

GRAY'S INN STUDENT LAW JOURNAL



VOLUME X

EDITED BY

DANIEL DE LISLE

Association of Gray's Inn Students

LONDON · 2018

CONTENTS

<i>Foreword</i>	4
What does the Miller case tell us about the role of the Executive in our Constitution? <i>Emma Hughes (Winner of the Michael Beloff Essay Prize)</i>	5
To what extent, if at all, should parliamentary privilege provide a protection to members of parliament against prosecution in the criminal courts and an action for damages in the civil courts? <i>Daniel Fox (Winner of the Lee Essay Prize)</i>	15
The Commercial Justifications under Section 9 of the Competition Act 1998 – Fit for Purpose? <i>Arianna Barnes</i>	25
A Critique of the Legal Framework for Combating Ocean Acidification <i>Caitlin Farr</i>	33
The right of refugee-receiving states to compensation: a ‘general framework’ under the international law of state responsibility <i>Camila Zapata Besso</i>	40
Solitary Confinement: The Role of the Human Body in Claims-Making <i>Elinoram Abramov</i>	46
Achieving Harmonisation on Public Policy and Arbitrability <i>Hasanali Pirbhai</i>	56
How the ICJ has interpreted the crime of genocide in relation to the specific intention to destroy, ‘in whole or in part’, a protected group <i>Jack Duffy</i>	68
Crises in International Law <i>Lisa Evans</i>	75

The Two Faces of Janus: the Juridical Foundations of the Law of Frustration in Modern English Contract Law <i>Paulo Fernando Pinheiro Machado</i>	82
Challenges in the regulation of police stop and search powers <i>Rosalia Myttas-Perris</i>	93
The Human Biochip: Examining the Current Legal Infrastructure <i>Anastasiya Sattarova</i>	101
The ability of the modern British constitution to guard against atrocities <i>Yaavar Afshin</i>	109
BPE Solicitors and another (Respondents) v Hughes-Holland (in substitution for Gabriel) (Appellants) [2017] UKSC 21 <i>William Fabbro</i>	117

FOREWORD

This is a special edition of the Journal: the tenth. Michael Beloff QC, in his foreword to the first edition, somewhat inauspiciously invoked the mayfly, before expressing his expectation that the journal would continue. It has continued, due to the enthusiasm and hard work of all our contributors, ten committees of Gray's Inn Students, the Education Department and earlier editors. Thank you to all of them.

Master Beloff noted that there was an impressive proportion of articles in the Journal that year on public law topics, borne by the changing winds of litigation. The articles this year are characterised as much by their diversity as anything else, and a weather vane among them would be borne one way by a gust of criminal law articles (supplied by Elinor Abramov and Rosalia Myttas-Perris) and another by a swirl of international law (supplied by Jack Duffy and Lisa Evans).

Nor, on its tenth birthday, could anyone accuse the Journal of living in the past. Current affairs are here, from Emma Hughes' consideration of the Miller case to Camila Zapata Besso's look at the legal consequences of refugee flows. These are turbulent moments for the British constitution and international law, and the articles offer considered reflection on the world as it is now. It has been a pleasure to read these essays, one I hope you'll share.

Daniel de Lisle

WHAT DOES THE MILLER CASE TELL US ABOUT THE ROLE OF THE EXECUTIVE IN OUR CONSTITUTION?

Emma Hughes (Winner of the Michael Beloff Essay Prize)

I. Introduction

Long before the EU referendum in June 2016, repeal of the European Communities Act 1972¹ was mooted as a possibility in an attempt to reconcile the supremacy of EU law with the Diceyan orthodoxy of a sovereign Parliament. The prospect of repealing the ECA 1972 provided a theoretical device to preserve Parliament's ultimate sovereignty because any limitation Parliament had accepted upon its powers when it enacted the ECA 1972 was reversible should Parliament so wish.² What was given no consideration in this hypothetical was what role the executive would have, if any, in this process of disentangling the UK from the EU and, more particularly, whether the executive could singlehandedly trigger it.

This was the principal issue that *Miller* raised.³ A majority decided that the Government could not rely on the royal prerogative to give notice to the EU under Article 50(1) of the TEU⁴ of the UK's intention to cease its membership. More broadly, *Miller* required the judges to grapple with the relationship between the executive and legislative branches in our constitution. The significance of the case is that a majority of the Supreme Court held, unsupported by authority, that effecting major constitutional change lay does not fall within the executive's role.

The political implications of *Miller* have proved to be unremarkable. The European Union (Notification of Withdrawal) Act 2017 was passed authorising the Prime Minister to give notice under Article 50. Absent from this Act was any attempt by Parliament to limit the Government's power to begin the process of extrication. *Miller*'s significance derives not from its political consequences but its legal implications.

Section one of this essay will analyse the *Miller* decision. It will argue that there were three strands to the majority's reasoning: (a) the 'source of law' argument; (b) their interpretation of the ECA 1972; and (c) the 'scale' argument, that major constitutional change lies outside the executive's role. Whilst the first and second strands of the majority's reasoning are controversial, it is the third strand of reasoning that is of most significance for the purposes of this essay. The majority's judgment prompts the following normative question: what principle(s), if any, justify restraining the executive's role in this way? It is only by properly identifying the principle(s) that animated the majority's decision that we can begin to answer the question as to what the *Miller* case tells us about the executive's role in the constitution. Section two will be concerned with this question and it will argue that the majority omit to tell us *which* principles they have in mind. The result of the *Miller* case is that the justification for this 'scale' restriction lacks principle and its limits are unknowable. The majority's attempt to

¹ Henceforth the 'ECA 1972'

² See Lord Bingham, 'The Rule of Law and the Sovereignty of Parliament' (2008) 19 KLJ 223, 229 - 230.

³ [2017] UKSC 5, [2017] 2 WLR 583. The Supreme Court also considered whether the consent of devolved legislatures needed to be obtained.

⁴ The Treaty of the European Union.

delimit executive power is motivated by no more than an instinct that within our constitution some matters do not belong in the executive's role. This instinct is questionable. Section three will be concerned with the practical question as to when the executive will no longer be able to lawfully exercise its prerogative power. Given the conclusion of section two, this practical question does not admit of an easy answer because there is no underlying principle which when uncovered can inform the scope of the restriction. An attempt will be made to flesh out the scope of this restriction using analogical reasoning; when else, if ever, is it likely that the constitutional significance of a change will suffice to remove it from the executive's domain?

II. Section 1

Article 50(1) of the TEU provides that a member state must provide a notification of an intention to withdraw from the Union 'in accordance with its own constitutional requirements'. What the UK's constitution required proved to be controversial. The Government had assumed that it could singlehandedly signal the UK's intention to withdraw from the EU. This was challenged by the claimants in *Miller* and this challenge was upheld by the Divisional Court and a majority of the Supreme Court. The majority consisted of Lord Neuberger, Lady Hale, Lord Mance, Lord Kerr, Lord Clarke, Lord Wilson, Lord Sumption and Lord Hodge. Lord Reed, Lord Carnwath and Lord Hughes dissented, with Lord Carnwath and Lord Hughes delivering separate dissents but concurring with that given by Lord Reed.

There are three interlinked strands of reasoning in the majority's judgment. The first strand relies on the majority's characterisation of EU law as a source of domestic law (the 'source of law' argument). The second strand is the majority's interpretation of the ECA 1972 as predicated upon continued EU membership. The third strand is the majority's concern that the decision at stake was simply not appropriate for ministerial determination (the 'scale' argument).

A. *The 'Source of Law' Argument*

It was established by Lord Coke in the *Case of Proclamations*⁵ that the executive cannot use the prerogative to change the law.⁶ On the face of it, it is not obvious how this restriction is engaged so far as Article 50 is concerned because triggering Article 50 only begins a process of negotiations which might lead to the UK leaving the EU after two years.⁷ Counsel for the claimants, Lord Pannick QC, however, drew an analogy between Article 50 and the firing of a bullet. When notice is given the trigger is pulled which causes the bullet to be fired, with the consequence that the bullet will hit the target and the treaties cease to apply.⁸ If the executive were able to give notice under Article 50 this, Lord Pannick QC submitted, would be tantamount to altering the law by ministerial action alone. The majority endorsed Lord Pannick's metaphor and agreed that the ministers could not pull the trigger because the

⁵ (1610) 12 Co Rep 74, 76

⁶ This well settled legal position was also summarised by the Privy Council in *The Zamora* [1916] 2 AC 77, 90

⁷ This is how Lord Carnwath in his dissent characterised it (*Miller* (n 3) [259]).

⁸ *Miller* (n 3) [36].

executive has no power to change domestic law and remove rights.⁹

There are two problems with this bullet analogy. First, the argument assumes that notice given under Article 50(1) is irrevocable. This is controversial. There is nothing in Article 50 which suggests that this is so. It is also contrary to the position adopted by Article 68 of the Vienna Convention on the Law of Treaties 1969. This provision provides that in relation to withdrawing from a treaty any communication given by one party to another may be revoked at any time before it takes effect.

Second, the majority repeatedly characterised EU law as an ‘independent and overriding source of domestic law’.¹⁰ This led them to conclude that Article 50 would lead to a change in domestic law and rights and, consistently with previous authority, the prerogative was not available to achieve such a result. This characterisation is contentious. As Lord Reed explained in his dissent EU law is of a fundamentally different nature from Acts of Parliament and the common law for its authority derives not from the rule of recognition but from statute (the ECA 1972) which itself derives its authority from the rule of recognition.¹¹ This was also the analysis favoured by Lord Mance in *Pham*.¹² It is for these two reasons that Lord Carnwath was correct in his dissent to describe Lord Pannick QC’s analogy as ‘fallacious’.¹³

B. The Interpretation of the ECA 1972

It is also long established that the prerogative cannot be used to frustrate legislative choices. The second strand of reasoning apparent in the majority’s judgment is that the ECA 1972, correctly interpreted, prohibited the use of the prerogative to withdraw from the EU Treaties. The majority agreed with the Divisional Court that the ECA 1972 was predicated upon the UK’s continued membership of the EU.¹⁴ The necessary implication therefore was that the rights it gave effect to were not capable of being undone by the executive. The Government had submitted that section 2 of the ECA 1972 was ‘ambulatory’ in its effect, requiring direct effect to be given to EU law rights only if they existed and as they varied over time.¹⁵ This is what Professor Finnis had in mind when he described the ECA 1972 as a ‘conduit’ statute, drawing an analogy between it and double tax treaty arrangements.¹⁶ Whilst Lord Reed in his dissent agreed with this characterisation¹⁷ the majority held that ‘by the 1972 Act, Parliament endorsed and gave effect to the UK’s membership of what is not the EU under the EU Treaties in a way which is inconsistent with the future exercise by ministers of any prerogative power

⁹ *ibid* [94].

¹⁰ *ibid* [65], [80] and [86].

¹¹ *ibid* [222]-[230].

¹² *Pham v Secretary of State for the Home Department* [2015] 1 WLR 1591 [80].

¹³ *Miller* (n 3) [262].

¹⁴ *ibid* [88]. Finnis criticizes this interpretation and places significance on Parliament’s choice of wording in the title of the 1972 Act. The Act is entitled ‘An Act to make provision in connection with the enlargement of the European Communities to include the UK’. Finnis contrasts this with the long titles of various Independence Acts all of which substitute ‘in connection with’ for ‘for’ and thereby mandate a specific state of affairs. See J. Finnis, *Brexit and the Balance of our Constitution* (Judicial Power Project, London 2016).

¹⁵ *ibid* [74].

¹⁶ Finnis (n 14), p 17.

¹⁷ *Miller* (n 3) [177].

to withdraw from such Treaties'.¹⁸ The majority held that there was a difference in kind, rather than just a difference in degree, between changes in the EU treaties as they vary over time and the complete abrogation of the rights derived from them altogether.¹⁹ Since it is an established restriction on the royal prerogative that it cannot be exercised to frustrate statutory provisions the majority's reading of the ECA 1972 led the Supreme Court to find that a pre-existing restriction on the use of the prerogative was engaged.²⁰

It may be thought that the majority's arguments so far would have sufficed to lead them to conclude that the executive acting alone could not trigger Article 50. However, what is interesting about the judgment is that the majority chose, unprompted by the claimants' submissions, to buttress the above arguments with a novel line of reasoning that the prerogative cannot be used in such a way as to effect significant constitutional change (the 'scale' argument). This cannot be cast aside as a mere passing observation by the majority for this argument reoccurs throughout the judgment.²¹ Whereas the first two strands of reasoning in the judgment, if correct, would have engaged pre-existing restrictions on the royal prerogative, this third strand of reasoning introduced a new restriction. The Divisional Court had based their judgment on statutory interpretation and had not entertained the possibility that there was a previously unacknowledged additional restriction on the prerogative where significant constitutional change was at stake.²² A majority of the Supreme Court, in contrast, felt the need to demarcate, in stringent terms, the parameters of the executive's role.

C. The 'Scale' Argument

The majority took it to be the case that there are some constitutional changes which are simply too important to be accomplished through the prerogative. This approach can be detected throughout the majority's judgment. When discussing the enactment of the ECA 1972 the majority emphasised its 'exceptional nature'²³ and its 'unusual legislative history'²⁴ holding that it authorised 'a dynamic process' which gave rise to an 'unprecedented state of affairs'.²⁵ The majority described the EU Treaties implemented pursuant to the 1972 Act as 'unique in

¹⁸ *ibid* [77]. See also [82]: "The UK's membership of the EU became a fixed domestic starting point".

¹⁹ *ibid* [81].

²⁰ See *Laker Airways Ltd v Department of Trade* [1977] QB 643, 718-719 (Roskill LJ) and 728 (Lawton LJ); *R v Secretary of State for the Home Department, Ex p Fire Brigades Union (FBU)* [1995] 2 AC 513, 551-552 (Lord Browne-Wilkinson). The majority in FBU extended this restriction because they held that ministers could not exercise the prerogative power to set up a compensatory scheme for criminal injuries in order to make a statutory scheme redundant, even though the relevant scheme was not yet in force.

²¹ See (n 24 - 28).

²² It is true that the Divisional Court emphasized the special constitutional significance of the ECA 1972 (see *Miller* [2016] EWHC 2768 (Admin); [2017] 1 All E.R. 158 [82]-[94]) but the Divisional Court considered that this only gave rise to a strong interpretive presumption that Parliament intended to legislate in such a way 'that this could not be undone by exercise of Crown prerogative power' (at [92]). Unlike the Supreme Court, they did not consider that the constitutional principles at stake went so far as to produce a freestanding fetter on the royal prerogative.

²³ *Miller* (n 3) [68].

²⁴ *ibid* [88].

²⁵ *ibid* [60]. See also [90].

their legislative and constitutional implications'.²⁶

Having emphasised the constitutional uniqueness of the ECA 1972 the majority considered that withdrawing from the EU treaties would result in a major constitutional change that could not be effected without Parliament's approval. The majority held that 'it would be inconsistent with long-standing and fundamental principle for such a far reaching change to the UK constitutional arrangements to be brought about by ministerial decision or ministerial action alone'.²⁷ A 'major change' to the UK's constitutional arrangements 'must be effected in the only way that the UK constitution recognises, namely by Parliamentary legislation'.²⁸

Strands (A) and (C) of the majority's argument are interlinked. For the majority it was the loss of a source of law that constituted the relevant 'fundamental legal change'.²⁹ Strands (B) and (C) are also related to the extent that the majority considered that the scale of the constitutional change at stake militated against construing the ECA 1972 so as to allow for prerogative initiated withdrawal from the EU. Perhaps it is a failure to disentangle these various strands of reasoning that explains why this 'scale' argument in the majority's judgment has been overlooked somewhat. Some academic commentary presents the majority's judgment as turning exclusively on the majority's characterisation of EU law and interpretation of the ECA 1972.³⁰ However, given the repeated reference to the scale criterion throughout the judgment it merits treatment as a separate pillar of the majority's analysis in its own right.

The result of the majority's judgment is that a new restriction on the use of the prerogative has emerged. The prerogative cannot be relied upon to achieve significant constitutional change because achieving change of this nature lies beyond the executive's remit. The question that arises is why? It is this normative question with which the following section is concerned.

III. Section 2

The majority's 'scale' argument has been subject to much criticism.³¹ The majority clearly felt that within our constitution some matters are simply not appropriate for the executive to handle without the involvement of Parliament. In order to understand what this means for the role of the executive in our constitution we must identify the principle(s) underpinning this new restriction. The majority tell us that their conclusion 'appears to follow from the ordinary

²⁶ *ibid* [90].

²⁷ *ibid* [81].

²⁸ *ibid* [82].

²⁹ *ibid* [83].

³⁰ M. Barczentewicz, 'Miller, Statutory Interpretation, and the True Place of EU Law in UK Law' (article forthcoming in Public Law (2017) draft available at SSRN). N. Aroney, '*R (Miller) v Secretary of State for Exiting the European Union: Three Competing Syllogisms*' 80(4) MLR 726; K. Ewing, 'Brexit and Parliamentary Sovereignty' 80(4) MLR 711; R. Craig, 'Miller Supreme Court Case Summary', U.K. Const. L.

Blog (26th January 2016). Cf H. Djinder, 'Sources of Law and Fundamental Constitutional Change', U.K. Const. L. Blog (27th Jan 2017); M. Elliott, 'The Supreme Court's judgment in Miller: in search of constitutional principle' (2017) CLJ 257; D. Feldman, 'Pulling a trigger or starting a journey? Brexit in the Supreme Court' (2017) CLJ 217.

³¹ See M. Elliott (n 30); D. Feldman (n 30). Cf N. Barber, T. Hickman and J. King, 'Pulling the Article 50 'Trigger': Parliament's Indispensable Role', U.K. Const. L. Blog (27th Jun 2016).

application of basic concepts of constitutional law to the present issue'.³² By failing to be more specific in identifying what these concepts are the majority give us the impression that it simply follows *res ipsa loquitur* that it would be constitutionally intolerable if the executive's role was not so constrained.

A helpful starting point is to identify the basic concepts of constitutional law and to see if, when applied to the facts, they lead us to same result. It seems sensible to begin with the principle of parliamentary sovereignty since this is invoked repeatedly by the majority and described as a 'fundamental principle of the UK constitution'.³³ Professor Ewing has also argued that it is the majority's defence of parliamentary sovereignty which is 'the most eye-catching feature of the decision'.³⁴

Would it offend parliamentary sovereignty if the executive could singlehandedly bring about constitutional change? It is not obvious that it would. Clearly, parliamentary sovereignty would be infringed if the executive could rely on the prerogative to subvert legislation. This is of course why it is well settled that the prerogative is susceptible to being supplanted by legislation³⁵ and cannot be used to frustrate legislative purposes.³⁶ However it is not clear that parliamentary sovereignty requires an additional restriction on the prerogative precluding its exercise when the executive seeks to bring about constitutional change which would not contravene legislation. As Professor Elliott has argued parliamentary sovereignty must not be confused with a parliamentary monopoly over law-making.³⁷

Professor Elliott proposes as an alternative contender the separation of powers principle which is, like parliamentary sovereignty, a basic constitutional concept. The separation of powers requires that the power of the State be divided between the executive, the legislative and judicial branch and that there should be an adequate system of checks and balances in place. However the principle is not self-executing. It does not prescribe how powers are to be demarcated between the three branches. Prior to *Miller* no one thought to rely on the principle to argue that major constitutional change must be channelled through Parliament. In any event it is not a principle that the UK constitution rigidly adheres to.³⁸

As Professor Elliott has argued the majority seem to be animated by no more than a judicial instinct that the constitutional balance of power should lie firmly with Parliament.³⁹ Detectable throughout the majority's judgment is an inherent scepticism of the executive and an unwillingness to accept that the executive's accountability to Parliament⁴⁰ and the prerogative's

³² *Miller* (n 3) [82].

³³ *ibid* [43]

³⁴ K. Ewing (n 30), p712.

³⁵ See the *De Keyser* case [1920] AC 508.

³⁶ See (n 20)

³⁷ See Elliott (n 30), p267.

³⁸ See Bagehot, *The English Constitution* (London 1867), p12: 'the efficient secret of the English Constitution may be described by the close union, the nearly complete fusion, of the executive and legislative powers'.

³⁹ See Elliott (n 30), p 284.

⁴⁰ This is in contrast to Lord Carnwath in particular who, in his dissent, emphasizes the principle of parliamentary accountability (*Miller* (n 3) [249] and [259]).

susceptibility to judicial review⁴¹ suffice to ameliorate their concerns. Whilst the majority make frequent reference to the sovereignty of Parliament and cite the rule of law as the principle that legitimises the judiciary's constitutional role⁴² there is no equivalent discussion of the role of the executive and the principles which justify and delimit executive power. Scepticism towards the executive is not necessarily a bad thing provided that it is matched by scepticism of power when it is concentrated in the hands of Parliament and the judges. Problems arise where the scepticism is one-sided and weighted - unfairly - in one direction.

Miller is consistent with a trend to treat the prerogative with suspicion. The history of the prerogative is one of erosion.⁴³ Professor Endicott has observed that cases and literature characterise executive power as a 'stubborn stain' that we must endeavour to wash out of the fabric of our constitution.⁴⁴ The problem is that this viewpoint is misguided. Executive power is necessary if the executive is to achieve its functions and serve the public good. Today the executive is democratic, accountable and responsible. The making and unmaking of treaties is an archetypal function of the executive. In *Burmah Oil* Lord Reid described prerogative powers as a 'relic of a past age'.⁴⁵ The majority in *Miller* argue that this should not be interpreted as implying that the prerogative is 'either anomalous or anachronistic'⁴⁶ but by sanctioning a new restriction on the prerogative without grounding it in underlying constitutional principles it seems difficult to accept that this is not how they regarded it.

IV: Section 3

The upshot of section two is that the *Miller* case introduces a new fetter on executive power. This fetter was engaged in the *Miller* case itself because the loss of EU law qualified as a 'far-reaching',⁴⁷ 'major'⁴⁸ and 'fundamental legal'⁴⁹ change. In order to fully appreciate the implications of *Miller* for the executive's role we must consider when else this fetter will be engaged. When else will constitutional propriety require that the executive be disabled from

⁴¹ It is now well established that the prerogative is susceptible to judicial review: *GCHQ* [1985] AC 374, *R v Home Secretary ex parte Bentley* [1994] QB 349, *R (Bancoult) v. Secretary of State for the Foreign & Commonwealth Affairs* [2007] EWCA Civ 498. Some prerogative powers will nonetheless be non-justiciable (see *R v Jones* [2006] UKHL 16 (making war and peace and disposition of troops not justiciable)). Note too that not all grounds of judicial review apply to the prerogative. See *R (Sandiford) v Secretary of State for Foreign and Commonwealth Affairs* [2014] UKSC 44 where Lord Carnwath and Lord Mance held that the rule that a public body may not fetter the exercise of its discretion did not apply to the prerogative.

⁴² *Miller* (n 3) [42].

⁴³ See Lord Browne-Wilkinson's remark in *R v Home Secretary, ex parte Fire Brigades Union* [1995] 2 AC 513, 552 that 'the constitutional history of this country is the history of the prerogative powers of the Crown being made subject to the overriding powers of the democratically elected legislature as the sovereign body'

⁴⁴ T. Endicott, *Parliament and the Prerogative: From the Case of Proclamations to Miller* (Judicial Power Project, London 2016), p 3.

⁴⁵ [1965] AC 75, 101.

⁴⁶ *Miller* (n 3) [49].

⁴⁷ *Miller* (n 3) [81].

⁴⁸ *ibid* [82].

⁴⁹ *ibid* [83].

exercising its prerogative power?

If it had been possible to locate the constitutional principle that the majority took to delimit executive power then the scope of this category could more easily be identified. However, given the conclusion of section two that no such principle can be identified it is more difficult to explore the content of this category. Instead of grappling with the contours of an underlying principle we must reason by analogy and consider when else the constitutional change arising from the ratification or withdrawal of a treaty may be likely to provoke the same judicial instinct that united the majority in *Miller*.

When it comes to ratifying treaties the Ponsonby Convention already dictates that ministers will ordinarily lay treaties before both Houses of Parliament at least 21 days before they are ratified to enable Parliamentary objections to be heard.⁵⁰ This Convention has since become a legal requirement under section 20 of the Constitutional Reform & Governance Act 2010 (CRAG). Under this provision, however, parliamentary approval is not required in order for a treaty to be ratified. It suffices if the treaty has been considered by Parliament and has not received a negative resolution in the House of Commons. Helen Mountfield QC has argued that *Miller* may have further reduced the government's room for manoeuvre in this respect.⁵¹ She suggests that post-*Miller* treaties which envisage the creation of rights for individuals or otherwise concern constitutional change may now require express statutory authority.

When it comes to withdrawing from treaties the majority's instinct that the prerogative should not be available to alter rights without Parliament's authorisation seems likely to apply to the ECHR.⁵² It is not at all far fetched to consider that there may come a time when the present Government will attempt to remove the UK from the ECHR. Post-*Miller* however it seems likely that the Government would be denied the power to achieve this result. The HRA 1998 operates in a structurally similar way to the ECA 1972 in that it is ambulatory in its effect and on numerous occasions the HRA has been listed alongside the ECA 1972 as a constitutional statute.⁵³ There are differences in that neither the ECHR nor the HRA attempts to ascribe primacy to any of the convention rights.⁵⁴ There is nothing to suggest however that the majority intended to limit their constitutional scale argument only to cases where the prerogative would remove international laws that have been accorded hierarchal priority in the domestic sphere. Further, it would seem that, if anything, the judicial instinct apparent in *Miller* would be even

⁵⁰ *ibid* [58].

⁵¹ H. Mountfield QC, 'Beyond Brexit: What does Miller mean for the UK's power to make and break international obligations?', Law of Nations Blog (8 February 2017) (available at <https://lawofnationsblog.com/2017/02/08/beyond-brexit-miller-mean-uks-power-make-break-international-obligations/>).

⁵² For discussion of the application of *Miller* to the ECHR see M. Elliott (n 31), p 265-267; H. Mountfield QC (n 51); and A. Peplow, 'Withdrawal from the ECHR after Miller - A Matter of Prerogative?' UK Constitutional Law Blog (28 February 2017) (available at <https://ukconstitutionallaw.org/2017/02/28/alex-peplow-withdrawal-from-the-echr-after-miller-a-matter-of-prerogative/>).

⁵³ See *Thoburn v Sunderland City Council* [2003] QB 151 [62] (Laws LJ); *H v Lord Advocate* [2012] UKSC 24, [2013] 1 AC 413 [30]-[32] (Lord Hope); *R (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3, [2014] 1 WLR 324 [207] (Lord Neuberger and Lord Mance).

⁵⁴ Any clash between domestic law and the convention rights (which cannot be interpreted away under section 3) is to be resolved under section 4, under which the Supreme Court can issue a declaration of incompatibility.

stronger in the case of the executive seeking unilateral withdrawal from the ECHR under Article 58(1) of the ECHR. This is because notice under this provision takes immediate effect six months after a State communicates the relevant notification.

Going forward, it seems that the majority's judgment will have a limiting effect on the scope of the prerogative power. It is concerning that the scope of this restriction is uncertain. What is more concerning, however, is that the justification for this restriction is unclear. For as long as the justification for the restriction remains unknown its scope will similarly remain unknowable because it is difficult to foresee when a majority of the court will again share the view that something should fall outside of the executive's domain.

V. Conclusion

Miller was an unprecedented case for several reasons. It was historic that the court sat as a full panel of eleven judges. The case attracted an unparalleled level of media coverage and public interest. Some of the legal complexity and controversy prompted by the parties' submissions, the correct way of interpreting the ECA 1972 and characterising EU law for example, are liable to distract attention away from the basic issue that the case raised. The court was required to decide what role the executive should have in the constitution. More particularly, the court was required to decide whether the executive should have any role at all in *shaping* the constitution. A majority held that the executive should have no such role.

This essay has explored the difficulties with the majority's reasoning. The majority fail to tell us which constitutional principles preclude the executive from having this role and, as section two explored, it is not obvious that there are any constitutional principles which dictate this result. The instinct that the executive's role should be so confined appears to be based on the stubborn stain theory of prerogative power, which is simplistic at best. Section three considered *Miller's* likely implications beyond Brexit, limiting the prerogative when it comes to the making and unmaking of treaties, at least when rights are at stake.

With the passage of the EU (Withdrawal) Bill through Parliament it is becoming clear that the *Miller* case will not be the only occasion in the Brexit story where the Government, Parliament, academics (and maybe even the judges) will be required to grapple with the parameters of the executive's role.⁵⁵ The EU (Withdrawal) Bill attempts to deal with the legal ramifications of repealing the ECA 1972. It has sparked controversy for the scale of the powers it proposes to confer upon the executive via Henry VIII clauses.⁵⁶ Whilst parliamentary sovereignty and the rule of law, the two principles that justify and delimit the roles of Parliament and the courts respectively, dominate constitutional law courses, prerogative powers and Henry VIII clauses have tended to have been side-lined as less interesting, less contentious features of the constitution. One of Brexit's most interesting contributions to constitutional debate has been the way in which it has focused attention on the executive which, at least to date, has been

⁵⁵ At the time of writing the Bill had passed its second reading in the House of Commons (11 September 2017).

⁵⁶ The House of Lords Constitution Committee has issued an interim report in which it comments that the "political, legal and constitutional significance of the Bill is unparalleled". See also M Elliott, 'It is difficult to overstate the constitutional difficulties raised by the Repeal Bill', *Prospect Magazine* (7 September 2017).

under-theorised.

TO WHAT EXTENT, IF AT ALL, SHOULD PARLIAMENTARY PRIVILEGE PROVIDE A PROTECTION TO MEMBERS OF PARLIAMENT AGAINST PROSECUTION IN THE CRIMINAL COURTS AND AN ACTION FOR DAMAGES IN THE CIVIL COURTS?

Daniel Fox (Winner of the Lee Essay Prize)

Introduction

Parliamentary privilege does not provide a protection to members of parliament; it provides a protection to proceedings in Parliament, in which members often play a part. This essay will take “members of parliament” to mean members of the House of Commons (MPs). It will argue that the status quo should be kept: parliamentary privilege should provide a protection to MPs against criminal and civil proceedings so long as the act in question took place in, and was related to, the proceedings in Parliament. The essay will defend this conclusion from arguments for limiting the scope of parliamentary privilege. There seems to be few who argue for its scope to be widened, so this possibility will be ignored. The structure of the essay will be as follows: firstly, it will outline the current law; secondly, it will urge caution in legislating to change the status quo; thirdly, it will consider criminal proceedings; and fourthly, it will consider actions for damages and injunctions.

The Status Quo

There are two key aspects to parliamentary privilege. Firstly, freedom of speech and secondly, the concept of exclusive cognisance.

Fundamental to the freedom of speech aspect is Article 9 of the Bill of Rights 1689 – henceforth referred to as Article 9. In the words of Professor de Smith, it is this Article that forms “the basis of the modern law [on parliamentary privilege].”¹ It has been of decisive importance in cases² up until the present day, including that of *Church of Scientology of California v. Johnson-Smith*³ in which Browne J said: “The principle as to the privilege of Parliament is of course entirely clear. It comes for modern purposes from Article 9 of the Bill of Rights 1688.”⁴

Article 9 provides that “the Freedom of Speech and Debates or Proceedings in Parlyament ought not to be impeached or questioned in any Court or Place out of Parlyament.”⁵ Thus, whatever is said or done in the course of the proceedings in Parliament – and the person who acts or speaks – is immune from criminal and civil liability. This protection applies not only to MPs; it applies to any person who participates in such proceedings. The purpose of the protection is to allow any relevant matters to be raised in Parliament without fear of court proceedings.

¹ De Smith, *Constitutional and Administrative Law*, p.327

² For example, *R v. Williams*, *Stockdale v. Hansard*, *Dillon v. Balfour*, *Dingle v. Associated Newspapers Ltd.*

³ [1972] 1 QB 522.

⁴ *Ibid.*, p.528.

⁵ Article 9, Bill of Rights 1689.

Exclusive cognisance is “the right of each House of Parliament to regulate its own proceedings and internal affairs without interference from any outside body.”⁶ This includes the conduct of Members and that of other participants in proceedings such as witnesses before select committees.⁷ The principle is, in effect, an exception to the general principle of the rule of law.⁸ This has been accepted by the courts since at least the case of *Bradlaugh v. Gosset*, in 1884, in which Justice Stephen held that “the House of Commons is not subject to the control of Her Majesty’s courts in its administration of that part of the statute law which has relation to its own internal proceedings.”⁹

The purpose of exclusive cognisance is to protect Parliament in its role as a legislative and deliberative assembly.¹⁰ As Adam Tucker argues “there are occasions when insisting upon the general application of the law would cause (or risk causing) the judiciary or the executive to interfere with the proper operation of Parliament.”¹¹ If the Houses did not have the protection of exclusive cognisance, the courts could strike down Parliament’s decisions by challenging its procedures, which would undermine the independence of a sovereign Parliament.

There has been tension between Parliament and the judiciary about what “proceedings in Parliament” means and who defines it. However, through cases such as *Stockdale v. Hansard*,¹² *Pepper v. Hart*¹³ and most recently *R v. Chaytor*,¹⁴ the courts have made it clear that it is within their jurisdiction to determine its scope, unless Parliament legislates on the matter.

Further points should be made about Article 9. Firstly, the term “court or place out of Parliament” has never been read as meaning any place.¹⁵ Newspapers and people in the streets are not included in its scope. As the government green paper on parliamentary privilege states, “the assumption has been that the term applies to bodies which are similar to courts...”¹⁶ Secondly, there have been questions raised about the words “impeached or questioned”.¹⁷ It is sufficient for the purposes of this essay to state that this means that any action, including speech, made in the course of the proceedings in Parliament is immune from criminal prosecution or actions for civil damages.

The Problem with Legislating on Parliamentary Privilege

Even if it is decided that the status quo is unsatisfactory, there is cause for caution before

⁶ Government Green Paper, Parliamentary Privilege, CM 8318, April 2012 (hereafter Cm 8318), para 7

⁷ *Ibid.* Para 7

⁸ Report from the Joint Committee on Parliamentary Privilege, Session 2013-14, HL Paper 30, HC100 (hereafter HC100), para 18.

⁹ *Bradlaugh v. Gosset* (1884) 12 QBD 271.

¹⁰ Cm 8318, para 8.

¹¹ Dr Adam Tucker response to Government consultation on the Green Paper, Cm 8318, para 2.

¹² [1839] 9 Ad & El 1 at 107-108.

¹³ [1993] AC 593.

¹⁴ [2010] UKSC 52; [2010] 3 WLR 1707.

¹⁵ Cm8318, para 80.

¹⁶ *Ibid.*

¹⁷ See Leopold, “The application of the civil and criminal law to members of Parliament and parliamentary proceedings,” in *The law and Parliament*, Drewry and Oliver, p.77-80.

recommending legislation in the area.

Sir William Blackstone in Book I of his Commentaries:

If therefore all the privileges of parliament were once to be set down and ascertained, and no privilege to be allowed but what was so defined and determined, it were easy for the executive power to devise some new case, not within the line of privilege, and under pretence thereof to harass any refractory member and violate the freedom of parliament. The dignity and independence of the two houses are therefore in great measure preserved by keeping their privileges indefinite.¹⁸

Even if we accept that the executive will respect the privileges of Parliament – though the case of Miller¹⁹ and recent attempts to invoke so-called Henry VIII clauses²⁰ hint otherwise – there are real practical implications to legislation. The courts and Parliament have currently reached a balance about the scope of parliamentary privilege. As the Government’s green paper states:

In most instances it is very clear whether an action is a “proceeding” and therefore covered by the protection in Article IX. A speech in the chamber, a written or oral parliamentary question, a motion or a committee report will be a proceeding. A speech at a private event, a request to either House under the Freedom of Information Act 2000, or a TV interview will not be.²¹

The point of legislating would be to clarify privilege; however, it would only be as the result of litigation, and the resulting interpretation of the courts, that the concept would become clear. Legislating would be at the cost of the time and money of litigants and the courts. The Lord Chief Justice, in his response to the government’s consultation in 2013:

If you had no real reservations about...[the current scope of parliamentary privilege,] I would not go down the legislative route that defined, semi-defined, sub-divided, allowed for, or exercised this and that, because you would end up in interminable discussions, and, in court, interminable arguments, about what that really meant. Unless you are dissatisfied with the way in which your privileges operate, I would leave this well alone.²²

Legislation to change the status quo, then, should be a last resort.

Criminal Proceedings

Article 9 provides that no court can impeach or question a proceeding in Parliament. Thus, anything said or done in the course of these proceedings cannot be used as evidence to support a criminal prosecution. As the 2012-13 Joint Committee admitted “there is a tension between the public interest in bringing to justice those accused of criminal offences, and the public

¹⁸ Sir William Blackstone, Commentaries on the Laws of England (London, 1765), Book I, 164.

¹⁹ [2017] UKSC 5.

²⁰ Thompson, “Repeal bill: key legal points on the Brexit measure,” Financial Times, (July 14th 2017).
<https://www.ft.com/content/aa98b53a-67ea-11e7-9a66-93fb352ba1fe>

²¹ Cm8318, para 52.

²² HC100, para 40.

interest in the absolute protection afforded to freedom of speech in Parliament.”²³ The first question to ask is: why should proceedings in Parliament be special at all?

Parliament is the sovereign legislative body in our country. The democratically constituted Commons is tasked with making, examining and changing laws. It is also tasked with holding the executive – the Government – to account. Parliament then is special, from both a theoretical and a practical standpoint. The theoretical point is about separation of powers. Parliament should be free from judicial or executive interference, since it is Parliament that holds the government to account and Parliament that creates our laws. Without parliamentary privilege, Parliament could be hindered in its work by the courts or the executive, thus damaging the sovereignty of Parliament.

The practical point is that the legislative work of Parliament necessarily touches all aspects of the country, from criminal reform to taxes to agriculture. For Parliament to legislate to the best of its ability in all these areas it must have access to all information and all opinions available. Those participating in proceedings in Parliament, often MPs, should be able to speak freely on any topic. If parliamentary privilege did not provide such protection then this would likely have a ‘chilling effect’. MPs and others in those proceedings would not be as open with information and opinions than they otherwise would have been. Malcolm Peacock, the Clerk of the Legislative Council of the Parliament of Western Australia describes a scenario in which a Member of Parliament might decide not to talk about his personal experience of commercial business practices for fear that it might open him up to investigation for corporate crimes.²⁴ Similarly, a Member might not talk about personal experience with drugs for fear of incriminating herself. The Clerk of the UK Parliaments used the example of the 2011 riots in which an MP might refer to facts communicated, in confidence, by constituents who had played a tangential parts in those riots.²⁵ These scenarios would likely be subject to a chilling effect in the absence of parliamentary privilege. We elect MPs to debate and legislate on such topics; it is important that parliamentary privilege allows them to talk freely without fear that what they say could be used in court proceedings.

An argument sometimes raised against the status quo is that the current system of self-regulation of MPs is inadequate. Loveland states that “of...significance to the question of the legitimacy of maintaining the privileges of the Commons is the way in which the house responded in the recent past to widespread public disquiet about the ethical shortcomings of some of its members.”²⁶ There are problems. As Loveland outlines,²⁷ in 1995 the MP Sir Jerry Wiggin tabled amendments during the committee stage of a Bill’s passage in the name of another Conservative, Sebastian Coe, without Coe’s permission. Wiggin had a financial interest in the issue; he was a consultant for an organisation which would benefit from the amendment. He had used Coe’s name for fear that the amendment’s prospects of success would

²³ Ibid. Para 140.

²⁴ Clerk of the Legislative Council of the Parliament of Western Australia, response to the Government consultation on the Green Paper Cm8318, para 5.9.

²⁵ Written evidence from the Clerk of the Parliaments on HC100, para 17.

²⁶ Op.cit. p.256.

²⁷ Ibid. The following is taken from Loveland.

be lessened if the house knew its mover had been paid by a commercial organisation to promote it. The Speaker declined to refer the matter to the Committee of Privileges; in her opinion Wiggin merited no greater punishment than an apology to the house. The problem with exclusive cognisance then, at least in terms of regulation of standards, is that MPs will not properly enforce those standards upon each other. The case of Wiggin adds weight to that claim.

