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Dedicated to Tracey Reeves,
Assistant Professor of Law,
Coventry Law School.



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Editorial

We are very pleased to publish the second issue of the thirtieth volume of the *Coventry Law Journal*, marking the 30th anniversary of the Journal since its first publication in 1996. The Journal was initially devised to encourage staff in the Law School to embark on their academic writing careers, and to then proceed and write in other publications. However, in addition to fulfilling that goal, the Journal soon encouraged other academics and practitioners to contribute. Since its first publication, the Journal has published articles, legal essays, recent developments, case notes and book reviews on a variety of legal issues. Although specialising in Public Law and Human Rights, it has attracted scholarly work in all areas of law from academics, students and practitioners (from the United Kingdom and overseas) and achieved a solid reputation as a university-based, in-house journal. We are proud to note that the Journal has survived and outlived many other such journals, and that its contributions are regularly cited by other academics and organisations. We are particularly proud of our efforts in encouraging our students to publish their legal work and to embark of their academic careers.

As with previous issues, this one contains pieces covering contemporary legal issues and dilemmas, such as the reform of domestic employment law and employment status, harassment and freedom of expression, equality and diversity, prisoners' rights and the ban on smoking in prisons, the right to protest and European Union Law. We are particularly pleased to publish pieces by a former student, and one current undergraduate student, based on their undergraduate studies and research. We wish them every success in the future as academic writers. We are also delighted to publish a research article by Dr Rona Epstein, who shares her recent research findings on contempt of court law and practice, adding to her considerable publications in various aspects of criminal and civil justice. We are equally delighted to include an article from a student at the University of Maastricht, whose essay on Law and Shakespeare is included in the Articles section of this issue.

This issue is dedicated to Tracey Reeves, who has taught on our LLB law programmes for over 20 years, and who has recently retired from her position as Assistant Professor in Law at the University. Tracey joined the Law School having taught law at the University of Central Lancashire (formerly Preston Polytechnic) and instantly became a favourite with our students, and a treasured colleague with the staff and management in the School and the Faculty. Tracey specialised in employment law, in particular equality law, and her outstanding module evaluation results in those subjects (and in others) was testimony to her expertise, professionalism and her deep love of law and teaching. Tracey also taught on a variety of other law modules, and without exception her dedication was appreciated by the students and rewarded with exceptional module evaluation results and feedback. Tracey led the Law School's programme on student satisfaction, creating a friendly environment for assisting law students on issues of student health and happiness, legal skills and success on their programmes. Staff, management and, of course, students were indebted to Tracey for her work in this area, and she will be sorely missed as a lecturer and academic and personal tutor. Tracey made several contributions to the *Coventry Law Journal* on employment and equality law, displaying exceptional writing and analytical skills. We wish Tracey every success and happiness in her retirement and hope that she will keep in contact with the University; Tracey, we will miss your regular presence in the School, and your dedication and attention to detail, and your overall humanity.

We hope you enjoy reading this issue and find something of interest to satisfy your academic research and curiosity. We also look forward to receiving your contributions for future issues. We encourage contributions from students, academic staff and practitioners, and if you wish to contribute to the Journal and want any advice or assistance in being published, then please contact the editors. For the next issue we are particularly interested in receiving work related to maintaining the rule of law and international law, both in national law and globally, although

contributions in other legal areas are welcome. The next publication date is August 2026, and contributions need to be forwarded to us by the end of June 2026 at the latest.

The editors: Dr Steve Foster and Dr Stuart MacLennan

ARTICLES

LEGAL SYSTEM

Contempt of court sanctions: a catalogue of injustices

Rona Epstein, Honorary Research Fellow, Coventry Law School

Introduction

This article is based on our database of 424 cases of sanctions for breach of behaviour orders that were imposed in the County Courts between January 2019 and 15 December 2025.

Criminal Behaviour Orders were introduced in the Anti-Social Behaviour, Crime and Policing Act 2014 to replace the Anti-social Behaviour Order regime, together with a civil injunction to prevent nuisance and annoyance (IPNA). Local councils, the police or any social landlord can apply for an IPNA to stop anti-social behaviour. Further, a court may grant an IPNA if it is satisfied on the balance of probabilities that a person has engaged, or threatens to engage, in anti-social behaviour, and it is just and convenient to grant the injunction for the purpose of preventing anti-social behaviour. In March 2015, Part 1 of the Anti-Social Behaviour Crime and Policing Act 2014 came into force. It introduced new powers for the police and the courts, including the imposition of a civil injunction, an ASBI – Anti-Social Behaviour Injunction. If breach of an injunction is alleged the complainant can bring the case before the County Court, under civil law. If the breach is proven to the criminal standard, beyond reasonable doubt, then the court has only four options: to take no action; to adjourn; to impose a fine; to impose a sentence of imprisonment of up to two years either immediate or suspended. Community orders under probation supervision are not a permitted option.

Criticisms of the legal system with respect to behavioural orders and contempt of court

This article now examines various aspects of behavioural orders and contempt of court which we identified in our empirical research.

No oversight of the courts

In a Court of Appeal case,¹ Sir James Munby related the history of imprisonment of those found to be in contempt of court. From 1963, the matter of such committals was regulated by the Direction to the Official Solicitor issued in May 1963, requiring the Official Solicitor to: ‘Review all cases of persons committed to prison for contempt of court ... take such action as he may see necessary thereon and ... report thereon quarterly ... in every year’. This direction remained in force until revoked by Chris Grayling, as Lord Chancellor, on 1 November 2012. The modern practice was that prison governors notified the Official Solicitor of the reception of every person jailed for contempt of court very shortly after the prisoner’s arrival, which meant that the Official Solicitor could intervene, where appropriate, very quickly. The process of quarterly review by an officer of the court, instituted in 1830, continued until 2012. It served well those found to be in contempt of court, and more generally, the justice system. Those inappropriately imprisoned could be freed at the earliest proper time. Following Mr Grayling’s decision in 2012, the

¹ *Devon County Council v Kirk* [2016] EWCA Civ 1221

protection provided by the review procedure ceased to exist.² The need for oversight was detailed by the Civil Justice Council in its October 2020 Report.³ In our cases, we see evidence of court practice that calls for investigation. For example, the transcript of the case of Floyd Carruthers indicates that he did not understand the court proceedings or its decision. When he asked, ‘Have I been found guilty?’ - the judge did not stop the proceedings to ensure that the defendant understood them.

Questions of procedure and decision-making arise regarding imposing injunctions on those suffering addictions and other mental illnesses: do they understand the injunction imposed and are they capable of complying with it? Questions arise too concerning those sentenced to imprisonment when mentally ill. Similarly, decisions that reveal disproportionate punishment should be scrutinised. However, there is no public body to whom we can put our concerns and suggest investigation of questionable practice.

No official data

As noted in the Council of Civil Justice report, there is no official record kept of contempt of court cases and the sanctions imposed. Our database information comes from 76 different county courts. There are 170 county courts. We do not know whether the 94 county courts not in our database have not imposed any sanctions for contempt of court in this period (January 2019 to December 2025) or whether they have heard such cases and have failed to report them, as they should have done under the applicable regulation.⁴

Non-compliance with the Regulation

Some courts are not complying with the regulation requiring them to report committals on the publicly available judicial site. This is seen in Carruthers, who died after being committed to prison by a judge in Birmingham County court for four months for his first breach of an Anti-social Behaviour Injunction (ASBI). This judgment is not published on the judicial site.⁵

Representation: legal aid

The Rule governing ASB, CPR Part 81 under the 2014 Act. Part 81, Rule 81.s.4 (2) (i) and (j), makes clear ‘the importance of legal representation for respondents via non-means-tested legal aid if they want it and there is an obligation on the court to ensure that this is made available’.⁶ Legal aid is difficult to obtain for civil hearings. There is no duty solicitor available in the county courts to present mitigation for someone who does not have a defence solicitor. About 50 per cent of those in our study were not represented when imprisonment was imposed. One example: on 18 December 2024, Peterborough County Court imposed 18 months immediate imprisonment on Jacqueline Reilly for breaching her injunction by sleeping in YMCA. She was not present in court; no one was in court to represent her.

No protections

Anti-Social Behaviour Injunctions come under civil, not criminal, law. There are many safeguards built into the criminal law system,⁷ but none of them apply to contempt of court hearings which are heard under civil, not criminal, law:

² Sir James Mumby, *Devon CC v Kirk* [2016] EWCA Civ 1221. See: Rona Epstein, Imprisonment for contempt of court, (2016) 21(2) *Coventry Law Journal*, page? See: Gordon Exhall:

<https://www.civillitigationbrief.com/2016/12/06/civil-committal-proceedings-still-a-matter-for-grave-concern/>

³ <https://www.judiciary.uk/guidance-and-resources/anti-social-behaviour-and-the-civil-courts/>

⁴ Following a committal hearing, 81(8): The court shall be responsible for ensuring that where a sentence of imprisonment (immediate or suspended) is passed in contempt proceedings under this Part, that judgment is transcribed and published on the website of the judiciary of England and Wales.

⁵ <https://www.judiciary.uk/judgments/>.

⁶ *Christopher Lovett v Wigan Borough Council* [2022] EWCA Civ 1631, para 27.

⁷ <https://www.transformjustice.org.uk/news-insight/in-praise-of-criminal-courts/>

- The public interest factors which must be considered before a criminal case is brought (offenders are less likely to be prosecuted if elderly or suffering from significant mental or physical ill health) do not apply in the civil system.
- The Probation Service does not serve the civil system. In contrast, in the Magistrates' court a pre-sentence report (PSR) must be obtained from the Probation Service before the court orders imprisonment, unless the court gives reasons as to why a PSR is unnecessary. (Adult Court Bench Book, April 2025, page 8). The civil courts being unable to request a PSR are less likely to learn of any physical or mental ill-health issues, dependants or family problems.
- In the Magistrates' Courts the defendant should be legally represented (Adult CoBench Book, April 2025, page 8). This does not apply in the civil courts. The Civil Justice Council's report on anti-social behaviour and the civil courts found that half the defendants in the county court had no legal representative.
- The county court, unlike the criminal court, has no power to impose a community order. Such orders provide support and supervision in the community.
- In civil courts there is no provision for liaison and diversion services to assess mental health problems, and to provide support and help. Out-of-Court disposals, diversion and pre-court measures are available to the police to deal with less serious low-level crime. There is evidence that these measures have been largely successful and have kept people subject to them out of the criminal justice system. For example, see NEW CHANCE run by West Midlands police. Help with drug and alcohol problems, housing and employment issues, and mental health difficulties have proven effective in curbing criminal activity and lessening the harm to communities.
- The Sentencing Council advises the criminal courts when there may be issues of mental ill-health. These Guidelines do not apply in the civil courts. Our research has revealed many instances where mental ill-health is mentioned in the judgment, but imprisonment is nevertheless imposed.
- Criminal courts must follow the Sentencing Guidelines regarding defendants who have dependent children, especially if he or she is the sole or primary carer of children (the 'General Guideline: Overarching Principles'). In some cases, the court may think that custody is not inevitable but that it is one possible option. If so, the court should not impose a prison sentence if the impact on any dependants would mean that the sentence was disproportionate to the aims of the sentencing. In other cases, the court may think that the is so serious that custody is unavoidable. If so, the impact on any dependants could be relevant to the length of the sentence and whether the sentence should be suspended. This does not apply in the civil system.
- In the criminal courts the court must take account of the Sentencing Guideline on mental disorder (October 2020) which lays down how offenders with mental disorders, developmental disorders or neurological impairments must be treated.

None of the above safeguards apply in the civil system.

JUSTICE'S Report, *Lowering the Standard: a review of Behavioural Control Orders in England and Wales*⁸ states that these orders have attracted criticism because they bypass the procedures and evidential standards of the criminal law whilst still attracting criminal sanctions. The Report states, at page 9: 'The desire to bypass the criminal process is intentional'.

Injunctions not enforceable if the subject is unable to understand it or comply with it

Since many of the people who breach an injunction live with mental ill-health, a relevant issue is whether the person subject to an injunction understands it and is able to comply with it. The Court of Appeal decision in *Wookey* states: A respondent must have mental capacity to

⁸ <https://justice.org.uk/behavioural-control-orders-report/>

understand the injunction and have mental capacity to comply. This is colloquially known as *Wookey capacity* following the leading case on this: *Wookey v Wookey*.⁹

During this research, I have read about 300 judgments of committals following breach of an injunction. *Not one single judgment* refers to *Wookey*.

The *Wookey* test applies particularly in the following cases:

- (i) Floyd Carruthers was diagnosed with schizophrenia in 2003. In April 2021 he breached an ASBI by banging twice on his neighbour's door, first at 17.30 and again at 19.30. The Court found he had breached his injunction; he was remanded in custody. When the case was again before the Birmingham County Court on 6 May 2021, he was committed to prison for 66 days. He had an infected heart valve and did not eat in the prison for four days. No medical personnel were called. He was found collapsed in his cell and died in hospital on 14.6.2021.
- (ii) On 19.10.2021, Milton Keynes County Court ordered Charlotte Nudd, who had a long history of self-harming and drug overdoses, to be taken directly from a psychiatric ward to serve 6 months in prison (she had directed vile abusive racist language at a housing official).¹⁰ The judgment states that Charlotte Nudd is attending the court hearing remotely from Arbury Court PICU, Townfield Lane Winwick, Warrington which is a secure psychiatric hospital.

Addressing Ms Nudd, the judge stated:

Your behaviour at court on 6th August in shouting and interrupting the proceedings was such that the court had reason to think that a Mental Health Assessment was required, (at para 14). Your mental health deteriorated whilst within the court building and the court was informed that you refused to leave the cell. It was not possible to proceed with a hearing that day. I adjourned the hearing and remanded you in custody for further medical examination. At the return hearing ..., you attended by video and were represented by your solicitor Ms M. The court had read the medical report from Dr T which states, "I believe that the defendant is fit to plead and fit to stand trial based on the Standard Pritchard Criteria" and an email dated 16th September 2021 from DH who stated, "I am of the opinion that she [Mrs Nudd] requires transfer to hospital for assessment and treatment". At that hearing you made it clear to the court and to your solicitor that you did not believe that you were suffering any mental health condition and were not prepared to be assessed any further and having heard representations, the case proceeded to a penalty hearing. (at para 15).

- (iii) Gillian Marriot, described as having mental health issues, had repeatedly telephoned 999, and attended Stoke Mandeville hospital, when there was no medical need. Phoning 999 is a criminal offence, the maximum sentence under criminal law (s.127(2) Communications Act 2003) is 6 months in prison.¹¹

The judge stated he had no option but to commit her to prison for six months, for Anti-Social Behaviour Injunction breach. On leaving prison, she repeated the same anti-social behaviour (calling 999) as before. This time, on 3 March 2023, Milton Keynes County Court committed her

⁹ [1991] 3 All ER. <https://greenandburtonasb.co.uk/mental-capacity-in-injunction-and-contempt-proceedings/>

¹⁰ See: <https://www.filia.org.uk/latest-news/2022/1/25/the-rich-go-to-rehab-the-poor-go-to-prison>

¹¹ A person is guilty of an offence if, for the purposes of causing annoyance, inconvenience or needless anxiety, he...sends a message that he knows to be false...or persistently makes use of a public electronic communications network. Under s.127(3), the maximum penalty for this offence is six months' imprisonment and/or an unlimited fine.

to **12 months** immediate imprisonment for contempt of court for breach of an ASBI.¹² She had breached the injunction three times.

Disproportionate punishment

Committals for ASBI breach are rarely appealed. When the Court of Appeal heard the case of Lovett,¹³ it stated that any sentence must be ‘just and proportionate.’ (at para 56) The CJC Report referred to the above reported disproportionate punishments imposed by the civil courts under ASBI legislation. We have found this too.

- A. In 2021, a group of Travellers breached injunctions forbidding them from moving their caravans onto land that Essex County Council believed they should not occupy (an issue of current litigation). The sanctions imposed were extremely harsh; clearly disproportionate.
 - (i) On 14 December 2021, the High Court imposed 14 months immediate imprisonment on Thomas Cleary who breached his injunction by moving his caravan to a proscribed site. (By way of comparison, in a recent case, Luton Crown Court imposed a sentence of 14 months in prison on a man who admitted causing death by careless driving and causing death while uninsured or unlicensed.)
 - (ii) The High Court committed Leah Foley, a mother of six dependent children to prison for 6 months for the same breach.
 - (iii) For the same breach the High Court committed Bridget McDonagh to 11 months immediate imprisonment.
 - (iv) Gerry Anderson spent 24 weeks in prison for the same breach.
- B. Discussed above, is the committal of Jacqueline Reilly, long term no-fixed-abode, 18 months immediate imprisonment. Her breach was to sleep in a proscribed place.
- C. On 21 April 2021 Leicester County Court imposed 12 months immediate imprisonment on a Mr Barry for begging.¹⁴

Custody imposed when no harm caused

The Court of Appeal (*Lovett*) stated that committals to prison under ASBI law must be just and proportionate. Committal to prison cannot be just and proportionate if ‘no harm or inconvenience to any person was caused’. This database includes three cases of immediate imprisonment, where ‘no harm was caused’.

- A. Annie Harley: On 9 January 2023, Nuneaton County Court imposed four weeks immediate imprisonment on Annie Harley, stating that there was no evidence that her presence in the prohibited area caused any harm, or distress to any person. She did not appear in court and was not represented. The judge said: ‘*On no occasion was there evidence of a resident or person lawfully present in the exclusion zone suffering any adverse consequences as a result of the defendant being present*’. She spent 15 days in prison on remand.
- B. Zacherian Gordon: On 20 October 2022 Swindon County Court sent Gordon to prison for 15 days; he spent five days in prison on remand. The judge said: *It could not be shown the breaches had caused harm to any persons.*
- C. Christopher Scott: On 29 April 2024 Newcastle County Court committed Mr Scott to prison for two days for entering an exclusion zone. The judgement states: ‘Little or no harm or distress caused to any person, no persons were actually inconvenienced by his presence in the exclusion zone.’ The Defendant explained he was simply meeting his grandmother who lives within the exclusion zone, and she has mobility issues. He said he sought to obtain funds for food, as he is currently homeless.

¹² <https://www.judiciary.uk/judgments/committal-for-contempt-of-court-chief-constable-of-thames-valley-police-v-marriot/>

¹³ *Christopher Lovett v Wigan Borough Council* [2022] EWCA Civ 1631.

¹⁴ <https://www.judiciary.uk/judgments/leicester-county-council-v-batty/>

In prison on remand

Many protestors have been remanded in custody.¹⁵ The judgments all state ‘this was an entirely peaceful protest.’ We note that imprisonment should be reserved for those who have been found guilty of committing offences causing serious harm, as a last resort for the most serious offences, Criminal Justice act 2003. Yet imprisonment on remand has been imposed on those who have engaged in peaceful protest who have not yet been found guilty of any criminal offence or found to have breached an injunction.

Apart from the protestors, we note also that in two of the cases cited in Section 8, Harley and Gordon, whose behaviour caused ‘no harm or inconvenience’, had spent time in prison on remand before the court hearing. There is also the tragic case of Floyd Carruthers (above) who was remanded in custody for his first and only breach of an ASBI (shouting through his neighbour’s door and banging his fist on the door), was then sent to prison for four months for the breach and died in hospital of sepsis having collapsed in his cell.

Punishing destitution

Those found sleeping rough and/or begging have been sentenced to immediate imprisonment for terms of 12, 26 and 52 weeks.

- A. In January 2022, Watford County Court found that Pukakdandawa Lanke, an asylum seeker who was not represented nor present in court, had breached an injunction by sleeping rough and leaving belongings in front of St Albans Civic Centre. He was committed to 12 weeks immediate imprisonment.
- B. On 21 February 2021, Mr Batty came before Leicester County Court, which found that he had breached an injunction against begging. It ordered 52 weeks immediate imprisonment.¹⁶
- C. On 25 April 2019, Recorder Hill QC, sitting in the County Court at Birmingham as a Judge of the County Court, sentenced James Maguire to a custodial sentence of 26 weeks for contempt of court (Case Number D02BM967): he had been found begging.
- D. On 21 July 2022, at Swindon County Court, Mr Recorder Main Thompson (‘the Recorder’) committed Mr Abrook for contempt of court to HMP Bullingdon for ten months. He is a long-term drug addict.¹⁷ On release, he continued to beg.

Punishing mental illness¹⁸

In fifty cases in this database (12 per cent), where judgments mention ‘mental health issues’ or ‘mental illness’ or ‘drug or alcohol addiction’ sentences of imprisonment were imposed. As noted above, in several cases the judge mentions the defendant’s mental ill-health and then imposes terms of immediate imprisonment: Charlotte Nudd, Floyd Carruthers, and Gillian Marriott.

Similarly in cases of addiction, committal to prison is imposed, sometimes stating that the defendant will not be able to obtain treatment in prison.

- In December 2021, Swindon County Court imposed seven months immediate imprisonment on Michelle P, who is addicted to drugs, the judge stating: ‘*The Defendant expressed remorse for her actions and explained the assistance she was seeking to deal with her addictions.*’

¹⁵ See for example: <https://www.judiciary.uk/judgments/north-warwickshire-borough-council-v-brocklebank-pritchard/> See: Rona Epstein: Women in prison: remand in custody The Justice Gap 29 June 2022.

¹⁶ <https://www.judiciary.uk/judgments/leicester-county-council-v-batty>

¹⁷ *Swindon BC v Abrook* [2024] EWCA Civ 221

¹⁸ <https://www.crimeandjustice.org.uk/resources/punishing-mental-illness>

- Kelly B breached her ASBI by being drunk and in a prohibited area. On 16 September 2020 the judge at the Central London County Court stated that the defendant '*is of no fixed abode, has a chaotic lifestyle*'. She was under the influence of alcohol. Her drunken aggressive behaviour manifested itself in particular by shouting, swearing, lashing out with her feet and spitting: the defendant's conduct and demeanour caused nuisance or annoyance. She was sentenced to 48 weeks immediate custody of which 28 weeks was for the breach of suspended sentences.

Penalising the victims of domestic abuse

On 25 July 2023, Rachael Williamson, Head of Policy and External Affairs at the Chartered Institute of Housing, spoke at a seminar on Anti-Social Behaviour organised by the Public Policy Exchange. She reported findings from Resolve¹⁹ that show that one in three cases of ASB are noise related. Analysis from the Domestic Abuse Housing Alliance shows domestic abuse survivors are four times more likely than the general tenant population to receive ASB complaints²⁰. While both men and women experience domestic abuse, women are considerably more likely to experience repeated and severe forms of it. When complaints are made and dealt with as instances of ASB housing nuisance – loud noise, abusive language, banging and shouting – these are frequently due to domestic abuse. Both parties are then subject to the sanctions for ASB. Thus, the victim of domestic abuse is punished in the same way and to the same extent as the perpetrator. Clearly, this is a serious injustice.

