008] *Health Care Analysis Publications* 263

<sup>72</sup> Department of Health and Home Office, *Reforming the Mental Health Act -- Part I: the New Legal Framework* (2000), in Dr I H Treasaden, 'An Update on Managing Dangerous People with Severe Personality Disorder -- "the Human Time Bombs"' [2004] *Med.Leg.J.* 2

argued that PD offenders should exclusively stay in the Criminal Justice System (CJS) not the MHS.

The widespread 'warehousing' and 'parking' of personality disordered offenders<sup>73</sup> to prevent them re-offending is highly questionable. Consultation documents from the Council of Europe<sup>74</sup> state that the MHS should not be used for custodial reasons, even when there is significant risk of harm to others. Rather, that it is a matter for the CJS. Indeed, it is worth noting that 'fashions' in criminal justice and mental health come and go,<sup>75</sup> and the *Michael Stone* case can be isolated as to the trigger of the MHA reform of 2007 and the DSPD experiment.<sup>76</sup>

However, there is a wealth of criminal legislation to detain PD offenders that are considered a risk to society. The criminal law already uses forms of preventative detention based upon dangerousness like discretionary sentences under section 34 of the Criminal Justice Act 1991<sup>77</sup> and section 2 of the Crime (Sentences) Act 1997.<sup>78</sup> Despite being preventative, detention is only after a guilty verdict, unlike that of psychiatric detention. Further, there is electric tagging and monitoring through probation, where sentencing laws are inadequate and dangerousness only estimated.<sup>79</sup>

Although PD offenders cannot be forced treatment in prison, treatments for PD need co-operation anyway, as Lady Hale pointed out in *Ashworth*.<sup>80</sup> Further, because there is no 'cure', voluntary engagement with 'coping skills' in prison is advocated.<sup>81</sup> Even if imprisonment is not rehabilitative, the penal system is justified by being punitive. Lastly, there

<sup>73</sup> P Tyrer et al, 'The successes and failures of the DSPD experiment: the assessment of severe personality disorder' [2010] *Med Sci Law* 97

<sup>74</sup> Council of Europe (2000) *White Paper Regarding a Draft Recommendation on Legal Protection of Persons Suffering from Mental Disorder Especially Those Placed as Involuntary Patients*. Strasbourg: Council of Europe.

<sup>75</sup> H Prins, 'Incapacitating the Dangerous in England and Wales: High Expectations, Harsh Reality' [2002] *J.M.H.L.* 10

<sup>76</sup> Tyrer et al, 'The successes and failures of the DSPD experiment' 96

<sup>77</sup> S. 34 CJA 1991 empowers a judge to give discretionary life sentences upon conviction of a serious offence based upon grounds of risk to society. In, H Howard, 'The Confinement of Personality Disordered Individuals: Questions of Justice and Safety' [2001] *J.C.L.* 2

<sup>78</sup> S.2 Crime (Sentences) Act 1997 goes further, requiring a life sentence to be given to a defendant who has committed a serious offence, having previously committed a serious offence exceptional circumstances. In Howard, 'The Confinement of Personality Disordered Individuals' 2

<sup>79</sup> Howard, 'The Confinement of Personality Disordered Individuals' 7

<sup>80</sup> P Bartlett, 'Psychiatric Treatment: In the Absence of Law?' [2006] *Med.L.Rev.* 126

<sup>81</sup> Howard, 'The Confinement of Personality Disordered Individuals' 7

is still a range of safeguards for personality disordered offenders within the CJS.<sup>82</sup>

The dilemma of the MHA governing PD offenders has been over emphasised. Notably, *Gunn et al* found that only 8% of prisoners had a primary diagnosis of PD.<sup>83</sup> Moreover, it is likely the initial inclusion of PD within the MHA was for political reasons, following the 'demonisation' of psychopaths and urgency felt by government that 'something must be done'.<sup>84</sup> For these arguments, PD offenders at risk to the public should remain in the CJS and not spill into the MHS via the MHA.

### III. Conclusion

The MHA is not appropriate legislation to govern PD. Fundamentally, it is morally unacceptable to detain individuals 'who have been wrongly diagnosed, or wrongly assessed as posing a risk to the public, in the hope of identifying the small number of DSPD individual' as expressed by the Law Society.<sup>85</sup>

Of course, due to the broad spectrum of those suffering from PD there is no *faultless* legislation that could suit all. However, sufferers of PD clearly require sufficient safeguards and appropriate treatment, regulated under legislation but the MHA is not appropriate or effective to do this.

<sup>82</sup> For example, under the Police and Criminal Evidence Act 1984 there are safeguards within the Code of Practise, Code C. In Puri, Brown, KcKee, Treasaden, 74-75

<sup>83</sup> Peay, 'Sentencing psychopaths' 2

<sup>84</sup> Ibid.

<sup>85</sup> Laing, 'Detaining the Dangerous' 10

## WHAT IS A HOUSE?

Nikolaos Michalakis

The word '*house*' could be categorised as a very common and frequently used English word. According to Lewison LJ in *Magnohard Limited v The Right Honourable Charles Gerald John Earl Cadogan, Cadogan Estates Limited*<sup>1</sup> 'The word 'house' is one of the 200 most frequently used words in the English language, and one of the 20 most frequently used nouns'. It is, probably, used on a daily basis by every English speaking person in the world and one certainly comes across it during ones daily routine in one form or another. The Oxford English Dictionary defines it as; 'a building for human habitation'. Most people would not be troubled, as such, when they come across the word. However, it seems that this simple and very common word has caused a plethora of cases in the English courts. Most of these cases relate to the Leasehold Reform Act 1967 ('the Act'). This essay will explore some of the significant cases that have gone through the English courts and conclude with the most recent interpretation of the statutory definition of '*house*', for the purposes of the Act, following the joint appeal to the Supreme Court in the cases of *Day v Hosebay Limited*<sup>2</sup> and *Howard de Walden Estates Limited v Lexgorge Limited*<sup>3</sup>.

Prior to reviewing the definition of 'house' in relation to the Act it would be prudent to review whether the courts have been called to define what a house is in scenarios where no statutory definition exists. Lord Carnwath in the joint appeal of *Hosebay* and *Lexgorge* brought the Court's attention to a case that was reported prior to the enactment of the Act, *Ashbridge Investments Ltd v Minister of Housing and Local Government*<sup>4</sup>. In that case Lord Denning MR defined 'house' as; 'a building which is constructed or adapted for use as, or for the purposes of, a dwelling'. The similarity between Lord Denning's definition in *Ashbridge* and the Act –

<sup>1</sup> [2012] EWCA Civ 594

<sup>2</sup> [2012] UKSC 41

<sup>3</sup> [2012] UKSC 41

<sup>4</sup> [1965] 1 WLR 1320

detailed in the next paragraph – is significant. Lord Denning himself commented upon the similarities in *Lake v Bennett*.<sup>5</sup>

It would appear that in the Leasehold Reform Act, 1967, Parliament adopted these words, but added the limitation 'reasonably so called.

From the above discussion one could potentially conclude that in the likelihood that the definition of 'house' became a matter in issue, in a case of any statutory or common law context where a definition does not already exist, then the interpretation given by the courts, to the definition adopted under the Act, would probably be the one used.

Since the essay will explore the meaning of house for the purposes of the Act, the start of the journey has to be from the definition provided by the Act, which can be found under section 2 of the Act and states:

For purposes of this Part of this Act, 'house' includes any building designed or adapted for living in and reasonable so called, notwithstanding that the building is not structurally detached, or was or it not solely designed or adapted for living in, or is divided horizontally into flat or maisonettes; and:

- a) where a building is divided horizontally, the flats or other units into which it is so divided are not separate 'houses', though the building as a whole may be; and
- b) where a building is divided vertically the building as a whole is not a 'house' though any of the units into which it is divided may be.

The courts have split the above definition into a two-limb test; a) is it a building designed or adapted for living, and b) is it a building reasonable so called 'house'. Both limbs must be satisfied for the property to come under the Act.

The first limb of the test has not, as such, troubled the courts to a great extent and the majority of case law has been in relation to the second limb. However, there has been an important House of Lords

<sup>5</sup> [1970] 1 Q.B. 663



case, *Boss Holdings Ltd v Grosvenor West End Properties Ltd*<sup>6</sup>, which was, until the *Hosebay* case in the Supreme Court, considered the leading authority. In *Boss* Lord Neuberger took, according to Lord Carnwath, a grammatical analysis of the relevant statutory words. Lord Neuberger's decision in *Boss* was justified on the premise that since the building was originally designed for 'living in' and that the original design was still visible in the property then that was sufficient to bring the property within the definition in the Act in spite of its adaptation to other uses. Lord Carnwath in *Hosebay* rejected the 'literalist' approach taken by the House of Lords in *Boss* and at paragraph 35 adopted Lord Denning's approach in *Ashbridge*:

I find myself drawn back to a reading which accords more closely to what I have suggested was in Lord Denning's mind in *Ashbridge*, that is a simple way of defining the present identity or function of a building as a house, by reference to its current physical character, whether derived from its original design or from subsequent adaptation.

However, the Supreme Court in *Hosebay* did not overrule *Boss* as it was found to be correct in its facts, therefore restricting its application.

The first important case to reach the Court of Appeal ('CA') where the 'reasonable so called' part of the test was in issue was *Lake v Bennett*<sup>7</sup>. The case related to a building which had a basement, a ground floor and two floors above the ground, with the ground floor being sublet as a business. The CA held that the building in question was a 'house reasonably so called' for the purposes of the Act regardless the fact that part of the building has been converted and used for business purposes. The CA, in particular Lord Denning, supported its decision on the fact that if the part of the building used for business was operated by the tenant of the remaining building then it would be reasonable called a 'house' and come under the definition of the Act. In this case, the fact that part of the building which was used for business was sublet was irrelevant for the purposes of the test.

The decision in *Lake*, due to the similarity in facts, was considered by the House of Lords ('HL') in the case of *Tandon v Trustees of Spurgeons Homes*<sup>8</sup> where the majority held that a shop with living accommodation

<sup>6</sup> [2008] UKHL 5

<sup>7</sup> [1970] 1 Q.B. 663

<sup>8</sup> [1982] A.C. 755

above was a 'house reasonably so called' for the purposes of the Act. It has to be noted that it was a 3/2 majority. In the *Tandon* case Lord Roskill laid down a test for scenarios of mixed use properties, the test is as follows:

I deduce from it the following propositions of law: (1) as long as a building of mixed use can reasonably be called a house, it is within the statutory meaning of 'house', even though it may also reasonably be called something else; (2) it is a question of law whether it is reasonable to call a building a 'house'; (3) if the building is designed or adapted for living in, by which, as is plain from section 1 (1) of the Act of 1967, is meant designed or adapted for occupation as a residence, only exceptional circumstances, which I find hard to envisage, would justify a judge in holding that it could not reasonably be called a house. They would have to be such that nobody could reasonably call the building a house.

In *Tandon* only 25% of the property was occupied for residential purposes but the court did find that the building was a 'house' for the purposes of the Act. The propositions in *Tandon* have been used in many cases and according to Hudson<sup>9</sup>, *Tandon* used to be regarded by the courts as the test applicable to all cases concerning the second limb of the statutory definition. However, following the decision in *Hosebay* it only appears to be applicable to mixed use properties.

The next important decision to review mixed-use properties, following *Tandon*, was the *Prospect Estates Ltd v Grosvenor Estate Belgravia*<sup>10</sup> which involved a mixed use property of which only a very small portion was used for residential purposes. The court of appeal reversed the judgement of first instance, distinguishing the current case from *Tandon* on the fact that the judge had given insufficient weight to the 'exceptional circumstances', echoing Lord Roskill's propositions, of the prescribed use of the building in the leases, the current use of the building and the relevant proportions of mixed use. The case was later considered in

<sup>9</sup> Jeremy Hudson, 'The ongoing 'house' conundrum.', *Estates Gazette* 2013, 1327, 80-82.

<sup>10</sup> [2008] EWCA Civ 1281

*Hosebay* where it was accepted that the current use of the building should be one of the most determinative factors.

The latest Supreme Court decision on the interpretation of the 'house' under the Act, is *Hosebay*,<sup>11</sup> as already mentioned above. Lord Carnath who gave the leading judgement, and to which all other Lords agreed, carried a review of all of the above cases and explained them in a different light. However, the Supreme Court did not overrule any of the previous cases but restricted most of them on their facts and therefore restricted them on their use. The court did not rule on matters such as; the importance of the terms of the lease, the appearance of the building, which according to academics<sup>1112</sup> and practitioners<sup>13</sup> create potential uncertainty. According to Orji<sup>14</sup> the court missed an opportunity to take a definite stand on the point of whether it is a question of law or fact. The court did however make an overarching statement about the interpretation of the definition. Lord Carnath in paragraph 9 of *Hosebay* states the following:

Both parts need to be read in the context of a statute which is about houses as places to live in, not about houses as pieces of architecture, or features in a street scene, or names in an address book.

Lord Carnath's introduction and above statement brings back into the test the '*residency*' requirement that the Commonhold Act 2002 ('the 2002 Act') has removed from the Act, '...reining in the scope of the 1967 Act to 'genuine homes' intended to be covered by enfranchisement.'

Following the *Hosebay* decision, a case relating to the second limb of the test reached the Court of Appeal, *Henley v Cohen*<sup>15</sup>. The case related to a building which consisted of a ground floor shop and a first floor storeroom. The leaseholder decided to adapt the first floor storeroom into a flat, creating a mixed use building, in breach of the lease's covenants. The Court of Appeal, distinguishing *Tandon*, held that the property could not be a 'house reasonable so called' and therefore did not come under the Act. One of the distinguishing factors, relied upon by the court, from *Tandon* was that the flat was not connected with the shop.

<sup>11</sup> Ibid

<sup>12</sup> Nicholas Hopkins, 'What is a house?', The Conveyancer and Property Lawyer, 2013, 2, 140-148

<sup>13</sup> Hudson, 'The ongoing 'house' conundrum.', 80-82.

<sup>14</sup> Peter Orji, 'House – a call to parliament', Journal of Housing Law, 2013, 16(2), 26-30

<sup>15</sup>[2013] EWCA Civ 480

Hudson<sup>16</sup> stated that the test in *Tandon* should have been relevant as it was mixed use premises. The Court of Appeal seems to intimate that Hudson's comment would be correct if the premises were always mixed use or were adapted into mixed use without contravention of the lease. Although the lease may not be treated as a major factor in the case of *Henley*, had the court not taken into account the history of the building and the terms of the lease, it would have allowed the leaseholder to come under the Act and force the freeholder to sell him the freehold. The decision can therefore be viewed as an equitable one, especially in light of the following passage by Mummery LJ at paragraph 58:

Having found that the conversion of the upper storey of the building was a breach of clause 5, the judge was, in my view, justified in concluding that the claimants were not entitled to rely on those unauthorised conversion works to assert that part of the Premises had been 'adapted for living in.

In conclusion it transpires that following the decision in *Hosebay*, and the subsequent decision in *Henley*, premises that are used wholly for business purposes at the relevant time will not fall under the definition of 'house' for the purposes of the Act. It is clear from Lord Carnath's introduction in *Hosebay* that the Supreme Court has interpreted the definition of 'house' taking into account the original purpose of the Act. The Court did not seem troubled about the removal of the 'residency' qualification by the 2002 Act. By making reference to the Draft Bill and Consultation Paper of the 2002 Act the court concluded that there is no doubt that the purpose of the 2002 Act was to address perceived flaws in the 'residential leasehold system' not in the leasehold system more generally (as per Lord Carnath, *Hosebay* paragraph 3). On that analysis the Supreme Court seems to re-introduce the 'residency' requirement as part of the test. As Hudson<sup>17</sup> stated:

Ten years after the repeal of the residency qualification, emphasis is being placed on the original purpose of the legislation and freehold claims must be viewed in that statutory context. Premises in wholly or mainly non-

<sup>16</sup> Hudson, "The ongoing "□ house" □ conundrum.", 80-82.

<sup>17</sup> Ibid.

residential use at the relevant time cannot qualify for enfranchisement.

*Hosebay* and *Henley* also appear to restrict or create doubts about the scenario of mixed use properties, which would previously fall under *Tandon*. Since 2002 and the removal of the 'residency' qualification there appears to have been an increased number of cases reaching the appellate courts<sup>18</sup>. There have been half a dozen cases between the introduction of the Act in 1967 and 2002 and more than half a dozen cases between 2002 and *Henley*. If the Supreme Court felt that the 'floodgates' had been opened by the removal of the 'residency' qualification, then the decision in *Hosebay* may well reset the 'floodgates' to ajar. However, academics and practitioners remain sceptical as to whether the law is settled in this area.

<sup>18</sup> Ibid



## CONTRACT LAW 'UNDER PRESSURE'

Rebecca Cross

*We are being asked to extend the categories of duress ... This is not necessarily objectionable, but it seems to me that an extension capable of covering the present case, involving 'lawful act duress' in a commercial context in pursuit of a bona fide claim, would be a radical one with far reaching implications. . . . The aim of our commercial law ought to be to encourage fair dealings between parties. But it is a mistake for the law to set its sights too highly when the critical enquiry is not whether the conduct is lawful but whether it is morally or socially unacceptable.<sup>1</sup>*

The warning of Steyn LJ gives due regard for the need of certainty in the commercial bargaining process so that it will be 'relatively rare' to class as illegitimate a threat of lawful action which is not in itself unlawful. The case held that to regard a threat of lawful action, used in pursuit of a bona fide claim in a commercial context, as illegitimate would 'introduce a substantial and undesirable element of uncertainty in the commercial bargaining process'.<sup>2</sup>

### I. Contract law and duress

The common law of duress renders a contract voidable where consent of a contracting party has been obtained by pressure which the law regards as improper. There has been a progressive development of the law relating to duress as a vitiating factor as it seeks to respond to changing social and economic conditions. The question is no longer what was threatened, but whether the threat amounts to a form of illegitimate pressure. In practice, cases divide into three categories: duress of the person, duress of goods and 'economic duress'.<sup>3</sup> The required causal link

<sup>1</sup> Steyn LJ *CTN Cash & Carry Ltd v Gallaber Ltd* [1994] 4 All ER 714, 719.

<sup>2</sup> *ibid.*

<sup>3</sup> Gunther Treitel, *The Law of Contract*, (Oxford: Sweet & Maxwell, 2011 by Peel) para 10-002.

of the illegitimate pressure varies, with the test most stringent for economic duress. There is no discrete category of 'lawful act duress'. Pressure is a permissible feature of everyday life; it is difficult to accept that the law should give relief against acts which are not proscribed as being unlawful.

## II. Do the foundations for lawful act duress exist?

### A. Case law

To grant relief on the basis of economic duress, the courts must make the difficult distinction between those agreements which are the result of 'commercial pressure' and those which are the result of unfair exploitation.<sup>4</sup> Steyn LJ notes that a threat of lawful action may be illegitimate when 'coupled with a demand for payment' but this test is somewhat uncertain.<sup>5</sup> In the commercial context threats are often used to back a demand for some form of payment.

Any extension of the categories presents the challenge of articulating a clear and practicable test. Enonchong suggests four factors that emerge as being relevant for when a threat of lawful action may constitute illegitimate pressure.<sup>6</sup> The danger with a multi-factor approach is a lack of consistency as different courts place different emphasis on different factors. Such a doctrine would be unstructured, at odds with commercial litigation, where it is vital for judicial response to be certain and predictable.

If the categories are to be extended to allow lawful pressures, the only viable basis for discriminating between acceptable and unacceptable pressures is not positive law but social morality, leaving the judiciary to say what pressures are improper as contrary to prevailing standards.<sup>7</sup> In general, the courts exercise a great deal of caution in determining whether a threat of lawful action may be deemed morally or socially unacceptable so as not to upset the expectations of commercial parties.

<sup>4</sup> *The Siboen and the Sibotre* [1976] 1 Lloyd's Rep. 293 (QBD) [336].

<sup>5</sup> *CTN Cash & Carry Ltd v Gallaher Ltd* (n 1) [637].

<sup>6</sup> Nelson Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (London: Sweet & Maxwell, 2006) para 3-022.

<sup>7</sup> Peter Birks, *An Introduction to the Law of Restitution* (Oxford: Clarendon Press, 1988) 177.



Their Lordships concluded in *The Universe Sentinel* that they did not have a free hand to develop their own conception of illegitimacy, and chose instead to reflect the standards found in legislation.<sup>8</sup> The uncertainty resulting from attempts to expand the doctrine would erode the very protection it was intended to confer. A category of lawful act duress would confer an inappropriate judicial discretion in examining parties' intent in the context of what is considered by society as being fair, at odds with the needs of commercial convenience and certainty.

### B. First principles of contract law

Two ideologies underpin the contract rule book: market-individualism and consumer-welfarism.<sup>9</sup> Market-individualism is to be favoured over consumer-welfarism, which suffers from a pluralistic scheme of principles, inconsistency and lack of unity.<sup>10</sup> The function of contract is not simply to facilitate exchange; it is to facilitate competitive exchange.<sup>11</sup> For those who enter into the market it is important that they should know where they stand. This means that the ground rules of contract should be clear. Hence, the restrictions on contracting must not only be minimal (in line with the competitive nature of the market), but also be clearly defined (in line with the market demand for predictability). It is inherent in market-individualism that judges should play a non-interventionist role with respect to contracts.

The principle of sanctity of contract enjoins the courts to be ever-vigilant in ensuring that established or new doctrines do not become an easy exit from bad bargains.<sup>12</sup> The sum total of freely negotiated bargains is the good of society as a whole in that it results in an economically efficient use of resources.<sup>13</sup> It is not for the courts to enter into the market place and direct what are or are not proper bargaining tactics.

<sup>8</sup> [1983] 1 AC 366 (HL).

<sup>9</sup> John Adams and Roger Brownsword, 'The Ideologies of Contract' (1987) 7 LS 205.

<sup>10</sup> Ibid.

<sup>11</sup> Ibid 206.

<sup>12</sup> Ibid 210.

<sup>13</sup> Gareth Jones, *Goff and Jones: The Law of Restitution* (London: Sweet & Maxwell, 1<sup>st</sup> supp, 7<sup>th</sup> edn, 2009) para 10-034.

Market-individualism involves eliminating or reducing any legal or moral factors that could lead to uncertainty.<sup>14</sup>

### C. Commercial reality

Lawful act duress is too pure a standard for business dealings because it omits legitimate self-interest. In assessing causation, the courts consider what alternative courses of action, other than to submit to the pressure, were reasonably available.<sup>15</sup> It would be difficult to establish 'lawful act duress' – it does not seem unreasonable to resist pressures not condoned by law. Relief is inappropriate if a complainant makes no protest and conducts himself in a way which shows he is prepared to live with the consequences.<sup>16</sup> If a category were established, a party who is not influenced by illegitimate pressure may express words of protest simply for the purpose of relying on it in future in case, for commercial reasons, it turns out it is in his interest to avoid the transaction.

An examination of good faith would be integral to 'lawful act duress', but English law has traditionally resisted recognising such a duty.<sup>17</sup> A duty to negotiate in good faith is unworkable in practice as it is inherently inconsistent with the adversarial position of a negotiating parties.<sup>18</sup> Given the many difficulties when defining good faith, case law suggests it is an irrelevant consideration.<sup>19</sup>

### III. Conclusion

There exists a tension between encouraging contractual flexibility and restraining opportunism. The function of the law is to provide an effective and fair framework for contractual dealings, but great legal changes should only be embarked on when truly necessary.<sup>20</sup> This article

<sup>14</sup> Hamish Lal, 'Commercial exploitation in construction contracts: the role of economic duress and unjust enrichment' (2005) 21 Const.L.J. 590.

<sup>15</sup> *The Universe Sentinel* (n 8).

<sup>16</sup> *Huyton SA v Peter Cremer GmbH* [1999] 1 Lloyd's Rep 620 (QBD).

<sup>17</sup> *Merton LBC v Stanley Hugh Leach Ltd* [1985] 32 BLR 68 (Ch D) [80].

<sup>18</sup> *Walford v Miles* [1992] 2 AC 128 (HL) [138].

<sup>19</sup> *The Atlantic Baron* [1979] QB 705; *Ultraframe (UK) Ltd v Tailored Roofing Systems* [2004] EWCA 585 (CA).

<sup>20</sup> Johan Steyn, 'Contract Law: fulfilling the reasonable expectations of honest men' (1997) 113 LQR 433.

concludes by agreeing with Steyn LJ: an extension of the categories to duress is unnecessary and unwise.



## THE ICC REPARATIONS REGIME: THE FUTURE OF INTERNATIONAL JUSTICE OR AN EMPTY PROMISE?

Mariya Peykova

With the coming into force of the Rome Statute in 2002, the world saw the beginning of a new era in international criminal justice, with the establishment of a new International Court which has the potential to deliver both retributive and substantive justice. With a mandate focused on the investigation and prosecution of international crimes, and a strong commitment to victim-tailored justice, the International Criminal Court is a permanent international institution with an express mandate to deliver reparations for victims. With a number of challenges facing the newly established reparations regime, however, does this innovative approach mark the beginning of a new future for international criminal justice, or is it just an empty promise?

### I. The ICC reparations regime: An Overview

According to Aristotle, there are two types of justice: complete and special.<sup>1</sup> Special justice, as a component of complete justice, represents the method by which complete justice is attained in the face of inequality and injustice. Aristotle further divided special justice into rectificatory and distributive justice. While distributive justice is about the fair allocation of goods in society, rectificatory justice echoes a desire to rectify or correct the injustice suffered by the injured party.<sup>2</sup> The doctrine of rectificatory justice features quite prominently in traditionally civil law countries, where a role for victims is preserved within the criminal process, by allowing for victim participation in the proceedings (as *partie civile*), with the aim of obtaining reparations.<sup>3</sup> The idea of restorative justice for

<sup>1</sup> Aristotle, *Nicomachean Ethics*, Book V

<sup>2</sup> Luke Moffett, *Justice for Victims before the International Criminal Court*, page 25

<sup>3</sup> Eva Dwertman, *Reparations System of the International Criminal Court: Its Implementation, Possibilities and Limitations*, Chapter 2, page 13

victims of crime is not so prominent in the common law tradition, where the criminal process focuses more on the perpetrator of the crime, and the notion of retribution as justice.

In recent years, international law has gradually moved from a more 'perpetrator-oriented' to a more 'victim-oriented' approach,<sup>4</sup> in what could be characterised as a steady progression towards a notion of victim-tailored justice. Modern world history has been plagued by the perpetuation of crimes on a massive scale, from the atrocities committed during WWII, the killings and violence in Kosovo and Rwanda, mass attacks against civilian populations in various African States, to the current conflict in Syria and Iraq, where human rights violations take place on a daily basis - sometimes filmed and aired for the whole world to see - resulting in a large number of victims. The international community has responded to such atrocities by establishing a number of International Courts and Tribunals, with a view to punishing the perpetrators of such crimes. However, it is said that victims have often been neglected by international criminal tribunals,<sup>5</sup> and this has been attributed to the retributive focus of international criminal justice.<sup>6</sup>

The progression of international law towards a notion of victim-tailored justice reached a pivotal point with the coming into force of the Rome Statute of the International Criminal Court in July 2002, whose provisions on victim participation have been declared as a 'high-water

<sup>4</sup> This shift in international justice can be seen through the adoption of various international law instruments, such as the [Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law](#), adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005, as well as Article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which recognises an individual's right to compensation for harm suffered. Similar provisions are found in Article 19 of the Declaration for the Protection of All Persons from Enforced Disappearances, and Article 39 of the Convention on the Rights of the Child. All the above instruments recognise an individual's right to a remedy in relation to harm suffered.