In the wake of public scandals, including that of Wiggin, the system of self-regulation has been strengthened. It now consists of two parts. The expenses system is regulated by the Independent Parliamentary Standards Authority ('IPSA') and the rest of the conduct of MPs – governed by a Code of Conduct – is investigated by the Parliamentary Commissioner for Standards and adjudicated by the Committee on Standards.²⁸ IPSA, established by section 3 of the 2009 Parliamentary Standards Act, is nominally independent of the House of Commons.²⁹ It is responsible for administering the expenses system.³⁰ Loveland questions its independence, arguing that “the notion that IPSA was an independent body was rather undermined by the Prime Minister’s blunt assertion that if IPSA did not change the rules then IPSA itself would be changed.”³¹ Indeed modifications were subsequently made in 2011, in particular in respect of the number of MP’s who would be entitled to claim expenses for running a second home.³²

The rest of the standards system is regulated by the Committee on Standards, in conjunction with the Parliamentary Commissioner on Standards which, according to a Parliament report,³³ is an independent role. The Committee on Standards now also includes lay members.³⁴ A report for the OSCE Office for Democratic Institutions and Human Rights noted that the (then forthcoming) proposal to appoint lay members to the House of Commons Committee on Standards “would go some way to addressing concerns that self-regulation is prone to an inherent conflict of interest, as well as to complaints that Parliament is sometimes remote and out of touch with public expectations.”³⁵

The problem with self-regulation is the perception that there is a conflict of interest involved—Alan Doig calls this “the inherent contradictions of the self-regulation of sleaze.”³⁶ This is a harm of the current law; however it is unclear that the alternative would be better. David Howarth argues that:

The penalties of suspension and the ultimate penalty of expulsion [two of the penalties that the House can inflict upon transgressors of its Code of Conduct] are powers that it would be very

²⁸ UK Parliament, “The Standards Systems in the House of Commons – Committee on Standards,” Regulation of MPs, paras 60-62, 77-80.

<https://publications.parliament.uk/pa/cm201415/cmselect/cmstandards/383/38306.htm>

²⁹ Op.cit. (Loveland) p.260.

³⁰ Ibid.

³¹ Ibid.

³² Ibid.

³³ Op.cit. (UK Parliament), para 61.

³⁴ Ibid.

³⁵ OSCE/ODIHR, Background Study: Professional and Ethical Standards for Parliamentarians, 63.

³⁶ Doig, Sleaze Fatigue in ‘The House of Ill-Repute,’ Parliamentary Affairs 389, p.399.

dangerous to hand over to a body outside the House. The reason for that is political and constitutional. Do you want people outside the House – people who are not democratically accountable – to have the power to affect the majority in the House, and maybe even to affect who forms the Government?³⁷

The answer, for the reasons given above about the sovereignty of Parliament and the importance of its work, should be no.

In any case, for the purposes of this essay the problem of self-regulation is limited. The 2012-13 Joint Committee points out that “it is well established that “ordinary crimes” committed by Members or non-Members on the parliamentary estate can be prosecuted in the courts.”³⁸ For example, in *R v. Chaytor*³⁹ the defence of parliamentary privilege was not open to the defendants accused of crimes related to their expenses. As noted in Chaytor, “for centuries the House of Commons has not claimed the privilege of exclusive cognisance of conduct which constitutes an ‘ordinary crime’ – even when committed by a Member of Parliament within the precincts of the House.”⁴⁰ Lord Rodger of Earlsferry, in his judgement on Chaytor, described “ordinary crimes” as those which do not relate “in any way to the legislative or deliberative processes of the House of Commons or of its Members, however widely construed.”⁴¹ Therefore MPs can be prosecuted for offences such as theft, arson and assault even if conducted in the course of a parliamentary debate since these offences do not relate in any way to the legislative or deliberative process. Protection is only available to MPs in the narrow circumstances in which an offence which is committed in the course of the proceedings in Parliament is also related to those proceedings. Thus “while making a seditious speech in the house would not be an ‘ordinary crime’, fiddling one’s expenses was, just as an MP would commit an ‘ordinary crime’ by assaulting a fellow MP in the chamber or stealing money from the till in one of the house’s dining rooms.”⁴²

Therefore the problems of self-regulation raised above are only pertinent to this essay in so far as they apply to criminal offences that are contained under the narrow scope of protection offered by privilege. As argued above, this is a narrow window. It seems unlikely that it extends much into the realm of sleaze and corruption envisaged by Doig. The harm of not punishing these offences seems greatly outweighed by the potential chilling effect on freedom of speech within the Commons that reducing the scope of privilege would have.

One offence that could fit within this narrow scope is bribery. Imagine that an MP accepted a bribe to change her vote on an issue, or ask questions in Parliament.⁴³ It would be likely that the offer of bribery took place outside the proceedings, while the conduct itself took place in the proceedings.⁴⁴ Thus, the act of receiving the bribe could be questioned in court; however,

³⁷ Op.cit. (UK Parliament) para.74.

³⁸ Op.cit. para 146.

³⁹ Op.cit.

⁴⁰ Ibid. para 112.

⁴¹ Ibid. para 122.

⁴² Op.cit. (Loveland), p.262.

⁴³ Cm8318, para 106.

⁴⁴ Ibid.

the act that the bribe persuaded the MP to undertake would likely receive privilege under Article 9.

The 1999 Joint Committee saw this as a problem and expressed doubts about whether MPs could be prosecuted under the common law offence of bribery.⁴⁵ This issue has since been addressed by the Bribery Act 2010. It is now an offence to request or agree to receive a bribe, irrespective of whether or not the acts for which the bribe was sought or offered are actually carried out. UK law is now analogous to the situation in the United States, where the case of *US v. Brewster* established that a Senator could be prosecuted by demonstrating that an unlawful agreement was entered into, without the need to show that the bribe led to specific conduct.⁴⁶ The Government, in its 2012 green paper, pointed to a dissenting opinion from the *Brewster* case, which suggested that any consideration of whether a bribe was taken will naturally also cause a court to question (if only by inference) whether the recipient of the bribe then acted on it,⁴⁷ thereby potentially invoking privilege under Article 9. In addition, the Government argues that “a defendant in such circumstances would seek to use proceedings [in Parliament] in a case, and would claim he or she could not mount a defence and obtain a fair trial without reference to such proceedings.”⁴⁸ As a result, the Government proposed legislation to disapply Article 9 in respect of all criminal proceedings minus certain statutory exceptions.⁴⁹ An alternative would be to keep the general applicability of Article 9 but to legislate to disapply it from certain offences including that of bribery.

The Government’s proposal was attacked by the subsequent Joint Committee, arguing that the “general disapplication of Article 9 in respect of criminal prosecutions is unnecessary and would have a disproportionately damaging effect upon free speech in Parliament.”⁵⁰ The problem with having exceptions to the rule is that an MP at the time of speaking would not have certainty as to whether they were protected under privilege. Lord Browne-Wilkinson in his judgement in *Prebble v. Television New Zealand* puts the point:

The important public interest protected by such privilege is to ensure that the member or witness at the time he speaks is not inhibited from stating fully and freely what he has to say. If there were any exceptions which permitted his statements to be questioned subsequently, at the time when he speaks in Parliament he would not know whether or not there would subsequently be a challenge to what he is saying. Therefore he would not have the confidence the privilege is designed to protect.⁵¹

There are harms with the status quo: an MP can incite a criminal act through the course of parliamentary proceedings; an MP can give away official secrets; the adequacy of the current system of internal regulation of the House can be questioned. However, MPs are

⁴⁵ H.L. Paper 43, H.C. 214 (1998-99).

⁴⁶ *United States v. Brewster*, 408 US 501 (1972).

⁴⁷ Cm8318, para 109.

⁴⁸ *Ibid.* para 110.

⁴⁹ *Ibid.* para 116-137.

⁵⁰ *Op.cit.* para 156.

⁵¹ *Prebble v. Television New Zealand Limited* [1995]1 AC 321.

democratically elected and fulfil a vital role, deliberating and legislating in parliamentary proceedings. Given what was argued previously about the caution of legislating in this area and given that there does not seem to be any great mischief that such legislation would rectify,⁵² this essay argues that the status quo should remain.

Damages and Injunctions

Article 9 also provides absolute protection from civil claims, including actions for damages, for acts undertaken in the course of proceedings in Parliament. In practice, the most likely and most controversial occurrence of this is in defamation proceedings and so this is what this essay will focus on. In addition, this section will address the potentially criminal matter of breaching injunctions, in particular those which restrict the reporting of an incident, since this is also a controversial issue and fits well with the discussion on defamation.

As seen above, it should be noted that the scope of this protection is narrow – it does not protect MPs in the course of television interviews for example. However, it is clear that there are harms with the status quo. In 1986 the MP Geoffrey Dickens used parliamentary privilege to accuse a clergyman of having sexually abused young children.⁵³ The clergyman had already been subject to a police investigation, concluding that there was no basis for a prosecution.⁵⁴ More recently two Northern Irish Unionist MPs named individuals as terrorist murderers, an accusation which as well as being defamatory exposed the persons named to personal danger.⁵⁵ These examples highlight the problem: it is up to the judgement of individual MPs as to whether or not they use privilege to defame someone or break an injunction. If so used for no good reason then this is a harm. As the late Professor Harry Street summed up, when talking about the approach to civil liberties in Britain, “for every wrongful encroachment upon one’s liberty there is a legal remedy awarded by an independent court of justice.”⁵⁶ There is no legal remedy in these circumstances.

However, the specific act of making a defamatory statement, or breaching an injunction, in the course of parliamentary proceedings does not cause much harm; it is the fact that this statement can then be amplified through media and social media reports that causes the harm. Here the law mitigates the harm to some extent, as outlined in the 2013-14 Joint Committee Report.⁵⁷ The Parliamentary Papers Act 1840 provides absolute protection to publications authorised by Parliament, for example Hansard. However, the absolute protection given to these publications is not the problem; it is instant unofficial reporting that amplifies the harm. The 1840 Act also provides qualified protection to any extract or abstract made by other publications. These publications enjoy protection if they are acting in good faith and without malice. An abstract is described as a “summary or epitome” by the 1999 Joint Committee,⁵⁸ therefore this qualified

⁵² The Brewster prosecution for bribery was after all successful.

⁵³ Op.cit. (Loveland) p.246.

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ Op.cit. (De Smith) p.152.

⁵⁷ Op.cit. para 171-174.

⁵⁸ Report from the 1999 Joint Committee on Parliamentary Privilege, para 340.

protection does not apply to media reports, which generally do not fit under the banner of being an “extract or abstract” – this was confirmed by the Media Lawyers Association in their response to the Government’s green paper.⁵⁹ Media reports, however, do have protection under the common law for defamation purposes – absolute if the whole debate is published and qualified (good faith and without malice) if extracts are published. This common law protection is buttressed by s.15 of the Defamation Act 1996 which provides qualified protection to fair and accurate reports of proceedings, as well as to fair and accurate copies or extracts of proceedings, for defamation purposes. To summarise, no unauthorised publication enjoys absolute protection for the reporting of parliamentary proceedings. Any protection that is given to unauthorised publications is qualified: these reports must be in good faith and without malice. The only context in which this qualified protection applies to media reports – as opposed to extracts and abstracts – is that of defamation. As Lord Neuberger notes, it is unclear whether such a common law protection also applies to media reports in the context of breaking injunctions.⁶⁰ Therefore, theoretically it seems plausible that the law removes the possibility of a journalist handing information to an MP who then uses privilege to break an injunction or defame someone, whilst the same journalist then reports on what the MP said, thereby removing all force to the injunction or the law on defamation. It is unlikely that such a report would be found to be in good faith and without malice and therefore it would not receive qualified protection. In the context of injunctions it is unclear whether such a report would receive any protection at all. Theoretically at least, one of the key harms of the status quo is minimised.

In practice we live in an age in which anyone can take to Twitter to report instantly on what was said in the House of Commons. It is impractical to expect that all these people will be subject to defamation claims or prosecution for breaching injunctions. Similarly, it is unlikely that our courts will be able to enforce such claims against non-UK hosted websites. The MP John Hemming made this point when he used parliamentary privilege to breach the injunction on Ryan Giggs: “With about 75,000 people having named Ryan Giggs on Twitter it is obviously impracticable to imprison them all...”⁶¹ However, this demonstrates a problem with the enforceability of injunctions and defamation law in general, rather than a specific problem with the scope of parliamentary privilege. It was only after thousands of twitter users had breached the injunction by naming Ryan Giggs that John Hemming invoked parliamentary privilege to do the same thing. This makes the theoretical argument raised above, about the protection the law provides in respect of secondary reporting, pertinent. There is no point in blaming parliamentary privilege for the lack of enforceability of our current law on defamation and the breaching of injunctions. Theoretically the law minimises the harms that the indiscriminate use of parliamentary privilege could cause. If there is a problem in practice then this problem is with the enforceability of the law on injunctions and defamation, not with parliamentary privilege.

⁵⁹ Op.cit. para 172.

⁶⁰ Master of the Rolls, Report of the Committee on Super-Injunctions (2012). P.vii.

⁶¹ “Oral Answers to Questions – Education,” Parliamentary Debates (Hansard). UK: House of Commons. Col.638.

The Joint Committee on Privacy and Injunctions, in concluding that no change should be made to the status quo, stated:

If the revelation of injunctioned information becomes more commonplace, if injunctions are being breached gratuitously, or if there is evidence that parliamentarians are routinely being ‘fed’ injunctioned material with the intention of it being revealed in Parliament, then we recommend that the Procedure Committees in each House should examine the proposals made to us for new restrictions with a view to implementing them.⁶²

There is little evidence to suggest that MPs are routinely using parliamentary privilege to defame people or to break injunctions. In most cases, it is more likely that thousands of internet users will have broken an injunction or defamed someone well before an MP has the opportunity to use parliamentary privilege to do just that. Thus, if parliamentary privilege is restricted in such matters then all this will restrict is the ability of MPs to debate about a problem that is very real; they will not be able to mention the very statement that they are debating about.

There has been ample discussion above about the importance of parliamentary privilege; the fact that it applies to parliamentary proceedings rather than to MPs themselves; and the likely chilling effect⁶³ that disapplying its protection would have. Given these discussions and given the dangers of legislating in this area, this essay argues that the status quo should remain.

Conclusion

Parliamentary privilege is a fundamental principle of UK constitutional law. It embodies the sovereignty of Parliament and ensures that the deliberative and legislative work of Parliament can be conducted without fear of intervention from the executive or the courts. This essay began by arguing that legislating to change the status quo should be met with caution; legislation to alter parliamentary privilege should only be used if there are serious problems with the status quo. The focus of this essay was on the protection parliamentary privilege provides to MPs from criminal and civil proceedings. This protection is narrow and so the harms it causes are minimised. There are problems, particularly in respect of defamation and injunctions. However, these problems are largely caused by other factors, such as the lack of enforceability of injunctions and defamation law in general, rather than by parliamentary privilege. The freedom of speech of MPs would be hindered by restricting the absolute protection parliamentary privilege provides them with in the course of proceedings in Parliament. This would reduce the ability of MPs to deliberate and legislate. Additionally, this protection should not be widened; there is no reason to extend parliamentary privilege beyond its currently narrow scope. Thus, the status quo should remain.

⁶² Report from the Joint Committee on Privacy and Injunctions, Session 2010-12, HL Paper 273/HC 1443, para 230-231.

⁶³ Particularly pertinent to civil proceedings would be debates around tax evasion and corrupt business practices.

THE COMMERCIAL JUSTIFICATIONS UNDER SECTION 9 OF THE COMPETITION ACT 1998 – FIT FOR PURPOSE?

Arianna Barnes

Introduction

Article 101(1) TFEU and S2 of the Competition Act 1998 (CA) work to ensure that markets remain open and the competition within them remains effective.¹ An agreement is prohibited, and therefore void, if it has as its object or effect the restriction of competition either within the Internal Market or the United Kingdom respectively. The general aim of this is to maximise consumer welfare and create an efficient allocation of resources.² S9 of the CA ‘mirrors’³ Article 101(3) of the Treaty on the Functioning of the European Union (TFEU)⁴ and therefore will be referred to as this throughout the essay. It provides a ‘structured framework for assessing economic benefits generated by restrictive agreements and balancing them against the anti-competitive effects’.⁵ Through an analysis of the United Kingdom’s Multilateral Interchange Fee (UK MIF) and minimum resale price maintenance (MRPM), this essay will explore whether the commercial justifications under Article 101(3) TFEU are fit for purpose.

The Purpose of the Commercial Justifications under Article 101(3) TFEU

The purpose of Article 101(3) TFEU is to balance any anti-competitive effects of an agreement against any pro-competitive effects of an agreement.⁶ This is because the ‘very essence of competitive rivalry’ is to win customers by offering better products and better prices.⁷ Therefore if an agreement contributes to this by producing compensating beneficial effects it should be capable of being exempted.⁸ In the absence of a block exemption, an agreement must satisfy the conditions of Article 101(3) TFEU. It contains the phrase ‘any agreement’ as it is true that ‘any agreement’ could have pro-competitive effects in practice.⁹ Even ‘hard-core’¹⁰ and ‘object’ restrictions can satisfy the conditions¹¹. However, for several reasons, it seems that many agreements frequently have their route to exemption closed off and perhaps in a way that is not in line with the purpose of Article 101(3) TFEU. For example, for the past 50 years there has not been a successful ‘individual’ exemption for MRPM.¹²

The undertakings must show that they can satisfy the four cumulative and exhaustive conditions. The first condition is the requirement of an improvement in the production or distribution of goods or the promotion of technical or economic progress.¹³ The purpose of this

¹ Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/01, art 101.

² Guidelines on the application of Article 81(3) of the Treaty [2004] OJ C101/97, para 13.

³ Art 101 (n 1).

⁴ R Whish and D Bailey, *Competition Law* (8th edn, Oxford University Press 2015) 378.

⁵ J Faull and A Nikpay, *The EU Law of Competition* (3rd edn, Oxford University Press 2014) 310.

⁶ *ibid*, 309.

⁷ *ibid*, 308.

⁸ Whish and Bailey (n 4) 355.

⁹ Art 101 (n 1).

¹⁰ Case T-17/93 *Matra Hachette SA v Commission* [1994] ECR II-595.

¹¹ *Societe Air France/Alitalia Linee Aeree Italiane SpA* Commission Decision [2004] OJ L 362/17.

¹² M Velez, ‘The tenuous evolution of resale price maintenance’ [2011] ECLR 297, 303.

¹³ Art 101 (n 1).

is to identify all economic benefits flowing from the restrictive agreement irrespective of the market in which they arise.¹⁴ Secondly, the restrictions must be indispensable to the attainment of the economic benefit. The guidelines invert the second and third conditions because the ‘pass on analysis’ should not contain any effects that are not indispensable.¹⁵ The restrictive agreement itself ‘must be reasonably necessary in order to achieve the efficiencies’; the efficiencies must be linked to the agreement and there must be no less restrictive means of achieving them.¹⁶ Additionally, the intensity of the restriction on competition must be reasonably necessary and in the absence of this restriction of competition there would be a significant reduction or elimination of the efficiency.¹⁷ Generally, the more restrictive the measure the stricter the test will be under this condition and the more likely that there will be an alternative measure.¹⁸

The second condition is that a fair share of the efficiency must be passed onto the consumers.¹⁹ The term ‘consumer’ is defined quite broadly to include all direct and indirect users of the products covered by the agreement.²⁰ Thus this includes wholesalers, retailers and final consumers.²¹ The greater the restriction the greater benefit to consumers is necessary.²² Finally, the agreement must not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.²³ This is important because ‘when competition is eliminated the competitive process is brought to an end and short term efficiency gains are outweighed by longer term losses’.²⁴

Evidently, this framework seems quite ridged, and as it will be outlined below, can be applied in a very formulistic manner that may result in some key pro-competitive aspects being overlooked. Additionally, there is a high burden of proof as undertakings must show that they can satisfy these with ‘detailed, robust and compelling analysis that relies in its assumptions and deductions on empirical data and facts’.²⁵

Exemption of the UK MIF

The UK MIF is paid to the issuing bank, the bank that issues the customer with cards, from the acquiring bank, the bank that provides the merchants with the machines.²⁶ Moreover, the level of the MIF tends to affect the amount the acquiring bank charges merchants. In the case of *Sainsbury’s Supermarkets Ltd v MasterCard Inc* it was established that Sainsbury’s had been charged a higher merchant service charge than they would have had the banks been able to set their own interchange fees.²⁷ Although it could be described as price fixing and therefore an

¹⁴ Case T-111/08 *MasterCard and Others v Commission* [2009] 4 CMLR 17, para 228.

¹⁵ *ibid* para 39.

¹⁶ *ibid* para 73.

¹⁷ *ibid* para 73.

¹⁸ Case T-86/95 *Compagnie Generale Maritime and Others* [2002] ECR II-1011, paras 392-395.

¹⁹ Art 101 (n 1).

²⁰ Guidelines (n 2) 84.

²¹ *ibid*.

²² *ibid* para 90.

²³ Art 101 (n 1).

²⁴ Guidelines (n 2) para 105.

²⁵ *MasterCard v Commission and Others* (n 14) paras 194-237.

²⁶ Case 1241/5/15 (T) *Sainsbury’s Supermarkets Ltd v MasterCard Inc* [2016] UK CAT, para 8.6.

²⁷ *ibid*.

object restriction it was eventually established as an effect restriction and a default rule²⁸. It is worth noting that a law and economics approach of default rules is that they are unlikely to be deviated from because of the inertia that they create.²⁹ Indeed, it was held that as a result of the UK MIF issuing banks were unlikely to engage in negotiations.³⁰

Despite being branded as an ‘effect restriction’ it is likely that it functioned as an object restriction would. This may be one of the key sources of confusion as to why it was so difficult for it to be exempted. It was stated that the UK MIF was not necessary for the operation of the MasterCard scheme. The only thing that it contributed to be was reducing transaction costs that would have been incurred in the negotiations of the bilateral interchange fees.³¹ As a consequence it could not satisfy the rest of the conditions either.³²

Is this Difficulty Justified?

The purpose of Article 101(3) TFEU is to balance the positive and negative effects of an agreement on competition. Therefore, it is questionable whether the scope of the first condition should be broader. On the one hand, the 2004 Guidelines on Article 101(3) TFEU provide that the first condition should be interpreted narrowly and thus limited to purely economic efficiency gains. Although these guidelines are a good tool they should be applied ‘reasonably and flexibly’ as they contain soft law.³³ Moreover, as the wording of Article 101(3) does not explicitly or implicitly exclude wider considerations there is certainly room for a wider interpretation. A broader view of Article 101(3) TFEU would ‘allow policies other than efficiency to be taken into consideration when deciding whether to allow agreements that are restrict competition’.³⁴ Wesseling believes that this should be the favoured approach.³⁵ Thus, the way in which the first condition is currently being applied may not be correct.

Nevertheless, it is still difficult to fit even one of the wider economic considerations on to the UK MIF. The most relevant to the present case seems to be consumer protection as it could be argued that the MIF can be used to promote investment by the issuing bank, for example to increase security measures. In the case of *Asahi* the commission exempted an agreement that allowed the introduction of new technology that enhanced protect safety.³⁶ However, the trend in the case law that has been analysed by academics is that efficiency gains are always the primary concern and any other gains, such as consumer protection, are secondary.³⁷ Moreover, the guidelines state that an argument based on the idea that a restrictive agreement allows undertakings to increase their profits, which enables them to invest more, and creates benefits

²⁸ *ibid*, para 103.

²⁹ R Bubbs and R Pildes, ‘How Behavioural Economics Trims Its Sails and Why’ (2013) 127 Harv L Rev 1593, 1618.

³⁰ *Sainsbury’s* (n 26), para 61.4.

³¹ *ibid* para 197.4.

³² *ibid* para 288.

³³ Guidelines (n 2) para 6.

³⁴ Whish and Bailey (n 4) 166.

³⁵ R Wesseling, ‘The Commission White Paper on Modernisation of EC Antitrust Law: Unspoken Consequences and Incomplete Treatment of Alternative Options’ [1999] ECLR 420.

³⁶ Case IV/33.863 *Asahi/Saint-Gobain* [1994] OJ L354/87, paras 24–26.

³⁷ A Maziarz, ‘Do Non-Economic Goals Count in Interpreting Article 101(3) TFEU?’ (2014) 2 European Competition Journal 341, 349.

for consumers may not be considered because the effects are too remote and uncertain.³⁸ Thus, it is implied that, if Article 101(3) TFEU is interpreted broadly it would produce potentially inaccurate results: only the strict efficiency gains can be relied upon to determine whether a restriction of competition has been balanced out.

Furthermore, it seems that the possibility of wider effects being analysed has completely diminished since the introduction of self-assessment. It does not seem appropriate for national courts, never mind individual undertakings, to consider wider European Union policies.³⁹ It is important to note that in 2002 the commission recognised the network externalities that a modified intra-regional MIF in the Visa network brought and stated that this contributed to technical and economic progress.⁴⁰ Indeed, Cooke has stated that the effect of the move to self-assessment should not be underestimated.⁴¹ Analysis under Article 101(3) TFEU entails complex economic assessment that is equally as complex as the assessment of Article 101(1) and Article 102 TFEU, which are not self-assessed.⁴² Therefore, it could be argued that since Regulation 1/2003 the commercial justifications are no longer fit for purpose due to the assessment arrangements.

It is interesting to see, however, that the system that has been developed in Hong Kong is a mixture of self-assessment and actions in front of the competition tribunal if the case is novel or involves unresolved questions of wider important or public interest.⁴³ Thus, having seen the development in the European Union, and perhaps having learned from the EU's mistakes, they have opted for a system that is not as rigid as the EU's system in terms of self-assessment.

Another line of criticism is that the commercial justifications under Article 101(3) TFEU may not be fit for the purpose of analysing complex systems such as MasterCard, despite the article containing the phrase 'any agreement'. Indeed the Guidelines focus on agreements such as those that pool together resources and it is difficult to analyse the UK MIF with the Guidelines in mind.⁴⁴ Moreover, the literature on MIFs is 'fragmented and has yet to define a model capable of incorporating all the necessary elements' of the system.⁴⁵ On the one hand, the Baxter Model provides evidence that MIFs are needed to correct this market failure.⁴⁶ It argued that a high issuing fee to consumers, which is likely to be the result of a lower MIF, would result in consumers switching to cash as a method of payment and thus a loss of technical and economic progress. Nevertheless, this model has been heavily criticised because of its

³⁸ Guidelines (n 2)

³⁹ Whish and Bailey (n 4).

⁴⁰ Case No COMP/29.373 *Visa International- Multilateral Interchange Fee* [2002] OJ L318/17

⁴¹ J Cooke, 'Changing Responsibility and Relationships for Commission and National Courts: The Implications of the White Paper' in A Dashwood (ed), *The Modernisation of European Competition Law: The Next Ten Years* (Cambridge Centre of European Studies 2000).

⁴² *ibid.*

⁴³ A Waksman, 'The Benefit of Hindsight: A Comparison of Individual Exemption under EU and Hong Kong Competition Law' [2016] ECLR 442, 445.

⁴⁴ Guidelines (n 2) para 45.

⁴⁵ J Mathis, 'European Competition Law and Multilateral Interchange Fees in the Market of Payment Cards: A Critical Outlook' [2013] ECLR 139, 142-144.

⁴⁶ W Baxter, 'Bank Interchange of Transactional Paper: Legal and Economic Perspectives' (1983) 26 *Journal of Law and Economics* 562.

‘relative simplicity’.⁴⁷ It assumes that cash will always be a viable alternative but it is not, for example when shopping online. On the other hand, the ‘tourist test’ has been highly endorsed as a method used to find an optimal level of MIF.⁴⁸ The test is passed when the ‘merchant discount’, which is influenced by the MIF, is set at a level where the retailer would accept a card payment from a non-repeat customer.⁴⁹ The benefit from card acceptance should be above their marginal cost.⁵⁰ In any event this shows that Article 101(3) TFEU cannot determine alone whether the UK MIF as actually set should be exempted because the correct level is so hard to establish.

The result of this is that several key pro-competitive effects may be overlooked. As ‘cashless transactions complete financial markets’ by making transactions more transparent and more efficient they contribute to the growth of the economy.⁵¹ Clearly the use of cards has an ‘objective value to the EU as a whole’ in this manner.⁵² Moreover, the UK MIF inherently has effects on this system. A very real and direct impact of Article 101(3) TFEU is that merchants such as Sainsbury’s will get a lower merchant service charge as a result of downward pressure on the UK MIF but it will not be passed on to their consumers in the form of lower prices. Firstly, *Sainsbury’s v MasterCard and Others* provides some evidence for this because it was established that Sainsbury’s did not pass on the higher MIF to consumers.⁵³ Additionally, the empirical study provided by Chan et al. in Australia also reflects this conclusion: merchants may use the reduction as a means to increase profits.⁵⁴ It is also very likely that issuing fees will increase to offset the loss from the lower MIF. It does not seem fair that Sainsbury’s having to pay a higher merchant service charge has been prohibited but yet the possibility of final consumers, the parties with less resources and bargaining power having to pay a higher issuing fee has not been prohibited. ‘Benefits from each’ affected market should be taken into account but the effect of this application of Article 101(3) TFEU seems to be that the benefits to merchants are given more weight.⁵⁵ In effect Sainsbury’s and the subsequent other merchants that are bringing proceedings against MasterCard are able to use Article 101 TFEU to manipulate the conditions of the market when only the legislators should be capable of this.

Severe Restrictions of Competition: Minimum Resale Price Maintenance

MRPM ‘encompasses agreements and other practices in which a manufacturer and a distributor or retailer agree on a fixed price below or over which the distributor or retailer is not allowed to sell the product’.⁵⁶ In the case of *Online resale price maintenance in the commercial refrigeration sector*, Foster created a discounting policy that prohibited resellers from

⁴⁷ Mathis (n 45) 143.

⁴⁸ C Rochet and J Tirole, *Must-Take Cards: Merchant Discounts and Avoided Costs* (Toulouse School of Economics 2008).

⁴⁹ Mathis (n 45) 142.

⁵⁰ *ibid.*

⁵¹ Mathis (n 45) 139.

⁵² Case C-382/12 P *MasterCard and Others v Commission* [2014] 5 CMLR 23, para 234.

⁵³ *Sainsbury’s* (n 26) para 525.

⁵⁴ H Chang, D Evans and D Garcia Swartz, *The Effect Of Regulatory Intervention In Two-Sided Markets: An Assessment Of Interchange Fee Capping In Australia* (AEI-Brookings Joint Center for Regulatory Studies 2005) 6.

⁵⁵ P *MasterCard and Others* (n 52).

⁵⁶ C Banerji, ‘Should the EU Reconsider the Rules on Resale Price Maintenance?’ [2016] ECLR 290, 290.

advertising any Foster product below a minimum advertised price both online and offline.⁵⁷ Foster regularly monitored the resale prices and their disciplinary mechanism was to reduce the discount that could be obtained if the minimum resale price was not adhered to. It was held that this was by its very nature harmful to competition and thus a restriction by object because it severely limited their customer's ability to communicate a lower resale price.⁵⁸ Some website even stated to 'call for a better price'.⁵⁹ This is significant because the ability to sell products at discounted prices on the Internet 'can intensify price competition' and it increases reseller's incentives to act efficiently so that they can pass on cost savings to the customer in the form of lower resale prices.⁶⁰

It seems quite logical that severe restrictions of competition, such as this, will be less likely to satisfy the individual exemption Article 101(3) TFEU because the more severe the restriction of competition, the greater the pro-competitive effect that is required to balance it out. What is interesting though is that vertical agreements, such as the one in question, are generally seen to be less damaging than horizontal agreements. Nevertheless, the Commission and Market Authority stated that the intentions of Foster were to 'protect margins', 'reduce downward pressure on prices' and to protect their brand and thus concluded, with arguably very little analysis, that it could not satisfy Article 101(3) TFEU.⁶¹ Indeed it was almost assumed that this agreement could not be exempted. This approach highlights the significance of the label 'object' and just how heavy the burden of proof is on the undertaking in question.

Are Key Pro-Competitive Aspects being Overlooked?

The effects of MRPM can be severe. It can impede price competition between retailers that deal with the same product or brand and thus effect the foundations of competition.⁶² The competition between distributors of the product under the MRPM agreement is 'softened' because they are all expected to sell at or above the minimum set price.⁶³ This price stability also may reduce the downward pressure on the wholesaler. The removal of this downward pressure on prices results in inefficiencies. Furthermore, discount stores, and the benefits that they bring, cannot exist if resellers are forced to charge a price that is not seen as a discount from the perspective of the consumer. Additionally, MRPM has been revealed as a device that can be used to facilitate collusion both in the upstream and downstream market.⁶⁴ Moreover, there is evidence that when MRPM is removed sales will increase.⁶⁵

Many argue that MPRM can reduce the 'free rider' problem. This is the problem whereby some producers will invest into pre-sales services such as demonstrations or tutorials and

⁵⁷ Case CE/9856/14, *Online resale price maintenance in the commercial refrigeration sector* [2016] UK CMA

⁵⁸ *ibid* para 6.5.3.

⁵⁹ *ibid* para 5.12.4.

⁶⁰ *ibid* para 1.13.

⁶¹ *Online resale* (n 57), para 4.22.

⁶² Velez (n 12) 299.

⁶³ *ibid*.

⁶⁴ I Apostolakis, 'E-Commerce and Free Rider Considerations Under Article 101 TFEU' [2016] ECLR 114, 114.

⁶⁵ M Bennett, A Fletcher, E Giovanetti and D Stallibrass, 'Resale price maintenance: explaining the Controversy, And Small Steps Towards A More Nuanced Policy' (2011) 33 *Fordham International Law Journal* 1278, 1295.

increase prices to cover these costs. Firms that do not invest in such services and do not incur these costs can price lower and free ride off the services provided by the other firms to attract the customers to these products. In turn firms will be not be incentivised to invest in pre-sale services. However, using MRPM will never be indispensable because the free rider problem can be solved by other means such as selective distribution⁶⁶ and promotional allowance by contract to encourage and reward dealers for taking the risks and making the investments⁶⁷. Furthermore, pre-sale services are only applicable for certain types of products. Indeed, in the digital era the free rider problem is less prominent if you are selling products on the Internet.

However, MRPM can result in a firm's brand retaining its prestige and creating customer loyalty. A higher price can act as a signal for quality. If this prestige has been earned through investment and thus the creation of better quality products, which goes to the very essence of competition, then this should not be overlooked simply due to the label of 'object'. Furthermore, distributors who have their revenue guaranteed by such agreements are encouraged to distribute goods, for example, the goods of new entrants in the market. Thus, for firms trying to penetrate the market a MRPM agreement can be useful. The issue here is not necessarily that potential or existing competitors need to be protected. The issue is more the fact that consumers may be charged a higher price in the long run if MRPM is not allowed in the short run for new entrants. This can also give consumers increased choice.

On this point, it could be argued that the flexibility for this short-term safe harbour already exists within the framework of Article 101(3) TFEU. However, in practice, and particularly as established in this very case⁶⁸ and the Sainsbury's case⁶⁹, a prohibited object or effect restriction can be difficult to rebut. Consequently, for a smaller firm MRPM will not be a risk worth taking considering the fines that may be incurred. Therefore, Article 101(3) TFEU may effectively be discouraging pro-competitive effects and creating a significance opportunity costs for consumers. Moreover, the commercial justifications under Article 101(3) TFEU are therefore perhaps unfit for purpose due to the uncertainty that surrounds its application. Indeed, since modernisation there is little jurisprudence to guide undertakings and guidance that has been given has 'failed to increase legal certainty and the application of Article 101(3) has come to a standstill'.⁷⁰

Additionally, the United States of America (USA) apply a rule of reason approach to MRPM that was established in the case of *Leggin*.⁷¹ The key difference between the USA and the UK, however, is that the USA tends to apply this approach in relation to private actions whereas the EU cases tend to be on a public level.⁷² Banerji suggests that the difference between the systems means that Article 101(3) TFEU may actually be fit for its purpose because the effects approach of the USA may be too broad for the UK.⁷³ Nevertheless, the USA's approach

⁶⁶ Apostolakis (n 64) 119.

⁶⁷ Velez (n 12) 391.

⁶⁸ *Online resale* (n 57)

⁶⁹ *Sainsbury's* (n 26).

⁷⁰ B Baarsma and N Rosenboom, 'The Veritable Tower of Babel: On the Confusion Between the Legal and Economic Interpretations of Article 101(3) of the Treaty on the Functioning of the European Union (2015) 11 Eur Competition J 402, 403.

⁷¹ *Leggin Creative Leather Products v PSKS Inc* (2007) 551 US 877.

⁷² Banerji (n 56) 294.

⁷³ *ibid.*

serves as a key reminder that MRPM can have pro-competitive effects. Currently, the effects of MRPM in the short and long run may be overlooked. Thus as the UK moves out of the European Union it might be possible to implement a trial period for a US style approach to MRPM in order to accurately determine any pro-competitive effects.⁷⁴

Conclusion

This essay has outlined that the way in which Article 101(3) TFEU functions is very close to a per se prohibition for certain types of agreements. Indeed, although the two cases have been categorised at either ends of the spectrum for restricting competition, they equally struggle to satisfy Article 101(3) TFEU. This is not in line with its purpose but nevertheless has occurred because the framework is too ridged and thus the full effects of an agreement cannot be accurately considered. As Kyprianides explains, there will always be ‘a crisis of some kind’ that can be used as an excuse to cut corners.⁷⁵ Therefore there should be a greater focus on what type of framework and assessment procedure will result in the most accurate application of Article 101(3) TFEU instead of focusing on the practicability of the system.

⁷⁴ G Kypriandies, ‘Should Resale Price Maintenance be Per Se Illegal?’ [2012] ECLR 376, 384.

⁷⁵ *ibid.*

A CRITIQUE OF THE LEGAL FRAMEWORK FOR COMBATING OCEAN ACIDIFICATION

Caitlin Farr

Introduction

This essay will aim to provide a comprehensive guide to the global legal framework on ocean acidification (OA) whilst providing a critique as to whether the framework is effective in combating the phenomenon. There will be a discussion of the separate regimes that are currently in place that could potentially tackle OA, (namely the climate change regime, marine pollution regime and biological diversity regime), and suggestions as to what more can be done in order to establish a truly effective legal framework.

Anthropogenic climate change has been an issue of considerable debate within recent years. Our oceans are known to function as significant carbon reservoirs, drawing down carbon dioxide from the atmosphere. ‘The basic chemistry of seawater is changing...and it is happening at ‘an unprecedented rate not experienced in the last 65 million years’.¹ The consequence of carbon dioxide release on the oceans has had very little attention and has also lead to a serious problem known as OA.

Within the scientific community one may note a growing consensus that OA is already having highly detrimental repercussions on many ocean species and ecosystems,² with tropical and sub-tropical coral reefs such as the Great Barrier Reef coming under severe threat with calcification throughout the Great Barrier Reef declining by 14.2% since 1990.³

Global Legal Framework

The Monaco Declaration, called for policymakers “to stabilize atmospheric CO₂ at a safe level to avoid not only dangerous climate change but also dangerous ocean acidification.”⁴ More recently the UN General Assembly has voiced concern as to the effects of OA on marine organisms and has encouraged an “increase of national, regional and international efforts to address levels of ocean acidity and the negative impact of such acidity on vulnerable marine ecosystems, particularly coral reefs.”⁵ Despite this there is still no global treaty on the subject of OA to date. The responses to OA by the international community have consisted of non-binding requests for cooperation and further research.

The current international legal framework in place, that could potentially address the issue of OA, consists of an uncoordinated range of multilateral and regional legal regimes.⁶ With such

¹ United Nations Environment Programme, UNEP Emerging Issues: Environmental Consequences of Ocean Acidification: A Threat to Food Security (2010) 2.