Bereavement

Natalie W's baby had died. In July 2021, at Bristol County Court, the judge commented on her mental health issues, stating that, due to the Covid pandemic, no mental health help was available to her, and said: '*I am very sorry to see her in such a distressed state*'; he hoped she would get help. The court imposed four months suspended imprisonment for making a noise outside her flat.

Nicholas M fed pigeons on his balcony, causing mess from birds: he was committed to 15 weeks' immediate custody on 12 June 2020.²¹ He gave this account of his mental condition to Freedom in Everyday Life.²²

I started feeding birds with my mum in the 60s. In recent years, feeding the birds has helped with my grief, depression, and on-going sobriety. I owe them. I lost my partner, mother, brother, and best friend in the space of a few years. I haven't drunk since 1990. My first CPN for feeding the birds was in 2016; then a civil injunction was issued. In 2017, there was another CPN, and, in 2019, another injunction was issued. In 2020, I was arrested for breaches and held for one day. At my breach trial, the council had four members present, all saying things that were exaggerated, including lies from the next-door neighbour who hated birds (and poured disinfectant on my balcony). The judge was horrible. I tried to tell him about how feeding the birds saved me from drinking again and helped my grief. I had a solicitor, who said that it was a mental health issue, but the judge disagreed. He offered no compassion for my severe grief and very fragile mental state and told me that I was sentenced to 15 months prison for several breaches.

Neurodiversity and learning difficulties

The JUSTICE Report on Behaviour Control Orders states 'Similar concerns were also raised in respect of Orders being imposed on neurodiverse persons and those with learning difficulties ...

¹⁹ Noise Nuisance - Resolve (resolveuk.org.uk)

²⁰ <https://www.dahalliance.org.uk/>

²¹ <https://www.judiciary.uk/judgments/committal-for-contempt-of-court-in-open-court-at-bristol-magistrates-court/>

²² <https://manifestoclub.info/imprisoned-for-feeding-the-pigeons/>

a report by HM Inspectorate of Prisons and Probation found that, in the context of the criminal justice system generally, people experience specific disadvantage because of their neurodivergence'. In our data there are two men sent to prison for feeding pigeons. Continuing to feed birds, despite having an injunction imposed, may be linked to neurodivergence.²³

Darren J. fed pigeons. On 5 April 2022, Birmingham Civil Justice Centre sentenced Darren J. to six weeks imprisonment suspended, stating '*He has a number of physical and mental health issues, and he has a history of chronic pain due to spinal difficulties.*' The judgment reports this exchange:

Defendant: 'Your Honour, I was allowed to feed the birds then, there was not an injunction. It was – I was OK to feed the birds then.'

Judge Truman: Mr Jones, you were not at liberty to feed the birds then, there was an injunction against you. Please do not interrupt.'

No consideration of dependent relatives

Under the criminal law, the court should have regard to the Sentencing Council's 'Definitive guideline 2017 on the imposition of community and custodial sentences.' It states that a factor indicating that suspending the sentence may be the correct decision is where immediate custody will result in significant harmful impact upon others. Under the criminal law, being a 'sole or primary carer for dependent relatives' is a statutory factor reflecting personal mitigation.²⁴ In the civil law, there is no requirement to take account of a significant harmful impact on others.

On 28 September 2023, the judge at Wolverhampton County Court sentenced Ms Rothan to 14 weeks immediate custody for breaching an injunction by causing nuisance to her neighbours. He noted that her daughter was 'on the autism spectrum' but did not state her age and made no mention of any enquiries regarding who would care for her during her mother's three months in prison.

The right to protest

Above, we discussed the imprisonment on remand of people taking part in peaceful protest, an injunction having prohibited them from standing in a particular place - outside an arms factory or an oil-refinery, for example. The right to protest is an intrinsic feature of a functioning democracy which should be valued, guarded and protected.

JUSTICE has recently published its report on the right to protest, detailing the many ways in which this right has been eroded in the past decade.²⁵ The report recommends that to restore clarity, safeguard public confidence, and ensure compliance with the rule of law, there should be:

- a pause on all new protest-related legislation
- repeal of the most draconian and unworkable powers introduced since 2022
- the creation of an independent Public Order Monitoring Authority to review policing and legislation annually
- removal of protest from civil order regimes and stronger oversight of local authority powers
- a statutory requirement for visible police identification at all protests
- a national database to bring transparency to protest policing.

²³ Lowering the standard: a review of Behaviour Control Orders (2023) <https://justice.org.uk/behavioural-control-orders-report/>

²⁴ See: Shona Minson Safeguarding children when sentencing parents: information for sentencing courts. <https://shonaminson.com/safeguarding-children-when-sentencing-parents-information-for-sentencing-courts/> Rona Epstein & Hugh Williams, Sentencing Mothers and The Rights of the child, *New Law Journal* 20 October 2023

²⁵ <https://www.justice.org.uk/reports/striking-the-balance-protest-rights-and-public-order>

Care not punishment: an example

A report broadcast on BBC Radio 4 *File on Four* on 6 June 2023 illustrated some aspects of the multi-faceted problem of Anti-social Behaviour:

- The dreadful damage that ASB can inflict on an area, in this case an attractive park in an area short of green spaces, which was trashed and rendered unusable.
- How anti-social behaviour reflects the poverty and deprivation of the poorest areas of our cities.
- That positive measures – for example, organising activities for young people, arranging for the supply of food, school uniforms, toys and other goods – can lead to lower levels of anti-social behaviour and the development of pro-social attitudes and behaviour among those young people who previously caused so much damage and destruction in their home area.

Recommendations

- Reform is urgent. The current system is profoundly unjust. The punishments fall largely on the most vulnerable in our society, those with mental illness and addictions, those suffering from trauma and bereavement, those least able to cope without support. The sanctions are ineffective; the same names appear in the court records again and again.
- Reform should include adequate protections for those accused of breach of injunctions.
- The right to legal representation should be respected.
- There should be an obligation on the court to ensure that the contemnor understands the proceedings, both in terms of providing interpreters if the contemnor's main language is not English and in the sense that mental ill-health, disability or learning difficulties may mean the defendant requires help to ensure understanding.
- When a committal order (or a community sentence, should that option be available) is being contemplated as a contempt sanction, the court should be required to order a pre-sentence report, unless the court considers it to be unnecessary in the circumstances.
- Community sentences should be available as a sanction for contempt of court. The courts should be able to order community sentences together with probation support in case of breach of an injunction.
- If the court imposes a suspended sentence of imprisonment, it should be obliged to order and arrange support from probation and other services (such as health care, help with accommodation, education, training or employment) for the contemnor. Without support, there will be further breaches.
- A finding of contempt and any associated sanction should never appear on a criminal record certificate.
- Where a committal order is being contemplated as a contempt sanction and the contemnor is or appears to be suffering from a mental disorder, before that order is made:
 - the court should be required to obtain and consider a medical report unless, in the circumstances of the case, it considers that it is unnecessary to obtain a medical report; and
 - the court should be required to consider any information before it which relates to the contemnor's mental condition (whether given in a medical report, a pre-sentence report or otherwise), and the likely effect of committal on that condition and on any treatment which may be available for it.
 - the court should have to consider the *Wookey* test: the injunction cannot be enforced unless the defendant is able to understand it and to comply with it.
- Where no harm or inconvenience has been caused by a breach, no sanction should apply.
- There should be annual publication of data, publicly available, in relation to contemnors received into prison, including, for each contemnor,
 - the court that sentenced them

- the nature of the breach
- any mention of mental ill-health, physical ill-health or addiction
- the number of days expected to be served before their automatic release date,
- the number of days actually served in prison.
- Annual statistics should be published on the numbers of people sanctioned for breach of a behaviour order injunction, categorised by the nature of the breach
- There must be adequate and effective oversight of courts imposing sanctions for breach of injunctions to ensure that sentences are not disproportionate.

Comparison with other jurisdictions

As part of the research, I examined the law and practice in this area in various other jurisdictions. Below is a summary of those jurisdictions.

Australia: Prohibited Behaviour Orders & Personal Safety/Intervention Orders

- Australia does not have a nationwide ASBI (Anti-Social Behaviour Injunction) civil anti-social order with a single statute.
- Instead, there are **State/Territory orders**:
 - In Western Australia, the **Prohibited Behaviour Orders Act 2010** allows courts to impose orders against persons with a history of anti-social behaviour offences to restrict future conduct; breach is an offence with fines or imprisonment.²⁶
 - Across most states/territories, victims can apply for **Apprehended Violence Orders (AVOs)** or **Personal Safety Intervention Orders** (e.g., Victoria's **Personal Safety Intervention Orders Act 2010**), especially where there is fear of violence or harassment.
- These tools focus primarily on **personal protection** (harassment/violence) rather than broad anti-social behaviour like public nuisance

Austria

- Austria does **not have a broadly comparable ASBI system**.
- Anti-social conduct is generally dealt with through **criminal offences** (harassment, public disorder) or **administrative fines**, not preventive civil orders like ASBOs. (OECD reviews note that countries like Austria mainly use criminal and administrative methods rather than civil anti-social orders).

Brazil

- Brazil lacks a formal ASBI-type injunctive system for anti-social behaviour.
- Public disturbances, harassment, vandalism, and anti-social acts are handled through **criminal law** (public disorder, damage to property) and **administrative police powers**, with courts imposing penalties including imprisonment. (Comparative sources indicate Latin American jurisdictions do not widely replicate the UK's civil anti-social order model.)

Canada: Equivalent tools: Peace Bonds / 810 Orders

- Canada does **not have an ASBI equivalent** expressly for "anti-social behaviour."
- Instead, courts can issue **peace bonds** under **section 810 of the Criminal Code**, which are recognisance/ protection orders requiring a person to "keep the peace and be of good behaviour" and obey conditions (e.g., no contact with someone). They are preventative and may include conditions limiting behaviour likely to cause harm.

²⁶ legislation.wa.gov.au+1

- If conditions are breached, it is a **criminal offence**, and the person can face prosecution with possible **imprisonment** (up to **four years** depending on how the prosecution proceeds).
- Peace bonds are similar in effect to civil restraining orders, but are enforceable as criminal offences if breached

Chile

- Chile does not appear to have direct equivalents of anti-social behaviour injunctions; conduct considered anti-social (e.g., public disorder, threats) may be addressed through standard **criminal provisions** or administrative sanctions rather than a separate civil injunction regime.

Denmark

- Denmark does **not have an ASBI system**.
- Anti-social conduct like harassment or disorderly behaviour is addressed via the **Danish** Penal Code (crimes such as insult, public disorder) and through police powers under criminal law. There is no known civil injunction regime with contempt/ imprisonment consequences similar to the UK's ASBIs.

France

- France does **not have a UK-style anti-social behaviour injunction**.
- Conduct that might be labelled "anti-social" (harassment, public nuisance) is regulated under **criminal law or administrative sanctions**. For example, public insult/ harassment can be criminal offences with fines or imprisonment.

Germany

- Germany does **not use ASBI equivalents**.
- Anti-social conduct is predominantly within **criminal offences** or dealt with in youth courts for juveniles. There is **no civil injunction** regime equivalent to UK ASBIs with contempt enforcement by imprisonment.

Ghana

- Ghana lacks a specific anti-social behaviour injunction system like the UK.
- Anti-social conduct generally falls under **criminal law** (public nuisance, disorderly conduct) with criminal penalties (fines or imprisonment).

Italy

- Italy does **not have a UK-style civil anti-social behaviour injunction regime**.
- Behaviour like harassment is typically criminalised in specific contexts (e.g., stalking under Penal Code art. 612-bis).
- Preventive injunctions exist in limited contexts (e.g., domestic violence restraining orders) but **not a broad public ASB injunction system**.

Japan

- Japan does not have an ASBO-like civil order system specifically for anti-social behaviour.
- Anti-social conduct is covered under various criminal provisions or administrative guidance orders, but there is no standalone broad civil injunction for general anti-social

conduct with imprisonment for contempt. (OECD indicates Japan lacks civil enforcement tools similar to ASBOs and relies on other mechanisms.)

Netherlands

- The Netherlands **does not use ASB civil anti-social behaviour injunctions**.
- Issues like harassment, stalking, or public nuisance are dealt with through **criminal offences** (e.g., stalking under the Criminal Code) or **administrative measures** (local authority exclusion orders for specific contexts like homelessness). pace.coe.int+1
- There is no broad civil injunction regime with contempt proceedings for breach akin to UK ASBIs.

Portugal

- Portugal does not use ASBI-style measures.
- Behaviour considered anti-social is dealt with under **criminal law provisions** (public order offences) or administrative sanctions rather than an independent civil anti-social injunction system

Spain

- Spain does **not broadly employ ASBI-like orders** for general anti-social conduct.
- Conduct such as insult, harassment, or disorderly behaviour is addressed through **criminal code provisions** and police powers. Administrative sanctions may also be used, but not a standalone ASB injunction regime.

Summary of Key Differences

Country	ASBI-like Civil Injunction System?	Breach Leading to Criminal Penalty/Imprisonment
UK	✓ Yes (civil order, breach contempt/crime) =	Up to several years for breach of orders.
Canada	Peace bonds (not exactly ASBO)	Breach = criminal offence (possible imprisonment)
Australia	Varies by state (PBOs/AVOs)	Breach can be offence punished by imprisonment.
Austria, France, Germany, Denmark, Netherlands, Japan, Spain, Portugal, Ghana, Chile, Brazil, Italy	✗ No broad ASBI equivalent	Anti-social behaviour addressed through criminal/administrative law.

Conclusions

We should not accept the injustices occurring every day when county courts deal with breach of behaviour control orders which are heard under civil law, with none of the protections afforded by the criminal courts, with no judicial oversight, falling disproportionately on the poorest and most disadvantaged in our society. This echoes the report by the Civil Justice Council in 2020. They noted the lack of representation for many in contempt cases, and the disproportionate punishments imposed. They reported how limited are the options available to the judges in such

cases, and made it clear that diversion and liaison services, so useful in the criminal system for supporting people who have committed minor offences, are not available in contempt of court cases. They called for reform of the system, making fifteen recommendations. None has been implemented. Sensible reform would be compliant with human rights and would respect the need for social justice and for a welfare-based, rather than a punitive, approach to social problems. Such reform would make economic sense, as prison is the most expensive option when dealing with anti-social behaviour. It would also provide a significant contribution to alleviating the pressure on prison places.²⁷

²⁷ This research was supported and funded by The Oakdale Trust. Acknowledged with gratitude.

EMPLOYMENT LAW

Traditional employment versus the gig economy: does one size really fit all?

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Introduction

The increasing focus on ‘limb b workers’ has led to the call for reform with respect to employment status. Section 230(3)(b) of the Employment Rights Act 1996 defines a ‘worker’ as an individual that undertakes “*any other contract [to that of a contract of employment], whether express or implied.*” This definition goes on to term a ‘limb b’ worker as those who undertake personal performance of work or services for another party to the contract whose status is not that of a client or customer, as you may not have clients or customers as a worker. The recent and rapid rise in ‘limb b workers’ has transformed the UK’s traditional economy into a more flexible labour market, epitomised by “business models which depend on exercising a large degree of control over supposedly independent contractors.”¹ This is more commonly known as the ‘gig economy’. For evidence of this rise, one need only refer to Uber’s ever-expanding UK driver base, growing from 60,000 in 2021,² to over 100,000 in 2023.³ Further, the range of jobs caught by this definition continues to widen, from Uber drivers to freelance writers and task-based workers.

The history of the ‘worker’ definition

This phenomenon has experienced slow and gradual development. The current definition originates from the dynamic of control, tracing back to the Master and Servant Act 1823, where it was made a criminal offence for a workman to be disobedient, and calling for strikes was made punishable as an aggravated breach of contract. Following the Slavery Abolition Act 1833, UK law would not experience a landmark piece of employment legislation until 1963, when the right to be given a contract of employment and the right to a minimum statutory notice of termination was introduced.⁴ Following World War II, trade unions had enjoyed a command of respect and influence.⁵ It is perhaps pertinent to understand, therefore, that the policy focus of UK law had shifted, placing a greater focus on the rights and protection of its workers. The existing laws on individual employment rights were later codified in the Employment Rights Act 1996. Despite a steady stream of provisions and amendments thereafter, such as the embodiment of some employment rights in the Human Rights Act 1998 and the Working Time (Amendment) Regulations 2007, the next shift in legal focus would not be seen until the recent withdrawal from the European Union and the onset of the Coronavirus pandemic.

Despite the relative functionality of the current definition, the recent UK government appears to have elected for change. Due to the relatively chronological correspondence between Brexit and the global Coronavirus lockdown, the process of creating and passing new laws slowly ground

¹ IDS Employment Law Brief, ‘Contracts of employment’ (2021) 1144 IDS Employment Law Brief 3.

² Natasha Bernall, ‘Uber has lost in the Supreme Court. Here’s what happens next’ (*Wired*, 19 Feb 2021) <<https://www.wired.com/story/uber-loses-gig-economy-case/>> accessed 8 February 2025.

³ Andrew Brem, ‘The Impact of Uber in the UK’ (*Uber Newsroom*, 20 September 2023) <<https://www.uber.com/en-GB/newsroom/the-impact-of-uber-in-the-uk-2/>> accessed 8 February 2025.

⁴ Contracts of Employment Act 1963.

⁵ See Phil Tinline, ‘Can UK trade unions recover their post-war power?’ (*Economics Observatory*, 28 March 2023) <<https://www.economicsobservatory.com/can-uk-trade-unions-recover-their-post-war-power/>> accessed 9 February 2025.

to a near halt, in sacrifice of the Retained EU Law (Revocation and Reform) Act 2023 and the Coronavirus Act 2020. Aside from Brexit's impact,⁶ and perhaps more powerfully, during the peak of the Coronavirus pandemic in April 2020, the Office for National Statistics reported that 46.6 per cent of employed people in the UK assumed some level of work from home.⁷ Notably, in March 2020, UberEats enjoyed a 30 per cent increase in customer signups, alongside an inundation of applications to become drivers.⁸ This appears to indicate the early establishment of the gig economy, with people adopting more flexible working patterns and relying upon those operating under more freelance circumstances. The breadth of the s.230 definition appears to have reached its limit; "no construct, however perfect, is capable of addressing all the vagaries inherent in the patterns of working life in the context of the demands in a modern economy".⁹ Nevertheless, common law guidance as to status can appear misaligned, often proving to be a question of fact on a case per case basis. In 2021, the decision in *Uber BV v Aslam*¹⁰ drew media and legal attention to this growing issue.

This article will discuss the likelihood of enduring reform to UK employment status. Focus will primarily be attributed to the proposals and actions of the Labour government between 2024 and early 2025. Between the Labour manifesto and the Employment Rights Bill, at the Committee Stage in the House of Lords at the time of writing, the initial promises will be highlighted and assessed against their later concretisation. This will be supplemented by a critical comparison of the common law treatment of employees and workers, as well as providing a brief political and historical context to understand whether any similar reform has been previously attempted. The article will conclude by analysing the main findings and providing an alternative suggestion for reform.

The first steps towards change

The current UK government's call for reform have been noted in their most recent manifesto,¹¹ and the King's Speech 2024.¹² Although it is understood that a manifesto does not amount to a wholly accurate representation of the views of a party, it remains effective for the purpose of highlighting key party philosophies. As the gig economy continues to dilate the scope of employment options, the current UK government aims to unify the definitions and rights of 'employees' and 'workers' and distinguish these from the truly self-employed. The present government feels that the current system has "contributed to the rise of bogus self-employment" and allowed some employers to exploit "the complexity of the UK's framework to deny people their legal rights."¹³ This was seen in *Pimlico Plumbers Ltd v Smith*,¹⁴ which will be examined below.

⁶ See House of Commons, 'Volume 726: Retained EU Law (Revocation and Reform) Bill' (*Hansard*, 18 January 2023) <[https://hansard.parliament.uk/Commons/2023-01-18/debates/BD8058AD-784A-4E34-A21D-58B05D7DC48C/RetainedEULaw\(RevocationAndReform\)Bill](https://hansard.parliament.uk/Commons/2023-01-18/debates/BD8058AD-784A-4E34-A21D-58B05D7DC48C/RetainedEULaw(RevocationAndReform)Bill)> accessed 9 February 2025.

⁷ Department for Business and Trade, 'Impact Assessment: Making Flexible Work the Default' (*Gov.UK*, 21 October 2024) <https://assets.publishing.service.gov.uk/media/6712491cb40d67191077b36d/impact-assessment-make-flexible-working-the-default-where-not-unreasonable_.pdf> accessed 9 February 2025.

⁸ Marco Chiappetta, 'UberEats Demand Soars Due To COVID-19 Crisis' (*Forbes*, 25 March 2020) <<https://www.forbes.com/sites/marcochiappetta/2020/03/25/uber-eats-demand-soars-due-to-covid-19-crisis/>> accessed 9 February 2025.

⁹ Robert Upex, 'Workers and the gig economy: an appraisal of the Supreme Court's decision in the Uber case' (2021) 26(1) *Coventry Law Journal* 25, 38.

¹⁰ [2021] UKSC 5.

¹¹ Labour Party, 'Labour's Plan to Make Work Pay' (*Labour*, 24 May 2024) <<https://labour.org.uk/wp-content/uploads/2024/06/MakeWorkPay.pdf>> accessed 12 February 2025.

¹² Prime Minister's Office, 10 Downing Street and His Majesty King Charles III, 'The King's Speech 2024' (*Gov.UK*, 17 July 2024) <<https://www.gov.uk/government/speeches/the-kings-speech-2024>> accessed 12 February 2025.

¹³ Prime Minister's Office, 10 Downing Street and His Majesty King Charles III, 'The King's Speech 2024' (*Gov.UK*, 17 July 2024) <<https://www.gov.uk/government/speeches/the-kings-speech-2024>> accessed 12 February 2025.

¹⁴ [2018] UKSC 29.