<sup>5</sup> Moffett, page 58

<sup>6</sup> The Nuremberg and Tokyo Tribunals made no reference to victims, and the focus was predominantly on the perpetrators of the crimes. While the ad-hoc tribunals for Yugoslavia and Rwanda came into existence at a time when the approach to victims' needs and their participation in proceedings was developing and growing in importance, the ad-hoc tribunals do not offer victims the possibility to receive reparations.

mark.<sup>7</sup> Article 68(3) of the Rome Statute enables victims to participate in proceedings, by granting them the right to have their views and concerns heard and considered by the Court, in a manner which is not prejudicial to the rights of the accused. The drafters of the Rome Statute did not stop at simply granting victims the necessary *locus standi* in proceedings, but went as far as envisaging the creation of an unprecedented reparations regime, designed to deliver substantive justice for victims of international crimes. UN Secretary-General Kofi Annan particularly stressed at the opening of the Rome Conference that the 'overriding interests must be that of the victims and the international community as a whole'.<sup>8</sup> It was further enunciated that the Court represented 'an opportunity to bequeath to the next century a powerful instrument of justice... [and] succeeding generations [a] gift of hope'.<sup>9</sup>

Article 75 of the Rome Statute grants power to the Court to establish principles relating to reparations, including restitution, compensation and rehabilitation. With limited case law in this area<sup>10</sup>, the doctrine of reparations within the framework of international criminal justice is still a long way from being an established principle, consisting of solid case law fleshing out its legal framework. The provisions regarding reparations, however, are set out in a way that allows ample room for judicial interpretation, making it a potentially powerful tool in the fight against injustice.

## II. The reparations regime makes the ICC unique in nature.

It has often been said that the mandate of the ICC is unique, in that it has both a retributive and restorative objective,<sup>11</sup> a rare combination that is not found in any of the ad-hoc tribunals. The doctrine of reparations, however, is not a foreign concept in international law. The ambit of reparations in post-World War II international law was a lot more

<sup>7</sup> Christine Chung, *Victims' Participation at the International Criminal Court: Are Concessions of the Court Clouding the Promise?* Northwestern Journal of International Human Rights 6(3) (Spring 2008) 459-545, p. 516

<sup>8</sup> Moffett, *Justice for Victims before the International Criminal Court*, page 87

<sup>9</sup> Ibid

<sup>10</sup> So far only the Lubanga case has reached the reparations stage, and the Court issued a decision establishing the principles on reparations, but no actual reparations have been awarded yet.

<sup>11</sup> Alison Bottomley and Heather Pryce, *The Future of Reparations at the International Criminal Court: Addressing the danger of inflated expectations*, GIGI Junior Fellows Policy Brief No 5, July 2013, p. 1

confined than it is today, with reparations being payable to states by states only,<sup>12</sup> excluding thus any claims by and against individuals. Later attempts to award reparations in international law, such as the reparations awarded by Germany post World War II, were conferred in a similar manner. In the case concerning the factory at Chorzow,<sup>13</sup> the Permanent Court of International Justice stated that 'it is a principle of international law and even a general conception of the law, that any breach of an engagement involves an obligation to make reparation in an adequate form'.<sup>14</sup> Reparations are also a prevalent part of proceedings at the Inter-American Court of Human Rights,<sup>15</sup> as well as the Extraordinary Courts of Cambodia, where victims can be awarded reparations for human rights violations.<sup>16</sup> Even though the relationship between international law and the concept of reparations could be characterised as one of discernible familiarity, the ICC reparations regime remains unique and unprecedented, in that it has removed the state from the equation, making access to reparations a matter between the Court, the perpetrator and the victims. The hybrid nature of the ICC framework means the Court has the potential to deliver both retributive and substantive justice, with a strong focus on victim-tailored reparations.

### III. The nexus between the victim and the perpetrator

The ICC reparations regime is distinctive mainly because it revolutionizes the nexus between the victims and the perpetrators of crimes. By allowing for victim participation in the proceedings<sup>17</sup> and introducing the concept of individual criminal responsibility,<sup>18</sup> the Rome Statute makes it

<sup>12</sup> Richard M. Buxbaum, *A Legal History of International Reparations*, Berkeley Journal of International Law, Volume 23, Issue 2, 2005, p.6

<sup>13</sup> Publications of the Permanent Court of International Justice, Series A, No 17, 1928, Case concerning the factory at Chorzow

<sup>14</sup> Publications of the Permanent Court of International Justice, Series A, No 17, 1928, Case concerning the factory at Chorzow, page 21

<sup>15</sup> Article 63 of the Inter-American Charter of Human Rights establishes the principle of reparations payable to individual victims by states in line with their obligations under international law. Payment of reparations was ordered by the IACHR in the case of *Gómez-Paquiyaui Brothers v. Peru*.

<sup>16</sup> Moffett, *Justice for Victims before the International Criminal Court*, p. 179

<sup>17</sup> Article 68(3) of the Rome Statute

<sup>18</sup> Article 25 of the Rome Statute



possible for victims to receive reparations directly from the perpetrator of the crime,<sup>19</sup> once the latter has been convicted. In March 2012 the ICC delivered its first judgment in *Prosecutor v Thomas Lubanga Dyilo*,<sup>20</sup> followed by a reparations decision on 7<sup>th</sup> August 2012, which marked the beginning of the Court's mandate to formulate reparations principles. The Court reaffirmed the principle that 'reparations can be directed against particular individuals',<sup>21</sup> solidifying thus the nexus between victim and perpetrator.

#### IV. Lubanga: The formulation of principles on reparations

The decision establishing the principles on reparations has been heavily criticised for failing to formulate principles in a satisfactory way and or live up to the expectations of victims or academic commentators.<sup>22</sup> The Chamber set a number of general principles relating to the ambit, focus and application of reparations, but according to some commentators, the decision cannot be described as comprehensive,<sup>23</sup> mainly because of its failure to define precisely the notion of 'harm' and the element of causation.<sup>24</sup> Although such criticisms have some basis, it would be unfair and one-sided to ignore or diminish the contribution of the Court's decision to the establishment of a set of principles on reparative justice at the ICC. In fact, Trial Chamber I made the following important findings:

A. In terms of the beneficiaries of reparations, the Court found that those could be granted to both direct and indirect victims of crimes, including the family members of direct victims.<sup>25</sup> Trial Chamber I ('TCI') engaged in an in-depth discussion of the categories of victims that could benefit from reparations, making sure that access would not be restricted solely to those who had participated in the proceedings.<sup>26</sup>

<sup>19</sup> Article 75(2) of the Rome Statute

<sup>20</sup> Situation in the Democratic Republic of the Congo in the case of Prosecutor v Thomas Lubanga Dyilo, 14 March 2012, ICC-01/04-01/06-2842

<sup>21</sup> Decision establishing the principles and procedures to be applied to reparations, 7 August 2012, ICC-01/04-01/06, para 179

<sup>22</sup> Mia Swart, *The Lubanga Reparations Decision: A Missed Opportunity?*, XXXII Polish Yearbook of International Law, 2012, p. 171

<sup>23</sup> Swart, p. 188

<sup>24</sup> Ibid

<sup>25</sup> ICC-01/04-01/06, para 194

<sup>26</sup> Ibid

B. TCI emphasised the importance of a gender-inclusive approach in the effort to set principles and guidance on reparations, by stressing that 'gender parity in all aspects of reparations is an important goal of the Court'.<sup>27</sup>

C. The importance of formulating and implementing reparation awards for victims of sexual crimes<sup>28</sup> and children<sup>29</sup> was heavily stressed by the Court, even though Thomas Lubanga was never actually charged with crimes of a sexual nature. Addressing the needs of vulnerable victims, such as victims of sexual violence and children was particularly emphasised by the Court in this decision, making it an issue of utmost importance.

D. TCI engaged in a detailed discussion relating to the modalities of reparations, reiterating that the main modes of reparations would be restitution, compensation and rehabilitation, without excluding the possibility for other types of reparations to be awarded, such as symbolic measures aimed at addressing the shame felt by victims and measures to prevent future victimisation.<sup>30</sup> Examples were also provided by the Court of the types of harm that may give rise to compensatory reparations,<sup>31</sup> marking the first step towards a definition of the concept of harm within the context of reparatory justice at the International Criminal Court.

E. In relation to the principle of causation, TCI did not provide a general definition of the concept, applicable to all cases of reparations before the Court, but focused more on the applicable causation principle in the specific case, mainly that 'reparations should not be limited to "direct" harm or the "immediate effects" of the crimes of enlisting and conscripting children under the age of 15 and using them to participate actively in the hostilities, but instead the Court should apply the standard of 'proximate cause'.<sup>32</sup>

<sup>27</sup> ICC-01/04-01/06 /06-2904, para 202

<sup>28</sup> ICC-01/04-01/06 /06-2904, paras 207-209

<sup>29</sup> ICC-01/04-01/06 /06-2904, paras 210-216

<sup>30</sup> ICC-01/04-01/06 /06-2904, para 240

<sup>31</sup> ICC-01/04-01/06 /06-2904, para 230

<sup>32</sup> ICC-01/04-01/06 /06-2904, para 249

The criticisms levelled at the decision of the Court have mainly been focused on the fact that TCI failed to produce a comprehensive decision setting out solid principles on reparations. As seen above, however, TCI engaged in a thorough discussion relating to core principles on reparations, without setting a set of rigid principles that might not be applicable or appropriate in future cases. In fact, TCI clarified that although in [its] decision the Trial Chamber has established certain principles relating to reparations and the approach to be taken to their implementation, these are limited to the circumstances of the present case,<sup>33</sup> making thus the formulation of principles on reparations a case-by-case exercise. Given the complexity, sensitivity and distinct nature of each case, as well as of every victim's story and experience, a rigid set of principles on reparations might not be appropriate.

#### V. The challenges facing the ICC reparations regime

As a newly established system, the ICC system of reparations is bound to face challenges and difficulties, some of which can be easily predicted and tackled, while others may be less easy to foresee or resolve. It has been argued that one of the main challenges facing the ICC reparations regime is the lack of funding, which may ultimately undermine the legitimacy of the ICC.<sup>34</sup> Article 75(2) of the Rome Statute stipulates that an order for reparations is made 'directly against the convicted person'<sup>35</sup> and 'where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in Article 79'<sup>36</sup>. In cases where the convicted individual is indigent, or has no identified assets<sup>37</sup>, the onus to pay reparations to the victims shifts to the TFV.<sup>38</sup>

Although in theory this is a very good idea, in practice it turns out to be a less than ideal solution, especially since it has been suggested that the TFV only has set aside about 1.2 million Euros, an amount that 'is

<sup>33</sup> ICC-01/04-01/06 /06-2904, para 181

<sup>34</sup> Alison Bottomley and Heather Pryse, *The Future of Reparations at the International Criminal Court: Addressing the Danger of Inflated Expectations*, CIGI Junior Fellow Policy Brief, No. 5, June 2013, p. 3

<sup>35</sup> Anja Wiersing, *Lubanga and its implications for Victims Seeking Reparations at the International Criminal Court*, Amsterdam Law Forum, Volume 4:3, p. 33

<sup>36</sup> Ibid

<sup>37</sup> See Lubanga

<sup>38</sup> Article 79 of the Rome Statute

intended for all relevant reparations awards in cases currently before the Court.<sup>39</sup> More recent figures suggest that the TFV has managed to set aside about 6.5 million Euros<sup>40</sup> for victims, an amount which - albeit considerably larger than previous years - is still quite modest given the high number of victims in cases before the Court.

Given the number of cases before the Court, as well as the potential number of victims likely to apply, or be eligible for reparations, it becomes obvious that the funds available for reparations awards will not be sufficient to cover the needs of all victims. The total number of victims participating in the Bemba case only is believed to be 5,229.<sup>41</sup> Given the rising number of victims participating in Court proceedings, it appears that the TFV will not be able to satisfy the needs of all victims. This can lead to disillusionment and disappointment, severely undermining the legitimacy of the Court.

This, however, is linked to another major challenge facing the Court and its newly established reparations regime, that of inflated expectations. Victims and other parties to reparations proceedings could potentially have unrealistic expectations about the way the process operates. This is often due to the fact that victims are misinformed, or not informed at all about what the term 'reparations' actually entails. In many cases the translation of the word itself in their native language could have a meaning not entirely concurrent with the one afforded to it by the drafters of the Rome Statute. What makes it even more complex is the fact that the very same drafters deliberately provided a very basic conceptual framework regarding reparations, to allow ample room for judicial interpretation, a fact that undoubtedly contributes to the confusion.

A tendency to romanticise the reparations regime is detected in the work of a lot of academic commentators, whose criticisms and proposed solutions often fail to grasp a number of practical considerations and harsh realities that surround the ICC reparations process. This tendency to idealise the reparations system often impedes rather than assists the work of the Court, contributing to the general feeling of disillusionment

<sup>39</sup> Wiersing, p.33

<sup>40</sup> TFV official website, <http://www.trustfundforvictims.org/news/tfv-receives-unprecedented-support-12th-assembly-states-parties-0>

<sup>41</sup> Luke Moffett, *Realising Justice for Victims Before the International Criminal Court*, ICD Brief 6, September 2014, p. 6

and disappointment that could be experienced by victims and various parties to the proceedings.

Another reason why disillusionment could occur is because there tends to be some confusion regarding the capacity in which the Court can offer reparations. As the main role of the Court remains the investigation, prosecution and punishment of those guilty of international crimes, its restorative mandate is meant to be complementary to that process, not an entirely independent and cardinal function of the Court. In line with this, this paper assumes the opinion that the reparations regime was designed to work in correlation with efforts by the states involved in the rectificatory process.

It has been argued that restorative justice systems, such as the ICC reparations regime, fail to fulfil their rectificatory mandate, mainly because they are physically remote from the victims and the locations where the atrocities were committed.<sup>42</sup> The degree to which the ICC reparations regime is expected to fulfil its rectificatory mandate is currently a contested issue. In fact, this paper argues that the reparations regime was designed to function in tandem with efforts by the state, in a supportive rather than executive capacity.

#### VI. The ICC reparations regime: The future of restorative justice

This paper takes the view that the ICC reparations regime has a lot to offer to the Court's efforts to deliver justice, even under the debilitating circumstances impeding its successful operation. Even though financial considerations continue to plague the operation of the ICC reparations system, the primary source of funding for reparations awards remains in the convicted individual's assets. This innovative approach puts the victims in a position where they can *legally* seek reparations directly from those who have wronged them, and in the alternative turn to the TFV. Even in less than perfect situations, where funding through the TFV is limited, victims will still end up receiving an amount, albeit modest.

Even where monetary reparations are limited or unavailable, the Court's jurisdiction permits for various types of reparations to be awarded to victims, making the scope and ambit of such awards wide enough to cover a variety of situations. Under the Court's jurisdiction reparations can take the form of compensation, restitution and

<sup>42</sup> Wiersing, p.23

rehabilitation, but nothing in the Statute suggests that the list is exhaustive. The Court in Lubanga<sup>43</sup> explicitly stated that '[it] is entitled to institute other forms of reparation, such as establishing or assisting campaigns that are designed to improve the position of victims; by issuing certificates that acknowledge the harm particular individuals experienced; setting up outreach and promotional programmes that inform victims as to the outcome of the trial; and educational campaigns that aim at reducing the stigmatisation and marginalisation of the victims of the present crimes.'<sup>44</sup>

The flexible and creative approach adopted by TCI in Lubanga demonstrates only a fraction of the possibilities with regard to the formulation of reparation awards. In addition to that, the Court also has the possibility to award both collective and individual reparations, further demonstrating the flexibility and wide applicability of the reparations regime. It has been argued that 'the possibility for the Court to award collective reparations is likely to have a significant effect in shaping and developing new jurisprudence on creative means and mechanisms for reparations.'<sup>45</sup> The use of collective awards may be a good way to deal with the challenges related to financial constraints, as they may be awarded in lieu of individual reparations, as a way of bringing a certain measure of justice to victims.<sup>46</sup>

The reparations regime could have a cathartic effect on victims and their families, as it serves as a mechanism through which victims can vent. Article 75(3) of the Rome Statute is a key provision for victims, granting them the opportunity to present their views on reparations. By making submissions through their legal representatives, the victims are granted the opportunity to become official parties to the proceedings, with the possibility to have their opinions voiced, describe their loss and the harm they suffered, an opportunity that is often not granted to victims of crimes in a number of domestic jurisdictions, often leaving the victims feeling detached and isolated from the proceedings.

<sup>43</sup> ICC-01/04-01/06 /06-2904

<sup>44</sup> ICC-01/04-01/06 /06-2904, para 239

<sup>45</sup> Carla Ferstman (2002), *The Reparation Regime of the International Criminal Court: Practical Considerations*, Leiden Journal of International Law, 15, p. 675

<sup>46</sup> Ibid

## VII. Conclusion

Despite the various challenges associated with the award of reparation, the ICC reparations regime has the potential to deliver true justice for victims of international crimes, and set a strong precedence in the field of reparative justice on a global scale. With reparations pending in the cases of *Lubanga* and *Katanga*, as well as a pending appeal on various procedural and material issues arising out of the *Lubanga* reparations decision,<sup>47</sup> the ICC will soon be in the process of making historical decisions, decisions that will define the future of the reparations regime and the future of the ICC.

<sup>47</sup> Report of the Court on Principles relating to reparations, Assembly of States Parties, International Criminal Court, Twelfth Session, The Hague, 20-28 November 2013, ICC-ASP/12/39, p. 6





## **The case for International Humanitarian Law to also apply to Internal/Non-International Armed Conflict**

Meredoc McMinn

This paper will examine the limitations of International Humanitarian Law (IHL), which regulates the behaviour of states parties in armed conflict, in application to non-international situations, or as is it also called 'internal armed conflict'. These conflicts are between a state and non-state parties such as rebel forces, or among non-state parties.

It will also examine the consequences of these limitations; and how international humanitarian law could be extended to apply to all armed conflicts including those that are non-international or internal. Firstly, there is a brief exegesis of international humanitarian law, specifically that which applies to non-international/ internal armed conflict. Secondly, three types of conflict which are of a non-international character, either internal or involving non-state parties, are assessed in order to determine whether any parts of international humanitarian law may necessarily apply, and if so whether it is sufficient. Finally, there is a brief inquiry of how international humanitarian law may develop to more effectively apply to these non-international, or internal, armed conflicts.

### **I. International Humanitarian Law**

International Humanitarian Law applies to armed conflict between states; it generally does not apply to armed conflict which is internal or, as referred to by the International Committee for the Red Cross (ICRC), 'conflicts not of an international character'.<sup>1</sup> The canon of international humanitarian law including: the Geneva Conventions and Additional Protocols; case law of the International Court of Justice (ICJ); International Criminal Court (ICC) statute; a number of international

<sup>1</sup> [Convention \(III\) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949.](#)  
'Conflicts not of an international character', [Online] available:  
<https://www.icrc.org/ihl/WebART/375-590006>

treaties, such as those dealing with weapons of mass destruction (nuclear, chemical and biological); and much of customary law, all primarily address international armed conflict.

The limited humanitarian law addressing internal armed conflict is found in: the brief article 3, common to the Geneva Conventions of 1949; the comparatively short Additional Protocol II, which also incorporates article 3; and the ICC Statute article 8, which in s.8.2(c) and s.8.2(d) incorporates article 3, and makes a brief expansion of law applicable to internal conflict in s.8.2(e), citing as support 'the established framework of international law' for 'acts' i- xii, dealing with issues including: attacking civilians, rape, conscripting children, providing no quarter, forced displacement, and destroying and confiscating property. There have been limited additions to s.8.2(e), though these only apply to states that agree the amendments, which include amendments applying international humanitarian law regarding use of weapons, such as chemical weapons, to internal armed conflict.<sup>2</sup>

Furthermore, the means to prosecute violations of international humanitarian law in internal armed conflict is notably limited. The Geneva Conventions deal with the actions of states, and common article 3 is focused on protection for those in combat, and does not deal with non-combatants, nor does it enable prosecution for violations of international humanitarian law. Separately, the ICC Statute deals with individual criminal responsibility, not that of states. State parties to the ICC are able to bring cases to the court against individuals, however, since it began operations in 2002 only four states have referred 'situations' to the court. It would seem that, given states are, by their nature, highly concerned to protect their sovereignty, there is insufficient incentive for them to do so.

However, the ICC prosecutor is able to investigate and apply to the court, per articles 13 and 15, to initiate proceedings against individuals who are citizens of state signatories to the statute for violations of international humanitarian law, including in internal conflict. Also, the United Nations Security Council is able to refer cases to the court, whether or not the state is a signatory, and this has been done with regard to Sudan and Libya, neither of which are signatories. Despite these means

<sup>2</sup> Sheryn Omeri, 'Chemical Weapons and The ICC', *Counsel Magazine*, January 2015 [Online] Available: <http://www.counselmagazine.co.uk/articles/chemical-weapons-and-the-icc>

of bringing cases to the ICC, since its inception there have been only two convictions.

The intention of international humanitarian law is to stop or regulate conflict; however, since 1945 approximately 80% of the victims of armed conflicts have been as a result of non-international conflicts.<sup>3</sup> The impact of these conflicts is much more severe than solely the number of casualties, as they usually also result in, inter alia: mass displacement; breakdown of governance and communities; severe or total economic deterioration; and destruction and loss of culture.

## II. Types of conflict not readily covered by IHL

This paper assesses three types of conflict which indicate the limits of international humanitarian law to deal effectively with internal armed conflict. First, where an external state supports non-state armed groups in another state, as compared to those in which the non-state armed group operates independently. Second, conflicts that are de facto international, though are possibly not de jure, and thus there is arguably a lack of clearly applicable humanitarian law. Third, where internal conflict does not, de jure, involve state government, however, does involve non-state groups operating within states.

### A. External state supports non-state

In the first type of conflict, if an external state supports a non-state armed group, such as rebels, operating in another state then this 'internationalises' the conflict and thus international humanitarian law applies to all parties involved. However, if this connection is not proven, or ceases, then it is only the less extensive law addressing purely internal conflict which would apply to either the state or the rebels in its territory. For example, in *Nicaragua v. United States*, ICJ 1984,<sup>4</sup> the US was held

<sup>3</sup> Introduction to: Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, [Online] available: <https://www.icrc.org/ihl/INTRO/475?OpenDocument>

<sup>4</sup> *Nicaragua v United States of America* (merits), the International Criminal Court, Judgement of 27 June 1986 [Online] available at: <http://www.icj-cij.org/docket/?sum=367&p1=3&p2=3&case=70&p3=5>

accountable on most charges of aggression, including some for supporting the rebel Contras that were operating within and against the Nicaraguan state. In order to assess if an external state was involved in an internal conflict, the ICJ developed a test whether or not the external state had 'effective control' over the rebel group. However, where this connection is not proven then the conflict is outside the ICJ's jurisdiction as they are limited to adjudicating on international issues between state parties.

The application of international humanitarian law to conflicts that do not, ostensibly, have an international character was further developed by the International Criminal Tribunal for former Yugoslavia (ICTY); and, its application to an armed conflict which is largely internal, by the International Criminal Tribunal for Rwanda (ICTR). Both of these tribunals were mandated by the United Nations Security Council, pursuant to Chapter VII which addresses 'any threat to the peace, breach of peace, or act of aggression and shall make recommendations to maintain or restore international peace and security', and was invoked a result of internal conflicts within, respectively, FRY and Rwanda.

The ICTY Statute article 2,<sup>5</sup> gave the Tribunal authority to prosecute those committing or ordering grave breaches of the Geneva Conventions of 1949. In the case of *Prosecutor v Tadic* ICTY 1999,<sup>6</sup> in determining whether, during the break-up of the former Federal Republic of Yugoslavia (FRY), a conflict was international or internal and thus what legal regime would be applicable, ICTY did not use the ICJ test and instead applied a test of 'overall control'. The issues in the case concerned armed conflict within one of the FRY breakaway republics- Bosnia and Herzegovina (BIH). The situation was that BIH had divided internally along ethnic-sectarian lines, and within BIH ethnic Serbs (essentially defined as Christian Orthodox) formed the Republic Srpska (RS), and RS forces committed atrocities against non-Serbs, mainly ethnic Bosniaks (essentially defined as Muslim).

<sup>5</sup> Updated Statute of the International Criminal Tribunal for Former Yugoslavia, September 2009 [Online] available at:

[http://www.icty.org/x/file/Legal%20Library/Statute/statute\\_sept09\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf)

<sup>6</sup> *Prosecutor v Tadic*, International Criminal Tribunal for the former Yugoslavia 1999, Case No IT-94-1 (Appeals Chamber) 15 July 1999 [online] available at:

<http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf>

In the case of 'Tadic' it was found the test (paras 84,146, 156, 162), was satisfied for the actions of a non-international state actor, the RS military, to be governed by international law, because it was found that an external state, FRY (essentially the state of Serbia), 'has a role in organising, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group' (para 137).

Also contributing to the conflict being determined to be 'international', is that it was found that the aggressors were committing atrocities against the victims because they did not consider the victims to be nationals of FRY, or the RS, because the victims were of a different ethnicity. As it was succinctly put by the Chambers, paragraph 167, 'However, it has been shown above that the Bosnian Serb forces acted as *de facto* organs of another State, namely, the FRY. Thus the requirements set out in Article 4 of Geneva Convention IV are met: the victims were 'protected persons' as they found themselves in the hands of armed forces of a State of which they were not nationals.' Additionally, in paragraph 169, 'Hence, even if in the circumstances of the case the perpetrators and the victims were to be regarded as possessing the same nationality, Article 4 would still be applicable. Indeed, the victims did not owe allegiance to (and did not receive the diplomatic protection of) the State (the FRY) on whose behalf the Bosnian Serb armed forces had been fighting.'

While the decision is that international humanitarian law applies to what may otherwise have been considered an internal armed conflict, this decision also illustrates some of the inherent problems with the application of international humanitarian law to internal conflict. First, international humanitarian law automatically applies to international armed conflict, however a conflict which is apparently internal requires that the issue is referred by interested parties to a court with sufficient jurisdiction to decide whether international humanitarian law could apply, a process which requires substantial resources and detracts from an efficient, and thus also effective, application of the law.

Second, a test had to be applied, for example whether there is 'effective' or 'overall control' and which, while it may have succeeded in some cases e.g. *Nicaragua v US* and *Tadic*, may be not in others. If the case is not brought or the test not successful then international humanitarian law cannot be applied although the non-international armed

conflict has at least as detrimental an affect as any other conflict, such as internal armed conflicts in Russia's Chechnya, insurgencies in South and East Asia, internal conflict in some states in Africa. So instead of international humanitarian law the less extensive and robust laws governing non-international conflict would apply, such as article 3.

The statute of the ICTR preamble outlines that it will apply international humanitarian law to prosecute those responsible for committing genocide and other such war crimes committed in the territory of Rwanda- which essentially covers issues of internal conflict.<sup>7</sup> However, it is only with this Security Council mandate, through creating a special tribunal, that international humanitarian law is applicable to this internal conflict. What about the large number of other internal conflicts? This illustrates another serious inconsistency, and arguably a form of discrimination, in that that this extended application of international humanitarian law does not apply equally to all internal conflicts, but only to those that have sufficient international geo-political interests and where intervention is supported, such as by a coalition of states or the UN Security Council. Nonetheless, like the ICTY,<sup>8</sup> the judgments of the ICTR have contributed to customary law regarding internal conflict.<sup>9</sup>

Given the difference in how comprehensive and robust is the humanitarian law applied to international as compared to internal conflict, there is also a possibility that there might be some incentive for a state to operate clandestinely through proxy rebels involved in an internal conflict, rather than attack externally.<sup>10</sup> As noted, this also gives a prosecutor the burden of proving external, or 'international', support so

<sup>7</sup> The International Criminal Tribunal for Rwanda in Brief, [Online] available: <http://www.unictr.org/en/tribunal>

<sup>8</sup> Marco Sassòli and Laura M. Olson 'The judgement of the ICTY Appeals Chamber on the merits in the Tadic case- New horizons for international humanitarian and criminal law?', International Review of the Red Cross, No. 839, 30-09-2000 [Online] Available: <http://www.icrc.org/eng/resources/documents/misc/57jqc.htm>

<sup>9</sup> Steven R Ratner, 'International v Internal Armed Conflict', Crimes of War, 2011 [Online] Available:

<http://www.crimesofwar.org/a-z-guide/international-vs-internal-armed-conflict/>

<sup>10</sup> James G Stewart, 'Towards a single definition of armed conflict in international humanitarian law:

A critique of internationalized armed conflict', Revue Internationale de la Croix-Rouge/International Review of the Red Cross/ Vol 85/ Issue 850/ June 2003 pp 313-350 [Online] Available: [http://www.icrc.org/eng/assets/files/other/irrc\\_850\\_stewart.pdf](http://www.icrc.org/eng/assets/files/other/irrc_850_stewart.pdf)

as to show the conflict is 'internationalised' and then be able to apply international humanitarian law.