² Glenn De'ath and others, 'Declining Coral Calcification on the Great Barrier Reef' [2009] 323(5910) Science 116

³ Second International Symposium on the Ocean in a High-CO₂ World *Monaco Declaration* (ISOPRESS, October 2008)

⁴ Ibid

⁵ UN General Assembly Resolution 66/231, (5 April 2012)

⁶ Yoshifumi Tanaka, *The International Law of the Sea* (2nd edn, Cambridge University Press 2015)

an array of international agreements in place there is a real threat that one may see inconsistencies in obligations, and the duplication of goals.⁷

Climate Change Regime

The climate change regime is arguably the most applicable regime with regards to reducing OA as both phenomenon share the same root cause. A global legal framework for combating climate change is provided by the *United Nations Framework Convention on Climate Change (UNFCCC)*⁸ and the subsequent *Kyoto Protocol to the United Nations Framework Convention on Climate Change (Kyoto Protocol)*.⁹ Although there is no explicit mention of the phenomenon in either text there are still a number of provisos which are arguably of relevance. Article 2 of the *UNFCCC* provides for its “ultimate objective” to achieve the “stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.”¹⁰ For the purposes of the *UNFCCC* the “climate system” is defined as “the totality of the atmosphere, hydrosphere, biosphere and geosphere and their interactions.”¹¹ The oceans are part of each of these spheres and ocean acidification is a problem which interacts with each component, thus it is fair to conclude that Article 2 of the *UNFCCC* would embrace a commitment to take into consideration the effects of climate change upon the oceans.¹²

The objective of the *UNFCCC* as laid out within Article 2 leads one to question what would be considered as “dangerous anthropogenic interference”. In order to determine whether such an interference has occurred States may look to the work of subsidiary bodies established under the *UNFCCC*¹³ and the *Intergovernmental Panel on Climate Change (IPCC)*. In the *IPCC’s* Fourth Assessment Report¹⁴ we see OA mentioned explicitly, however it still remains questionable whether determination of “dangerous anthropogenic interference” could be defined by reference to a dangerous ocean PH threshold, given the atmospheric focus of Article 2 of the *UNFCCC*.¹⁵

The *UNFCCC* sets out the definition of climate change as “a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods.”,¹⁶ with “adverse effects of climate change” being defined as “changes in the physical environment or biota resulting from climate change which have significant deleterious effects on the composition, resilience or productivity of natural and managed ecosystems or on

⁷ E Brown Weiss, ‘International Environmental Law: Contemporary Issues and the Emergence of a New World Order’ (1993) 81 *Georgetown LJ* 675, 699

⁸ United Nations Framework Convention On Climate Change (adopted 9 May 1992, entered into force 1 March 1994) (“UNFCCC”)

⁹ Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, came into force 16 February 2005) (“Kyoto Protocol”)

¹⁰ UNFCCC (n 10) Art 2

¹¹ *Ibid* Art 1(3)

¹² WGBU, Special Report 2006: The Future Oceans, Warming Up, Rising High, Turning Sour (2006)

¹³ Konrad Ott and others, Reasoning Goals of Climate Protection: Specification of Article 2 UNFCCC (2004)

¹⁴ Intergovernmental Panel on Climate Change, Climate Change 2007: Synthesis Report (2007)

¹⁵ R Baird and others, ‘Ocean Acidification: A Litmus Test for International Law’ (2009) 4 *CCLR* 463

¹⁶ UNFCCC (n 10) Art 1(2)

the operation of socio-economic systems or on human health and welfare.”¹⁷ Due to the ambiguous wording of these provisos it is contended that Article 3 of the *UNFCCC* does not include an obligation to prevent or limit OA.¹⁸

The consequence of the climate regime’s atmospheric focus is that the emissions targets set by the *Kyoto Protocol* are calibrated by reference to their atmospheric rather than oceanic effects.¹⁹ The Protocol provides no specific requirement to reduce carbon dioxide emissions, rather the solution to climate change as propelled by Article 3(1) is that states reduce “aggregate anthropogenic carbon dioxide equivalent emissions” of greenhouse gases below particular levels, and requires states to decrease emissions to ‘at least 5 percent below 1990 levels.’²⁰ Resulting in Annex B parties to the Protocol being able to increase their carbon dioxide emissions provided that there is a corresponding reduction in their emissions of other greenhouse gases.²¹ The Protocol appears to have no consideration for the fact that OA is caused directly by the emissions of carbon dioxide into the atmosphere.

Furthermore, the *UNFCCC* can be seen as containing provisos that are actually counterproductive in reducing OA. “Sink” is defined as any any “process, activity or mechanism which removes a greenhouse gas, an aerosol or a precursor of a greenhouse gas from the atmosphere”,²² and “reservoir” as “a component or components of the climate system where a greenhouse gas or a precursor of a greenhouse gas is stored.”²³ Article 4 then requires States to “promote sustainable management, and promote and cooperate in the conservation and enhancement, as appropriate, of sinks and reservoirs of all 11 greenhouse gases not controlled by the Montreal Protocol.”²⁴ The word ‘enhance’ implies that the uptake of CO₂ by the oceans is to be supported, OA seems to be presented as part of the solution to climate change, rather than as a problem in and of itself.²⁵ Article 2(1)(a)(ii) of the *Kyoto Protocol* provides for the “protection and enhancement of sinks and reservoirs of greenhouse gases not controlled by the Montreal Protocol”²⁶ arguably adapting Article 4(1) and aiding the prevention of OA. However, despite this the climate change regime is still far from effective and the *Kyoto Protocol* itself is questionable when we consider its effectiveness in relation to reducing OA, with Article 2(1)(a)(iv) of the *Kyoto Protocol* calling for the “promotion, development and increased use of, new and renewable forms of energy, of carbon dioxide sequestration technologies”, these sequestration technologies would arguably worsen OA.

The issue of enforceability when considering the effectiveness of the climate change regime is paramount. States negotiate their own targets for each commitment period and there is an absence of any significant legal repercussions if states fail to reach such targets, the “enforcement branch” of the protocol merely declares a state is in non-compliance and requires

¹⁷ Ibid Art 1(1)

¹⁸ Baird (n 17) 463

¹⁹ Ibid 464

²⁰ Kyoto Protocol (n 11) Art 3(1)

²¹ R. E. Kim, ‘Is a New Multilateral Environmental Agreement on Ocean Acidification Necessary?’ (2012) 21 Review of European Community and International Environmental Law 245

²² UNFCCC (n 10) Art 1(8)

²³ UNFCCC (n 10) Art 1(7)

²⁴ UNFCCC (n 10) Art 4(d)

²⁵ Baird (n 27) 464

²⁶ Kyoto Protocol (n 11) Article 2(1)(a)(ii)

the state to make up the difference in the next commitment period and submit a compliance action plan.²⁷ Moreover, states themselves have to consent to be enforced upon – just as a state can negotiate a higher target for itself, it can also refuse to sign onto an agreement.²⁸ Even if the *Kyoto Protocol* was fully adhered to ‘it would constitute a very modest down payment on what ultimately must be done to stabilize atmospheric concentrations of greenhouse emissions’.²⁹ There has been further attempts to enhance the implementation of the *UNFCCC*, demonstrated by the adoption of the *Accord de Paris (Paris Accords)* however the enforcement issue still paramount when considering the *UNFCCC*’s effectiveness at combating OA.

Marine Environmental Protection Regime

We see the main principles of environmental protection contained within Part XII of the *United Nations Convention on the Law of the Sea (LOSC)*.³⁰ The *LOSC* places an obligation upon states to “protect and preserve the marine environment”,³¹ requiring states to take “all measures...necessary to prevent, reduce and control pollution of the marine environment from any source”³² and “adopt laws and regulations to prevent, reduce and control pollution of the marine environment from or through the atmosphere.”³³ Which clearly includes an obligation to prevent OA due to CO₂ pollution.

However, the response to OA under the *LOSC* is arguably weakened by the stipulation that states shall make their efforts to comply with the treaty using the ‘best practical means at their disposal’ and ‘in accordance with their abilities’.³⁴ These uncertain terms lead one to question whether compliance with the provisions is in fact enforced, there is no clear guidance within the provisos of the treaty as to what would satisfy the tribunal that individual states were fulfilling their obligations. Furthermore, Boyle and Redgewell note the hortatory nature of the wording contained within Article 201(4), the use of the word ‘endeavour’ advocates that compliance is voluntary.³⁵

The *LOSC* ‘in itself does not contain concrete marine pollution standards, nor does it purport to substitute for special agreements’.³⁶ At present the *LOSC* is inefficient at pinpointing what may constitute a violation or what consequences would flow from such a violation.³⁷ States are

²⁷ United nations framework convention on climate change, 'Kyoto Protocol Compliance' (*Unfcccint*, 16 February 2005) <http://unfccc.int/kyoto_protocol/compliance/items/3024.php> accessed 14 May 2017

²⁸ Hannah Chang, 'A “Legally Binding” Climate Agreement: What Does it Mean? Why Does it Matter?' (Columbiaedu, 23rd February) <<http://blogs.ei.columbia.edu/2010/02/23/a-“legally-binding”-climate-agreement-what-does-it-mean-why-does-it-matter/>> accessed 15 May 2017

²⁹ W C G Burns, 'Potential Causes of Action for Climate Change Damages in International Fora: The Law of the Sea Convention' (2006) 2 McGill Int J Sustainable Development L & Policy 27, 30-31.

³⁰ United Nations Convention on the Law of the Sea (adopted 10 December 1982 came into force 16 November 1994) (“*LOSC*”)

³¹ *Ibid* Art 192

³² *Ibid* Art 194(1)

³³ *Ibid* Art 212

³⁴ J C Kunich, *Killing Our Oceans Dealing With the Mass Extinction of Marine Life* (Praeger Publishers Inc 2006) 56

³⁵ Y Downing, 'Ocean acidification and protection under international law from negative effects: a burning issue amongst a sea of regimes?' C.J.I.C.L. 2013, 2(2), 242-273

³⁶ D M Ong, 'The 1982 UN Convention on the Law of the Sea and Marine Environmental Protection' in Fitzmaurice, Ong & Merkouris (eds) *Research Handbook on International Environmental Law* 567, 571.

³⁷ *Ibid*

left to question the threshold of harm required to constitute environmental damage, who can actually make a claim and what legal remedies are in fact available.

In addition to these issues with the *LOSC*, there is also the pressing concern that not all states have ratified the *LOSC*, the United States being one such state, which is a point of significant interest as they are arguably one of the biggest contributors to CO₂ emissions and subsequently ocean acidification. Since they have not ratified the *LOSC* it appears that they would not be at risk of being pursued by the *UNCLOS* tribunal.³⁸

The response under the *LOSC* at the present time is arguably reactive rather than preventative, we see the existence of money reparation and the concept of *restitutio in intergrum* (a commitment to restore a damage environment to its former state),³⁹ however, money reparation does not fix the damage done to the marine ecosystems and it is questionable as to whether *restitutio in intergrum* is even scientifically achievable. To be considered an effective legal framework there needs to be provisos in place which prevent states from damaging the marine environment, not just a system within which compensation is provided /when pollution occurs.

Biological Diversity Regime

The *United Nations Convention on Biological Diversity (CBD)*⁴⁰ is the main international agreement that governs biodiversity issues, it has particular relevance with regards to OA given the severe effects the phenomenon will have on marine organisms and ecosystems which comprise the majority of the planet's biological diversity.⁴¹ "Without significant action to reduce CO₂...there will be no place in the future oceans for many of the species and ecosystems that we know today."⁴²

Concerns were raised about the impacts of OA at the 2010 *Conference of the Parties (COP)* of the Rio Convention leading to the adoption of the 'Strategic Plan for Biodiversity 2011-2020' including the 'Aichi Biodiversity Targets'. However, it is dubious as to whether any provisos 'could be used to impose a clearly-defined obligation on states parties to limit their CO₂ emissions by reference to the impact of these emissions on acidity levels in the ocean'.⁴³ Moreover, *COP* relies on voluntary compliance by states, the *CBD* does not grant the power to legally bind contracting parties to the *COP*.⁴⁴

What more can be done

Within Bodansky's work we see the observation that "the lack of coordination between different treaty regimes and international organisations creates the potential for conflicts, gaps and overlapping, inefficient requirements, or what some have referred to as 'treaty

³⁸ M Doelle, 'Climate Change and the Use of the Dispute Settlement Regime of the Law of the Sea Convention' (2006) 37 *J. Ocean Development & Int L* 319, 322

³⁹ Ong (n 33) 573

⁴⁰ Convention on Biological Diversity (adopted 5 June 1992 came into force 29 December 1993) ("CBD")

⁴¹ Baird (n 17) 469

⁴² Royal Society, *Ocean Acidification Due to Increasing Atmospheric Carbon Dioxide* (2005)

⁴³ M Simons & T Stephens, 'Ocean Acidification: Addressing the Other CO₂ Problem' (2009) 12 *Asia Pacific J Env L* 1, 17

⁴⁴ A Proelss & M Krivickaite, 'Marine Biodiversity and Climate Change' (2009) 4 *CCLR* 437, 440.

congestion”.⁴⁵ At the present time there appears to be too much law, so much that it is appearing incoherent and becoming hard for States to determine what they can and can’t do.

One of the most significant problems in dealing with acidification is having sufficient data to outline where the main problems lie and to what extent the ocean is being affected. As the phenomenon is recent there has been little opportunity for an influential epistemic community of concerned scientists to assemble and raise awareness of the seriousness of the problem.⁴⁶ Simply put, very little is known about acidification, aside from a few hotspots. One approach could be for scientists to find a specific appealing/charismatic marine animal (possibly a whale) and demonstrate that acidification is a threat. However, this is flawed as these sorts of commitments are generally diluted as states try to prioritise things that are more achievable. Lamirande suggests that an international treaty that specifically addresses OA is needed,⁴⁷ however introducing a new treaty could arguably add to the already existing issue of treaty congestion, confusing states even more and creating extra burdens at the national level in implementing international agreements.⁴⁸ There is effectively no ‘clean slate’⁴⁹ upon which to create this new treaty, and therefore in order to achieve a more effective regime attention must be focused upon ‘ensuring that existing regimes are modified where necessary to embrace ocean acidification as a regime focus’,⁵⁰ as such, arguably a new protocol within the *UNFCCC*, rather than a whole new treaty, may be the best solution. On one level, there could also be some attempts to build water quality standards into the legislation, so that there are binding commitments to address acidification as at the present time there are relatively few coastal jurisdictions with this sort of requirement. This is flawed however, since acidification manifests itself in places far from the original pollution, so places like Iceland that are carbon neutral bear the brunt of CO₂ burning in other jurisdictions. A state trying to deal with OA is hamstrung by the fact that they are dealing with carbon deposits from somewhere else. This might give rise to a state responsibility claim, or one could get creative with the emerging doctrine of due diligence in international law to try to argue that states should keep stronger controls over carbon emissions. However, short of a meaningful global commitment to meet (and exceed) the *Paris Accords* there is no quick fix for establishing an effective global legal framework to combat OA.

Conclusion

First and foremost, the real problem faced by OA policies is that it is so connected to “climate change” that it tends to get lost in the conversation. One key challenge from a legal point is decoupling it from the climate change/ocean warming narrative. Ultimately, to stop acidification we have to restrict the amount of CO₂ in the atmosphere, so if we’re going to put in place any one policy to address this, keeping to the *Paris Accords* commitments is the main thing. In order for the global legal framework to be considered ‘effective’ at preventing OA

⁴⁵ D Bodansky, ‘The Art and Craft of International Environmental Law’ (2010) University of Georgia School of Law, 267-268.

⁴⁶ Ibid 460

⁴⁷ H Lamirande, ‘From Sea to Carbon Cesspool: Preventing the World’s Marine Ecosystems from Falling Victim to Ocean Acidification’ (2011) 34 Suffolk Transnat’l LR 183, 20

⁴⁸ Downing (n 35)

⁴⁹ Baird (n 17) 463

⁵⁰ Ibid 471

legislation needs to be adopted that directly recognises the phenomenon and CO2 emission targets need to be regulated and enforced. The enforcement issue is pivotal to the success of any legal framework attempting to combat OA, states need to be penalized and vilified.

THE RIGHT OF REFUGEE-RECEIVING STATES TO COMPENSATION: A 'GENERAL FRAMEWORK' UNDER THE INTERNATIONAL LAW OF STATE RESPONSIBILITY

Camila Zapata Besso

Introduction

The notion that refugee-generating states (“states of origin”) should compensate refugee-receiving states (“host states”) directly for losses incurred as result of the influx of refugees into their territory is not new. In 1986, the International Law Association (“ILA”) published its ‘Declaration of Principles of International Law on Mass Expulsion’, which set out the existing international legal basis for compensation to be claimed by host states.¹ Since then, academics have seriously considered the possibility of states of origin being liable to provide compensation.² Most recently, Goodwin-Gill has endorsed the idea that states of origin should provide the assets needed by host states to meet the needs of refugees, which are grave indeed. To give an example, in 2013 contributions to the UNHCR by the international community only accounted for 45% of assessed funding needs, creating a “critical funding gap”.³ Goodwin-Gill has since suggested that this gap would be mitigated if states of origin were held financially accountable for generating refugee outflows.⁴

There is, however, a paucity of practice by states of origin in providing compensation to host states. The first example is Germany’s *ex gratia* reparations to Israel after WWII for Jewish victims of Nazi persecution.⁵ Second, following a United Nations Security Council Resolution directing Iraq to pay compensation for losses resulting from its unlawful invasion of Kuwait, the United Nations Compensation Commission (“UNCC”) awarded Jordan damages for environmental losses incurred as a result of the influx of Kuwaiti refugees into its territory.⁶ To date, however, no host state has made a compensation claim before an international tribunal on the basis that states of origin commit internationally wrongful acts by persecuting their nationals.

Nonetheless, the fact that no host state has yet claimed compensation for losses resulting from refugees does not mean that the right to do so does not exist under international law. By way of analogy, it has been reaffirmed by the United Nations General Assembly,⁷ as well as the

¹ ‘Declaration of Principles of International Law on Mass Expulsion’ in International Law Association Report of the Sixty-Second Conference (International Law Association, Seoul 1986) (“Declaration of Principles on Mass Expulsion”) principle 6.

² Luke Lee, ‘The Right to Compensation: Refugees and Countries of Asylum’ [1986] 80 AJIL 532.

³ Guy Goodwin-Gill and Selim Sazak, ‘Footing the Bill: Refugee-Creating States’ Responsibility to Pay’, *Foreign Affairs* (29 July 2015) <<https://www.foreignaffairs.com/articles/africa/2015-07-29/footing-bill>>.

⁴ Guy Goodwin-Gill, ‘The Movements of People between States in the 21st Century: An Agenda for Urgent Institutional Change’ [2016] 28 IJRL 679, 684.

⁵ Nicholas Balabkins, *West German Reparations to Israel* (New Brunswick, NJ: Rutgers University Press, 1971).

⁶ UNCC Governing Council decision 7 (1991) UN Doc S/AC.26/1991/7/Rev. 1 (“UNCC GC 7”) [34].

⁷ UNGA Res 194 (III) (11 December 1948); see also Res 53/51 (3 December 1998) UN Doc A/RES/53/51.

International Law Association,⁸ that refugees have a right to compensation from their states of origin for proprietary and moral damage incurred as a result of being forced to flee. The fact that no state of origin has yet provided such compensation to refugees does not mean that their right does not exist. As Michael Lynk explains, “sufficient precedents and rules exist, particularly on restitution and compensation, to productively and equitably craft their implementation in any contemporary situation”.⁹ This essay will show that there currently exists under international law a firm legal basis on which host states can directly claim compensation from states of origin. In order to do so, the author will set out the general legal framework that would apply if such a claim were to come before an international tribunal.

(A) The basic framework

It is a basic maxim of international law that where a state’s internationally wrongful act causes injury to another state, the wrongdoing state has a delictual responsibility to make full reparation to the injured state.¹⁰ In order to prove that host states are entitled to compensation from states of origin, it will be shown that: (i) the violation of international human rights implicated in the persecution of human beings constitutes an internationally wrongful act giving rise to state responsibility; (ii) there is a direct causal nexus between this internationally wrongful act and the subsequent influx of refugees into the territory of neighbouring host states; (iii) less-developed host states may suffer actual loss as a result of the presence of refugees in their territory; (iv) compensation is likely to be the only way of repairing that loss; and (v) the quantum of any compensation award should not impose a disproportionate burden on the state of origin.

(i) The internationally wrongful act

In order to qualify as a refugee, a person must show that they were forced to flee as a result of persecution.¹¹ Even though the Refugee Convention does not explicitly define persecution, Hathaway has famously stated that it can be defined as the “sustained or systematic failure of state protection in relation to one of the core [human rights] entitlements.”¹²

Indeed, the creation of mass refugee populations is often caused by the violation of human rights by their states of origin.¹³ It is therefore submitted that the host state’s cause of action

⁸ Luke Lee, ‘The Cairo Declaration of Principles of International Law on Compensation to Refugees’ [1993] 87 AJIL 157 (“Cairo Declaration”).

⁹ Michael Lynk, ‘The right to restitution and compensation in International Law and the displaced Palestinians’ in Victor Kattan (ed), *The Palestine Question in International Law* (BIICL 2008) 165.

¹⁰ International Law Commission, ‘Report of the International Law Commission on the Work of its 53rd Session’ (23 April-1 June and 2 July-10 August 2001) UN Doc A/56/10 Chapter IV.E.1 (“ARSIWA”) Art 31, as affirmed by the PCIJ in *Case Concerning the Factory at Chorzów (Germany v Poland)* (Merits) [1927] PCIJ Rep Series A No 17 (“*Factory at Chorzów*”) 47.

¹¹ Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (“Refugee Convention”) Art 1.

¹² James Hathaway, *The Law of Refugee Status* (London, Butterworths 1991) 112.

¹³ GJL Coles, ‘Problems Arising from Large Numbers of Asylum Seekers: A Study of Protection Aspects’ (International Institute of Humanitarian Law, San Remo 1981) 5.

lies in the state of origin's violation of international human rights.¹⁴ Although international human rights law imposes obligations on states with respect to individuals, it is comprised of treaty and customary obligations owed between states.¹⁵ This is demonstrated by the numerous human rights treaties that allow for inter-state claims,¹⁶ as well as their preambular recognition of the relationship between human rights and international stability.¹⁷ The International Law Commission ("ILC") Articles on State Responsibility stipulate that a breach of international law by a state entails its responsibility for that internationally wrongful act.¹⁸ Accordingly, in violating human rights, "the state that turns a person into a refugee commits an internationally wrongful act."¹⁹

(ii) *Causation*

For the responsibility of a wrongdoing state of origin to be invoked by an injured state, the injured state must show that there is a causal nexus between the wrongdoing state's internationally wrongful act and the injury suffered.²⁰ Thus, it must first be shown that a state of origin's human rights violations directly caused persons to flee into the territory of a host state. The UNCC considered there to be a direct causal nexus between Iraq's invasion of Kuwait and the influx of refugees into Jordanian territory because Jordan was unable to prevent the influx.²¹ It is submitted that such a direct causal nexus between states of origin and host states exists by virtue of the non-refoulement obligation,²² but only where these are neighbouring states.

The non-refoulement obligation,²³ widely regarded as a rule of customary international law,²⁴ requires that a host state not return a person to a state where they would be persecuted. It is generally accepted that states which neighbour states of origin have no choice but to accept refugees into their borders because any other act, such as refoulement at the border, would

¹⁴It is noted that the creation of refugees does not necessarily entail the international responsibility of the state of origin. A state will only be responsible for human rights violations where such violations are attributable to that state (ARSIWA, Arts 4-8).

¹⁵ *Brownlie's Principles of Public International Law* (8th ed, Oxford University Press 2012) 638-642.

¹⁶ For example, International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 ("ICCPR") Art 41; Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (adopted 4 November 1950, entered into force 3 September 1953) ETS 5, Art 25; African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 21 ILM 58, Arts 45 and 47.

¹⁷See ICCPR; International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 [preambles].

¹⁸ ARSIWA, Art 1, as affirmed by the ICJ in *Corfu Channel (UK v Albania)* (Merits) [1949] ICJ Rep 4, 23.

¹⁹ Cairo Declaration, principle 2.

²⁰ ARSIWA, Art 42, as affirmed by the ICJ in *United States Diplomatic and Consular Staff in Tehran (US v Iran)* (Merits) [1980] ICJ Rep 3 [89], [92].

²¹ UNCC GC 7 [34].

²² C Tomuschat, 'State Responsibility and the Country of Origin' in V Gowlland-Debbas (ed), *The Problems of Refugees in the light of Contemporary International Law Issues* (Martinus Nijhoff 1996) 50.

²³ Refugee Convention, Art 33(1); UN Human Rights Committee 'General Comment No. 20' (10 March 1992) UN Doc HRI/GEN/1/Rev.6 [9].

²⁴ G Goodwin-Gill and J McAdam, *The Refugee in International Law* (3rd ed, Oxford University Press 2007) 248.

necessarily return refugees to the state of their persecution.²⁵ Thus, it is submitted that the influx of refugees into the territory of a neighbouring state is a direct and proximate²⁶ consequence of any state's persecution of its nationals. However, this is not true of non-neighbouring states. States such as Australia, the United Kingdom and the United States often exercise a choice in admitting refugees into their borders.²⁷ This is because, where refoulement at the border does not necessarily entail the return of a refugee to their state of persecution, the non-refoulement obligation is not engaged.

Commentators have suggested that because states have consented to be bound by the non-refoulement obligation, they should not be compensated for performing it.²⁸ The author does not subscribe to this view. Neighbouring host states are expected to perform their customary obligations in good faith.²⁹ Thus, a state of origin should not be permitted to shift the burden of a large portion of its population onto the territory of a neighbouring state in the knowledge that the latter will have no choice but to accept it. This view was shared in the ILA's Cairo Declaration, which stated that "the discharge of the obligation to care for refugees by receiving states... does not relieve the country of origin of their basic responsibility, including that of paying adequate compensation."³⁰

(iii) *Injury*

Next, it must be shown that a host state suffered financial injury as a result of the influx of refugees onto its territory. The ILC Articles on State Responsibility define injury as "material damage."³¹ While it is true that states often incur expenses as a result of the influx of refugees into their territory, such expenses do not necessarily always amount to material losses to their economies. In fact, the UNHCR has recognised that refugee populations can have a "positive" effect on host economies, particularly those in Western Europe.³² Although the economic analysis required to rationalise such positive effects is beyond the scope of this essay, it is submitted that they can be attributed to three factors. First, the economies of developed states are well equipped to withstand the shock of sudden population rises. Second, developed economies often have aging populations, to which refugees can provide a helpful additional workforce.³³ Third, refugees are more likely to permanently settle in countries with secure economies, thus such countries are more likely to witness their positive contribution to the

²⁵ *Ibid.*

²⁶ ARSIWA Art 31, Commentary at (10).

²⁷ See R Byrne and A Shacknove, 'The safe country notion in European asylum law' [1996] 9 HHRJ 185.

²⁸ Selim Sazak, 'An Argument for Using Frozen Assets for Humanitarian Assistance in Refugee Situations' [2015] 68 JIA 305, 311.

²⁹ *Nuclear Tests (New Zealand v France)* (Admissibility) [1974] ICJ Rep 457 [49].

³⁰ Cairo Declaration, principle 1.

³¹ ARSIWA, Art 31(2).

³² UNHCR Standing Committee, 'Social and economic impact of large refugee populations on host developing countries' (1997) EC/47/SC/CRP.7.

³³ IMF Staff Discussion note, 'The Refugee Surge in Europe: Economic Challenges' (2016) <<https://www.imf.org/external/pubs/ft/sdn/2016/sdn1602.pdf>> [53].

economy in the long-term.³⁴ Moreover, absent of a pressing non-refoulement obligation, such States are unlikely to choose to accept numbers of refugees that would constitute a substantial economic burden, or indeed be required to do so by regional organisations.³⁵

The same, however, is not true of low-income states in regions such as the MENA. Refugee generating states tend to be situated in regions without developed economies, thus the largest burden of refugees tends to be shouldered by low-income neighbouring states. For example, to date, 34 non-neighbouring developed states have offered places to Syrian refugees.³⁶ These places only account for 5.15% of the Syrian refugee population living in the neighbouring host states of Egypt, Jordan, Lebanon, Iraq and Turkey, which is currently at 4.9 million.³⁷ Moreover, in contrast to the European experience, recent studies have shown that low income countries invariably suffer in the long term as a result of the mass influx of refugees.³⁸

(iv) *Compensation*

Compensation in international law is available where a state's internationally wrongful act has caused another state loss, and restitution is incapable of repairing the loss.³⁹ In light of the foregoing paragraphs, it is submitted that western states or those with developed economies are unlikely to meet the 'causation' or 'financial loss' tests necessary in order to found a claim for compensation. In contrast, low-income host states which neighbour states of origin are likely to meet both tests. Moreover, refugees cannot readily be returned to situations prevailing in their states of origin, so the financial damage suffered by low-income neighbouring host states in the meantime can only be repaired by compensation.

(v) *Quantum*

Failed states of origin cannot be brought to bear on compensation claims,⁴⁰ at least until their governments are formally reestablished.⁴¹ Notwithstanding, public policy still begs the question: even where a state of origin *is* capable of satisfying a claim for compensation, *should* it be required to do so? States that generate refugees often do so in the context of their own

³⁴ European Commission Institutional Paper 033, 'An Economic Take on the Refugee Crisis: A Macroeconomic Assessment for the EU' (July 2016) <https://ec.europa.eu/info/sites/info/files/file_import/ip033_en_2.pdf>.

³⁵ See, for example, EU state government responses to the immigration quota system proposed by Germany in 2015 (Euractiv, 'Many EU countries say "no" to immigration quotas' (30 June 2015) <<http://www.euractiv.com/section/justice-home-affairs/news/many-eu-countries-say-no-to-immigration-quotas/>>).

³⁶ UNHCR, 'Resettlement and Other Admission Pathways for Syrian Refugees' (2017) <<http://www.unhcr.org/uk/protection/resettlement/573dc82d4/resettlement-other-admission-pathways-syrian-refugees.html>>.

³⁷ UNHCR Inter-agency Information Sharing Portal, 'Syria Regional Refugee Response' (2017).

³⁸ IMF Staff Discussion note, 'The Economic Impact of Conflicts and the Refugee Crisis in the Middle East and North Africa' (2016) <<https://www.imf.org/external/pubs/cat/longres.aspx?sk=44228.0>> 9, 35, 13.

³⁹ ARSIWA, Art 36; *Factory at Chorzów*, 47.

⁴⁰ Chakola Beyani, 'State Responsibility for the Prevention and Resolution of Forced Population Displacements in International Law' [1995] 7 IJRL 130, 130.

⁴¹ Hannah Garry, 'The Right to Compensation and Refugee Flows: A 'Preventative Mechanism' in International Law?' [1998] 10 IJRL 97, 111-112.

economic crises, or the ravaging effects of war. It is counter-intuitive to suggest that host states should receive large sums of compensation from states of origin where this would exacerbate the same destabilizing factors that led to the generation of refugees in the first place.

In response, it is submitted that international law is sufficiently developed to prevent compensation awards from being made against states of origin in forms that would exacerbate their economic destitution. State practice since the Treaty of Versailles has been to consider the needs of affected populations in determining amounts sought for post-war reparations.⁴² Moreover, in 2009 the Eritrea-Ethiopia Claims Commission stated that it was bound to apply international human rights law in coming to a decision on quantum for compensation awards. In doing so, the Commission could not disregard the possibility that excessively large damages awards might “impose crippling burdens upon [each state’s] economy and population.”⁴³ In our case, any host state’s cause of action would be based on international human rights law, so similar considerations would inevitably be applied by the international tribunal hearing such a claim.⁴⁴ Moreover, the jurisprudence of international tribunals shows that these are willing to adopt methods of valuation, interest and installments in ascertaining quantum,⁴⁵ or to leave the exact form of reparations to the negotiation of parties post-judgement.⁴⁶ Thus, it is submitted that even where compensation could be awarded against a state of origin, it would not be awarded in a form that jeopardizes its future economic stability.

(B) Conclusion

As shown above, the posited compensation regime is only capable of being utilised in order to proportionately alleviate real financial burdens on neighbouring host states. Importantly, it is not capable of being exploited by developed western economies against poor refugee-generating states. Thus, it is submitted that the compensation framework, where applicable, provides a potent and equitable tool for ensuring that states of origin are held accountable for violating the human rights of their nationals.⁴⁷ Its application in practice would deter potential refugee-generating states from adopting domestic policies that violate human rights, whilst alleviating the economic burden already placed on host states.

⁴² Eritrea-Ethiopia Claims Commission Decision No. 7 (27 July 2007) [24].

⁴³ Eritrea-Ethiopia Claims Commission, Final Award: Ethiopia’s Damages Claims (17 August 2009) [18]-[23].

⁴⁴ See, for example, Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 3 Bevens 1179, Art 38(1).

⁴⁵ *Yukos Universal Limited (Isle of Man) v The Russian Federation*, PCA Case No AA 227, Final Award (18 July 2014).

⁴⁶ See *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria)* (Merits) [1998] ICJ Rep 303.

⁴⁷ Luke Lee, ‘The Preventative Approach to the Refugee Problem’ [1992] 28 WLR 821, 822.

SOLITARY CONFINEMENT:
THE ROLE OF THE HUMAN BODY IN CLAIMS-MAKING
Elinoram Abramov

Introduction

In 1970 Arthur Johnson was convicted of murdering a man named Jerome Field in a street fight and was subsequently sentenced to life without parole. Nine years later, Johnson participated in an unsuccessful escape attempt from a prison in Pittsburgh. Although no one was hurt, an officer was bound, gagged and locked in a prison cell during the attempt. As a disciplinary measure, and due to Johnson's "dangerous nature,"¹ he was placed in solitary confinement. Johnson stayed in a seven-by-twelve-foot cell for twenty-three hours a day, in perpetual light, for the next thirty-seven years.² In September 2016, he challenged the constitutionality of his confinement by arguing that it violated the Eighth Amendment's proscription against cruel and unusual punishment. In order to establish this, Johnson had to prove that the conditions of his confinement were "sufficiently serious" and "pose a substantial risk of serious harm."³

In making this claim, Johnson's lawyers followed in the footsteps of a multitude of solitary confinement cases. In a 1974 case, *Camprise v. Hamilton*, the imprisonment of the plaintiff in solitary confinement was held to violate the Eighth Amendment due to the particularly unhygienic conditions of his cell.⁴ *Laaman v. Helgemoe* extended the provision of cruel and unusual punishment to psychological as well as physical damage. The case concluded that the negative effect of solitary confinement on the physical, mental and emotional well-being of inmates at the New Hampshire State Prison "does violence to our societal notions of the intrinsic worth and dignity of human beings."⁵ The cases *Madrid v. Gomez*,⁶ *Ruiz v. Johnson*⁷ and *Jones 'El v. Berge*⁸ prohibited the use of solitary confinement for mentally ill prisoners due to the adverse psychological effect of the practice. Thus, *People v. Fischer* concluded that "numerous courts have found that long stretches of segregation can constitute cruel and unusual punishment... conditions of segregated confinement are unconstitutional if they do not meet certain minimum standards."⁹

This paper aims to problematize the conceptualization of solitary confinement under cruel and unusual punishment, whilst simultaneously making a broader claim that the physical body mediates personhood in legal human rights discourse. It will argue that, while invoking the

¹ Angela Coulombis and Mensah M. Dean, "37 years in Solitary Confinement is Enough for Inmate from Philly, Judge Rules," *The Philadelphia Inquirer*, September 21, 2016, accessed December 6, 2016, http://www.philly.com/philly/news/20160615_The_Philly_man_who_s_spent_three_decades_in_solitary.html

² Ibid

³ Standards established by: *Farmer v. Brennan*, 511 U.S. 825 (1994), 834

⁴ *Camprise v. Hamilton*, 382 F. Supp. 172 (D.C. Tex. 1974)

⁵ *Laaman v. Helgemoe*, 437 F. Supp. 269 (D.C. NH. 1977)

⁶ *Madrid v. Gomez*, 899 F. Supp. 89 (N.D. NY 1995)

⁷ *Ruiz v. Johnson*, 37 F. Supp. 2d 855 (S.D. Texas, 1999). The decision was later reversed by the 5th Circuit, see: *Ruiz v. Johnson*, 178 F. 3d 385 (5th Cir. 1999)

⁸ *Jones 'El v. Berge*, 164 F. Supp. 1096 (W.D. Wis., 2001)

⁹ *People v. Fischer*, 898 F. Supp. U.S. 618 (2012), 620

suffering body in legal practice and during political resistance has practical benefits, it also at best obscures, and at worst reinforces, the wider injustices of incarceration that underpin solitary confinement in the United States.

Part II will focus on the use of the body as evidence in solitary confinement litigation. Drawing a parallel between the use of specialist evidence in refugee cases and solitary confinement cases, it argues that the reliance on medical evidence in law renders the personhood of claimants precarious since their humanity is only recognised through their suffering body. Part III argues that prisoners have internalised the valorisation of the suffering body in human rights discourse and use bodily self-destruction as a tool to make visible and material injustice. Lastly, Part IV, offers an alternative to the individualist frame of solitary confinement as cruel and unusual punishment. Placing solitary confinement in the wider context of punitive incarceration policies which do not target individuals but whole groups.

The Body as a Site of Proof

In *Humanitarian Reason*, Didier Fassin claims that the condition of asylum seekers in contemporary society articulates two “histories of the human body.”¹⁰ First, the “body is the place, par excellence, on which the mark of power is imprinted,” therefore functioning to display and demonstrate political power, physically marking instances of persecution. Second, due to this perceived function, the body is the site “through which a truth is stated.”¹¹ Through mere examination, the body can bear witness to suffering and persecution. Given these functions, asylum-seekers have increasingly used medical and psychological reports, which testify to their bodily suffering, as a means to corroborate their experience of persecution. Indeed, the organization ‘Comité médical pour les exiles,’ which was set up to provide health care and legal assistance for undocumented migrants in France, saw a 100 percent increase in the number of medical certificates supplied in support of applications for refugee status between the late 1990s and the early 2000s.¹² Furthermore, the UK based organization ‘Freedom from Torture,’ has not only produced more medico-legal reports but has also seen an increase in report length from “approximately five pages in the 1990s to approximately 20 pages in 2016.”¹³

In tandem with the use of medical experts to determine the status of the asylum-seeker, health and illness became legitimate grounds to secure legal status for migrants. Specifically, ill-health has been used as a tactic to secure the principle of non-refoulement for migrants and asylum-seekers in danger of being deported. Ayten Gündoğdu highlights this in the case of *N. v. UK*. Persecuted and raped due to her association with the Lord’s Resistance Army, N fled Uganda and sought asylum in the UK. However, after being denied asylum, she appealed not on the grounds of political persecution, but rather based on her biological condition as an HIV-positive patient. N’s lawyers reasoned that she would be less likely to be deported, if they could

¹⁰ Didier Fassin, *Humanitarian Reason: A Moral History of the Present* (Berkeley: University of California Press, 2012), 114

¹¹ Ibid

¹² Ibid

¹³ Freedom from Torture, “Demanding the Impossible: Home Office Mistreatment of Expert Medical Evidence,” November, 2016, 13, www.freedomfromtorture.org/sites/default/files/documents/proving_torture_a4_final.pdf

prove that her life was dependent on HIV treatment that is unavailable in Uganda. Thus, a consulted physician prepared a report which claimed that N's life expectancy would drastically reduce to less than one year if her treatment was discontinued.¹⁴ The case exemplifies the recent trend to turn to Article 3 of the ECHR, which places an absolute prohibition on inhuman or degrading treatment, in an attempt to overcome the limits of asylum and non-refoulement in legal practice.¹⁵

The 'body as proof' has only proliferated due to a climate of anti-immigration, where successful asylum applications are increasingly rare. Under this climate, the claims of the asylum seeker are automatically mistrusted, creating a culture of deep suspicion. In this way, asylum-seeker's testimony is no longer seen as sufficient to confirm her persecution.¹⁶ Indeed, an air of suspicion is built in the 'Istanbul Protocol', a UNCHR manual on the effective investigation and documentation of torture. Paragraph 290 states that "the clinician should carefully evaluate consistencies and inconsistencies [in the narrative of the asylum-seeker], including the possibility of fabrication or exaggeration of the account of torture."