This ‘complexity’ has resulted in widespread confusion for our rising gig economy population, unable to confidently declare themselves as workers. This is further aggravated upon the discovery of many more non-identical ‘worker’ definitions within English law. Within the Employment Rights Act itself, s.43K extended the meaning of worker for those who are not “worker[s] as defined by s.230(3)”. Section 296 of the Trade Union and Labour Relations (Consolidation) Act 1992 slightly broadens the core s.230 definition, imparting an ulterior consideration of employment under government departments.¹⁵ Further, the National Minimum Wage Act 1998 introduced supplementary definitions for agency workers,¹⁶ and home workers who are not otherwise “workers.”¹⁷ Interestingly, as the gig economy continues to exacerbate these weaknesses, the s.230 definition appears to have remained the central tool by which the law attempts to address this pitfall. This definition is therefore the likely focus of the current government’s ambitions and would presumably form the crux of any reforms. It would be remiss to ignore that the Labour Party aims to deliver “*for working people*.”¹⁸ Following the Labour Party winning a parliamentary majority in the 2024 general election,¹⁹ clarity for these ‘working people’ seemed to lie just over the horizon. Between Labour’s Plan to Make Work Pay,²⁰ and the King’s Speech 2024,²¹ many potential routes to reform have been suggested, from attempting to remove the need for “knowledge of complex legal tests and an encyclopaedic knowledge of case law”²² to “enhanc[ing] employment rights”, supposedly marking “the biggest upgrade to workers’ rights in a generation.”²³ As these plans have since been refined against reality, it is pertinent to analyse and compare the differences between these propositions and the law as it currently stands. Despite any artificiality as to the credibility of the above comments, Labour has since published a ‘Next Steps’ article, detailing the proposed delivery of their initial plan to ‘Make Work Pay’.²⁴

The Employment Rights Act, from which the s.230 definition is drawn, was introduced under John Major’s Conservative government.²⁵ Two textual amendments to s.230 were later implemented under David Cameron’s Coalition and Conservative governments respectively.²⁶ Section 230(7) was inserted by the Children and Families Act 2014 and protected disclosures,²⁷ and regulations prohibiting discrimination because of a protected disclosure,²⁸ were substituted into s.230(6) by the Small Business, Enterprise and Employment Act 2015. As the government majority continues to shift back and forth, s.230(3) remains wholly unchanged. Therefore, it is arguable that the current proposals for reform are sorely necessary, with the prospect to facilitate a substantial transformation to UK employment status. However, this will be no easy feat; a

¹⁵ Trade Union and Labour Relations (Consolidation) Act 1992, s.296(1)(c).

¹⁶ National Minimum Wage Act 1998, s.34.

¹⁷ Note 29, s.35.

¹⁸ Labour Party, ‘About Us’ (*Labour*, 2025) <<https://labour.org.uk/about-us/>> accessed 24 March 2025

¹⁹ House of Commons Library, ‘General election 2024 results’ (*UK Parliament*, 24 September 2024) <<https://commonslibrary.parliament.uk/research-briefings/cbp-10009/>> accessed 24 March 2025.

²⁰ Labour Party, ‘Labour’s Plan to Make Work Pay’ (*Labour*, 24 May 2024) <<https://labour.org.uk/wp-content/uploads/2024/06/MakeWorkPay.pdf>> accessed 24 March 2025.

²¹ Prime Minister’s Office, 10 Downing Street and His Majesty King Charles III, ‘The King’s Speech 2024’ (*Gov.UK*, 17 July 2024) <<https://www.gov.uk/government/speeches/the-kings-speech-2024>> accessed 24 March 2025.

²² Labour Party, ‘Labour’s Plan to Make Work Pay’ (*Labour*, 24 May 2024) <<https://labour.org.uk/wp-content/uploads/2024/06/MakeWorkPay.pdf>> accessed 24 March 2025.

²³ Prime Minister’s Office, 10 Downing Street and His Majesty King Charles III, ‘The King’s Speech 2024’ (*Gov.UK*, 17 July 2024) <<https://www.gov.uk/government/speeches/the-kings-speech-2024>> accessed 24 March 2025.

²⁴ Labour Party, ‘Next Steps to Make Work Pay’ (*UK Government*, 10 October 2024) <https://assets.publishing.service.gov.uk/media/6707a5eb92bb81fcdbe7b62b/next_steps_to_make_work_pay.pdf> accessed 24 March 2025.

²⁵ UK Government, ‘Past Prime Ministers: The Rt Hon Sir John Major KG CH’ (*Gov.UK*, 7 November 2019) <<https://www.gov.uk/government/history/past-prime-ministers/john-major>> accessed 25 March 2025.

²⁶ UK Government, ‘Past Prime Ministers: The Rt Hon Lord Cameron’ (*Gov.UK*, 18 July 2024) <<https://www.gov.uk/government/history/past-prime-ministers/david-cameron>> accessed 25 March 2025

²⁷ Employment Rights Act 1996, 47B (3).

²⁸ n.45, 49B (10).

harmonisation of this sprawling legal landscape will certainly require a thoroughly holistic and prudent approach, to support the inherently flexible and ever-dynamic UK employment structure.

Traditional employment vs the gig economy and the UK employment status framework

This section will now assume a more modern focus, analysing Labour's two key pledges as outlined in their manifesto. A critical comparison of the legal treatment of traditional employees and gig economy workers will first be provided, giving rise to the current complexion of UK employment status. The 1968 case of *Ready Mixed Concrete*²⁹ is commonly regarded as a cornerstone of employment STATUS law, and the resulting test is usually the first tool employed by the courts. Briefly, this test asks questions regarding provisions consistent with a contract of employment to determine whether the claimant may be considered an employee. However, as UK law provides rights to the employee based upon this status, but separately determines taxation as a different status, this area of law appears far from clear. This has led to the introduction of countless provisions and amendments to clarify this position, considering the bargaining power of both parties, as seen in *Autoclenz*,³⁰ the mutuality of obligations between parties,³¹ and the correlation between engagements between the parties and a contract of employment.³² As this scope has become more disproportionate and unclear, it is possible that the general understanding of rights entitlement may suffer and the risk of exploitation from employers may increase, despite the protection seemingly afforded to them.

The infancy of the gig economy at common law

It is fair to say that the current UK employment status framework has been operational. This does not appear surprising, in consideration of the fact that the current s.230 definition that we rely upon repealed s.8(2) Wages Act 1986. It would, therefore, appear a foregone conclusion that such a definition would support traditional employment structures, drawing influence from the basis of 'regular', salaried employment. It would also be remiss to ignore the law's generosity regarding all those caught under this definition, whether they be employees, workers or the genuinely self-employed. In totality, the concept of traditional employment, one which the UK has been familiar with for near one hundred years, has been under the protective lock and key of the English legal system, emboldening the rights of the 'little man' against the 'all-powerful employer'. Nowhere has this been more evident than in the leniency of the courts in relation to personal injury claims. In the case of *Lane v Shire Roofing*,³³ despite numerous factors pointing towards self-employment, such as the use of his own tools and the onus of his own taxation, the courts determined Mr. Lane to be nearer an employee of Shire Roofing. Section 2 of the Health and Safety at Work Act 1974 provides the duty of an employer to "ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees". When Mr. Lane fell off a ladder during a job for Shire Roofing, the courts held that "there [were] many factors to be taken into account in answering this question" of labelling an employer/employee relationship,³⁴ evidencing the flexibility of the law to appease policy considerations in favour of the more traditional worker. This case challenges, and certainly appeared to broaden, the scope of what constitutes 'employment'. This case appeared to present the label of 'employee' as a relatively malleable attribution, able to be bent to the mould of the case, one factorial consideration from tipping the balance between 'employee' and 'self-employed'. In many ways, this ambiguity armed the 'little man' with a thin veil of bargaining equality against the employer.

²⁹ *Ready Mixed Concrete (South East) Ltd v Ministry of Pensions and National Insurance* [1968] 2 QB 497 (QBD).

³⁰ *Autoclenz Ltd v Belcher* [2011] UKSC 41.

³¹ *Airfix Footwear Ltd v Cope* [1978] ICR 1210 (EAT).

³² *Revenue and Customs Commissioners v Professional Game Match Officials Ltd* [2024] UKSC 29.

³³ *Lane v Shire Roofing* [1995] IRLR 493 (CA).

³⁴ *Lane v Shire Roofing* [1995] IRLR 493 (CA), 421.

This soft spot does not yet appear to have completely worn thin. More recently, the Supreme Court demonstrated that it is more than willing to extend the scope of whistle blower protection for employees.³⁵ In *Royal Mail Group Ltd v Jhuti*,³⁶ particular focus was attributed to unfair dismissal;³⁷ the corporate bluff was defeated, thus allowing the true unfairness of the claimant's dismissal to be understood in full. It is, therefore, concluded that the great love between the law and traditional employment has empowered the courts to, more often than not, stand in the corner of the 'little man' throughout the years. A similar conclusion was drawn in the Employment Law Review 2024, believing that the clarification of employment status was still considered to stand as the "gateway" to statutory employment rights;³⁸ further reflecting the court's positive affirmation of rights for the employee. That is not to say that workers, historically an afterthought of the s.230 definition, have not benefited from the court's generosity. Despite claims that a plumber carrying out plumbing and maintenance work on behalf of a plumbing company was a self-employed independent contractor, the courts determined in *Smith v Pimlico Plumbers*,³⁹ that Smith was a 'worker' within s.230(3)(b). The court's focus on control and dependence on the employer in this case would set an early precedent for the looming gig economy. Aside from this, this case again demonstrated the court's favour towards those caught by the longstanding s.230 definition, particularly within the context of the potential denial of rights. Therefore, one need not look far to see the tenured relationship between the law and 'traditional employment'.

Thus, until and around 2020, change appeared both largely unnecessary and almost completely unforeseeable.

Although some reports seem to allude to the onset of a gig economy from as early as 2017,⁴⁰ the general consensus appears to be that following the Coronavirus pandemic and the UK's decision to leave the European Union this development of a gig economy is now enjoying full force. The evidence is somewhat speculative and far scattered, but by way of example, Deliveroo, a staple of the gig economy stereotype, had approximately 30,000 riders in 2017,⁴¹ but now report a surplus of 180,000.⁴² Therefore, it is certainly fair to theorise that such indicators give rise to the conclusion that the gig economy is planting its roots in the UK. But what of the fabled s.230 definition?⁴³

Does our new economic backbone share in the great reliance previously enjoyed by traditional employment? Currently, this does not appear to be the case. The discrepancies in the loose definition of a 'gig economy worker' appear to be somewhat of a hindrance. Two of the most identifiable problems lie in common supplements to the *Ready Mixed Concrete* test.⁴⁴ In *Yewens v Noakes*,⁴⁵ control was at the forefront of considerations, leading Bramwell LJ to determine that a "servant is a person subject to the command of his master as to the manner in which he shall do his work." As explained above, the support provided by digital platforms is one characterisation of the gig economy. However, workers often determine their own schedule, location and workload.⁴⁶ It is certainly arguable that, by this measure, the application of control is near

³⁵ Public Interest Disclosure Act 1998, s.5.

³⁶ *Royal Mail Group Ltd v Jhuti* [2019] UKSC 55; [2020] IRLR 731

³⁷ Employment Rights Act 1996, s.43A.

³⁸ IDS Employment Law Brief, 'Employment law Review 2024' (2024) 1178 IDS Employment Law Brief 21

³⁹ *Pimlico Plumbers Ltd v Smith* [2018] UKSC 29.

⁴⁰ Department for Business, Energy and Industrial Strategy, 'Characteristics of those in the gig economy' (*Gov.UK*, February 2018).

<https://assets.publishing.service.gov.uk/media/5aa69800e5274a3e391e38fa/The_characteristics_of_those_in_the_gig_economy.pdf> accessed 9 March 2025.

⁴¹ BBC, 'Deliveroo makes huge loss on food delivery business' (*BBC*, 21 September 2017)

<<https://www.bbc.co.uk/news/business-41347817#:~:text=Heavy%20investment',140%20cities%20around%20the%20world.%22>> accessed 9 March 2025

⁴² Deliveroo, 'Locations' (*Deliveroo*, 2025) <<https://careers.deliveroo.co.uk/locations/>> accessed 9 March 2025.

⁴³ Employment Rights Act 1996, s.230.

⁴⁴ *Ready Mixed Concrete (South East) Ltd v Ministry of Pensions and National Insurance* [1968] 2 QB 497 (QBD).

⁴⁵ *Yewens v Noakes* (1880) 6 QBD 530 (CA), Bramwell LJ.

⁴⁶ Deliveroo, 'The Rider Life' (*Deliveroo*, 2025) <<https://riders.deliveroo.co.uk/en/the-rider-lifestyle>> accessed 9 March 2025.

fictitious, and the way workers conduct their work certainly does not appear to be at the command of anyone but themselves. In *Stevenson Jordan v MacDonald*,⁴⁷ integration was instead the focus of Denning LJ's conclusion, providing that "under a contract for services, [a worker's] work, although done for the business, is not integrated into it but is only accessory to it." Due to the near exclusive provision of short-term contracts and freelance work, the gig economy seems to lend itself to the idea of quick cash grabs, allowing workers to drop in and out of business structures without the need for 'integration'. Such considerations certainly appear to leave 'gig economy workers' left on their backs, with very little concrete protection. It appeared simply a matter of time before this would be challenged.

The decision in Uber

This eventually arrived via the case of *Uber BV v Aslam*. This case reached the Supreme Court when Uber appealed against the Court of Appeal's finding that their private hire vehicle drivers were 'workers' under s.230(3) Employment Rights Act. Uber, having defined themselves as a technology provider, argued that their drivers were independent contractors, with their service simply acting as a 'booking agent'. This therefore allowed them to assert that the direct contract existed only between the driver and the passenger.⁴⁸ Conversely, the drivers attempted to emphasise five specific aspects that they felt determined them as 'workers'. These aspects mainly focused on control, particularly as their full remuneration is fixed by Uber, and the only degree of control they retained in this sense was their choice of when and how much they work.⁴⁹ All drivers also must accept the standard written form of agreement and the terms on which they transport passengers.⁵⁰ The driver's third argument considered multiple heads of control, as it was understood that drivers are not informed of the passenger's intended destination until the request is accepted, providing no chance to decline. This was coupled with Uber's determination of the rate of acceptance and cancellation of trip requests. Tribunal evidence provided that "a driver whose percentage rate of acceptances falls below [80 per cent]... (or whose cancellation rate exceeds a set level) receives an escalating series of warning messages which, if performance does not improve, leads to the driver being automatically logged off the Uber app and shut out from logging back on for ten minutes."⁵¹ The final forms of control argued were that of the vetting of the type of cars permitted by Uber, provided for through their integral and wholly owned technology,⁵² and their specific prohibition on communication with passengers after the trip ends, except in circumstances to communicate any lost property.⁵³ It was ultimately ruled that the Employment Tribunal at first instance was correct in their determination that Uber's drivers were workers;⁵⁴ this conclusion had been reached at every stage of proceedings. Despite the earlier supposition that 'gig economy workers' are not well protected under the current framework, the court certainly managed to make do with the 'limb b' definition, providing a positive precedent for the future of the gig economy. However, this decision once again provided otherwise inaccessible rights to the victors of this case, as Uber's drivers were entitled to basic employment rights hereafter.

In many ways, the scope of employment status and treatment of workers appears largely unaffected by the conclusion of this case, despite the relative delicacy seen in the Court's approach. However, the rejection of the classic contractual approach of employment disputes in this case has seemingly muddled the unknown waters of the legal approach to the gig economy. Adams-Prassl also theorised "whether Uber also marks a complete rejection of contractual

⁴⁷ *Stevenson Jordan & Harrison v MacDonald & Evans* [1952] 1 TLR 101 (CA), Denning LJ.

⁴⁸ *Uber BV v Aslam* [2021] UKSC 5.

⁴⁹ At 446.

⁵⁰ *Uber BV v Aslam* [2021] UKSC 5, 446.

⁵¹ *Uber BV v Aslam* [2021] UKSC 5.

⁵² At 447.

⁵³ At 448.

⁵⁴ At 457.

approaches”.⁵⁵ As the legal capabilities of the gig economy are beginning to be tested by the law, Lord Leggatt’s judgment certainly appears to stand as a general guidance. Lord Leggatt’s attempts to harmonise contract and statute to bridge the sparsity in definition appears necessary, to allow mutual reinforcement to defeat “evasive stratagems... of a contractual nature”.⁵⁶ This decision has gone some way to highlight the proficiencies and deficiencies of the current law, and its adaptability in the face of change.

The law is not faultless, nor is it blameless, despite its reliance on man-made progression. The law’s partiality toward employees and workers has already been suggested. However, it is possible that this view ignores a stronger desire of the courts to prevent “employers exploiting the complexity of the UK’s framework to deny people their legal rights.”⁵⁷ Through this lens, the court’s approach to gig economy workers thus far shares a somewhat comforting similarity to that of traditional employment. Unfortunately, the inherent difficulties appear to render the work of the law somewhat ineffectual. A starkly apparent drawback that may be concluded is that of a question of sustainability. Aside from any current difficulties within the law in relation to the gig economy, the lack of substantive definition within employment legislation has been in question since 2017. The Taylor Review of Modern Working Practices, widely regarded as a significant contribution to the sphere of employment, proposed that the “minimalistic approach to legislation” should be replaced “with a clearer outline of the tests for employment status, setting out the key principles in primary legislation, and using secondary legislation and guidance to provide more detail.”⁵⁸ In consideration of the date of publishing alone, despite the numerous recommendations following this paper, the sustainability of the current employment law framework certainly leaves a lot to be desired. Drawing from this school of thinking, Pitt has commented on Deliveroo’s attempts to describe their riders as self-employed; the very feat that landed Uber in the Supreme Court. She wrote disapprovingly of their unhampered ability to find “a simple method by which to undermine employment protection rights and... a method against which neither the provisions of ILO Recommendation 198 nor the EU Platform Work Directive would necessarily be proof.”⁵⁹ It stands to reason, therefore, that the fresh ambiguity of the gig economy further distorts the reality and workability of this framework. Curiously, the unprecedented tenure of this framework has warranted a degree of solemn respect and surprise from the law and commentators alike, but the gig economy now appears to have dealt a final and fatal blow to the s.230 definition.

The ‘Make Work Pay’ pledges

The current Labour government appears to have taken heed to the warnings cautioned above. Before and throughout their tenure in power thus far, the adopted course of action has certainly appeared promising. From as early as Labour’s manifesto to ‘Make Work Pay’, published in May 2024,⁶⁰ two main pledges appear to have been submitted to the public. The first relates to employment rights. The Labour Party appear to acknowledge the presence of the gig economy, suggesting that “the lengthy wait for basic rights means the risk of moving jobs falls too heavily on the individual”⁶¹ leading to their bid to introduce “basic individual rights from day one for all workers, ending the current arbitrary system that leaves workers waiting up to two years to access

⁵⁵ Jeremias Adams-Prassl, ‘*Uber BV v Aslam*’: “[W]ork relations... cannot safely be left to contractual regulation” (2024) 51(4) *Industrial Law Journal* 955, 963.

⁵⁶ At 964.

⁵⁷ Labour Party, ‘Labour’s Plan to Make Work Pay’ (*Labour*, 24 May 2024) <<https://labour.org.uk/wp-content/uploads/2024/06/MakeWorkPay.pdf>> accessed 10 March 2025.

⁵⁸ Department for Business and Trade and Department for Business, Energy & Industrial Strategy, ‘Good Work: The Taylor Review of Modern Working Practices’ (*Gov.UK*, Crown Copyright 2017) <<https://assets.publishing.service.gov.uk/media/5a82dcde5274a2e87dc35a4/good-work-taylor-review-modern-working-practices-rg.pdf>> accessed 10 March 2025.

⁵⁹ Gwyneth Pitt, “The simple things you see are all complicated”: thoughts on Deliveroo’ (2024) 53(4) *Industrial Law Journal* 784, 794.

⁶⁰ Labour Party, ‘Labour’s Plan to Make Work Pay’ (*Labour*, 24 May 2024) <<https://labour.org.uk/wp-content/uploads/2024/06/MakeWorkPay.pdf>> accessed 25 March 2025.

⁶¹ Note 89.

basic rights of protection against unfair dismissal, parental leave and sick pay.”⁶² The current system appears to be somewhat ‘arbitrary’, particularly in consideration of the fact that each of the rights noted have individual and differing standards. Should a claimant wish to pursue unfair dismissal, they must be an employee, and under the respondent company’s employ for a minimum of two years.⁶³ This right is not available to workers. Parental leave is available to “an employee who satisfies specified conditions” after one year of employment.⁶⁴ However, Shared Parental Leave is an exclusive employee right, whilst Statutory Shared Parental Pay remains available to both employees and workers.⁶⁵ Under the Social Security Contributions and Benefits Act 1992, “statutory sick pay shall not be payable for the first three qualifying days in any period of entitlement”.⁶⁶ Despite this delay in access, statutory sick pay may only be claimed by employees and agency workers.⁶⁷ In *National Union of Professional Foster Carers v Certification Officer*,⁶⁸ it was suggested that the Government should consider introducing “bespoke legislative provision for the position of foster carers [regarding] rights appropriate to their very unusual role.” Although application of the Trade Union and Labour Relations (Consolidation) Act to foster carers was of central focus in this case,⁶⁹ it appears fair to draw the conclusion that, using the above words of Underhill LJ, a revised employment status with a broader catch-all scope, focusing on the relational dealings between parties, may be of greater benefit than the current three-tier employment status. Any potential reform would bear the burden of the consideration of a great number of varying employment rights, statutory provisions and common law verdicts. It is therefore asserted, in light of Labour’s government first pledge, that this current definition is ultimately not fit for purpose. In consideration of the support of the Taylor Review,⁷⁰ and the belief of many that “for some time now...in Britain we have been in danger of evolving a two-tier labour force”,⁷¹ burying our heads in the sand has simply paved the way to this inevitable juncture. The call for change does not appear to have fallen upon deaf ears.

The current Labour government has made clear its intentions.

The Labour Party’s second proposition was that of a comprehensive and calculated shift towards “a single status of worker and transition towards a simpler two-part framework for employment status which will differentiate between workers and the genuinely self-employed.”⁷² It was suggested that the law would thereafter stand equipped to “adapt to changing forms of employment and guard against a minority of employers using novel contractual forms to avoid legal obligations”,⁷³ allowing for an “[evaluation of] the way flexibility of ‘worker’ status is used and understood across the workforce”.⁷⁴ The law currently accommodates a three-tier employment status. Section 230 defines an employee under subsection (1) and a worker under subsection (3). Self-employment is not specifically defined. It is instead determined through the application of many different common law decisions, such as the test for a personal service or

⁶² Note 89.

⁶³ Employment Rights Act 1996, s.108.

⁶⁴ Employment Rights Act 1996, s.75E(1).

⁶⁵ Department for Business and Trade, ‘Shared Parental Leave and Pay’ (*Gov.UK*, 2025) <<https://www.gov.uk/shared-parental-leave-and-pay/eligibility-for-birth-parents>> accessed 27 March 2025.

⁶⁶ Social Security Contributions and Benefits Act 1992, s.155(1)

⁶⁷ Department for Work and Pensions, ‘Statutory Sick Pay (SSP)’ (*Gov.UK*, 2025) <<https://www.gov.uk/statutory-sick-pay/eligibility>> accessed 27 March 2025.

⁶⁸ *National Union of Professional Foster Carers v Certification Officer* [2021] ICR 1397, 1445.

⁶⁹ Trade Union and Labour Relations (Consolidation) Act 1992, s.296.