### B. De Facto International Conflicts

In the second type of conflict, the lack of clearly applicable humanitarian law can be a problem for what is de facto, though possibly not de jure, an international conflict. An example of this is when Israel attacked the organisation Hezbollah in Lebanon in 2006 in retaliation for rocket attacks. There were a number of interpretations of the legal situation, which could, to a large degree, be resolved by having one approach to armed conflict. Although Israel was attacking an organisation, Hezbollah, it is based in Lebanon, and so Israel caused collateral damage and casualties in Lebanon, even though the Lebanese government had not endorsed Hezbollah. However, the group has a connection with Lebanon as they participate in government.<sup>11</sup> For Israel, EU, US and the Gulf Cooperation Council among others, Hezbollah is a terrorist organisation. However, other states, notably Iran and Syria, support the group as resistance to Israeli occupation of the Palestinian Territories.

Prima facie, international humanitarian law would apply because Israel is fighting in another state. However, could there possibly be an argument to limit application of international humanitarian law as Israel is defending itself against terrorists operating domestically, regardless that they are based in another state? <sup>12</sup> Or even possibly, could there be questions for a prosecutor about the types of international law applicable? For instance, would it be possible to cite Geneva Convention Protocol I Art. 4(1), which recognises the right of rebels to fight colonial powers, for example, as defence for the actions of Hezbollah? A single legal approach to armed conflict would enable more focus on the conflict itself, and any protection that could be provided by international humanitarian law, rather than there being divergence about the applicable laws, resulting in delays and less effective regulation of the armed

<sup>11</sup> Richard Falk and Asli Bali 'Intl law at the vanishing point', Middle East Report, Vol. 36, Winter 2006 [Online] Available: <http://www.merip.org/mer/mer241/international-law-vanishing-point>

<sup>12</sup> Dr. Robbie Sabel, 'Hezbollah, Israel, Lebanon and the Law of Armed Conflict', Jurist- Legal News and Research, University of Pittsburgh School of Law, 25 July 2006 [Online] Available: <http://jurist.org/forum/2006/07/hezbollah-israel-lebanon-and-law-of.php>

conflict, and avoidance of accountability and of any possible prosecutions.

### C. Non-state groups

The third type of conflict is that which involves non-state groups operating within states, such as the ethnic conflict in Sudan between the government-backed Janjaweed and Darfurian rebels; or the internal conflict resulting from the election violence in Kenya in 2007 that, ostensibly, did not involve government but in which political parties were in armed conflict. Effort to apply international humanitarian law to internal conflicts is complicated and politicised and largely ineffective.<sup>13</sup> States do not want to cede any sovereignty on internal issues, and international law has little direct application in this area, save for Article 3 and application of the ICC Statute against individuals, such as Sudan's President Omar al-Bashir and Kenya's President Uhuru Kenyatta.

Sometimes, instead, what legal authority there is to regulate internal armed conflict, such as provided by article 3, is displaced by military action when internal conflict affects security-political interests or causes regional destabilisation, such as in Kosovo or Libya. Sometimes these actions obtain legal justification through the Security Council, sometimes subsequent to the intervention. However, this process is politicised in that some internal conflicts are deemed to justify intervention, like Kosovo and Libya, though others do not, like Sudan's Darfur region and the current conflict in Syria. This does not provide a universally applicable, defined and predictable basis for an effective means to regulate non-international/internal armed conflict.

<sup>13</sup> Alex De Wall, '[Sudan and the International Criminal Court: a guide to the controversy](http://www.opendemocracy.net/article/sudan-and-the-international-criminal-court-a-guide-to-the-controversy)', Open Security- Reconciliation and Conflict, 14 July 2008 [Online] Available: <http://www.opendemocracy.net/article/sudan-and-the-international-criminal-court-a-guide-to-the-controversy>



### III. Two ways on how to proceed

#### A. First method

While there is the ideal of the supremacy and strength of international law, such as Humanitarian, in reality its extent and applicability is defined by states and international politics. Arguably states' sovereignty continues to be the highest authority in the world, and so international law is largely subject to states' voluntary adherence. In theory international law supersedes state authority when it achieves the status of *jus cogens*- and it is a moot point when this is achieved. This supremacy remains theoretical because, regardless of the status of the international law, a state is only subject if it chooses to submit to the law or is forced to do so, as made obvious by various international situations in which states refuse to submit and are not otherwise compelled, such as the conflict in Ukraine, nuclear tests in North Korea, etc.

If, in this symbiotic relationship between customary international law and states' sovereignty, states remain dominant, then having international law extend to also deal with internal conflict would require states to accept and acquiesce to further law that could directly impinge on their internal authority. However, the limits of states' readiness to do so has been proven by the fact that states refused to accede much authority when negotiating the Geneva Convention Protocol II.<sup>14</sup> The protocol applies to situations of internal conflict in which a state fights rebels internally, however, notably, the protocol has the exception that it does not apply when a state is acting to maintain stability, which could always provide the state with a reasons for the law not to apply.

It is unlikely that states would support international humanitarian law being applied to internal conflict as they would want to retain fuller sovereignty and authority, and would not want to be hindered in dealing with what they may perceive as, for example, not rebel organisations but instead terrorists. This distinction between rebels and terrorists could also be difficult for a prosecutor, for example if the Kosovo Liberation Army were considered rebels, what about the Irish Republican Army, or does it

<sup>14</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977. [Online] available at: <https://www.icrc.org/ihl/INTRO/475?OpenDocument>

depend on the actions of the state, or on the rebel/terrorist organisation's aims or actions?

There is argument, put forth by Sandesh Sivakumaran, that, *inter alia*, there has been a shift to apply international law to deal with internal conflict through applying international human rights law and international criminal law, such as through the ICC.<sup>15</sup> However, these legal approaches have their own limitations, as is evident with the ICC, for instance, the indictments against Sudan's president Al Bashir, issued in 2009 and 2010 for crimes in Darfur, have gone unenforced. The indictment against the Kenyan President, Uhuru Kenyatta made in 2011, was dropped in 2014. There have also been no indictments against the recent Russian government of President Vladimir Putin for actions in Ukraine and Crimea; and no consideration of any against state leaders who attacked Iraq based on possibly falsified evidence.<sup>16</sup> While the benefits of the ICC and its ability to make indictments under international criminal law are evident, so are its limits.

How is it possible to move from this zero-sum game between states' maintaining their sovereignty and to acquiescing to international law? Although the increasing authority of supranational organisations, like the EU, and processes of devolution, such as with the UK, seem to detract from state sovereignty, states still retain the final determination. This is evident by the UK threatening to withdraw from EU, and the perennial possibility of parliament interfering with devolution, as has been done with the Northern Ireland Assembly Stormont. So there is no sure trajectory for this process. This issue continues to be that in order to have comprehensive and effective application of international law there has to be a means of coercion, such as economic sanctions or military force, in order to ensure compliance. However, although state power does not so easily wane, it may be that this is not required in order for international law to strengthen.

<sup>15</sup> Sandesh Sivakumaran, 'Re-envisaging the International Law of Internal Armed Conflict' *The European Journal of International Law* Vol. 22 no. 1 [Online] available: <http://ejil.oxfordjournals.org/content/22/1/219.full>

<sup>16</sup> PMQs: Tapsell claims Blair falsified Iraq evidence, British Broadcasting Corporation, 21 January 2015 [Online] available at: <http://www.bbc.co.uk/news/uk-politics-30918451>

## B. Second Method

As any organisation is only as strong as its constituent members, similarly international law is only as strong as the states that adhere to it. As such, it seems that the process of strengthening and extending international humanitarian law to apply to internal and non-international conflicts will continue to be an incremental process as states agree to be bound by international laws. The relatively recent success in dealing with Syrian regime's use of chemical weapons is a case in point. Ostensibly the regime of Assad voluntarily agreed to the Chemical Weapons Convention regulating the use of Chemical Weapons, and to join the Organisation for the Prohibition and Chemical Weapons (OPCW) and comply with their assessment and allowing them and UN staff to remove chemical weapons stockpiles. However, the contention is that this was really only successful due to the threat of force, whether UN sanctioned or by a coalition or by the US unilaterally, if the regime did not comply.<sup>17</sup>

Nonetheless, if voluntary adherence, coupled with UN endorsed threats of legal action and possibly force, is currently the only viable means, then the most effective approach would be for organisations, and states, to continue to promote, accede to, and ratify international conventions and treaties that contribute to controlling and reducing internal armed conflict. Each accession and adherence strengthens the applicability and efficaciousness of the law. This would include acceding to what may seem minor treaties, or minor parts of treaties, though they can have significant repercussions for application of law to all forms and aspects of armed conflict.

An example of some success with this approach has been in outlawing the use of child soldiers- those under 18. Although few states now permit recruitment of those under 18, there are however some that do and the problem is more pervasive in armed conflict involving non-international parties or in armed conflict that is internal.<sup>18</sup> However, general compliance has improved as more states fully adhere to the UN Convention on the Rights of the Child and its Optional Protocol on the

<sup>17</sup> Anthony Deutsch, 'Weapons inspectors find undeclared sarin and VX traces in Syria diplomats', Reuters, 8 May 2015 [Online] available at: <http://www.reuters.com/article/2015/05/08/us-mideast-crisis-syria-chemicals-exclusiveUSKBN0NT1YR20150508>

<sup>18</sup> Child Soldiers International, 'Non-state armed groups' [Online] available at: [http://www.child-soldiers.org/theme\\_reader.php?id=2](http://www.child-soldiers.org/theme_reader.php?id=2)

Involvement of Children in Armed Conflict which calls for the prohibition of recruitment of soldiers under 18.

However, some developed states, such as the UK, and Canada, could assist by adhering fully to the Optional Protocol on the Involvement of Children in Armed Conflict, as currently they, respectively, allow recruitment at the age of 16 and 17. Although the UK ratified the Optional Protocol it included an 'explanatory memorandum' that it would continue to recruit those under 18. In this case, for example, the more states that fully comply with the treaty, with no exceptions, the more strengthened would be the legal means for controlling use of child soldiers such as by irregular forces. It is the same logic that would apply to the application of other aspects of IHL to non-international, or internal, armed conflict.<sup>19</sup>

The need for international humanitarian law to apply to all conflicts has come to the fore with the rapid rise of the Islamic State in Iraq and Syria (ISIS; also known as ISIL- Islamic State in Iraq and Levant) and their essentially blitzkrieg capture of territory and cities in areas across Iraq and Syria. ISIS is not recognised as a state actor and yet it operates as one, commanding a large and effective military, and governing in its own way the territory it captures. While its military action is aggressive and unjustified and its control of territory and people is destructive, discriminatory and cruel, there should be a comprehensive and robust international legal system that can automatically apply in non-state territories, such as where ISIS operates and controls, and apply to non-state parties, such as ISIS. It should not matter whether the conflict or parties are, semantically, international or non-international/internal the same international law regulating armed conflict should apply.

<sup>19</sup> The author was involved in negotiating for cessation of recruitment of child soldiers and their demobilisation in South Sudan in late 2012, and although Sudan is not a signatory to the UN Convention on the Rights of the Child nonetheless the authority of the Convention contributed to the senior military leaders agreeing to cooperate. However, South Sudan requests and receives military training from developed states like the UK and it could be known that these states do not fully comply with the Optional Protocol thus diminishing the persuasiveness and possibility of South Sudan's full compliance.

## THE ART OF ARTICLE 5

Andrew Otchie

This article examines the conditions which permit the use of force, according to article 5 of the NATO Treaty, in the light of the applicable International legal framework, as well as recent developments in political and military affairs. It identifies the legal basis under the NATO Treaty that authorises the use of force as compared to the contemporary threats faced by NATO. The article asks whether article 5 remains relevant, and functional, or is in need of reform. It argues that whilst NATO States continue to possess the legal right to engage in collective self-defence measures, the NATO Treaty's utility as an International instrument lies in legitimising the doctrine of deterrence, which has thus far prevented large-scale International aggression.

### I. NATO and the International legal framework

The legal construct which recognises the rights of States to use force is set out in legal terms in the UN Charter, a document which emerged from deep intergovernmental cooperation in the immediate aftermath of World War II. When efforts were renewed to deprecate the 'scourge of war', the rights of States to exist and resist attacks from International aggression were formally recognised and therefore, measures taken in pursuit of 'self-defence' can be deemed as lawful, falling within a relevant exemption to the general prohibition on the use of force. Moreover, the Charter sanctions measures in pursuit of 'collective security' taken by the International community, by authority vested in the UN Security Council. However, the UN was not the only International institution to materialise in the post-war world; through NATO, certain European States and the USA formed a military alliance that guaranteed they would assist each other in respect of acts of aggression against them.

Article 5 of the NATO Treaty mirrors article 51 of the UN Charter in that it decrees NATO States have the right to collectively use force, to

defend each other from an armed attack in collective self-defence. Whilst NATO had been designed to protect against the specific threat of the expansion of the Soviet empire, NATO was never called upon in this regard, and its Treaty obligations had never been invoked until after the end of the Cold War, in the onset of the September 11<sup>th</sup> attacks. In one sense, the NATO Treaty can be deemed as a tremendously effective document, in that it gave a legal basis to the policy of deterrence (which seemingly succeeded in preventing a full scale Cold War) as well as recognising the inherent right of States to resort to the use of force on a collective basis. On the other hand, NATO forces have now been deployed for prolonged periods in order to combat the threat of International terrorism, when this had never been the intended purpose at the time of NATO's formation, thus prompting scepticism as to the legitimacy of NATO's use of force.

Since the establishment of the post-war International legal framework, the potentially catastrophic danger that the world faced through inter-State war has largely subsided, although in 2014, a threat to the interests and stability of European States became very apparent from a resurgent Russia and its seizure of the Crimea. The threat is however difficult to define and involves the use of next generation, or 'ambiguous' warfare, through the deployment of unconventional tactics, including asymmetric and cyber attacks, which may be hard to properly attribute and counter.<sup>1</sup> Concerns have been raised that Russian actions have been deliberately calculated so as to fall outside of a remit that would potentially trigger the collective self-defence principle as is understood by article 5 of the NATO Treaty.<sup>2</sup>

Meanwhile, amidst Russian military intervention in Ukraine and the regional instability posed by the onset of Islamic State in the Middle East,

<sup>1</sup> Russia's combination of hybrid conventional warfare and nuclear threats are circumventing the West's military strength, argues Justin Bronk, Research Analyst in the Military Sciences Programme at the think tank RUSI (Royal United Services Institute) 'Russia Outflanks the West' RUSI Defence Systems, 7 Nov 2014: [www.rusi.org](http://www.rusi.org)

<sup>2</sup> See Defence Committee of the UK House of Commons -Third Report 'Towards the next Defence and Security Review: Part Two-NATO':

<http://www.publications.parliament.uk/pa/cm201415/cmselect/cmdfence/358/35807.htm>

The report reviews the recovery of Russia's military power over the past decade, but focuses on how the Russians have been increasingly employing more-effective 'next-generation warfare' tactics, with the essential condition being avoiding conventional force-on-force fighting with superior NATO forces.

the most recent NATO summit was held in Wales in September 2014 and made clear that NATO States would abide by their article 5 Treaty obligations, in order to assist each other in the face of an armed attack; NATO, International law and the use of force have new found relevance.<sup>3</sup>

The International legal framework, under which States can lawfully employ force, has been of considerable interest to scholars. There is a range of opinion as to what circumstances are sufficient to qualify as an armed attack, thereby triggering the lawful use of force in rebuttal. Moreover, in the face of budgetary constraints on much of the world's defence spending, policy initiatives have looked to collective self-defence, as a means of ensuring protection from outside military aggression. Participation in NATO forms a central place in the UK's defence strategy. Against this background, this article aims to offer an original contribution to the debate by examining NATO's use of force and asking whether there is any need for the reform of article 5. It will be argued that the NATO Treaty already makes clear that NATO will respond to acts of International aggression, so as to deter such, and prevent potential conflicts taking place; besides that, it is clear the prohibition on the use of force in International law already applies to 'indirect aggression', a state of affairs falling short of war, which is most likely to encompass ambiguous warfare.

In summary, this article will examine the theoretical and legal doctrines as to the prohibition of the use of force and relevant exemptions; the rationale behind these positions and where the debates have reached thus far; the current defence policies concerning NATO and possible responses to Russia's ambiguous warfare; established critiques of NATO and collective self-defence; and discusses if the NATO Treaty might be amended to better achieve its aim. In conclusion, remarks are offered as to the direction of the continuing debate on the lawful use of force.

<sup>3</sup> The 'Wales Declaration' set out the various agreements that were reached at the NATO Summit Wales 2014 and further actions for NATO:  
<https://www.gov.uk/government/publications/nato-summit-2014-wales-summit-declaration/the-wales-declaration-on-the-transatlantic-bond>

## II. NATO and the Use of Force

### A. The academic views

With its stunning array of military power and an impressive diversity of forces and brigades under its control, NATO is undoubtedly the world's most powerful military organisation<sup>4</sup> and remains important in the shaping of military doctrine<sup>5</sup>. NATO has continued to expand, taking on a new lease of life into the 21<sup>st</sup> Century, when it might not otherwise have done, and its efficacy in using force cannot be disputed. As well, NATO plays a significant role in shaping the understanding of the legal constraints on the use of force<sup>6</sup>.

Meanwhile, the central debates and doctrinal positions taken by scholars on the legality of the use of force have tended to focus on State practice, including the pre-emptive use of force and responses towards terrorism, rather than the fact and status of the world's great military alliance. Whilst there is nothing inherently unlawful in the NATO Treaty and the obligation conferred upon its members, through article 5, to use force in the face of an armed attack upon any of them, it ought to be remembered that the character of International law which prohibits the use of force is explicit – article 2.4 of the UN Charter bans the use of force between States, save for the exceptions of self-defence, or Security Council authorisation, as is found in Chapters VII and VIII.

<sup>4</sup> The International Institute for Strategic Studies publishes 'The Military Balance', which provides an annual comprehensive analysis of nations' military capabilities. A clear division exists between NATO and the rest of the world.

<sup>5</sup> NATO's definition of doctrine, used unaltered by many member nations, is: 'Fundamental principles by which the military forces guide their actions in support of objectives. It is authoritative but requires judgement in application' see: AJP-01(D) ALLIED JOINT DOCTRINE (December 2010) available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/33694/AJP\\_01D.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/33694/AJP_01D.pdf)

<sup>6</sup> NATO has not systematically codified its doctrines on when to use force, but it has released the NATO Legal Deskbook, which is intended to reflect, as closely as possible, the policies and practice of NATO in legal matters. However, the Deskbook is not a formally approved NATO document and therefore does not purport to reflect the official opinion or position of NATO. Thus, while the Deskbook is not intended to supplant national guidance on a range of issues, and is a refinement of working practices and experiences gained over the past few years (since its earlier 2008 edition), it can be deemed as a useful compilation for understanding the issues coming before NATO legal advisors. The Second Edition (2010) Deskbook is available at: <http://publicintelligence.net/tag/north-atlantic-treaty-organization/>



At present, there is a fragile consensus that force can only be lawful when used by States within the legal paradigm of the UN Charter, although the peremptory nature of the prohibition on the use of force has come under increasing attack over the past decade, particularly with the military interventions, led by a 'coalition of the willing' into Iraq and Afghanistan respectively. It had been claimed by the US Administration that the legitimacy of those conflicts arose in circumstances that had not been originally envisioned by the UN Charter and thus, these recent military interventions have been justified by the novelty in method and the potential degree of destruction that would be executed, if possible, by the perpetrators of the terrorist attacks of 9/11, as well as the intentional sense of alarm spread by them - giving rise to reciprocal novel rights of States to use force<sup>7</sup>.

Moreover, it is argued that doctrines of anticipatory self-defence, preventative self-defence, regime change, revival theory, humanitarian intervention, State responsibility, and pre-emptive strike, now have legitimacy because of the security challenges faced in the 21<sup>st</sup> Century<sup>8</sup>. So it goes, the applicable limitations originally imposed upon States, by International law, on the use of their military power (force) since the founding on the UN Charter, and as so eloquently set out in the seminal work of over 50 years ago by Ian Brownlie QC FBA, in 'International Law and the Use of Force by States' ought to be viewed in light of contemporary State practice and therefore reinterpreted, in a more permissive light.

However, when a UN High level panel came to consider the sufficiency of the International legal framework, and particularly, whether the rules on the use of force (including article 51 of the Charter) are sufficient, the conclusion was that they were, and its recommendation was that there need be no reform<sup>9</sup>. Nevertheless, debates as to the sufficiency of the legal framework and the legacy of conflicts in Iraq and

<sup>7</sup> A primary advocate for the legality of the Iraq War also became the Rt. Hon. Tony Blair, his evidence before the Iraq Inquiry can be seen at:

<http://www.iraqinquiry.org.uk/transcripts/oralevidence-bydate.aspx>

<sup>8</sup> The debate is explored by C Chinkin in 'Rethinking Legality/Legitimacy after the Iraq War' pp. 219-247 in R Falk, M Juergensmeyer and V Popovski (eds) *Legality and Legitimacy in Global Affairs* (OUP 2012).

<sup>9</sup> United Nations High-Level Panel on Threats, Challenges and Change '*A More Secure World: Our Shared Responsibility*' (2 December 2004) UN Doc A/59/565. Available at: [http://www.un.org/en/peacebuilding/pdf/historical/hlp\\_more\\_secure\\_world.pdf](http://www.un.org/en/peacebuilding/pdf/historical/hlp_more_secure_world.pdf)

Afghanistan on the understanding of the lawful use of force have continued for sometime thereafter. In 'Reappraising the Resort to Force'<sup>10</sup> Moir carefully examined the impact of the Iraq and Afghanistan conflicts. His observation was that while Article 51 of the UN Charter was drafted in a State-centric paradigm, which it seems States have reasonably moved on from, the UN Charter paradigm is not dead and it would be dangerous and premature to conclude that any enduring change to International law has occurred<sup>11</sup>.

Moreover, that there ought not to be a loosening of the constraints on the use of force is a view forcefully espoused by Corten in his considerable polemic on 'The Law Against War: The Prohibition on the Use of Force in Contemporary International Law'<sup>12</sup>. This scholar goes a considerable way to demonstrate just exactly how the prohibition on the use of force, and its peremptory nature, remains one of the cornerstones of International law. For Corten, the question of what suffices as an armed attack, according to article 51, can be answered definitively by reference to the context and formal discussions at the time of the Charter's configuration<sup>13</sup>. Therefore, the term 'force' mentioned in article 2.4 was deliberately chosen, as differing from what is an 'armed attack', the later denoting a military act, as opposed to adverse economic or political action.

In addition, Corten sees particular significance as to what qualifies as an armed attack, in the definition of 'aggression' appended to resolution 3314 (XXIX), adopted by consensus by the UN General Assembly in 1974<sup>14</sup>. Thus, it is only by very stringent criteria, that unlawful force becomes an act of violence, which is necessary to meet the definition of aggression, or armed attack. However, in practice, while the Security Council does not abide by such a definition to guide it in determining situations of aggression, or whether an armed attack has occurred, the text also provides an informative basis as to the question of 'indirect

<sup>10</sup> Moir, L. *Reappraising the Resort to Force* (Hart Publishing 2010).

<sup>11</sup> Ibid. pp. 150-6.

<sup>12</sup> The title of that work being translated from the famous Latin expression '*Le droit contre la guerre*' Corten, O. *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (Hart Publishing 2012).

<sup>13</sup> Ibid. pp. 402 ff.

<sup>14</sup> Article 3(g) of the Definition of Aggression and its interpretation includes a provision which holds a State responsible for the sending of irregular forces according to certain stringent conditions, thus concerning the matter of State attribution.

aggression' – which involves certain adverse measures taken by one enemy State against another, thus falling short of a direct military operation.

Even so, according to Corten's (restrictive) view of International law, such forms of belligerent confrontation by States are not sufficiently recognised (by precedent or case law) as giving rise to the right of self-defence. Another major contribution to the literature comes from Yoram Dinstein in *War, Aggression and Self-Defence*<sup>15</sup> whereby Dinstein provides a thorough overview of the legal nature of war, including a detailed discussion of the subject of neutrality, the formal beginning and termination of wars, and suspension of hostilities. Although Dinstein acknowledges a range of situations 'short of war' involving limited use of force, he maintains that in legal terms 'there are only two states of affairs in international relations – war and peace – with no undisturbed middle ground'<sup>16</sup>.

Consequently, it would appear clear that article 5 of the NATO Treaty is drafted in terms that are analogous to article 51 of the UN Charter and means that nothing short of an actual armed attack, meaning a substantial and intentional, military incursion into the sovereign territory of a State, will entitle NATO to use force. Albeit, if an applicable situation which would activate the article 5 obligation to resort to the use of force may be capable of evolving into novel circumstances that were not envisioned at the establishment of NATO, such circumstances must be determined carefully on a case by case basis, with utmost care being taken not to proliferate the use of force.

However, the problem that has been identified by the UK Select Committee's report on recent Russian actions, is a profound one, and does not seem to have been adequately dealt with in academic opinion as yet. Essentially, in recent times, NATO has come to grapple with the threat of 'ambiguous warfare', 'asymmetric warfare', or 'next generation warfare' and in particular, certain techniques posed by Russian forces in unconventional attacks upon its neighbouring States. The deliberate and sustained types of attacks which have been practised by Russia in operations in Estonia in 2007, Georgia in 2008 and Ukraine in 2014 include substantial cyber attacks, information operations, psychological operations, economic attacks and proxy attacks including the use of the

<sup>15</sup> Dinstein, Y *War, Aggression and Self-Defence* 5<sup>th</sup> Edition (CUP 2005).

<sup>16</sup> Ibid. p. 16.

Russian Special Forces (Spetsnaz)<sup>17</sup>. The Select Committee has concluded that Russian asymmetric tactics represent a new challenge to NATO; it would appear that events in Ukraine demonstrate that Russia has the ability to effectively paralyse an opponent and such operations may have been deliberately designed to come short of aggression, or an armed attack, so as to evade any potential invocation of article 5.

### B. Policy positions

Despite the seeming end of the Cold War, the UK has recognised that there are a myriad of future threats that are relevant to the use of military force. In January 2010, the UK Ministry of Defence published the 4<sup>th</sup> edition of 'Strategic Trends Programme –Global Strategic Trends –Out to 2040' which confirmed the long-term nature of defence planning and the need for a wide-ranging understanding of the future strategic environment. Global Strategic Trends provides a measure of context and coherence in an area characterised by transition, risk, ambiguity and change and moreover, addresses subjects such as: the shifting global balance of power; emerging demographic and resource challenges; as well as climate change and societal changes<sup>18</sup>. Likewise, the UK's National Security Strategy proclaims that 'In a world of startling change, the first duty of the Government remains: the security of our country'<sup>19</sup> – thus, resort to collective self-defence, in the form of participation in NATO, forms a central part of the Strategy, as well as featuring prominently in British defence doctrine<sup>20</sup>.

<sup>17</sup> See fn. 2, p.12-17.