Whilst the 'culture of suspicion' explains the proliferated use of medical experts in providing certificates and illness-permits, it does not explain *why* invoking the suffering body is so effective in claims-making. Miriam Ticktin argues that compassion and benevolence occupy a central position in political life, to the extent that relieving suffering has become a "moral imperative,"¹⁷ and those who do so are "looked to as morally and ethically untainted."¹⁸ The suffering or sick body is a manifestation of our common humanity precisely because, unlike the murky world of political asylum, biology is deemed fixed and universal.¹⁹

There is an interesting parallel between the asylum-seeking claims and solitary confinement cases. For example, whilst Johnson provided testimony on the suffering he experienced under solitary confinement his testimony was not considered sufficient to meet the demands of cruel and unusual punishment.²⁰ His case relied on expert testimony to 'prove' the psychological degradation he suffered in solitary confinement. Specifically, the psychiatrist Dr. Craig Haney, who *specialises* in the effects of prolonged solitary confinement, evaluated Johnson in a non-contact visitation room. He echoed Johnson's reports of progressive sleeplessness, depression, difficulty in concentrating and obsessive behaviour, and ultimately, like the expert in N's case, imbued Johnson's condition with a sense of urgency, concluding that Johnson is "approaching the will to live."²¹ Chief Judge Conner, emphasizes the importance of Dr. Haney's report in establishing the 'serious conditions of confinement' condition needed to prove a violation of the Eighth Amendment, arguing that it "corroborates" Johnson's "lay" description of his mental health.²²

¹⁴ Ayten Gündoğdu, *Rightlessness in an Age of Rights: Hannah Arendt and the Contemporary Struggles of Migrants* (New York: Oxford University Press, 2015), 110

¹⁵ *Ibid*, 111

¹⁶ Fassin, "Humanitarian Reason," 110

¹⁷ Ticktin, "Casualties of Care," 3

¹⁸ *Ibid*, 7

¹⁹ *Ibid*, 98

²⁰ *Johnson v. Wetzel*, Civil Action No. 1: 16-CV-863 (2016)

²¹ *Ibid*

²² *Ibid*

However, another psychiatric expert, Dr. Pogos Voskanian, drew quite differing conclusions from his evaluation of Johnson's mental state. He argued that Johnson's symptoms do not amount to any "cognizable form of mental illness."²³ The differing conclusions drawn by the psychiatric experts in the evaluations of Johnson are a testament to the slipperiness of the 'suffering body' in legal discourse. Particularly, the line at which bodily suffering is considered 'cruel and unusual,' is not clear-cut. A paradox therefore appears when one uses the suffering body in claims-making: while physical illness is used due to its apparent universal and fixed character, the meaning of the suffering body and bodily integrity is negotiated through social, economic and political contexts.²⁴

We can therefore see that, like cases of contemporary asylum-seekers, solitary confinement litigation attempts to secure the personhood of prisoners by invoking their suffering body. Furthermore, by virtue of their criminal status, prisoners are subject to a culture of suspicion that is also present, albeit in differing ways, in asylum-seeking claims. As delegitimized beings, prisoners under solitary confinement are reliant on the reports of medical and psychological experts to prove their bodily suffering and thus mediate their personhood. This, however, is a precarious process, for as Ticktin argues, the universal suffering body is "imagined."²⁵ What determines the efficacy of claims-making, be it in the asylum-seeker or prisoner cases, are subjective and contextual political conditions. These conditions are left untouched when we invoke the suffering body in claims-making.

The Body as a Site of Resistance

Considering the entrenchment of the suffering body in claims-making described in part II, victims of human rights abuses often use their suffering body beyond litigation, as a site of political resistance to injustice. In particular, bodily self-destruction has been used as a tool to make visible and materialize suffering throughout history. In the context of the prisoner's rights movement hunger striking has consistently been used as a means of protest. Between July 2011 and February 2013 prisoners in California's Pelican Bay State Prison Security Housing Unit (SHU) went on a series of hunger strikes to protest, not just their conditions of confinement, but their presence in solitary confinement based on alleged gang affiliations.²⁶ The strike is known for its relative success. It garnered significant and sustained media attention and the prisoners were able to meet and negotiate with the Undersecretary of Corrections, Scott Kernan. Ultimately, the strike culminated in the issuing of a class action lawsuit on behalf of the Pelican Bay SHU prisoners, *Ashker v. Brown*, which was settled in 2015. However, as will be explained later in this section, the achievements of the lawsuit were relatively limited.

Nevertheless, the Pelican Bay hunger-strike was successful in its ability to externalize suffering under deplorable conditions of imprisonment. This was particularly important considering that, as isolated spaces within already segregated prisons, solitary confinement

²³ Ibid

²⁴ Ticktin, "Casualties of Care," 4

²⁵ Ibid

²⁶ The Center for Constitutional Rights, "Pelican Bay Hunger Strike One Year Later: The Movement Against Solitary Confinement," *The Huffington Post*, November 7, 2014, accessed on December 10, 2016, www.huffingtonpost.com/the-center-for-constitutional-right/pelican-bay-hunger-strike_b_5578295.html

cells are doubly invisible to the public.²⁷ The efficacy of visibility is inextricably connected to the perception that the body and its ability to suffer manifests a common humanity (described in part II). By placing themselves in a state of hunger or starvation, prisoners reduce themselves to the bare minimum of life that we all share. The invocation of bare life implicit in hunger-striking, is particularly powerful in the prison context considering that solitary confinement *aims* to reduce life to mere physical existence. Historically, it was assumed that by instating sensory deprivation and cutting off all forms of “meaningful activity and engagement in the world,” those in solitary confinement can be reduced to *tabula rasa*- “a blank state from which to begin again as a newly made republican machine.”²⁸ This rehabilitative rationale is largely missing in contemporary discourse on solitary confinement. However, proponents of the practice argue that deprivation is not only a fitting form of punishment for those who have violated prison rules, but also necessary to separate these deviants in order to protect the rest of the prison population.

In both cases of rehabilitation and punishment, reducing the conditions of imprisonment to the bare minimum needed to ‘live’ is a means to control the prisoner population. Indeed, expanding on Foucault’s concept of biopolitics, Achille Mbembe argues that the most powerful mechanism of control in contemporary society is found in “necropolitical spaces,” where populations are not killed but “subjected to conditions of life conferring upon them the status of the living dead.”²⁹ Many prisoners in solitary confinement have described their experience in exactly these terms of living death. In the 1840s, Harry Hawser, a poet and inmate in the first solitary confinement prison in the US- Eastern State Penitentiary- described solitary confinement as “a living tomb.”³⁰ After visiting Eastern Penitentiary, Charles Dickens commented that the prisoner in solitary confinement, “is a man buried alive...dead to everything but torturing anxieties and horrible despair.”³¹ More recently, Jack Abbott, who spent much of life in prison, including solitary confinement, described his status vis à vis the state as “a ghost of the civil dead.”³² Thus, by reducing prisoners to bare life, solitary confinement “stalled somewhere between life and death, rendering the distinction almost indiscernible.”³³

Given that this state of bare life- a living death- constitutes the ultimate manifestation of sovereign power and control, hunger-striking as a form of resistance has particular power. By self-inflicting hunger and starvation, prisoners mimic the violence on the body imposed on them by the state.³⁴ In this way, hunger striking is an action that can revert the body from the object of the state to an instrument against it.³⁵ It is an action that seemingly restores individual agency.

²⁷ Keramet Reiter, “The Pelican Bay Hunger Strike: Resistance within the Structural Constraints of a US Supermax Prison,” *South Atlantic Quarterly* 113 (2014): 604

²⁸ Lisa Guenther, *Solitary Confinement: Social Death and its Afterlives* (Minneapolis: University of Minnesota Press, 2013) 14

²⁹ Libby Meintjes Mbembe, “Necropolitics,” *Public Culture* 15 (2003)

³⁰ Guenther, “Solitary Confinement,” 15

³¹ Charles Dickens, *American Notes and Pictures from Italy* (London: Oxford University Press, 1957), 100

³² Guenther, “Solitary Confinement,” xxvii

³³ *Ibid*, 17

³⁴ Bargu Banu, *Starve and Immolate: The Politics of Human Weapons* (New York: Columbia University Press), 80

³⁵ *Ibid*

This invocation of the suffering body is seen outside of the organized resistance movement and in the individual actions of supermax prisoners. For example, it is not uncommon for those living in solitary confinement to smear their bodily fluid, particularly faeces, on the walls of their cell. By doing so, prisoners theatrically, and tragically, draw attention to their corporeality: “prisoners and their keepers [are] in a persistent round of dirtying and cleaning and keeping everyone engaged in this aversive corporeal ‘conversation’”³⁶ In other words, like hunger-strikers, individual prisoners in solitary confinement are able to weaponized their bodies against the conditions that are imposed on them by the state.³⁷

Whilst there is great power in weaponising the physical body against the violence of the state. Such bodily forms of resistance ultimately narrow the scope of contestation. Esmail Nashif argues that in the case of Palestinian political captives, hunger-striking was perceived as the ability to regain control over one’s material body, thereby subverting the authority of the Israeli state. Ultimately, however, the demands of the prisoners- permission to grow beards and moustaches; reducing overcrowding in cells; stopping the use of violence and improving the quality of the food- focused on the material conditions of imprisonment as opposed to challenging the very foundations of political power that is responsible for their imprisonment. Thus prisoners failed to make the distinction “between control over the body, and control over the environment of the body.”³⁸

We can also see the limitations of the suffering body in claims-making when we consider the demands of the Pelican Bay hunger-strikers. Rather than demanding for the destruction of SHU or the release of those hunger-striking from the SHU, the prisoners’ demands, like their resistance, centred around the physical body. They asked for better food and warmer clothing. Beyond these immediate corporal concerns, the hunger-strikers demanded privileges that would make life in solitary confinement more manageable. For example, they asked for a handball in the SHU exercise yard, wall calendars and access to proctored exams. In other words, employing the individual suffering body as a form of resistance, ultimately produces individual gains as opposed to systematic overhauls. Keramet Reiter, dubs this the “legitimacy paradox”, whereby, “prisoners condemned their individualized conditions of confinement, without condemning the legitimacy of the broader prison system imposing these conditions.”³⁹

Solitary Confinement in Context: Injustice of the Carceral State

Using Robert Nozick’s famous thought experiment, the ‘experience machine,’ George Wright argues that solitary confinement is not unjust due to the physical and psychological affects that it causes, but rather due to its violations of “human dignity.” He argues that even it were technologically possible to overcome the psychologically harmful effects of solitary

³⁶ Lorna A. Rhodes, *Total Confinement: Madness and Reason in the Maximum Security Prison* (Berkeley: University of California Press, 2004), 48

³⁷ It would be wrong romanticize the actions of these prisoners by implying that they constitute conscious political resistance per se. Smearing faeces is an act of total desperation and more often than not a sign of mental illness. However, whether conscious or unconscious, political resistance or mental illness, the invocation of bodily fluids during confinement recognizes the centrality of the physical body in invoking a common humanity.

³⁸ Esmail Nashif, *Palestinian Political Prisoners: Identity and Community* (London: Routledge, 2008), 52

³⁹ Reiter, “The Pelican Bay Hunger Strike,” 581

confinement, the practice would still entail the “forfeiture of human dignity.”⁴⁰ For Wright, ‘human dignity’ is inextricably linked to the meaningful activities and commitments inherent in a social life.⁴¹ Whilst his thesis is ultimately flawed since it too essentialises the human condition, his insight is valuable to understanding the limits of the cruel and unusual punishment defence. This section argues that the reason for this limitation is that the suffering body does not acknowledge, and therefore challenge, the wider *political* context for contemporary solitary confinement: mass incarceration and the hyperincarceration of people of colour.⁴²

In explaining the connection between solitary confinement and mass incarceration, it is useful to briefly trace the genealogy of the practice in the US. The first solitary confinement penal institution was Eastern Penitentiary in Pennsylvania in around 1829. Under this penal system, men were kept in eight-by-twelve foot cells for twenty-three hours a day where they were expected to do “honest work,” such as shoemaking, weaving and other manual labour.⁴³ One hour a day was dedicated to exercise in an adjoining yard. The prisoners had minimal physical and visual contact with anyone and had to wear a hood when moved out of the cell to further reduce the chances of interaction.⁴⁴ The penitentiary was designed with two main rationales in mind. Firstly, in a somewhat ironic way, it was seen as a humanitarian alternative to the punishment system of public humiliation, torture and executions that were prevalent under British colonialism. Secondly, it was founded on the Quaker reformist mentality which emphasised redemption and rehabilitation.⁴⁵ Crucially, however, the new punishment project of Eastern Penitentiary was short-lived. Under growing criticism that the institution was both immoral and ineffective, as well as series of formal investigations into the prison’s punishment practices that began in 1834, solitary confinement practices broke down by the 1870s and were officially abandoned in the prison in 1913.⁴⁶

Solitary confinement largely disappeared from domestic US punishment practices for nearly a century, before it was brought back in the 1970s. A defining moment in the re-institutionalisation of solitary confinement was the death of Black Panther George Jackson.⁴⁷ After Jackson was shot by San Quentin prison guards in 1971, a series of prison riots broke-out across the US. The most well-known of these was at Attica State Prison in New York, where prisoners staged a four-day takeover which ended in the deaths of thirty-nine people after state troopers and the National Guard opened fire in the prison yard.⁴⁸ In order to control these ‘dangerous’ forces in prison, and prevent riots from happening again, states began

⁴⁰ George Wright, “What (Precisely) is Wrong with Prolonged Solitary Confinement?” *Syracuse Law Review* 64 (2014): 298

⁴¹ *Ibid*, 311

⁴² Eastern State Penitentiary, “History of Eastern State Penitentiary: Timeline,” accessed December 13, 2016, www.easternstate.org/learn/timeline

⁴³ *Ibid*

⁴⁴ *Ibid*

⁴⁵ Guenther, “Solitary Confinement,” 3

⁴⁶ Eastern State Penitentiary, “Timeline,” <https://www.easternstate.org/learn/timeline>

⁴⁷ It is important to note that solitary confinement had been used before this event, indeed, at the time of his death, George Jackson was being held in isolation awaiting trial on charges that he had murdered a prison guard. However, it is only after this event that solitary confinement was employed on a systematic level, with the proliferated construction of supermax SHU prisons.

⁴⁸ Larry Getlen, “The True Story of the Attica Prison Riot,” *New York Post*, August 20, 2016, accessed December 14, 2016, nypost.com/2016/08/20/the-true-story-of-the-attica-prison-riot

using solitary confinement in prisons to control deviant prison populations and political ‘radicals.’ These new forms of imprisonment were named supermax prisons.⁴⁹

One such supermax prison was Marion Penitentiary in Illinois. Shortly after Jackson’s murder, around a hundred federal prisoners who were considered “disruptive of institutional authority,” or who held radically political views, were transferred from prisons across the country to Marion.⁵⁰ Crucially, however, these prisoners were not moved as a punishment for violent actions or because they violated prison rules. Rather, “solitary confinement at Marion became a veritable behavioural modification system, replete with operant conditioning therapy intended to break down pre-existing patterns of thought and action.”⁵¹ Psychologists such as Edgar Schein, a professor at Massachusetts Institute of Technology, drew on their research of ‘brainwashing’ techniques used on U.S prisoners of war in Korea to develop a program for US inmates that aimed to change the behaviour and attitude of prisoners.⁵² According to Schein, in order to achieve this “it is necessary to weaken, undermine or remove the supports to the old pattern of behaviour and the old attitudes.” Thus, isolation was used to break or weaken social and emotional ties by segregating leaders and undermining group solidarity.

Contemporary solitary confinement is therefore inextricably connected, not only to a resistance against the prisoners’ right movement, but also to minority liberation movements more broadly. In this way, consistent with Mbembe’s previous comments on ultimate power being manifested in “necropolitical spaces,” the deployment of living death- through solitary confinement- is the state’s strategy to tighten their grip on ‘radical’ inmates. This context gives us new insights to Jackson’s case. His prison was part of a larger trend of prison rebellions in the 1970s. Furthermore, at the time of his escape attempt, Johnson “began running with imprisoned members of the black liberation movement,” thereby making him “a target for severe state repression.”⁵³

It would be a misconception to argue that contemporary solitary confinement is still being used to detain and modify the behaviour of political radicals. Today, solitary confinement is being justified solely on control and containment grounds: “we are living in an era of the control prison, where the immobilisation of inmates has become an end in itself.”⁵⁴ This need for control was of course an inevitable consequence of the earlier movement to change the behaviour of radicals, but it was further entrenched when the incarceration rates of the US ballooned. Since the 1970s the prison population in the US has more than quadrupled, making the US the world’s highest incarcerator. Black Americans have disproportionately been affected by this increase, constituting 37 percent of prison inmates but only 13 percent of the American population. It is estimated that one in six Black men has been incarcerated as of

⁴⁹ Reiter, “The Pelican Bay Hunger Strike,” 582

⁵⁰ <http://www.naacp.org/criminal-justice-fact-sheet/>

⁵¹ Stephen F. Eisenman, “The Resistable Rise and Predictable Fall of the U.S Supermax”, *Monthly Review*, 61, 61 (2009), 35-36

⁵² Edgar Schein, “Man Against Man: Brainwashing” paper presented at “The Power to Change Behaviour Symposium,” proceedings published in *Corrective Psychiatry and Journal of Social Therapy* 8 (1962): 91

⁵³ Coulombis and Dean, “37 Years in Solitary Confinement,”

http://www.philly.com/philly/news/20160615_The_Philly_man_who_s_spent_three_decades_in_solitary.html

⁵⁴ Guenther, “Solitary Confinement,” xvi

2001.⁵⁵ In order to facilitate this expansion and combat the overcrowding in prisons, new prisons were constructed at a fast pace. Indeed, between 1990 and 1995, Corrections officials built 213 state and federal prisons, many of which were supermax prisons including solitary confinement cells. As Amnesty international notes, “the growth of super-maximum security facilities has been linked to the huge rise in the numbers of people incarcerated in the USA from the late 1970s onwards.”⁵⁶ We can therefore see that tracing the genealogy of solitary confinement within the wider genealogy of incarceration reveals a crucial fact: their developments have risen and fallen in near parallel. Solitary confinement was attached to the birth of the penitentiary. It largely disappeared when the prison population was low and an emphasis on rehabilitation, vocational training and education in prison was common. With the rise of mass incarceration and overcrowding in prisons, solitary confinement was institutionalised through the construction of supermax prisons.

Given these roots of solitary confinement and mass incarceration, it is unsurprising that Black individuals are more likely to receive solitary confinement sentences and that these sentences tend to be longer than those imposed on their White counterparts.⁵⁷ For example, in New York, 62 percent of individuals held in Upstate and Southport correctional facilities, where individuals with the longest SHU sentences are incarcerated, are Black. By contrast, approximately 49 percent of the general prison population is Black.⁵⁸ Furthermore, a study of the New York City jail system found that African Americans were less likely to be admitted to the jail system’s mental health service. Specifically, African Americans comprised 40 percent of the study population but only 16 percent of the mental health patients. Comparatively, 22 percent of the mental health patients were white even though they only made up 9 percent of the study population.⁵⁹

It is therefore clear that the modern form of solitary confinement was an explicitly political project, which aimed to control a whole group that challenged the social order. Thus, solitary confinement “creates its own rational; it is not a solution to incorrigibility, but a justification of the penal state.”⁶⁰ This raises important questions as to how we should organise to eradicate the practice. If we understand solitary confinement and mass incarceration to be two sides of the same coin, then the removal of solitary confinement from the U.S. criminal justice system is contingent on the eradication of mass incarceration and vice versa.

Conclusion

Solitary Confinement has thus far been challenged under cruel and unusual punishment grounds. Intrinsic to this notion is that our common humanity is based on our bodily ability to suffer. By invoking this premise under litigation, however, we render the personhood of

⁵⁵ Amnesty International, “USA: The Edge of Endurance,” (2012), www.amnestyusa.org/sites/default/files/edgeofenduracecaliforniareport.pdf

⁵⁶ Ibid

⁵⁷ Margo Schlanger, “Prison Segregation: Symposium Introduction and Preliminary Data on Racial Disparities,” *Michigan Journal of Race & Law* 18 (2013): 242. Due to the invisibility of those sentenced to solitary confinement, there is very little statistical evidence on the demographics of the population.

⁵⁸ Second Amendment Complaint, *People v. Fischer*, 33

⁵⁹ Eichelberger, “How Racist is Solitary Confinement”

⁶⁰ Eisenman, “The Resistable Rise”, 31

prisoners precarious to the whims of psychiatric and medical experts, and their ability to judge not only what constitutes suffering but to what extent this suffering is ‘cruel.’ In resistance efforts, prisoners under solitary confinement have been able to invoke elements of bare life such as hunger, or bodily waste, to draw attention to their status as suffering humans. In so doing, prisoners subvert the conditions of bare life intrinsic to the functioning of solitary confinement for their own ends, as well as make themselves visible to the public. Crucially, however, focusing on the body limits the changes that can be achieved; because on the conceptual as well as the material level, the valorisation of the suffering body implicitly accepts the separation of the biological from political existence.⁶¹ Indeed, in both litigation and organised resistance efforts, the political aspect of solitary confinement as a mechanism of social control is missed.

It is important to emphasise at this point that, whilst this paper aimed to critique the centrality of the physical body in solitary confinement claims-making, it should not be seen as an attack on the lawyers and prisoners who are actively struggling against the solitary confinement system. These actions are extremely important and have achieved marked results. Furthermore, it is undeniable that solitary confinement *does* constitute a grave form of torture. However, this paper aimed to show that lawyers, activists and prisoners are ultimately constrained by a legal discourse that valorises the physical and suffering body, and therefore falsely assumes that the ‘body’ is a natural, fixed and apolitical concept. In so doing, they are unable to challenge the wider context of solitary confinement, an explicitly political project of mass incarceration which disproportionately affects people of colour.

⁶¹Bargu Banu, *Starve and Immolate: The Politics of Human Weapons* (New York: Columbia University Press), 80

ACHIEVING HARMONISATION ON PUBLIC POLICY AND ARBITRABILITY

Hasanali Pirbhai

Introduction

Harmonisation of public policy and arbitrability is indeed achievable - and may be well underway - because of the effect of globalisation and regulatory competition on international commercial arbitration. It should be noted that this piece is framed in the context of the arbitrability and public policy exceptions in Art V of the New York Convention and Art 36(1)(b) of the Model Law.

To prove my argument, this piece will start by defining the two concepts and show that arbitrability lies in the domain of public policy. I will then analyse, with the help of academic commentary, the effect that globalisation has had on international arbitration in the context of public policy. This will be followed with a discussion of case law across multiple jurisdictions to show how globalisation has affected the scope of public policy and arbitrability. I will then explain that harmonisation of these two concepts can be achieved through regulatory competition amongst states, followed by a brief conclusion.

By the end of my piece, I hope to convince you of the following points: first, globalisation has resulted in the liberalisation of the scope of arbitrability whilst restraining the scope of public policy. Secondly, regulatory competition might have a role to play and could potentially result in the harmonisation of the two concepts despite that not being the current aim of states.

What do arbitrability and public policy mean?

Arbitrability and public policy arise when it comes to enforcement. They allow national courts (by virtue of the New York Convention or the Model Law) to refuse enforcement if they deem the subject matter not arbitrable or against public policy.¹ It is first important to consider what is meant by arbitrability and public policy.

Arbitrability can usually be defined as whether or not the subject matter at hand can be submitted to arbitration under the national law of the state.² For example, most if not all states would allow an arbitration regarding a CISG contract, however there is no state that would allow matters of criminal law to be submitted to arbitration. This is because the latter is considered the domain of the national courts.³ Given that it is jurisdictional in nature means that what is arbitrable in one state may not be arbitrable in another.

Public policy on the other hand is not so easy to define. A judge has likened it to an *“unruly horse that once you get astride it you never know where it will carry you. It may lead you from*

¹ New York Convention Art V (2) reads

“Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or (b) The recognition or enforcement of the award would be contrary to the public policy of that country.”

Model Law 1985 Art 36 (1)(b) reads

“Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only: (b) if the court finds that: (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or (ii) the recognition or enforcement of the award would be contrary to the public policy of this State.”

² Lew J, *Comparative International Commercial Arbitration* (2003, Kluwer Law International), at 188

³ *ibid*

sound law”.⁴ Whilst scholars too have used similar words with one referring to public policy as “*one of the most elusive and divergent notions in the world of juridical science*”.⁵ Others have suggested that public policy is difficult if not impossible to define or that the definition is ambiguous.^{6 7} Clearly, the definition of public policy is not clear cut.

If we turn to the Oxford Dictionary for guidance, we learn that public policy is “*the principles, often unwritten, upon which social laws are based*”.⁸ We can draw two things from this definition; first, it being unwritten would mean that we cannot point out exactly what these principles are. Secondly, being related to social laws means its interpretation may differ depending on the values of each individual country, and may change overtime.⁹ Therefore, what is considered public policy in one state may be entirely different in another state with a different economic, political, religious, or social, and therefore, legal system.¹⁰

In short, public policy, although not easily defined, is different in each state, relative, and dynamic in the sense that it changes over time.

Are arbitrability and public policy linked?

Arbitrability and public policy are mentioned separately in the New York Convention and the Model Law, and some scholars have suggested that the two concepts are mutually exclusive.¹¹ The suggestion is that inarbitrability relates more to the natural limitations of arbitration as a dispute resolution mechanism rather than public policy. The example given is that insolvency matters are not arbitrable because it would be impossible to bring all concerned third parties (creditors) to arbitration.¹² I disagree with this view because it can equally be argued that the notion of not bringing a third party (or a creditor in this example) is based on the importance of consent, which is of primordial importance in international commercial arbitration.¹³ I would instead suggest that arbitrability is linked to public policy. This is not to say the latter is a synonym for the former, but rather that arbitrability forms part of the domain of public policy and can be influenced by it.¹⁴ This view encompasses jurisdictions (mainly civil law

⁴ Richardson v Mellish [1824] 2Bing 229, at 252

⁵ De Enterria J, *The Role of Public Policy in International Commercial Arbitration*, (1990) 21Law&Pol’y.Int’l.Bus 389, at 401

⁶ Mistelis L, *Arbitrability: International and Comparative Perspectives*, (2009, Kluwer Law International), at 2

⁷ Tang ZS, *Jurisdiction and Arbitration Agreements in International Commercial Law*, (2014, Routledge), at 94

⁸ Oxford Dictionary, Public-Policy <<http://www.oxforddictionaries.com/definition/english/public-policy>>

⁹ *For example, in the 20th Century alone, Germany has gone from being a monarchy, to a dictatorship, to being split into two, to a democracy. The social values between Nazism and the modern German democracy are wholly different.*

¹⁰ Böckstiegal KH, *Public Policy As a Limit to Arbitration and its Enforcement*, (2008) 2 Disp. Resol. Int’l 123, at 124

¹¹ See generally Brekoulakis S, *On Arbitrability: Persisting Misconceptions and New Areas of Concern* (2009)

¹² *ibid*, at 32, where he says “*Given the fact that third-party proceedings are generally not accepted in arbitration, third-party creditors would not be able to take part in bilateral proceedings between the trustee or the administrator and one of the several creditors. Therefore, it would be very difficult to determine the order in which the several creditors would be paid, and the allocation of the available funds to the several creditors, especially if some of the claims are contested. Thus, the purpose of the insolvency legislation (namely, the allocation of the limited funds to the several creditors in accordance with the security that each of the creditors had originally obtained) might be defeated, because of the contractual limitations of arbitration.*”

¹³ Redfern A, *Law and Practice of International Commercial Arbitration* (2004, Sweet and Maxwell), at 131

¹⁴ Böckstiegal KH, *supra* note 10, at 126

ones) that delineate inarbitrability using criteria related to public policy,¹⁵ and sits with the historical development of arbitration in the sense that courts once geographically restricted arbitrability and did not allow arbitration for anything that happened within its borders.¹⁶ For instance, it was only after the end of the Second World War that attitudes (and thus public policy) towards arbitration started changing in order to address the needs of commercial parties.¹⁷ Therefore, a change in public policy produced a change arbitrability. This shows that the two concepts are not mutually exclusive and are in fact linked. In other words, arbitrability lies in the domain of public policy.

The problem with this is that if public policy is indeed relative, dynamic, and undefinable as previously suggested, then the result would be that the concept of arbitrability could end up rather vague. This would be problematic for commercial parties that rely on certainty to sleep well at night. Whilst this is true, it need not be a worry for commercial parties because globalisation has affected the public policy of most (if not all) countries.

What effect has globalisation had on international arbitration?

Our world is increasingly connected. Trade happens across borders in a variety of different time zones. It has been suggested that the philosophical underpinnings of globalisation are the freedom to trade, freedom to invest capital, and freedom of establishment of business in other countries.¹⁸ From an economic perspective, globalisation has been defined as the “*diminution or elimination of state-enforced restrictions on exchanges across borders and the increasingly integrated and complex global system of production and exchange that has emerged as a result*”.¹⁹ In essence, economic globalisation has undermined (and even eroded) state sovereignty in our era.²⁰

Whilst participation in international commerce is seen by most countries as a desirable objective to ensure economic prosperity, international commercial arbitration is perceived as an essential ingredient when pursuing commerce across borders.²¹ However, international commercial arbitration necessitates the erosion of state sovereignty. It is the almost Faustian contract where the state, in the interests of potential economic prosperity, sign away the right of its judiciary to rule on disputes that may concern it. It requires a shift in public policy.

This is in no way a bad thing. The framework of international commercial arbitration has made a positive contribution to the diminution of barriers to free trade (and arguably increased economic prosperity). It has given commercial parties the freedom to structure their business relationships and related dispute resolution mechanisms. It can be perceived as part of a larger movement to promote reforms and facilitate international commerce whilst avoiding parochial discrimination by states.²² , it has filled the void that came with globalisation, and has provided

¹⁵ See for example Belgian Judicial Code Art. 1676(1); The Netherlands Arbitration Act Art. 1020(3); Italian Code of Civil Procedure Art. 806; Greek Code of Civil Procedure Art. 867; and French Civil Code 2060

¹⁶ Lew J, *Achieving the Dream: Autonomous Arbitration*, (2006) 22 *Arb Int'l* 179, at 183

¹⁷ *Ibid*, at 184

¹⁸ Gibson C, *Arbitration, Civilization and Public Policy: Seeking Counterpoise between Arbitral Autonomy and the Public Policy Defense in View of Foreign Mandatory Public Law*, (2009) 113 *Penn St. L. Rev.* 1227, at 1238

¹⁹ Gibson C, *supra* note 18, at 1239

²⁰ Lynch K, *Forces of Economic Globalization: Challenges to the Regime of International Commercial Arbitration*, (2003, Kluwer Law International), at 37

²¹ Carbonneau T, *The Ballad of Transborder Arbitration*, (2001-2002) 56 *U. Miami L. Rev.* 773, at 795

²² Gibson C, *supra* note 18, at 1239

commercial parties with a neutral and flexible dispute resolution mechanism that gives them certainty of what would occur in the event of a dispute.²³

However, whilst arbitration is international in the sense that it has allowed commercial parties to be on “*another plane*” with regards to national regulation, states would not relinquish all sovereignty. This is why the public policy exception exists. Because it is so vague, it allows states to maintain some degree of control vis-à-vis international commercial arbitration and national interests.²⁴ In other words, it is one of the few threads of sovereignty still linking international commercial arbitration to national interests. Hanotiau refers to this as the balance between the jurisdictional theory and contractual theory of arbitration.²⁵ This is because arbitration rests on a private agreement which requires state assistance for the award to be recognised and enforced. However, he also agrees that globalisation has contributed to an erosion in state control and governance vis-à-vis international commercial arbitration.²⁶

Thus far, two suggestions can be made. First, international commercial arbitration is the “*court*” of globalisation. Secondly, the role of public policy with regards international commercial arbitration represents the tension, or pivot point, between sovereign and transnational economic interests.

The second of these suggestions merits further discussion. More specifically, we must ask how states interpret public policy to both maintain some semblance of sovereignty whilst still allowing arbitration to be international and neutral.

Has globalisation changed the concept of public policy?

In both the Model Law and New York Convention, reference is made to the public policy of the state where enforcement is sought. However, given that every state has their own definition of public policy, this creates risk. This is because commercial parties and arbitrators must worry about what the public policy concerns of the enforcement country will be, which is hard enough given that public policy itself is vague and hard to define. Therefore, it is pertinent to ask if states have applied their own narrow interpretation of domestic public policy, or if they have come up with a different interpretation to appease commercial parties engaged in international commercial arbitration. In addressing this question, I shall first look at it theoretically, followed by an examination of case law.

There have been suggestions that states have come up with a concept called “international public policy”.²⁷ It has been differentiated from domestic public policy and is regarded as less rigorous and more narrowly drawn.²⁸ It is so narrowly drawn that some commentators have said that public policy does not seem to be much of an obstacle in international arbitration.²⁹

²³ *ibid*

²⁴ *ibid* at 1240

²⁵ Hanotiau B, *International Arbitration in a Global Economy: The Challenges of the Future*, (2011) 28 J Int'l Arb 89, at 91 where says that: “*according to the contractual theory of arbitration, the jurisdiction of an arbitral tribunal derive solely from the parties’ mutual agreement... On the other hand the jurisdictional theory of arbitration puts the emphasis on the authority and supervisory powers of the state to regulate any international commercial arbitration within its territory*”

²⁶ *ibid*, at 92

²⁷ Lynch K, *supra* note 20, at 133

²⁸ Carbonneau T, *supra* note 21, at 824

²⁹ Böckstiegal KH, *supra* note 10, at 125

Some jurisdictions such as France have a distinction between *ordre public interne* and *ordre public international* with the former applying domestically and the latter applying to recognition of international arbitral awards.³⁰ Whilst countries that lack such a specific provision also recognise the distinction between the two concepts.³¹ For example, the Australian Supreme Court has referred to equivalent concepts of “*supranational public policy*” in its decisions.³² Whilst the American District court of Massachusetts summarised the American position by encouraging an international approach to arbitration rather than a parochial domestic one. It said, “the line of decisions which conclusively tip the judicial scale in favour of arbitration is a line... which enthusiastically endorse an international approach towards commercial disputes involving foreign entities”.³³ Furthermore, the European Court of Justice has also hinted to a narrow application of public policy.³⁴

In its 2002 report on public policy in international commercial arbitration, the International Law Association (ILA) pointed out that a number of courts, legislatures, and commentators have restricted the scope of public policy using “*international public policy*”.³⁵ The ILA thus recommended that international public policy be used in the context of New York Convention and conceptually defined it as comprising “(i) *fundamental principles, pertaining to justice or morality, that the State wishes to protect even when it is not directly concerned; (ii) rules designed to serve the essential political, social or economic interests of the State, these being known as lois de police or public policy rules; and (iii) the duty of the State to respect its obligations towards other States or international organisations*”.³⁶ Whilst the second condition could be thought of as akin to domestic public policy, the first and third conditions limit the scope of the second and thus prevent it from being overly discriminatory and onerous.

At this point, it is important to make a few clarifications. Whilst the ILA report was to do with public policy exception in the New York Convention, I have previously argued that arbitrability and public policy are linked, with the latter affecting the former. Therefore, the narrowing down of the scope of public policy through international public policy in turn affects the scope of arbitrability. In this case, public policy has been narrowed down to increase certainty and encourage arbitration. There is a pro-arbitration stance. My argument is that if there is a pro-arbitration stance in public policy to encourage arbitration, this means that as a result arbitrability will be liberalised. In other words, when the scope of public policy is restrained, more matters are considered arbitrable.

³⁰ Code de Procedure Civil [C. Pr. Civ] s 1498 (1986)

³¹ De Enterria J, *supra* note 5, at 398

³² Wei S, *Rethinking the New York Convention: A Law and Economics Approach*, (2013 Intersentia), at 243

³³ *Sonatrach (Algeria) v Distrigas-Corp* 80B.R.606 (1987)

³⁴ *Krombach v Bamberski*, ECJ Case C-7/98, [2001] 3 WLR 488 at 19, where the court stated that: “*Recourse to the public policy clause in Article 27, point 1 of the Convention (1968 Brussels Convention/1988 Lugano Convention/2001 EC Council Regulation) can be envisaged only where recognition or enforcement of the judgment in another Contracting State would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it infringes a fundamental principle. The infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as being fundamental within that legal order.*”

³⁵ International Law Association, *New-Delhi Conference Report: Committee on International Arbitration* (2002), at 10

³⁶ *Ibid*, at 25

To show this to be true, I will now look at case law from several jurisdictions to show the liberalisation of arbitrability and the narrowing down of public policy. I will show that this is because of a pro-international commerce and pro-arbitration stance in public policy.

How have states liberalised arbitrability and restrained public policy in case law?

The discussion in this section will give examples from several jurisdictions of differing economic strength. This is to show that countries, in the interests of international commerce, have adopted a pro-arbitration stance in their public policy.

America

In the United States, courts have repeatedly limited the role of public policy and liberalised the concept of arbitrability. Whilst doing this they have always made clear that they are acting for the benefit of international commerce. For example, the court in *M/S Bremen*³⁷ said that “*we cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts*”.³⁸ This is a clear indication of a pro-international commerce bias. The court is essentially giving businessmen confidence that the US will not apply its own parochial interpretation of law when it comes to international commerce. The court clearly wants to encourage international commerce.

The *Parsons & Whittemore*³⁹ case shows a clear example of the narrowing down of public policy. Here an agency of the US State Department (Parsons) withdrew funding for a project to construct a paper mill in Egypt due to deteriorations in the relationship between America and Egypt. It is important to mention that this scenario was in the backdrop of Israel’s 6-day war and America’s strong support for Israel. The tribunal found against Parsons, and the latter turned to the US courts asking it to refuse enforcement via the public policy defence under the New York Convention.⁴⁰ The US court agreed with the tribunal and said that “*to read the public policy defence as a parochial device protective of national political interests would seriously undermine the Convention’s utility. This provision was not meant to enshrine the vagaries of international politics under the rubric of “public policy”*”.⁴¹ The court then went on to narrow down the public policy defence and said that it “*should be construed narrowly, enforcement of foreign arbitral awards may be denied on this basis only where the enforcement would violate the forum state’s most basic notions of morality and justice*”.⁴²

What this case demonstrates is that US courts have narrowed down the scope of public policy. This is despite the very clear US national interests in this case given that during the six-day war, Egypt and Israel were at war.⁴³ The public policy defence was narrowed down to “*basic notions of morality and justice*”. Concepts which although vague and subjective, are still

³⁷ *M/S Bremen v Zapata Offshore Co* (1972) 407 U.S. 1

³⁸ *Ibid*, at 1

³⁹ *Parsons & Whittemore Overseas Co. v Societe Generale de L’industrie du Papier* (1974) 508 F 2nd 969

⁴⁰ Harris T, The “Public Policy” Exception to Enforcement of International Arbitration Awards Under the New York Convention,(2007) 24 J Int’l Arb 9, at 12

⁴¹ *Parsons & Whittemore Overseas Co. v Societe Generale de L’industrie du Papier* (1974) 508 F 2nd 969, at 974

⁴² *ibid*, at 973

⁴³ BBC News On This Day, 1969: Israel Launches Attack on Egypt, available at:

<http://news.bbc.co.uk/onthisday/hi/dates/stories/june/5/newsid_2654000/2654251.stm> Accessed on 22nd Dec 2014

narrower than domestic public policy. This clearly shows a pro-arbitration and pro-international commerce stance in US public policy.

With regards to arbitrability, we must turn to the *Mitsubishi*⁴⁴ case for guidance. This case concerned the question of whether a claim under US antitrust laws could be decided in Japanese arbitration proceedings. This was despite clear public policy deeming that arbitration cannot be entrusted to respect US antitrust laws.⁴⁵ The court responded with an emphatic yes and stated that US courts should “*subordinate domestic notions of arbitrability to the international policy favouring commercial arbitration*”.⁴⁶ The court went on to highlight that the “*need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties agreement even assuming that contrary result would be forthcoming in a domestic context*”.⁴⁷

This case clearly shows that US courts have the needs of international commerce on their minds when making decision relating to international arbitration. The decision also delighted commentators that noted what they called a trend towards greater arbitrability of subject matter and highlighted that courts were treating international arbitration less suspiciously.⁴⁸ It also shows that the courts apply a different standard to international arbitration which is not at all similar to the domestic standard. Here the courts have clearly said that the pro-arbitration policy has underpinned their decision. In short, the scope of arbitrability has been affected by public policy.