⁷⁰ Department for Business and Trade and Department for Business, Energy & Industrial Strategy, ‘Good Work: The Taylor Review of Modern Working Practices’ (*Gov.UK*, Crown Copyright 2017) <<https://assets.publishing.service.gov.uk/media/5a82dcdce5274a2e87dc35a4/good-work-taylor-review-modern-working-practices-rg.pdf>> accessed 10 March 2025.

⁷¹ Aaron Baker, Ian Smith and Owen Warnock, *Smith & Wood’s Employment Law* (16th edn, OUP 2023).

⁷² Labour Party, ‘Labour’s Plan to Make Work Pay’ (*Labour*, 24 May 2024) <<https://labour.org.uk/wp-content/uploads/2024/06/MakeWorkPay.pdf>> accessed 27 March 2025.

⁷³ Note 101.

⁷⁴ Note 101.

substitution clause, as a contract of employment requires personal service,⁷⁵ and is often distinguished against traditional employment; a contract ‘of’ employment or services against a contract ‘for’ services.⁷⁶ These somewhat tenuous differentials have produced no end of seemingly varying and contradictory results. In *Johnson v Transopco UK Ltd*,⁷⁷ an Employment Appeals Tribunal concluded that Johnson was not a worker of Transopco, despite owing them an obligation of personal service. This case again demonstrates a misalignment in common law, displaying the court’s focus on the factual grounds on which the claim is brought. A similar view was provided in an article within an issue of the IDS Employment Law Brief, deeming this case to be “a useful reminder that the question of ‘worker’ status turns on its own facts”.⁷⁸ This was also likened to the earlier decision of the Supreme Court in *Uber*, noting that it “remains possible for taxi app operators to devise a business model that does not involve employing drivers”.⁷⁹ A two-tier employment status, therefore, should it address the transparent and widespread inconsistencies between the multitudinous common law and statutory provisions, would likely benefit the UK employment structure. Clarity and centrality in one ‘catch-all’ provision would certainly, at the very least, mitigate the complications brought about by the deficiencies of the s.230 definition.

It would be, therefore, ultimately unfair to surmise that the problems outlined above have been ever-present; however, it does appear that this area of the law has fallen foul of the classic criticism of failing to ‘keep up to date’. The contemporary nature of the gig economy, in its infancy, has already garnered legal and media attention, pointing fingers at the deficiencies of the law. Nevertheless, it is conversely arguable that the warning signs are evident. Should the Labour government stay true to their intentions to “*move towards a single status of worker and transition towards a simpler two-part framework for employment status*”,⁸⁰ it is arguable that the surging population of gig economy workers may potentially be equipped with the ability to defeat those previously discussed fears and risks.

The reality of reform

Following Labour’s victory in the general election on 4 July 2024,⁸¹ the King’s Speech was published soon after, on 17th July.⁸² The King made early mention of the new government’s commitment to “ban exploitative practices”⁸³, as well as the intention to “work in close partnership with trade unions and businesses to deliver [the Labour Party’s] New Deal”.⁸⁴ The King’s prompt comment regarding ‘exploitative practices’ was interesting, as, although similar phraseology was adopted by the Labour Party in their belief that “some employers [are] exploiting the complexity of the UK’s framework to deny people their legal rights,”⁸⁵ this comment did not appear to be a driving factor in the call for change. Instead, combatting bogus self-employment appeared to be at the forefront of Labour’s focus. Nevertheless, such a comment

⁷⁵ *Express & Echo Publications Ltd v Tanton* [1999] IRLR 367 (CA).

⁷⁶ Employment Rights Act 1996, s.230(2).

⁷⁷ *Johnson v Transopco UK Ltd* [2022] EAT 6; [2022] ICR 691.

⁷⁸ IDS Employment Law Brief, ‘Taxi driver working through app not a “worker”’ (2022) 1146 IDS Employment Law Brief 10.

⁷⁹ IDS Employment Law Brief, ‘Taxi driver working through app not a “worker”’ (2022) 1146 IDS Employment Law Brief 10.

⁸⁰ Labour Party, ‘Labour’s Plan to Make Work Pay’ (*Labour*, 24 May 2024) <<https://labour.org.uk/wp-content/uploads/2024/06/MakeWorkPay.pdf>> accessed 10 March 2025.

⁸¹ House of Commons Library, ‘General election 2024 results’ (*UK Parliament*, 24 September 2024) <<https://commonslibrary.parliament.uk/research-briefings/cbp-10009/>> accessed 28 March 2025.

⁸² Prime Minister’s Office, 10 Downing Street and His Majesty King Charles III, ‘The King’s Speech 2024’ (*Gov.UK*, 17 July 2024) <<https://www.gov.uk/government/speeches/the-kings-speech-2024>> accessed 28 March 2025.

⁸³ Note 15.

⁸⁴ Prime Minister’s Office, 10 Downing Street and His Majesty King Charles III, ‘The King’s Speech 2024’ (*Gov.UK*, 17 July 2024) <<https://www.gov.uk/government/speeches/the-kings-speech-2024>> accessed 28 March 2025.

⁸⁵ Labour Party, ‘Labour’s Plan to Make Work Pay’ (*Labour*, 24 May 2024) <<https://labour.org.uk/wp-content/uploads/2024/06/MakeWorkPay.pdf>> accessed 28 March 2025.

remains harmonic with Labour's pledges to clarify and refine the current three-tier employment status. The 'New Deal' references the realisation of Labour's proposal of the amalgamation of employment rights. It was also implied that the above excerpts from the King's Speech would materialise in the form of an Employment Rights Bill. A newly introduced Bill, should it remain focused on the pledges of the Labour Party, be an effective solution to the shortcomings previously discussed. Of course, status is not the primary, nor only, consideration within the sphere of employment. As has been evident, the law in this area exists as an intricate and self-supportive framework. Should the Labour Party's initial aims remain at the spearhead of any Employment Rights Bill, this may present itself as the greatest opportunity in a decade to address the shortcomings of the s.230 definition. Recently, a number of additional difficulties have risen to prominence within UK Employment Law. Particularly, fire and rehire practices have been thrust toward the attention of the media following the Insolvency Service's investigations as to whether "any offences had been committed by P&O when it dismissed 786 employees on 17 March [2022] ...contrary to s.194(1) of the 1992 Act."⁸⁶ Further, zero-hour contracts are also likely to feature in any upcoming Bill. It would be narrow-minded to fail to acknowledge the outstanding and seemingly separate challenges that persist in almost all far-reaching corners of employment law. However, in *Addison Lee Ltd v Gascoigne*,⁸⁷ an overlap between zero-hours contracts and status was raised and addressed by an Employment Appeals Tribunal. Under Regulation 2 Working Time Regulations (an equivalent definition of worker to s.230, the argument of the existence of "a true 'zero hours contract' where there is no such [limb (b) mutuality of] obligation" was dismissed. Therefore, UK employment status, and indeed the previously termed 'self-supportive' framework as a whole, may stand to benefit tremendously from a new Employment Rights Bill, should these areas, which may initially appear disparate, be addressed as a collective, with the intention to unify and harmonise the existing conflict within the law.

The Labour Government's next step towards reform was the aptly named 'Next Steps to Make Work Pay' paper, published on 10 October 2024.⁸⁸ This paper had the intention of setting out "the next steps [the Labour Party] intend to make in [their] mission to effect change and make work pay".⁸⁹ Understandably, many issues troubling UK employment law were addressed, in accordance with the Labour Party's original manifesto. Both zero-hour contracts and fire and rehire practices were addressed in tandem with unfair dismissal, supposedly the key forces in ending employers' unfair leverage of "one-sided flexibility."⁹⁰ The recurring theme of 'exploitation' resurfaced within this paper, contextualising "exploitative practices,"⁹¹ now taken to mean "exploitative zero hours contracts".⁹² Until this point, endorsement of the original pledges as first presented by the Labour Manifesto has appeared stable; that is, until we reach the 'Wider reforms' portion of this paper. It is at this point that the Government makes clear its intention to "consult on a simpler framework that differentiates between workers and the

⁸⁶ Julian Harris, 'Insolvency Service decides against prosecuting P&O over redundancies' (2022) 43(11) Company Lawyer 373, 373.

⁸⁷ *Addison Lee Ltd v Gascoigne* [2018] ICR 1826.

⁸⁸ Labour Party, 'Next Steps to Make Work Pay' (*UK Government*, 10 October 2024) <https://assets.publishing.service.gov.uk/media/6707a5eb92bb81fcdbe7b62b/next_steps_to_make_work_pay.pdf> accessed 29 March 2025.

⁸⁹ Note 125.

⁹⁰ Labour Party, 'Next Steps to Make Work Pay' (*UK Government*, 10 October 2024) <https://assets.publishing.service.gov.uk/media/6707a5eb92bb81fcdbe7b62b/next_steps_to_make_work_pay.pdf> accessed 29 March 2025.

⁹¹ Prime Minister's Office, 10 Downing Street and His Majesty King Charles III, 'The King's Speech 2024' (*Gov.UK*, 17 July 2024) <<https://www.gov.uk/government/speeches/the-kings-speech-2024>> accessed 29 March 2025.

⁹² Labour Party, 'Next Steps to Make Work Pay' (*UK Government*, 10 October 2024) <https://assets.publishing.service.gov.uk/media/6707a5eb92bb81fcdbe7b62b/next_steps_to_make_work_pay.pdf> accessed 29 March 2025.

genuinely self-employed”, aside from the Employment Rights Bill.⁹³ This minor comment could present itself to be a major oversight. The research presented thus far is in no way completely exhaustive but quantifiably demonstrates the complications of the question of status. Simply, where the relevant employment rights are being addressed, why should the definition to which these rights are attached be cast aside for another day? At a brief glance, this paper certainly proves to any reader that the Labour Party have furthered their original propositions to bring about “basic individual rights from day one for all workers... [such as] basic rights of protection against unfair dismissal, parental leave and sick pay.”⁹⁴ In fact, a great deal of relevant rights that apply inconsistently between employees and workers have been addressed, such as a potential “new right to bereavement leave”⁹⁵ and “the enforcement of holiday pay policy”.⁹⁶ However, in the same vein, it appears that the catalogue of rights presented is incomplete, neglecting to mention the right to time off for dependants,⁹⁷ by way of example. Should this fail to be rectified as an exclusive employee right,⁹⁸ the future-proof nature of these plans is jeopardised. The Labour Party voiced their concerns as to “employers using novel contractual forms to avoid legal obligations” in their manifesto.⁹⁹ For as long as this fault remains unaddressed, such employers will capitalise on the law’s inability to act retroactively, meaning that the “working people”¹⁰⁰ that the Labour Party seeks to protect will remain unshielded. As recently as 2023, on Appeal, an Employment Tribunal was found to have erred when determining whether an individual operating several companies was a worker in consideration of a written agreement between the service companies and a putative employer.¹⁰¹

Therefore, until a completely holistic scrutiny and revision of the law regarding status is complete, the s.230 definition is dwarfed by the shadow of its risks. A similar criticism may be drawn from a later commitment to “strengthen protections for the self-employed through a right to written contract; extending blacklisting protections and extending health and safety protections”.¹⁰² It is unclear as to whether these supplementary considerations will be tackled individually or as a bundle of rights; what is clear is that for every rung added this becomes an increasingly long and tiresome ladder to climb. Countouris criticised this section of the paper in a similar fashion, indicating that a new approach to status requires “more than just tinkering with existing definitions. The new category of worker must include the bulk of all existing employment relationships and those that may emerge in the future”.¹⁰³ Therefore, it could be argued that the shortcomings of this paper stand as the first hurdle that the Labour government has failed to jump. It certainly appears as though the audacious promises made by their manifesto have wavered, giving way to a more cautionary approach with the parliamentary majority now in hand. Coupling the relevant rights and definitions would result in the greatest chance of comprehension, due to their co-dependency. The differences in definition between workers and the self-employed need not exist if not for the separate bundles of rights entitled to each, and,

⁹³ Labour Party, ‘Next Steps to Make Work Pay’ (*UK Government*, 10 October 2024)

<https://assets.publishing.service.gov.uk/media/6707a5eb92bb81fcdbe7b62b/next_steps_to_make_work_pay.pdf> accessed 29 March 2025.

⁹⁴ Note 130.

⁹⁵ Labour Party, ‘Next Steps to Make Work Pay’ (*UK Government*, 10 October 2024)

<https://assets.publishing.service.gov.uk/media/6707a5eb92bb81fcdbe7b62b/next_steps_to_make_work_pay.pdf> accessed 29 March 2025.

⁹⁶ Note 132.

⁹⁷ Employment Rights Act 1996, s.57A.

⁹⁸ Department for Work and Pensions, ‘Time off for family and dependants’ (*Gov.UK*, 2025)

<<https://www.gov.uk/time-off-for-dependants>> accessed 30 March 2025.

⁹⁹ Labour Party, ‘Labour’s Plan to Make Work Pay’ (*Labour*, 24 May 2024) <<https://labour.org.uk/wp-content/uploads/2024/06/MakeWorkPay.pdf>> accessed 30 March 2025.

¹⁰⁰ Note 136

¹⁰¹ *Plastic Omnium Automotive Ltd v Horton* [2023] EAT 85; [2023] ICR D3.

¹⁰² Labour Party, ‘Next Steps to Make Work Pay’ (*UK Government*, 10 October 2024)

<https://assets.publishing.service.gov.uk/media/6707a5eb92bb81fcdbe7b62b/next_steps_to_make_work_pay.pdf> accessed 30 March 2025.

¹⁰³ Nicola Countouris, ‘Waiting for Godot’ - The Employment Rights Bill 2024 and the ‘single status of worker’ omission’ (*IER*, 11 March 2025) <<https://www.ier.org.uk/comments/waiting-for-godot-the-employment-rights-bill-2024-and-the-single-status-of-worker-omission/>> accessed 30 March 2025.

inversely, without being able to differentiate these rights, how can we be so sure in our characterisation of who is a worker and who is not? Should this Bill manage to funnel the wide array of currently available provisions, a brighter future for the complexion of employment status within the UK is foreseeable. However, should this Bill seek only to carry out menial maintenance work on a definition that is otherwise struggling to stay afloat, then it is submitted that this new Employment Rights Bill will simply become a greater hindrance than help.

The Employment Rights Bill revelation

Between the ‘Next Steps’ paper and the current version of the Employment Rights Bill, the ‘Get Britain Working’ White Paper was published on 26 November 2024.¹⁰⁴ The White Paper will not be individually dissected but may be sporadically referred to throughout the analysis of the Bill. The White Paper undertook a slightly different focus, concentrating on increasing the working population of the UK, forming a salient part of “wider government action to spread opportunity and fix the foundations of our economy... strengthening employment rights through [the Labour Party’s] Plan to Make Work Pay”.¹⁰⁵ At the time of writing, this Employment Rights Bill is at the Committee Stage in the House of Lords, with the most recent version being dated 14 March 2025.¹⁰⁶ The Labour Party have neglected to mention the s.230 definition throughout the entirety of this 310-page Bill. It appears needless to note that the Labour Party have failed to discuss a factor that has already been determined to sit “outside of the Employment Rights Bill”.¹⁰⁷ This would certainly be a fair comment, had a significant portion of this Bill not been dedicated to “amend[ing] the Seafarers’ Wages Act 2023 [and] to make provision for the implementation of international agreements relating to maritime employment”.¹⁰⁸ Thus, it is asserted that a singular paragraph within the ‘Next Steps to Make Work Pay’ paper was attributed to “ensur[ing] that we never see a scandal like that of P&O Ferries ever again”.¹⁰⁹ The Labour Party promised to “strengthen workers’ rights at sea and implement international conventions relating to seafarer employment” via amendment¹¹⁰. Such considerations were thereafter omitted by the White Paper.

At a distance, this somewhat sudden pivot in focus could easily be mistaken as evidence of progress. However, upon closer inspection, this is more plausibly a diversion of attention. The entirety of Part 3, Chapter 3 has been designated to reform maritime conventions.¹¹¹ Aside from a single amendment to the Seafarers Wages Act, most of this Chapter is focused on inserting international agreements relating to maritime employment after s.84 of the Merchant Shipping Act. A brief review of s.84 demonstrates that this section has remained unamended since its publication in 1995.¹¹² As previously noted, s.230 has been amended; the former likely appears, to the untrained eye, as a milestone change. In both actuality and in law, this instead proves to be an ‘easy fix’. The initial injection of positivity provided by the Labour Party’s manifesto appeared to provide employees, workers and the self-employed with politically ideal, but largely unrealistic, expectations as to their future security. However, now forming the government

¹⁰⁴ Department for Work and Pensions, HM Treasury and Department for Education, ‘Get Britain Working White Paper’ (Gov. UK, 26 November 2024) <<https://www.gov.uk/government/publications/get-britain-working-white-paper>> accessed 1 April 2025.

¹⁰⁵ Department for Work and Pensions, HM Treasury and Department for Education, ‘Get Britain Working White Paper’ (Gov. UK, 26 November 2024) <<https://www.gov.uk/government/publications/get-britain-working-white-paper>> accessed 1 April 2025.

¹⁰⁶ Employment Rights HL Bill (2024-25) 81.

¹⁰⁷ Labour Party, ‘Next Steps to Make Work Pay’ (UK Government, 10 October 2024) <https://assets.publishing.service.gov.uk/media/6707a5eb92bb81fcdbe7b62b/next_steps_to_make_work_pay.pdf> accessed 1 April 2025.

¹⁰⁸ Employment Rights HL Bill (2024-25) 81.

¹⁰⁹ Labour Party, ‘Next Steps to Make Work Pay’ (UK Government, 10 October 2024) <https://assets.publishing.service.gov.uk/media/6707a5eb92bb81fcdbe7b62b/next_steps_to_make_work_pay.pdf> accessed 1 April 2025.

¹¹⁰ Labour Party, ‘Next Steps to Make Work Pay’ (UK Government, 10 October 2024) <https://assets.publishing.service.gov.uk/media/6707a5eb92bb81fcdbe7b62b/next_steps_to_make_work_pay.pdf> accessed 1 April 2025.

¹¹¹ Employment Rights HL Bill (2024-25) 81, Part 3, Chapter 3.

¹¹² Note 152.

majority, Labour's flame already appears to be flickering. Aside from this peculiar focus, zero hours workers, unfair dismissal and dismissal for failing to agree to variations of contracts (fire and rehire practices) were all addressed within this Bill. Zero hours workers may now stand to enjoy the "right...to be offered guaranteed hours".¹¹³

The absence of any obligation to provide work has historically characterised the zero hours contract. Should this Bill be enacted in its current state, an employer will thereafter be required to make "a guaranteed hours offer to a worker"¹¹⁴ subject to a number of exceptions to this duty.¹¹⁵ Schedule 3 reviews unfair dismissal. The proposed repeal of s.108 Employment Rights Act is momentous, removing the qualifying period of employment for an unfair dismissal claim. Despite the initially substantial advantage that this repeal would provide to employees, employers are thereafter provided with a specific set of circumstances in which they may dismiss an employee within their initial period of employment.¹¹⁶ Dismissal for failing to agree to variations of contracts is addressed under Part 1, Clause 26.¹¹⁷ A statutory code of practice on dismissal and re-engagement, permitted by s.203 Trade Union and Labour Relations (Consolidation) Act,¹¹⁸ was published in July 2024.¹¹⁹ This Bill appears to concretise this code of practice, translating the expectation of employers to take "all reasonable steps to explore alternatives to dismissal"¹²⁰ into non-application where "the employer could not reasonably have avoided the need to make the variation".¹²¹ However, flexibility appears to have been provided to financially disadvantaged small businesses, with these new propositions being disregarded where "the reason for the variation was to eliminate, prevent or significantly reduce, or significantly mitigate the effect of, any financial difficulties" that may affect an employer's ability to "carry on the business".¹²² This, unsurprisingly, displays the Labour Party's forecasted tendencies to protect the "*working people*,"¹²³ providing the target audience with a 'get-out clause'. This Bill could positively legislate the future of UK employment status, with the Labour Party appearing to have largely maintained the trajectory of their promises. The "current arbitrary system" surrounding basic protection rights,¹²⁴ has been substantially addressed, and an "[extension to] the time limit for bringing claims to Employment Tribunals",¹²⁵ has been realised, stretching from three to six months.¹²⁶

However, with each of the above rights, the inclusion of exceptions and circumstances only appears to complicate and frustrate the 'catch-all' plausibility of any new worker definition. The intention to 'future-proof' these provisions is admirable, however this sacrifice appears to weigh heavy on the general and consistent application of these rights. Each of these seemingly minor 'ifs and buts' are starting to accumulate, and we are beginning to lose sight of the original 'one-size-fits-all' capacity of this reform. Legal commentators do not appear to be the only ones to

¹¹³ Employment Rights HL Bill (2024-25) 81

¹¹⁴ Note 155, Part 1, Clause 1.

¹¹⁵ Note 155, Part 1.

¹¹⁶ Employment Rights HL Bill (2024-25) 81

¹¹⁷ Note 160, Part 1, Clause 26.

¹¹⁸ Trade Union and Labour Relations (Consolidation) Act 1992, s.203.

¹¹⁹ Dismissal and re-engagement: code of practice (2024) <<https://www.gov.uk/government/publications/dismissal-and-re-engagement-code-of-practice/code-of-practice-on-dismissal-and-re-engagement-issued-by-the-secretary-of-state-under-section-203-of-the-trade-union-and-labour-relations-consolidat>>

¹²⁰ Dismissal and re-engagement: code of practice (2024) <<https://www.gov.uk/government/publications/dismissal-and-re-engagement-code-of-practice/code-of-practice-on-dismissal-and-re-engagement-issued-by-the-secretary-of-state-under-section-203-of-the-trade-union-and-labour-relations-consolidat>>

¹²¹ Employment Rights HL Bill (2024-25) 81.

¹²² Note 165.

¹²³ Labour Party, 'Labour's Plan to Make Work Pay' (*Labour*, 24 May 2024) <<https://labour.org.uk/wp-content/uploads/2024/06/MakeWorkPay.pdf>> accessed 4 April 2025.

¹²⁴ Labour Party, 'Labour's Plan to Make Work Pay' (*Labour*, 24 May 2024) <<https://labour.org.uk/wp-content/uploads/2024/06/MakeWorkPay.pdf>> accessed 4 April 2025.

¹²⁵ Labour Party, 'Next Steps to Make Work Pay' (*UK Government*, 10 October 2024) <https://assets.publishing.service.gov.uk/media/6707a5eb92bb81fcdbe7b62b/next_steps_to_make_work_pay.pdf> accessed 4 April 2025.