<sup>18</sup> The document is available at:

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/33717/GST4\\_v9\\_Feb10.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/33717/GST4_v9_Feb10.pdf)

<sup>19</sup> A Strong Britain in an Age of Uncertainty: The National Security Strategy (Oct. 2010) p. 3. Available at:

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/61936/national-security-strategy.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/61936/national-security-strategy.pdf)

<sup>20</sup> Joint Doctrine Publication 0-01 UK Defence Doctrine (Nov. 2014):

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/389755/20141208-JDP\\_0\\_01\\_Ed\\_5\\_UK\\_Defence\\_Doctrine.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/389755/20141208-JDP_0_01_Ed_5_UK_Defence_Doctrine.pdf)

The US has similarly stated that it will work closely with International allies, including NATO, further to the principle of collective security<sup>21</sup>. The current US National Security Strategy, promoted by President Obama, exhibits a notable departure from previous US Strategy – it is evident that later US foreign policy initiatives have sought to distance the Administration from the past approval of pre-emptive warfare under the Bush doctrine.

In the context of the Cold War, it is easy to see how the UK and US have viewed their policy positions, as to defence and national security, through recourse to NATO. The deterrence theory was made credible by NATO, as a major international actor with a substantial nuclear arsenal at its disposal. However, while article 5 was drafted with the potential threat of Soviet aggression in mind, specifically in attempting to defend against any furtherance of its political control of Eastern Europe into other parts of the continent, it was not the Cold War which led to the invocation of the clause, rather the terrorist attacks upon the World Trade Center in New York City on 9/11. NATO therefore found relevance and a new lease of life into the 21<sup>st</sup> Century, when it might not otherwise have done, not through the policy of deterrence, but through its unforeseen participation in the International security architecture, and taking on a role of combating the phenomenon of global terrorism<sup>22</sup>.

Thus, as the importance and use of NATO, as a means to enforce international peace and security grew exponentially, NATO deployed and sustained the world's most potent military forces in the far flung destinations of the former Yugoslavia, Afghanistan and Libya; it remains responsible for the defence of 900 million citizens around the world, and over 70% of the world's military expenditure; it is a strategic alliance that must face rapidly changing challenges, in terms of environments in which to operate, defending against the most difficult and dangerous potential armed attack (upon any of its members), being prepared to face unknown

<sup>21</sup> US National Security Strategy (May 2010):

[http://www.whitehouse.gov/sites/default/files/rss\\_viewer/national\\_security\\_strategy.pdf](http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf)

<sup>22</sup> *The task of combating the ensuing insurgency in Afghanistan was a major theme of the previous NATO summit of 2012, see: Chicago Summit Declaration, issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Chicago on 20 May 2012:*

[http://www.nato.int/cps/en/natolive/official\\_texts\\_87593.htm?mode=pressrelease](http://www.nato.int/cps/en/natolive/official_texts_87593.htm?mode=pressrelease)

hostile aggressors and having the arrangements in place to meet the threat of other contingencies, such as nuclear warfare<sup>23</sup>.

NATO's political purpose is commonly addressed through its biennial summits, which are regarded as a periodic opportunity for Heads of State and Heads of Government of NATO member countries to evaluate and provide strategic direction for NATO activities. NATO summits are also often used to introduce new policy, invite new members into the alliance, launch major new initiatives, and build partnerships with non-NATO countries<sup>24</sup>. Furthermore, NATO is an organization that uses International law to further its political purposes. In particular, when the detente between NATO and Russia started in 1991, there was a deliberate attempt to establish the footing between the great powers by International agreements, such as the NATO-Russia founding Act<sup>25</sup> and NATO has been instrumental in the peace agreements that took place in the aftermath of the Bosnian conflict<sup>26</sup>; NATO has defined its International legal position, necessary for military operations, through the negotiation of certain privileges and immunities from potential legal suits, on a multi-lateral basis and throughout the various jurisdictions of the Alliance and outside it, by its Partnership for Peace (PfP)<sup>27</sup> and Status of Forces Agreements.

However, it is NATO's seeming success, through enlargement and posturing towards the concerns of Eastern European countries, which has been said to have triggered the apparent Russian riposte. In the post Cold War world, Russia has attempted to re-assert its military prowess and in particular, Russian aspirations for grandeur have been expressed through the Putin Presidency. The Russian position is that NATO ought to have been disbanded at the end of the Cold War and its continuing accession of new allies has deliberately undermined Russian security interests.

<sup>23</sup> The Strategic Concept adopted at the 1999 Washington Summit described future threats as 'multidirectional and often difficult to predict'.

<sup>24</sup> Medcalf, J *NATO* (Oneworld Publications 2005).

<sup>25</sup> See discussion in: 'NATO enlargement and the NATO-Russian Founding Act: the interplay of law and politics' *International & Comparative Law Quarterly* 1998, 47(1), 192-204.

<sup>26</sup> 'The role of NATO in the Peace Agreement for Bosnia and Herzegovina' *European Journal of International Law* 1996, 7(2), 164-175.

<sup>27</sup> [http://www.nato.int/cps/en/natolive/topics\\_50086.htm](http://www.nato.int/cps/en/natolive/topics_50086.htm)

Moreover, Russia has been critical of the legality of NATO operations in Kosovo and more recently in Libya, suggesting that the deployment under the Responsibility-to-Protect doctrine and the operationalisation of UN Security Council Resolutions 1970 and 1973 was contrary to International law. Accordingly, Russia reckons that there are new threats to its national security, presented by an increased NATO and its global activity, such that in December 2014 Russian military doctrine was updated<sup>28</sup>. Thus, the Russian military remains a defensive tool that the country pledges to use only as a last resort and also unchanged, are the principles of the use of nuclear weapons that Russia adheres to. Their primary goal is to deter potential enemies from attacking Russia, but it would use them to protect itself from a military attack – either nuclear or conventional – threatening its existence.

### III. NATO and the Thin Red Line?

#### A. Why Collective Self –Defence

Whilst there is considerable benefit for NATO members in the policy of collective self-defence, which is given a firm legal basis through article 5 of the NATO Treaty, as well as article 51 of the UN Charter, it ought to be remembered that NATO's relationship with International law has not been an entirely positive one. 'A thin red line' –is how Bruno Simma (a former Judge of the International Court of Justice) described the threat, or use of force by NATO without UN authorisation, in regard to the ensuing Kosovo crises in 1999. If the 1999 airstrikes against the then Federal Republic of Yugoslavia had breached the UN Charter, or taken the possibility of doing so unto a knife-edge (as most commentators say<sup>29</sup>) it is prudent to ask, where are we now, and more specifically, whether any further erosion of the UN paradigm can be attributed to NATO; Simma went on to say that the NATO Treaty implies subordination to the principles and practice of the UN Charter and furthermore, that if repeated, there was a great potential for the actions of NATO to undermine International law<sup>30</sup>.

<sup>28</sup> <http://rt.com/news/217823-putin-russian-military-doctrine/>

<sup>29</sup> Chinkin, C 'The Legality of NATO's Action in Yugoslavia' 49 ICLQ 910 (2000).

<sup>30</sup> Simma, B 'NATO, the UN and the Use of Force: Legal Aspects' EJIL (1999) 10 (1).

On the other hand, the widespread regional destabilisation in Ukraine and unlawful annexation of the Crimea, are well documented and can only be properly attributed to Russian indirect aggression<sup>31</sup>. The Eastern European and Baltic States that once feared for their existence are still protected by article 5 of the NATO Treaty, as the Wales Summit has recently made explicitly clear, the principle of collective self-defence is the most logical and arguably the only, manner in which to ensure the continued existence of small States that are considerably weaker than Russia in military terms.

Nonetheless, the legality of collective self-defence remains contingent upon a response being made to an actual armed attack and throughout the Cold War, there seemed to be little doubt as to what an armed attack entailed. Then, in the wake of the War on Terror, the question became unsettled, through the targeting of non-State actors and the pre-emptive use of force. Russia's recent military intervention into Ukraine has highlighted the question of whether force can be lawfully employed, as a result of indirect aggression. Despite massive developments in the manner and motivations for modern military operations<sup>32</sup>, NATO and the principle of collective self-defence endures as an effective means of protecting States against International aggression.

However, there are definite criticisms that are in order: whilst NATO carries on with a renewed sense of purpose, it ought to be remembered that NATO is not a nation, nor cannot it be properly understood as a collection of nations, or States with legal personality, such as the EU, or US. NATO's legal status has meant that it is difficult to hold accountable and NATO has never been successfully sued before any national court<sup>33</sup>.

<sup>31</sup> Amnesty International considers the war to be 'an international armed conflict' and presented independent satellite photos analysis proving involvement of regular Russian army in the conflict. It accuses Ukrainian militia and separatist forces for being responsible for war crimes and has called on all parties, including Russia, to stop violations of the laws of war. Amnesty has expressed its belief that Russia is fuelling the conflict, 'both through direct interference and by supporting the separatists in the East' and called on Russia to 'stop the steady flow of weapons and other support to an insurgent force heavily implicated in gross human rights violations.': <http://www.amnesty.org/en/region/ukraine>

<sup>32</sup> So says the highly experienced military practitioner, General Sir Rupert Smith, in *The Utility of Force: The Art of War in the Modern World* Allen Lane; First Edition edition (2005) p. 269.

<sup>33</sup> An excellent take on the unfruitful attempts by the former FRY to sue NATO is provided by Olleson, S in 'Killing Three Birds With One Stone? The Judgments of the International Court of Justice in the *Legality of Use of Force Cases*', *Leiden Journal of International Law*, vol. 18 (2005), p. 237.



Neither is NATO an institution that is formally connected to the UN, such as the International Court of Justice, but NATO is an International Organisation that is supposed to be strongly allied to the principles and purposes of the UN (this includes the peaceful resolution of disputes and developing friendly relations among nations<sup>34</sup>). Moreover, NATO has yet to formally take on the promotion of human rights and recognise the jurisdiction of the International Criminal Court, which would be important objectives in the context of a mature International Organisation.

The ambitious system that was originally set out by the UN Charter in 1945, envisioned an amalgamation of world military power, ready to take on any threat to International peace and security, contributed to by all the members of the United Nations, being made available to the Security Council to direct and control. This has not been done, although the applicable legal provision that sought to make it so is Article 43 of the Charter, which still remains in place. In reality, a rather different system of International security architecture is at play, which relies on delegations of power from the UN Security Council to a range of powers, namely the Secretary-General, groups of States, UN subsidiary organs, and regional arrangements, including NATO<sup>35</sup>. Simma's critical observation that NATO is not subordinate to the will of the UN is a weighty one and NATO's autonomy to interpret the circumstances which will give rise to its collective self-defence obligations, does not yet bestow any corresponding obligations in International law.

#### B. Amendment of the NATO Treaty?

International law recognises a philosophical belief that the use of force (war) has brought terrible consequences to mankind and must only be permitted in situations of necessity, only then as a last resort, and then to a proportional extent. In the context of the total war, which was World War II, it is easy to see why<sup>36</sup>. However, the recent pursuit of Russian

<sup>34</sup> <http://www.un.org/en/documents/charter/chapter1.shtml>

<sup>35</sup> Sarooshi, D *The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII Powers* Oxford Monographs in International Law (OUP 2000) p. 251.

<sup>36</sup> In *The War of the World: History's Age of Hatred* Penguin (2009) Niall Ferguson looks at why the 20<sup>th</sup> Century was the most violent in man's history, arguing that despite the globalisation, and booming economies married to technological breakthroughs that seemed to promise a better world for most people, it proved to be overwhelmingly the most violent, frightening, and

stealth tactics constitutes indirect aggression and ought to be addressed by the International community. If article 5 can be interpreted in a manner that is set in motion by the type of behaviour from Russia, which has caused concern in the House of Commons Select Committee report, then this would signify a significant shift in International law. The report suggests this may be desirable and goes as far to say that consideration ought to be given to amending the NATO Treaty, so as to remove the adjective 'armed' from the phrase 'armed attack', signifying that NATO would be entitled to respond to the full breadth of the Russian unconventional threat, stretching into economic and energy policy<sup>37</sup>.

The appeal in this proposed reform is that it would signify the obligations conferred upon States by the NATO Treaty are being taken seriously and reviewed against a relevant state of play in international affairs. However, because of the analogous relationship between article 5 of the NATO Treaty and article 51 of the UN Charter, any such re-interpretation of an armed attack, if adopted and exploited by other unscrupulous States, would be likely to have far reaching consequences for the concept of self-defence in International law altogether.

On the other hand, the Vienna Convention on the Law of Treaties requires that the words of a Treaty be interpreted in their context and in the light of the Treaty's object and purpose, and therefore, a good case exists that the NATO Treaty can already be used in a manner that means it can recognise and respond to measures that come short of an armed attack (with proportionate force). In fact, most commentators agree that whilst there is a particular threshold for an armed attack to cross, NATO remains entitled to reply to any lesser use of force, against any of its members, if it so chooses.

Moreover, although it may seem counterintuitive, most commentators agree that there is no particular threshold for an armed attack to cross<sup>38</sup>, and thus NATO remains entitled to reply to any armed attack that comes, if it so chooses. Besides this, on a practical level, very little has been established in terms of an alternative model to NATO and

brutalized in history; with fanatical, often genocidal warfare engulfing most societies between the outbreak of the First World War and the end of the Cold War. It was an age of hatred that ended with the twilight, not the triumph, of the West and, he warns, it could happen all over again.

<sup>37</sup> Ibid, p. 34.

<sup>38</sup> See above.

the collective self-defence doctrine. So, while the NATO Treaty is not a comprehensive instrument comprising all existing and foreseeable aspects of military defence and security policies (and was not meant to be), it could, with sufficient political impetus, be followed by the conclusion of further subject-specific instruments which would set out in more precise terms, exactly what NATO deems to be sufficient to trigger its article 5. An obvious example would be the conclusion of an international accord to formalise the NATO position on its stance relating to Cyber attacks, although, the apparent disadvantage in stating anything more than NATO's decision-making process is done on a case by case basis, is that it may lead to criticism that it has acted irrationally, when not demonstrating such discretion as could be expected of it.

Either way, if the NATO Treaty is amended or not, the point has been made clear: NATO continues, and it will safeguard its members' right of self-determination. Thus, as NATO's deterrence factor may continue to prevent a full-scale world war occurring again and so far as appropriate measures are taken, falling short of force, to censure Russian indirect aggression, then there is no need to reform article 5, as there has been no need to reform article 51. A thorough examination of the law provides that it remains functional and relevant and does not inhibit the use of lawful military force when necessary. Indeed, to counter the behaviour of Russia, such a fundamental structural change to International law is radical and unnecessary; rather, the more pressing concern is the practical matter of military preparedness and ability to show that the NATO deterrence factor is a credible one. If this can be achieved, then the present an International rules based system will be preserved – a departure into an unknown, contradictory world at Russia's behest could prove very difficult to reverse and have cataclysmic consequences.

### C. Lawfare

Consequently, another observation is in order: whether by fault, or design, and with surprising success, the framers of the NATO Treaty encapsulated a legal means to provide for the implementation of an established military strategy, the doctrine of deterrence. Whether the law can ensure that other strategic objectives and principles are provided for, in an evermore unstable and dangerous world, is a now a fitting question.

In the aftermath of the conflicts in Iraq and Afghanistan, there is an increasing need to ensure that the full range of military operations, from influence, to coercion, through to intervention, and full-scale invasion are legal<sup>39</sup>; the NATO Treaty proves that a certain aspect of military strategy can be contained coherently within a legal document and accordingly, further research would be welcome on which other aspects of military doctrine would lend themselves to being enshrined in legal statute, such as ensuring that certain percentages of GDP must be spent on defence spending, or that International Humanitarian Law (IHL) is applicable over International Human Rights Law (IHRL) in a non-International armed conflict<sup>40</sup>.

Indeed, whilst deterrence is a long established defence policy, and military alliances are found throughout history, certainly in Biblical times<sup>41</sup>, the growing resort to litigation over the use of force - 'lawfare', is a phenomenon that now deserves serious attention. Lawfare has been defined as 'the *abuse* of Western laws and judicial systems to achieve strategic military or political ends' and 'the exploitation of real, perceived, or even orchestrated incidents of law-of-war violations being employed as an unconventional means of confronting a superior military power'; so that from this perspective, lawfare consists of 'the negative manipulation of international and national human rights laws to accomplish purposes other than, or contrary to, those for which they were originally enacted'<sup>42</sup>.

Thus, whilst States remain legally entitled, either individually, or collectively, to deploy armed forces (and use force), in a range of circumstances that classify as self-defence, another aspect of the difficulty in doing so comes not from violent conflict that their Servicemen may face in an operational theatre, but the damage that can be done by the

<sup>39</sup> Bailey, J., Iron, R. & Strachan, H. *British Generals in Blair's Wars* Ashgate (2013) p.5 ff.

<sup>40</sup> This was the position of the Ministry of Defence, that was argued unsuccessfully to the Court of Appeal, so that it held British Forces had had no right to detain the first appellant in Afghanistan for more than 96 hours, in *Serdar Mohammed v Ministry of Defence and Rahmatullah & the Iraqi Civilian Claimants v Ministry of Defence & Foreign and Commonwealth Office* [2015] EWCA Crim 843.

<sup>41</sup> In Genesis 14, Abram encounters kings and chieftains who not only are named, but also have territories and military associations that are spelled out in detail. Cf. the Prophet Ezekiel's complaint against the unholy alliances that Israel created with the Egyptians and Assyrians (Ch. 16).

<sup>42</sup> The Lawfare Project: *What is Lawfare?* <http://www.thelawfareproject.org/what-is-lawfare.html>

very accusation (real or imaginary) that their mission, or conduct, is unlawful<sup>43</sup>. The logic of deterrence does not apply in these circumstances and much damage would be done if the NATO model could be fragmented by such an indictment.

#### IV. Conclusion

The range of circumstances that will trigger article 5 of the NATO Treaty is renewing the debate on the lawful use of force; the UN Charter paradigm does not seem a good fit for current challenges from the Russian political agenda and the utility of the law is again, under scrutiny. International law has long been used to contain the use of force and there ought to be considerable caution attached to the calls to broaden the definition of armed attack, so as to permit a response to a wider ambit of hostile acts; the danger in an extensive interpretation remains that it may result in unintended consequences, such as States using force on a more regular basis to settle disputes.

Moreover, debates concerning NATO are unique because of the sheer scale of the International Organisation and what is at stake if mistakes are made (the spectre of nuclear war has not gone). Whilst there remains a lawful basis upon which States will continue to defend each other militarily, it seems likely that the enlarged NATO will exhibit a propensity for divergent views, as to the immediacy and level of seriousness, of any given threat posed.

As the practical basis of what military force is used for changes, it is inevitable that there will be further paradigm shifts and further questions raised about the functionality and relevance of International law on the use of force. Into the future, NATO's relationship with International law will be defined by how it reacts in such, as yet unforeseen circumstances, and utilises increasing developments in technology<sup>44</sup>. However, there are

<sup>43</sup> The Policy Exchange have published a paper that is very critical of what it suggests has been 'sustained legal assault' on British forces, which could have 'catastrophic consequences' for the safety of the nation: Tugendhat, T., Morgan J. & Ekins, R 'Clearing the Fog of Law Saving our armed forces from defeat by judicial diktat': <http://www.policyexchange.org.uk/images/publications/clearing%20the%20fog%20of%20law.pdf>

<sup>44</sup> A fascinating account of what futuristic warfare will entail is capsulated by Singer, P.W. in *Wired for War: The Robotics Revolution and Conflict in the 21st Century* (Penguin books 2009); furthermore, see Sutherland, B. in *Modern Warfare, Intelligence and Deterrence: The technologies that are*

also important lessons for NATO that can be learned from history and in particular, the causes of World War I. The Great powers that fought each other had formed ad hoc defensive alliances, when it was unclear that they would do so, giving rise to unpredicted and catastrophic consequences<sup>45</sup>. It is argued that the success of the NATO Treaty has been that it makes clear which States will react to outside aggression and where the balance of military power ultimately lies<sup>46</sup>. The absence of a full-scale conflict with the Soviet Union - the Cold War going 'hot' - would seem to support this view and it is therefore to be welcome that debate has not stopped on how the Treaty is to be understood, and can continue to play an important role in maintaining International peace and security.

NATO has become less connected to the UN and has developed outside the original intention of its role as a regional organisation, as set out in Chapter VIII of the UN Charter<sup>47</sup>. Continued debate as to NATO's relationship with the UN is therefore also due and attention ought to be paid to understanding why UN forces have seemingly failed, where NATO succeeds, that is, in implementing sustainable peace keeping and peace enforcement missions.

Thus, while debate continues as to when force can be legally used in the modern world, it ought to be remembered that relevant legal doctrines on the definition of indirect aggression have existed for longer than a generation; defining how force can be deployed effectively, in a contemporary environment, seems to be an endeavour of continuous effort, requiring rigorous and systematic analysis<sup>48</sup>. Moreover, what seems to be needed, in a world that enjoys only fragile condition of peace, is

*transforming them*' Economist books (2011).

<sup>45</sup> MacMillan, M. *The War that Ended Peace: How Europe abandoned peace for the First World War* (Profile Books 2013).

<sup>46</sup> A recent and useful article has been published by Buckley, E and Pascu I on 'How to Avoid Wars: NATO's Article 5 and Strategic Reassurance' <http://www.atlanticcouncil.org/publications/articles/how-to-avoid-wars-nato-s-article-5-and-strategic-reassurance>

<sup>47</sup> Gazzini, T 'NATO's role in the collective security system' JCSL 2003 (231)

<sup>48</sup> Boothby has offered a relevant and complete overview of the law of weapons in armed conflict. He makes out a compelling case that the law concerning the means of warfare (that is, weapons, or weapons systems, in an armed conflict) is arguably one of the most important areas of *ius in bello*: Boothby, W *Weapons and the Law of Armed Conflict* (OUP 2009).

further debate as to how the national, and International, legal systems<sup>49</sup> can successfully categorise and permit appropriate countermeasures to combat ambiguous warfare – within an existing International security architecture that may have to fight itself, to continue its own existence.

<sup>49</sup> In *Foreign Relations Law* (CUP 2014) Campbell McLachlan QC has made a worthy contribution by examining the legal principles that govern the external exercise of the public power of States within common law legal systems (the United Kingdom, Australia, Canada and New Zealand). McLachlan concludes that the prime function of foreign relations law is not to exclude foreign affairs from legal regulation, but to allocate jurisdiction between the national and the international legal systems.





## A CRITICAL ANALYSIS OF BIOSECURITY AND AVIATION HEALTH BORDERS IN THE UK

Stephen Hill

The history of transport is one of the key identifiers in following the passage of civilisation around the world, and over the ages has provided the key to understanding many of the great questions of how human society interacts and responds to its environment. Languages, culture and wealth however are not the only thing to have passed along the great arteries of the world, and since the beginnings of human habitation, biosecurity has been one of the key concerns of the nations and states of the world.

The word 'biosecurity' is a catchall term, and can be divided into three distinct definitions all dealing with different aspects of biological threats: the introduction of invasive species into ecosystems; the prevention of the transmission of infectious disease across international borders; and the threat of biological agents being used to commit acts of terrorism/war. The oldest of these definitions, and the one on which this paper will focus, is the prevention of the transmission of infectious disease across international borders.

International pandemics are nothing new, and have long been recorded in the annals of history, with pandemics of note being recorded by the ancient Greek city-states<sup>1</sup> and the Roman Empire,<sup>2</sup> and have had vast and far reaching effects on societies, most notably during the period known as the Black Death in Europe, which devastated much of the continent, causing the deaths of as many as 75 million people.<sup>3</sup> Advances

<sup>1</sup> David Biello, "Ancient Athenian Plague Proves to Be Typhoid," *Scientific American*, 25<sup>th</sup> January 2006, Accessed: 2<sup>nd</sup> January 2015, <<http://www.scientificamerican.com/article/ancient-athenian-plague-p/>>

<sup>2</sup> Verity Murphy, "Past Pandemics that Ravaged Europe," *BBC News*, 7<sup>th</sup> November 2005, Accessed 2<sup>nd</sup> January 2015, <<http://news.bbc.co.uk/2/hi/health/4381924.stm>>

<sup>3</sup> Will Dunham, "Black Death 'Discriminated' Between Victims," *ABC Science*, 29<sup>th</sup> January 2008, Accessed 6<sup>th</sup> January 2015, <<http://www.abc.net.au/science/articles/2008/01/29/2149185.htm>>;

in medical science and international interactions have somewhat reduced the number of pandemics in recent years, and generally speaking modern pandemics have been relatively contained within national boundaries with a few important exceptions. With more people having easy access to quick and easy travel, especially within the international air network however, the risk of further pandemics and more dangerous cross-border infections is just as concerning, if not more so than it ever was.

Recent pandemics such as the SARS and H1N1 Avian flu pandemics have highlighted the need for caution in the transport industry against the transmission of newly emergent diseases whose transmission vectors include human-to-human contact. Although in neither of these cases the World Health Organisation advocated the closing of national borders, rather stating that time would best be spent working to mitigate the dangers of potential outbreaks,<sup>4</sup> it is clear from the actions of certain states that mitigation of the risks of infection entering the country are high on the list of priorities for governments. IATA estimates that their members (representing approximately 84% of all commercial flights) fly 1.9 billion passengers a year, 860 million internationally,<sup>5</sup> and these figures continue to grow with the population, as more people gain access to air travel.

### I. Current regulation of aviation biosecurity

International regulation of aviation biosecurity is not unheard of. The founding document of the modern international air network, the Chicago Convention, identified in article 14 a need to prevent the spread of disease through aviation, identifying several of the classically most virulent diseases known at the time (cholera, typhus, smallpox,<sup>6</sup> yellow fever and plague), as being of particular concern,<sup>7</sup> and the World Health

<sup>4</sup> "World Health Organisation: Global Alert and Response: H1N1 Pandemic" (27<sup>th</sup> November 2009), Accessed 6<sup>th</sup> January 2015,

<[http://www.who.int/csr/disease/swineflu/frequently\\_asked\\_questions/travel/en/](http://www.who.int/csr/disease/swineflu/frequently_asked_questions/travel/en/)>;

<sup>5</sup> "Fact Sheet: IATA- International Air Transport Association" (December 2013), Accessed 6<sup>th</sup> January 2015, <[http://www.iata.org/pressroom/facts\\_figures/fact\\_sheets/Pages/iata.aspx](http://www.iata.org/pressroom/facts_figures/fact_sheets/Pages/iata.aspx)>;

<sup>6</sup> Smallpox provides a fine example of the mutability of the biosecurity needs of states- the World Health Organisation declared Smallpox eradicated in 1979

<sup>7</sup> Convention on Civil Aviation (Adopted 7<sup>th</sup> December 1944, entered into force 4<sup>th</sup> April 1947) 15 UNTS 295, art. 14

Organisation<sup>8</sup> publishes the International Health Regulations,<sup>9</sup> which states are bound to implement as minimum standards in their domestic law.<sup>10</sup>

The IHR themselves make no mention of what was once the standard response to major outbreaks of disease- the closing of borders for prevention purposes, a notable omission which can likely be in part attributed to the political pressures put upon the organisation. The need to combat biological threats to security without closing borders is a symptom of increased globalisation and trade, a trend which has proved as beneficial to biosecurity as it has detrimental.

The ability to share information, data, and even samples within days globally has proved advantageous, but when a disease has a transmission rates that mean it can spread to five countries within 24 hours, and another twenty over five continents in two months, as did SARS in 2003,<sup>11</sup> this becomes less of an impressive feat, and more of an explanation of the WHO's position encouraging states in these cases to focus on combatting the disease when it reaches their shores, rather than attempting to prevent its entry altogether.

This however does not stop nations from taking precautions to prevent the cross-boundary spread of international disease, and whilst it is rare (indeed, almost unheard of) for a country to close its borders absolutely to international traffic, special precautions are often taken when flights are inbound from zones known to be infected.