These cases clearly show that globalisation has affected the public policy of the US. It has resulted in the US taking a pro-arbitration stance in favour of the needs of international commerce. This pro-arbitration public policy has led to the narrowing down of the scope of public policy in the enforcement sense (despite a clear arguable case in the national interest in the *Parsons* case), whilst also allowing for the liberalisation of arbitrability (whilst maintaining antitrust as inarbitrable on the domestic level in the *Mitsubishi* case). Commentators say that such decisions will encourage businessmen to enter the field of international commerce and thus result in an efficient allocation of global resources because they feel confidence that potential disputes will be settled in a neutral forum rather than the other party’s home jurisdiction.⁴⁹

Europe

Europe too has taken a similar pro-arbitration approach. This pro arbitration approach has distinguished the domestic standard from the international standard, and has slowly liberalised the scope of arbitrability, whilst restraining public policy to a definition similar to the US court in *Parsons*.

⁴⁴ *Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc* (1985) 473 U.S. 614

⁴⁵ Posner E, *Arbitration and the Harmonisation of International Commercial law: A Defence of Mitsubishi* (1998-1999) 39 Va. J. Intl 647, at 650

⁴⁶ *Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc* (1985) 473 U.S. 614, at 629

⁴⁷ *ibid*

⁴⁸ Park W, *Private Adjudicators and the Public Interest: The Expanding Scope of International Arbitration* (1986) 12 Brooklyn J Int'l L 629, at 639

⁴⁹ *ibid*, at 640

For instance, a German court said that “*the recognition of foreign arbitral awards thus is governed normally by a less stringent regime than domestic awards*”⁵⁰. A Luxembourg court said that “*public policy intervenes only in its attenuated form and is less stringent than if the case concerned the acquisition of the same rights in Luxembourg*”.⁵¹ An Italian court was more direct and said that “*we must say that where this consistency (between the arbitral award and public policy) is to be examined, reference must be made to the so-called international public policy, being a body of universal principles shared by nations of similar civilization, aiming at the protection of fundamental human rights, often embodied in international declarations or conventions*”⁵² Finally, an English court when considering a contract where bribery was an issue said that “*there are some rules of public policy which if infringed will lead to non-enforcement by the English court whatever their proper law and wherever their place of performance but others are based on considerations which are purely domestic... contracts for the purchase of influence are not of the former category... contracts for the purchase of personal influence if to be performed in England would not be enforced as contrary to English domestic public policy... where such a contract is to be performed abroad, it is only if performance would be contrary to the domestic public policy of that country also that the English court would not enforce it*”.⁵³

What the above cases show is that European courts are drawing a distinction between domestic and international public policy, and choosing not to apply the former to international arbitration. They are limiting the scope of public policy and telling commercial parties that they will not apply their parochial interpretations of the law to their transactions. They are doing this so as not to hinder international commerce. In other words, they have also taken a pro-arbitration and pro-international commerce stance in their public policy.

This stance has also affected the scope of arbitrability. For example, in the *ECO Swiss*⁵⁴ case, it was understood that the ECJ was allowing the arbitrability of EU competition law.⁵⁵ Some commentators have likened this case to the US *Mitsubishi* case.⁵⁶ In my opinion, this is but a further example of how the scope of arbitrability is expanding when states take a more pro-arbitration and pro-international commerce stance.

However, the discussion thus far has been concerned with countries which are arguably stronger in terms of economic power. To further illustrate my point that when countries take a pro-international commerce stance in their public policy they limit public policy and expand arbitrability, I will now discuss states which are deemed to be economically still developing.

Brazil

Brazil is an emerging economy that forms part of BRICS group of developing nations. The country has experienced a high level of growth since the 1990s and was poised to become one

⁵⁰ [Seller] v [Buyer] Federal Sup Ct Germany, (1992) 27 YB Com Arb 503

⁵¹ Sovereign Participants Int'l SA v Chadmore Devs Ltd, Ct App Luxembourg, (1999) 24a YB Com Arb 714

⁵² Allsop Automatic Inc v Tecnoski snc, Ct App. Milan, (1992) 22 YB Com Arb 725

⁵³ Westacre Investments Inv v Jugoinport-SPDR Holding Co Ltd (1999) QB740 39, at 86

⁵⁴ Case C-126/97 Eco Swiss China Time Ltd v Benetton International NV [1999] ECR I 3055

⁵⁵ Tang ZS, supra note 7, at 100

⁵⁶ Lew J, supra note 2, at 101

of the world's next economic powers.⁵⁷ Therefore, in this era of globalisation it should also be taking a very pro-arbitration stance.

This has been confirmed by one of the co-drafters of the Brazilian Arbitration Act 1996 (BAA) who said "*arbitration has emerged from its cocoon... and is no longer obsolete*".⁵⁸ Whilst the BAA contains reference to domestic public policy,⁵⁹ scholars in Brazil have expressed fears that if the courts were to be too parochial in its interpretation, it would harm arbitration in Brazil and recommended that be interpreted "*in harmony with the best international standards*".⁶⁰ This might prove to be the case.

Brazil ratified the New York Convention in 2002 which has led to an evolution in judicial reasoning. For example, in the *Tremond*⁶¹ case, a party was resisting enforcement because the award did not conform to the mandatory requirements for an arbitral award to be valid as per Article 26(1) of the BAA. The court rejected this and decided that they should not be excessively formalistic.⁶² In the case of *AES Uruguaiana*⁶³ which concerned a state-owned company, the Superior Court of Justice reversed the decisions of the lower courts which barred the state-owned company from denying an arbitration clause. In the case of *Righetti*,⁶⁴ the court said that employment disputes are arbitrable and that the view that labour rights are indispensable is outdated.⁶⁵ This shows that the Brazilian courts are trying to be less parochial and trying to give the impression that theirs is a neutral jurisdiction for arbitration. I would argue that they are doing this because of the economic boom they are experiencing, and they are thus taking a pro-arbitration stance in their public policy which has been reflected in judicial reasoning.

Whilst Brazilian scholars admit that the formulation of public policy is still in its embryonic stages in Brazil, they point out that recent cases show some fragments of the concept of international public policy.⁶⁶ However Brazil does have a long way to go. What this shows is the possible start of Brazil recognising international public policy and curtailing domestic public policy in favour of arbitration and the needs of its economy with regards to international commerce. As this happens, the scope of arbitrability will increase.

Whilst this is true in Brazil as a developing country, commentators have suggested a similar trend in third world nations. They have suggested that whilst certain third world countries maintain a degree of ambivalence towards arbitration, this is mainly due to past experiences rather than true reflections of present or future attitudes.⁶⁷ It has been suggested that these countries are altering the way they protect "*national interest*" so as not to conflict with their

⁵⁷ Adrogué R, Brazil's Long-Term Growth Performance— Trying to Explain the Puzzle, IMF Working Paper WP/06/282

⁵⁸ De Oliveira L, International Public Policy and Recognition and Enforcement of Foreign Arbitral Awards in Brazil, (2013) 1 J Int'l Arb 49, at 50

⁵⁹ Article 39, Brazilian Arbitration Act 1996

⁶⁰ De Oliveira L, supra note 58, at 57

⁶¹ *Tremond Alloys and Metals Corp v Metalubos Industria e Comercio de Metais Ltda*, SEX 760/EX Special Court of the Super Court of Justice, June 19 2006

⁶² De Oliveira L, supra note 58, at 64

⁶³ *AES Uruguaiana Empreendimentos Ltda v Companhia Estadual de Energia Eletrica- CEEE*, Special Appeal No.612.439/RS Second Chamber of the Superior Court of Justice, Sep 14 2006

⁶⁴ *Righetti v Organizacao das Naco Unidas*, reported in Tang ZS, supra note 7, at 101

⁶⁵ Tang ZS, supra note 7, at 101

⁶⁶ De Oliveira L, supra note 58, at 69

⁶⁷ Mistelis L, supra note 6, at 61

commitment to international arbitration.⁶⁸ I would suggest that as their economies pick up, they too will enter the embryonic stage that Brazil is at, and emerge with liberal doctrines similar to the US and Europe.

Other countries

I will now briefly give a quick overview of other countries that have limited the scope of public policy because of a pro-arbitration bias. My intention here is to show that this is the norm.

In the *Adviso NV*⁶⁹ case, a Korean court said that “*due regard should be paid to the stability of international commercial order, as well as domestic concerns, Article V (2)(b) should be interpreted narrowly*”.⁷⁰ In the New Zealand case of *Amaltal*⁷¹ the court made express reference to the narrow interpretation of public policy in *Parsons* and concluded that its function was restricted to examining issues that raised an essential principle of law and justice.⁷²

Courts in Hong Kong have thus far followed the ILA recommendations when interpreting public policy despite the fact that their laws make express reference to domestic public policy.⁷³

Whilst in the UAE, commentators have suggested that since ratifying the New York Convention, the state would most probably be taking a pro-arbitration stance despite what could be regarded as rather parochial precedent.⁷⁴ This is especially because of the creation of the Dubai International Financial Centre (DIFC) in which the judges sitting are internationally respected jurists.⁷⁵ I would suggest this is because Dubai wants to be seen as neutral and friendly towards international commerce and is thus trying its best to give commercial parties confidence in their legal system.

What does all this show?

What the approach in all these jurisdictions show is that with the advent of globalisation, states are taking a pro-arbitration stance to encourage international commerce. This stance leads to the restraining of domestic public policy (and instead opting for international public policy) and the increase in the scope of arbitrability.

Whilst a lot of my discussion has been about public policy, it is important to remember that public policy affects arbitrability. Commentators have suggested that there is a trend to extend the scope of arbitrability to provide certainty to commercial parties, and some have advocated that all matters be considered arbitrable unless there is international public policy against it.⁷⁶

I would argue that as globalisation increases, and a state’s economy gets stronger, it may be in a state’s best interest to do as the US and Europe have done.

⁶⁸ *ibid*

⁶⁹ *Adviso NV v Koreak Overseas Construction Corp*, Sup Ct Korea, (1996) 21 YB Com Arb 195

⁷⁰ *ibid*

⁷¹ *Amaltal Corp Ltd v Maruha (NZ) Corp Ltd* (2004) WL 234 (2nd Cir ct) 871

⁷² Ozumba O, *Enforcement of Arbitral Awards: Does the Public Policy Exception Create Inconsistency?* (2009), at 16 Available at: <www.dunde.ac.uk/cepmlp/gateway/files.php?file=cepmlp_car13_8_127246631.pdf> Accessed 20th December 2014

⁷³ Van Den Berg AJ, *New Horizons In International Commercial Arbitration and Beyond*, (2005, Kluwer Law International), at 288

⁷⁴ Al-Nassair M, *The Effect of Public Policy on the Enforcement of Foreign Arbitral Awards in Bahrain and UAE*, (2013) 88Int’l.Arb.L.Rev1, at 6

⁷⁵ *ibid*, at 7

⁷⁶ Tang ZS, *supra* note 7, at 102

Whilst I have shown that globalisation leads to a restriction in public policy and expansion in arbitrability, it is now important to ask why this happens. What actually causes this, and how will this potentially lead to harmonisation?

What role does regulatory competition play?

Regulatory competition is the phenomena in which nations reform their laws in order to be more competitive with other nations.⁷⁷ The main aim behind this is to attract business activity to their jurisdiction.⁷⁸ This has been studied in the context of arbitration with regards to the selection of the seat of arbitration.⁷⁹ Empirical research has generally found that countries who modernise their arbitration laws generally experience significant increases in arbitration proceedings held in that country.⁸⁰

Whilst this is perhaps true for procedural arbitration law, I would suggest that it might hold true with regards to arbitrability and public policy. In other words, in a globalised world, states compete with other states to deregulate their laws and increase the scope of arbitrability and restrain public policy to attract commercial parties to do business in their jurisdiction. However, my argument is that whilst they continuously compete with each other, they may end up in a situation where they all treat arbitrability and public policy the same despite never having intended harmonisation of these concepts.

This idea is not new. It has been studied extensively in the context of corporate law and is commonly referred to as the “*Delaware effect*” or the “*race to the bottom*”.⁸¹ This refers to Delaware’s liberal corporation law which was used to attract businesses, and the academic criticism that it would spark a domino effect of liberalisation of corporation law amongst US states, which would in turn harm consumers despite being extremely beneficial for commercial parties.⁸² However, I will not enter into a discussion regarding the criticism of the Delaware effect, I merely want to point out that this effect exists.⁸³

This effect has a role to play in the potential harmonisation of arbitrability and public policy. In the previous section I have shown that globalisation is affecting the scope public policy and arbitrability. These states want to attract business. For example, I have shown that Brazil is in the embryonic stages of changing its conception of public policy in arbitration. This is because it wants commercial parties to view Brazil as a jurisdiction with favourable laws. Given that arbitration is the court of globalisation, it only makes sense for it modernise its arbitration laws. The US and Europe are already economically powerful and thus have favourable laws. My argument is that the “*race to the bottom*” will take place (or is perhaps already happening) with regards to arbitrability and public policy. Whilst states race to the bottom they will unwittingly

⁷⁷ Carbonneau T, *Cases and Materials on the Law and Practice of Arbitration* 2nd Edition, at 1143

⁷⁸ Drahozal C, *Towards a Science of International Arbitration: Collected Empirical Research* (2004, Kluwer Law International), at 167

⁷⁹ Drahozal C, *Regulatory Competition and the Location of International Arbitration Proceedings*, (2004) 24 Int’l Rev L & Econ

⁸⁰ Drahozal C, *ibid*, at 14

⁸¹ Clary W, *Federalism and Corporate Law: Reflections Upon Delaware*, (1973-1974) 83 Yale L.J. 663, at 666

⁸² *ibid*, at 665

⁸³ *For greater discussion of the Delaware effect see: Fischel D, The “Race to the Bottom” Revisited: Reflections on Recent Developments in Delaware’s Corporation Law*, 76 NW. U. L. Rev. 913 (1982); Adler B *On the Delawarization of Bankruptcy Debate* (2003) 52 Emory L.J. 1309

For discussion of regulatory competition in arbitration see generally: Lynch K, supra note 20

converge at a point where their laws are similar. This is because regulatory competition is, in my opinion, a by-product of globalisation.

Examples of the possibility of this convergence can be seen with public policy already being construed as international public policy and “*fundamental principle of morality and justice*” across several jurisdictions. With regards to arbitrability, the conception is slowly being liberalised. My opinion is that whilst states race to the bottom with regards to arbitrability, they will not give up on jurisdiction of certain issues (like criminal proceedings). Thus, they may emerge all having the same view on what is arbitrable and what is not. Harmonisation is thus in the realm of possibility; it is achievable thanks to regulatory competition.

Conclusion

This piece has demonstrated that the concept of arbitrability lies in the domain of public policy and that a change in public policy affects arbitrability. With this in mind, I have shown that the advent of globalisation has made most states take a pro-arbitration stance to allow for economic prosperity. This pro-arbitration stance has liberalised arbitrability allowing most issues to be considered arbitrable. Public policy on the other hand has been reduced to encompass morality and justice. I have used examples from the US, Europe, Brazil, and other jurisdictions to show this effect.

Finally, I have argued that harmonisation of arbitrability and public policy is achievable via regulatory competition amongst states to attract commercial activity to their jurisdiction. This competition could result in states deregulating and emerging with similar conceptions of public policy and arbitrability. Whilst some may not agree that this could happen, this piece has demonstrated that it is at the very least plausible.

HOW THE ICJ HAS INTERPRETED THE CRIME OF GENOCIDE IN RELATION TO THE SPECIFIC INTENTION TO DESTROY, 'IN WHOLE OR IN PART', A PROTECTED GROUP

Jack Duffy

Introduction

This article seeks to analyse the International Court of Justice's (ICJ) interpretation of genocide taking into account the recent conviction of the 'Butcher of Bosnia', Ratko Mladić¹. The judgment in that case revisits the road already trodden by the ICJ and has largely restated the law as has already been decided. This means that *Mladić* adds to the commitment to a special intent requirement for genocide whilst also adhering to interpretations of the words '*in part*' in its definition. The consequence of this is, firstly, that advocates of a knowledge-based approach to genocide will not find any support in the *Mladić* judgment and, secondly, Mladić was not found guilty for Count 1 of his 11 charges. This latter point is in reference to the ICJ's holding that, despite determining that certain physical perpetrators had an intention to destroy the part of the Bosnian-Muslim group in five municipalities², this did not satisfy genocidal intention as that group did not constitute a substantial part of Bosnian-Muslims in Bosnia-Herzegovina as a whole.³ This may be disappointing for those who argue that genocidal intent should not be degraded into a question of arithmetic, however, this decision was unsurprising as it followed the factual and legal precedent already set by the Court.

Intention to destroy

Genocide is a crime that has been referred to as the 'crime of crimes'⁴ due to it being distinguishable from all other international crimes by the requirement that the perpetrator must have specifically intended 'to destroy in whole or in part [a protected group]'⁵. As stated in *Mladić*, in assessing specific intent 'consideration ought to be given to all of the evidence, taken together instead of considering separately'.⁶ While this requires an analysis of the alleged perpetrators mind, evidence of this intention can be drawn from the prohibited acts themselves. However, some commentators have argued that this method of determining *mens rea* is inadequate and that specific intent should be substituted for a knowledge-based approach that requires merely the knowledge one's actions will cause the destruction of whole or part of a protected group in order to secure a conviction for genocide.

One of the arguments for supporting this assertion is that, allegedly, specific intent goes beyond the intentions of the Drafters of the Genocide Convention⁷ or beyond the original interpretation

¹ UN Trial Judgment Summary for Ratko Mladić, 22 November 2017, available at <http://www.icty.org/x/cases/mladic/tjug/en/171122-summary-en.pdf> [accessed 4/2/17]

² *Mladić* Judgment, part 3, 22 November 2017, Case No. IT-09-92-T: 1759 - 1763

³ Ibid: 1801.

⁴ *Kambanda* ICTR T. Ch. 4.9.1998 at [16].

⁵ Ibid; *Kayishema* ICTR T. Ch. II 21.5.1999.

⁶ IT-09-92-T: 1756 at [3435].

⁷ Lippman M '*The Drafting of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide*', [1985] 3 B.U. Int'l L.J. 1,41

as stated by Raphael Lemkin⁸. Lemkin was the architect of the word ‘genocide’ after coining the term in response to Churchill’s reference to Nazi atrocities as a ‘crime without a name’⁹. However, Lemkin’s perception of genocide gave little emphasis towards intent and prioritised the *actus reus* that destroys the ‘essential foundations of the life of national groups’¹⁰. Consequently, combining Lemkin’s conceptual authorship with his extensive literary work clearly adds significance to his version of genocide.¹¹ However, Lemkin’s definition is by no means legally binding, and if it suits international law to develop genocide from its origins then it clearly should.

Nevertheless, any divergence from the intentions of the drafters is more problematic as every interpretation has to abide by the ‘purpose of [the] Convention to prevent the destruction of racial, national, linguistic, religious or political groups of human beings’¹². Therefore, as the distinguishing feature of genocide is the destruction of groups, and not the intention of the perpetrator, then this arguably attracts a knowledge-based approach as it focuses on the material aspect of the crime above a higher *mens rea* threshold¹³. Yet, special intent was also ‘mentioned’ in the drafting of the Convention and neither approach was clearly preferred by the drafters.¹⁴ In fact, there was a ‘vigorous and confused debate over the intent standard that remained alarmingly unresolved at the time of the Convention’s adoption’.¹⁵ Consequently, as neither approach can be convincingly determined from the intention of the drafters, then this argument is not conclusive in its isolation.

A further argument for the knowledge-based approach is that special intent is inappropriate as it introduces ‘a concept not precisely defined [nor] generally accepted in Common Law countries’¹⁶. This is a persuasive argument as the practice of Civil Law countries highlight the difficulty surrounding special intent’s definition. For example, intent in French law has been a consistent source of confusion with courts applying both a strict intent and a wider intent defined as ‘the conscious and voluntary action to violate the law’¹⁷. However, as genocide is a unique crime, it is not unreasonable to expect the ambiguities of intention to be refined in the

⁸ Goldsmith K, ‘*The Issue of Intent in the Genocide Convention and Its Effect on the Prevention and Punishment of the Crime of Genocide: Toward a Knowledge Based Approach*’, [2010] *Genocide Studies and Prevention: An International Journal*: Vol. 5: Iss. 3: Article 3. Available at: <http://scholarcommons.usf.edu/gsp/vol5/iss3/3> : 246

⁹ Sayapin, ‘*Raphael Lemkin: A Tribute*’, *EJIL* [2009], Vol. 20 No. 4, 1157–1162, doi: 10.1093/ejil/chp088 : 1159

¹⁰ Lemkin, ‘*Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress*’, [1944] 79 Second Edition, The Lawbook Exchange,

¹¹ see, *Ibid*; Lemkin, ‘*Genocide*’, 15 *American Scholar* [1946] 227; Lemkin, ‘*The Legal Case Against Hitler*’, *The Nation*, [1945].

¹² The Secretariat Draft of the Genocide Convention, May 1947, Article I(I) ECOSOC, Draft Convention on the Crime of Genocide, UN Doc. E/447 (26 June 1947).

¹³ see Peruvian Delegate, Seventy-First Meeting, UN Doc. A/C.6/SR.71, 3.15pm (Palais de Chaillot, Paris, 11 October 1948).

¹⁴ See Goldsmith, *supra n. 8*: 247

¹⁵ Greenawalt A, ‘*Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation*’, [1999] *Columbia Law Review* 2259: 2266

¹⁶ Triffterer O, ‘*Genocide: Its Particular Intent to Destroy in whole or in part the Group as Such*’, [2001] 14 *Leiden Journal of International Law* 399: 404.

¹⁷ Bartholemy Mercadel, *Recherche sur l'intention en droit penal*, 22 *Revue de Science Criminelle et de Droit Penal Compare* 1,20,31 [1967] (translation by Greenawalt) cited in Greenawalt, *supra n.15*: 2269

court itself. This can be shown by the ICTR's decision to infer intention from 'presumptions of fact' in the absence of a confession.¹⁸ By doing this, the court delineated realistic boundaries for genocide, but also maintained its exclusivity for only those with the highest criminal intent by not completely absorbing a knowledge-based approach. It has been argued that this decision encourages a movement towards knowledge-based intent¹⁹, however, this is difficult to support as the court's decision to sometimes infer a more lenient intention cannot be a reason to weaken the intention requirement in its entirety.

Furthermore, while it is true that Common Law countries often see knowledge and intent as carrying the same value²⁰, this does not necessarily mean that the courts should be dissuaded from seeking a particular *mens rea* when it comes to the 'crime of all crimes' on the international legal plane²¹. As stated by the Trial Chamber in 1999, 'the influence of domestic criminal law practice on the work of the International Tribunal must take due account of the very real differences between a domestic criminal jurisdiction and the system administered by the International Tribunal'²².

The strongest argument for the knowledge-based approach is that genocidal intent is 'a mental factor which is difficult, even impossible, to determine'²³, therefore, this creates evidentiary problems that could lead to culpable perpetrators avoiding liability²⁴. However, while the conviction of Mladić itself contradicts this assertion, this criticism is also undermined by the development of the complicity doctrine that circumvents this issue. As stated in *Semanza and Akayesu*, the accomplice 'need not necessarily share the *mens rea* of the principal perpetrator'²⁵ but if he knew or had reason to know that the principal had the special intent requirement of genocide, then he could be guilty of complicity²⁶. This reduces the *mens rea* standard for the accomplice to essentially a knowledge-based approach, thus providing a solution to the 'evidentiary problems with genocidal intent in general'²⁷ as the knowledgeable actors, who fall short of special intent, could be prosecuted as accomplices. Furthermore, as stated in *Mladić*, if the physical perpetrators of the underlying prohibited acts do not possess the required specific intent 'then the specific intent of an accused and other [Joint Criminal Enterprise] members, if proved, is sufficient'.²⁸ Thus, evidence from only a member of an enterprise is enough to prove the *mens rea* of the whole enterprise.

¹⁸ The Akayesu judgment, Case No. ICTR-96-4: at [523]

¹⁹ see, Totten S, 'Impediments to the Prevention and Intervention of Genocide', [2013] Volume 9 of Genocide: a Critical Bibliographic Review, Transaction Publishers: 82; and Greenawalt, *supra* n.12.

²⁰ Cassese A, 'International Criminal Law', [2008] 2nd ed. (New York: Oxford University Press, 2008): 62

²¹ Damgaard C, 'Individual Criminal Responsibility for Core International Crimes: Selected Pertinent Issues', [2008] Springer, University of Copenhagen: 219

²² Prosecutor v. Miroslav Kvočka et al., Case No.: IT-98-30/1, 'Decision on Defence Preliminary Motions on the Form of the Indictment', T. Ch., 12 April 1999, at [16-17].

²³ ICTR-96-4: 523

²⁴ see Greenawalt, *supra* n.15: 2281.

²⁵ The Prosecutor v. Semanza, Judgement, Case No. ICTR-97-20-T, T.Ch.III, 15 May 2003: at [388].

²⁶ ICTR-96-4

²⁷ Den Herik V and Sliedregt V, 'Ten Years Later, the Rwanda Tribunal still Faces Legal Complexities: Some Comments on the Vagueness of the Indictment, Complicity in Genocide, and the Nexus Requirement for War Crimes', [2004] Leiden Journal of International Law, 17, 537: 550-551.

²⁸ IT-09-92-T: 1756 at [3435].

Fundamentally, the issue turns on the answer to the question posed by Triffterer, ‘[s]hould it not be sufficient that [the perpetrator who] commits a genocidal act just with an ordinary intent “to destroy,” is as punishable as ‘the person motivated by his hate against this group’²⁹? In response to this, specific intent should be differentiated from mere knowledge-based intent in the same way that racially aggravated assault should be viewed differently from mere assault. The discriminatory basis of genocide offends the fundamental values that we have strived to protect and, as a consequence, knowledge-based intent would ‘denature genocide for the sake of encompassing within its terms as many categories and degrees of criminal involvement as possible’.³⁰ As shown by the *Mladić judgment* and the other convictions of genocide, it is certainly possible to find individuals guilty for genocidal crimes. Furthermore, the materialisation of differential attribution in the form of complicity, provides a ‘fair and realistic solution’ to the evidentiary problem while leaving the gravest criminal conviction to those, like Mladić, who most deserve it.³¹

‘in whole or in part’

The insertion of the requirement that the perpetrator intended to destroy ‘in whole or in part’ a protected group has caused considerable controversy. While it is self-explanatory that the desire to destroy the ‘whole’ of a group satisfies a genocidal intent, the meaning of ‘in part’ is less obvious. This is because a literal reading could indicate that targeting a few people for murder, due to their membership of a group, could be seen as genocidal. To take the example of *Krštić*, where it was found that the target of the genocide was Bosnian Muslims³², the evidence pursued was that Krštić did not have the intention to kill the whole of the Bosnian Muslim population but the Srebrenica Muslims who constituted a part of that whole. To determine whether this conformed with the definition of genocide in Article 4 of the Genocide Convention, the ICTY followed the findings in *Jelisić*³³ and *Sikirica*³⁴ that there must be ‘evidence of an intention to destroy a *substantial* number relative to the total population of the group’³⁵. As stated in *Mladić*, in determining substantiality, ‘considerations may include: the relative numerical size of the targeted part, the prominence of the part of the group within the larger whole, and the area of the perpetrators’ activity and control’.³⁶

This is important as if it was purported in *Krštić* that there was an intention to kill ‘Bosnian Muslim men of military age’ then this would not meet the substantiality requirement when

²⁹ Triffterer O, ‘*Genocide: Its Particular Intent to Destroy in whole or in part the Group as Such*’ [2001] 14 *Leiden Journal of International Law* 399: 404-405

³⁰ Mettraux G, ‘*International Crime and the Ad Hoc Tribunals*’ [2005] (New York: Oxford University Press, 2005), 215

³¹ van der Wilt, (2006), ‘*Genocide, Complicity in Genocide and International v. Domestic Jurisdiction: Reflections on the van Anraat Case*’, [2006] *J Int Criminal Justice* 4 (2): 239-257: para 12

³² Krštić Trial Judgment Case No. IT-98-33-T: at [560], Krštić ICTY No. A. Ch. 19.4.2004: at [6]

³³ Jelisić, ICTY A. Ch. 5.7.2001.

³⁴ Sikirica et al. Case No. IT-95-8, ICTY T. Ch. 13.11.2001.

³⁵ Sikirica Judgement on Defence Motions to Acquit, ICTY T. Ch. 3.9.2001: at [65].

³⁶ IT-09-92-T: 1756-1757 at [3437].

measured against the entire group of Bosnian Muslims³⁷. Nevertheless, when considering the intention of the perpetrator, the court has to show an element of realism. For example, when Nazi Germany was at the height of their power there was unlikely to be a realistic intention to exterminate the Jews beyond the edges of Europe³⁸. If the holocaust was measured against the global Jewish population then the likelihood of finding genocidal intent may still be satisfied but would, nevertheless, add uncertainty to the most recognisable genocide in history. In this way, the finding of genocidal intent will ‘always be limited by the opportunity presented to [the perpetrator]’³⁹.

Nevertheless, the *Krštić* decision has been criticised for expanding the crime of genocide and distorting ‘[it’s] definition unreasonably’⁴⁰. As Schabas argued, it was an ‘enormous deduction to make’ when the deaths could be justified for the military reason of killing combatants.⁴¹ While the Trial Chamber explained that the ‘destruction of the group would have a lasting impact on the entire group’⁴², for Schabas, there is a marked difference between the physical destruction of a group and a lasting impact on the group.⁴³ Admittedly, Schabas did not take due account of the evidence used by the ICTY of the transference of women and children from the area to supplement their finding of genocidal intent. However, he is not alone in criticising the legal development of the ‘in part’ proviso as many have perceived its use as widening the scope of genocide too far⁴⁴. Even in the discussions before the Genocide Convention, certain countries saw the ambiguity inherent in the words as potentially leading to a perverse lowering of the crime’s threshold. For example, Belgium stated that genocide had to be solely aimed at the whole group as it would be ‘illogical to introduce into the description of the requisite intention the idea of partial destruction’⁴⁵.

Yet, any questions of expansion in *Krštić* cannot be reiterated in *Mladić* as the ICJ firmly committed itself to previous case law in finding Mladić not guilty for Count 1 of his charges. Count 1 involved the question of genocide in relation to Kotor Varoš, Prijedor Sanski Most, Vlasenica, and Foča Municipalities. The ICJ held that, in relation to these Municipalities, they could find a number of individuals perpetrating prohibited acts with the intention ‘to destroy the Bosnian Muslims in those Count 1 Municipalities as a part of the protected group’.⁴⁶ These acts included ‘killings, causing serious bodily and mental harm, destruction of property, inhumane acts (forcible transfer), and deportation, plunder and appropriation, as well as imposing restrictive and discriminatory measures’.⁴⁷ Judge Orie dissented on this point arguing

³⁷ IT-98-33-T at [18].

³⁸ Ibid at [13].

³⁹ Ibid at [13].

⁴⁰ Schabas W, ‘Was Genocide Committed in Bosnia and Herzegovina? First Judgments of the International Criminal Tribunal for the Former Yugoslavia’, [2002] 25 Fordham International Law Journal at 45-47: 47

⁴¹ Ibid.

⁴² IT-98-33-T: at [595].

⁴³ see Schabas, *supra n. 40*.

⁴⁴ Southwick K, ‘Srebrenica As Genocide? The *Krštić* Decision and the Language of the Unspeakable’, [2005] 8 Yale Human Rights and Development Law Journal 188: 206-11.

⁴⁵ UN Doc A/C.6/SR.73 (Kaeckenbeeck, Belgium).

⁴⁶ IT-09-92-T: 1794 at [3526].

⁴⁷ Ibid: 1791 at [3520]

that ‘the intent to support the moving out of the Bosnian Muslim population so as to create ethnically pure areas, [did not constitute an intention] to destroy a part of the protected group as such’⁴⁸. Nevertheless, this distinction did not materially change the conclusion of the ICJ as the Court was unanimous in the finding that these actions did not constitute genocide as the *mens rea* did not extend to the intention of ‘destroying the Bosnian Muslims and Bosnian Croats as a *substantial* part of the protected groups in Bosnian-Herzegovina’.⁴⁹

In each of the municipalities, the ICJ found that the Bosnian Muslim population was proportionally larger than the Bosnian Muslim population in Bosnia-Herzegovina as a whole⁵⁰. However, the largest Bosnian Muslim population was found in the Prijedor Municipality at 49,700⁵¹ and the Court found that the effect of the prohibited acts on these relatively small groups did not have a substantial impact on the total 1.9 million Bosnian-Muslim population.⁵² For the ICJ, therefore, the substantiality requirement is not satisfied quantitatively nor is it satisfied qualitatively as the perpetrators lacked genocidal intention as the Municipalities were not emblematic in relation to the protected group as a whole.⁵³ This arithmetical determination may be disappointingly arbitrary, however, it lines with previous case law on the issue.⁵⁴ Thus, the ICJ were incapable of departing from what had already been decided. The only possibility to find a genocidal conviction would have been to determine the Bosnian-Muslims proportionally in relation to the Municipality they existed in, however, this would have stretched the definition of genocide too far. This is because it would be geographically unacceptable to distinguish the Municipality from the total territory and is, therefore, unrelatable to the separation of Europe from the world in relation to the Holocaust example made earlier. In order to maintain the potency of a genocidal conviction it is, thus, necessary to persist with this substantiality requirement as interpreted by the Courts.

Conclusion

In its four volumes of some 2500 pages, the International Court of Justice (ICJ) in *Mladić* passed a detailed and illuminating judgment in relation to the crimes that were committed against Bosnian Muslims and Bosnian Croats by Mladić and his military inferiors. Unsurprisingly, the decision has received widespread praise with one survivor of Trnopolje concentration camp stating that ‘Justice has won’.⁵⁵ However, beyond the judgments effect on justice, it offers an influential insight into the crime of genocide itself. Despite criticisms, genocide has maintained the special intent requirement – rather than the knowledge-based

⁴⁸ Ibid: 2477 at [5220] Partially Dissenting opinion of Judge Alphons Orie

⁴⁹ Ibid: 1801 at [3536] emphasis added.

⁵⁰ Ibid: 1796-1800 at [3530-3534]

⁵¹ Ibid: 1799 - 1801 at [3534]

⁵² Ibid: 1796 at [3529], roughly 43.7% of 4.4 million.

⁵³ 1801 at [3535]

⁵⁴ *Jelisić* Trial Judgment, at 82; *Sikirica et al* Judgment on Defence Motion to Acquit, at [76-7]; *Krstić* Trial Judgment, at [585-7].

⁵⁵ Agerholm H, ‘*Fikret Alic: Ratko Mladic's genocide conviction witnessed by subject of infamous Bosnian concentration camp photo 25 years later*’, [2017] Independent Article available at <http://www.independent.co.uk/news/world/europe/fikret-alic-ratko-mladic-conviction-bosnian-war-genocide-serb-general-concentration-camp-photo-a8069801.html> [accessed 4/2/17]

approach– as it maintains the crime’s potency. While proving an individual’s state of mind is extremely difficult, examples like Mladić illustrate is that it is possible to convict high-ranking individuals despite this difficulty in establishing *mens rea*. The preservation of genocide as the crime of all crimes can also be reflected in the substantiality requirement within the meaning of genocide’s ‘in part’ proviso. While it may seem unsatisfying that Mladić was not convicted of all 11 charges (the ‘Butcher’s’ dozen?) maintaining this criterion focuses criminal convictions on those crimes that have devastating effects on the foundation of a group, thus, being faithful to the original definition of the crime.

CRISES IN INTERNATIONAL LAW

Lisa Evans

Introduction

The lens of crises has long been a powerful tool for the development of international law. In recasting complex issues as smaller, bite-sized events, crises can be used to promote substantive change. This essay examines, *inter alia*, the ambiguities within international law that allowed the United States to further arguments of pre-emption following the crisis of 9/11, the epithet of humanitarian intervention in Libya, and the role international law plays, or can play, in relation to structural problems such as poverty. It will ultimately be concluded that the lens of crisis in our discipline means that international law is complicit in overlooking structural problems that pose little threat to the powerful states that benefit from a crisis-focused international law.

The Power of Crises

“A crisis ... always creates opportunities that did not exist before.”¹

As will be explored throughout this essay, framing an event as a crisis “can act as a catalyst or a decoy” which can either prompt or deflect change.² International law operates a crisis-driven hierarchy of urgency whereby issues of war, conflict, and violence are prioritised over structural problems such as poverty.³ There is no doubt that the utilisation of crisis has increased in the aftermath of 9/11, “which suspended the international community into a ... permanent state of catastrophe.”⁴ As a result, the lens of crisis has acted as a justification for unconventional policies.⁵

Crisis as an opportunity

9/11 is an example of how the US framed a crisis into an opportunity to exploit the ambiguities within international law to further arguments of pre-emptive self-defence.⁶ The shock of 9/11 attracted extraordinary media coverage and captivated those who witnessed the horror unfolding live. In witnessing the chaos, the American people turned to the President for reassurance and guidance, who in a series of televised speeches, placed the attacks in an

¹ Barbara Stark, *International Law and its Discontents: Confronting Crises* (Cambridge University Press 2015) 20.

² Benjamin Authers and Hilary Charlesworth, ‘The Crisis and the Quotidian in International Human Rights Law’ (2014) 44 NYIL 19, 22.

³ *ibid* 21.

⁴ Dianne Otto, ‘Queer Feminists’ Perspective of International Law’ in Barbara Stark (ed), *International Law and its Discontents: Confronting Crises* (Cambridge University Press 2015) 115.

⁵ *ibid* 117.

⁶ Peter Amato, ‘Crisis, Terror, and Tyranny: On The Anti-democratic logic of empire’ in Gail Presbey (ed) *Philosophical Perspectives on the War on Terrorism* (Rodopi 2007) 114.

ongoing melodrama of evil versus American virtue.⁷ In a construction of heroes and tyrants, the attackers were framed as “the very worst of human nature” whilst the President praised the bravery and fearlessness of average Americans.⁸ However, Charlesworth’s concerns regarding the assumption of facts can be illustrated, as Bush described the motives for the attacks as an intention “to frighten our Nation into chaos and retreat.”⁹ In doing so, he neglected to address the possibility that the motives could be borne out of a desire to provoke the US into an ill-thought-out counterattack, to destroy the US economy, or as retaliation for US involvement in the Middle East.¹⁰

As identified by Charlesworth, crises prompt two possible courses of action: to act or not to act.¹¹ Following the attacks, the US advanced a new doctrine of self defence and initiated the war on terror. Whilst article 2(4) of the UN Charter prohibits the threat or use of force, the Charter recognises the “inherent right of individual or collective self-defense if an armed attack occurs” and the Security Council’s inherent right to use force as may be necessary to maintain or restore international peace and security.¹² Following the attacks, the US sought to rely on the exception contained in Article 51, stating that it “will not hesitate to act alone, if necessary, to exercise our right of self-defense by acting pre-emptively against such terrorists.” It is worth considering the ambiguities within the UN Charter which allowed for such manipulation.

Proponents of the doctrine of pre-emption rely on Article 51’s inclusion of the word ‘inherent’, which they argue allows for such force via customary international law.¹³ The Caroline incident recognised that anticipatory self-defence may be justified where the threat is instant, overwhelming, and leaving no choice of means, and no moment for deliberation.¹⁴ However, such an approach “requires privileging the word inherent over the plain terms of Article 2(4) ... it requires privileging one word over the whole structure and purpose of the UN Charter.”¹⁵ As such, it is somewhat tenuous to rely too heavily on the use of ‘inherent’. The 9/11 attacks, seen through the lens of crisis, provided the necessary moral cover for pre-emptive military action in Afghanistan, and an opportunity to secure the Shultz Doctrine as widely accepted customary international law.¹⁶ Whilst this pre-emptive right is theoretically available to all

⁷ Craig Smith, ‘President Bush’s Enthymeme of Evil – The Amalgamation of 9/11, Iraq, and Moral Values’ (2005) 49(1) *American Behavioural Scientist* 32.

⁸ George.W.Bush, ‘9/11 Address to the Nation’, <<http://edition.cnn.com/2001/US/09/11/bush.speech.text/>> accessed 15 April 2017

⁹ *ibid.*

¹⁰ n.7, 37.

¹¹ Hilary Charlesworth, ‘International Law: A Discipline of Crisis’ (2002) 65(3) *MLR* 377, 387.