¹²⁶ Employment Rights HL Bill (2024-25) 81.

bear the burden of this confusion. During the first sitting of this Bill on 26 November 2024, a Scottish National Party MP, Chris Law, raised what he believed to be “a fundamental issue” with the Bill, following the first parliamentary debate regarding the proposed two-tier employment status. His comments concerned the relationship between “zero-hours contracts and the different legal categories of a worker”.¹²⁷ Having acknowledged the supposed universality in the application of labour law, it was questioned whether a new clause was required to ensure that all rights contained within the Bill apply to “any individual who is engaged by another to provide labour and is not, in the provision of that labour, genuinely operating a business on his or her own account”.¹²⁸ These comments, upon reflection, seemingly foreshadowed the difficulties now evident in the interpretation of this Bill. Without a concurrently developing worker definition, we remain “*without clarification on the legal status of all those who work, [meaning that] the rights in the Bill are allocated piecemeal*”.¹²⁹ The intended simplicity of this new definition will inevitably be distorted and diluted, due to the complexity and abundance of exclusions and exceptions attached to all the aforementioned rights. Therefore, this Bill has had the resultant impression of a sidestep, providing equal and contrary measures of development and regression, rather than a step towards clarity for employment status within the UK.

An ulterior consideration

At this point, it appears fair to conclude that Labour have acted quickly, perhaps even hastily, regarding this Employment Rights Bill. Having secured a landslide victory at the July 2024 general election¹³⁰, Labour have somewhat fast-tracked this Bill, through to the Committee Stage in the House of Lords by March 2025.¹³¹ Thus far, the stages of legislation have only been followed for a matter of months. Admittedly, although the pace perhaps feels somewhat brisk, this process has conformed to a relatively standard timeframe. However, it is with the understanding of this bill’s potential context with which the revelation of its pace turns on its own facts. This bill, as Labour have made clear, intends to largely usurp the current three-tier employment status framework, entrenched as it is within the UK legal system. This author believes that, for the evidential flaws and unanswered questions that already appear to have permeated this Bill, such a piece of legislation, intended to be wholly and radically transformative, warrants a greater level of commitment and scrutiny than that of a slapdash charge to Royal Assent. This Bill, despite its admirable intention and purpose, is highly unlikely to clarify the legal ambiguity that the UK employment complexion currently suffers from. Section 230(3) has remained in its original semblance since its introduction in 1996. Problems have arisen and have been left unaddressed. Calls for reform have been hollow and unsettled, inevitably carving a wider mould to be filled by any reformative action.

There is undoubtedly a need for reform. However, this author foresees an incommensurate balance of large-scale disruption in exchange for fractional success in Labour’s current policies. In an aging building, unfit for its purpose, close to collapse, would the sense lie in its complete detonation, or pursuing a safer, piecemeal deconstruction, more akin to breaking it down to build it back up? The latter certainly appears more logical. Therefore, this author surmises that steady implementation may allow this Bill to enjoy the level of success that was originally implied with its drive for change. The first, and arguably most rational, step in this process would regard the focal change proposed; the unification and merging of the definition of both employee and worker. Simply, this is a necessary foundation, and once in place, would allow those affected to better understand the direction and vision of this bill. Further, as the Labour government appear keen to avoid the further exploitation of “the complexity of the UK’s framework to deny people

¹²⁷ Public Bill Committee, *Employment Rights Bill First Sitting Official Report* (First Sitting, House of Commons, 26 November 2024) c192.

¹²⁸ Note 171, c193.

¹²⁹ Note 171, c192.

¹³⁰ House of Commons Library, ‘General election 2024 results’ (*UK Parliament*, 24 September 2024) <<https://commonslibrary.parliament.uk/research-briefings/cbp-10009/>> accessed 8 April 2025.

¹³¹ Employment Rights HL Bill (2024-25) 81.

their legal rights,”¹³² it is asserted that a readily available definition may clarify the position of these newly termed ‘workers’, leave little room for misinterpretation and, with the execution of the following procedure, exploitation. However, this step may not be realised without this elusive, transformative new ‘worker’ definition that has been so heavily discussed but has yet to come to fruition.

Gradual implementation

This article supposes that rights should be grouped, bound by their similarities, and implemented successively, until the Bill has been enacted in full force. Relying solely upon the scope of rights discussed within this piece, it is submitted that three groups of rights may be sequentially imposed. The first group may be categorised as the “*basic individual rights from day one for all workers*”,¹³³ including unfair dismissal, parental leave and sick pay. This group has already been provided by the Labour government, now seeking to remove the qualifying periods attached to each. Providing these rights to our newly defined population of ‘workers’ would allow the Labour government to demonstrate their support, providing an accountable standard of rights, to which every ‘worker’ now has access. Further, the unique benefit of this approach may also be appreciated at this point, as, with only partial implementation, an early indication as to the success of the Bill may be understood. This provides a certain quality of adaptability to the remaining stages, as each step may thereafter be taken in the knowledge of the successes and shortcomings of each previous step. Following this assertion, the next implementation should consider rights pertaining to ‘the expectations of the employer’, such as the new principles of dismissal for failing to agree to variations of contracts. Enforcing these expectations at the second stage of proceedings may achieve one of Labour’s original aims; to defeat the inherent and preventable exploitation of workers.

This method of implementation is hallmarked by its simplicity; a multi-step, one-at-a-time process. As Labour fear for the “complexity of the UK’s framework,”¹³⁴ the gradual progression and release of each bundle of rights offers this Bill an aspect of generalised readability. Providing the working population, the largest demographic of the Bill, with even a fundamental understanding of their updated rights may, in part, diminish the perception of complexity that employers have previously lauded over workers, as Labour term it. Upon the select rights addressed by this article, the final group to be implemented may be named the ‘transformed rights.’ This would bring those rights that have been substantially changed into force, including the zero hours contracts, which now supposedly provides the “right...to be offered guaranteed hours”.¹³⁵ Having largely changed in substance, these rights perhaps stand to be the most ambiguous upon implementation, and therefore the least predictable. The retrospective dimension of this process again proves its value here. By introducing these rights at the final stage, a metaphorical game of damage limitation can be played, as the reaction of the framework to each of the previous steps has been understood in turn, and this invaluable information can be factored in and utilised to support the incorporation of these newly classified rights.

Briefly straying from the time frame in which this article writes from, by November 2025, the bill has passed through every stage in the House of Commons and the House of Lords, currently awaiting Royal Assent. The Labour government have also now introduced an ‘implementation roadmap’, indicating that a process of gradual implementation, as previously discussed, will

¹³² Prime Minister's Office, 10 Downing Street and His Majesty King Charles III, ‘The King’s Speech 2024’ (Gov. UK, 17 July 2024) <<https://www.gov.uk/government/speeches/the-kings-speech-2024>> accessed 8 April 2025.

¹³³ Labour Party, ‘Labour’s Plan to Make Work Pay’ (Labour, 24 May 2024) <<https://labour.org.uk/wp-content/uploads/2024/06/MakeWorkPay.pdf>> accessed 8 April 2025.

¹³⁴ Prime Minister's Office, 10 Downing Street and His Majesty King Charles III, ‘The King’s Speech 2024’ (Gov. UK, 17 July 2024) <<https://www.gov.uk/government/speeches/the-kings-speech-2024>> accessed 8 April 2025.

¹³⁵ Employment Rights HL Bill (2024-25) 81.

“deliver its new package of workers’ rights through the plan to Make Work Pay”¹³⁶. Despite some ambiguity, the earlier House of Commons briefing on this new Bill also alluded to the “majority of reforms” taking effect “no earlier than 2026.”¹³⁷ It is thus concluded that this method of implementation, having always presented itself as an apparent solution to the government and commentators alike, now appears to stand as the favoured course of action. Despite the inevitable hindrances that shadow any large-scale procedural upheaval, including this new employment rights Bill, it is argued that the framework would thereafter enjoy a much stronger position with the foundational definitions and rights already in place. Any rectifications would likely only require amendment, as opposed to complete upheaval, defeating a fatal flaw that negates the Labour government’s current procedure. In totality, this provides a more cautionary and safe approach for the new Employment Rights Bill. The current trajectory, implementing the Bill in its entirety, lends itself to a brutally simple dichotomy. The bill will either sink or swim. As this article has sought to highlight, this bill has the potential to remedy a great number of the issues that plague UK Employment Law and should not be condemned to fail simply for a handful of serious but amendable oversights. The proposed process of gradual implementation does not fall victim to such a harsh reality and instead may keep itself afloat until calmer waters are reached. However, it would be remiss for this article to ignore the potential difficulties that this process may face. Primarily, such a gradual and repetitive procedure is likely to carry several logistical intricacies.

Nevertheless, should these complications be overcome, this method provides, as previously discussed, a significant number of otherwise inaccessible benefits. Should any of the stages already in effect require amendment, they may be subject to a delay, until the implementation process is concluded. It is pertinent to note, however, that any such amendments may be rendered unnecessary by several mitigating factors. By one measure, any problems may be resolved by a later introduction. Further, the risk of early deficiencies in these new definitions is arguably reduced with each step taken, as this process is intelligent, understanding and improving from the successes and shortcomings of each previous step. It is implied by the ‘catch-all’ nature of this bill that the Labour government does not foresee the need for amendments so soon after implementation, however, this article believes that such a proposition is too idealistic. Therefore, a piecemeal implementation of this Employment Rights Bill may provide greater support to both the bill itself and the fragile UK Employment Law framework. However, this article remains inflexible in its position that a concurrent ‘worker’ definition would play the pivotal role in the success of this bill.

It is therefore submitted that harmonious reform to UK employment status may be further away than first predicted. Broadly speaking, the Labour Party’s decision to address a new single worker definition aside from the current Employment Rights Bill appears to be a confusing and potentially costly mistake. For all affected by the implementation of this new Bill, whether they be self-employed, working within traditional employment or under the emerging gig economy, as has been the focus of this paper, it is unclear how near and absolute any protection will be. The scope of those rights, provisions and qualifying periods previously supposed to land within a new ‘catch-all’ definition appears to be widening, as the possibility of its realisation becomes ever-narrower. Following this extensive review of potential reform, this article will conclude by ultimately deciding whether, in relation to UK employment status, one size really does fit all.

¹³⁶ Department for Business and Trade and others, ‘Roadmap unveiled to boost rights for half of all UK workers and provide certainty to employers’ (*Gov.UK*, 1 July 2025) <<https://www.gov.uk/government/news/roadmap-unveiled-to-boost-rights-for-half-of-all-uk-workers-and-provide-certainty-to-employers>> accessed 11 November 2025.

¹³⁷ Patrick Brione and Stephanie Cunningham, ‘Employment Rights Bill 2024-25 Research Briefing’ (*House of Commons Library*, 23 October 2024) <<https://researchbriefings.files.parliament.uk/documents/CBP-10109/CBP-10109.pdf>> accessed 11 November 2025.

Conclusions and recommendations

Following an analysis of Labour's propositions as to the future of UK employment status, supplemented by a brief history of the development of its definition, alongside an evaluation of its current condition, it is concluded that the gig economy's already fragile legal foundation is not fit for purpose. Reform appears essential to the future of the gig economy. However, this proves to be a promise much easier made than kept. All the previously discussed definitions, rights and common law decisions must be harmonised by any potential reform, should this action wish to be comprehensive and enduring. This article will now reassert the conclusions previously reached, assessing their contribution to this work's focal question, before suggesting a further potential supplement to the current reformative action. Thereafter, a conclusion will be drawn as to whether one size fits all regarding potential reform to UK employment status.

The Labour government's first steps towards change were then established. Labour's most recent manifesto,¹³⁸ and the King's Speech 2024,¹³⁹ were assessed, noting the accuracy of their focus toward the key issues plaguing UK Employment Law at the time of their publishing. The extent of inconsistently applicable definitions, rights and common law verdicts within UK Employment Law were clarified, and the dated nature of s.230(3) was understood. This section concluded by providing a brief political explanation to this legal issue, noting that the Employment Rights Act itself was introduced by a Conservative government, and s.230(3) provides this current Labour government with a chance, although difficult, to positively brand this otherwise antiquated section of legislation.

A critical comparison was then drawn in the article between traditional employment and the gig economy, considering the suitability and scope of the current definition. The greatest difference between employees and workers lies in the definitions and associated rights. Despite this disparity, the courts have seemingly approached new and novel contractual forms in much the same manner as 'traditional' employment. This approach was challenged in the landmark decision in *Uber*. The Supreme Court took an unorthodox but familiar approach,¹⁴⁰ finding Uber drivers to be workers and granting basic but otherwise inaccessible employment rights.¹⁴¹ The recency of the gig economy is reflected in its infancy in law; the *Uber* case managed to reach the Supreme Court, demonstrating the legal merit in Uber's argument¹⁴². This comparison was drawn to contextualise the two main proposals submitted to the public by the Labour government. The Labour government detailed plans to shift towards a two-tier UK employment status framework and a resultant amalgamation and clarification of specific 'worker' and 'employee' exclusive rights. This section determined that although uniformity in common law treatment lends itself to the impression that one size may fit all, the difficulty with which this is provided to workers suggests the need for further legal clarification, leading to inevitable differences in definitions.

Focus was then given to the reality of Labour's largely idealistic visions of reform. The final steps in the chronology of Labour's proposals for reform thus far were analysed. Despite a relatively consistent continuation of their initial promises, the decision to "consult on a simpler [definition] framework" aside from the current Bill stands as a noticeable oversight. Likely slowed by the debate as to whether all employment rights should be accessible to the distinctive 'employee' and 'worker', a lack of concurrent definition has caused confusion amongst legal commentators and politicians.¹⁴³ Therefore, gig economy workers will remain unsure as to their

¹³⁸ Labour Party, 'Labour's Plan to Make Work Pay' (*Labour*, 24 May 2024) <<https://labour.org.uk/wp-content/uploads/2024/06/MakeWorkPay.pdf>> accessed 13 April 2025.

¹³⁹ Prime Minister's Office, 10 Downing Street and His Majesty King Charles III, 'The King's Speech 2024' (*Gov.UK*, 17 July 2024) <<https://www.gov.uk/government/speeches/the-kings-speech-2024>> accessed 13 April 2025.

¹⁴⁰ See *Lane v Shire Roofing* [1995] IRLR 493 (CA).

¹⁴¹ *Uber BV v Aslam* [2021] UKSC 5.

¹⁴² Note 190, 426.

¹⁴³ See Public Bill Committee, *Employment Rights Bill First Sitting Official Report* (First Sitting, House of Commons, 26 November 2024).

status for the duration of this omission. An alternative process of implementation was then discussed, highlighting potentially superior benefits to the current approach. Despite Labour's idealistic attempts, the evident flaws in approach suggest an inherent contradiction to the plausibility of one size fitting all for UK employment status.

Supplementing the reformative action

These conclusions point toward one very clear suggestion for reform. A grandiose and sweeping proposition would be both unrealistic and unfair, as the Bill is at the Committee Stage in the House of Lords at the time of writing. However, in the same vein, there remains chance to amend this Bill.¹⁴⁴ This article has already suggested a process of steady implementation for this bill. However, the conclusion that continues to be drawn, and therefore stands as a logical supplementary amendment, is the provision of a concurrent 'worker' definition, before this Bill receives Royal Assent, as this would largely remedy the shortcomings previously highlighted. This arguably minor adjustment would provide sorely needed context as to the application of the amended rights as previously reviewed. It is reasserted that the Labour government's approach has been largely pragmatic and comprehensive. However, a 'worker' definition that can be anticipated and understood by legal professionals, politicians, and, most importantly, gig economy workers, may prove to be the conclusive component to this Bill. Aside from the exclusion of a small number of relevant employment rights, a lack of 'worker' definition could defeat the intended 'future-proof' nature of this Bill; employers will continue "exploiting the complexity of the UK's framework,"¹⁴⁵ until clarity is provided. This amendment would also avoid the statutory backlogs caused by the EU law retainment process.¹⁴⁶ Therefore, a 'one size fits all' approach to UK employment status would appear more probable should the originally intended definition, unifying both 'workers' and 'employees', be introduced alongside the current Employment Rights Bill, providing protection, security and clarity to an otherwise straddling population of gig economy workers.

As already noted, reform to UK employment status appears much easier said than done. The chronological approach to the Labour government's current proposals, supplemented by a holistic dimension of the history and current position of UK employment status taken throughout this article has consistently demonstrated that, despite any desire to simplify and uniform, such a proposition does not appear feasible. The current Labour government's Employment Rights Bill stands as a commendable effort towards the realisation of this proposal. However, this does not render their attempts faultless. The unanswered questions, shortcomings and confusion highlighted by this article underscore the presence of entrenched and extensive difficulties in UK employment status, that have inadvertently been exacerbated by decades of legal ambiguity. It would be imprudent to believe that one bill, drafted and potentially enacted within the first year of this Labour government, would conclusively defeat the myriads of complications previously raised. It is maintained that the nature of these issues that have previously plagued UK Employment Law are inescapable and will inevitably re-emerge in different novel forms in future, no matter how inarguably simple the definition or how copious the protection. Therefore, it is ultimately concluded that UK employment status cannot definitively exist in a 'one size fits all' format.

¹⁴⁴ UK Parliament, 'Making laws: House of Lords stages' (*UK Parliament*, 2025)

<<https://www.parliament.uk/business/lords/work-of-the-house-of-lords/making-laws/>> accessed 13 April 2025.

¹⁴⁵ Labour Party, 'Labour's Plan to Make Work Pay' (*Labour*, 24 May 2024) <<https://labour.org.uk/wp-content/uploads/2024/06/MakeWorkPay.pdf>> accessed 13 April 2025.

¹⁴⁶ Leigh Gibson and Graeme Cowie, 'The end of REUL? Progress in reforming retained EU law' (*UK Parliament*, 2 February 2024) <<https://commonslibrary.parliament.uk/research-briefings/cbp-9957/>> accessed 13 April 2025.

LEGAL HISTORY

The inviolability and enforcement of Shylock's bond: a look into sixteenth-century Venetian contract law through Shakespeare's eyes

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Introduction

"I'll have my bond. Speak not against my bond.

I have sworn an oath that I will have my bond."¹

The law is a complication in society that may be confronted constantly.² The above verses relate to the legalistic debate over the pound of flesh within *The Merchant of Venice* by William Shakespeare. Through the character of Shylock, Shakespeare confronts the reader with the theme of the inviolability of the contract between Shylock and Antonio. In the Law and Literature movement, Shakespeare's works have been looked at with great interest due to the importance of legal themes in his plays,³ and one of the works most famously analysed within this movement is the theatrical comedy *The Merchant of Venice*. In this play, Shakespeare deals with different themes and plots that confuse and intrigue the reader at the same time. Generally, three main plots have been identified. The first main plot is "the flesh bond", between Shylock and Antonio;⁴ the second is the "casket plot" concerning Portia and her suitors; lastly, is the "Lorenzo and Jessica plot", which regards the love story between a Christian and a Jew.⁵ All the three plots are inextricably linked and fused together by the overarching element of the bond.⁶ The bond is represented by the contract between Shylock and Antonio, but also by the relationship of friendship, love, and family throughout the play.⁷

The "flesh bond plot" is the most explored theme in the Law and Literature movement. This theme is often chosen as a setting for the discussion between equity and justice.⁸ Several scholars have conducted research by applying an historical background to Shakespeare's work. In the academic world there has been almost literary consensus for the use of Elizabethan jurisdiction of equity⁹ as a background to the comedy, to represent the struggle between common law and equity.¹⁰ Despite the fact that Shakespeare himself was well acquainted with the law, he appeared to struggle with the concept of justice as it was a recurrent theme in his plays.¹¹ Shakespeare's concept of justice within the law in Elizabethan England has been exhausted by academics throughout the centuries, as well as the role of Portia, who is often depicted as the incarnation of equity balancing the strict common law.¹² Nonetheless, alternatives to the common law versus

¹ William Shakespeare, *The Merchant of Venice* (Jay L. Halio ed, Oxford University Press 1993) act III.III vv 4-5.

² Tullio Ascarelli, 'Antigone e Portia' (1955) 1 Italian Law Journal 167, 167.

³ Richard A Posner, 'Remarks on Law and Literature' (1992) 23 Loyola University Chicago Law Journal 181, 181.

⁴ Shakespeare (n 1) act I.III vv 1- 178, act II.VIII, act III.I, act III.II vv. 218 - act III.IV, and act IV.I.

⁵ Michael Jay Wilson, 'View of Justice in Shakespeare's the Merchant of Venice and Measure for Measure' (1995) 70 Notre Dame Law Review 695, 695.

⁶ Jay L Halio, 'General Introduction' in William Shakespeare, *The Merchant of Venice* (Jay L Halio ed, Oxford University Press 1993) 17 and 29.

⁷ *ibid* 29.

⁸ B J Sokol & Mary Sokol, 'Shakespeare and the English Equity Jurisdiction: the Merchant of Venice and the Two Texts of the King Lear' (1999) 50 The Review of English Studies 417, 417.

⁹ Further readings on the rise of English court of equity and its relationship with common law can be found, see S F C Milson, *Historical Foundation of Common Law* (Butterworths 1969) 74-90.

¹⁰ Sokol & Sokol (n 8) 417. Charles Spinoza, 'Shylock and the Debt and Contract in the Merchant of Venice' (1993) 5 Cardozo Studies in Law and Literature 65, 65.

¹¹ Jay L Halio, 'General Introduction' (n 6) 23. Wilson (n 5) 695.

¹² For further readings on the role of Portia as equity, see Sokol & Sokol (n 8). Marl Edwin Andrews, *Law Versus Equity in the Merchant of Venice; A Legalization of Act IV, Scene I* (University of Colorado Press 1965).

equity analysis of the comedy have been provided.¹³ An interesting alternative is the possibility that Shakespeare may have also wanted to reflect on the actual setting of the comedy: Venice and its law.

This article aims to renew the possibility of legal-literary analysis of Shakespeare's *The Merchant of Venice* by applying it to the real Venetian context. The essay accomplishes this objective by answering the following research question:

To what extent do the inviolability of Shylock's bond and its enforcement stem from popular culture and legal historical reality of Venetian law in the sixteenth century?

In order to tackle this research question, the article recognises the following premise: the penal clause, namely the pound of flesh requested by the contract between Shylock and Antonio, would have been enforceable in Venice in the sixteenth century. The enforceability of the *stipulatio poena* is thus accepted. Stefania Gialdroni and Thomas Niemeyer have already shown that a penalty of a contract requiring part of the creditor's body was possible and enforceable in Venice and in Europe during the sixteenth century.¹⁴

The main body of this article is divided into three main sections. The first section presents the theatrical comedy in order to permit the reader to have an overview of Shakespeare's work and its influences. It also informs the reader of the popular culture around Venice in the sixteenth century. Hence, it includes the depiction of the city through the myth of Venice, and how the popular vision of the city influenced Shakespeare's work. Furthermore, the second section explores what would have been the applicable contract law of Venice in the sixteenth century. In particular, it provides an answer to the question: how would Shylock's bond be interpreted in Venetian law, and in which court would it have been enforced? It follows a brief overview of Venetian sources of law and legal tradition, in order to allow the reader to understand the process of discovery of a probably applicable legal provision. Once that provision has been identified, the article then refers exclusively - and in a novel way - to Liber I Chapter XXXIII of the *Statutum Novum*, establishing the rule: "promises must be kept" within the framework of contracts. Lastly, in this section, the court before which Shylock should have sought enforcement in the reality of Venetian law is established. Hereinafter, the third section compares Shakespeare's depiction of the bond and its enforcement before the Duke of Venice to the reality of Venetian contract law discovered in the previous section. The article deals with the development of the "flesh bond" plot throughout the comedy juxtaposed with the reality of Venetian contract law of the sixteenth century, and the conclusion evaluates to what extent Shakespeare's bond and its enforcement before the court stem from popular culture and legal historical reality of Venetian law.