Unusually, naturally occurring pathogens have begun to sneak onto the agendas of security bodies, at both the international and national levels. 10<sup>th</sup> January 2000 marked the first time that the UN Security Council met with the express reason of establishing a resolution highlighting the potential security risks of the HIV/AIDS pandemic,<sup>12</sup> a meeting which was followed by similar proceedings in the United States

<sup>8</sup> Hereinafter 'WHO'

<sup>9</sup> Hereinafter 'IHR'

<sup>10</sup> World Health Organisation International Health Regulations (2005) online: World Health Organisation <[http://whqlibdoc.who.int/publications/2008/9789241580410\\_eng.pdf](http://whqlibdoc.who.int/publications/2008/9789241580410_eng.pdf)>; Accessed 6<sup>th</sup> January 2015

<sup>11</sup> "World Health Organisation: Summary of Probable SARS Cases with Onset of Illness from 1 November 2002 to 31<sup>st</sup> July 2003" (21<sup>st</sup> April 2004) online: WHO <[http://www.who.int/csr/sars/country/table2003\\_09\\_23/en/](http://www.who.int/csr/sars/country/table2003_09_23/en/)>; Accessed 6<sup>th</sup> January 2015

<sup>12</sup> UN Security Council, *Security Council Resolution 1308 (2000) on the Responsibility of the Security Council in the Maintenance of International Peace and Security: HIV/AIDS and International Peacekeeping Operations*, S/RES/1308

National Security Council.<sup>13</sup> The inclusion of such threats upon lists which contain other security issues such as weapons of mass destruction and conventional terrorism<sup>14</sup> cannot be understated as an indicator of growing concern within national governments for the future potential of naturally occurring pandemics, such as those which have occurred recently such as SARS; H1N1; H5N1; and in agricultural zones, foot and mouth disease.

Although states have long had procedures in place for the control of biological agents, the first comprehensive legislation on biosecurity was that promulgated by the Parliament of New Zealand in 1993.<sup>15</sup> The three-hundred and fifty six page act provided an extensive distribution of powers for the control, quarantine and elimination of invasive biological agents of all natures, adopting a broad definition of 'organisms'<sup>16</sup> as any non-human creature, reproductive cell, or prion;<sup>17</sup> a definition which is indubitably in keeping with the precautionary nature of the act. The New Zealand act would largely appear to concern itself with threats to livestock, although it does remain equally applicable to threats to human life.

In countries such as New Zealand, where a large proportion of the economy is geared towards the production, import and export of agricultural goods and services, traditionally there has always been a need for clear inspections of goods, and the act has a great focus on imported goods and organisms, applying a broad discretion for inspectors of goods to give direction to the masters of craft,<sup>18</sup> and for the inspection<sup>19</sup> and potential quarantine of goods and individuals.<sup>20</sup> The act also provides heavy reference to the Hazardous Substances and New Organisms Act, which has restrictions on the exact nature of imports, and what is permitted.<sup>21</sup>

<sup>13</sup> Barton Gellman, "AIDS Is Declared Threat to Security," *Washington Post*, 30<sup>th</sup> April 2000, 34

<sup>14</sup> George W Bush, *The National Security Strategy of the United States of America* (Washington DC: White House, 2006), 44

<sup>15</sup> Biosecurity Act 1993 (NZ) 1993/95

<sup>16</sup> The term used to define the scope of the act

<sup>17</sup> *Supra* n15 at 2(1)

<sup>18</sup> *Supra* n15 at s. 32

<sup>19</sup> *Ibid* at s. 31

<sup>20</sup> *Ibid* at s. 41

<sup>21</sup> Hazardous Substances and New Organisms Act 1996 (NZ) 1996/30

As with most public health legislation, a list of notifiable diseases is also included, by way of schedules 1 and 2 of the Health Act 1956,<sup>22</sup> requiring importers, or the inspectors of craft to report certain diseases to the central government.<sup>23</sup> A somewhat unusual provision in the New Zealand act permits the Chief Technical Officer of a region to authorise the use of pesticides or herbicides from aircraft over wide areas, providing that notification is given.<sup>24</sup> This provision is somewhat unusual as in most jurisdictions approval of such measures would need to be given at the ministerial level. As formulated in the Biosecurity Act, this is possibly a demonstration of the need for agricultural states to be able to respond more precipitously to threats which may, if they go unchecked, spread rapidly through populations of livestock. The efficaciousness of the act with regards to livestock threats has been proved multiple times, against both pathogens,<sup>25</sup> and imported undesirable organisms,<sup>26</sup> although it is notable in its failures to identify threats at the border, despite extensive provision to do so. In this respect, the act has both succeeded as a responsive measure and failed as a preventative one.

Primary enforcement of the act is undertaken by the Environmental Protection Agency under the Ministry of Primary Industries, an arrangement which allows administration of all provisions, including those criminalising certain acts, such as the knowing communication of infections and restricted organisms,<sup>27</sup> a system which is common to most jurisdictions. Across the Tasman Sea, the Australian government operates a similar system, although all biosecurity control is undertaken by the centralised agency, Biosecurity Australia. By having a dedicated agency for biosecurity, Australia has been largely successful in the prevention of disease entry and effect upon its isolated ecosystem, including the prevention of human diseases, such as the SARS outbreak, which bypassed both New Zealand and Australia, whilst infiltrating many other prepared states.

<sup>22</sup> Health Act 1956 (NZ) 1956/65 at Sched 1 and 2

<sup>23</sup> Supra n15 at s. 45-46

<sup>24</sup> Ibid at s. 114A

<sup>25</sup> Ministry of Agriculture and Forestry, *PSA Pathway Report* (Wellington: Ministry of Agriculture and Forestry, 2011)

<sup>26</sup> Jose Derraik, "The potential direct impacts on human health resulting from the establishment of the painted apple moth (*Teia anartoides*) in New Zealand," NZMJ 121 (2008): 1278

<sup>27</sup> Supra n15 at s.32

## II. Disease control and aviation within the United Kingdom

Control of disease in the United Kingdom is largely undertaken under the auspices of the Public Health (Control of Disease) Act,<sup>28</sup> which makes provision for regulations to be made by the Secretary of State for Health. Specific regulations for aviation have previously been made, in the form of the Public Health (Aircraft) Regulations,<sup>29</sup> last amended by the Public Health (Aircraft)(Amendment) Regulations in 2007,<sup>30</sup> however several provisions of the Public Health Act do also apply to aviation, although the act itself is largely concerned with the transition of organism and organic material across riparian borders.

The powers granted for the regulation and control of disease are broad, but are predicated, perhaps a little unwisely on the assumption of full knowledge of infections and infestations,<sup>31</sup> including the type and nature of the infection, facts which when infections first appear on borders may not be known. Specific regulations with regards to aerodromes, as defined in the Civil Aviation Act,<sup>32</sup> require the specification of enforcing authorities by the Secretary of State, which may be local councils, National Health Service Trusts, or Special Health Authorities.<sup>33</sup>

The lack of centralised policy has proved problematic in the past, and during the recent avian flu outbreaks, different local areas have dealt with the situation in very different ways, from local medical practitioners being put on 'standby',<sup>34</sup> to full screening,<sup>35</sup> and in some places, notably Manchester Airport,<sup>36</sup> no action being taken, even on flights coming from infected zones.<sup>37</sup> This deficiency, and the increasing liberalisation of the air network and move towards the internationalisation of regional airports has engendered problems within the field of biosecurity by

<sup>28</sup> Public Health (Control of Disease) Act 1984 (UK)

<sup>29</sup> Public Health (Aircraft) Regulations SI 1979/1434(UK)

<sup>30</sup> Public Health (Aircraft) Regulations SI 2007/1603 (UK)

<sup>31</sup> *Supra* n28 s 13(1)

<sup>32</sup> Civil Aviation Act 1982 (UK)

<sup>33</sup> *Supra* n28 at 13(4)

<sup>34</sup> At Birmingham Airport

<sup>35</sup> At London Heathrow

<sup>36</sup> The third busiest airport in the UK

<sup>37</sup> Adam Warren et al, "Airports, Localities and Disease: Representations of Global Travel during the H1N1 Pandemic," *Health and Place* 16 (2010): 727

essentially opening up many new borders, each with its own authority, through which potentially infected passengers may enter the country.

The delegation of responsibility to local authorities itself however may not be at the root of the problem, as no fewer than eight different agencies have to co-ordinate responses to biological threats and have some level of involvement in day-to-day health practices at airports,<sup>38</sup> even when there is no threat present, and because of the operational differences of airports, each must do so in their own ways, which does not allow for the efficient and effective implementation of biosecurity legislation in all airports in the same manner.<sup>39</sup>

Whilst some degree of difference might be expected in any jurisdiction, the confusion over who does what and the manner in which duties should be carried out would seem to be excessive when compared to those jurisdictions such as Australia or New Zealand where one agency bears primary responsibility for biosecurity. Disparities between agencies are not merely a British idiosyncrasy, similar conflicts have been found by Koblenz in the United States, conflicts which in this case seem to be being exacerbated by the differences in national security strategies of successive presidents.<sup>40</sup>

Within the UK, authority to inspect aircraft is strictly limited to situations when the aircraft commander requests inspection, and situations where there is 'reasonable grounds for belief' that it may be infected,<sup>41</sup> a restriction that though it is understandable, does not explicitly provide for the automatic inspection of aircraft from infected countries without reasonable grounds for belief. The extent of the 'reasonable grounds' clause within this act has never been tested in the courts, so any determination as to whether a blanket assumption that all aircraft from an infected country may be infected has yet to be made, and no clarification has been given by the office of the Secretary of State.

Practice in recent epidemics would indicate that this assumption would not constitute reasonable grounds; however as has been already stated, practice is very much down to the individual authorities, and can

<sup>38</sup> Lucy Budd et al, "Maintaining the Sanitary Border: Air Transport Liberalisation and Health Security Practices at UK Regional Airports," *Trans Inst Br Geogr* 36 (2011): 272

<sup>39</sup> Lucy Budd et al, "Safeguarding Public Health at UK Airports: An Examination of Current Health Security Practices," *Transportation Planning and Technology* 34 (2011): 19

<sup>40</sup> Gregory Koblenz, "From Biodefence to Biosecurity: The Obama Administration's Strategy for Countering Biological Threats," *International Affairs* 88 (2012) 131

<sup>41</sup> *Supra* n29 at s. 7(2)

vary massively, apparently depending upon the whims of the controlling body. Detention and isolation of persons under the regulations may only be undertaken on the authority of the attending medical officer, a potential flaw which could help in the spread of disease. Customs officials may, under section 8(4) detain individuals required to produce a valid International Vaccination Certificate 'until the arrival of the medical officer or for three hours, whichever is the shorter period,'<sup>42</sup> a provision which though no doubt protective of the right against arbitrary detention could prove aggravating if such person is in fact a carrier of an infectious disease.

With the pressures on the medical system, summoning a medical official within three hours may not be as easy as it would first appear, and therefore would lead to infected individuals being released before examination, in a manner that seems at best unwise, and at worst downright irresponsible. The medical officers themselves possess much broader powers, to detain, isolate or restrict individuals to the aircraft upon which they are arriving.<sup>43</sup> Although in itself this seems reasonable given the specialist knowledge of said practitioners, the deficiencies inherent in a system which has the potential to release potentially infected individuals before they are seen by a medical official cannot be understated.

All this being said, it is possible for medical officers to place individuals under surveillance for periods which are specified in s 30(1) of the act.<sup>44</sup> These surveillance measures however only apply to a limited number of diseases, and would not apply to any disease not specified within the regulations, another flaw, which when compared to the broader powers within the New Zealand act's emergency provisions<sup>45</sup> would seem something of a dereliction of duty, or at the very best, a short sighted approach, given the evolutionary and transitory nature of many diseases.

Powers with regard to the aircraft itself are also exercised by the medical official, who may order the detention, disinfection and deratting of aircraft reasonably believed to be infected,<sup>46</sup> but inspections must be

<sup>42</sup> Ibid at s 8(4)

<sup>43</sup> Ibid at s. 9

<sup>44</sup> Ibid at s.30(1)(a-d)

<sup>45</sup> Supra n15 at s. 87

<sup>46</sup> Supra n29 at s. 13



undertaken as soon as possible,<sup>47</sup> with the aircraft being released after the inspection has been undertaken, or after a duration of three hours, with the written permission of the medical officer.<sup>48</sup> This carries with it the same problems that plague the provisions related to passengers, requiring the presence of a medical officer within three hours. Although most airports do have medical staff on hand, the medical officer is required to be employed by the local authority, and may not be immediately accessible in occasions when other problems have arisen. Airport deficiencies do not extend only to missing medical personnel, as many smaller local airports, some of which now receive international flights under the liberal regime, do not have adequate facilities for the isolation or treatment of infections. Under these circumstances, the medical officer is permitted to direct the commander of an aircraft to adjourn to a 'sanitary airport',<sup>49</sup> an airport designated under article 19 of the IHR as having optimal facilities for the prevention of disease.<sup>50</sup>

There is a certain amount of pressure under the Regulations for medical officials to dispatch their duties efficaciously and efficiently. Section 24 obligates them to 'have regard to the need for freeing aircraft from control under these regulations as quickly as possible', a stipulation which cannot be found in any other similar regulations. It is difficult to assess exactly what effect this has on said officials, as no studies have been done in the area, however the presence of such a regulation should be slightly concerning, as increased pressure from the airlines, who cannot afford to have a plane downed, and the airport, who often cannot afford to have valuable space taken up by the same plane, could potentially have the effect of corners being cut in order to facilitate swift onward journeys. This is pure speculation, however it is more than conceivable that such events could, and may well have happened in the past.

Departing aircraft have their own set of regulations under the instrument, regulations which do not provide for the detention of aircraft, or the prevention of flights. Individuals who are reasonably believed to be infected with a disease subject to the IHR may be examined by the medical official prior to their boarding, and may be

<sup>47</sup> Ibid at s. 17

<sup>48</sup> Ibid at s. 18-19

<sup>49</sup> Ibid at s. 22

<sup>50</sup> Supra n10 at Art. 19

prohibited from boarding.<sup>51</sup> Alternatively, in other cases, notification may be given to the commander of the aircraft and the health authorities in the destination that certain passengers require surveillance.<sup>52</sup> Broad provision is made in s. 28 for the Secretary of State to designate any disease beyond those subject to IHR which he opines may 'constitute a menace to other countries' as being subject to the regulations,<sup>53</sup> and all medical officers are obliged to follow any regulation beyond those that are laid down in s. 28<sup>54</sup> that may be made by the Secretary of State.

### III. Future development of aviation biosecurity within the UK

There are then in essence three key problems with the current United Kingdom legislation for biosecurity: implementation problems caused by the lack of centralised policy and cohesive administration; lack of effective provision for pre-flight screening; detention powers that could release potentially infected persons before they are examined by medical professionals; and limited provision for transmission vectors other than human-human contact.

The first of these is perhaps the most concerning. The confusion arising when eight separate bodies are attempting to respond to the same crisis according not only to these regulations, but to their own regulations as well has the potential to cause huge gaps in coverage, where safety and security may be at risk, an unacceptable possibility when it comes to public health. Lack of co-ordination between authorities is considered to be one of the key barriers that needs to be broken, not only nationally, but internationally, and some writers have suggested that the only way to effectively combat emergent pathogens, and re-emergent ones is to promote 'Increased co-ordination among national governments, international organisations, the private sector, and nongovernmental organisations.'<sup>55</sup>

This is a tactic which would not only serve to increase the number of people who were on the watch for disease, but also the number of points

<sup>51</sup> Supra n29 at s. 27(a)

<sup>52</sup> Ibid at s. 27(c)

<sup>53</sup> Ibid at s.28

<sup>54</sup> Ibid at s. 28(a-f)

<sup>55</sup> Gregory Koblentz, "Biosecurity Reconsidered: Calibrating Biological Threats and Responses," *International Security* 34 (2010): 124

at which it would be possible for potentially high-risk passengers to be identified, and watched for any signs of infection.

There is a risk, and particularly in the UK, where much criticism has already been levelled at the presence of the so-called 'big brother' state, where so many are watched for much of the time, that this approach could be seen as unnecessarily invasive, however, the implementation of this should not be seen as being any different to the checks that are already undergone on flights. It would even be possible, if the Australian approach was taken, and a single biosecurity body established for the state to reduce the amount of apparent oversight, even if there was no real decrease in the amount of observers of flight passengers.

This response to criticism is one that should certainly be considered, and although much of it could only be established by government policy, interactions with the private sector would almost certainly require a rewriting of the present regulations to extend certain limited powers and responsibilities to the airlines, and managers of the airports. There is also an underlying public apathy towards biosecurity, in large part based on ignorance, and the combatting of this should also form a large part of the government's response to increased threats.

The idea of 'responsibility in travel' has been mooted by critics of the current policy,<sup>56</sup> an idea which could also be used to ameliorate the problem of effective screening. The present lack of general mandatory health checks is understandable from a policy perspective, and would generally seem to be a positive idea; however some degree of checks would seem to be useful. In this regard, self-reporting can be effective,<sup>57</sup> that is to say the reporting by passengers at the gate of any potential symptoms of highly infectious diseases, and this system may prove one potential solution to weeding out high risk travellers at the point of departure, if appropriate queries and regulations were legislated for.

Thermal screening, though it has proved somewhat ineffective in some sectors with regards to some viruses, has proved to be effective in certain other cases, and the integration of some degree of regulation mandated thermal screening at the gate may also prove to be a useful tool in the defence of the frontier against biological hazards. For non-human transmission vectors, such as goods carried in baggage, increased use of

<sup>56</sup> *Supra* n38

<sup>57</sup> Anite Heywood et al, "Self-Reported Symptoms of Infection Among Travelers Departing from Sydney and Bangkok Airports," *JTM* 17 (2010) 243

sniffer dogs, which have proved as much as seven times more effective at detecting prohibited products which may bear infections.<sup>58</sup> The threat of cross boundary transportation of insects and other organisms bearing infections is also a present one which is not at the moment effectively combatted under the present legislation.<sup>59</sup> Although it would be absurd for states to legislate against insects, a more effective strategy needs to be adopted, possibly by way of more inspections at varied points even after goods have passed the border.<sup>60</sup>

The lack of effective detention powers, which mean that no person can be held for more than three hours without seeing a medical official, also bears closer examination. The potential risks of allowing a passenger with a highly infectious disease to be released to continue their onward journey without examination far outweigh any concerns over the inconvenience of the detention. A reformulation of the provision, allowing for detention until the person has been examined, dropping entirely the three hour release window, would seem to be in order, to more effectively mitigate the possibility of illness spreading merely because a physician could not be located within three hours.

#### IV. Conclusion

Given that the general attitude of the WHO seems to be one of mitigation, not prevention, it is perhaps understandable that states have adopted similar policies. Certainly in the UK, the recent update of the Civil Contingencies Act<sup>61</sup> would indicate a standing government policy disregarding the possibility of stopping diseases at the gates,<sup>62</sup> in favour of attempting to prevent extensive damage post-infection. Although this attitude would seem to be serving the world well for the moment, increased border biosecurity would not only serve to increase domestic

<sup>58</sup> Jyh-Mirn Lai et al, "Modelling Exotic Highly Pathogenic Avian Influenza Virus Entrance Risk Through Air Passenger Violations," *Risk Analysis* 32 (2012): 1099

<sup>59</sup> Stacey Knobler et al, *The Impact of Globalisation on Infectious Disease Emergence and Control* (Washington DC: The National Academies Press: 2006), 22

<sup>60</sup> Manuel Colunga-Garcia et al, "Freight Transportation and the Potential for Invasions of Exotic Insects in Urban and Periurban Forests of the United States," *Journal of Economic Entomology* 102 (2009): 237

<sup>61</sup> Civil Contingencies Act 2004 (UK)

<sup>62</sup> Ben Anderson, "Pre-emption, precaution, preparedness: Anticipatory Action and Future Geographies," *Prog Hum Geogr* 34 (2010): 791

health confidence and security, but also to aid in the moderation of the spread of diseases around the world, an attitude in keeping with Koblenz's suggestion of increased co-ordination.

It is important to recall that different states not only have a responsibility to protect their own citizens by preventing disease spread across borders, and within their borders; but also to the spread of infection to other countries, a task which can only be undertaken by increased security. As one of the primary points of access to the EU, and a nation with a long history of aviation and some of the busiest airports in the world, the UK has a distinct responsibility to improve its biosecurity, and help to slow the spread of pathogens. The emergence of new infections is not going to slow down, and current efforts have proved to be largely ineffective in preventing cross border travel.

That so far mitigation efforts once infections have been effective should be of little comfort. With the development of drug-resistant strains of infection it is eminently plausible that one such strain will occur which mitigation efforts will not be successful in this situation, the only hope to prevent a worldwide pandemic of devastating proportions, may be border control, border control which presently seems to be critically ineffective.



**WOODLAND v ESSEX COUNTY COUNCIL**

Samuel Parsons

The appellant in *Woodland v Essex*<sup>1</sup> was a student who had suffered severe hypoxic brain injuries during a school swimming lesson, aged 10 at the time of the incident. The national curriculum at the time had included swimming, and pupils at the school had swimming lessons in normal school hours. The teacher and lifeguard present were employed by an independent contractor, not the education authority. Both at first instance and in the Court of Appeal (Laws LJ dissenting), it was held that the authority's strike-out application should succeed. In the Supreme Court, it was held unanimously that the authority owed the Appellant a non-delegable duty of care, with the result that it would be liable at law for any negligence on the part the teacher and lifeguard.<sup>2</sup>

This 'monumentally significant case'<sup>3</sup> placed a new duty on local authorities with regard to children under their care. Courts should be sensitive whenever a decision will impose a new burden on those providing public services, as it can lead to an inefficient use of resources in defending litigation<sup>4</sup> and a potential 'chilling effect' may result in fewer amenities being made available because of the fear of litigation.<sup>5</sup> Nevertheless, it is submitted that no unreasonable burden was cast on schools by recognising the existence of a non-delegable duty on the criteria set out in *Woodland*.

This is so for five principal reasons.<sup>6</sup> First, the duty is consistent with long-standing policy of protecting those who are both vulnerable and highly dependent on the observance of proper standards of care. Second, parents are required by law to send their children to school and generally have no influence over the arrangements or delegations that the school

<sup>1</sup> [2013] UKSC 66.

<sup>2</sup> The matter then had to be sent back to the High Court for the relevant facts to be found.

<sup>3</sup> Julian Fulbrook, 'Woodland v Essex CC: Case Comment' [2014] J.P.I. Law, C1-C5.

<sup>4</sup> *X (Minors) v Bedfordshire CC* [1995] 2 A.C. 633, 749-751

<sup>5</sup> *Tomlinson v Congleton* [2003] UKHL 47, 66

<sup>6</sup> Cf. [2013] UKSC 66 at [25] *per* Lord Sumption

may make. Third, clear limitations are set out in *Woodland* which delineate the range of matters for which a school assumes non-delegable duties. Fourth, the recognition of non-delegable duties act as a counterbalance to the growth of outsourcing. Fifth, other schools were already subject to such non-delegable duties and the same result should follow when comparable services are provided by a public authority. The first, third, and fourth justifications are considered in detail.<sup>7</sup>

### I. Policy and coherence

Lord Sumption identifies two broad categories of non-delegable duties.<sup>8</sup> The first is the 'varied and anomalous class of cases' which relate generally to 'ultra-hazardous' activities'.<sup>9</sup> In the second, which is at issue in *Woodland*, his Lordship identifies three critical characteristics where the common law imposes such a duty:

First, it arises not from the negligent character of the act itself but because of an antecedent relationship between the defendant and the claimant. Second, the duty is a positive or affirmative duty to protect a particular class of persons against a particular class of risks, and not simply a duty to refrain from acting in a way that foreseeably causes injury. Third, the duty is by virtue of that relationship personal to the defendant.<sup>10</sup>

His Lordship then asserts that the characterisation of non-delegable duties originated in the law of nuisance<sup>11</sup> and goes on to trace a number of situations where a special relationship requires the defendant to assume positive duties to take care, especially in the line of authority surrounding the issue of 'pure economic loss'.<sup>12</sup> This coheres with Stevens' argument that since the relationship in instances of non-delegable duties was voluntarily assumed by the defendant, the law is

<sup>7</sup> This essay has been edited for the purposes of submission.

<sup>8</sup> *Woodland* (n 1) at [7]

<sup>9</sup> *Honeywill and Stein Ltd v Larkin Brothers (London's Commercial Photographers) Ltd* [1934] 1 KB 191

<sup>10</sup> at [7]

<sup>11</sup> *Rylands v Fletcher* (1866) LR 1 Ex 265; (1868) LR 3 HL 330 and *Dalton v Henry Angus & Co* (1881) 6 App Cas 740

<sup>12</sup> *Henderson v Merrett* [1995] 2 AC 145; *White v Jones* [1995] 2 AC 207



inevitably less concerned with preserving the defendant's liberty of action.<sup>13</sup> It is therefore appropriate in many cases that the default rule should be a higher standard than it is in relation to duties which are not voluntarily assumed.

Lord Sumption also suggests that vulnerability of the claimant and 'a degree of protective custody' will be relevant characteristics before a non-delegable duty will be established.<sup>14</sup> This was so in cases such as *Wilsons & Clyde Coal Co Ltd v English*<sup>15</sup> in which non-delegable duties were established in order to evade the doctrine of common employment.<sup>16</sup> The non-delegable duty in *Woodland* therefore fits within a wider scheme of law in protecting those who are vulnerable and affected by the acts or omissions of others.

## II. The Criteria

Lord Sumption's restatement of the applicable principles also include apparently clear criteria to 'prevent the exception from eating up the rule.'<sup>17</sup> This is especially important when negligence is at issue since non-delegable duties of care are inconsistent with the fault-based principles on which the law of negligence is based.<sup>18</sup> The 'second category' of non-delegable duties are characterised by the following defining features:<sup>19</sup>

- (1) The claimant is a patient or a child, or for some other reason is especially vulnerable or dependent on the protection of the defendant against the risk of injury. Other examples are likely to be prisoners and residents in care homes.

<sup>13</sup> Robert Stevens, 'Non-delegable Duties and Vicarious Liability' in Jason Neyers et al, *Emerging Issues in Tort Law* (Oxford: Hart Publishing, 2007) 331, 354.

<sup>14</sup> *Woodland* (n 1) at [8]

<sup>15</sup> [1937] UKHL 2

<sup>16</sup> Glanville Williams, 'Liability for Independent Contractors' (1956) CLJ 180, 190. The solution created by non-delegable duties has now outlived the problem of the doctrine of common employment. This was also applied to an independent contractor in *McDermid v Nash Dredging and Reclamation Co Ltd*. [1987] AC 906

<sup>17</sup> at [22]

<sup>18</sup> Although, as Stevens notes, "[t]he dominance of the view that the common law is resistant to the imposition of liability where the defendant has not been negligent has led to non-delegable duties being treated as an inexplicable rag-bag of cases, somehow related to vicarious liability... The twisting together of claims based upon different sorts of rights, and their treatment together within a single uber-tort [sic] of negligence, has misled us into thinking that a uniform standard of care is always applicable." Neyers et al (n 7), 368

<sup>19</sup> at [23]

(2) There is an antecedent relationship between the claimant and the defendant, independent of the negligent act or omission itself, (i) which places the claimant in the actual custody, charge or care of the defendant, and (ii) from which it is possible to impute to the defendant the assumption of a positive duty to protect the claimant from harm, and not just a duty to refrain from conduct which will foreseeably damage the claimant. It is characteristic of such relationships that they involve an element of control over the claimant, which varies in intensity from one situation to another, but is clearly very substantial in the case of schoolchildren.

(3) The claimant has no control over how the defendant chooses to perform those obligations, i.e. whether personally or through employees or through third parties.