¹² UN Charter, Article 2(4); Article 51; Article 39

¹³ Y.Dinstein, *War, Aggression and Self-Defence* (CUP 2001) 167.

¹⁴ Daniel Webster, ‘Letter to Sir Henry Stephen Fox’ in K.E.Shewmaker (ed), *The Papers of Daniel Webster: Diplomatic Papers, Volume 1: 1841-1843* (Dartmouth College Press 1983) 62.

¹⁵ Mary Ellen O’Connell, *The Power and Purpose of International Law: Insights from the Theory and Practice of Enforcement* (OUP 2011) 174.

¹⁶ Secretary of State George Shultz, during the Reagan’s presidency, argued that increased terrorist threats against the US necessitated a policy of pre-emptive strikes; Michael Byers, ‘Preemptive Self-Defense: Hegemony, Equality and Strategies of Legal Change’ (2003) 11(2) *Journal of Political Philosophy* 171, 179; Jackson Maogoto, *Battling Terrorism: Legal Perspectives on the Use of Force and the War on Terror* (Routledge 2016) 90.

states, it is only of practical use to those with the resources to project military force.¹⁷ As a result, it is inevitable that a handful of powerful states have acquired a greater sphere of legality to intervene abroad.¹⁸ 9/11 allowed the US to become the judge and jury of a system which distinctly favoured its own policies.¹⁹ Cassese recognises that whilst the magnitude of the attacks may warrant the broadening of Article 51, the new conception of self-defence has presented serious problems, which can be seen in the justifications for the 2003 Iraq war.²⁰ Charlesworth criticises crises, as the response usually fails to take account of the broader implications; this is worryingly apparent when considering pre-emptive military action.²¹ In broadening the understanding of self-defence there was a clear failure to consider the potential consequences of states such as China, Pakistan or India following the same paradigm.²² Indeed, “once the door to pre-emptive strikes is open, it can hardly be closed again.”²³

Crisis as a decoy

The lens of crisis was also used to frame NATO’s 2011 intervention in Libya. Military enforcement of a no-fly zone was authorised by the UN in order to protect civilians and to respond to the violence between government and rebel forces.²⁴ In conveying the sense of immediacy, Obama stated “if we waited one more day, Benghazi ... could suffer a massacre that would have reverberated across the region and stained the conscience of the world.”²⁵ Whilst the narrative of intervention was framed in a humanitarian way, it was clear from the early stages there were ulterior motives.²⁶ It has been suggested that by intervening in the Libyan conflict, Western oil interests could be secured.²⁷ Indeed, NATO’s actions in attacking Gaddafi’s hometown of Sirte were more concerned with fostering a regime change not protecting civilians.²⁸ If international law was to follow Charlesworth’s suggestion of studying humanitarian intervention from the perspectives of the Libyan people, it is unlikely that the same conclusion would be reached.²⁹ In a series of demonstrations in Tripoli, Libyans stated

¹⁷ *ibid* Michael Byers, 179.

¹⁸ *ibid*.

¹⁹ Antony Anghie, ‘International Law in a time of change: should international law lead or follow?’ (2011) 26(5) *Am.U.Int’l L.Rev* 1315, 1334.

²⁰ Antonio Cassese, ‘Terrorism is Also Disrupting Some Crucial Legal Categories of International Law’ (2001) 12(5) *EJIL* 993, 997.

²¹ n.11, 384.

²² John Davis, ‘Implications of Preventive Wars for Collective Security’ (2004) 15(1) *Mediterranean Quarterly* 105, 116.

²³ Jackson Maogoto, ‘Rushing to break the law? The ‘Bush Doctrine’ of pre-emptive strikes and the UN Charter on the Use of Force’ (2003) 7 *University of Western Sydney Law Review* 1, 33.

²⁴ Alan Kuperman, ‘NATO’s Intervention in Libya: A Humanitarian Success?’ in Aidan Hehir and Robert Murray (eds), *Libya, the Responsibility to Protect and the Future of Humanitarian Intervention* (Palgrave Macmillan 2013) 191; Security Council Resolution 1973 (17 March 2011) UN Doc S/RES/1973

²⁵ Barack Obama, ‘Remarks by the President in Address to the Nation on Libya’

<https://obamawhitehouse.archives.gov/the-press-office/2011/03/28/remarks-president-address-nation-libya>

²⁶ James Pattison, ‘The Ethics of Humanitarian Intervention in Libya’ (2011) 25(3) *Ethics & International Affairs* 271, 273.

²⁷ Seumas Milne, ‘There’s Nothing Moral About Nato’s Intervention in Libya’ (*The Guardian*, 2011)

<<https://www.theguardian.com/commentisfree/2011/mar/23/nothing-moral-nato-intervention-libya?>> accessed 24 April 2017

²⁸ n.24, 197.

²⁹ n.11, 391.

“We want Muammar Gaddafi, he is our leader ... No one has the right to take him from us”³⁰. Indeed, the long-term efficiency of responding to crises such as Libya can be described as “ad hoc approaches of a fire-fighting nature.”³¹

It is certainly plausible that the term ‘humanitarian intervention’ has been exploited by Western states as a means to revive their colonial ambitions. We can see clear similarities between the language of humanitarian intervention - which was also used in Haiti, Rwanda and Kosovo - and the old rhetoric of empire, where humanitarianism was used to justify colonialism as a civilising mission.³² In furthering the doctrine several questions are raised, not least regarding sovereignty, human rights violations, and the protection of civilian lives. Indeed, framing the intervention as ‘humanitarian’ obscured the devastating consequences.³³ It is clear that the response to the Libyan conflict ignored “the larger historical context of causation ... shutting out democratic participation and deliberation in the name of urgency.”³⁴

This brief account illustrates how crises have been used as a catalyst and decoy for the development of international law. In viewing events through the lens of crises, powerful states have been able to further radical arguments with little scrutiny, and exploit a climate of fear created by a complicit media.

Poverty – An everyday crisis

Post 9/11 developments - such as the UN Global Counter-Terrorism Strategy - demonstrate that international law is capable of analysing the long term trend of terrorism, which has an increasing influence on the West, however, “the real crisis humanity faces today is a world (of) poverty and chaos.”³⁵ Whilst the 9/11 attacks claimed 2,753 lives, 22,000 children die each day due to poverty related causes.³⁶ Furthermore, more than 1.3 billion people are living in extreme poverty - surviving on less than \$1.25 a day.³⁷ The absence of the lens of crisis has made poverty appear quotidian, a part of everyday life which is swept under the carpet.³⁸ Compared to the vast media coverage of 9/11, poverty is often portrayed as a peripheral

³⁰ Damien McElroy, ‘Libya Crisis’ (*The Telegraph* 2011)

<<http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8392872/Libya-crisis-Gaddafi-loyalists-warn-of-tribal-conflict.html>> accessed 3 May 2017

³¹ Dan Banik, ‘Hunger and Human Rights: The Appealing Rhetoric versus Dreary Reality’ in Bard Andreassen and others (eds), *Freedom from Poverty as a Human Right: Economic Perspectives* (UNESCO 2010) 246.

³² Joanna Davidson, ‘Humanitarian Intervention as Liberal Imperialism: A Force for Good?’ (2012) 7 *POLIS Journal* 128, 154.

³³ n.11, 384.

³⁴ n.4, 116.

³⁵ n.6, 126.

³⁶ CNN, ‘September 11, 2001: Background and Timeline of the Attacks’ (CNN, 2016)

<<http://edition.cnn.com/2013/07/27/us/september-11-anniversary-fast-facts/>> accessed 3 May 2017; UNICEF, ‘Child Mortality rate drops by a third since 1990’ (UNICEF, 2010)

<https://www.unicef.org/media/media_56045.html

³⁷ Do Something, ‘11 Facts about Global Poverty’ (*Do Something*, 2017)

<https://www.dosomething.org/us/facts/11-facts-about-global-poverty>> accessed 3 May 2017

³⁸ n.11, 21; n 31,256.

concern, affecting those in distinctly different situations from the average reader.³⁹ However, poverty is a crisis, and must be distinguished from what is deemed a crisis in international law. Poverty is neither natural nor inevitable, it remains a denial of rights that is supported by a legal framework.⁴⁰ This therefore begs the question of how is something that is factually a crisis not recognised as such by international law?

Why poverty is not deemed a crisis

Although “humans are entitled to relief from severe poverty regardless of its cause”,⁴¹ it is the unfortunate truth that international law is practical rather than principled. Indeed it is possible to assert that in certain situations international law acts as “a key facilitator” of structural problems such as poverty.⁴² It has been argued that whilst there is international recognition and protection of human rights, this is undermined by an institutional order whereby poverty is sustained by the existence of relations between third world governments and multinational corporations.⁴³ Additionally, both the US and the EU utilise free trade agreements which “allow them to impose trade concessions on weaker states.”⁴⁴ Indeed, to infer that most post-colonial states that have fallen into extreme poverty have done so as a result of their own actions is a fallacy.⁴⁵ It is undeniable that Western states benefit from global poverty in several ways, for example, low-cost country sourcing, low-profit margins and the exploitation of resources are but a few examples.⁴⁶ This can be illustrated by looking at Nigeria; despite being the 8th largest producer of crude oil globally, 70 percent of its population remains trapped in poverty due to profits being exploited by Western corporations.⁴⁷ Indeed, overdeveloped Western countries “have come to see our extravagant way of life as absolutely necessary” regardless of the outcome for poorer nations.⁴⁸

It must also be remembered that structural problems such as poverty can actively contribute to dramatic crises. Extreme poverty destroys economies and leaves its citizens vulnerable, and

³⁹ Tom Clark, ‘Poor Show’ (*The Guardian* 2008) <<https://www.theguardian.com/society/joepublic/2008/sep/10/poverty.pressandpublishing>> accessed 13 May 2017; Apurv Chauhan and Juliet Foster, ‘Representations of Poverty in British Newspapers: A Case of ‘Othering’ the Threat?’ 24 (2014) *Journal of Community & Applied Social Psychology* 390

⁴⁰ Christine Chinkin, ‘The United Nations Decade for the Elimination of Poverty: What Role for International Law?’ (2001) 54(1) *C.L.P* 553, 565.

⁴¹ Thomas Pogge, *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor?* (OUP 2007) 8. n.1, 10.

⁴³ Thomas Pogge, ‘Recognised and Violated by International Law: The Human Rights of the Global Poor’ (2005) 18 *LJIL* 717; Martti Koskenniemi, ‘International Law and Hegemony: A Reconfiguration’ (2004) 17(2) *Cambridge Review of International Affairs* 19.

⁴⁴ Jeanne Woods, ‘Global Crisis and the Law of War’ in Barbara Stark (ed) *International Law and its Discontents: Confronting Crises* (CUP 2015) 256.

⁴⁵ Susan Marks, ‘Human Rights and the Bottom Billion’ [2009] *E.H.R.L.R* 1.

⁴⁶ Daina Stukuls Eglitis, ‘The Uses of Global Poverty: How Economic Inequality Benefits the West’ in J Macionis and others (eds) *Seeing Ourselves: Classic Contemporary and Cross-Cultural Readings in Sociology* (Prentice-Hall 2004) 216.

⁴⁷ Alan Taylor, ‘Nigeria: The Cost of Oil’ (*The Atlantic* 2011) <<https://www.theatlantic.com/photo/2011/06/nigeria-the-cost-of-oil/100082/>> accessed 19 April 2017.

⁴⁸ n.1, 8.

there is evidence that this can also be a driving force for terrorist organisations.⁴⁹ Therefore, the war on terror has a bleak outcome “as long as there are conditions in the world that make people desperate.”⁵⁰ By fixating on iconic events such as 9/11, we fail to see the larger picture of how these structural problems may be contributing to crises.⁵¹ However, it would be absolutist to say that international law has not attempted to address poverty. For example, compulsory licensing provisions within the TRIPS agreement actively allows for poorer nations without manufacturing capabilities to provide their citizens with lifesaving medication.⁵² Furthermore, provisions within the International Covenant on Economic, Social and Cultural Rights (ICESCR) recognise the right to, amongst other things, adequate food, clothing and housing.⁵³ Despite this, the rights enshrined in the ICESCR have been described as non-justiciable.⁵⁴ As an illustration of this, allowing states to gradually progress under the realisation of these rights means that countries, such as Nigeria, could be in compliance with the ICESCR despite not guaranteeing full enjoyment of treaty rights to each citizen.⁵⁵ Whilst international law should be praised for its attempts to address poverty, it is clear that they pale in comparison to the resources committed to fighting terrorism.

A crisis for whom?

Furthermore, it is clear that poverty does not warrant the label of crisis as it is not affecting the West. For example, the ongoing conflict in Yemen has resulted in a major humanitarian crisis, where 2.2 million children are currently malnourished and 6.8 million people are deemed to be in a state of emergency.⁵⁶ Despite this, the attention of the media gravitates towards Syria, whose impact on the West is much clearer in terms of refugees and terrorist organisations.⁵⁷

⁴⁹ Kennedy Odede, ‘If you really want to fight terrorism, start by fighting child poverty’ (*The Guardian* 2015) <<https://www.theguardian.com/global-development-professionals-network/2015/aug/21/terror-groups-africa-recruit-children-from-kibera-mathare-slum-poverty>> accessed 30 April 2017.

⁵⁰ CNN, ‘Tutu: Poverty fueling terror’ (*CNN* 2007)

<http://edition.cnn.com/2007/WORLD/asiapcf/09/16/talkasia.tutu/index.html?_s=PM:WORLD> accessed 13 May 2017.

⁵¹ n.11, 386.

⁵² Article 31bis, Agreement on Trade-Related Aspects of Intellectual Property Rights (‘TRIPS Agreement’) (15 April 1994) 1869 UNTS 299; 33 ILM 1197 (1994)

⁵³ UN General Assembly ICESCR (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS, Article 11(2)

⁵⁴ Randall Peerenboom, ‘Human Rights and Rule of Law: What’s the Relationship?’ (2005) 26 *Georgetown Journal of International Law* 809, 816.

⁵⁵ Sital Kalantry et al., ‘Enhancing Enforcement of Economic, Social, and Cultural Rights Using Indicators: A Focus on the Right to Education in the ICESCR’ (2010) 32 *Hum.Rts.Q* 253, 256.

⁵⁶ UNICEF, ‘Right now 2.2 million children in Yemen are malnourished’ (*UNICEF* 2017)

<<https://www.unicef.org.uk/donate/yemen/?gclid=Cj0KEQjwi17vIBRDpo9W8y7Ct6ZcBEiQA1CwV2MUNtCNdex6-uXBCnKYAkFujhtZpSutMgjtW78JDEDwaApPc8P8HAQ&sisr=1>> accessed 2 May 2017; Les Roopnarine and others, ‘Yemen at ‘point of no return’ as conflict leaves almost 7 million close to famine’ (*The Guardian* 2017) <<https://www.theguardian.com/global-development/2017/mar/16/yemen-conflict-7-million-close-to-famine>> accessed 4 May 2017

⁵⁷ Annie Slemrod, ‘Why does no one care about Yemen?’ (*IRIN News* 2016)

<<http://www.irinnews.org/analysis/2016/02/11/why-does-no-one-care-about-yemen>> accessed 2 May 2017

It is true that crises such as 9/11, and subsequent terrorist attacks on the west, have an eye-catching and page-turning power that “slow violence” such as poverty cannot match.⁵⁸ However, there is potential for international law to focus attention on the need for action.⁵⁹ Whilst the human rights framework provides a basis for poverty reduction strategies, no provision explicitly provides the right to be free from poverty.⁶⁰ The human rights discourse provides an opportunity to move away from the utilitarian language of development which is often used, and instead focus on the entitlements and obligations enshrined in the United Nations Declaration of Human Rights.⁶¹ In doing so, international law is capable of providing a platform on which rights can be discussed, however this is restricted by a crisis-focused approach.

Conclusion

The lens of crises in our discipline has allowed powerful states to manipulate the ambiguities within international law. In doing so, radical changes which greatly benefit these states and their agendas have been furthered in relation to the use of force. By contrast, in failing to realise its potential and limitations, international law continues to be implicated in the marginalisation of structural problems that affect the weakest, most vulnerable parts of the world.

⁵⁸ Rob Nixon, *Slow Violence and the Environmentalism of the Poor* (Harvard University Press 2011) 3.

⁵⁹ Henry Steiner, ‘Social Rights and Economic Development: Converging Discourses’ (1998) 4 *Buffalo Human Rights Law Review* 25, 37.

⁶⁰ n.40, 557-559.

⁶¹ *ibid* 564-565.

THE TWO FACE OF JANUS: THE JURIDICAL FOUNDATIONS OF THE LAW OF FRUSTRATION IN MODERN ENGLISH CONTRACT LAW¹

Paulo Fernando Pinheiro Machado

Abstract: This article argues that the principles of *pacta sunt servanda* and *rebus sic stantibus* are, in fact, two aspects of one single General Principle of Law. That principle is present in all legal systems, and the internal articulation of its two subprinciples provide the rules of the law of frustration in each positive system. In the case of Modern English Law, its libero-utilitarian philosophical basis made the reception of the law of frustration a difficult fit in the formative period of the system. This article also argues that the English jurisprudence on frustration reached a mature point in the second half of the twentieth century, and can now be organised into a coherent hierarchical system, apt to provide certainty and foreseeability in concrete cases.

Keywords: jurisprudence, contract law, frustration, *pacta sunt servanda*, *rebus sic stantibus*, Roman Law

Introduction

Those who believe that the law of frustration lacks any principled justification are utterly mistaken. The error, however, is understandable, for historical reasons. The popularity of the doctrine of frustration had fallen in the nineteenth century, precisely at the moment of consolidation of Modern English Contract Law. That prevented an easy reception of the principle and generated more than 200 years of judicial difficulties, that can now be solved by the jurisprudential developments of the second half of the twentieth century.

This essay, therefore, will argue three main points: 1) the doctrine of frustration is a ‘general principle of law recognised by civilized nations’²; 2) the principle had a conflicted reception into Modern English Law; and 3) the current jurisprudence can be conciliated and organised into a coherent hierarchical system that is faithful to the original Roman formulation of the doctrine. The analysis will begin precisely by an assessment of those origins.

¹ City Law School, City, University of London. Email: Paulo.Pinheiro-Machado@city.ac.uk. This essay was awarded the 7 King’s Bench Walk Contract Law Prize. The author would like to thank 7 King’s Bench Walk Chambers for the recognition, Professor Timothy Endicott, University of Oxford, and Associate-Professor Katherine Reece-Thomas, City Law School, for comments on an earlier draft, as well as the referees for this journal.

² As the concept enshrined in Article 38(1)(c) of the Statute of the International Court of Justice.

The Origins of the Doctrine

Frustration, or *clausula rebus sic stantibus*, is indeed one of the most ancient jurisprudential doctrines. According to Lauterpacht, it is present in all legal systems and enjoys the status of a General Principle of Law.³ Whatever its theoretical justifications,⁴ the main effect of the doctrine is to mitigate the harshness of another General Principle of Law, namely the principle of *pacta sunt servanda*, or the sanctity of contract, when the circumstances had changed, without responsibility of any of the parties, making the full performance of the contract impossible.⁵ Treitel states that the kernel of the question is precisely the conflict – or interrelation - between those two principles.⁶

In this sense, both the *pacta sunt servanda* and the *clausula rebus sic stantibus* are, in fact, two aspects of one single principle, which emanates by its turn from the dictates of Natural Justice. Like the two faces of Janus, they cannot subsist in isolation and the real question, to develop over Trietel's point above, is the dialectical articulation between them, whose precise contours will slightly differ in each positive legal system. To understand this articulation in the English Legal System, therefore, it is necessary first to return to the ancient origins of the *clausula*.

In Ancient Rome, the doctrine was already formulated by moral philosophers as a demand of Justice, to soften the harshness of the principle of the *pacta sunt servanda*.⁷ It was founded on the old maxim of *ad impossibilia nemo tenetur*, i.e. that no one is bound to do what is impossible. The highest refinement of the doctrine, however, came in the later days of the Republic with Cicero. In *De Officiis*⁸ he presents the doctrine in a famous passage which deserves to be quoted in full:

Promises are, therefore, sometimes not to be kept; and trusts are not always to be restored. Suppose that a person leaves his sword with you when he is in his right mind, and demands it back in a fit of insanity; it would be criminal to restore it to him; it would be your duty not to do so. Again, suppose that a man who has entrusted money to you proposes to make war upon your country, should you restore the trust? I believe you should not; for you would be acting against the state, which ought to be the dearest thing in the world to you. Thus there are many things which in and of themselves seem morally right, but which under certain circumstances prove to be not morally right: to keep a promise, to abide by an agreement, to restore a trust may, with a change of expediency, cease to be morally right.⁹

It is no exaggeration to say that this formulation was one of the most influential legal constructions in history. Zimmermann presents a brilliant summary of its reception until the

³ Hersch Lauterpacht, *The Function of the Law in the International Community* (OUP 2011) 281

⁴ *ibid* 284-285

⁵ *ibid* 281-282

⁶ Guenter H. Treitel, *Frustration and Force Majeure* (3rd edn, Sweet & Maxwell 2014) 1

⁷ Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Munich Cape Town 1990) 579

⁸ 3, XXV - 95

⁹ Marcus Tullius Cicero, *De Officiis: with an English Translation by Walter Miller* (London Heinemann 1913) 371-373

modern days.¹⁰ The fundamental here is that it was adopted by St Augustine, and from him it was formally received into Canon Law, through the *Decretum Gratiani*.¹¹ St Thomas Aquinas also glossed on the doctrine, from the theological point of view, in his *Summa Theologica*.¹² According to him, if the circumstances change in a certain way, a promise is not binding and should not be kept.¹³

Zimmermann draws an interesting parallel between the Medieval conception of the *clausula rebus sic stantibus* and its early appearance in Modern English Law. According to him, since its early reception in Canon Law, from the twelfth century onwards, the doctrine was explained as an implied term of the contract, which was the same construction adopted in *Taylor v Caldwell*.¹⁴

The seventeenth century, in fact, was a period of growth of the doctrine of frustration and the golden era both for its development in international law and for its advancement through the works of natural lawyers.¹⁵ Zimmermann points out, notwithstanding, that in private law the doctrine began to lose its appeal by this time.¹⁶

The Reception of the Doctrine in Modern English Contract Law

The *clausula rebus sic stantibus*, however, fell into disfavour in the eighteenth and nineteenth centuries, when the philosophy of the economic liberalism, the freedom of contract and need for legal certainty was in its apex.¹⁷ According to Zimmermann the *clausula* almost but disappeared by this time, when the Aristotelian-Thomist tradition was replaced by the new wave of positivism.¹⁸

The doctrine, in fact, found an even more difficult reception in English Contract Law, in those formative days of the system, for two main reasons. The first one, being a General Principle of Law and, as such, an imposition of Natural Law, the doctrine of *rebus sic stantibus* found itself somewhat out of place in a newly designed system, which was based upon the utterly pragmatic values of the *laissez-faire*. A doctrine that provided an exception to the sanctity of contract was viewed with suspicion as dangerously interventionist.

According to H.L.A. Hart, Bentham and the Utilitarians were the dominating inspiration of English jurisprudence.¹⁹ From the starting point of the principle that *rex est imperator in regno suo*,²⁰ the Utilitarians defended that there could be no constraints to the legislative capacity of the State and, therefore, rejected Natural Law in principle as an illusory fetter on that power. Bentham, in particular, advocated a clear separation between law and morals, restricting Natural Law to the latter. “Utility” – not “justice” – should be the ultimate standard of the law,

¹⁰ Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Munich Cape Town 1990) 579-582

¹¹ *ibid* 580

¹² *ibid*

¹³ John Finnis, *Aquinas: Moral, Political and Legal Theory* (OUP 1998) 198, n 66

¹⁴ Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Munich Cape Town 1990) 580, n 242

¹⁵ *ibid* 581

¹⁶ *ibid*

¹⁷ *ibid* 579

¹⁸ *ibid* 581

¹⁹ Michael Freeman, *Lloyd's Introduction to Jurisprudence* (9th edn, Sweet & Maxwell 2014) 198

²⁰ *ibid* 195

to be validated by “a calculus of felicity”, i.e, the greater good to the greater number of people.²¹ For Bentham, jurisprudence should be “censorial” and not “expository”, in the sense that the science of legislation should be isolated from moral judgments.²²

A valid objection would be that, at least in theory, it should be possible for a Utilitarian to develop a theory of frustration upon the justification that economic efficiency would be maximised by accepting that an agreement could be discharged – and therefore resources would not be kept underutilised - by an intervening event when the parties had been silent on the allocation of risk for that particular event. Indeed, the greatest contradiction of the utilitarian philosophy was that it eventually evolved to transform itself into an interventionist doctrine that promoted the welfare state.²³ However, that was not yet the case in the early days of the constitution of the English Legal System and, at that juncture, the “calculus of felicity” was equated in terms of *laissez-faire*: the greatest economic good could only be achieved by free commerce, which was itself based upon the principle of the sanctity of contract. Any idea that could potentially restrict that principle, as a theory of frustration for instance, was immediately discarded as a clog in the maximisation of scarce resources.

Against this background, Treitel singles out two main principles of the English Common Law that presented a bar to the doctrine of frustration. The first is that English Law repeatedly rejected the principle of the *ad impossibilia nemo tenetur*.²⁴ He cites the judgement of Holt CJ in *Thornborow v Whiteacre*²⁵ as an early instance of such a rejection. Treitel remembers,²⁶ however, that Equity has founded an analogy with the Civil Law principle in the rule stated in *Forrer v Nash*²⁷, when it was held that ‘the court does not compel a person to do what is impossible’.²⁸ A tension, therefore, is clearly found in the system from its very beginnings.²⁹

The second principle pointed by Treitel is that liability in English Contract Law is strict, i.e. independent of fault. In this sense, a supervening event that altered the meaning or sense of the performance agreed would not *prima facie* be sufficient to set aside the contract.³⁰ This principle, however, is not absolute.³¹ Treitel believes that the best reading of the authorities on this point is in the sense of assessing whether the contract has successfully allocated the risk for the supervening event.³²

The second reason for the difficulty of English Law in receiving the doctrine of *rebus sic stantibus*, as well-observed by Hersch Lauterpacht,³³ lies in the long-term stability of the British Pound. In fact, the doctrine of frustration was indeed more frequently invoked and more

²¹ *ibid* 197

²² *ibid*

²³ *ibid*

²⁴ Guenter H. Treitel, *Frustration and Force Majeure* (3rd edn, Sweet & Maxwell 2014) 1-2

²⁵ (1706) 2 Ld. Raym 1164, at 1165: ‘when a man will for a valuable consideration undertake to do an impossible thing, though it cannot be performed, yet he shall answer in damages’.

²⁶ Guenter H. Treitel, *Frustration and Force Majeure* (3rd edn, Sweet & Maxwell 2014) 2-3

²⁷ (1865) 35 Beav. 167

²⁸ *ibid* 171

²⁹ This tension is even greater since Lord Philips of Worth Matravers expressly recognises the principle of *ad impossibilia nemo tenetur* in *Great Peace Shipping Ltd v Tsavlis Salvage (International) Ltd* [2002] EWCA Civ 1407, at 73

³⁰ Guenter H. Treitel, *Frustration and Force Majeure* (3rd edn, Sweet & Maxwell 2014) 4

³¹ *ibid*

³² *ibid* 5

³³ *The Function of the Law in the International Community* (OUP 2011) 281, n2

sophisticatedly developed in countries that had suffered through periods of hyperinflation and currency depreciation, such as Germany and Brazil. The United Kingdom, in fact, did not experience the instability of a multitude of contracts becoming impossible to perform overnight, due to a currency shock.³⁴ Notwithstanding this, the country's response to the impact of the First World War gave, in fact, the doctrine of frustration its colours in English Law.³⁵

Being the doctrine of frustration a General Principle of Law, however, it could not be absent from any legal system. Zimmermann notices that, due to the rejection of Natural Law in the nineteenth century, not even the German BGB adopted a rule on frustration, and that the doctrine would have its return *extra legem*, through the works of the theorists and the jurisprudence.³⁶ The works of natural lawyers have been a permanent source of positive inspiration. According to Gordley, the Anglo-American legal systems did, in fact, import its general law of contracts from Natural Law traditions, but somewhat failed to fully incorporate some of its institutions and doctrines.³⁷ However, a jurisprudential foundation for the reception of the doctrine of frustration, that was in accord with the pragmatic basis of the newly-created system, needed to be found. And Blackstone himself, when attempting to organise English law into a coherent system, was very much inspired by Natural and Civil Law.³⁸

Hersch Lauterpacht speculates³⁹ that the origins of the doctrine of frustration in English Law would lie in the eighteenth century, more precisely in the famous judgment of Lord Mansfield in *Moses v Macferlan*⁴⁰, when the remedy of *indebitatus assumpsit* was formally recognised as a form of action to recover money paid in circumstances that render the defendant 'obliged by the ties of natural justice and equity to refund'⁴¹. Lauterpacht sees in this case the signs of a primeval connection between unjust enrichment and frustration.⁴²

Treitel, however, points out that early exceptions to the doctrine of absolute contracts in English Law were found in cases of supervening illegality.⁴³ In *Brewster v Kitchell*,⁴⁴ therefore, a covenant for the payment of land taxes in a deed of rent-charge was apparently frustrated by a supervening Act of Parliament. Holt C.J. held that 'if H. covenants to do a thing which is lawful, and an Act of Parliament comes in and hinders him from doing it, the covenant is repealed.'⁴⁵

³⁴ There is a case, however, where the inflation compounded over a period of 50 years led the Court of Appeal to hold that the contract could be terminated upon reasonable notice: *Staffordshire Area Health Authority v South Staffordshire Waterworks Co* [1978] 1 WLR 1387. Lord Denning MR, at 1397, opined that that would be a case for frustration. See J. Beatson, A. Burrows and J. Cartwright, *Anson's Law of Contract* (29th edition, OUP 2010) 492-493.

³⁵ Catharine MacMillan, 'English contract law and the Great War: the development of a doctrine of frustration' in *Comparative Legal History* 2014, 2(2), 278-302

³⁶ Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Munich Cape Town 1990) 581-582

³⁷ James Gordley, *The Philosophical Origins of Modern Contract Doctrine* (OUP 2011) 159

³⁸ *ibid* 136

³⁹ *The Function of the Law in the International Community* (OUP 2011) 283, n5

⁴⁰ (1760) 2 Burrow 1005

⁴¹ *Moses v Macferlan* (1760) 2 Burrow 1005, per Lord Mansfield at 1012

⁴² *The Function of the Law in the International Community* (OUP 2011) 283, n5

⁴³ Edwin Peel, *Treitel: The Law of Contract* (14th edn Sweet & Maxwell 2015) 1032

⁴⁴ (1697) 1 Salkeld 198; 91 E.R. 177

⁴⁵ *Brewster v Kitchell* (1697) 1 Salkeld 198; 91 E.R. 177, at 178

In any case, most commentators begin the account of the doctrine of frustration in English law by the rule in *Paradine v Jane*,⁴⁶ a paradigmatic case that established the doctrine of absolute contracts. In this case, the plaintiff had let lands to the defendant, who was expelled from them by the army of Prince Rupert of the Rhine, during the Civil War. Paradine brought an action for debt and Jane submitted that the contract had been discharged by the war. It is interesting to note that counsel for the defendant submitted that the rule for the discharge of the pact was confirmed by the ‘civil law, and canon law and moral authors.’⁴⁷ Judgment was given for the plaintiff and the decision has two limbs: 1) a contractual duty is to be performed irrespective of any accident (apart from supervening illegality);⁴⁸ and 2) if the lessor is to perceive eventual profits from the land he should also suffer its casual losses.⁴⁹

Being the principles of *pacta sunt servanda* and *rebus sic stantibus* as the two faces of a Janus, in the sense that particular legal systems will always have to find a balance between them, in English Law *Paradine v Jane* tipped the balance heavily towards the first of them, the sanctity of contract. The rule, therefore, created a further difficulty in establishing a doctrine of frustration that could live with it in a coherent juristic foundation. Hence the difficulties - and apparent confusion - in the subsequent jurisprudence in assessing the justification of the doctrine. Treitel points out that, from the starting point of *Paradine v Jane*, English Law elaborated five different theories as to what is the legal foundation of the *clausula rebus sic stantibus*.⁵⁰ We shall analyse each one in turn.

Implied Term

The modern doctrine of frustration in English Law is generally recognised to begin with *Taylor v Caldwell*.⁵¹ In this case, the parties agreed to let the Surrey Gardens and Music Hall, during four days, for the purposes of holding concerts and balls. After the contract was made but before the starting date, however, the Hall was destroyed by fire, without fault of any of the parties. The question for the court was whether, under these circumstances, the defendants were bound to pay for the letting even if they could not use the Hall.

Blackburn J gave the judgment of the court. After a review of the doctrines in the Civil Law tradition, from the Digests of Justinian to the Treatises of Pothier, Blackburn J states that

The great case of *Coggs v. Bernard* (1 Smith's L. C. 171, 5th ed.; 2 L. Raym. 909) is now the leading case on the law of bailments, and Lord Holt, in that case, referred so much to the Civil law that it might perhaps be thought that this principle was there derived direct from the civilians, and was not generally applicable in English law except in the case of bailments; but the case of *Williams v. Lloyd* (W. Jones, 179), above cited, shews that the same law had been already adopted by the English law as early as The Book of Assizes. The principle seems to us to be that, in contracts in which the performance depends on the continued existence of a given person or thing, a condition

⁴⁶ (1647) Aley 26; 82 E.R. 897

⁴⁷ (1646) Style 17; 82 E.R. 519, at 520

⁴⁸ Edwin Peel, *Treitel: The Law of Contract* (14th edn Sweet & Maxwell 2015) 1032, n3

⁴⁹ (1647) Aley 26; 82 E.R. 897, at 898

⁵⁰ Guenter H. Treitel, *Frustration and Force Majeure* (3rd edn, Sweet & Maxwell 2014) 642

⁵¹ (1863) 3 B & S 826; 122 E.R. 309

is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance.⁵²

McKendrick points out that, by focusing on the perishing of the object of the contract, Blackburn J avoided a confrontation with *Paradine v Jane*.⁵³ He also notes that the court recognised an implied condition on the contract that arose out of the intentions of the parties.⁵⁴ McKendrick cites Professor Ibbetson as pointing to a difference here between English Law and Civil Law, in the sense that ‘where Roman law had applied a rule, English law construed – or imposed – an intention.’⁵⁵

With respect, the Roman Law, and subsequent Civil Tradition, recognised a term implied by fact that evolved to one implied by law.⁵⁶ Furthermore, the justification was that the term to be implied was an imposition of the nature of the contract itself, and that seems to be the same analysis carried out by Blackburn J, in reviewing different types of contracts that would necessarily imply a condition of the permanence of its subject-matter.

Treitel recognises⁵⁷ that this was the interpretation effected by Lord Loreburn in the *Tamplin*⁵⁸ case, which further elaborated the theory of *Taylor v Caldwell*. He maintains, however, that an objective analysis based on the ‘reasonable bystander’ would suppress the role of the parties in bringing about frustration, reducing, therefore, the appeal of the doctrine.⁵⁹ With respect, the force of the doctrine resides precisely in the fact that it operates as an imposition of reality (or as a necessary consequence of certain types of contracts) and not in the will of the parties. The will of the parties is material only to restrict the effects of the doctrine, by freely allocating the risk in the agreement. This traditional Roman view, in fact, is somewhat closer to the next theory, based on the ‘foundation of the contract.’

Foundation of the Contract

According to this theory, every contract is agreed upon a factual basis that serves as its foundation, and, to paraphrase Lord Haldane in the *Tamplin* case,⁶⁰ if that factual basis vanishes, the contract also vanishes with it. The literal translation of *rebus sic stantibus* is indeed ‘the things remaining the same’. In other words, every contract is built upon a foundation, and has an implied term – or a condition precedent - that it is valid ‘the things remaining the same’.

⁵² *ibid*, at 839

⁵³ Ewan McKendrick, *Contract Law: Text, Cases, and Materials* (7th edn OUP 2016) 697

⁵⁴ *ibid*

⁵⁵ *ibid*

⁵⁶ Caio Mário Silva Pereira, *Instituições de Direito Civil, Vol III, Contratos* (20th edn, Forense: Rio de Janeiro 2016) Ch XLIV at 16

⁵⁷ Guenter H. Treitel, *Frustration and Force Majeure* (3rd edn, Sweet & Maxwell 2014) 642-643

⁵⁸ *FA Tamplin Steamship Co Ltd v Anglo Mexican Petroleum Products Co Ltd* [1916] 2 A.C. 397

⁵⁹ Guenter H. Treitel, *Frustration and Force Majeure* (3rd edn, Sweet & Maxwell 2014) 643. Note that in response to this same critique, some Civil Law regimes (such as in Article 1497 of the Italian Civil Code of 1942) developed a conciliatory rule, opening to the other party the possibility of offering a modification of performance, in order to salvage the will of the parties. See also Caio Mário Silva Pereira, *Instituições de Direito Civil, Vol III, Contratos* (20th edn, Forense: Rio de Janeiro 2016) Ch XLIV at 16. English Law has rejected this conciliatory possibility as too uncertain: see J. Beatson, A. Burrows and J. Cartwright, *Anson’s Law of Contract* (29th edition, OUP 2010) 474

⁶⁰ [1916] 2 A.C. 397, at 406.

Treitel⁶¹ traces this theory back to *Taylor v Caldwell* and the *Tamplin* case as well, and remarks that it received the approval of Goddard J in *WJ Tatem Ltd v Gamboa*.⁶² He also points that this view has the advantage of being simple, but it is too uncertain and, at the end, not practically different than the ‘implied term theory’.⁶³

With respect, this view is closer to the original Roman formulation of the doctrine. There is, according to this view, an implied term to the contract, not springing from the will of the parties, but rather from the objective matrix of facts upon which the agreement was built. What was this matrix of fact and how much has it changed as to render performance of the agreement impossible is a question of fact to be ascertained upon the evidence, but it is clearly an objective factual element, not in any way too uncertain as to be impossible to be established. It does not offer an *a priori* abstract formula – or a precise test –, upon which one can evaluate the circumstances, but it is objective in the sense of being ascertainable through a factual analysis.

Just Solution

Another theory mentioned by Treitel is the one called ‘Just Solution’.⁶⁴ According to this view, the doctrine of frustration would release the parties not as the operation of a machinery inherent in the actual contractual instrument, but rather as a necessity of Justice. Treitel points that the basis of this theory is found in the judgement of Rix LJ in *The Sea Angel*, when his lordship states that the doctrine is founded on the ‘dictates of justice’.⁶⁵

Thomas Bingham LJ, furthermore, summarised this theory in *The Super Servant Two*⁶⁶ as follows:

The object of the doctrine was to give effect to the demands of justice, to achieve a just and reasonable result, to do what is reasonable and fair, as an expedient to escape from injustice where such would result from enforcement of a contract in its literal terms after a significant change in circumstances.⁶⁷

Following the judgement of Lord Hailsham LC, in *Panalpina*,⁶⁸ Treitel believes, quite rightly, that this theory provides the ultimate purpose and foundation of the doctrine of frustration, but does not say anything about the rationale of its juristic operation.⁶⁹ This theory is in accordance with the original Roman conception of the doctrine, as shown above, and does indeed provide a final justification as to what metrics the *pacta sunt servanda* is to be balanced against the *rebus sic stantibus*. As Treitel points out⁷⁰, it can in fact explain many decisions, in particular some of the Suez cases, but it stills leaves the question as how the doctrine is to operate in practice without an answer. The ‘Just Solution’, however, provides an importance piece to the jigsaw, by showing from where the doctrine springs out.