As a limitation to this article, it is important to note that the existence of the Alien Statute is not considered. The Alien Statue is a possibly fictional Venetian statute requiring Shylock's life and properties to be at the mercy of the Duke of Venice, because the foreigner attempted to the life of a citizen, Antonio.¹⁵ This limitation allows us to set the focus on the sole bond and its enforcement between fiction and reality.

Predominantly, this article analyses *The Merchant of Venice* from the application of legal historical sources. The research has been conducted mainly through an historical method. However, the historical legal documents on this specific topic are not yet explored by many legal

¹³ For other examples on the role of Portia as an opportunistic figure, see Ascarelli (n 2). Portia interpreted as the goddess of Fortune, see Ellen M Caldwell, 'Opportunistic Portia as Fortuna in Shakespeare's the Merchant of Venice' (2014) 54 Studies in English literature 349. For further readings on another analysis of the trial of act IV.I of *The Merchant of Venice* considering the English Law Merchant and the Law Merchant Tribunal, see B J Sokol, 'The Merchant of Venice and The Law Merchant' (1992) 6 Renaissance Studies 60.

¹⁴ For further readings on the penal clause (*stipulatio poena*), see Stefania Gialdroni, 'La Clausola Penale tra Finzione e Realtà. Il Caso Limite di Shylock alla prova del diritto Veneziano, del Diritto Comune e del Common law' in S Cherti (ed), *La Pena Convenzionale nel Diritto Europeo* (Jovene 2013) 25-26 and 32. Thomas Niemeyer, 'Judgment against Shylock in the Merchant of Venice' (1915-1916) 14 Michigan Law Review 20, 30.

¹⁵ Shakespeare (n 1) act IV.I vv 344-359.

scholars, thus further research is necessary.¹⁶ The article firstly considers the general legal framework of the Republic of Venice. Venice represented a *unicum* in its legal tradition as influenced by different sources but never united with the *ius commune* as the rest of the Italian peninsula.¹⁷ Secondly, it aims to explore the specific statutory contract law in force. Hence, from the historical flow of events the article traces back to the *Statutum Novum* and its glosses referenced in the State Archives of the city of Venice.¹⁸ For this purpose, secondary legal sources have been studied to interpret the primary law of the time. Additionally, in order to analyse the theatrical comedy, secondary literal academic sources have also been employed in order to better understand the work of Shakespeare.

***The Merchant of Venice* and its influences**

Before examining the historical legal setting of *The Merchant of Venice*, the article provides an overview of the “flesh bond” plot of the comedy and considers its literary sources. The function of this section is to acquaint the reader with the details of the comedy and its background, as well as the popular perception of Venice, in order to fathom subsequent analysis of the legal reality and to evaluate Shakespeare’s influences from popular culture. The first section of the section presents a brief summary of *The Merchant of Venice*’s “flesh bond” plot and its literary sources. Subsequently, the second section examines the special importance of Venice to the Shakespearean comedy, diving into the popular culture of the city during the sixteenth century.

A brief overview of the Shakespearean comedy

Scholars generally agree that *The Merchant of Venice* was written between 1594 and 1598.¹⁹ Although the comedy was not printed and published until 1600, it was entered in the Stationers’ Register in 1598.²⁰ Shakespearean comedies are often characterised by numerous stories and characters that blend together.²¹ Those stories have as a primary aim the description of the social fabric within a particular time and place.²² In *The Merchant of Venice*, there are three main plots intertwined among themselves: “the flesh bond plot”, the “casket plot”, and the “Lorenzo and Jessica plot”. The “flesh bond” plot is the central theme of this article.

Antonio, a Venetian merchant, borrowed three thousand ducats from Shylock, a Jew money-lender.²³ He turned to Shylock in order to help his dear friend Bassanio to win the hand of the lady of Belmonte, Portia, in marriage.²⁴ The Jewish money-lender provided the money to Antonio, who had to return the amount within three months.²⁵ Shylock inserted a penal clause in the contract in case of default of the debt: Antonio would be liable for a pound of flesh to be taken from his own body.²⁶ Antonio agreed to the condition.²⁷ Unfortunately, at the end of the three-month period, Antonio had lost his ships at sea and was not able to repay his debt to

¹⁶ For examples of articles on Venetian law, the *ius commune* and commercial law, see Silvia Gasparini, ‘I Giuristi Veneziani e il loro Ruolo tra Istituzioni e Potere nell’Età del Diritto Comune’ in Karin Nehlsen-von Stryk & Dieter Norr (eds), *Diritto Comune Diritto Commerciale Diritto Veneziano* (Centro Tedesco di Studi Veneziani 1985). Giovambattista Gasparini, ‘Diritto Veneziano e Diritto Comune (riassunto)’ in Karin Nehlsen-von Stryk & Dieter Norr (eds), *Diritto Comune Diritto Commerciale Diritto Veneziano* (Centro Tedesco di Studi Veneziani 1985).

¹⁷ S Gasparini (n 16) 70-71.

¹⁸ Jacopo Tiepolo, ‘Statutum Novum [New Statute]’ as commented by Roberto Cessi in Roberto Cessi (eds), *Gli Statuti Veneziani di Jacopo Tiepolo e le loro glosse* (Venezia 1938).

¹⁹ Wilson (n 5) 707.

²⁰ The first performance known of the play was at the court of James I in 1605, see Jay L Halio, ‘General Introduction’ (n 6) 27.

²¹ Wilson (n 5) 703-704.

²² *ibid.*

²³ Shakespeare (n 1) act I.III.

²⁴ *ibid* act I.I vv 161-176 (Bassanio’s request) vv. 177-185 (Antonio’s reply).

²⁵ *ibid* act I.III vv 1440-148.

²⁶ *ibid* act I.III vv 1440-148.

²⁷ *ibid* act I.III vv 149-150.

Shylock.²⁸ Thus, Shylock decided to enforce his bond in front of the Duke of Venice.²⁹ Towards the end of the comedy, in act IV.I, the trial began. There, Portia, taking on the appearance of a lawyer, saved Antonio from certain death. Portia claimed that the contract only awarded Shylock a pound of flesh but no blood could be spilled.³⁰ To her judgment,³¹ Portia attached the consideration on the Alien Statute that provided for Shylock to be at the mercy of the Duke as he attempted at the life of a citizen, namely Antonio.³² At the end of Act IV.I, the “flesh bond” plot is concluded: Antonio is safe while Shylock has lost half of his property, and now, by virtue of a decision of the Duke of Venice, he has to convert to Christianity due to the application of the Alien Statute.³³

As far as Shakespeare’s literary historical sources are concerned, several scholars ascribed the different stories behind the plots in *The Merchant of Venice* to previous popular works.³⁴ Shakespeare took inspiration from pre-existing folkloristic stories for this play.³⁵ Considering the character of Shylock in general, several scholars cited Marlow’s *The Jew of Malta* as a model.³⁶ Another important reference to *The Merchant of Venice*’s background sources is *Il Pecorone* (‘The Dunce’).³⁷ This short story was most likely a tale in Giovanni Fiorentino’s collection of tales and it closely resembled the Shakespearean play.³⁸ The main character of *Il Pecorone*, Gianetto, asked his friend Ansaldo to lend him money.³⁹ Ansaldo agreed but he had to borrow money from a Jew money-lender.⁴⁰ As Ansaldo eventually forfeited the loan, a pound of flesh was asked of him as provided in a contract they subscribed.⁴¹ Fortunately, the lady of Belmonte, namely Gianetto’s lover, as a lawyer in disguise, tricked the Jew and saved Ansaldo.⁴² Notwithstanding that Shakespeare took inspiration from this story, he also modified the play adding conflicting plots based on other popular works. For example, the “casket’s plot” was probably based on Boccaccio’s *Decameron* or on the *Gesta Romanorum*, while the Jessica and Lorenzo subplot built on Marlow’s *Jew of Malta* or Masuccio’s *Il Novellino*.⁴³

Popular culture of Venice in the sixteenth century

As far as is known, Shakespeare never travelled to Venice.⁴⁴ He most probably gained his knowledge from conversations with friends, acquaintances who travelled to the city, and various readings he had access to.⁴⁵ In the sixteenth century, Venice had a reputation for great wealth and

²⁸ *ibid* act III.III vv 2-7.

²⁹ *ibid* act III.III vv 4-11.

³⁰ Shakespeare (n 1) act IV.I vv 302-309.

³¹ It is referred to “her judgment” as from act IV.I vv 296-297 Portia is taking the role of the judge, notwithstanding she was technically Antonio’s lawyer. It is Portia who is giving the judgment and not the Duke of Venice. See *ibid* act IV.I vv 296-297.

³² *ibid* act IV.I vv 343-359.

³³ *ibid* act IV.I vv 376-386.

³⁴ Wilson (n 5) 707.

³⁵ Jay L Halio, ‘General Introduction’ (n 6) 13-23.

³⁶ Wilson (n 5) 708. Joan Ozark Holmer, ‘The Education of the Merchant of Venice’ (1985) 25 *Studies in English Literature 1500-1900 Elizabethan and Jacobian Drama* 307, 322.

³⁷ Halio, ‘General Introduction’ (n) 14-15. Jay L. Halio (ed), *Understanding the Merchant of Venice: a student casebook to issues, sources and historical documents* (Greenwood press 2000) 2.

³⁸ Daria Perocco, ‘Venice, Shakespeare and the Italian Novella’ in Laura Tosi & Shaul Bassi (eds), *Visions of Venice in Shakespeare* (Ashgate 2011) 38.

³⁹ Jay L Halio, ‘General Introduction’ (n 6) 14-15.

⁴⁰ Perocco (n 38) 39.

⁴¹ Jay L Halio, ‘General Introduction’ (n 6) 14-15.

⁴² *ibid*.

⁴³ Wilson (n 5) 708. Halio, *Understanding the Merchant of Venice: a student casebook to issues, sources and historical documents* (n 37) 2. Perocco (n 38) 40-41. Other scholars have identified additional possible sources such as: *The Ballad of Gernutus*, Antony Muday’s *Zelauto*, and Alexander Silvayn’s *The Orator*, see Holmer (n 36) 308.

⁴⁴ Virginia Mason Vaughan, ‘Super subtle Venetians: Richard Knolles and the Geopolitics of Shakespeare’s *Othello*’ in Laura Tosi & Shaul Bassi (eds), *Visions of Venice in Shakespeare* (Ashgate 2011) 19.

⁴⁵ *ibid*.

cosmopolitanism.⁴⁶ The city appealed to Shakespeare's contemporaries who would see it as an ancient republic that had earned prestige for political astuteness, wealth, and legal justice.⁴⁷

In the popular imaginary of the Republic of Venice, the so-called "myth of Venice" dominated the scene.⁴⁸ According to David McPherson, there were four components that characterized the city of Venice in popular culture: Venice the "città galante" (the "pleasure city"), Venice "the rich", Venice "the wise", and Venice "the just".⁴⁹ First, taking into account the epithet "città galante", the city had earned standing as the pleasure capital of Europe.⁵⁰ Second, Venice was also referred to by the epithet "the rich" due to its great maritime and economic power.⁵¹ Venice was an attraction for foreign trade, even though in the sixteenth century its wealth and power were in decline.⁵² Third, the city was also named "the wise". The Venetian state was regarded as such due to the fact that its government was composed of three different parts: monarchy, represented by the Duke of Venice; aristocracy, embodied in the Senate; and democracy, personified by the *Maggior Consiglio* (the "Great Council").⁵³ Academics and scholars considered the city balanced and wise due to its mixed form of government.⁵⁴ The closing epithet for Venice was "the just".⁵⁵ The city was referred as such because of the rigidity of its laws and the fairness of its justice.⁵⁶

For the purpose of this article, Venice "the just" is the most important aspect of the myth of Venice. According to the myth, the city had a great reputation for impartiality and severity of its laws.⁵⁷ Travellers of the sixteenth century reported their astonishment by the inviolableness of Venetian law.⁵⁸ For example, Venice's severity would normally provide for the loss of tongues or eyes as a result of swearing.⁵⁹ Fynes Morysons, a traveller who visited Venice in 1590, assisted and reported the mutilation and execution of two sons of senators for blasphemous songs and other misdemeanours.⁶⁰

The myth of Venice and the highly favourable image of Venetian justice had probably reached England through Lewkenor's translation of Contarini's *De Magistribus et Republica Venetorum* of 1543.⁶¹ First and foremost, Contarini's book portrayed Venice as a mixed form of government.⁶² According to David McPherson, Lewkenor had translated Contarini's book on the commonwealth and governance of Venice in 1599.⁶³ Shakespeare was probably fascinated by the city as well as his contemporaries, nonetheless it is unclear if he read Lewkenor's translation of Contarini for his play *The Merchant of Venice*.⁶⁴ David McPherson claimed that the book had some influence as far as Act IV is concerned, as Shakespeare may have had time to access the

⁴⁶ Andrew Hadfield, 'Shakespeare and Republican Venice' in Laura Tosi & Shaul Bassi (eds), *Visions of Venice in Shakespeare* (Ashgate 2011) 67.

⁴⁷ Jay L Halio, 'General Introduction' (n 6) 24-26.

⁴⁸ For further readings not addressed in this chapter in regard to the shortcomings of the myth and when the myth lost power, see James S. Grubb, 'When the Myth Loses Power: Four Decades of Venetian Historiography' (1986) 58 *The Journal of Modern History* 43.

⁴⁹ David McPherson, *Shakespeare, Jonson and the Myth of Venice* (University of Delaware Press 1990) 27.

⁵⁰ McPherson, *Shakespeare, Jonson and the Myth of Venice* (n 49) 37.

⁵¹ *ibid* 29-30. Jay L Halio, 'General Introduction' (n 6) 24-26.

⁵² McPherson, *Shakespeare, Jonson and the Myth of Venice* (n 49) 30.

⁵³ *ibid* 32. David McPherson, 'Lewkenors' Venice and its Sources' (1988) 41 *Renaissance Quarterly* 459, 462.

⁵⁴ McPherson, *Shakespeare, Jonson and the Myth of Venice* (n 49) 32. For further readings on the "Myth of Venice" see, Franco Gaeta, 'Alcune considerazioni sul mito di Venezia' (1961) 1 *Bibliothèque D'Humanisme and Renaissance* 58.

⁵⁵ McPherson, *Shakespeare, Jonson and the Myth of Venice* (n 49) 37.

⁵⁶ *ibid*.

⁵⁷ *ibid*. Halio, 'General Introduction' (n 6) 24-26.

⁵⁸ McPherson, *Shakespeare, Jonson and the Myth of Venice* (n 49) 39.

⁵⁹ *ibid* 38.

⁶⁰ *ibid* 37.

⁶¹ McPherson, *Shakespeare, Jonson and the Myth of Venice* (n 49) 37-38.

⁶² McPherson, 'Lewkenors' Venice and its Sources' (n 53) 459.

⁶³ *ibid*.

⁶⁴ *Satutum Novum* (n 18) and accompanying text.

manuscript before the publication of the play in 1600.⁶⁵ He argued that Shakespeare successfully employed a number of contradictory qualities of the myth. For example, the figure of Portia represented impartiality and justice, while wealth and richness were part of Shylock's character.⁶⁶ However, even if Shakespeare had no time to read Lewkenor, other scholars claimed that his information about Italian culture and the Republic of Venice probably built on the manuscript *History of Italy* by William Thomas.⁶⁷ An indication to that end is the fact that Thomas' book was of central influence in the English vision of Venice before Lewkenor.⁶⁸

Consequently, having considered Shakespeare's influences and historical sources, it is possible to assume that *The Merchant of Venice* was mainly inspired by Giovanni Fiorentino's *Il Pecorone* which indeed had the same setting and a similar plot. Moreover, building on the importance of Venice in the popular imaginary, Shakespeare employed the city's characteristics well within his play. Indeed, Venice was regarded as the 'purest city' in terms of its system of justice. Hence, Shakespeare could have decided to exploit the different aspects of the city known to his contemporaries to develop the theme of the "flesh bond" and its inviolability.

The inviolability of Shylock's bond and its enforcement in Venetian law

This section presents a legal historical overview of Venetian contract law in the sixteenth century. Notably, it considers the inviolability and the enforcement of Shylock's bond according to the law of the time and it provides an answer to the question: how would Shylock's bond be interpreted in Venetian law, and in which court would it have been enforced? The first section of the section provides a brief overview of the Venetian legal tradition, while the second is dedicated to Venetian statutory development in order to identify the applicable set of legal provisions within the framework of Venetian contract law. The article focuses on one particular legal provision that in a novel way sustains the inviolability of the Shakespearean bond. As the final part of this section, the third section provides an overview of the Venetian civil court system. In particular, the court of law before which Shylock should have sought enforcement is presented.

Venetian legal tradition⁶⁹ and the rejection of the *ius commune*

Legal historians refer to the *ius commune* as the secure point of reference shared among the different legal systems in Italy.⁷⁰ In its historical meaning, the *ius commune* was the combination of Roman law and Canon law, with elements of customary law and feudal law.⁷¹ As a result of the rediscovery of the *Digest* in the eleventh century, the study of Roman law took off and expanded in the peninsula, as well as in the whole of Europe.⁷² Even though the *ius commune* was a secure point of reference for the legal tradition that prevailed in Italy, the peninsula was a patchwork of different cities, and each of them also had its own laws.⁷³ Among those cities and

⁶⁵ McPherson, 'Lewkenors' Venice and its Sources' (n 53) 466.

⁶⁶ McPherson, *Shakespeare, Jonson and the Myth of Venice* (n 49) 51.

⁶⁷ Hadfield (n 46) 68.

⁶⁸ Thomas' book was published in 1549, see *ibid*.

⁶⁹ In this essay 'legal tradition' is understood as: "A set of deeply rooted, historically conditioned attitudes about the nature of the law, about the role of the law in the society and the polity, about the proper organization and operation of the legal system, and about the way law is or should be made, applied, studied, perfected and taught." See, John Henry Merryman, *The Civil Tradition: An Introduction to the Legal Systems of Western Europe and Latin America* (Stanford University Press 1969) 2.

⁷⁰ Reinhard Zimmermann, 'Statuta sunt stricta interpretanda? Statutes and the Common Law: A Continental Prospective' (1997) 56 *The Cambridge Law Journal* 315, 316.

⁷¹ Giovanna Spadolini, 'La Storia dei Comuni Italiani' no. 7 October 2006 (Retrieved from the Official Website of the Italian Senate of the Republic) Available at: https://www.senato.it/3182?newsletter_item=1107&newsletter_numero=104# Last Accessed 28th June 2020. Paul J du Plessis, 'Towards the Medieval Law of Hypothec' in John W Cairns & Paul J du Plessis (eds) *The Creation of the Ius Commune* (Edinburgh University Press 2010) 165.

⁷² Harry Dondorp & Eltjo H J Schrage, 'The Source of Medieval Learned Law' in John W Cairns & Paul J du Plessis (eds) *The Creation of the Ius Commune* (Edinburgh University Press 2010) 13-15.

⁷³ Manlio Bellomo, *The Common Legal Past of Europe 1000-1800* (Lydia G Cochrane tr, The Catholic University of American Press 1995) 83-96.

territories, the most important ones were: the Papal State, the Kingdom of Naples, the Duchy of Milan, and the Republics of Venice and Florence.⁷⁴ All of those entities formed different jurisdictions with their own courts and legal systems.⁷⁵ The different variations of local law throughout the territory were named *ius proprium*.⁷⁶ Therefore, even though Roman law was seen as the source of inspiration of the different legal systems, it was mostly not applicable within courts.⁷⁷ The prevailing legal doctrine established that the legal systems of the Italian peninsula were built around the rule that the *ius proprium* had precedence over the *ius commune*, while the latter was used as a binding supplementary source.⁷⁸ Accordingly, the political autonomy of the cities had to be respected and this required compliance with their statutes.⁷⁹

The city of Venice was very peculiar due to the fact that it rejected the *ius commune*, as opposed to the tradition of the rest of the Italian peninsula.⁸⁰ The Republic of Venice had extensive territories that were divided into *Dogado*, *Terraferma* and *Stato da Mar*.⁸¹ The city of Venice was to be found in the *Dogado*, while the *Terraferma* was formed by Italian territories, and the *Stato da Mar* was composed by the Venetian colonies in the Balkans.⁸² The focus of this article lays on the city of Venice only, as the setting of *The Merchant of Venice*. Venice was the sole city that had a different legal tradition than the rest of the Venetian territories. Outside of Venice, each Italian territory accepted the *ius commune*.⁸³ Venice's separation from the prevailing legal tradition was established around 1300, following a gradual process.⁸⁴ Venice alone did not consider the rediscovery of Roman law as binding, but only as a potential source of interpretation.⁸⁵ The decision of the city not to apply the *ius commune* stemmed from a determination of non-recognition of a superior authority and the accommodation of Venetian self-sufficiency.⁸⁶

One of the first references to the topic of Venetian rejection of the *ius commune* may have been from Odofredo Denari who observed how Venetians “do not follow the law but only live to their own customs”.⁸⁷ Later, Bartolo da Sassoferrato declared that Venetians live without a clear set

⁷⁴ Randall Lesaffer, *European Legal History: a cultural and political prospective* (Arriens J tr, Cambridge University Press 2009) 326.

⁷⁵ Bellomo (n 73) 78.

⁷⁶ Zimmermann (n 70) 316.

⁷⁷ Bellomo (n 73) 80.

⁷⁸ *ibid.* Aldo Mazzacane, ‘Law and Jurists in the formation of the Modern State in Italy’ in Julio Krushner (ed) *The origins of the State of Italy* (Chicago University Press 1995) 68. Zimmermann (n 70) 317. Mario Ascheri, *The Laws of Late Medieval Italy* (100-1500) (Brill 2013) 271.

⁷⁹ Zimmermann (n 70) 317.

⁸⁰ G Gasparini (n 16) 65. Mazzacane (n 78) 69.

⁸¹ For further readings on the rise of Venice and its territories, see Gaetano Cozzi, ‘La politica del diritto nella Repubblica Veneziana’ in Gaetano Cozzi (ed), *Stato società e giustizia della Repubblica veneta (sec. XV- XVIII)* (Jouvence 1980). Luciano Pezzolo & Isabella Cecchini, ‘Merchant and Institutions during the Early Modern Age’ (2012) 41 *Journal of European Economic History* 89.