(4) The defendant has delegated to a third party some function which is an integral part of the positive duty which he has assumed towards the claimant; and the third party is exercising, for the purpose of the function thus delegated to him, the defendant's custody or care of the claimant and the element of control that goes with it.

(5) The third party has been negligent not in some collateral respect but in the performance of the very function assumed by the defendant and delegated by the defendant to him.

The apparent clarity of these principles is to be commended, and stands as a riposte to the criticisms of Williams that the law in this area is unduly difficult to apply and lacking in principle.<sup>20</sup> The decision therefore minimises the onerousness of the duty imposed on local authorities with regard to children in their care by increasing certainty in the law. However, as George notes,<sup>21</sup> Lady Hale is more cautious about this 'test', warning that the common law 'must proceed with caution, incrementally by analogy with existing categories, and consistently with some underlying principle.'<sup>22</sup> Her Ladyship concludes that the boundaries of

<sup>20</sup> Williams 1956, 192

<sup>21</sup> Rob George, 'Non-delegable duties of care in tort' (Case Comment) [2014] LQR 534

<sup>22</sup> at [28]. See *Caparo Industries plc v Dickman* [1990] 2 AC 605

what the authority in question has undertaken to provide may not always be as clear cut as in *Woodland* but will 'have to be worked out on a case by case basis as they arise.'<sup>23</sup> For example, George contends that *A (Child) v Ministry of Defence*<sup>24</sup> appears to have been put on the wrong side of the dividing line. The issue of 'control' arguably makes matters unclear. Lord Sumption thought that the Ministry of Defence had undertaken to have medical care arranged, rather than to provide medical care itself, and that this was crucial, but the point is not entirely obvious.<sup>25</sup> There may be future litigation to determine the exact extent of the principle restated in *Woodland*.

### III. Outsourcing, non-delegable duties, and vicarious liability

Exceptionally, when vicarious liability applies, the defendant commits no tort himself, but is nevertheless held liable as a matter of public policy.<sup>26</sup> In 1990, McKendrick documented a swell in 'atypical' workforces, which have the potential to allow employers to make risk-free gains by contriving independent contractor relationships, thereby preventing vicarious liability from arising.<sup>27</sup> It is therefore unsurprising that the boundaries of vicarious liability have recently been "on the move"<sup>28</sup> and may now embrace tortfeasors who are not employees of the defendant, but stand in a relationship which is sufficiently analogous to employment.<sup>29</sup> However, it has never extended to the negligence of those who are truly independent contractors.<sup>30</sup>

Vicarious liability is to be distinguished rigorously from non-delegable duties, since any breach of a non-delegable duty is the tortfeasor's own.<sup>31</sup> Nevertheless, non-delegable duties and vicarious

<sup>23</sup> at [39]

<sup>24</sup> [2005] QB 183

<sup>25</sup> George 2014, 537

<sup>26</sup> *Majrowski v Guy's and St Thomas's NHS Hospital Trust* [2007] 1 AC 224

<sup>27</sup> Ewan McKendrick, 'Vicarious Liability and Independent Contractors - A Reexamination' (1990) 53 MLR 770

<sup>28</sup> *Various Claimants v Catholic Child Welfare Society* [2013] 2 AC 1

<sup>29</sup> The real surprise is that it has taken the law over 20 years to reflect this increase of independent contractor-type relationships.

<sup>30</sup> *Woodland* (n 1) at [3]

<sup>31</sup> Not all commentators make such a rigorous distinction. Fleming describes non-delegable duties as a "disguised form of vicarious liability". See John G. Fleming, *The Law of Torts* (9th edn, Sydney: LBC Information Services, 1998) 433.

liability are 'intertwined'.<sup>32</sup> As Lord Sumption described it in *Woodland*, the issue of non-delegable duties has 'nothing to do with vicarious liability, except in the sense that it only arises because there is none.'<sup>33</sup> Markesinis and Deakin have noted that '[t]he very same policy factors, involving an assessment of the deterrent effects of liability, risk-shifting through insurance, and the danger of adverse 'defensive' practices, apply in both sets of cases.'<sup>34</sup> The imposition of a non-delegable duty in *Woodland* therefore acted as a counterbalance to the non-availability of vicarious liability where it would have been available to the claimant in comparable situations, save for the interposition of an independent contractor.<sup>35</sup> Had the teacher and lifeguard been employed directly by the local authority, the authority would have been vicariously liable for any negligence of the teacher or lifeguard. It is therefore fair, just and reasonable that a non-delegable duty was found on the facts.

Because the Supreme Court was deciding a preliminary issue, the question of vicarious liability was not before the court. Beuermann argued that non-delegable duties would be a more coherent basis on which to found liability in *Woodland* in any event.<sup>36</sup> She contends that it would also have provided a logically sound path in child abuse cases such as *Lister v Hesley Hall*.<sup>37</sup> In fact, Lord Hobhouse came close to eliding the two ideas in his speech in *Lister* by stating that '[t]he liability of the employer derives from the voluntary assumption of the relationship towards the plaintiff and the duties that arise from that relationship and their choosing to entrust the performance of those duties to their servant'.<sup>38</sup> There are clear resonances between this statement and the reasoning of Lord Sumption in *Woodland*. Non-delegable duties may therefore prove to be a logically more certain alternative to any further expansion of vicarious liability, however carefully that 'tailoring' process is carried out.<sup>39</sup>

<sup>32</sup> Simon Deakin et al, *Tort Law* (7th edn, Oxford: Oxford University Press, 2013) 584

<sup>33</sup> *Woodland* (n 1) at [4]

<sup>34</sup> Deakin et al 2013, 588

<sup>35</sup> Cf. [2013] UKSC 66 at [30] *per* Lady Hale

<sup>36</sup> Christine Beuermann 'Vicarious Liability and Conferred Authority Strict Liability' (2013) 20 *Torts Law Journal* 265

<sup>37</sup> [2001] UKHL 22. The *Various Claimants* case was also one of child abuse.

<sup>38</sup> at [55]

<sup>39</sup> Lord Hope of Craighead [2013] LQR 514

#### IV. Conclusion

The decision in *Woodland* undoubtedly imposes a more stringent duty on local authorities with regard to children under their care. But it strikes a fair, just and reasonable balance between finding liability in this instance while remaining sensitive to the issues in finding public authorities liable more generally. It is however submitted that the criteria set down by Lord Sumption give greater flexibility than would at first appear and may give rise to uncertainties, leading to future litigation in this area. Nevertheless, the Supreme Court is to be commended for this principled and coherent expansion that may be compared favourably with the boundaries recently re-drawn in the area of vicarious liability.



## A FEMINIST APPROACH TO EVANS V UK

Malaeka Kazmi

The last hope of having biological children disappears because of an ex-partner withdrawing consent, and the court reasons this is justified in accordance with the law. This is the situation of Natalie Evans. In addressing why this case is important, a look towards the feminist perspective is necessary in addressing the gender equality of the gametes, through the eyes of the courts and its judges. Though arguably Evans may have an unjust outcome, I discuss whether this may be surprisingly fair from a feminist approach.

### I. Facts

In *Evans v United Kingdom*,<sup>1</sup> the European Court of Human Rights (ECHR) held that in accordance to the Human Fertilization and Embryology Act 1990 (HFE), there was no violation of Articles 2, 8 or 14 of the Convention of Human Rights and Fundamental Freedoms.

Natalie Evans and Howard Johnston were an engaged couple at the time of Evans's diagnosis. Evans was diagnosed with ovarian cancer, which would affect her fertility. Preliminary tests revealed that the applicant had serious pre-cancerous tumours in both ovaries, and that her ovaries would have to be removed.<sup>2</sup> She was offered a round of IVF cycle to freeze her eggs, which could then be implanted two years after her recovery. She wanted the option to freeze her own eggs separately, but was told of a lower chance of success if this was to be done. With the questions of the longevity of their relationship at hand, Johnston assured her he would be there for her, and that their relationship was stable.<sup>3</sup>

<sup>1</sup>Evans v United Kingdom App.no.6339/05 (2008) 46 EHRR 34, affirming Evans v United Kingdom (2006) 43 EHRR 21.

<sup>2</sup>Ibid, para 14

<sup>3</sup>Ibid, para 15

Will J purports that the courts recognized his intentions were to comfort his partner at a time when she needed him, and should be considered with good faith.<sup>4</sup> A nurse explained at this time to the applicant and Johnston, they would each have to sign a form consenting to the IVF treatment. Additionally, in accordance with the provisions of the Human Fertilization and Embryology Act 1990(HFE Act), it would be possible for either to withdraw his or her consent at any time before the embryos were implanted in the applicant's uterus.<sup>5</sup> With full consent, they signed the forms permitting their gametes to be frozen.

The form read, 'NB - You may vary the terms of this consent at any time except in relation to sperm or embryos which have already been used'.<sup>6</sup> Her former fiancé, signed the form permitting to the harvesting and fertilization of six embryos, and had them frozen. Two years later in 2002, the couple split and the future of the embryos was discussed by the parties. In a letter requesting the embryos to be destroyed, the clinic informed her, according to current IVF UK law, that they were legally bound to destroy the embryos as he had retracted his consent<sup>7</sup> by the Human Fertilization and Embryology Authority.<sup>8</sup> This signifies the importance of the case, as it has the potential to overturn the meaning of the Human Embryo and Tissue Act as it currently stands.

The legal issues raised have the potential to determine that the continuity of consent is a practice that has no place in the stages of the reproductive process. Much like conception through the natural means of sexual intercourse, where the male's consent is invalid after the initial act, it counters that this is not the case with emerging sciences. Professor John Harris of the University of Manchester told the BBC in September 2002, 'Until now, it has operated on the basis that there must be continuing consent between a man and a woman in every stage of the reproductive process. If she (Ms Evans) succeeds in this case, then she will have established that the man's role ends once the egg is fertilized'.<sup>9</sup>

<sup>4</sup> Ibid, para 20.

<sup>5</sup> Ibid, para 37.

<sup>6</sup> Ibid.

<sup>7</sup> Ibid, para 18.

<sup>8</sup> [http://en.wikipedia.org/wiki/Human\\_Fertilisation\\_and\\_Embryology\\_Authority](http://en.wikipedia.org/wiki/Human_Fertilisation_and_Embryology_Authority) (Accessed 09/03/2014)

<sup>9</sup> <http://news.bbc.co.uk/1/hi/health/2249442.stm> (Accessed 09/03/2014)



A feminist approach is very insightful in determining if future sciences possess gender equality, because it looks at the role of the woman on the basis that each gametes is worth the same. Though there are differing strands of feminism, more often than not it looks to the most just consequence for the woman. This may suggest, that this result may indicate that firstly there are problems with the law as it stands, and secondly that what is perhaps most 'just' might not be the fair outcome to all parties.

### Court's Reasoning

The Court of Appeal originally decided the initial application of *Evans v Amicus Healthcare*, and subsequent leave to the House of Lords was refused, resulting in the taking of her case to the ECHR.<sup>10</sup>

On 7 March 2006 a panel of seven judges of the ECHR delivered a majority 5-2 ruling against Ms Evans, which read:

The Court, like the national courts, had great sympathy for the plight of the applicant who, if implantation did not take place, would be deprived of the ability to give birth to her own child.<sup>11</sup>

The Court's reasoning cements the foundations of current law. In choosing not to deviate from the law it, according to *Michael Wilks* of the British Medical Association Ethics Committee, 'It's the right verdict, but a terrible situation'.<sup>12</sup>

The applicant emphasized that since her ovaries had to be removed to combat cancer, the embryos created with her eggs and J's sperm represented her only chance to have a child to whom she was biologically related.<sup>13</sup> Evans sought a declaration of incompatibility under the Human Rights Act 1998 to the effect that section 12 and Schedule 3 of the 1990 Act breached her rights under Articles 8, 12 and 14. Evans argued that her Article 8 respect for private family life,<sup>14</sup> including parenting

<sup>10</sup> *Evans v United Kingdom* (2008) 46 EHRR 34, affirming *Evans v United Kingdom* (2006) 43 EHRR 21.

<sup>11</sup> [http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/07\\_03\\_06\\_echr.pdf](http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/07_03_06_echr.pdf) (Accessed 10/03/2014)

<sup>12</sup> <http://news.bbc.co.uk/1/hi/4779876.stm> (Accessed 11/03/2014)

<sup>13</sup> *Evans*, para 49.

<sup>14</sup> *Evans* At para 72: Court noted in the legal sense she could still be a mother by way of adoption or even giving birth to a child originally created in vitro from donated gametes.

decisions, Article 14<sup>15</sup> (right to be free from discrimination) and 12 (right to start and found a family), was violated under the HFE Act.<sup>16</sup>

The applicant also complained under Articles 2, 8 and 14 of the Convention that domestic law permitted her former partner effectively to withdraw his consent to the storage and use of her of embryos created jointly by them.<sup>17</sup> Additionally, she pleaded that the embryos were entitled to protection under Articles 2 and 8.<sup>18</sup>

The court refuted these arguments. Justice Wall held that the embryos were not to be treated as persons, thus their right to life wasn't threatened, and there prior to implantation there cannot be an Article 8 violation.<sup>19</sup> Subsequently with Article 12, if Article 8 was not breached, then neither was the right to marry and form a family. With respect to the question of Article 14, it does not discriminate against women who cannot conceive without consent. Similarly, this would protect infertile men who did not want their gametes or eggs to be used without consent, and therefore this law could not gender discriminate.<sup>20</sup>

In the s.12(c) of the HFE Act it reads that 'except in relation to the use of gametes in the course of providing basic partner treatment services or non-medical fertility services that the provisions of Schedule 3 to this Act shall be complied with'. Justice Wall purports,<sup>21</sup> Johnston equally has rights under Article 8. It could be deemed to be equally as unjust to force parenthood on a party who does not want it. Johnston admitted he could not be an uninvolved parent. The ECHR held in their 5-2 ruling against Ms Evans that with 'great sympathy',<sup>22</sup> that the right to family life (article 8) could not override Johnston withdrawal of consent.'

In the joint dissenting opinion of Judges Türmen, Tsatsa-nikolovska, Spielmann and Ziemele it was highlighted that the court was

<sup>15</sup> At para 93: The applicant complained of discrimination contrary to Article 14 of the Convention taken in conjunction with Article 8, reasoning that a woman who was able to conceive without assistance was subject to no control or influence over how the embryos developed from the moment of fertilisation, whereas a woman such as herself who could conceive only with IVF was, under the 1990 Act, subject to the will of the sperm donor.

<sup>16</sup> At para 22

<sup>17</sup> At para 3

<sup>18</sup> At para 19.

<sup>19</sup> At para 22

<sup>20</sup> At para 23

<sup>21</sup> At para 23

<sup>22</sup> At para 90

disproportionate in its ruling.<sup>23</sup> They argued the 'disadvantage is that if it is too clear – categorically – it provides too much certainty and no flexibility.'<sup>24</sup> No weight was given to Johnson 'assurance'<sup>25</sup> and a complex case such as this should not be decided on a simplistic mechanical process.

A liberalist feminist approach would determine this to be a fair strand of thought as in dealing with complicated personal issues such as a last chance of motherhood.<sup>26</sup> More sensitivity would therefore be appreciated from the courts. This may suggest the reasoning of the judges may be influenced by feminist approaches, which arguably should not be the case in matters of prescribing the law equally.

## II. Feminism in Judges

Consideration of a feminist approach primarily looking at Lady Justice Arden and renowned feminist Baroness Hale is significant in indicating the appropriate feminist response to this case. Feminist approaches while often relevant in consideration of the ethical approaches taken, when used in judicial scenarios can be seen to possibly aid notions of greater equality. This is because feminism prescribes to give greater social, political and by association legal, instruments for reform according to Owen M.Fiss.<sup>27</sup>

Lady Justice Arden considered that the real comparators were fertile and infertile women, since the genetic father had the possibility of withdrawing consent to IVF at a later stage than in ordinary sexual intercourse.<sup>28</sup> The deciding judges were nevertheless in agreement that, whatever comparators were chosen, the difference in treatment was justified and proportionate under Article 14 of the Convention for the same reasons which underlay the finding of no violation of Article 8. This suggests that judicial reasoning is not affected by feminist views, but instead what is proportionate to what the law presents as just. This then

<sup>23</sup> Paragraph 7 of dissenting judgment in *Evans v UK*

<sup>24</sup> M.-B. Dembour, *Who Believes in Human Rights? Reflections on the European Convention*, Cambridge, Cambridge University Press, 2006, p. 93.

<sup>25</sup> Para 8 of dissenting judgment

<sup>26</sup> Storrow, Richard F. "Quests for conception: fertility tourists, globalization and feminist legal theory." *Hastings LJ* 57 (2005): 295.

<sup>27</sup> Fiss, Owen M. "What is feminism." *Ariz. St. LJ* 26 (1994): 413.

<sup>28</sup> At para 27

begs the questioning why is Ms Evans left without hope of her own genetic children as most of the judges were 'sympathetic'<sup>29</sup> to her loss? Is this the true arbitration of justice?

On the one hand, equality was not achieved as Evans had no hope for future genetic children, whereas comparatively, Johnston did. If equality was to be judged on this basis, then irrespective of whether Johnston withdrew his consent, it would be equal to both have this chance at parenthood. Alternatively, feminism could argue that the entire process of IVF is 'Different for Men'<sup>30</sup> due to the often ambivalent stance on the relationship between men and IVF as a technology; the predominance of hegemonic masculine culture in mediating the meaning of IVF for men. If the assumption that IVF as a technology means different things to both men and woman, it could be seen that Evans and Johnston might also partake these differing outlooks. For Evans, a last chance at her own genetic children, for Johnston a child he may later choose not to have.

In reiterating the question at hand from a radical feminist approach, surely one should empathise with a woman whose only chance to have her own genetically-related child is about to be taken from her due to the withdrawal of consent by her ex-partner. Or contrastingly, should one be concerned to resist the relentless social pressures which valorise motherhood as the highest object of a woman's life and which privilege genetic families over other forms of family relationships?<sup>31</sup>

If the court is then to judge on this basis alone, equality would suggest that Evans's gametes are given greater weight than Johnston's. This equally should be the case for fatherhood according to Caroline Morris, in 'Evans v United Kingdom: Paradigms of Parenting'.<sup>32</sup> She purports that the model of fatherhood which predominates in law is that of the symbolic father. She notes that the law is uneasy about 'fatherless' children and un-partnered women, but not necessarily from a child welfare perspective. On the contrary, the man's (legal) presence is required to legitimate and complete the woman's role in the process of

<sup>29</sup> At para 25

<sup>30</sup> Throsby, Karen, and Rosalind Gill. "It's Different for Men" Masculinity and IVF." *Men and masculinities* 6.4 (2004): 330-348.

<sup>31</sup> Feminist Judgments and Feminist Judging Feminist Justice? Symposium University of Ulster 29 June 2010 Rosemary Hunter

<sup>32</sup> (2007) 70 MLR 797

reproduction.<sup>33</sup> This is echoed by Lady Arden also concluding, 'Motherhood could surely not be forced on [the applicant] and likewise fatherhood cannot be forced on [J.], especially as in the present case it will probably involve financial responsibility in law for the child as well.'<sup>34</sup>

This indicates that the law views either role as equally as important in the upbringing of a child, and sentencing a child to a fatherless life is a notion the court takes into account. Baroness Hale puts it in the 'Foreword to our book', 'Feminism involves the belief both that women are the equals of men and that the experiences of women are as much part of the common experience of mankind as are the experiences of men it is no longer possible to assert the opposite of either belief.'<sup>35</sup> This then addresses that in understanding the Court's reasoning the judges' personal opinions cannot conflict this point of law. This furthers that despite judicial activism, it is not proportionate or fair to assume that judges should take feminist approaches, other than binding law, into account. According to Baker in, *Women's Diversity: Legal Practice and Legal Education – A View from the Bench*, 'Feminism in a judge is evidence of judicial partiality and a threat to judicial independence'.<sup>36</sup> Or similarly as Baroness Hale has pointed out, decisions can indeed be legally motivated while also – inevitably – reflecting personal views:

The business of judging, especially in the hard cases, often involves a choice between different conclusions, any of which it may be possible to reach by respectable legal reasoning. The choice made is likely to be motivated at a far deeper level by the judge's own approach to the law, to the problem under discussion and to ideas of what makes a just result.<sup>37</sup>

This has undeniable truth, as the courts are to be an objective judicial body enforcing the law. If this case was in favour of Evans, it would undermine the law as it stands as it would determine that Evans would be treated ironically 'unjustly' in awarding her, her own embryos. This is

<sup>33</sup> Sheldon, in 'Fragmenting Fatherhood: The Regulation of Reproductive Technologies' (2005) 68(4) MLR 523, 532–536.

<sup>34</sup> At para 26. This then suggests that the courts acted for the benefits of the child unborn; theoretically incorrect as it this would come under Article 8 right to family life.

<sup>35</sup> *Feminist Judgments and Feminist Judging?*; *Feminist Justice?* Symposium, The University of Ulster, 29/June/2010

<sup>36</sup> (1996) 45 *University of New Brunswick Law Journal* 199, 199.

<sup>37</sup> B Hale, 'Maccabaeon Lecture in Jurisprudence: A Minority Opinion?' (2008) 154 *Proceedings of the British Academy* 319, 320.

affirmed by Lord Bingham of Cornhill who purports that judicial decisions must be 'legally motivated', rather than being motivated 'by extraneous considerations [such] as 'the prejudice or predilection of the judge, or worse, by any personal agenda of the judge, whether conservative, liberal, feminist, libertarian or whatever.'<sup>38</sup> Such 'legal motivation', affirms that the court's reasoning was correct, albeit unfortunate as it did not detour from the law. Then why did this result leave Evans left childless? Sheldon, in 'Multiple Pregnancy and Reproductive Choice: *R. v. Queen Charlotte Hospital*',<sup>39</sup> purports the view that the law desires to entrench or even impose the nuclear family model, with fatherhood being perceived primarily as symbolic or emblematic. This however should not be the case in the assertion of individual appellant's situations, despite what this appears to be here.

This may suggest that a feminist approach may condemn a child to a fatherless family, as the role of the mother should be heightened or is more important. She also suggests the second, is that the social aspects of fatherhood are becoming more important in society,<sup>40</sup> and while this is a welcome development socially, it denounces the role of woman as equal, thus less important than historically the norm. This may however conflict with the feminist reasoning that places the role of the mother as more important than the father in order to have an equal footing. For there to be legal equality, both the mother and father should have an equal say, and IVF highlights this major move away from conventional conception, as consent can be revoked. This may further suggest that differing strands of feminism may not find problems with IVF and emerging sciences, but in the law that governs how different circumstances are enforced.

### III. The issue of consent

It is suggests that this area of law is more complex than the ruling judges may have suggested. In considering feminist notions, the notion of a failure to consent undermines the woman's role in IVF conception. This is due to the fact that her contribution is limited if the male donor refuses consent. In context, future couples seeking to freeze their embryos, must

<sup>38</sup> 20 T Bingham, 'The Judges: Active or Passive?' (2005) 139 Proceedings of the British Academy 55, 70.

<sup>39</sup> et al., Ex parte SPUC, Ex parte Philys Bowman (1997) 5 Feminist Legal Studies 99

<sup>40</sup> Ibid.

now acknowledge consent from either party may be revoked. This is further undermined in context of other cases and literature acknowledging scientific development is out of step with legislation. The White Paper Human Fertilization and Embryology: A Framework for Legislation, published in November 1987, in response to the first IVF born child,<sup>41</sup> noted, 'the particular difficulties of framing legislation on these sensitive issues against a background of fast-moving medical and scientific development'.

There is a greater chance in success, freezing fertilized embryos rather than the singular sperm or egg quickly<sup>42</sup> which Evans was advised to do. Thus the role of the female is one that is difficult to determine in consideration of what is just or fair.

In 'Human Fertilization and Embryology: Regulating the Reproductive Revolution',<sup>43</sup> it purports there are wider issues that the law must address with emerging sciences. This could then implicate that the HFE Act was not prepared for situations such as Evans, as the ensuing result left her childless, surely calling for an amendment in existing law. This can be illustrated by the conflicting facts of *R v Human Fertilization and Embryology Authority ex parte blood*.<sup>44</sup> This case resulted in a widow obtaining sperm from her comatose husband prior to his death. The husband due to his medical condition was unable to give written consent, which according to Lord Wolf 'was not clear prior to the court's decision'. Therefore there was a violation under the HFE Act 1990. However, it was removed and preserved. The ensuing result was that she exported the sperm to Belgium where written consent is not required in the storage of gametes. The Court of Appeal held there would be no questioning of case precedent as this was a unique situation. This leads to several negative consequences as the courts failed to recognize that each scenario has differing elements that makes the situation equally unique.

As well as determining whether according to the European Convention on Human Rights, consent to IVF treatment could be given without violating citizens' rights to private life and freedom from

<sup>41</sup> (Cm 259)

<sup>42</sup> At para 14.

<sup>43</sup> Lee, Robert G., and Derek Morgan.(2001).

<sup>44</sup> [1997] 2 All ER 687.

discrimination on the basis of disability.<sup>45</sup> In the failure to recognize this, perhaps the courts would not have ruled in favor of Johnston.

The notion of consent while necessary for patient autonomy highlights a clear flaw in the law of reproduction. With sexual intercourse, consent cannot be withdrawn after the act. The problem with new emerging technologies is that consent is a notion that can then be withdrawn as the embryo has 'potential' to be implanted, thus before the act, undermining the conventional idealism of the want to produce a child. This would then suggest that the law would need to be more cohesive in creating a distinction between what medicine and further technologies can allow, and distinguishing it, with what the law of consent can allow. Arguably from a radical feminist approach, consent should be once and final as the emotional strain on a women suffering from a condition removing her uterus is not accounted for.<sup>46</sup> To subsequently lose her final chance at a child that is genetically hers, is something the courts are undervaluing by assuming consent can be equal.

This also fails to address the price of a loss of hope a woman may feel in this situation; emphasizing the advantages such as the Canadian law to be bound by original intention. Lady Justice Arden stated, by way of introduction, that, "The 1990 Act inevitably uses clinical language, such as gametes and embryos. But it is clear that the 1990 Act is concerned with the very emotional issue of infertility and the genetic material of two individuals which, if implanted, can lead to the birth of a child. Infertility can cause the woman or man affected great personal distress. In the case of a woman, the ability to give birth to a child gives many women a supreme sense of fulfilment and purpose in life. It goes to their sense of identity and to their dignity."<sup>47</sup> This perfectly dissects the real problem with the law as it stands. The mechanical stance the law projects may not correctly address issues requiring a more ethical approach to rulings given; 'sympathy'<sup>48</sup> may not be enough. In acknowledgement that the courts have taken a pragmatic approach, the ruling in Evans has undeniable issues.

<sup>45</sup> Goodemote, Eric, "Evans v. United Kingdom, 43 E.H.R.R. 21, European Court of Human Rights, Case Summary, 2007 40 Cornell Int'l L.J. 571

<sup>46</sup> Snitow, Ann. "Feminism and motherhood: An American reading." *Feminist Review* (1992): 32-51.

<sup>47</sup> At para 26.

<sup>48</sup> At para 90



The HFE act is in place to protect from people attempting to abuse the system, in instances such as this case, yet this 'good for the many' approach has failed to show consideration of the individual. From a post-modern feminist critique, J Butler<sup>49</sup>, purports that the pain of women is a definitive notion as each woman's circumstances cannot all be the same. There can be no one way to articulate women's oppression because each woman experiences oppression in a unique fashion.