⁶¹ Guenter H. Treitel, *Frustration and Force Majeure* (3rd edn, Sweet & Maxwell 2014) 646-647

⁶² [1939] 1 K.B. 132

⁶³ Guenter H. Treitel, *Frustration and Force Majeure* (3rd edn, Sweet & Maxwell 2014) 646

⁶⁴ Guenter H. Treitel, *Frustration and Force Majeure* (3rd edn, Sweet & Maxwell 2014) 643

⁶⁵ *Edwinton Commercial Corporation, Global Tradeways Ltd v Tsaviliris Russ (Worldwide Salvage & Towage) Ltd (The ‘Sea Angel’)* [2007] EWCA Civ 547, at 132

⁶⁶ *J Lauritzen AS v Wijsmuller BV, The Super Servant Two* [1990] 1 Lloyd’s Rep 1

⁶⁷ *ibid*, at 8

⁶⁸ *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] A.C. 675, at 687

⁶⁹ Guenter H. Treitel, *Frustration and Force Majeure* (3rd edn, Sweet & Maxwell 2014) 645

⁷⁰ *ibid*

Failure of Consideration

Another theory advanced to explain the results of the doctrine of frustration, namely the discharge of the contract, was the so-called ‘failure of consideration’, according to which a supervening event makes the performance of one of the parties impossible.⁷¹ This explanation is present in *Hirji Mulji*⁷² and the so-called ‘coronation cases’, such as *Krell v Henry*.⁷³ According to this view, since the consideration of one of the parties failed, the instrument must be discharged, since if only one of them has an obligation, the agreement becomes a promise and the other party a volunteer.

This doctrine does not present a satisfactory explanation. As Treitel rightly points out,⁷⁴ this theory demands a total failure of consideration, but a contract would be discharged upon partial failure and also after part performance. This is precisely the main reason why this theory was rejected by the House of Lords in *Panalpina*.⁷⁵

Construction of the Contract

The theory most accepted is the one adopted by the House of Lords in *Davis Contractors Ltd v Fareham Urban District Council*.⁷⁶ Being quite true to the Roman origins of the doctrine, Lord Radcliffe analysed that the implied term vision would produce an impasse, in the sense that the court would have to inquire into the intentions of the parties, when the doctrine should impose a requirement of the law into the agreement, irrespective of the will of the agents. In this sense, it would be necessary for the court to construe the contract to fully understand its meaning in context, in order to evaluate whether the supervening event has materially changed the circumstance as to render the agreement a different undertaking from what was originally intended. It is highly significant that Lord Radcliffe summarised the ratio of the doctrine of frustration with a quotation from the Aeneid: ‘*non haec in foedera veni*. It was not this that I promised to do.’⁷⁷

McKendrick calls the test proposed by Lord Radcliffe the ‘overall test’, based on a ‘multi-factorial’ approach, encompassing all the elements relevant to the court to assess whether the contract, by the supervening event, has become a thing ‘radically different’.⁷⁸ He points out⁷⁹ that this test and the scope of the elements to be taken into consideration by the court were summarised by Rix J in *The Sea Angel* case.⁸⁰ The court, in short, has to appraise the whole matrix of facts in which the contract was signed, to construe the meaning of the agreement in context. Not much different from the original Roman conception.

⁷¹ *ibid* 648

⁷² *Hirji Mulji v Cheong Yue SS Co Ltd* [1926] A.C. 435

⁷³ *Krell v Henry* [1903] 2 K.B. 740

⁷⁴ *ibid*

⁷⁵ *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] A.C. 675, at 687 and 702

⁷⁶ [1956] A.C. 696

⁷⁷ *ibid*, at 729

⁷⁸ Ewan McKendrick, *Contract Law: Text, Cases, and Materials* (7th edn OUP 2016) 702

⁷⁹ *ibid*

⁸⁰ *Edwinton Commercial Corporation, Global Tradeways Ltd v Tsaviliris Russ (Worldwide Salvage & Towage) Ltd (The ‘Sea Angel’)* [2007] EWCA Civ 547, at 111

Treitel understands, quite rightly, that all theories converge to this view of the construction of the contract.⁸¹ In this sense, not only it is not incompatible with them, but embraces them. In fact, as he points out⁸², to assess the foundations of an agreement it is necessary to construe the contract in its entirety. Treitel also quotes⁸³ Lord Hoffman in the *Belize Telecom* case⁸⁴ as recognising that one cannot imply a term into a contract without first construing its overall meaning.

It might be argued that, as frustration has its roots in equity,⁸⁵ the doctrine should not be a matter of construction, but actually an equitable solution to cases in which justice and fairness demand an exception to the common law principle of the sanctity of contract. It is submitted that this solution would not be able to provide a convincing explanation to the outcome of the cases, because if frustration were an equitable doctrine it would be a discretionary remedy and, as such, could not be objectively ascertained as a term implied by law can. This equitable explanation, thus, would add uncertainty where a precise explicative framework for the operation of the doctrine is needed.

The construction theory is, therefore, a more comprehensive and sophisticated view, apt to provide a juristic structure to the foundations and working machinery of the doctrine of frustration in English Law. The construction theory, therefore, provides the last piece of the puzzle, that can now be organised into a coherent hierarchical structure.

This structure is the following. The demands of Natural Justice impose two twin General Principles of Law to all legal systems: the *pacta sunt servanda* and the *rebus sic stantibus*. This principle should be read as in a single proposition, namely *agreements must be observed, the circumstances remaining the same*. In every legal system, the dialectical articulation of those two principles-propositions will be received into a specific normative formula, as to fit in its general socio-cultural and economic framework. This normative formula, finally, will enable the courts to provide the just solution in concrete cases.

The Modern English Legal System, thus, received the doctrine reaffirming its sources in the demands of Natural Justice, as stated in the ratios of the 'Just Solution' cases. The ontological definition of the twin principles was received in accordance with its original Roman formulation, as unanimously recognised in the jurisprudence of all theories. Furthermore, the practical normative formulation of the dialectical relationship between the twin principles can be articulated in a hierarchical system with the 'Construction Theory' as the major premise and the 'Foundation/Implied Term Theory' as the minor premise.

The normative formula, therefore, should work as follows: in order to assess whether the supervening event in question has materially and substantially changed the circumstances as to frustrate the purpose of the contract,⁸⁶ the court will construct the contract, assessing the whole matrix of facts at the time of agreement as well as the will of the parties, as objectively ascertained. This construction exercise will enable the court to precise the foundations of the

⁸¹ Guenter H. Treitel, *Frustration and Force Majeure* (3rd edn, Sweet & Maxwell 2014) 647

⁸² *ibid* 648

⁸³ *ibid*

⁸⁴ *Attorney-General of Belize v Belize Telecom Ltd* [2009] UKPC 10, at 19

⁸⁵ See the point about Lord Mansfield in *Moses v Macferlan* at pp 7-8 above.

⁸⁶ Triggering, therefore, the second sentence of the formula *pacta sunt servanda, rebus sic stantibus*.

contract, i.e. the circumstances of law and fact upon which the agreement was built.⁸⁷ The continued existence of those foundations⁸⁸, to conclude, must necessarily be an implied term of the contract. Not one imported by fact, but by the operation of the law – and in this case Natural Law.⁸⁹ This implied term, then, as all terms implied in law, will be objectively ascertained independent of the will of the parties.⁹⁰ This interpretive exercise, in short, will unveil the way by which the external foundations fit within the internal logic of the contract in its entirety.⁹¹

Conclusion

This essay sought to demonstrate that the doctrine of frustration, as a General Principle of Law, has a very ancient and well established theoretical justification. A confusion about it is justified by the difficult reception of the doctrine in Modern English Law, a system that was built and organised in the nineteenth century, under the philosophy of utilitarianism, which rejects doctrines and precepts founded upon Natural Law.

The developments of the English jurisprudence in the second of half of twentieth century provided several formulations as to how the doctrine fits into the system. This essay argued that far from being a cornucopia of mismatched improvised solutions, the different jurisprudential justifications not only can be conciliated, but can actually be organised into a coherent hierarchical system, apt to provide certainty and foreseeability in its practical applications.

⁸⁷ i.e., the ‘*rebus*’ in ‘*rebus sic stantibus*’.

⁸⁸ i.e., the ‘*sic stantibus*’ in the Latin proposition.

⁸⁹ Treitel points that the test for terms implied in law are ‘clearly based on consideration of “justice and policy”’, see Edwin Peel, *Treitel: The Law of Contract* (14th edn Sweet & Maxwell 2015) 256

⁹⁰ *ibid* 255, at 6-044.

⁹¹ An implication of a term is of necessity, because otherwise either the parties will have allocated the risk in the true construction of the agreement or there will be an express term, such as a force majeure clause. In both hypothesis, there will not be a case for frustration.

CHALLENGES IN THE REGULATION OF POLICE STOP AND SEARCH POWERS

Rosalia Myttas-Perris

Introduction

“Regulating police conduct is notoriously difficult, due partly to inherent features of the police role”.¹ These include the discretion required by policing and the need for on-the-spot decision-making. Regulation is also difficult due to the societal realities of the police, such as deeply entrenched attitudes and lack of effective accountability mechanisms.

“The power to stop and search a member of the public is a powerful policing tool, which when inappropriately or insensitively applied can have lasting consequences for the person stopped...the wider community, and the police service itself”.² These lasting consequences are why effective regulation is crucial.

This article will first set out the background and history of the stop and search (S&S) power. This will be followed by a brief discussion of suspicion-less searches. It will then examine three key challenges to the effective regulation of S&S, namely:

- 1) the wide discretion afforded to officers, fostered by the wording of the Police and Criminal Evidence Act 1984 (PACE) being open to interpretation;
- 2) police practice being resistant to change; and
- 3) the lack of effective independent regulation mechanisms.

Background

The traditional justification for the police force’s S&S power is that the police require legal tools to prevent and detect crime. By having the legal right to investigate “people suspected of wrongdoing, crime can be detected and prevented”.³

The power to S&S dates back to the 1824 Vagrancy Act, which gave officers the power to search and arrest for the offence of being a ‘suspicious person’. The power was refined for London officers (similar powers existed in the West Midlands, Manchester and Liverpool) five years later by the Metropolitan Police Act, which granted the power to S&S individuals who were ‘reasonably suspected’ of carrying stolen or unlawfully obtained items.

Although there are currently twenty-one separate statutes granting S&S powers to the police, they are rarely used, and most S&Ss are conducted under PACE, which is the main statutory instrument that will be referred to.

¹ Shiner, M. (2015). ‘Regulation and Reform’, in Delsol, R. and Shiner, M. (ed.) *Stop and Search: The Anatomy of a Police Power*. Palgrave Macmillan. 146.

² Havis, S. and Best, D. (2004). *Stop and Search Complaints (2000-2001): A Police Complaints Authority Study; Summary Report*. Police Complaints Authority. 6.

³ Bowling, B. and Marks, E. (2015). ‘The rise and fall of Suspicionless Searches’, paper presented at All Souls College, Oxford, 19 February 2015. 12.

The formal regulation of police practice is a relatively recent phenomenon and is part of the “broader cycle of crisis and reform that has engulfed the police”.⁴ One such crisis was when evidence emerged that the three teenage boys (wrongly) convicted of the murder of Maxwell Confait in 1972, had been mistreated while in police custody, leading them to falsely confess to the murder charges. This prompted the creation of the Royal Commission on Criminal Procedure in 1977, which focused on striking the balance between the rights of the suspect with the requirement of tackling crime. It called for the S&S power to be exercised within strict safeguards. This was ultimately enshrined in PACE, seven years later, after the Brixton Riots and subsequent Scarman report criticised the way Brixton had been policed, including the mass use of S&S and other “ill considered, immature and racially prejudiced actions of some officers”.⁵

Another reaction to police malpractice, particularly in relation to race, was the Lawrence inquiry in 1999 (some years after both the original incident and a change of government). It related to the police’s failure to bring the killers of black teenager, Stephen Lawrence, to justice. The inquiry found a series of fundamental errors on the part of the police in the course of their investigation, which the inquiry argued resulted from “professional incompetence, institutional racism and a failure of leadership by senior officers”.⁶ Shiner responds to these results by contending that, “viewed from a police perspective, the finding of institutional racism may have been counter-productive because it deflected attention away from the complex problem of indirect corporate discrimination”.⁷ Whilst this deflection may be the case, it is unreasonable to expect that the commission, upon unveiling institutional racism, should then seek to sugar coat it in anticipation of police institutions’ unreceptive reactions. Indeed the inquiry made it clear that it was not accusing all officers of being racist but rather portrayed destructive, continuous *institutional* racism. If the police fail to see the nuanced difference between the two, or indeed choose to wholly reject the finding, it merely highlights their unwillingness to consider criticism.

This brief historical summary highlights that the regulation of policing in England and Wales is largely based on broad, programmatic policy reforms. Unlike the United States system, which relies on judicial checks to hold police practice to account, British governments have tended to favour high-level official inquiries, national legislative reform and managerial control.

Suspicionless searches

“Since the enactment of PACE, the police had complained that the s1 requirement of reasonable suspicion that persons were carrying dangerous articles...constituted a serious

⁴ Shiner, 149.

⁵ Scarman report 1981 cited in Shiner, 150.

⁶ Macpherson, 1999, cited in Delsol and Shiner, 2006. 246

⁷ Shiner, 158.

impediment in preventing violent crime”.⁸ In response, the amended section 60 of the Criminal Justice and Public Order Act 1994 enables uniformed police officers to stop a pedestrian or vehicle within an authorised area and search for offensive weapons regardless of whether there are grounds to suspect that the person possess offensive weapons. These authorisations are made by senior officers, when they reasonably believe incidents involving serious violence may take place or where “potential troublemakers”⁹ are passing through. Additionally, section 47A (which replaced section 44) of the Terrorism Act allows police officers to stop a person or vehicle within an authorised area and conduct a search for articles of a kind which could be used in connection with terrorism. Such authorisations can again be made by a senior officer when considered necessary for the prevention of acts of terrorism. However, the authorisations must be confirmed by the Secretary of State within forty-eight hours, or they cease to be effective.

Officers’ enjoyment of unlimited discretion in choosing whom to stop during an authorised period, makes it difficult to regulate the use of S&S because there are no adequate controls on their power by which to hold officers to account. This makes accountability of officers difficult. However, some form of reasonable grounds for belief for granting area authorisations are required from further up the police force hierarchy. Yet police officer bias and cop-culture influence officers so that “in practice they tend to target individuals based on a ‘hunch’ or ‘professional intuition’” (Bowling and Marks, 2015:14). This will be explored further in the next section of the essay.

Wide discretion

Perhaps ironically, “the degree of discretion afforded to officers increases further down the organisational hierarchy”¹⁰ with police constables policing at ground level away from immediate supervision, exercising the most discretion.

This makes effective supervision difficult, in part because of the limited extent to which senior officers can be expected to supervise stops given the demands on their time. Whilst the lack of supervision will be discussed later on, what is important to note now is that the use of discretion will lead to different officers using their powers differently. This was highlighted by interviews with officers in which “a few said they would not search a person under reasonable suspicion unless they had enough evidence to arrest, while others worked to a much lower standard”¹¹, revealing a significant discrepancy in police practice. Personal judgements about whether or not to carry out a stop or search are most significant in situations which call for high discretion. In these circumstances generalisations and stereotypes are likely to play a role in determining likely offenders. Indeed, interviews

⁸ Jason-Lloyd, L. (2000). *An introduction to policing and police powers*. Cavendish. 43.

⁹ Jason-Lloyd, 43

¹⁰ Shiner, 146

¹¹ Quinton, P. (2011). ‘The formation of suspicions: police stop and search practices in England and Wales’, *Policing & Society* 21 (4), 357-368. 360

“revealed that officers were not able to describe exactly what reasonable suspicion they required before initiating contact”¹² The fact that “officers often struggled to put into words what made them suspicious, either describing recent encounters or talking vaguely about hunches”¹³, supports the idea that police are influenced by deep-seated biases which influence the way they use their discretion. This view is supported by Dixon (2008) who contends that whilst an officer’s suspicion when dealing with an individual may be prompted by “the kind of specific indicator contemplated by legislators (for example, slipping a packet into a bag)...it is more likely to be a complex mixture of preconceptions about what is normal in a particular place at a particular time, stereotypes and assumptions about particular types of people”¹⁴. These inherent biases are likely to result in the same behaviour carried out by two different people prompting different levels of suspicion.

Discretion is not only relevant when considering whether to S&S but also when deciding whether to escalate a stop to a search. As with the discussion above, officers have given a “range of justifications for the decision to escalate the stop to a search”¹⁵. Moreover, in their study of S&S complaints, Havis and Best¹⁶ found that the escalation of a stop to a search was significantly more likely for black complainants, even though white complainants were twice as likely to be arrested as a result of a stop alone their black counterparts. Once again we see the inherent bias in police culture coming through in their use of discretion.

We have seen that the wide discretion afforded to the police leads to fluctuating officer practices which makes police behaviour difficult to regulate. Additionally, it has been argued that the wide discretion enables officers to employ and sustain intrinsic predispositions. As Dixon notes: “An essential part of the police’s historical mandate has been the control of street economics, recreations, and people. This means employing wide discretionary powers against categories of the population which police culture distinguishes from ‘respectable people’ – the ‘toe rag’s, the ‘rubbish’, ‘the shit’, ‘the scruffs’”¹⁷. These attitudes will be seen throughout the articles, first in the next section where it will be shown that police practice is resistant to change, thus frustrating attempts to regulate police behaviour.

Police practice resistant to change

It is submitted that there has been an uneven and incomplete assimilation of the PACE rules into police culture and practice. This will be briefly shown through institutional attempts to obscure police practice, before focusing on the under-recording of S&S and persistent racist

¹² Quinton, 360.

¹³ Quinton, 361

¹⁴ Dixon, D. (2008). ‘Authorise and Regulate: A Comparative Perspective on the Rise and Fall of a Regulatory Strategy’, in Cape, E. and Young, R. (ed.) *Regulating Policing: The Police and Criminal Evidence Act 1984: Past, Present and Future*. Hart. 32.

¹⁵ Havis, S. and Best, D. (2004). *Stop and Search Complaints (2000-2001): A Police Complaints Authority Study; Summary Report*. Police Complaints Authority. 150.

¹⁶ Havis and Best

¹⁷ Dixon, D. (1997). *Law in policing*. Clarendon Press. 104

inclinations.

Glossing over

It has been argued that PACE operates as a set of ‘presentational rules’, which “put a gloss on policing behaviour so as to make it acceptable to the wider public”¹⁸, in the interests of both the police themselves and the wider public. This attempt to gloss-over policing realities was seen shortly after the publication of the Scarman report, when the Metropolitan Police Service released annual crime statistics, which were found to have been manipulated for political reasons¹⁹. Obscuring police practice challenges the effective regulation of police behaviour by deflecting attention away from areas and behaviours that need to be focused on.

Under-recording

The Code of Practice A requires that when officers use the legal power (rather than consent, which will be considered next) to S&S, they must complete a written record giving their details, those of the suspect and the grounds for the S&S. However, it provides an exception to this when it is not practicable to complete a record, for example in situations of public disorder. S&S’s which fall under the exception will be subject to limited regulation because of the absence of a record.

This recording requirement has had little impact on the practice of officers. In an interview study, officers with pre-PACE operational experience said that PACE had not changed the way they carried out stop/searches.²⁰

One key way officers can get around the recording requirement is through obtaining consent. If a suspect ‘consents’ to being stopped and searched, no legal power is being exercised, and so no recording needs to be made. Seeking consent is so widespread that “several officers told us that they did not even bother to carry out stop/search forms when they were on patrol. They...would try to get consent from a suspect: if this was not forthcoming, they would arrest him or her”²¹. In this way officers are able to test their suspicions about a person when trying to obtain consent, regardless of the fact that a person’s refusal to give consent *should not* constitute reasonable suspicion.

Indeed concepts such as rights and informed consent fit uneasily with the police’s historical emphasis of order maintenance and crime control. This is reflected when ex-officer Barber Wilding argues that the power to stop and account/search is a deterrent because, after the publication of the Macpherson Report - which “included a damning indictment of the police use of the stop and search power...almost overnight stop and search practically ceased, we

¹⁸ Smith and Gray, 1985 cited in Dixon, 1997. 94

¹⁹ Shiner, 2015.

²⁰ Dixon, 1997

²¹ Dixon, 1997 95

lost the streets and crime shot up”.²² This last phrase exposes the predispositions of the police to consider the streets (and its offenders) as their property and to prioritise crime control.

Similar strategies are at work when police officers ask individuals to identify themselves. Officers note that people rarely refuse to give this information, and if they did, “they would be talked, bluffed or coerced into giving the information and allowing the search”.²³ This is possible because of the widespread ignorance among the public who rarely know their rights. People assume that when an officer asks to look into your bag, he or she has the power to do so. This assumption is further fostered by officers use of language: giving an instruction rather than requesting permission, thereby implying that they have the power to give instructions. Whilst the general public continue to be ignorant of their rights, they will not assert them, and regulation of police behaviour will be hindered.

As well as consent, the 2013 revisions to PACE Code A, reduced the amount of recorded information required from twelve to seven fields (in section 4.3A). Fields such as the name and address of the person being searched and the outcome of the search were dropped. This made it more difficult to monitor repeat searches, measure effectiveness and hold officers to account and, consequently, acts as a clear challenge to regulating police officer behaviour in relation to S&S.

Racist inclinations

The under-recording of S&S is one example of how police practice is resistant to change. The racist predispositions of the police as an institution are another example of tendencies that are difficult to stamp-out. This may be because aspects of daily police work generate and sustain occupational structures supportive of racism. Shiner argues that “the use of stop and search as a means of policing ‘dangerous populations’ mean predominantly white officers routinely coming face-to-face with members of black communities in confrontational situations, while rarely doing so outside law enforcement situations, making them particularly susceptible to stereotyping”.²⁴ Consequently, S&S provokes a particular discontent within the black community. Indeed Havis and Best found that black complainants were significantly more likely to raise concerns regarding an officer’s justification for stopping them than complainants from any other ethnic group.

The proposals of the Scarman report met “stiff resistance and outright hostility from the police organisation”²⁵ and were further undermined by a police-orchestrated ‘counter attack’ which fostered the racist stereotype of the black, male mugger²⁶.

It is the failure to address these structural dimensions of police work that constitute a barrier

²² Wilding, B. (2008). ‘Tipping the Scales of Justice?: A Review of the Impact of PACE on the Police, Due Process and the Search for Truth 1084-2006’, in Cape, E. and Young, R. (ed.) *Regulating Policing: The Police and Criminal Evidence Act 1984: Past, Present and Future*. Hart. 134-136

²³ Dixon, 1997, 96.

²⁴ Shiner 155.

²⁵ Shiner 158

²⁶ Sim, 1982 cited in Shiner

to successful regulation and reform.

The racist inclinations of the police structure are also at play in the complaints procedure. Havis and Best found that it was significantly more likely for white complainants to have their complaint referred to the CPS for consideration of criminal charges. Indeed, in their analysis of S&S complaints between 2000 and 2001 where they looked at 100 complaint files, “in the only case where criminal charges were pursued against officers, the complainant was white”.²⁷ This is an example of institutional racism at play.

Ineffective accountability

The last major obstacle that challenges the effective regulation of police behaviour in relation to S&S is the inadequate accountability structures that are currently in place. After briefly taking note of the lack of supervision officers are subject to in relation to exercising their S&S powers, the lack of an independent system dealing with complaints and regulation will be considered.

Lack of supervision

Internal supervision of officers occurs rarely²⁸, and when it does, evidence suggests that it is relatively meaningless since recent research emphasises the need for supervisors to actually scrutinise forms (rather than simply sign them off) and take remedial action when problems are identified.²⁹ As long as this lack of supervision continues, police behaviour will remain difficult to regulate.

Lack of independent regulation

Although the power to S&S is subject to a legal code of practice, the breaching of which constitutes a disciplinary offence and is admissible as evidence in criminal or civil proceedings, compliance is nonetheless generally treated as an internal police matter. This means that the police investigate themselves and therefore are unlikely to examine internal matters as efficiently as an external body would.

Despite the existence of the Independent Police Complaints Commission (IPCC), Shiner and Delsol argue that it will continue to have limited effect in regulating police stops. This is because “very few complaints of any kind are substantiated” (Shiner and Delsol, 2006:252). Havis and Best (2004) also found that “where the exchange occurred between an officer and a complainant without witnesses, there are fundamental problems in substantiating a complaint” (Havis and Best, 2004:9). Specifically, in their pilot project, out of eighty-nine complainants, only seven had some of their complaints substantiated, with the most given reason for non-substantiation being insufficient evidence. This is directly related to the lack of (independent) witnesses to S&Ss, since their presence would likely provide further

²⁷ Havis and Best 17

²⁸ Shiner

²⁹ Delsol and Shiner

evidence of the abuse (or otherwise) of a S&S power. Not only are there lack of witnesses, but “stops and searches occur outside police stations and are more difficult to supervise, and they are particularly difficult to assess retrospectively in investigating complaints” (Havis and Best, 2004:11).

Conclusion

Despite “little evidence that the widespread use of S&S is an operational necessity”³⁰ it is one of the most used powers of the police and yet one of the most poorly regulated.

Despite efforts, there continue to be significant challenges to the regulation of police behaviour in relation to S&S. However police are arguably more accountable and under greater scrutiny today than ever: largely due to the increasingly informed and critical media and public debate; the involvement of external bodies; and the introduction of performance indicators to assess police practice. Nevertheless there are still disquieting trends, such as the persistent inequalities in the policing experience of different social groups.

As it has been seen, legal considerations do “not feature strongly in the decision-making process[es] [of officers] and officer practice varied significantly”³¹ due to the discretion afforded. Additionally, the resistance of police practice to change and the ineffective accountability structures will continue to hinder the regulation of police behaviour until all undergo radical reform.

³⁰ Bowling, B. and Weber, L. (2013). ‘Stop and search in a global context: an overview’, in Weber, L. and Bowling, B. (ed.). *Stop and Search: Police Power in Global Context*, Routledge. 132

³¹ Quinton 366

**THE HUMAN BIOCHIP: EXAMINING THE CURRENT LEGAL
INFRASTRUCTURE**
PART I: LEGAL SYSTEMS OF THE UK AND US – NATIONAL INTEGRATION
Anastasiya Sattarova

The day science begins to study non-physical phenomena, it will make more progress in one decade than in all the previous centuries of its existence.

Nikola Tesla

In my previous article I introduced the concept of the human biochip - as small as a grain of rice, it is an implantable technology (a microchip) within the human body that is capable of retaining personal data, accessible through an encrypted code, which can be read by a specifically programmed reader. The benefits of this biochip are endless and one can only guess at its true advantages, but the obvious ones that we have considered lay in the areas of: national security, policing, immigration, medicine and general data protection. One can, of course, foresee the notion being criticised for its breach of human rights and a potential greater invasion of individual privacy, yet as we have seen, such measures can be justified providing that it is proportionate to the State's objective.

This article comes as the second piece in a series of essays, and I thought it would be useful to discuss the place that a human biochip would take within national legal systems, with particular attention focused on privacy. Yet, before diving into the depth of analysis of legislation and case-law, let us consider the proposed concept.

Voluntary v Mandatory

It is important to understand that a Member State can adopt various methods for the introduction and operation of the proposed notion. Firstly, it can consider introducing it on a voluntarily basis. In this setting, individuals wishing to get an implant would have to express their consent to the designated authority before the procedure could take place. Cases of *voluntary* human microchip implantation are relatively wide-spread within the USA, and to a lesser extent within other States, such as Germany, Sweden and the UK.¹

The advantages associated with human microchipping and the lack of State control over this practice has led to the rise of the *coerced* type of implantation. Coerced human microchipping involves forceful implantation of a device without the individual's full knowledge and consent.

¹ **Sweden:** Mimmi Nilsson, [I'm among the first Swedes with a microchip](http://www.thelocal.se/20141118/swede-operates-microchip-into-body), The Local (November 18, 2014, 06:30 a.m.) available online at <http://www.thelocal.se/20141118/swede-operates-microchip-into-body>;

Germany: Sarah Griffiths, [Would YOU be microchipped? Kaspersky implants chip in man's hand that could one day be used to pay for goods and even unlock his home](http://www.dailymail.co.uk/sciencetech/article-3221287/Would-microchipped-Kaspersky-implants-chip-man-s-hand-one-day-used-pay-goods-unlock-home.html), Mail Online (September 03, 2015; 17:36 p.m.), <http://www.dailymail.co.uk/sciencetech/article-3221287/Would-microchipped-Kaspersky-implants-chip-man-s-hand-one-day-used-pay-goods-unlock-home.html>;

United Kingdom: Samuel Fishwick, [Biohackers: meet London's living synths who are implanting microchips into their own bodies](http://www.standard.co.uk/lifestyle/esmagazine/biohackers-meet-londons-living-synths-who-are-implanting-microchips-into-their-own-bodies-a3101646.html), Evening Standard, (October 29, 2015, 11:05 a.m.) <http://www.standard.co.uk/lifestyle/esmagazine/biohackers-meet-londons-living-synths-who-are-implanting-microchips-into-their-own-bodies-a3101646.html>

The practice of coerced human microchipping has already developed to some extent within the USA. In light of this, authorities have introduced laws and regulations for microchipping practice and have criminalised acts of coerced microchipping.² So far, outside of the USA, there have been no proven cases of coerced microchipping, although claims of such measures are common.³

Finally, the State can legislate on this matter, either making biochipping mandatory for every citizen or, alternatively, semi-mandatory. In other words, introducing it in certain circumstances, similar to the currently operational scheme of the UK's National DNA Database where the fingerprints and DNA profile of perpetrators, victims and witnesses can be stored on the national database for further use. Given the current states of affairs, legislative measures for implementation and regulation of the human biochip could be introduced in the interest of national security, reduction of crime and as a counter-terrorist measure, to name a few.

Yet, in order for this notion to reach its full potential and present the most benefit to its users – it must be implemented globally on a compulsory basis. I simply cannot see another solution and consider that adopting a “pick and mix” approach can prove to be detrimental to the very objective of the idea of a unified solution, adding further uncertainty to an already unstable state of affairs.

Yet, for the time being I would have to be content with restricting it to a much smaller scale, recognising that in order to achieve something big sometimes life requires us to take small steps at a time. In light of this, let us consider the idea of national, compulsory, implementation within one single State. As time goes by, national and international communities learn to accept new innovations, recognising the benefits, and expressing willingness to cooperate – perhaps leading to inter-state involvement.

In order to introduce human microchipping within a State, the government would be required to introduce the relevant legislation and regulations controlling the operational aspects of the concept, while at the same time providing its citizens with safeguards against any possible abuse. Such measures would have to be introduced in conformity with a State's international

² See for example Assembly Bill 290 (Wisconsin); House Bill 203-FN (New Hampshire); Californian Senate Bill 362 of 2007, making it illegal to force a person to have a microchip implanted, and provides an assessment of civil penalties available against the perpetrators. In 2008 the State of Oklahoma had passed 63 OK Stat § 63-1-1430 (2008 S.B. 47), that bans involuntary microchip implants in humans. The issue of human microchipping has further been addressed on a broader scale by the State of Georgia who introduced its Senate Bill 235 of April 5, 2010, which prohibits forced microchip implants in humans which would make it a misdemeanor for anyone to require this. The bill would allow voluntary microchip implants, as long as they are performed by a physician and regulated by the Georgia Composite Medical Board. As a natural consequence to the States reaction to the issues associated with human microchipping Washington State House Bill 1142 ordered a study using implanted radio frequency identification or other similar technology to electronically monitor sex offenders and other felons.

³ Interview with Professor Kevin Warwick, the subject of the first known biochip implantation in 1998, known as project Cyborg 1.0. His research has been discussed by the US White House Presidential Council on BioEthics, The European Commission and led to him being widely referenced and featured in academic circles. For the biography of Professor Kevin Warwick please see

<https://www.reading.ac.uk/sse/about/staff/k-warwick.aspx> and <http://www.kevinwarwick.com/>

obligations. Particularly, as the idea is directly related to human beings, so a State would have to ensure that no human rights would be violated without a fair balancing of the rights of society against the rights of the individual.

Throughout the literature, one issue of concern is prominent. Many have voiced their opinion on what effect the introduction of the human microchip may have on an individual's right to privacy.⁴ Therefore, throughout its analysis, this paper will concentrate on legislation aiming to safeguard one's right to privacy.

Given the compulsory nature of the proposed concept, claims for a breach of privacy rights would be unavoidable. Indeed, as Crispo, Rieback, and Tannenbaum noted, due to its wireless capabilities, an ability to identify a physical object's nature and its location, RFID⁵ technology is very vulnerable and has been an obvious target for abuse since its invention in the early 1940s.⁶

Designed and used during the Second World War as part of the IFF (Identification Friend or Foe) system, RFID has evolved, but so has its weaknesses.⁷ Due to the use of radio waves for communication between the chip and the reader '...we don't know when communication is occurring'.⁸ This exposes the carrier of the chip to a number of threats when their private information is illegally obtained and misused. However, as technology develops, so does protection, and things are not as gloomy now as they were in the '40's. Still, I do not tend to undermine the importance of strengthening national measures of privacy protection.

Many States are already signatories to international legal instruments safeguarding the right to privacy and have introduced national protective measures with regard to privacy rights as part of their international obligations. Yet, before discussing international legal instruments, it would be appropriate to consider existing national legislation safeguarding ones right to privacy and where applicable, the national approach to bio chipping.

This work will examine the legal systems of the United Kingdom and the United States of America. Each State has been selected for a particular purpose. Within the UK the right to privacy has not yet been established as a recognised right. The law in this area still remains somewhat vague and is constantly developing. The USA, on the other hand, offers greater

⁴ Alan Rubel, 'Chapter 14: Privacy and Pervasive Surveillance: A Philosophical Analysis' in M.G. Michael and K. Michael (eds.) Ubervveillance and the Social Implications of Microchip Implants (Hershey, USA: IGI Global, 2014) pp. 390-350.

⁵ Within known microchipping practices the microchip that is used for human implantation is known as Radio Frequency Identification (RFID) tag.

⁶ Melanie, R. Rieback, Bruno Crispo and Andrew S. Tanenbaum, The Evolution of RFID Security, IEEE Pervasive Computing, Vol. 5, No. 1 (2006, pp. 62-69) available online at <https://pdfs.semanticscholar.org/ca43/79c9fc05d7ef3f0e2a31ba38bf3f9cc2495d.pdf>

⁷ *Ibid.*, pp. 65-66.

⁸Roy Want, An introduction to RFID technology, IEEE Pervasive Computing, Vol. 5, No.1 (2006, pp.25-33), available online at https://www.researchgate.net/publication/3437143_An_introduction_to_RFID_technology

legal protection in the area of privacy through the Bill of Rights 1791. However, the significance of examining the US legislative practices lies in their pioneering nature in addressing human microchipping through legislation. As the case-law in this area develops, it is becoming clearer just how difficult any litigation of these issues may be.

National legislation

i. Common law - United Kingdom

The UK legal system is common law based, which to date has not recognised the right to privacy. Such a position is maintained in other common law jurisdictions such as Australia and New Zealand.

When addressing the right to privacy in the UK, one automatically makes reference to the Human Rights Act 1998 and in particular Article 8 of the First Schedule to the Act. However, given the origins of the Act, an analysis of the UK legal system based on its provisions alone would be incomplete and would give little, if any, guidance to the reader. Therefore, it is only appropriate, for the purpose of this work, to interlink the 1998 Act with the very roots of its foundation – the European Convention on Human Rights (ECHR) 1950.

Indeed, a reference in Article 8 of the First Schedule of the 1998 Act has a direct connection to Article 8 of the ECHR, both of which provide the individual with a right to the respect of private and family life, yet it does not in itself act as a guarantee to a right to privacy. Also, in considering Article 8 of the ECHR due regard must be given to Article 10 which provides for freedom of expression. When assessing claims for a right to privacy, courts generally conduct a balancing exercise between these two Articles, particularly when the case concerns a breach of privacy rights by the press or in instances of “whistleblowing”.

The protection of the right to privacy under European instruments has been further extended to include communications under Article 7 of the Charter of Fundamental Rights of the European Union 2000 (the Charter). With the possible introduction of the bio chipping concept, one can see Article 7 becoming more prominent in cases concerning a breach of the privacy right.

The right to privacy has been extensively considered by the UK’s courts. In the case of *Malone v Metropolitan Police Commissioner* (1979) which concerned telephone tapping by the police, the UK courts held that as there is no right to privacy under common law, the police actions therefore cannot be unlawful as there was no right that could be breached⁹. Significant efforts have been made by the privacy and human rights campaigners to recognise this right and afford it greater protection. However, the more recent opinion of the Advocate General, given on the 19th July 2016 in joined Cases C-203/15 and C-698/15, reaffirms the ability of the Member States to limit an individual’s privacy in order to reach a national objective, such as to fight serious crime, etc.¹⁰

⁹ *Malone v Metropolitan Police Commissioner* [1979] 2 All ER 620

¹⁰ Advocate General’s Opinion in Joined Cases C-203/15 *Tele2 Sverige AB v Post-och telestyrelsen* and C-698/15 *Secretary of State for Home Department v Tom Watson and Others*, available online

Even with the introduction of the Human Rights Act 1998, the courts were reluctant to recognise the right to privacy, nor did Parliament show any sign of enthusiasm for its introduction *per se*. Within the UK's jurisdiction there are two ways in which the right to privacy can be protected. Firstly, by relying on the abovementioned Article 8 of the European Convention on Human Rights and secondly, through the doctrine of the right to confidence.

While lacking any certainty with regard to privacy protection for some time, the judiciary has developed the doctrine of "breach of the right of confidence" which caters for limited protection of one's privacy. The right of confidence is a recognised right under common law and in essence entails a misuse of private information. Numerous judicial opinions have confirmed that obtaining or publishing information or unauthorized photographs can amount to a breach of the right of confidence providing that a 'duty of confidence' exists.¹¹ The doctrine has significantly evolved since the decision in *Coco v Clark*¹² which required for the 'duty of confidence' to be established in order for the claim to succeed. However, following the decision in *Campbell v Mirror Groups Newspapers Ltd*¹³, the Court of Appeal in *Douglas v Hello! (No 3)*¹⁴ has established a new position noting:

Megarry J in Coco v A N Clark identified two requirements for the creation of a duty of confidence. The first was that the information should be confidential in nature and the second was that it should have been imparted in circumstances importing a duty of confidence. As we have seen, it is now recognised that the second requirement is not necessary if it is plain that the information is confidential, and for the adjective 'confidential' one can substitute the word 'private'.¹⁵ (emphasis added)

The attractiveness of the doctrine of the breach of confidence lies in its flexibility, as the doctrine is able to protect private information in many situations, such as to protect commercially sensitive information, between employees and their employers and even to protect the details of a sexual relationship between two women.¹⁶

Hence, one may see how the doctrine of the breach of the right of confidence or pertinent legal instruments, such as Article 8 of the ECHR or Article 7 of the European Charter, can be invoked to protect one's privacy. It is important to note that both Article 8 of the Convention and Article 7 of the Charter are qualified rights and therefore Member States retain the power to limit them, providing that they have regard to the requirement for the fair balance that has to be struck

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=181841&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=239943>

¹¹ *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41 (Ch) 47

¹² *Ibid.*

¹³ *Campbell v Mirror Groups Newspapers Ltd* [2004] UKHL Civ 22

¹⁴ *Douglas v Hello! (No 3)* [2005] EWCA Civ 595, [2006] QB 125

¹⁵ *Ibid* [at 83].

¹⁶ *Stephen v Avery* [1988] 2 All ER 477, also see *Prince Albert v Strange* [1849] EWHC Ch J20 where the court held that: "Every man has a right to keep his own sentiments, if he pleases. He has certainly a right to judge whether he will make them public or commit them only to the sight of his friends."

between the competing interests of the individual and of society at large. Having said that, it is almost with confidence that one may suggest that with the more progressive development of human microchipping, the law with regard to privacy protection would evolve accordingly to accommodate the new technology and offer greater protection to citizens.

ii. Statutory law - United States of America

For the purpose of this paper, the USA presents a unique case. Not only does it afford greater protection to the privacy rights of its citizens through the means of the Privacy Act 1974 and the Bill of Rights 1791, but it is also the only State to address the notion of human microchipping through legislative provisions, therefore providing building blocks for a broader discussion and research on this matter.

As it currently stands, within the jurisdiction of the United States the procedure of human microchipping is legal in most of its internal States. In those States where human microchipping is prohibited, self-administration still remains as an option to a person wishing to have an implant. The US government has recognised the benefits of the RFID tag for some time with the US Food and Drug Administration giving their stamp of approval in 2004 for the use of such an implant in humans for medical purposes.¹⁷ Such a move has been further endorsed, not without some concern and emphasis on the need for further research, by the American Medical Association.¹⁸ The significance of such an endorsement further highlighted the proven benefit of the RFID implant within the medical sphere with an added emphasis to the requirement of informed consent. This directly corresponds with the United States Code, Title 10 which requires informed consent to be obtained in order to carry out experimentation involving human participants.¹⁹ Due to such a strict requirement, and growing concerns over its abuse, many internal States have begun to consider implementing legislation addressing the issues of forced or coerced human microchipping, deeming such actions illegal and subject to penalty.