⁸² The definition of *Dogado* is to be found in the encyclopedia Treccani, see Arrigo Lorenzi, ‘Dogado’ (Retrieved from Treccani website) Available at: http://www.treccani.it/enciclopedia/dogado_%28Enciclopedia-Italiana%29/ Last Accessed 28th June 2020. For further readings and definitions on the *Stato da Mar* and the Venetian *Terraferma*, see Sergio Zampetti, ‘Venezia e il Dominio da Terra e da Mar’ (Retrieved from Treccani website: *Storia di Venezia* 1994) Available at: http://www.treccani.it/enciclopedia/dal-rinascimento-al-barocco-veneziana-e-il-dominio-da-terra-e-da-mar-immagini-di-veneziana-in-terraferma-nel-500-e-primo-60_%28Storia-di-Venezia%29/ Last Accessed 28th June 2020.

⁸³ S Gasparini (n 16) 70-71.

⁸⁴ Ascheri (n 78) 276.

⁸⁵ Silvia Gasparini et al., ‘The Glosse: Civilians vs Venetians and the Exegesis of the *Statutum Novum*’ (Retrieved from PAX TIBI MARCE) Available at: <http://www.arielcaliban.org/paxtibimarce.htm> and at http://www.arielcaliban.org/PX_glosse.pdf Last Accessed 28th June 2020.

⁸⁶ Mazzacane (n 78) 67. Gasparini et al., ‘The Glosse: Civilians vs Venetians and the Exegesis of the *Statutum Novum*’ (n 85).

⁸⁷ Gasparini et al., ‘The Glosse: Civilians vs Venetians and the Exegesis of the *Statutum Novum*’ (n 85). Odofredo Denari was a Bolognese glossator from 1265, this comment can also be found in his *Lectura* on the second part of the *Digestum Vetus* D. 12. 1. 28.: *non servant legem sed solummodo vivunt secundum eorum consuetudine*. Gialdroni (n 14) 35.

of laws.⁸⁸ Moreover, other commentators such as Baldo degli Ubaldi explained that: “Venice since its beginning enjoyed its independence”, and further “according to international law, cities built on sea belong to those who built them”.⁸⁹ Baldo underlined Venetian independence in respect to the Emperor and the Pope’s influence.⁹⁰ Likewise, towards the end of the fifteenth century, Giason del Maino reflected on the Venetian’s claim of liberty, citing Baldo and proposing an image of Venice as an independent state.⁹¹

Accordingly, it is valid to ask which laws were in force in Venice and where the Venetian legal tradition stemmed from? In order to revendicate its independence from the influences of the Pope and of the Empire, the only binding laws in Venice were the ones promulgated by the Venetian legislator.⁹² Nonetheless, Venetian law was to some extent influenced by Roman law, as well as Byzantine law and Venetian *ius proprium*.⁹³ In fact, Venice’s rejection of the *ius commune* did not necessarily mean that its laws were materially different from Roman law.⁹⁴ Furthermore, it is possible to reconstruct the hierarchy of Venetian sources of law based on their presentation before courts.⁹⁵ This hierarchy remained valid until the 1700.⁹⁶ The sources were: *pactum*, *statutum*, *usum* and *arbitrium*.⁹⁷ The *pacta* were international treaties between states, mainly aimed at the reciprocal protection of the merchants’ rights and contractual obligations.⁹⁸ An example was the ancient accord between Venice and Byzantium.⁹⁹ Second, the *statuta* were the second most important source of law in Venice.¹⁰⁰ The most significant statute that remained in force until the end of the Republic in 1797 was the *Statutum Novum* by Jacopo Tiepolo.¹⁰¹ Third, customary law, or *usum*, was also regarded as a source of law.¹⁰² Lastly, the judges’ *arbitrium* filled the gaps of Venetian law.¹⁰³ The judges’ *arbitrium* had the capacity to resolve a dispute when there was no law, and no analogies could be drawn from the existing law.¹⁰⁴

Ultimately, the Venetian legal tradition was quite peculiar, as Venice was the only Italian entity rejecting the *ius commune*. However, the exclusion of Roman law from the Venetian binding legal sources was more likely to have a theoretical and normative value than a practical one. Indeed, Roman law had some influence in Venetian law as far as it was seen as customary law, or it was used in the application of *arbitrium* by the judges to resolve disputes.¹⁰⁵ Thus, it can be said that Venice used the *ius commune* without being dominated by it.¹⁰⁶

⁸⁸ Bartolo da Sassoferrato was a famous glossator who lived between 1313 and 1357. He claimed that Venetians lived *sine lege certa*, see Gasparini et al., ‘The Glosse: Civilians vs Venetians and the Exegesis of the *Statutum Novum*’ (n 85).

⁸⁹ Baldo degli Ubaldi was the pupil of Bartolo da Sassoferrato and lived between 1327 and 1400, see Gasparini et al., ‘The Glosse: Civilians vs Venetians and the Exegesis of the *Statutum Novum*’ (n 85).

⁹⁰ *ibid.*

⁹¹ Mazzacane (n 78) 72.

⁹² S Gasparini (n 16) 70-71.

⁹³ *ibid.* Gialdroni (n 14) 32.

⁹⁴ Ascheri (n 78) 329.

⁹⁵ Gerhard Rosch, ‘L’età del comune - Gli ordinamenti: le Strutture Commerciali’ (Retrieved from Treccani website: Storia di Venezia 1995) Available at: http://www.treccani.it/enciclopedia/l-eta-del-comune-gli-ordinamenti-le-strutture-commerciali_%28Storia-di-Venezia%29/ Last Accessed 28th June 2020.

⁹⁶ Gialdroni (n 14) 46.

⁹⁷ Rosch (n 95).

⁹⁸ *ibid.*

⁹⁹ Ascheri (n 78) 136.

¹⁰⁰ Rosch (n 95).

¹⁰¹ *ibid.*

¹⁰² Rosch (n 95).

¹⁰³ *ibid.* Karin Nehlsen-von Stryk, ‘Ius Comune, Consuetudo, e Arbitrium Iudicis nella Prassi Giudiziaria Veneziana del Quattrocento’ in Karin Nehlsen-von Stryk & Dieter Norr, (eds), *Diritto Comune Diritto Commerciale Diritto Veneziano* (Centro Tedesco di Studi Veneziani 1985) 110. Andrea Padovani, ‘La Politica del Diritto’ in Andrea Padovani (ed), *Storia di Venezia vol. II* (1992) 318.

¹⁰⁴ *Statutum Novum* (n 18) 6 Prologus I: *sicut iustum et equum eorum providentie apparebit, habentes Deum ante oculos sue mentis*. Giorgio Zordan, *L’ordinamento Giuridico Veneziano. Lezioni di Storia del Diritto Veneziano* (CLEUP 1984) 171.

¹⁰⁵ Nehlsen-von Stryk (n 103) 135.

¹⁰⁶ Ascheri (n 78) 330.

The *Statutum Novum* of Jacopo Tiepolo

The following section identifies one particular legal provision of Venetian contract law of the sixteenth century that supports the inviolability of Shylock's bond. In order to do so, the article focuses on the *statuta* as a source of law. The *statuta* were established as the second source in hierarchy after *pacta*, although the latter are not applicable to the case study of *The Merchant of Venice* since they refer to international treaties.¹⁰⁷ The first subsection includes an overview of the statutory development of civil law in Venice from the thirteenth century to the sixteenth century. Hence, having selected the applicable statute, the second subsection points out one legal provision that may help interpret Shylock's bond.

The statutory development in Venice from the thirteenth to the sixteenth century

The statutory experience in Venice started with a tumultuous growth of legal provisions during the early thirteenth century.¹⁰⁸ Between 1148 and 1156, a first collection of legal provisions was organized together by the Duke Morosini, which later were recognized under the name of *Usus Venetorum* ("Venetians Customs") in 1195.¹⁰⁹ The first text to survive was the *Statutum Parvum* ("Short Statute"), dated 1195, and containing seventy-four legal provisions.¹¹⁰ Consequently, the text *Novae Constitutiones seu Leges* ("New Constitutions or Laws") was promulgated and together with the statutory experience of the Duke Pietro Ziani, between 1205-1229, was absorbed into the *Statutum Novum* ("New Statute") by the Duke Jacopo Tiepolo in 1242.¹¹¹ The main function of the *Statutum Novum* was to solve "the great confusion in the legislation", as it is explained in the first prologue of the collection.¹¹² The *Statutum Novum* was of great importance. Indeed, the compilation was never repealed or modified as long as it remained in force. Actually, it was regarded as the fundamental core of Venetian civil law.¹¹³ It remained in force until the decline of the Republic in 1797.¹¹⁴ Under the Dukes of Venice who succeeded Jacopo Tiepolo, some contributions added value to his collection.¹¹⁵ In particular, the most important addition was promulgated by the Duke Andrea Dandolo in 1346, who collected the *glossae* attached to the *Statutum Novum* of his predecessors.¹¹⁶ His collection was placed as an extension to Tiepolo's *Statutum Novum* under the name of *Liber VI*.¹¹⁷ Its name and addition at the end of the five books composing the *Statutum Novum* suggested that it was intended as a complement to it.¹¹⁸ Moreover, in the fifteenth century, another collection of legal provisions with the name *Consulta ex Authenticis* was added to the framework of Venetian civil law.¹¹⁹ Up until the sixteenth century, promulgations by the following Dukes of Venice, and resolutions by the *Minor* and

¹⁰⁷ Rosch (n 95).

¹⁰⁸ Silvia Gasparini et al., 'From Jacopo Tiepolo's Statutes to Andrea Dandolo Liber Sextus' (Retrieved from PAX TIBI MARCE) Available at: <http://www.arielcaliban.org/paxtibimarce.htm> and http://www.arielcaliban.org/PX_statutes_tiepolo.pdf Last Accessed 28th June 2020.

¹⁰⁹ Morosini was the Duke of Venice between 1148 and 1156, see Mazzacane (n 78) 143.

¹¹⁰ Ascheri (n 78) 143. Enrico Besta has attributed this work to the Duke Enrico Dandolo between 1194 and 1195, see Enrico Besta, *Il Diritto e le Leggi Civili di Venezia fino al Dogado di Enrico Dandolo* (Federico Visentini 1900) 19-20.

¹¹¹ Ascheri (n 78) 143. The *Novae Constitutiones seu leges* is thought to date 1204 and it is attributed to the Duke Ranieri Dandolo. For further readings on the sources prior the *Statutum Novum* and other legislations, see Enrico Besta and Riccardo Predelli, *Gli Statuti Civili di Venezia Anteriori al 1242* (Federico Visentini 1901).

¹¹² A translation of the first prologue can be found at Ivone Cacciavillani, *Il Diritto di Venezia: Genesi e Principi* (Il Poligrafo 2015) 46-54.

¹¹³ Daniele Manin, 'Della Veneta Giurisprudenza: civile, mercantile e criminale', in *Venezia e le sue Lagune Vol. 1* (Figli Eredi 1848) 9.

¹¹⁴ *ibid.*

¹¹⁵ *ibid* 7.

¹¹⁶ *ibid.*

¹¹⁷ In *Liber VI* is possible to find corrections to Jacopo Tiepolo's *Statutum Novum*, in regard to: Liber I Chapter 20, Liber II Chapter 4, Liber III Chapter 19, Liber IV and V Chapters 14, see Manin (n 113) 9.

¹¹⁸ *ibid* 8.

¹¹⁹ *ibid.*

Maggior Consiglio (“Minor” and “Great Council”), continued the statutory experience.¹²⁰ In the latest editions, Venetian civil laws were composed by the *Statutum Novum* of Jacopo Tiepolo, the *Liber VI* of Andrea Dandolo, and other additions assembled until then.¹²¹

By the sixteenth century, there was a proliferation of legal provisions, and incoherence and confusion on which laws were in force.¹²² Within this framework there was a plethora of potential incongruities.¹²³ Therefore, the statutory development in Venice should be subject of further examination. Nevertheless, it is not conceptually relevant for the purpose of this article. Due to the diversity of the historical sources that have been inherited, the article assumes the applicability of the *Statutum Novum* of Jacopo Tiepolo to Shakespeare’s contract. The choice stems from the fact that the *Statutum Novum* was deemed to be the foundational core of Venetian civil law and it remained in force until the end of the Republic in 1797.¹²⁴

The *Statutum Novum* was drafted by a committee appointed by the Duke Jacopo Tiepolo. The draft was prepared in 1242 and approved by deliberation of the two Councils: *Maggior Consiglio* and *Minor Consiglio*, and by the *placitum*.¹²⁵ The *Statutum* was composed by three prologues and five books.¹²⁶ The first prologue described the history of the compilation, the second explained the criteria to be followed by the judges, and the third reported detailed instances of the effects of the various kinds of presumption.¹²⁷ The text mainly regarded substantive law, with some elements of procedural law.¹²⁸ The laws were written in Latin and Venetian dialect.¹²⁹ Moreover, the first four books were systematically divided, while the last one contained miscellaneous legislation.¹³⁰ The first book presented formalities in alienating estates and laid down procedural rules in civil trials, the second book regarded the protection of minors and incapacitated, the third book considered contracts, and the fourth book dealt with succession.¹³¹

Despite the fact that the third book of the *Statutum Novum* dealt particularly with contracts, scholars have studied Liber I Chapter XXXIII as emblematic for the contractual experience in Venice.¹³² For this reason, the essay relies upon this Chapter in Liber I for the purpose of the comparison of Shylock’s bond between Shakespeare’s comedy and Venetian reality.

¹²⁰ *ibid* 8-9. Silvia Gasparini et al., ‘The Beginning of the Republic’ (Retrieved from PAX TIBI MARCE) 11 Available at: <http://www.arielcaliban.org/paxtibimarce.htm> and http://www.arielcaliban.org/PX_04_Republic.pdf Last Accessed 28th June 2020. For further readings on the additions by the Dukes of Venice, see Manin (n 113) 8-11. Some of the additions were: *La Legge Pisana delle Appellazioni, Consulta ex Authenticis* (resolutions promulgated by the *Maggior Consiglio* and *Minor Consiglio* between 1274-1475), *La Pratica del Palazzo Veneto* (procedural law before certain Venetian courts) and other additions by the Dukes Barbarigo, Loredan, Grimani e Gritti, see Marco Bellabarba, ‘Dal Rinascimento al Barocco: diritto e istituzioni’ (Retrieved from Treccani website: Storia di Venezia 1994) Available at: http://www.treccani.it/enciclopedia/dal-rinascimento-al-barocco-diritto-e-istituzioni-le-pratiche-del-diritto-civile-gli-avvocati-le_%28Storia-di-Venezia%29/ Last Accessed 28th June 2020.

¹²¹ *ibid*.

¹²² Bellabarba (n 120) 10-14.

¹²³ *ibid*.

¹²⁴ Manin (n 113) 9.

¹²⁵ *Placitum* is the deliberation of popular assembly, see Treccani encyclopaedia online (Retrieved from Treccani website) Available at: <http://www.treccani.it/enciclopedia/placitum/> Last Accessed 28th June 2020. For further readings on the system of government and its organs in Venice, see Andrea Da Mosto, *L’Archivio di Stato di Venezia: Archivi dell’Amministrazione Centrale della Repubblica Veneta e Archivi Notarli* (Tomo I, Biblioteca d’Arte Editrice 1937), 21 *Minor Consiglio*: its main function was to mitigate the power of the Duke of Venice, 29 *Maggior Consiglio*: it had legislative and executive power, 15-19 Duke of Venice (*Doge*): greatest power in Venice, legislative power, executive power, and power of representation. Gasparini et al., ‘From Jacopo Tiepolo’s Statutes to Andrea Dandolo Liber Sextus’ (n 108).

¹²⁶ *Satutum Novum* (n 18).

¹²⁷ Gasparini et al., ‘From Jacopo Tiepolo’s Statutes to Andrea Dandolo Liber Sextus’ (n 108).

¹²⁸ Manin (n 113) 11.

¹²⁹ *ibid*.

¹³⁰ Besta (n 110) 92.

¹³¹ *ibid*.

¹³² Victor Crescenzi, ‘La Formazione dello Stato Patrizio: Il Diritto Civile’ (Retrieved from Treccani Website: La Storia di Venezia 1997), 122 Available at: http://www.treccani.it/enciclopedia/la-formazione-dello-stato-patrizio-diritto-finanze-economia-il-diritto-civile_%28Storia-di-Venezia%29/ Last Accessed 28th June 2020.

Liber I Chapter XXXIII of the Statutum Novum:

Liber I Chapter XXXIII of the *Statutum Novum* by Jacopo Tiepolo constitutes a precious reading key for the interpretation of the contractual experience in Venice in the sixteenth century.¹³³ The legal provision reads as follow:

He who makes a promise, must always observe the text of that promise. XXXIII.

*When one makes a promise to another, he will always have to observe the text of that promise. However, in making a promise in regard to what has been bought, he will have to defend what he has promised, except towards relatives and next of kin who own rights.*¹³⁴

Chapter XXXIII addressed the importance to keep promises in contractual obligations.¹³⁵ In particular, this legal provision referred to the selling of a property, as it can be seen in the commentary of the legal provision by the scholar Victor Crescenzi, and from the fact that Liber I regarded the alienation of estates.¹³⁶ The vendor must maintain his commitment to the buyer and protect it from third parties who may also have a claim, except in the situation of a relative of the vendor owning a right on the property.¹³⁷ As already stated above, Chapter XXXIII is significant for the general contractual experience in Venice, even though it points to the specific case of selling of property.¹³⁸

Analysing the wording of the text in Latin, “promises must be kept” is expressed by the locution *observabit textum promissionis*.¹³⁹ The wording *textum* was interpreted by Victor Crescenzi as referring to a written promise.¹⁴⁰ Nonetheless, a Venetian contract did not necessarily have to be written to be enforced. Simply in case of a written document, the wording of it would have been followed closely. As a matter of fact, the Venetian contractual experience was based on very little formalities as opposed to Roman law.¹⁴¹ This did not mean that a *pactum nudum* could have been valid, but simply that more lenient formalities were required.¹⁴² Hence, the solemnity of the ancient Roman *stipulatio* was not required, but the contract would have to follow certain characteristics to be recognizable as valid.¹⁴³ In this regard, Victor Crescenzi has reported certain documents of the protocols of the priest Domenico of Saint Maurizio, where at the end of the notarial act, it was noted that the contract could have been validly concluded without written form, but in order to elude future controversies, the parties decided to resort to the drafting of it.¹⁴⁴

Considering the interpretation problem of possible incoherence between the intention of the contracting parties and the wording of the contract *per se*, the issue was addressed by the *glossa* attached to Chapter XXXIII. In particular, the relevant *glossa* that is attached to the word

¹³³ Crescenzi (n 132) 122.

¹³⁴ The present translation is provided by the author of the essay. The author is grateful for the help of the professor in classical literature Mauro Messi, at Paolo Sarpi, Bergamo, Italy. The Latin text reads: *Qui facit promissionem, semper textum promissionis servare debet. XXXIII. Cum aliquis facit promissionem alteri, observabit textum promissionis. In promissione vero descendens super possessionem emptam, defendet quod promisit preter a propinquo et lateraneo ratione propinquitatis et lateranitatatis.* See *Satutum Novum* (n 18) Liber I Chapter XXXIII 65.

¹³⁵ Crescenzi (n 132) 122.

¹³⁶ *ibid.* Besta (110) 92.

¹³⁷ Crescenzi (n 132) 122.

¹³⁸ *ibid.* 124.

¹³⁹ *ibid.* 123.

¹⁴⁰ Crescenzi (n 132) 123.

¹⁴¹ *ibid.* 121-122.

¹⁴² *Pacta nudum* was the case of an agreement without any formalities and expressed scope, see *ibid.* 118-123.

¹⁴³ *ibid.* 121.

¹⁴⁴ Protocollo di Domenico prete di S. Maurizio, nr. 188, p. 144, 1312, 9 maggio: *Certa et uera securitas atque promissio quamvis solis posset subsistere uerbis, tamen ne post decurrencia tempora per ea que rode statuuntur aliqua rode oriatur occasio siue replicatio, necessarium est ut scripture uinculo confirmetur* see also Crescenzi (n 132) 127-128.

observabit seemed to resemble Roman law.¹⁴⁵ Indeed, in the text of the *glossa* n. 189, the glossator explained that: “in contracts, testaments, and laws, it is not possible to change the given word, if it is not clear that there was a different intention from the parties to the contract, the witness or lawyer”.¹⁴⁶ Hence, if there was a meeting of the mind at the time of the contract, promises must be kept. Thereafter, once a promise was given and the parties entered a contract, the contract must be performed in all its obligations, except if a derogation was provided by law.¹⁴⁷ Nevertheless, it is not clear to what extent judges in Venice mainly focused on the *voluntas* of the parties of the contract or they had to pay more attention to the *verba*.¹⁴⁸ It is assumed by scholars that towards the latest years of the Republic more attention was paid to the *voluntas*.¹⁴⁹ Nonetheless, since it is not possible to say whether one interpretation prevailed over the other, the only certainty is that for a contract to be enforced in Venice before a judge, there would have been an assessment of both the *verba* and the *voluntas* of the contracting parties.¹⁵⁰

The enforcement of a debt before a court of law in Venice

In *The Merchant of Venice*, Shylock sought to enforce his contract with Antonio before a court of law. The purpose of this section is to identify a possible court of law, within the framework of Venetian civil courts, where a dispute over the enforcement of a contract could have been settled in the sixteenth century. In Venice, the first degree of jurisdiction was held before magistrates in the *Curie di Palazzo*.¹⁵¹ Those were formed by six different courts: *Curia del Forestier*, *Curia del Procurator*, *Curia dell'Esaminador*, *Curia di Petizion*, *Curia del Mobile* and *Curia del Proprio*.¹⁵² The *Curia del Forestier* was a court that had the competence for international disputes over navigation and commerce.¹⁵³ Instead, the *Curia del Procurator* presided over disputes on the administration of patrimonies,¹⁵⁴ and the *Curia dell'Esaminador* aimed at the certification of deeds and legal documents.¹⁵⁵ Moreover, the *Curia di Petizion* was competent over controversies between creditor and debtor for defaults of payments of a value of at least fifty ducats.¹⁵⁶ Conversely, the *Curia del Mobile* was qualified for disputes over valuables for less than fifty ducats.¹⁵⁷ Lastly, the *Curia del Proprio* had its powers reduced throughout the centuries until it only resolved disagreements over dowry and inheritance.¹⁵⁸

Drawing from the overview of civil courts of first instance in the above paragraph, the *Curia di Petizion* may have been a possible *forum* of enforcement of Shylock's contract. The *Curia di Petizion* was created in 1244 by the Duke Jacopo Tiepolo.¹⁵⁹ From the sources gathered in the

¹⁴⁵ *Idem est iure romano*, see *Satutum Novum* (n 18) glossa n 189 65.