The advantage of science providing an alternative option for women who have fertility problems, is weakened further by the law having a continuity of consent. What it is implicating is more than just a failure of the law to address that there is a certain chance future couples might separate, but also determines that this chance is void once a couple split. In addition to the uncertainty that the implantation of the embryo will be successful, this is dwindled by the 'opt out' notion that the continuity of consent provides. This clause is unsatisfactory in addressing the emotional pain the woman might feel, suggestive the general public might show sympathy in the harshness of the law. There is a clear sense of the strength that womanhood provides that many woman feel by having a child.<sup>50</sup> This may fail to address the notion of equality as there is a party who is left unequivocally without hope of genetic children. This in turn could be seen to invoke certain feminist approaches.

One of many academics critically engaging with the case is Rosemary Hunter in 'Feminist Judgments and Feminist Judging'.<sup>51</sup> She purports that there can be no clear feminist perspective. What is clear however, is the notion that there is a gap in reasoning that puts woman on the forefront of justice. This case is a prime affirmation suggesting that men and woman are equal in the law. While this doesn't necessarily give justice as the woman is left without hope for genetic children, it is deemed as 'fair' by UK law as each the gametes is given equal weight. This case is significant in purporting the confusion in what is the best case scenario for the rights of all women as opposed to the wishes of the individual, Natalie Evans. 'From IVF to Immortality: Controversy in the Era of

<sup>49</sup> Butler, Judith. "Contingent foundations: Feminism and the question of "postmodernism"." *The postmodern turn: New perspectives on social theory* (1994): 153-170.

<sup>50</sup> Letherby, Gayle. "Childless and bereft? Stereotypes and realities in relation to 'voluntary' and 'involuntary' childlessness and womanhood." *Sociological Inquiry* 72.1 (2002): 7-20.

<sup>51</sup> Feminist Justice? Symposium, The University of Ulster, 29/June/2010

Reproductive Technology',<sup>52</sup> contemplates the possibility that some of our most deeply-held assumptions about human nature may be called into question by further developments in stem cell research and fertility treatments.

This could counter the notion that unlike sexual intercourse there should be equality in consent despite either gender's biological handicaps. *Dr. Allan Pacey*, secretary of the British Fertility Society, implicated, 'I think it was the only sensible decision which the Grand Chamber could come to. UK law is clear. It is a principle of shared responsibility'.<sup>53</sup> Such opposing views highlight how fundamental the HFE Act 1990 is, precisely why the 2008 amendment were necessary; that all fertilization outside the body is subject to regulation. This suggests that with Evans's ruling in mind, further amendments are necessary; as a clear blanket approach in these type of cases cannot work. With original 'consent', exploration in more depth is necessary as morality and accountability cannot be a separate thought process in the court's ruling as true arbiters of justice.<sup>54</sup>

#### IV. Concluding comments

A feminist approach to *Evans v UK* directly addresses whether the outcome is fair from a female perspective. By way of gender equality, judges are not to be blamed for instrumenting what the law prescribes, as it purports no discrimination to either male or female gametes. The approaches made by Lady Justice Arden and Baroness Hale are undoubtedly fair. Yet, this 'equal value' of both Evans and Johnston's gametes, left Evans without hope of future children. Arguably as the outcome has developed equally, but still has an unjust outcome to Evans, this may call for changes in the law of consent. Accordingly, several feminist approaches with differing issues with this case, appear unified by the notion of equality.

Thus it would lead one to conclude, that issues arising in cases should be dealt with on an individualistic case-by-case notion, as previous circumstance in other cases cannot adequately determine the correct

<sup>52</sup> *From IVF to Immortality: Controversy in the Era of Reproductive Technology* Ruth Deech & Anna Smajdor OUP Oxford (2007)

<sup>53</sup> <http://news.bbc.co.uk/1/hi/health/6530295.stm> date viewed 09/03/2014

<sup>54</sup> See, *Hadley v Baxendale* [1854] EWHC J70

reasoning for differing cases. The language of the courts having sympathy for Evans does little to provide a remedy for her loss, and may actually suggest that as judges cannot deviate from the law, the law itself must change.



## SHOULD A MORE GENEROUS APPROACH TO THE THREE CERTAINTIES BE APPLIED?

Naomi Dean

In this essay, it is argued that a more liberal approach than implemented was justified in the case of *McPhail*<sup>1</sup>. Nevertheless this approach should not be generally extended to other certainties - although it may be appealing to support a more liberal approach, the ramifications of this need to be assessed properly.

There are two tests for certainty: a specified individual test and a defined class of beneficiaries test. The rationale behind the complete list test before *McPhail*<sup>2</sup> was twofold, which Lord Wilberforce criticised. *McPhail* was set against a backdrop where there was no welfare state, the reasoning being that allowing more trusts would enable more support for people. Nevertheless, this is no longer relevant in today's society as we now have a systematic welfare system which supports people, making the prior reason for adopting a more liberal approach to trusts redundant.

### I. Analysis of *McPhail*<sup>3</sup>

In *McPhail v Doulton* the House of Lords were faced with a discretionary trust that was created for benevolent purposes, making it unsatisfactory on social policy grounds to hold the trust void when it would have been valid if it had been drafted as a power. Lord Wilberforce rejected the traditional rule, explaining that the duties of a trustee of a discretionary trust are very different from those under a fixed trust. With a fixed trust, each beneficiary has a specific claim to a specific share thus the trustee must discover each and every beneficiary, which Wilberforce criticised by stating: 'A trustee with a duty to distribute, particularly among a potentially very large class, would surely never require the preparation of

<sup>1</sup> *McPhail v Doulton* [1991] AC 424

<sup>2</sup> *McPhail v Doulton* [1991] AC 424

<sup>3</sup> *McPhail v Doulton* [1991] AC 424

a complete list of names'.<sup>4</sup> The new rule states the trustees must be able to say 'with certainty that any given individual is or is not a member of the class'.<sup>5</sup>

The reasoning in the specific context of the *McPhail*<sup>6</sup> case is defended. Lord Wilberforce doubted whether 'the great masters of equity, if faced with the modern trust for employees, would have failed to adapt their creation to its practical and commercial character'.<sup>7</sup> This demonstrates that the nature of social attitudes and commercial contexts have changed drastically from when the notion of equity was created. It was also stated in the case that, under the complete list rule, the beneficial ownership would be shared equally by the entire class of beneficiaries in the event that the trustee defaulted in his duty.<sup>8</sup> This article argues that the court were correct to reject the less liberal test and reject the maxim: 'equity is Equality'. Lord Wilberforce rejected this saying 'equal division is surely the last thing the settlor ever intended...'.<sup>9</sup>

## II. Analysis of Re Baden's more liberal test

A more liberal test in certainty of objects in discretionary cases can be seen in *Re Baden*.<sup>10</sup> As demonstrated by the majority, the employment of the class test a discretionary trust should never fail on the ground of evidential uncertainty. In this case the issue arose as to whether the definition of the beneficiaries as 'relatives' and 'dependants' made the trust void for conceptual uncertainty. Sachs LJ decided that the term relatives was not conceptually uncertain as he defined it as sharing a common ancestor arguing that 'Provided there is conceptual certainty the cardinal principle can be fulfilled'.<sup>11</sup> In approaching its task, the court is not to insist upon absolute certainty and, instead, must adopt a pragmatic stance and look to probability rather than theoretic possibility.

<sup>4</sup> *McPhail v Doulton* [1991] AC 424, at 449, per Lord Wilberforce

<sup>5</sup> *McPhail n* (1) at 454, per Lord Wilberforce.

<sup>6</sup> *McPhail v Doulton* [1991] AC 424

<sup>7</sup> *McPhail n* (1) at 452, per Lord Wilberforce.

<sup>8</sup> Geraint Thomas and Alastair Hudson, *The Law of Trusts* (2nd edn, OUP 2004).

<sup>9</sup> *McPhail n* (1), 451.

<sup>10</sup> *Re Baden (No.2)* [1973] Ch 9.

<sup>11</sup> CT Emery, "The Most Hallowed Principle" (1982) 98 *Law Quarterly Review*, 1996, 551, 576

However, this more liberal approach does indeed cause many problems: it creates the situation in which someone has never met or has any knowledge of knowing may be held to be his relative. There might be numerous entitled individuals who cannot prove their entitlement because of the reversal of burden. This is clearly not what the settlor would intend.

Thus, it can be seen that the liberal approach of the test adopted in *McPhail*<sup>12</sup> is problematic as reflected in the differing opinions of the judge. Despite this the liberal approach being justified, there may be a problem that numerous entitled individuals cannot prove the certainty requirement due to the burden of proof, so a more pragmatic reasoning should be applied in cases of certainty of objects.

### III. Certainty of intention

A pragmatic approach to certainty is justified in more informal circumstances regarding certainty of intention. It is an intention to enter into legal relations that we understand to be a trust. A mere expression of desire to make a gift or to confer a benefit is insufficient. The word trust itself need not be used and it is right that a more pragmatic approach was applied in *Paul v Constance*<sup>13</sup> where the parties were not legally savvy. It could be argued that this law is a 'rich man's law' and courts are attempting to bash a square-shaped rich person's law, into a round, normal, less-rich hole. Mr Constance was deceased, and had set up a bank account in his own name. The conduct of Mr and Mrs Constance in this situation implied to the court that Mr Constance did intend this to be a trust.

The test is whether on a construction of the words used and/or from the behaviour of the parties, there is a discernible, clear intention that the property is to be held on trust for the benefit of a third party. The Court is advised against taking an unduly technical approach to the interpretation of a homemade document and rightly so. Despite there being problems with this case (such as it not being clear when the trust precisely came into being), it is submitted that in some family situations such as this, a pragmatic approach should be applied. Therefore, the rigorous, inflexible approach does not suit normal, domestic situations.

<sup>12</sup> *McPhail v Doulton* [1991] AC 424

<sup>13</sup> *Paul v Constance* [1977] 1 WLR 527

On the other hand, there is no ground for liberalising the test on the grounds of precatory words. Although the Executors Act 1830 meant a liberal construction was placed on precatory words,<sup>14</sup> this has not been accepted in recent case law. In cases where precatory words are used, it would have great social implications. For example, it would be wrong to bind widows through the vehicle of precatory words and it could create a situation which creates trusts when women did not intend them to exist. It is submitted that restricting women from having property is very dangerous: women should have the same freedoms as men, thus liberalising the test of intention and potentially restricting women in this way would be harmful. Although in more informal contexts such as family situations a more liberal approach should be adopted, the courts should also be wary of restricting women's right to property.

Furthermore, there is a problem with the court frustrating the intention of the settlor which demonstrates that the court should not adopt such a liberal approach to interpreting a trust as seen in *Don King*.<sup>15</sup> In this case, the court was very willing to frustrate the intention of the court due to errors in the choice of language. In this case leading boxing promoters in Britain and America agreed to form a partnership. Unfortunately, there were two conflicting documents: one stating they should assign the partnership, the other disagreeing. Lightman J argued that if such intent can fairly be deduced and if this is necessary to effectuate that intent, the court *may* ignore what appear to be errors or inadequacies in the choice of language to yield to that intention. Thus the language must be reasonably construed to shed light on what the true intention was. Therefore, the Court held a trust existed. This is a very controversial and difficult result: the result is not consistent with the actual documents, and therefore, it was wrong for them to adopt a liberal approach and frustrate the settlor's intention.

Also, in terms of certainty of intention in the commercial context, the court should not adopt a liberal approach. This is because it would potentially allow for sham trusts to be held to be a trust and allow savvy businessmen to avoid paying tax which would be an abuse of a trust. The leading case is *Midland Bank v Wyatt*<sup>16</sup> where the Court took the view that

<sup>14</sup> Jill E Martin, *Hanbury and Martin Modern Equity*, (18<sup>th</sup> edn, Sweet and Maxwell 2010) 98.

<sup>15</sup> *Don King Productions Inc v Warren* [1998] 2 All ER 608

<sup>16</sup> *Midland Bank v Wyatt* [1997] 1 B.C.L.C. 242



the trust was a sham. This is a just decision and a strict approach to certainty of intention should be recognised in cases of commercial business because otherwise businessmen could use the trust as a mechanism to protect their assets to protect against insolvency. The trust should not be used as a scapegoat and as a means to financial protection. Although Li argues that a sham trust is an oxymoron saying "There is no need to use the word 'sham' because when all is said and done, there is either a trust or there is not"<sup>17</sup>, it is important that the courts recognise that there are ulterior motives for setting up a trust and where the motive is to avoid insolvency, the trust is a sham. So although Li's point is generally appreciated that there is either a trust or there isn't a trust and either a trust meets the requirements of a trust or it does not, the intention of the party should be taken into account in the commercial context, because in many cases it does make financial sense to set up a trust due to tax advantages.

#### IV. Subject matter

The third certainty requirement for a trust to exist is certainty of subject matter. A liberal approach would consist of getting rid of the separation rule in relation to tangible goods and instead replacing it with not maintaining the strict distinction for intangible items. However, it is right that the beneficiaries must be shown where their equitable rights lie at any given time. *Re Goldcorp Exchange Ltd*<sup>18</sup> was rightly decided, as only the claimants who had initial gold that had been separated could succeed in their quest for a trust. The other two groups of claimants in this case had no separated gold which was identifiable to them- it was indistinguishable from the any other gold in the bulk.

However, the courts have applied a different rule in relation to intangible subject matter as seen in *Hunter v Moss*<sup>19</sup> where the court held that because this was intangible property, there could be certainty of subject matter. The reasoning employed was that, since the shares were essentially identical and indistinguishable. A liberal approach would be to get rid of this rule of separation in relation to tangible goods. There is a

<sup>17</sup> Bahao Steven Li, "There is no Such thing as a Sham Trust", *Trust Law International* 82 (2013) 101

<sup>18</sup> *Re Steele's WT* [1948] Ch 603.

<sup>19</sup> *Hunter v Moss* [1994] 1 WLR 452

problem regarding subsequent administration of a fund: it has been pointed out, by Hayton<sup>20</sup> that difficulties in a case like *Hunter v. Moss* could arise if the trustee later split up the fund, sold the shares and invested some of the proceeds in different funds. Hayton rightly argues that the property must be specifically identified either by specifying fraction of all shares.<sup>21</sup> Although this may seem 'harsh' on people who have bought property on trust, I will demonstrate that it is a necessary pre-requisite for trusts which means that the property needs to be identifiable, meaning I am arguing for certainty of subject matter.

The only persuasive reason for upholding the distinction is through the guise of justice and the wider context. *Hunter v Moss*<sup>22</sup>, unlike *Re Goldcorp*, did not involve a claim by unsecured creditors to gain priority on insolvency. If the tangible-intangible distinction were not upheld then equity would not have done justice to Moss for Hunter's unconscionable conduct in refusing to give Moss the shares. It seems the court indirectly applied the maxim, 'those who seek equity must do equity', and however, this seems to be entering dangerous territory, because it undermines the paramount notion of certainty, which is why a liberal approach should not be adopted.

Moreover, although some critics have argued that tracing rules solves the problem of lack of segregation, this is not true. Despite Martin<sup>23</sup> pointing out, these difficulties are readily resolved by application of tracing rules concerning the mixing of trust funds with the trustee's own property and Ockleton arguing 'the tracing rules, developed for the identification of money that has found its way into a mixed fund, are not to the point, because the shares...have an earmark...',<sup>24</sup> it is not sufficient that an owner should declare an intention to hold certain property on trust out of a larger mass. Hayton argues that the property must be specifically identified, either by specifying a fraction of all the shares, or by separating out a parcel of shares.

<sup>20</sup> David Hayton, "Uncertainty of Subject-Matter of Trusts", *Law Quarterly Review* 110 (1994) 335

<sup>21</sup> Patrick Parkinson, "Reconceptualising the express trust" *Cambridge Law Journal* 61(3) (2002) 657, 667

<sup>22</sup> *Hunter v Moss* [1994] 1 WLR 452

<sup>23</sup> Jill Martin, "Certainty of Subject Matter: A Defence of *Hunter v Moss*' Conveyancer and Property Lawyer (1996) 233.

<sup>24</sup> Mark Ockleton, "Share and Share Alike?" *Cambridge Law Review* 53 (1994) 448, 449.

However, the fact that the shares are numbered should not be a reason for maintaining the distinction between tangible and intangible goods because the numbering is used for the purpose of accounting for the shares rather than being any reference to the quality of the property.<sup>25</sup> Therefore, the distinction is unintelligible and it is only fair that the strict approach should be applied to both tangible and intangible goods.

#### V. Conclusion

Overall, the reasons for *Mcp hail's* liberal approach are not applicable today. Only in specific circumstances should a more liberal approach be adopted for certainty of objects - where there is a family context - but at the same time the courts should take heed to make sure that women are not confined and not trusted with property. The courts should very rarely use a more pragmatic based approach for certainty of intention but only in family situations. Finally, a less pragmatic approach should be applied in cases of certainty of subject-matter regarding bulk property because the distinction is unintelligible. This more liberal approach should only be applied to cases concerning family related issues and not more commercial based discretionary trusts, as Harris argues.<sup>26</sup> There is general rule of reluctance in this area and the liberal approach, although justified in *Mcp hail*, should be confined to cases very similar on facts and legal principles.

<sup>25</sup> Roy Goode, 'Are Intangibles Fungible?' (2003) LLP TBA

<sup>26</sup> JW Harris, "Discretionary Trusts, an End and a Beginning" *Modern Law Review* 33 (1970) 686.



## A JUDICIAL REVIEW 500 YEARS IN THE MAKING: RICHARD III AND THE BURIALS ACT 1857

Philippa Byrne

### I. Appointment in Leicester

On 4<sup>th</sup> February 2013, to an audience of journalists, academics, and television cameras broadcasting across the world, it was confirmed that the bones discovered on the former site of Grey Friars' Priory, Leicester (and now a car park), were those of Richard III (1483-5). The discovery immediately sparked wrangling over where, and to whom, the king belonged. The remains had been discovered by archaeologists working with the University of Leicester. Under the terms of the licence permitting exhumation, Richard was to be re-buried in Leicester Cathedral. But the discovery of the remains of the last English king to die in battle generated political, historical, and legal tumult. Rather than prompting a nation to sit upon the ground and tell sad stories of the deaths of kings, the discovery was to trigger a judicial review, challenging over the decision to re-inter Richard's remains in Leicester.

The claimant in the review, The Plantagenet Alliance, was an organisation created specifically for the purpose of the proceedings. It purports to represent Richard's living collateral (non-direct) descendants, specifically his 16<sup>th</sup>, 17<sup>th</sup> and 18<sup>th</sup> great-nephews and -nieces. Lest this be considered a particularly elite or restrictive group, it should be noted that the number of Richard's modern descendants verges on the infinite, estimated to number between 1 million and 10 million.<sup>1</sup> The three defendants in the claim were the Secretary of State for Justice, the University of Leicester, and Leicester City Council, all of whom had played a role in the negotiations and arrangements surrounding the archaeological excavation of the burial site. The two intervening parties—

<sup>1</sup> R (*on the application of Plantagenet Alliance LTD*) v Secretary of State for Justice and Others [2014] EWHC 1662, [5].

the Council and Canons of Leicester Cathedral and Council and the Canons of York Minster—were bodies which considered themselves to have special claims to be the king's eternal resting place.

It was wholly apposite that the issue of Richard III's final resting place come before the courts as question of whether proper legal process had been observed. Historical debate on Richard's contentious reign has been divided, particularly as concerns his legal innovations. Richard has been sympathetically portrayed as a compassionate reformer who sought to curb the administrative abuses of the English medieval law, to the extent of pioneering a system of proto-legal aid.<sup>2</sup> Other historians, however, have been rather less indulgent, considering Richard a self-serving leader with little respect for due process, a ruler who abused the law in order to destroy his enemies.<sup>3</sup>

But what, it might well be asked, other than the public interest element, made this judicial review a matter worthy of serious legal consideration (or, indeed, discussion in this journal)? The furore over the king in the car park might seem little more than tabloid sensationalism with no real legal import. Indeed, such a view would only be reinforced by a cursory glance through the papers, where *The Daily Mail* gleefully revelled in identifying Benedict Cumberbatch as a 16<sup>th</sup> cousin of the king.<sup>4</sup> However, there was one pleasingly novel, and potentially significant, element to the claim for judicial review. The original licence for reburial had been obtained through the usual (legal and archaeological) process. The Plantagenet Alliance, however, constructed its challenge on the basis that, because the discovery of the bones of a king was so unusual an event, it demanded a different approach to consultation. In essence, the question was whether an exceptional discovery required a qualitatively higher standard of procedural fairness.

<sup>2</sup> For this characterisation, see Charles Ross, *Richard III* (New Haven: Yale University Press, 1981).

<sup>3</sup> See J.G. Bellamy, "Justice under the Yorkist Kings", *American Journal of Legal History*, 1, no. 9 (1965).

<sup>4</sup> Jenny Awford, "Genealogist claims Benedict Cumberbatch is as closely related to Richard III as the QUEEN", *The Daily Mail*, Jan. 5, 2015.

### I. Licence to Excavate

The substance of the challenge to the licence-granting process cannot be fully understood without appreciating the complex relationship between the various entities involved in the exhumation. When preparations for the 'search' for Richard III were first mooted, in 2011, representatives from the Richard III Society, the University of Leicester, and Leicester City Council met to discuss what would happen if the king were to be found. The possibility of finding royal remains seems to have been thought fairly remote.<sup>5</sup> Whilst discussing the rather more pressing question of how excavations would be funded, the parties agreed upon Leicester Cathedral as the appropriate re-interment site. Indeed, re-interment in the Cathedral was in keeping with best archaeological practices, given its proximity to the excavation.<sup>6</sup>

To the surprise of most experts, human bones were found on the first day of the excavations, 24<sup>th</sup> August 2012. It was not yet known, of course, whether the remains discovered would be identified as belonging to the king (or, indeed, were capable of being identified at all). The usual permissions for exhumation were immediately applied for, under the terms that '...in the unlikely event that the remains of Richard III are located the intention is for these to be reinterred at St Martin's Cathedral, Leicester, within 4 weeks of exhumation'.<sup>7</sup> The word to be stressed here is 'unlikely': finding bones of such a great age in a known medieval burial site was not surprising, and did not, in itself, provide any indication of the identity of the skeleton.

Accordingly, upon application, the Secretary of State for Justice, in line with usual exhumation practice, granted a licence for Richard III to be reinterred (if he were to be found) in Leicester Cathedral, under section 25 of The Burials Act 1857. That act both provides how and where all burial in England and Wales may take place, and the conditions under which bodies may be exhumed.

Ultimately, after a series of genetic tests, it was publicly confirmed that the bones discovered did indeed match the genetic profile for Richard. After a press conference which aired live on rolling news channels, public interest was piqued. Parliamentary debates ruminated on

<sup>5</sup> R (*on the application of Plantagenet Alliance LTD*) [47].

<sup>6</sup> *Ibid.*, [39].

<sup>7</sup> *Ibid.*, [45].

the most appropriate resting place for the king.<sup>8</sup> The city of York had enjoyed a particular association with Richard whilst he was living, and now made representations as to why it should claim his remains.<sup>9</sup> Proud sons of York now turned their ire not on their old enemy, Lancashire, but on Leicester. The Ministry of Justice, however, steadfastly refused to re-open the question of reburial. The Ministry's reasoning was that the appropriate and settled procedure had been followed when the exhumation licence was granted: neither the identity of the skeleton, nor the presence of film crews, changed the terms of the licence.

## II. The Legal Arguments: Public Interest and Exceptionalism

The crux of The Plantagenet Alliance's claim was that the lack of public consultation over the reburial site at the time of the granting of the original licence now undermined the legality of the decision to re-inter in Leicester.<sup>10</sup> The Alliance argued that the decision on where to re-bury the king should have been considered by 'a panel of suitably qualified experts' (although it was not clear exactly who these experts were envisioned to be, or what insight they would possess) in addition to broad public consultation. The Alliance emphasised that the views of the king's living relatives—not least the members of the Alliance themselves—should have their say. Without considering all those with an interest in the matter, the Secretary of State had not made a decision with all the relevant facts before him. That Leicester Cathedral was not the most appropriate venue for re-internment was a position stated with a fervour and passion visible throughout the review process.<sup>11</sup> In response, the defendants held the relatively straightforward position that the exhumation had been lawful; that they had been under no duty to consult.

It should be noted that, despite what the stance of The Plantagenet Alliance may suggest, permission for the review to proceed was not solely, or even primarily, granted on the basis of close *personal* link to Richard claimed by its members. The question of the Alliance's standing

<sup>8</sup> A flavour of the debate can be found in Hansard for Mar 12, 2013, col. 23WH.

<sup>9</sup> R (*on the application of Plantagenet Alliance LTD*) [62].

<sup>10</sup> Ibid., [76].

<sup>11</sup> Ibid., [76].



to bring a claim was rather ambivalent. Rather, the review went ahead as a point of public interest (as discussed in Mr Justice Haddon-Cave's original decision to grant permission).<sup>12</sup> The discovery of the mortal remains of a medieval king of England was an event wholly 'without precedent', the sheer weight of public interest in, and engagement with, the matter making the decision reviewable.

At the heart of the question was what the Burials Act 1857 did, or rather did not, say about the duty to consult on exhumations and reburials. As Mr Justice Haddon-Cave expressed it: 'the Burials Act 1857 is a paradigm example of a sparse Victorian statute. Section 25 grants an ostensibly untrammelled power to the Secretary of State to grant licences for the disinterment and re-interment of human remains'.<sup>13</sup> Section 25 of the statute stipulates that bodies may not be removed from burial grounds except under the terms of a licence granted by the Secretary of State. It makes no requirements for consultation when granting licences. Before the justices in the High Court was the question of how that silence should be glossed, and whether it was necessary, in the interests of fairness, to read such a requirement into the act.

A word or two on such licences may provide some assistance. The Ministry of Justice, the licence-issuing body, divides exhumation licences into two categories, modern and historical. 'Modern' are those requests for exhumations of named individuals, usually made by next of kin for recent burials (typically less than 100 years ago). 'Historical' exhumations refer to ancient burials (200 years or older), typically, and almost exclusively, undertaken by archaeologists. Such historical licences usually deal with unknown individuals and/or unidentifiable remains.<sup>14</sup> The point made by the by defendants was that there had never been public consultation on either kind of licence, although in cases of recent deaths, the wishes of the next of kin were weighed.

The Court (Hallett LJ, Ouseley J, Haddon-Cave J) dealt swiftly with the first issue, that the Secretary of State had owed a duty to consult widely, including with living relatives of the king, and other interested bodies, before issuing the licence, and before any bones were identified as belonging to Richard.<sup>15</sup> The High Court found that argument

<sup>12</sup> The rationale for the permission is to be found at *R (on the application of Plantagenet Alliance LTD) v Secretary of State for Justice and Others* [2013] EWHC B13 (Admin), [14-15].

<sup>13</sup> *R (on the application of Plantagenet Alliance LTD)* [88].

<sup>14</sup> *Ibid.*, [110].

<sup>15</sup> *Ibid.*, [127].

unconvincing, on the basis that it was to put the cart before the horse.<sup>16</sup> To consult before a body had even been found, without any certainty as to the identity of any remains, would have 'lacked purpose and meaning'.<sup>17</sup> On what was known at the time of the application—namely, the remoteness of the possibility that royal remains would be unearthed—the decision was perfectly proper.

The second issue was whether the Secretary of State's actions in issuing a licence passed the so-called 'Tameside Test'. That test derives from the judgment of Lord Diplock in *Secretary of State for Education and Science v Tameside MBC* [1977] AC 1014. It permits a court to intervene only if it is satisfied that, on taking a decision, no authority could reasonably have believed that it possessed the necessary relevant information to make that decision. The Tameside Test thus devolves into two limbs. First, what factors had to be known for a decision to be made? Secondly, if the decision-maker was unaware of any of the facts, could the decision be made properly without them? In essence, the question was whether the Secretary of State had done sufficient research before granting the licence.