It was not until 2004 that the first RFID related Bill was passed by the State of Utah's House of Representatives, addressing consumer privacy protection.²⁰ This move has been echoed by legislators in several other US States, implementing preventative measures to foil retailers from using RFID tags and consequently infringing on the privacy of their consumers.²¹ Further allegations that the Government and its agencies are planning to use RFID implants on schoolchildren, have triggered the State of California to pass the Senate Bill 682 that imposes a restriction on the use of RFID devices.²² Additionally, the Bill makes it illegal to intercept an

¹⁷ Rob Stein, Implantable Medical ID Approved by FDA, The Washington Post (October 14, 2004, at A01).

¹⁸ Council on Ethical and Judicial Affairs, Report of the Council on Ethical and Judicial Affairs: Radio Frequency ID Devices in Humans (CEJA Report 5-A-07 2007) <https://epic.org/privacy/rfid/ama-report.pdf>

¹⁹ US Code (2011) *Title 10-Armed Forces*, Subtitle A, Part II, Chapter 49, Section 980, available online <https://www.gpo.gov/fdsys/pkg/USCODE-2011-title10/pdf/USCODE-2011-title10-subtitleA-partII-chap49-sec980.pdf>

²⁰ Mark Baard, Lawmakers Alarmed by RFID Spying, WIRED, (26 February, 2004) available online at <http://archive.wired.com/politics/security/news/2004/02/62433>

²¹ *Ibid.*

²² Senate Bill 682 (California).

RFID signal without the subject's consent or knowledge and provides for creation of encryption standards.²³

With the US witnessing a gradual evolution within the area of human microchipping practice, Wisconsin Governor Jim Doyle has put forward a proposal for a legal provision criminalising the implantation of RFID microchips in humans.²⁴ Consequently, in 2006 the Assembly Bill 290 was unanimously passed by both houses of the Wisconsin state legislature, criminalising any form of coerced human microchipping and subjecting the perpetrator to a fine of up to \$10,000.²⁵ The State of California has followed suit, with its Governor Arnold Schwarzenegger signing Senate Bill 362. The Bill outlaws the "...requiring, coercing, or compelling any other individual to undergo the subcutaneous implanting of an identification device."²⁶ It has further expanded on the provisions of its predecessor and criminalised the actions of employers who force their employees to be microchipped as a condition for pay or benefits.²⁷ Subsequently, many other US States have followed suit in implementing legislative measures addressing illicit human microchipping practices.²⁸

However, although the introduction of legislation addressing coerced human microchipping gave a legal recourse to deal with this matter, it also showed just how difficult such claims would be to deal with. In the 2002 case of *Marino v. Gammel*,²⁹ a federal court in their preliminary opinion recognised the likelihood of the plaintiff being implanted with a microchip without their informed consent. Yet, due to the inconclusive results the plaintiff's claim could not be determined one way or the other.³⁰

Due to the difficulties of establishing conclusive evidence, cases on human microchipping are scarce and are extremely difficult to bring to court for trial. Furthermore, the lack of national legislative provisions makes it difficult to determine the national stance on the proposed concept. While some internal State's legislation criminalising the coercive type of human microchipping, others remain silent on the matter.

However, one thing is clear – the US will not abandon the practice of human microchipping, at least not any time soon. In its decision given by the Supreme Court in *Riegel v. Medtronic Inc.*³¹, the court affirmed its support for the medical implant manufacturers approved by the Food and Drug Administration. In this case the judiciary found itself obliged to support the governmental scheme giving medical implant manufacturers a degree of protection from

²³ SFGate, [The Right to Be Left Alone](http://www.sfgate.com/opinion/editorials/article/The-right-to-be-left-alone-2645339.php), SFGate (25 August, 2005), available online at <http://www.sfgate.com/opinion/editorials/article/The-right-to-be-left-alone-2645339.php>

²⁴ Assembly Bill 290 (Wisconsin).

²⁵ Beth Bachelder, [Wisconsin Bill to Ban Coerced Chip Implants](http://www.rfidjournal.com/article/articleview/2304/1/1/), RFID Journal (02 May, 2006) available online at <http://www.rfidjournal.com/article/articleview/2304/1/1/>

²⁶ Senate Bill 362 (California); California Civil Code, Section 52.7, available online at http://leginfo.ca.gov/faces/codes_displaySection.xhtml?lawCode=CIV§ionNum=52.7

²⁷ Senate Bill 362 (California).

²⁸ House Bill 07- 1082 (Colorado); Senate Bill 2415 (North Dakota); Senate Bill 47 (Oklahoma).

²⁹ *Marino v. Gammel* 191 F. Supp.2d 243 (D.C. Mass. 2002).

³⁰ *Ibid.*

³¹ *Riegel v. Medtronic Inc.* 128 S. Ct. 999 (2008).

personal injury liability, providing that implants have been marketed with the Food and Drug Administration's approval and have met their standards.³² With only one dissenting opinion, the decision in *Riegel v. Medtronic Inc.* emphasised the caution that needs to be taken when dealing with such matters, noting that allowing State juries to impose liability on manufacturers of approved devices will lead to the disruption of the federal scheme.³³

Out of all of the Member States who have contributed to the research and development of the concept of human microchip implants, the USA undeniably retains its place as the leader and a pioneer in this area. However, unless some form of national protection is implemented within its territory one can see the possibility of coerced human microchipping becoming more prevalent due to national security concerns, as well as such practices being moved underground in order to avoid State control.

Conclusion

In conclusion, I hope you can see how the legal platform is already in place on a national level, not just in the UK and US as considered above, but in other states whose legal systems are similar to those discussed.

The foundation is by no means perfect and further work will be needed to guarantee an adequate level of protection to citizens against possible abuse – but this is not to say that it is impossible. Technologically we are better advanced than ever and the technology does exist, and can be perfected, to address the weak basis of evidence in court if it came to this.

The idea of the human biochip is not a greater invasion of our privacy or further infringement of our human rights, it is the peace of mind to a parent over the safety of their child, it is the protection of the vulnerable in our society, it is timely and accurate medical attention, and for many it would bring closure. As much as you may be appalled by the very concept, or wonder how on earth one can consider this idea, put it to one side, reflect on it over time, and I am sure you will see that this concept presents hope for a safer future. Patience and persistence are two wonderful virtues. After all, Alan Turing was considered crazy when he first spoke about the computerised machine and look at the world now – his invention forms an inevitable part of our daily life.

³² Linda Greenhouse, Justices Shield Medical Devices from Lawsuits, The New York Times (21 February, 2008) available online at

http://www.nytimes.com/2008/02/21/washington/21device.html?_r=0

³³ *Ibid.*

THE ABILITY OF THE MODERN BRITISH CONSTITUTION TO GUARD AGAINST ATROCITIES

Yaavar Afshin

“I said thank heavens were not a democracy in this country! The politicians in this country....they represent almost nobody, they are themselves immensely incompetent and inexperienced.....why should we be so glad to be run by these people who have no experience of anything and don’t know anything and make a mess of everything they do....why shouldn’t you be glad that somewhere in our system there are restraints on them”¹ That was a quote by author and Mail on Sunday columnist Peter Hitchens on an edition of Question Time in 2010. The panel were discussing how much influence the monarchy should have on government policy in light of the recent revelations that plans for a £3 billion housing development programme in Chelsea had been scrapped after Prince Charles had spoken out against them.² At the time, Hitchens outburst was received with laughter and bemusement from both the panel and the audience however; a closer inspection of our unique, mixed constitution, the different state institutions and the exercise of their powers reveals that actually there was a certain element of truth in his comments about democracy in the United Kingdom. However, is this an inconvenient truth or in fact one to be applauded and respected? This is one of a number of themes that will be discussed in this piece, in which I shall examine whether the modern British constitution stops atrocities from happening – or at least makes them more difficult to develop. Comparisons will be made with the Weimar constitution of 1919 and the South Africa Act 1909 - both constitutions which have been in operation whilst humanitarian horrors have unfolded.

Conceptual Aspects of the Question

There are two key conceptual issues that require addressing before the question can be tackled. This piece is about determining whether the British constitution is able to guard against some of the horrors that other constitutions have historically failed to guard against. However, can horror actually be given an objective meaning or must we view it subjectively and take the circumstances and context of a particular situation into account? Even if horror can be spoken of in objective terms, does it actually make sense to speak of a constitution itself succeeding or failing to guard against atrocity? These are all relevant considerations that must be addressed if there is going to be any merit in answering this question.

It is my strongly held view that an objective idea of horror is possible to comprehend and indeed should be regarded as anything that goes against fundamental human rights as recognised by civil society. Although there is a school of thought suggesting that human rights

¹ Nsotd4, ‘Peter Hitchens on Democracy ”Thank heaven we are not a democracy”’ (4 November 2011) <<http://www.youtube.com/watch?v=-hIOiKsgTqQ>> accessed 18 May 2014.

² Robert Booth, ‘Prince Charles’s ‘meddling’: a royal right, or a privilege too far?’ *The Guardian* (London, 30 June 2010)

do not exist because they come from an indefinable source and because they are so transient³, I would disagree and contend that all individuals are born with some sort of innate, moral constitution which allows them to recognise reprehensible actions independently of law. An aspect of this is recognising that certain fundamental rights belong to each individual, which certainly seems to be what Dicey intimated when he said “the law of the constitution...are not the source but the consequences of the rights of individuals”.⁴ I contend that human rights should be rights never to be derogated from. It may be argued that sometimes it is necessary to qualify these rights in times of war, for example, where pacifism is simply not an option. However, I would argue that even in these circumstances, war is not a valid justification but merely a resignation to the fact that it is the only remaining solution once all other options have been exhausted. Overall, I believe that atrocity and horror can be objectively defined as anything that contradicts the human rights that are well understood by civil society. After all, the vast, vast majority of civilised society recognise the fundamental role that human rights plays in the fabric of society and its progression.

However, even with an objective meaning of ‘atrocity’, does it make sense to speak of a constitution itself failing when humanitarian horrors unfold or a constitution itself guarding against atrocity? This ultimately questions the relationship that law and society share. It concerns which of these aspects influences the other and the extent of that influence. A constitution, it is well understood, sets out the framework and the principles by which a country is to operate. It defines the powers of the different state institutions and the maxims, or guiding principles, by which these institutions must work.⁵ A constitution is there to reflect the wishes and values of the people it is intended to serve. In Britain, society has consented to be both protected by the law and answerable to it, so law appears to be in control of society. However, those very same laws arise out of bills drafted and enacted by political representatives whom we have voted to represent us in parliament. Judges then go further by interpreting and applying these laws. So the process appears circular. However the reality is that in any democracy, individuals will always hold the upper hand. The law is a social construct - it is man-made - and in a democratic system based on popularity, law only controls society as much as society wants it to. Ultimately, any law which once may have been held to have been relevant and necessary will always be vulnerable to being superseded by new wants of society and its legislators.

So, it appears a somewhat strange proposition to state that constitutions can fail horribly or successfully guard against atrocity. It is ultimately individuals that succeed or fail horribly. However, whilst a constitution, much like any law, can never guarantee that it will provide for a safe society, it can provide the means or tools for success and failure. It can still provide for measures and safeguards to ensure that the beginnings of an atrocity will find it more difficult to develop into a crisis. This is where I believe the ultimate strength of a constitution will lie; in its ability to provide the right balance between implementing a form of governance that is

³ Will Self, ‘A Point of View: do human rights really exist?’ ([www.bbc.co.uk](http://www.bbc.co.uk/news/magazine-17866473), 27 April 2012) <<http://www.bbc.co.uk/news/magazine-17866473>> accessed 18 May

⁴ Albert Venn Dicey, ‘*Introduction to the Study of the Law of the Constitution*’ (3rd edn, Macmillan and Co 1889) 190

⁵ A W Bradley and K D Ewing, *Constitutional and Administrative Law* (12th edn, Longman 1997) 4

both strong enough to withhold potential atrocities developing but one that is accountable to an electorate which continues to enjoy its liberty and right to self-determination. Therefore, I believe that to a certain degree it does make sense to discuss whether a constitution can guard against atrocity. However, the limitations and potentially temporary nature that any law will inevitably possess must not be forgotten.

Britain's Unique Constitution

The British constitution, it is fair to say, has enjoyed a very unique existence in British society like no other constitution. It is an unwritten constitution which combines a mixture of tradition, modernity, hereditary and democratic elements and where the government of the day does not hold absolute power.⁶ However, is it these unique features of the British constitution that guard against atrocity?

Britain's Bicameral System

One unique feature of the British constitution is that it has a bicameral legislature which means that there are two separate legislative bodies that work together in the enactment of legislation.⁷ One of these is an elected body known as the House of Commons and the other is the House of Lords. A bicameral system is by no means unheard of but the difference here is that not one member of the House of Lords is in fact elected; they are either appointed by ministers or are hereditary members.⁸ So although the UK is committed to democracy, an important part of its legislature directly contradicts this principle. The House of Lords used to have the power to veto bills that had been approved by the House of Commons. However, since the Parliament Act 1911, which Lady Hale described as the moment the UK became a true democracy (rather conversely)⁹, it can only delay bills from being enacted or make amendments to them.¹⁰ Members of the House of Lords are recognised as being the more experienced part of the legislature who have particular and specific expertise in a wide range of areas associated with public life.¹¹ This unique nature of our legislature is perhaps what Dicey was alluding to when he queried if, 'constitutional law is in reality a cross between history and custom which does not properly deserve the name of law at all'.¹²

Therefore, whilst not exactly consistent with the principle of democracy, does this system in fact offer greater protection against horror and atrocity? It could be argued that the fact that there is a House of Lords made up of hereditary peers who, along with other experienced members, carry the weight of the nation's history and tradition with them, making it more

⁶ Mark Elliot and Robert Thomas, *Public Law* (Oxford University Press 2011) 12-13

⁷ Mark Elliot and Robert Thomas, *Public Law* (n6) 89-90

⁸ Parliament, 'How members are appointed' (www.parliament.uk)

<<http://www.parliament.uk/business/lords/whos-in-the-house-of-lords/members-and-their-roles/how-members-are-appointed/>> accessed 18 May 2014

⁹ *Regina (Jackson and others) v Attorney General* [2005] UKHL 56, [2006] 1 AC 262

¹⁰ Parliament Act 1911, s 2(1)

¹¹ Parliament, 'Who's in the House of Lords' (www.parliament.uk)

<<http://www.parliament.uk/business/lords/whos-in-the-house-of-lords/>> accessed 18 May 2014

¹² Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (n4) 21

difficult for new and radical ideas and perspectives to be converted into any tangible form of law or authority. Arguably, they also act as a restraint against, what Coleridge would call, the more commercially interested House of Commons who, nowadays especially, tend to be career politicians seeking to increase their approval and popularity.¹³

Was this an important aspect that was missing from Nazi-Germany whilst the Weimar Constitution 1919 was in operation? Whilst Germany also had an upper chamber, known as the Reichsrat, it was not as effective as the current House of Lords. Even if the Reichsrat opposed a law approved by the Reichstag (the lower chamber) then so long as the Reichstag could get a two thirds majority after a second reading a bill can still be enacted by the president.¹⁴ Therefore, with Germany in practical terms seeming to have a unicameral legislature, though not constitutionally, it was always going to be more likely that the legislation proposed by the party in power was going to be enacted. The result of having such a weak legislature allowed the Fire Decree 1933 to be passed, which brought into force article 48 of the constitution. This article permitted the suspension of a number of rights protected under the constitution.¹⁵ This was swiftly followed by the Enabling Act of 1933, which in its very first article proclaimed that laws can be passed by the government in power without having to go through the legislative bodies.¹⁶ This allowed for the horrific Nuremberg laws, which essentially dehumanised the Jewish community by stripping them of their citizenship and segregating them from the supposed 'Arian' race.¹⁷ It is clear to see the chain of causality that resulted in the subsequent horrors which, in part at least, found its beginnings in a weak legislature.

Therefore, a fascist party in Germany was not only able to gain the support of the people but was also allowed to make rapid headway into the politics of the country with devastating consequences. This demonstrated a clear weakness and fragility of the German legislative system under the Weimar constitution, made even clearer by von Hindenburg's obligation to appoint Hitler as chancellor, despite being very reluctant to do so. Contrast that with the UK, which implemented the Public Order Act 1936 barely four years after the fascist party the BUF was formed.¹⁸ This is a clear example of how Britain's unique constitution, with its emphasis on tradition and having a strong bicameral system, was able to stop potential atrocity from happening. Had such a set of circumstances existed in Germany in 1930, perhaps the humanitarian horrors which followed could have been avoided.

¹³ NEWSWEEKLY, 'POLITICAL IDEAS: Samuel Taylor Coleridge - Conservatism's radical prophet' (www.newsweek.com.au, June 19 2004) <<http://newsweek.com.au/article.php?id=1803>> accessed 18 May 2014

¹⁴ Weimar Constitution 1919 (*Die Verfassung des Deutschen Reichs*) (FRG) article 74

¹⁵ Decree of the Reich President for the Protection of People and State (*Verordnung des Reichspräsidenten zum Schutz von Volk und Staat*) (FRG) article 1

¹⁶ Enabling Act (*Ermächtigungsgesetz*) (FRG) article 1

¹⁷ Nuremberg Laws 1935 (*Nürnberger Gesetze*) (FRG)

¹⁸ Public Order Act 1936

Royal Assent

Apart from having a unique bicameral system, there is another element involved when bills are being made into legislation. The UK is not a republic; it has a constitutional monarchy and one of its most important legislative prerogatives involves giving royal assent to legislation.¹⁹ Once bills have successfully passed through both the House of Commons and the House of Lords, the final procedure involves the monarch approving, or assenting, to the bill. Only after this royal assent has been made does a bill actually become law.²⁰ It is a constitutional convention that the Queen or King is allowed to express privately any concerns they may have about government policy and plans.²¹ More crucially however, the monarch, in theory at least, maintains the legal right to veto any bill passed to them. Although it is a constitutional convention that royal assent must be given to every bill, it is suggested by Brazier that under certain, extreme circumstances, the monarch maintains a legal right to refuse assent to a bill.²² The last monarch to refuse royal assent was in 1707 by Queen Anne when she refused assent to the Scottish Militia Bill however, Brazier speculates that there are three extreme circumstances in which a veto may be exercised.²³ First, if the correct procedure to pass a bill has not been followed where, for example, the bill repeals a previous law which requires a two thirds majority before it can be repealed. Second, where a bill proposes to prolong the life of parliament beyond the current statutory five year period, as this would go against the principles of democracy under the constitution. Finally, where a bill ‘would produce a permanent subversion of the democratic basis of the constitution’, then the use of the veto may be accepted.²⁴

It is difficult to gauge precisely just when the power to veto could be accepted given that no such constitutional conundrum or case law on the matter has arisen in recent times. However, legally this power still exists and serves as a constant reminder to both the government and parliament that there are checks and balances at work which are beyond even their jurisdiction. There was no such system of checks and balances afforded to the victims of the Nazi-Germany regime – is this the price that is paid for having a constitution that advocates a republic with an absolute democracy?²⁵

However, what must also be noted is that even in countries which have a monarchy that can withhold assent, there are no guarantees that such a power will be utilised in extreme circumstances. Under section 64 of the South Africa Act 1909, the king (or the Governor-General acting on his behalf) has the power to withhold assent to legislation.²⁶ Yet the Separate Representation of Voters Bill, which largely reduced black voting rights in South Africa, was assented to. From this, one of two conclusions can be drawn; either the power to veto was not

¹⁹ Rodney Brazier, ‘Royal assent to legislation’ (2013) 129 LQR 184, 185

²⁰ Ibid., 185

²¹ Ibid. 186

²² Ibid. 187

²³ Ibid. 201

²⁴ Ibid. 201-202

²⁵ Weimar Constitution 1919 (n14) article 1

²⁶ The South Africa Act 1909 s 64

possible to use in practice or the monarch agreed with the government's wishes, No matter which conclusion is drawn, it demonstrates the monarchical system is not fool-proof either.

The requirement of royal assent echoes the British constitutions emphasis on having both a democracy and traditional principles through its vesting of power in a small, elite group. Although an occasion has not arisen in recent times in which it can be tested whether royal assent has any practical, rather than merely theoretical, purpose, what it does ensure is that the UK constitution remains a mixed constitution. This is an idea dating back to Aristotle, who believed that a constitution which encompasses democratic, aristocratic and monarchic elements ensures that both the people are heard and that the traditions and values of the old are not forgotten – as opposed to a plainly democratic model vulnerable to sophists who pander to the audiences wishes.²⁷ The British model, partly through royal assent, continues to abide by this which is arguably why it has managed to steer clear of humanitarian atrocity.

Britain's Independent Judiciary

The most salient and convincing argument that can be put forward supporting the notion that Britain's constitution is able to guard against atrocity is the fact that we have a fiercely independent judiciary. Our judges are not elected by the people but are instead appointed by ministers. The judiciary is not merely subject to the law but indeed forms a part of it. We live under a common law system which means that not only do judges interpret and apply legislation, but they can also develop the law through their judgments which create a binding precedent on courts of lower standing. Dicey realised the crucial role our judiciary plays in the framework of the UK constitution when he noted, 'Our constitution, in short, is a judge-made constitution, and it bears on its face all the features, good and bad, of judge-made law'.²⁸ He also described how an appeal to precedent by judges is merely a way of disguising judicial decisions becoming legislation²⁹ thus showing the power that the law courts in this country truly possess. This common law system is an important feature also recognised by the monarchy where, upon coronation, promises and swears 'to govern the Peoples of the United Kingdom of Great Britain.....according to their respective laws and customs' showing that they are required to serve subject to the system of law already in place.³⁰

Our judicial system is no doubt unique when compared to the rest of Europe. Lord Neuberger drew upon this difference and used a fantastic analogy with ants and spiders, which arose from a poem by Francis Bacon. The poem went as follows:

*"The men of experiment are like the ant, they only collect and use; the reasoners resemble spiders, who make cobwebs out of their own substance."*³¹

²⁷ Stanford Encyclopaedia of Philosophy, 'Aristotle's Political Theory' ([www.plato.stanford.edu](http://plato.stanford.edu), January 26 2011) <<http://plato.stanford.edu/entries/aristotle-politics/>> accessed 8 May 2014

²⁸ Albert Venn Dicey, 'Introduction to the Study of the Law of the Constitution' (n4) 116

²⁹ Albert Venn Dicey, 'Introduction to the Study of the Law of the Constitution' (n4) 18

³⁰ The Official Website of the British Monarchy, 'Coronation Oath, 2 June 1953' (www.royal.gov.uk) <<https://www.royal.gov.uk/ImagesandBroadcasts/Historic%20speeches%20and%20broadcasts/CoronationOath2June1953.aspx>> accessed 19 May 2014

³¹ Lord Neuberger, 'The British and Europe' (Cambridge Freshfields Annual Law Lecture 2014, 12 February 2014)

Neuberger commented that the spider is like the European civil lawyer; supporting and using a strict code of principles which is then rigidly applied to each and every situation. However, the British common lawyer is much like the ant; collecting and using methods, seeing what can and cannot work and developing the law on a case by case basis.³² He is describing how the British legal system is able to correct and adapt itself in such a way that it can stay up to date with changing circumstances, as opposed to a strict adherence to codes and principles found in Europe. This echoes the sentiments of Lord Justice Laws who spoke of the virtues of a common law legal system.³³ He discusses how, ‘the common law’s distinctive method has yielded a process of continuous self-correction, allowing for the refinement of principle over time’ which maintains the constitutional balance between judicial and political power by acting as a restraint.³⁴

By having such an independent judiciary that is largely free from political influence and interference, it allows for the rights of individuals to be given greater protection from potentially horrific laws and policies that the government may create, thus ensuring that the government in power does not have absolute control. For example, in *Dr. Bonham’s Case*, Sir Edward Coke exclaimed that the common law will control an Act of Parliament and adjudge it to be void when it goes against common right and reason.³⁵ Although Coke may have been exaggerating somewhat the courts power, his underlying point about the courts not blindly submitting to the governments wishes is well evidenced in human rights case law. For example, in *A and Others v Secretary of State for the Home Department*, the House of Lords held that the British government was not allowed to derogate from the Human Rights Act 1998 by indefinitely holding suspected terrorists on the grounds that there was a public emergency affecting the life of the nation.³⁶ This is a fine example of Britain’s independent judiciary holding the government to account and stopping atrocities potential ensuing.

If a closer inspection is once again made on Nazi-Germany and the poignant steps that ultimately led to the humanitarian horrors, it is clear that not having an independent judiciary had a major role to play. The Weimar constitution makes it clear that, unlike the system currently in the UK, the courts are subject to the law – rather than as a system of checks and balances upon it.³⁷ Although article 102 states that judges are independent, this was simply not the reality of the time where under the constitution, parliament was allowed to legislate for how long judges were allowed to serve and under what conditions.³⁸ Worst still however, under article 48 there could be derogations from a number of human rights, meaning that the

³² Lord Neuberger, ‘The British and Europe’ (Cambridge Freshfields Annual Law Lecture 2014, 12 February 2014) (n31)

³³ Lord Justice Laws, ‘The Common Law and Europe’ (Hamlyn Lectures 2013, 27 November 2013) <<http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=6&ved=0CFUQFjAF&url=http%3A%2F%2Fadam1cor.files.wordpress.com%2F2013%2F12%2Fflaws-lj-speech-hamlyn-lecture-2013.pdf&ei=HE2DU7Xzl6zb7Ab4j4HwDQ&usq=AFQjCNF7BFvaVpMKrJe-oHtzwp8h79KZLw>> accessed 19 May 2014

³⁴ Lord Justice Laws, ‘The Common Law and Europe’ (Hamlyn Lectures 2013, 27 November 2013) (n33)

³⁵ *Dr. Bonham’s Case* (1608) 8 Coke Reports 107a, 77 ER 638

³⁶ *A and Others v Secretary of State for the Home Department*, [2004] UKHL 56, [2005] 2 AC 68

³⁷ Weimar Constitution 1919 (n14) article 102

³⁸ Weimar Constitution 1919 (n14) article 104

constitution was always going to be more susceptible to causing atrocity.³⁹ The constitutions ineffectiveness in this area is no better exemplified than by the fact that a Volks (peoples) court was created by Hitler which dealt largely with cases relating to politics and treason – independently of the rest of the judicial system⁴⁰ despite article 105 stating that ‘extraordinary courts are inadmissible’.⁴¹

It is clear to see the fundamental role a judiciary can play in the protection of fundamental rights and keeping the government in check if it is allowed to be independent and free from political interference. The judiciary of Britain today and the judiciary that operated in Nazi-Germany are poles apart, as were the consequences that ensued under each.

Afterword

This piece has been about determining whether the modern British constitution guards against atrocity. I proposed first that horror could be defined objectively and that to a certain degree, it does make sense to speak of a constitution itself guarding against atrocity by providing the means both for creating safety and horror. Horrors are less likely to happen under the British model because it has a unique bicameral system, the requirement of royal assent and because of our fiercely independent judiciary. As Dicey poignantly noted, the powers of the crown and government are concealed and nobody truly knows where all the power lies so full control can never be sought.⁴²

³⁹ Weimar Constitution 1919 (n14) article 48

⁴⁰ Holocaust Encyclopaedia, ‘Law and Justice in the Third Reich’ (www.ushmm.org)
<<http://www.ushmm.org/wlc/en/article.php?ModuleId=10005467>> accessed 19 May 2014

⁴¹ Weimar Constitution 1919 (n14) article 105

⁴² Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (n4) 11

BPE SOLICITORS AND ANOTHER (RESPONDENTS) V HUGHES-HOLLAND (IN
SUBSTITUTION FOR GABRIEL) (APPELLANTS) [2017] UKSC 21

William Fabbro

The case of *BPE Solicitor*¹ was an appeal before the Supreme Court in December 2016. The appeal examined the extent to which a client could claim damages in tort from a negligent solicitor for a failure to disclose critical information when entering into a commercial transaction.

Background

Mr Peter Little was a builder and developer. Mr Gabriel was a personal friend. In November 2007, Mr Little told Mr Gabriel that he was looking to borrow £200,000 in connection with a disused heating tower situated on Kemble Airfield in Gloucestershire, called Building 428. Although Mr Little did not say so in explicit terms, Mr Gabriel assumed that the £200,00 would be used to finance the development.

After the meeting, Mr Gabriel visited the site, and formed the view that Building 428 was worth about £150,000 and that once developed it would be worth more than £400,000. Taking Mr Little's estimate of development costs at face value, he decided that the project was viable and that he would lend the £200,000 that Mr Little needed.

However, there had been a misunderstanding: Building 428 belonged to High Tech Fabric Maintenance Ltd (Mr Little's trading company), subject to a charge in favour of a bank which secured a loan of £150,000. Mr Little intended to transfer it to a special purpose vehicle called Whiteshore Associates Ltd, which was to be used to carry out the development. Whiteshore was to pay £150,000 to High Tech for the building, which would be paid over to the bank in discharge of the loan and the charge. The purchase by Whiteshore was to be funded from the £200,000 borrowed from Mr Gabriel and the balance used to meet High Tech's liability for VAT. The Judge found that Mr Gabriel knew nothing about these plans, which were entirely inconsistent with his understanding of the transaction and would not have been acceptable to him.

The loan money would in effect be used to pay off a debt owed by Mr Little's principal operating company to the bank, leaving nothing to fund the development unless it could be found from other sources.

Mr Richard Spencer was an assistant solicitor at BPE Solicitors in Cheltenham. Mr Gabriel decided to instruct him to draw up a facility letter and a charge over Building 428. Mr Spencer received his instructions in a rather unconventional way. The Judge found that they came not from Mr Gabriel himself but from Mr Little, in a voicemail message left on his telephone. Mr Little told him that he intended to sell Building 428 to Whiteshore and that Mr Gabriel would

¹ *BPE Solicitors and Another v Hughes-Holland (in substitution for Gabriel)* [2017] UKSC 21.

lend him the money.

Mr Spencer at no time sought confirmation or clarification of these instructions from Mr Gabriel himself. Mr Spencer used a template for an abortive transaction which Mr Gabriel instructed him on earlier in the year, this contained statements to the effect that the loan moneys “will be made available as a contribution to the costs of the development of the property”, and that the purpose of the loan was to “assist with the costs of the development of the property.” Mr Spencer did not notice these statements and failed to remove them. They did, however, accord with Mr Gabriel’s understanding of what was proposed and served to confirm it.

On 7 December 2007 there was a completion meeting at BPE’s offices attended by (amongst others) Mr Gabriel, Mr Spencer, Mr Little and his solicitor. The Judge found that at the meeting Mr Gabriel learned for the first time that Building 428 belonged to High Tech, that it was charged to the bank and that it was intended to discharge the bank’s charge. But he was not told that this was to be funded with the loan moneys. The Judge found that Mr Gabriel was taken through the facility letter and read and noted the statements that the loan moneys were to be used to fund the development. He signed it and advanced the money on that basis. The Judge found that he would not have done so if he had known the use which Mr Little in fact proposed to make of the loan moneys.

The transaction and development was a failure and Mr Gabriel subsequently went bankrupt. He recovered nothing except £8,191.56 which was paid by Mr Little personally.

Procedural History

Mr Gabriel sued Mr Little, Whiteshore and High Tech for fraud and negligent misrepresentation. He sued BPE for dishonest assistance in a breach of an implied trust of the loan moneys to apply them to the cost of development, and for negligence.

The action was tried in May 2012 by Mr Robert Englehart QC sitting as Deputy Judge of the Chancery Division. He dismissed all the claims against Mr Little, Whiteshore and High Tech. With regards to BPE solicitors, the Judge held that they had no duty to advise Mr Gabriel about the commercial risks associated with the project, but should have explained to him that the funds would be applied for Mr Little’s benefit and that in reality he was not putting anything into the project. Mr Spencer failed to do that, and indeed negligently misled Mr Gabriel by allowing statements to appear in the loan documentation which suggested the opposite.

Mr Englehart also noted that it would not be right to conclude that the commercial venture was doomed to fail from the outset.² Having come to this conclusion he held that any loss resulting from the transaction was foreseeable, and recoverable subject to contributory negligence and mitigation. He assessed it at £191, 808.44, BPE Solicitors appealed.

² *Richard Gabriel v Peter George Little, Whiteshore Associates Limited, High Tech Design & Build Limited, BPE Solicitors LLP* [2012] EWHC 1193 (Ch), [90].

The Court of Appeal allowed the appeal, holding that the whole loss was attributable to Mr Gabriel's misjudgements and reduced the damages to nil. In any event, it would have been reduced by 75% for contributory negligence.

Hughes-Holland (Mr Gabriel's Trustee in bankruptcy) appealed largely on the ground that Mr Gabriel was entitled in law to the whole loss flowing from a transaction into which he would not have entered but for Mr Spencer's negligence.

The question before the Supreme Court was this: Is the negligent solicitor required to pay damages to his client equal to the full loss suffered by the client where he entered into a transaction which he would otherwise not have entered into? Or, does the solicitor escape liability if the transaction which the client thought he was entering into would in fact have been unviable?

Decision and Reasoning

The Supreme Court re-emphasised the distinction between professional "advice" and "information". Lord Sumption, delivering the unanimous judgment of the court, concluded that the reasoning in *Steggles Palmer*³ and *Portman Building Society v Bevan Ashford (a firm)* [2000] PNLR 344 had been wrongly applied and *South Australia Asset Management Corp v York Montague Ltd* [1997] AC 191 ("SAAMCO") had often been misunderstood.⁴ Lord Sumption re-defined two fundamental features of the reasoning in SAAMCO. Firstly, where the contribution of the defendant is to supply material which the client will take into account in making his own decision on the basis of a broader assessment of the risks, the defendant has no legal responsibility for his decision. Secondly, this principle has nothing to do with the causation of loss as that expression is usually understood in the law.⁵

Applying that to the present case, Mr Spencer owed Mr Gabriel a duty of care. Mr Spencer also breached this duty by negligently allowing the erroneous statements about the nature of the transaction to subsist in the facility letter, thus sustaining the misunderstanding of the purported use of the loan moneys.

It is a long established common law principle "that any event that would not have occurred but for the act of the defendant must be regarded as the consequence of that act": causation.⁶ Thus, as Mr Englehart QC found Mr Gabriel would not have paid the money if he had known it was to pay off a debt, the loss that Mr Gabriel suffered is, ostensibly, a consequence of Mr Spencer's negligent act. And, any loss flowing from the transaction would therefore be foreseeable, making Mr Spencer liable for the entire loss.

However, mere causation is not always a sufficient condition, and the principle stated in

³ *Bristol & West Building Society v Fancy & Jackson* [1997] 4 All E.R. 582. (*Steggles Palmer* was one of eight cases under this title).

⁴ *BPE Solicitors*, [34].

⁵ *Ibid.*, [34]-[36].

⁶ *Ibid.*, [20].

SAAMCO was not one of causation. “The law is concerned with assigning responsibility for the consequences of the breach, and a defendant is not necessarily responsible in law for everything that follows from his act, even if it is wrongful”.⁷

It is seemingly effortless for Mr Gabriel to allege that he would not have entered the transaction if Mr Spencer had discharged his duty of care. Where, however, a party (in the instant case, Mr Gabriel) is contemplating a commercial venture that involves a number of heads of risk and obtains professional advice in respect of one head of risk before embarking on the venture, negligent advice in respect of that one head of risk should not make the adviser the underwriter of the entire venture.⁸ This would impose crushing liability upon Mr Spencer for judgements and factors that were not within his control.

It therefore falls to consider the scope of Mr Spencer’s duty to fully understand the extent of his liability. We encounter the “information” and “advice” dichotomy: “The principle distinguishes between a duty to *provide information* for the purposes of enabling someone else to decide upon a course of action and a duty to *advise* someone what course of action he should take”.⁹

Within the “advice” category, it is left to the adviser to consider what matters should be taken into account in deciding whether to enter into the transaction. His duty is to consider all relevant matters and not only specific factors in the decision. If one of those matters is negligently ignored or misjudged, and this proves to be critical to the decision, the client will in principle be entitled to recover all loss flowing from the transaction which he should have protected his client against.¹⁰

By comparison, in the “information” category, a professional adviser contributes a limited part of the material on which his client will rely in deciding whether to enter into a prospective transaction, but the process of identifying the other relevant considerations and the overall assessment of the commercial merits of the transaction are exclusively matters for the client, the defendant’s legal responsibility does not extend to the decision itself. Otherwise the defendant would become the underwriter of the financial fortunes of the whole transaction by virtue of having assumed a duty of care in relation to just one element of someone else’s decision.¹¹

Mr Gabriel had almost all the information of the transaction at his disposal; by contrast, Mr Spencer had one piece of information, a discrete legal issue. This case therefore falls within the “information” category. Accordingly, Mr Spencer was under a duty to provide the correct information relating to the structure of the loan moneys, and he breached this duty because he provided Mr Gabriel with false information as to the nature of the transaction. However, this

⁷ Ibid.

⁸ Ibid., [25].

⁹ Ibid., [29].

¹⁰ Ibid., [40].

¹¹ Ibid., [41].

does not mean that loss actually suffered (£191,808.44 – i.e., £200,000 minus the money Mr Little already paid him) is attributable to Mr Spencer’s negligence.

Mr Gabriel is exclusively responsible for the commercial considerations and overall assessment of whether to enter the transaction. Mr Spencer is only liable for the consequences of his information being wrong. As Lord Sumption found that the venture was never commercially viable even if the money been applied in the way that Mr Gabriel thought it would be, he would have suffered this loss in any event.¹² The consequences of Mr Spencer’s negligent information amounts to zero.

The principle which flows from the decision can be distilled to this: in order to recover damages it is not enough to show that, but for the defendant’s breach of duty, the claimant would not have entered into the transaction and thus avoided the loss. There must be a sufficient relationship between the loss suffered and the particular respect in which the defendant broke his duty. It must also be demonstrated that protecting the claimant from loss of the relevant kind was within the scope of the defendant’s duty.

Significance

BPE Solicitors is an important clarification on this area of the law. It provided the following elucidations:

- (a) the principle is not directed to the question of causation or to whether the loss suffered was foreseeable. It is a different question entirely: see paragraph 25. Thus, rebutting the academic criticisms directed at Lord Hoffman’s reasoning in *SAAMCO*;
- (b) where the information contributed by the adviser is critical to the claimant’s decision whether to enter into the transaction, this does not in itself turn the claim into an “advice” case. Accordingly, the Supreme Court overruled the application of this reasoning in the cases of *Steggles Palmer* and *Portman Building*; and
- (c) the *SAAMCO* “cap” or restriction, is simply a tool for giving effect to the distinction between (i) loss flowing from the fact that as a result of the defendant’s negligence the information was wrong and (ii) loss flowing from the decision to enter not the transaction at all.

The application of the *SAAMCO* “cap” or restriction will depend on the particular facts of the case. Where, for example, in a valuation case it is possible to strip out the effect of the fall in the market as the only extraneous source of loss, it will be possible to quantify the loss attributable to the defendant’s negligent information. By contrast, in situations such as the present case, where the loss arises from a variety of commercial factors which it was for the claimant to identify and assess, it will commonly be difficult, impossible and unnecessary to

¹² *Ibid.*, [18]-[19].

identify the financial impact of each factor. Therefore, it will not be possible to quantify the loss attributable to the defendant's negligent information.

Moreover, the decision is significant for professionals and insurers alike. Previously, the services provided by solicitors and valuers often fell within the "advice" category because the information was critical to the claimant's decision whether to enter into the transaction. However, this will no longer be the case, categorisation will more rigorously follow the distinction detailed above.

Thus, the decision will further limit the opportunity for claimants to recover all of the losses suffered as a result of entering into a transaction, even where they would not have proceeded if the information given by their adviser was correct. In practice, full recovery will be more likely against financial advisers, but solicitors and valuers will enjoy greater protection against such claims. Accordingly, the decision will be welcomed by this sphere of professionals.