Here again, the High Court found the decision to issue the licence was taken properly. The Secretary of State had a considerable body of relevant information before him when he made the decision to issue the reburial licence. That information included the fact that: Leicester Council had given its permission for reburial in Leicester Cathedral; that as nearest church site, such a reburial was 'best practice' in archaeological terms; that Leicester cathedral was itself close to the battlefield where Richard had been injured and defeated; that the Richard III Society, the body most concerned with the king's modern-day reputation, was in favour of Leicester Cathedral at the time of granting the licence. In addition, both the representatives of the modern royal family and Church of England were satisfied (or, at least, uttered no objections) to Leicester Cathedral as the reburial site. The decision was taken rationally, with sufficient relevant information. On these grounds, despite the subsequent level of public interest after the bones were identified, there was no

<sup>16</sup> Ibid., [128].

<sup>17</sup> Ibid., [128].

*Tameside* failure: 'a panel of Privy Councillors and experts was not rationally necessary, though it may have been politic'.<sup>18</sup>

As a metaphorical last role of the dice, and, in perhaps the most interesting of their submissions, The Plantagenet Alliance made the claim that there was a particular justification for consultation, on two grounds. First, though The Burials Act did not create a statutory duty to consult, the Alliance argued that it was established practice to consult relatives when the remains were identifiable. The Court rejected that proposition: what might be established practice for recent deaths did nothing to create a precedent when the remains were over 500 years old. The descendants of Richard III could have no legitimate expectation of consultation after centuries had passed.<sup>19</sup>

The Alliance further argued that this was an 'exceptional' case, as the very nature of digging up a medieval king demanded recognition of its public importance through public consultation. Nothing, The Alliance claimed, could wash the balm off an anointed king, even the Victorian vagaries of The Burials Act. The Court was unmoved by this argument, its only response being that it had to proceed on principle.<sup>20</sup> 'Exceptionality' here was not equivalent to 'fairness', and making exceptions for the exceptional was inimical to good administration of justice. Although the situation was unique, that was not enough to grant it special status in administrative law.

### III. The Decision: Be Careful What You Dig For

To seasoned legal observers, the decision of the High Court was perhaps an unsurprising one. The Court held that the procedure followed in issuing the licence had been appropriate. Regardless of any popular view, there were no legal grounds for claiming that consultation should have been conducted before the licence was granted. The Burials Act was 'sparse', but the sparseness of its language and construction did not justify such special provisions being read into it, even upon the exhumation of the king.

In fact, the court further found that the Plantagenet Alliance's claim was, in itself, misdirected. There were no grounds by which it could bring

<sup>18</sup> Ibid., [148].

<sup>19</sup> Ibid., [153].

<sup>20</sup> Ibid., [154].

an action against the University of Leicester or Leicester Council. The former had never exercised a public function in relation the exhumation, but merely an archaeological one.<sup>21</sup> The latter owed no legal duty to consult, nor did it any power to demand a consultation or force the hand of the Secretary of State once the licence had been issued.<sup>22</sup>

Upon reading the decision, what is most striking, however, is the tone of the final paragraph of the judgment.<sup>23</sup> Implicit in the decision and language of the High Court seems to be a sense that the whole protracted process of public argument (across television, radio, and online) had been rather undignified. Civic rivalries (and, quite possibly, civic concerns for increased tourist revenue) had obscured the fact the object of discussion was not a prize to be fought over, but an individual's mortal remains. It was now time to put Richard III to rest. The process might, perhaps, have been more dignified, if at the start of the archaeological planning, there been a real belief that the university was likely to discover the king. Indeed, in that scenario, judicial review might well have been avoided. But at that time the idea of uncovering the remains of the last Plantagenet was only a remote possibility even in the minds of true believers. The High Court, in its way, provided a judgment of relevance for both lawyers and archaeologists. Legally speaking, it affirmed the position that, even the discovery of the exceptional does not necessarily demand the rewriting of established procedure. Speaking to the archaeologists, it provided a more prosaic lesson: to think—long and hard—before one starts digging, about what one expects to uncover.

<sup>21</sup> Ibid., [162].

<sup>22</sup> Ibid., [164].

<sup>23</sup> Ibid., [166].

## WHAT CAUSES PRISON SUICIDE? A SOCIOLOGICAL EXPLORATION

Nicholas Hall

### I. Introduction

A general consensus exists in contemporary literature that there is not one single cause of prison suicide, which is perhaps why each suicide appears such a personal and idiosyncratic act. However, although prison suicide may be partially explained solely by focusing on the individual and his personal characteristics,<sup>1</sup> a deeper understanding can be gained through exploring the interaction between susceptibility of the individual and what is happening in the wider environment.

Recent statistics show that prison suicides have risen to the highest level in seven years with 82 prisoners taking their own lives in 2014 – an increase of seven from the previous year. These figures released from the Ministry of Justice include the deaths of fourteen people between the ages of 18 and 24.<sup>2</sup>

This essay asserts that suicide prevention schemes need to focus on a key causal component of prison suicide, one which differentiates prison suicide from suicide in the wider community, namely the prison environment and its particular challenges. By focusing on the pains of imprisonment as sources of distress and therefore prison suicide, the complex, multiple, and interactive determinants of the real behaviour of prison suicide can be elucidated.<sup>3</sup> Durkheim outlines this necessity of understanding the individual as part of a social institution, stating that there are collective 'suicidogenic currents' which 'by virtue of their

<sup>1</sup> Zamble, E. and Quinsey, V. L. (1997) *The Criminal Recidivism Process*. Cambridge: Cambridge University Press.

<sup>2</sup> Howard League for Penal Reform Publication 2015. <http://www.howardleague.org/suicide-in-prison/>

<sup>3</sup> Zamble, E. and Porporino, F. J. (1988) *Coping, Behavior and Adaptation in Prison Inmates*. New York: Springer-Verlag.

origin...drive him more vigorously on the way to which he is already inclined by the state of moral distress directly aroused in him'.<sup>4</sup>

This article argues that consideration of distress induced by the prison environment is necessary to understand those factors that make the prisoner commit suicide. This assertion, which emphasises the importance of the prison environment, is made on the assumption that individual predispositions, coping abilities and personal circumstances also make an important contribution to prisoner suicide.

Firstly, this essay contends that the nature of prison suicide and its position at the end of a 'pain continuum' means that the distress provoked by the prison environment plays a major role in leading prisoners along their pathways to suicide. Secondly, it is argued that the changed nature of the prison environment has created new forms of distress which, by their invasive and persistent nature, situate prisoners further along the 'pain continuum' and thus contribute to prison suicide.<sup>5</sup>

## II. Distress and the nature of prison suicide

A thorough insight into the interaction between distress and prison suicide is crucial to understanding the role of the prison environment. The recognition of prisoner distress as a major factor in prison suicide exposes the unavoidable reality: one must look to the prison environment itself, as central to prisoner well-being to find the roots of prison suicide. Liebling notes that the specification of distress is often vague as it encompasses a wide range of emotions such as frustration, anger, despair and fear.<sup>6</sup> If it is possible for a highly vulnerable individual in a safe and respectful prison to experience low levels of distress and thus be situated on the opposite end of the continuum to suicide, the interaction between the modern prison environment, its pains of imprisonment and prison suicide must be explored.<sup>7</sup>

<sup>4</sup> Durkheim, E. (1952) p 214. *Suicide: A Study in Sociology*, translated by Spaulding, J. A. and Simpson, G., London: Routledge.

<sup>5</sup> Liebling, A. (2006b) "Prisons in transition", *International Journal of Law and Psychiatry* 29(5): 422-420.

<sup>6</sup> Liebling, A and Maruna, S (eds.) (2005) 'Introduction: the effects of imprisonment revisited', pp 1-29 in *The Effects of Imprisonment*. Cullompton: Willan

<sup>7</sup> Harvey, J. (2007) *Young Men in Prison*. Willan Publishing.

Suicidal desires are transient in nature: even those prisoners most at risk of committing suicide do not live in a constant state of wishing to end their own lives.<sup>8</sup> If suicidal thoughts can come and pass, the interaction between the vulnerable individual and the environment may be fundamental in explaining why prison suicide occurs. Jenkins *et al.* outline how these suicidal thoughts are relatively common among prison populations: 19.4 per cent and 33.9 per cent of male and female sentenced prisoners had thought about suicide during the past year, as compared with only 3.6 per cent and 4.1 per cent of males and females 'at home'.<sup>9</sup> These widespread levels of suicide ideation stress the potential importance of the prison environment in increasing general vulnerability to suicide and providing situational triggers that are often decisive in suicide attempts.

Hayes states that prison suicide should not be conceptualised as a 'static, isolated event that is simply associated with other static factors (e.g. sociodemographics)' but instead as a dynamic act that is directly linked to distress.<sup>10</sup> Suicide can partially be explained as the result of prisoners existing at one end of the 'pain continuum'. At the other end of the 'pain continuum', prisoners possess feelings of contentment, safety and calmness. However, in a pathway of suicide, distress crucially leads prisoners along this 'pain continuum', creating and then intensifying initial cries of anger, protestation and rage with 'hopelessness and despair'.<sup>11</sup> The necessity of the role played by distress in this escalating process is demonstrated by contemporary prison suicide statistics and research.

Liebling *et al.*'s research has found correlations between the average levels of prisoner distress and institutional suicide rates.<sup>12</sup> They established a significant statistical link between distress and prison suicide by examining three-year moving average suicide rates for each establishment and mean levels of prisoner distress, as measured by a 16-

<sup>8</sup> Tartaro, C. and Lester, D. (2009) *Suicide and Self-Harm in Prisons and Jails*. Lexington Books.

<sup>9</sup> Jenkins, R., Bhugra, D., Meltzer, H., Singleton, N., Bebbington, P., Brugha, T., Coid, J., Farrell, M., Lewis, G. and Paton, J. (2004) p262 "Psychiatric and social aspects of suicidal behaviour in prisons", *Psychological Medicine* 35: 257-69.

<sup>10</sup> Hayes, L. M. (1995) p 436 "Prison suicide: An overview and guide to prevention. *Prison Journal* 75: 431-456.

<sup>11</sup> Williams, M. (1997) p 218 *Cry of Pain. Understanding Suicide and Self-Harm*. Penguin Books.

<sup>12</sup> Liebling, A., Durie, L., Stiles, A. and Tait, S. (2005) "Revisiting Prison suicide: the role of fairness and distress" in A. Liebling and S. Maruna (eds.) *The Effects of Imprisonment*, pp 209- 231. Cullompton: Willan.

item 'overall distress' dimension and the 12-item General Health Questionnaire. This clear and measurable link between distress and prison suicide may provide a necessary complement to traditional measures of identification and suicide prevention.<sup>13</sup>

Current identification measures tend to focus on a single 'static' profile approach to offenders resulting in the problem of both false positive and negatives: only half of the prisoners who committed suicide from September 2008 to August 2009 had been identified at some time as 'at risk' by prison staff and merely 23 per cent had held Rule 45, vulnerable prisoner status.<sup>14</sup> Furthermore, an understanding of the role of distress in prison suicide may supplement suicide management, which tends to concentrate on the 'physical surveillance of vulnerable prisoners rather than on encouraging meaningful interactions' which can serve to reduce distress.<sup>15</sup>

#### A. The prison environment and the irreparable nature of prisoner distress

If the prisoner's feelings of distress are crucial to his location on the 'pain continuum' (as outlined above) and thus prison suicide, so then is the question whether the stress-provoking situation, particularly if it stems from the prison environment, can be remedied. Shneidman highlights how suicide occurs when the person is no longer willing to tolerate the intensity of pain experienced and when the prisoner feels incapable of removing its source.<sup>16</sup> If it is not possible to alter or remove the source of distress, the prisoner is forced to internally cope with the pain, or in the case of prison suicide, not cope. Thus, as Gall and Ruggiero suggest, the irreparability of the situation means that the distress becomes directed inwards towards the individual rather than outwards towards the

<sup>13</sup> Mills, J. F. and Kroner, D. G. (2005) "Screening for suicide risk factors in prison inmates: Evaluating the efficiency of the Depression, Hopelessness and Suicide Screening Form (DHS)", *Legal and Criminological Psychology* 10(1): 1-12.

<sup>14</sup> Ryan-Mills, D. (2010) *Review: Fatal Incidents Reports: From September 2009 to August 2009*. Prisons and Probation Ombudsman for England and Wales.

<sup>15</sup> Senior, J., Hayes, A. J., Pratt, D., Thomas, S. D., Fahy, T., Lesse, M., Bowen, A., Taylor, G., Lever-Green, G., Graham, T., Pearson, A., Ahmed, M. and Shaw, J. J. (2007) "The identification and management of suicide risk in local prisons", *The Journal of Forensic Psychiatry and Psychology* 18(3): 368-380.

<sup>16</sup> Shneidman, E. (1993) *Suicide as psychache: A clinical approach to self-destructive behaviour*. London: Jason Aronson Inc.



environment: 'anger and frustration become internalised conflicts [that] implode rather than explode'.<sup>17</sup>

Even though different categories of prisoners may have tendencies towards adopting different coping mechanisms, it is not solely *the type* of coping strategy available to the individual prisoner which is crucial to an understanding of prison suicide, but the *nature of the situation* that the prisoner is forced to cope with.<sup>18</sup> If the situation is uncontrollable, distress will persist and the prisoner may gradually shift along the continuum towards prison suicide. For example, although a prisoner may have tendencies to adopt a problem-solving approach to distress, if the distress has originated from disrespectful treatment by prison staff or the arbitrary removal of earned privileges, the situation may be unalterable and thus extremely painful. However, if the distress arose from a situation which the prisoner may have some control over, namely if the treatment by prison staff and the removal of the prisoner's privileges had been a fair and legitimate response to his actions, the prisoner may remove the source of distress by altering his behaviour.

This example illustrates how the controllability of the distress provoking situation is essential to the issue of prison suicide. The prison environment therefore holds great importance for the issue of prisoners taking their own lives: in the majority of cases where the distressful situation has arisen from the prison environment, the origins of distress will be beyond the prisoner's control and therefore irreparable.<sup>19</sup>

There has been some focus on the moral climate of prisons and how a significant contribution to prisoner distress, and therefore suicide, is made by the uneven experiences of unfairness, disrespect and lack of safety.<sup>20</sup> However, perhaps it is not solely the distress of the 'immoral' prison climate which causes prison suicide but also the fact that these forms of distress tend to be irremediable and thus persist. Exploring how distress emerges from modern imprisonment and the powerlessness of

<sup>17</sup> Gallo, E. and Ruggiero, V. (1991) p 284 "The 'Immaterial' Prison: Custody as a Factory for the Manufacture of Handicaps", *International Journal of the Sociology of Law* 19(2): 273-291.

<sup>18</sup> Reed, P., Alenai, Y. and Potterton, F. (2009) "Effect of time in prison on prisoners' use of coping strategies", *International Journal of Prisoner Health* 5(1): 16-24.

<sup>19</sup> Cohen, S. and Taylor, L. (1972) *Psychological Survival: The experience of long-term imprisonment*. Harmondsworth: Penguin

<sup>20</sup> Liebling, A. (2006a) "The Role of the Prison Environment in Prison Suicide and Prisoner Distress", in G. E. Dear (ed.), *Preventing Suicide and other Self-Harm in Prison*, pp 16-28. Palgrave MacMillan.

prisoners to control it is crucial to understanding the causal factors of prison suicide.

### III. Distress and Modern Imprisonment

Since the 1990s, academics and policy makers have paid increased attention to the problem of prison suicide.<sup>21</sup> A focus on both the moral climate of prisons and prevention strategies, such as the Safer Custody Groups's Safer Locals Programme,<sup>22</sup> are thought to have curtailed the rising suicide rate. However, the previously expected 'drastic' decline in suicide has not materialised: suicide rates have in fact rapidly increased since 2012.

This essay asserts that the changing nature of the prison environment provides a possible explanation: modern imprisonment has created new 'inward' forms of distress which, as unavoidable and irreparable, contribute to prison suicide. This distress is exasperated by difficulties associated with increased overcrowding. Figures show that the highest number of suicides occurred at two of the biggest jails. Four people took their own lives at Wandsworth prison, south London, last year. The jail currently holds 1,633 prisoners in accommodation designed for 943. Four people also took their own lives at Elmley, Kent, which holds 1,231 inmates in a jail also built for 943.<sup>23</sup>

#### A. The Changing Prison

The role and nature of prison has changed, in some ways dramatically, over the last two decades. The introduction of self-governing strategies including offending behaviour programmes, drug testing, incentives and sentence planning is demonstrative of 'changes in the depth, weight and emotional tone of imprisonment'.<sup>24</sup> Prisoners have become enveloped by the systemic nature of prison and tend to describe their prison population

<sup>21</sup> HMCIP (1999) *Suicide is Everyone's Concern: Report of a Thematic Inspection on Suicides in Prison*. London: HMSO

<sup>22</sup> HM Prison Service (2001) *Safer Locals Evaluation – Terms of Reference*. London: Prison Service.

<sup>23</sup> Howard League for Penal Reform Publication 2015. <http://www.howardleague.org/suicide-in-prison/>

<sup>24</sup> Liebling, A. (2006b) p 424 "Prisons in transition", *International Journal of Law and Psychiatry* 29(5): 422-420.

as 'deeper', 'heavier' and also 'tighter' than before.<sup>25</sup> Kruttschnitt writes that 'prison authority is thought to be increasingly centralised and encompassed in a new discourse that stresses risk and probability, identification and management, and classification and control'.<sup>26</sup>

Although the modern prison may appear to empower prisoners through addressing them as self-governing individuals, in reality the prisoner has lost almost all control, forced to self-govern in the way that prison deems to be appropriate. This extreme 'mortification of self' in the modern prison environment may explain feelings of distress and despair, causal factors in prison suicide; in this 'total institution... the boundary that the individual places between his being and the environment is invaded and the embodiments of self profaned'.<sup>27</sup>

#### B. The distress of modern imprisonment

The nature of the distress caused by the modern prison environment is elucidated by the traditional pains of imprisonment literature and contemporary prison research. Sykes outlines how this lack of control over one's sense of self can be extremely distressing as the 'individual's picture of himself as a person of value... begins to waver and grow dim'.<sup>28</sup> The feelings of distress and hopelessness that emerge from the prison environment soon become directed towards the prisoner, creating a self-destructive breakdown, ending possibly with the individual taking his or her own life.<sup>29</sup> Crewe identifies that these new feelings of distress and frustration may stem from the 'pains of psychological assessment' or the 'pains of uncertainty and indeterminacy'.<sup>30</sup>

The situations regarding parole and risk assessment are frequently described as painfully invasive and beyond the prisoner's control; the distress is both extreme and sustained, gradually shifting individuals along the suicide continuum. Attrill and Liell note the 'pure fear that risk

<sup>25</sup> Crewe, B. (2011) 'The pains and frustrations of modern imprisonment'.

<sup>26</sup> Kruttschnitt, C. (2005) p 148 "The politics of confinement: women's imprisonment in California and the UK" in A. Liebling and S. Maruna (eds.) *The Effects of Imprisonment*, pp 146-173. Cullompton: Willan.

<sup>27</sup> Goffman, E. (1961) "The inmate world", in *Asylums: Essays on the social situation of Mental patients and other inmates*. Harmondsworth: Penguin.

<sup>28</sup> Sykes, G. (1958) p 69. *The Society of Captives: A study of a maximum-security prison*. Princeton, NJ: Princeton University Press.

<sup>29</sup> Toch, H. (1975) *Men in Crisis: Human Breakdowns in Prison*. Chicago, Aldine Publishing Co.

<sup>30</sup> Crewe, B. (2011) 'The pains and frustrations of modern imprisonment'.

assessment' causes, with one interviewee stating that 'the post-sentence report process was the hardest time of my life – it made me suicidal by leaving me in the dark and being so swift and out of my control'.<sup>31</sup>

Bettelheim's concentration camp experience further highlights the importance of the freedom of individuals to assert their sense of self. Bettelheim, after having been called up for release and then sent back into the camp twice before, refused to attend his third summons. He explains that 'I had to prove to myself that I had some power to influence my environment... I acted on the unconscious realization of what I needed most to survive'.<sup>32</sup>

Comparisons can be made with the modern experience of parole where prisoners are distressed by their powerlessness and the perceived lack of fairness in the process, with one stating 'please stop moving the goal posts, tell me exactly what I need to do to be released'.<sup>33</sup> This is reiterated by the description of many incidents of self harm and suicide as 'despairing or desperate attempts by people who felt dehumaned and powerless to maintain some conception of themselves as active, controlling agents in some small sphere of their lives'.<sup>34</sup>

These categorisation decisions of modern imprisonment are almost intangible to the prisoner. The combination of the bureaucratisation of the prison and the shift of power away from the landings has meant that prisoners are left with no identifiable enemy against whom to direct frustrations.<sup>35</sup> Prisoners are charged with the responsibility of governing their own sentence and thus any negative repercussions are attributed, frequently by both the prison and the prisoner, to the individual's misbehaviour; the modern prison thus makes enemies of the self. The fact that prisoners' thoughts and inclinations are the subject of assessment and continual review, means that prisoners live in a constant state of self-regulation, mindful that their lives can be ruined 'with the stroke of a pen'.<sup>36</sup>

<sup>31</sup> Attrill, G. and Liell, G. (2007) p 194. "Offenders' views on risk assessment", in N. Padfield (ed.), *Who to Release? Parole, fairness and criminal justice*. Willan Publishing.

<sup>32</sup> Bettelheim, B. (1960) p 150. *The Informed Heart*. Thames and Hudson.

<sup>33</sup> Attrill and Liel (2007) p 200.

<sup>34</sup> McDermott, K. and King, R. D. (1988) "Mind Games: Where the action is in prisons", *British Journal of Criminology* 28(3): 357-377.

<sup>35</sup> Crewe, B. (2010), 'Soft power in prison: implications for legitimacy, liberty and staff-prisoner relationships'.

<sup>36</sup> Ibid.

The inherent distress and frustration of being part of this system means that prisoners in the modern prison environment are typically located further along the 'pain continuum' and thus are vulnerable to suicide. Furthermore, feelings of distress are exaggerated by the fact that in the modern prison, with its more permanent or 'adhesive' forms of discipline the consequences of not keeping distress under control may be more severe. The strain of this requirement is noted by Gallo and Ruggiero (1991: 280) who state that 'many of those interviewed by us describe their distress as being caused by the effort to keep distress itself under control'.<sup>37</sup> This obligation of self-vigilance could also directly undermine suicide prevention strategies because prisoners often do not disclose self-harm, extreme emotions of despair or suicidal feelings, for fear of repercussions.<sup>38</sup>

#### A. Individual susceptibility to the distress of modern imprisonment

The 'modern' prison environment will not affect all prisoners in the same way, as their coping abilities, personal circumstances and life-histories differ. However, in general, these new forms of distress may locate prisoners further along the 'pain continuum': frustrated, angry or despairing and thus more likely to commit prison suicide. As Harvey states, 'although levels of distress are generally high, some individuals feel more distress than others'.<sup>39</sup>

Those who may be specifically more susceptible to these new forms of distress are named by Liebling and Krarup in their typology of male prison suicide as 'poor copers' or 'situational'.<sup>40</sup> These 'poor copers' constitute the largest group of prison suicides and tend to be motivated by fear, helplessness, distress or isolation and thus the significance of the immediate prison situation may be most acute. This group of individuals may be more susceptible to the 'pains of modern imprisonment', as they

<sup>37</sup> Gallo, E. and Ruggiero, V. (1991) "The 'Immaterial' Prison: Custody as a Factory for the Manufacture of Handicaps", *International Journal of the Sociology of Law* 19(2): 273-291.

<sup>38</sup> Borrill, J., Snow, L., Medlicott, D., Teers, R. and Paton, J. (2005) "Learning from 'Near Misses': Interviews with Women who Survived an Incident of Severe Self-Harm in Prison", *Howard Journal of Criminal Justice* 44(1): 57-69.

<sup>39</sup> Harvey, J. (2007) p 250. *Young Men in Prison*. Willan Publishing.

<sup>40</sup> Liebling, A. (1999) 'Prison suicide and prisoner coping', in M. Tonry and J. Petersilia (eds.), *Crime and Justice: An Annual Review of Research*, Vol. 26, pp 283-360. Chicago: Chicago University Press.

are younger, have a weaker conception of the 'self' and tend already to direct frustrations inwards, for example, by self-harm.<sup>41</sup>

Although female prisoners make up a small percentage of the prison population, the issue of female suicide can still contribute to the broader question of 'what causes prison suicide?' The last two decades has seen a disproportionate rise in the number of female self-inflicted deaths in prison: 'whilst the average female prison population increased by approximately 165%, the rate of female suicide increased by almost 500%'.<sup>42</sup> It is generally accepted that women find the loss of their identity more painful and thus may be more susceptible to the psychologically invasive types of distress created by the modern prison environment. The high levels of self-harm amongst female prisoners may reflect the tendency of females to make enemies of the self or to direct frustrations inwards as a means of coping with their lack of control.<sup>43</sup> The role of the modern environment and distress as explanations of self-harm contribute to an understanding of what causes prison suicide as they both constitute expressions of a common suicidal process.

#### IV. Conclusion

Morrison notes that 'although suicide has been a feature of prisons since their inception... the research which has been conducted to shed light on the problem has produced many inconclusive and conflicting results'.<sup>44</sup> However, despite inconsistencies in the proposed causes of prison suicide, there can be no disputing the role of the prison environment: some types of prison environments contribute to prison suicide more than others. The nature of prison suicide either as a response to uncontrollable stresses that arise from the environment, or from the uncontrollability of the mental anguish itself, highlights the importance of

<sup>41</sup> Dear, G. E. (2006) "The Need for an Integrated System to Minimise the Incidence of Suicide and Other Self-Harm in Prison", in G. E. Dear (ed.), *Preventing Suicide and other Self-Harm in Prison*, pp 235-238. Palgrave MacMillan.

<sup>42</sup> Borrill, J., Snow, L., Medlicott, D., Teers, R. and Paton, J. (2005) "Learning from 'Near Misses': Interviews with Women who Survived an Incident of Severe Self-Harm in Prison", *Howard Journal of Criminal Justice* 44(1): 57-69.

<sup>43</sup> Downes, D. (1988) *Contrasts in Tolerance: Post-war Penal Policy in The Netherlands and England and Wales*. Clarendon Press: Oxford.

<sup>44</sup> Morrison, S. (1996) p 167. "Custodial suicide in Australia: A comparison of different populations", *Medicine Science and the Law* 36(2): 167-177.

identifying the pains of modern imprisonment. Changes in the prison environment have created new forms of distress that shift prisoners, especially the most vulnerable, along the 'pain continuum' towards the act of prison suicide. These modern sources of frustration, distress and despair with their uncontrollable and persistent nature substantially increase the likelihood that the prisoner will commit suicide.

Jewkes writes, 'what unites the most successful sociological studies of confinement...is that they reveal what it means to be human'.<sup>45</sup> Whilst acknowledging that everyone copes differently, the studies of confinement imply that there is something fundamental to all prisoners and indeed to all people. There is a fragility of human existence which, in particular circumstances, can be so diminished by the prison environment that the result is self harm or suicide.

Therefore academic literature in its investigation into prison suicide should not merely focus on legal policy and criminal justice management strategies. Further explorations are recommended that sociologically focus on not only what it entails to be a human, but on what it means to be a *suffering* human: 'for suicide is never born out of exaltation or joy...the author of suicide is pain'.<sup>46</sup> Only by strongly taking this into consideration might it be possible to form a coherent, logical and above all, effective approach to the problem of prison suicide.

<sup>45</sup> Jewkes, Y. (2005) p 378. "Loss, liminality and the life sentence: managing identity through a disrupted lifecourse" in A. Liebling and S. Maruna (eds.) *The Effects of Imprisonment*, pp 366- 388. Cullompton: Willan.

<sup>46</sup> Shneidman, E. (1993) p 246. *Suicide as psychache: A clinical approach to self-destructive behaviour*. London: Jason Aronson Inc.