¹⁴⁶ *Idem est iure romano, nam in contractibus et testamentis et legibus non est recedendum a verbis, nisi appareat aliam mentem contrahentium et testatoris vel proferentis esse*, see *Satutum Novum* (n 18) glossa n 189 65. The present translation is provided by the author of the essay. The author is grateful for the help of the professor in classical literature Mauro Messi, at Paolo Sarpi, Bergamo, Italy.

¹⁴⁷ Crescenzi (n 132) 125.

¹⁴⁸ Crescenzi (n 132) 129.

¹⁴⁹ *ibid.*

¹⁵⁰ *ibid* 130-132.

¹⁵¹ Silvia Gasparini et al., 'The Promissio Maleficiorum of Jacopo Tiepolo and its additions' (Retrieved from PAX TIBI MARCE) 1 Available at: <http://www.arielcaliban.org/paxtibimarce.htm> and http://www.arielcaliban.org/PX_maleficiorum_tiepolo.pdf Last Accessed 28th June 2020. For further researches on the Curie di Palazzo, see Da Mosto (n 125) 89.

¹⁵² Gialdroni (n 14) 41. These six courts were called *Curie Ordinatae* as they could only function if both parties were assisted in front of the judge by advocates, see Silvia Gasparini et al., 'Curiae Palatii: Courts of Justice' (Retrieved from PAX TIBI MARCE) 2 Available at: <http://www.arielcaliban.org/paxtibimarce.htm> and http://www.arielcaliban.org/PX_curie.pdf Last Accessed 28th June 2020.

¹⁵³ Lamberto Pansolli, *La Gerarchia delle Fonti di Diritto nella Legislazione Medievale Veneziana* (Giuffrè 1970) 83. Da Mosto (n 125) 91.

¹⁵⁴ Gasparini et al., 'Curiae Palatii: Courts of Justice' (n 152) p 2. Da Mosto (n 125) 93.

¹⁵⁵ Da Mosto (n 125) 92.

¹⁵⁶ *ibid.*

¹⁵⁷ *ibid* 94.

¹⁵⁸ *ibid* 90.

¹⁵⁹ *ibid* 92.

State Archives of Venice, it remained in place until the end of the Republic in 1797.¹⁶⁰ Its competences stemmed from other courts' competences such as from the *Curia del Proprio* and the *Curia del Forestier*.¹⁶¹ The parties to the dispute ought to be Venetians or at least the defendant ought to be a citizen of the city.¹⁶² Hence, a dispute between a foreigner and a Venetian was possible before this court. Furthermore, the *Curia di Petizion* was a first-degree court, while in case of a request for an appeal, the parties would have most probably had to go before the *Quarantia*, where the Duke of Venice and *Minor Consiglio* presided.¹⁶³

Karin Nehlsen von Stryk, a scholar of Venetian law, has investigated two hundred eighty-five trials before the *Curia di Petizion* in the fifteenth century, in order to identify certain schemes. It has been noted that most of the time, the parties referred to the contract standing between them. Within the trials, the parties frequently used the norm of the Liber I Chapter XXXIII of the *Statutum Novum* to express the relevance for the judges to take into account the letter of the contract.¹⁶⁴ This testimony is of extreme importance for the purpose of this article that identifies the inviolability of Shylock's bond as supported in Liber I Chapter XXXIII of the *Statutum Novum*, and its enforcement before the *Curia di Petizion*.

In addition, the judges presiding this court were allowed to provide extra-legal solutions as opposed to judges of other courts.¹⁶⁵ The *Capitolari* of the other courts laid down the impossibility and prohibition for judges to solve a dispute except on the basis of a law, a custom or their analogical interpretation.¹⁶⁶ Under other conditions, the prologue of the *Capitolare* of the *Curia di Petizion* provided for the possibility of extra-legal decisions to its judges. This court was free to act beyond rules to ensure fairness in cases where strict enforcement of the law would have not achieved a fair solution.¹⁶⁷ In Chapter XII of the *Capitolare* of the *Curia di Petizion*, it was provided that the judges were able to decide "according to whatever shall appear equitable and opportune to my [their] discretion and to that of my colleagues or of the majority of them, according to the principles of the statute approved by the assembly of the Venetian people".¹⁶⁸

In summary, the section has firstly identified the Venetian legal tradition as peculiar; it was the only Italian city rejecting the binding character of the *ius commune*, in order to claim its self-sufficiency. Subsequently, the section has identified four different sources of Venetian law: *pactum*, *statutum*, *usum* and *arbitrium*. Building upon the hierarchy of sources, the section has singled out the *statuta* to pursue the identification of an applicable article supporting the inviolability of the contract between Shylock and Antonio. Accordingly, the section has focused on the *Statutum Novum* by Jacopo Tiepolo, a fundamental collection in the statutory experience of Venetian civil law. Furthermore, one legal provision was considered to support the inviolability of the contract, namely Liber I Chapter XXXIII providing that "promises must be kept". The article, read in conjunction with its *glossa*, constitutes a precious reading key of the

¹⁶⁰ *ibid.* For an example, see Comandamenti Petizion (1451-1797), 24.

¹⁶¹ *ibid.*

¹⁶² *ibid.* 92.

¹⁶³ Gialdroni (n 14) 41. The *Quarantia* was a court of appeal for civil disputes or a court of first instance for penal disputes. For further researches, see Da Mosto (n 125) 63-64. Gasparini et al., 'The Promissio Maleficiorum of Jacopo Tiepolo and its additions' (n 151) 1.

¹⁶⁴ Nehlsen-von Stryk (n 103) 114-115. For example, the author cites Thomasio de Alberti in 1436: *examinar et observar ad literam come parla/perché el nistro statuto dizie, qui faxcit promixionem altri se per testum promissionis debet observari, siche, dove e scrittura, la raxion vuol, quella sia observada ad literam*, see Archivio di Stato di Venezia Gdp 73, 26r-27r (17 Novembre 1436).

¹⁶⁵ Each court had its *Capitolare*. It is a document divided in chapters that explained and laid down the duties of the judges of that court, see Gasparini et al., 'Curiae Palatii: Courts of Justice' (n 152) 4.

¹⁶⁶ *ibid.*

¹⁶⁷ *ibid.* 4-5.

¹⁶⁸ Archivio di Stato, Miscellaneo codici, 133, Capitolare della Curia di Petizion: "*Curam autem et studium habebomnes et singulas petitiones et querimonias Venetorum et forinsecorum que deposite fuerint contra Venetum vel forinsecum coram nobis diligenter audire et diffinire quam citius potero, bona fide sine fraude, secundum quod mee discretioni et sociorum meorum vel maioris partis eorum iustum videbitur, atque decens, secundum continentiam statut in concione populi Venetiarum conlaudati.*" Translation provided by Gasparini et al., 'Curiae Palatii: Courts of Justice' (n 152) 25.

contractual reality of Venice, as indicative of little formalities required in Venetian contracts and of the struggle between *verba* and *voluntas* of the parties. Lastly, the section has analysed the possible enforcement of a contract between a foreign creditor and a Venetian debtor. The probable applicable court of law was found to be the *Curia di Petizion*, as court of first instance for civil matters of a debt of more than fifty ducats. In that court, a dispute between a foreigner and a Venetian was possible. Additionally, a special power of the judges of the *Curia di Petizion* was discovered in the *Capitolare* of the court: the possibility to include extra-legal considerations in the court's judgments in order to ensure fairness where the law would not have provided it.

The Shakespearean narrative of Shylock's bond juxtaposed with Venetian reality

Having depicted the reality of Venetian contract law in the sixteenth century, the following section compares it to Shakespeare's depiction of the bond and its enforcement before the Duke of Venice. Indeed, the Venetian provision of Liber I Chapter XXXIII of the *Statutum Novum* and the characteristics of the *Curia di Petizion* are analysed in relation to the development of the "flesh bond" plot throughout the comedy. First, a part is dedicated to the Shakespearean representation of the contract between Antonio and Shylock in light of Liber I Chapter XXXIII of the *Statutum Novum*. Second, the court of law where the trial in the comedy takes place is examined in light of the characteristics of the *Curia di Petizion*. The examination allows the article to move to its final part and provide an answer to the research question, providing an evaluation considering the question to what extent the inviolability of Shakespeare's bond and enforcement before the court stem from legal historical reality of Venice.

Interpretation of Shylock's bond throughout the comedy

In *The Merchant of Venice*, the interpretation of the contract between Shylock and Antonio requiring the penalty of a pound of flesh is seen and described by Shakespeare in two very different ways. On the one hand, before the end of the trial taking place in act IV.I of the play, Shakespeare underlined the inviolability of the bond and the importance of upholding its validity within the Venetian commercial society. On the other hand, at the conclusion of the trial, the contract's interpretation took a different turn: permitting Antonio not to perform its obligations. The present section considers each situation represented in the Shakespearean comedy, in light of Liber I Chapter XXXIII of the *Statutum Novum*.

The first depiction of the bond can be found in the play from its beginning until act IV.I verse 302 of *The Merchant of Venice*. Through the use of the characters' voices, Shakespeare built an image of the bond as inviolable.¹⁶⁹ The reason for its inviolability was strictly connected to Venetian commercial society. The non-enforcement of a commercial contract would risk loss of certainty in Venetian impartiality and fairness, well-known to Shakespeare's contemporaries due to the existence of the myth of Venice.¹⁷⁰ As Thomas Bilello spelled out, every character in the play "recognizes that the law must respect and enforce such private commercial agreements or risk losing the confidence of its merchants for want of certainty and predictability".¹⁷¹ This can be seen for example in Shylock's threat of the enforcement of the bond.¹⁷² He was aware of the profound allegiance of the Venetian society to contract law, and he skilfully suggested that if the bond would be negated, there would be no justice in Venice:¹⁷³

"If you deny it, let the danger light,

¹⁶⁹ Thomas C. Bilello, 'Accomplished with What She Lacks: Law, Equity and Portia's Con' (2004) 16 Law and Literature 11, 27.

¹⁷⁰ *ibid.*

¹⁷¹ *ibid* 28.

¹⁷² Walter Cohen, 'The Merchant of Venice and the Possibilities of Historical Criticism' (1982) 49 ELH 765, 775.

¹⁷³ Posner (n 3) 184.

Upon your charter and city's freedom.”¹⁷⁴

Likewise, Antonio was aware of the inviolability of the bond, and that not even the Duke of Venice could deny the course of law. As a matter of fact, Venice was dependent on the trade with aliens, and the enforcement of contracts between aliens and Venetians was of extraordinary importance.¹⁷⁵

“The Duke cannot deny the course of law,
For the commodity that strangers have
With us in Venice, if it be denied,
Will much impeach the justice of the state,
Since that the trade and profit of the city
Consistenth of all nations. ...”¹⁷⁶

In the like manner, Portia replied to Bassanio, who prayed the Duke of Venice to “wrest once the law to your authority” in order to save Antonio.¹⁷⁷ She stressed the supremacy of the rule of law and further explained:¹⁷⁸

“It must not be, there is no power in Venice,
Can alter a decree established.
‘Twill be recorded for a precedent,
And many an error by the same example
Will rush into the state. It cannot be.”¹⁷⁹

Taking into account Liber I Chapter XXXIII of the *Statutum Novum*, Shakespeare can be said to have been faithful to the Venetian reality. In fact, Chapter XXXIII provided that “promises must be kept” even in case of issues with little formalities surrounding the contract.¹⁸⁰ Thus, an agreement between the parties should have been inviolable. In *The Merchant of Venice*, the bond between Shylock and Antonio was indeed depicted as legally binding. The parties agreed on the terms of the contract, namely a loan of three thousand ducats with the penalty of a pound of flesh in case of default of payment.¹⁸¹ Moreover, even though according to the norm the contract did not necessarily have to be in writing, Shylock and Antonio went to the notary to seal their bond.¹⁸² Consequently, having considered the display of characters in the play interpreting the contract as inviolable, it can be said that the Venetian norm of “promises must be kept” was upheld by Shakespeare’s first depiction of the bond. Therefore, Liber I Chapter XXXIII was respected, and Antonio should have fulfilled his contractual obligations.

¹⁷⁴ Shakespeare (n 1) act IV.I vv 37-38.

¹⁷⁵ Bilello (n 169) 27-29.

¹⁷⁶ Shakespeare (n 1) act III.III vv 26-31.

¹⁷⁷ *ibid* act IV.I vv 211-212.

¹⁷⁸ Bilello (n 169) 24.

¹⁷⁹ Shakespeare (n 1) act IV.I vv 215-219.

¹⁸⁰ *Statutum Novum* (n 18) glossa n. 189 65. Crescenzi (n 132) 122.

¹⁸¹ Shakespeare (n 1) act I.III vv 1-5 vv 140-148.

¹⁸² *ibid* act I.III v 141. Crescenzi (n 132) 122.

Nonetheless, it is interesting to note that the contract's interpretation took a different turn from act IV.I verse 302 onwards. First of all, Portia taking the role of the judge in the trial,¹⁸³ awarded the penalty to Shylock:

“A pound of that same merchant's flesh is thine.”¹⁸⁴

Second, after confirming the validity of the agreement, Portia blocked Shylock by using a different interpretation of the contract. She claimed, due to the literal interpretation of the terms, that Shylock was not allowed to spill a drop of blood, as not prescribed for in the contract.¹⁸⁵ The contract only provided for a pound of flesh without any notice to spilling blood. Portia seems to have used the law itself to save Antonio from certain death, converting the law to be an instrument of her will.¹⁸⁶ She demanded:

“Tarry a little; there is something else.

This bond doth give thee here no jot of blood;

The words expressly are ‘a pound of flesh’.

Take then thy bond. Take thou thy pound of flesh.

But in the cutting it, if thou dost shed

One drop of Christian blood, thy lands and goods

Are by the laws of Venice confiscate

Unto the state of Venice.”¹⁸⁷

The new interpretation did not make the contract invalid.¹⁸⁸ In fact, Portia did not label it as unjust, but her reading of the terms of the contract permitted Antonio to not perform its obligations.¹⁸⁹ Her interpretation made the bond practically impossible to be performed.¹⁹⁰ In reality, it was absurd for Shylock to claim his pound of flesh without spilling Antonio's blood. Considering that the norm “promises must be kept” in Liber I Chapter XXXIII of the *Statutum Novum*, Portia's quibble of the law was not in line with the reality of Venetian law in the sixteenth century. According to the *glossa* n. 189 attached to the Venetian norm, it was not possible to change the given word in a contract, except when it could be proven that there was a different intention by the parties.¹⁹¹ Therefore, in a contract both the *verba* and the *voluntas* of the parties should have been considered closely.¹⁹² In *The Merchant of Venice*, Portia's literal interpretation did not take into account the *voluntas* of the parties. She suggested that only the *verba* of the contract are worth consideration, while in reality, the intention of the parties was equally important. Clearly, Antonio was fully conscious that will he default, his blood will be spilled. Antonio's awareness can be seen in the play in act I.III since verse 153, Antonio did not fear this possibility as he believed he would not forfeit the debt. Moreover, when asked if he confessed

¹⁸³ Shakespeare (n 1) act IV.I v 297: “The court awards it, and the law doth give it.”. It can be also noticed that even Shylock refers to Portia as the judge, even though she should only be Antonio's lawyer, see *ibid* act IV.I v. 298: “Most rightful judge!”.

¹⁸⁴ *ibid* act IV. I v 296.

¹⁸⁵ Alice N. Benson, ‘Portia, the Law and the Tripartite Structure of the Merchant of Venice’ (1979) 30 *Shakespeare Quarterly* 367, 377.

¹⁸⁶ *ibid* 379. Bilello (n 169) 28. Monica J. Hamill, ‘Poetry, Law and the Pursuit of Perfection: Portia's Role in the Merchant of Venice’ (1978) 18 *Studies in English Literature, 1500-1900* 229, 230.

¹⁸⁷ Shakespeare (n 1) act IV. I vv 302-309.

¹⁸⁸ Ascarelli (n 2) 174.

¹⁸⁹ *ibid*.

¹⁹⁰ *ibid*.

¹⁹¹ *Satutum Novum* (n 18) *glossa* n 189 65.

¹⁹² *ibid*.

the bond by Portia during the trial, he replied “I do”.¹⁹³ Therefore, the parties reached the meeting of the minds when contracting the bond. As a result, Portia’s interpretation was not in line with Liber I Chapter XXXIII of the *Statutum Novum*, due to the fact that she did not consider the *voluntas* of the parties, who agreed to the danger. Shylock should have been allowed to spill Antonio’s blood.

In this section, the interpretation of Shylock’s bond throughout the comedy was analysed. The article has identified two different interpretations of the contract: first, as inviolable, secondly as practically impossible to perform. The first depiction of the bond is deemed to be in line with the norm highlighted as fundamental to contract law in Venice. Hence, Liber I Chapter XXXIII of the *Statutum Novum* was upheld by Shakespeare’s vision. Nonetheless, the second interpretation of the bond by Portia at the end of the trial scene is deemed to be contrary to the Venetian norm, as she claimed that blood could not be spilled. Portia did not consider the fact that in the interpretation of a contract, both *verba* and *voluntas* should be taken into account, as provided in the *glossa* n. 189 of Chapter XXXIII. Therefore, Shylock should have been able to spill blood.

Shakespeare’s mistake in the choice of court

The following section analyses the choice of court in act IV.I of the play. The Shakespearean court is evaluated in light of the *Curia di Petizion*’s characteristics. In particular, this section considers the competences and the powers of the judge. In *The Merchant of Venice*, before act IV.I, Shakespeare alerted the reader that the trial will take place in front of the Duke of Venice. This can be seen when Shylock invoked his right for justice:

“The Duke shall grant me justice.”¹⁹⁴

At the beginning of the trial, the figure of the Duke of Venice was presented: he was presiding the court and had the power of dismissal.¹⁹⁵ The Duke was an arbiter in the court, who however, could not force Shylock’s hand to spare Antonio’s life.¹⁹⁶ Nonetheless, towards the end of the trial, Portia, first acting as Antonio’s lawyer, became the judge and awarded the judgement to Shylock, while the Duke of Venice stayed on the side-lines.¹⁹⁷

According to the reality of Venetian law in the sixteenth century, the *Curia di Petizion* was the most appropriate court of law where Shylock should have sought enforcement for Antonio’s debt. The court was competent over disputes between creditor and debtor for default of payments of a value of at least fifty ducats, even between a Venetian and a foreigner.¹⁹⁸ This was exactly the case of the dispute in *The Merchant of Venice*: the loan was of three thousand ducats, Shylock was a foreigner, while Antonio was a Venetian. Moreover, the *Curia di Petizion* was a court of first instance and a normal magistrate would have presided.¹⁹⁹ Therefore, the judge should not have been either the Duke of Venice or Portia. The Duke would have only been present in an appellate court, namely the *Quarantia*,²⁰⁰ while Portia should have been simply Antonio’s lawyer. As a result of that, Shakespeare’s choice of court was erroneous.

Additionally, in the *Curia di Petizion*, the judges were able to act and give judgment beyond rules to ensure fairness and equitable results.²⁰¹ Nonetheless, Shakespeare accounted for the impossibility for the Duke of Venice, in his capacity as a judge, to do so:

¹⁹³ Shakespeare (n 1) act IV.I vv 177-178.

¹⁹⁴ Shakespeare (n 1) act III.III v 8.

¹⁹⁵ *ibid* act IV.I vv 1-33. The Duke has the power to dismiss the court as it can be seen in act IV.I v 103.

¹⁹⁶ *ibid* act IV.I v 87, vv. 100-102, vv 103-105.

¹⁹⁷ *ibid* act IV.I vv 296-297.

¹⁹⁸ Da Mosto (n 125) 92.

¹⁹⁹ *ibid* 63-64. Gialdroni (n 14) 41. Gasparini et al., ‘The Promissio Maleficiorum of Jacopo Tiepolo and its additions’ (n 151) 1.

²⁰⁰ *ibid*.

²⁰¹ Capitolare della Curia di Petizion (n 168). Gasparini et al., ‘*Curiae Palatii*: Courts of Justice’ (n 152) 25.

“There is no power in Venice

Can alter a decree established.”²⁰²

As a result, Shakespeare’s reference to the power of the judge in the court was also mistaken. A judge in the *Curia di Petizion* had the power to take extra-legal decisions.²⁰³ Thus, in regard to the choice of court and the power of the judge, *The Merchant of Venice* did not stem from legal historical reality of Venetian law.

In this section, the inviolability of Shylock’s bond and its enforcement in the Shakespearean comedy was compared to the reality of Venetian contract law. Shakespeare was found to be truthful to Venetian law in regard to the first depiction of the bond, up until act IV.I verse 302. He provided an image of the bond as inviolable, which is in accordance with the norm “promises must be kept” in Liber I Chapter XXXIII of the *Statutum Novum*. Nonetheless, Portia’s quibble of the law and Shakespeare’s choice of court did not stem from the legal historical reality of Venetian law. On the one hand, Portia interpreted the contract in a way that contradicted *glossa* n. 189 of Liber I Chapter XXXIII of the *Statutum Novum*, as she did not consider the intention of the parties to spill blood. On the other hand, in act IV.I the trial took place before the Duke of Venice, meaning that the court would have been an appellate court; while in reality Shylock should have initially sought enforcement before a first instance court dealing with debts between a foreigner and a Venetian: the *Curia di Petizion*. Additionally, Shakespeare did not consider the power of extra-legal decisions of the judges of the *Curia di Petizion*.

Conclusion

The article analysed *The Merchant of Venice*’s representation of the contract bond between fiction and reality. It aimed at renewing the possibility of legal-literary analysis of Shakespeare’s comedy by applying to it the reality of its Venetian context, instead of the largely used Elizabethan context. In particular, the focus laid on the inviolability and enforcement of the contract between Shylock and Antonio. The intention of the article was to evaluate to what extent the inviolability and enforcement of Shylock’s bond stemmed from popular culture and legal historical reality of Venetian law in the sixteenth century.

First, in order to answer the research question, the article informed the reader on the “flesh bond” plot of the comedy and identified that Shakespeare’s play is the result of diverse folkloristic stories and clever adaptation. Moreover, the research has analysed the popular culture of Venice in the sixteenth century, in relation to its influences on *The Merchant of Venice*. Shakespeare never travelled to Venice, but the city’s reputation had long reached him, probably through Lewkenor’s translation of Contarini’s *De Magistribus et Republica Venetorum*. Thanks to the myth of Venice, the city was seen as the personification of justice by Shakespeare’s contemporaries, for its rigidity of laws and fairness. Thus, the city’s reputation deeply influenced the play writer’s descriptions of the setting. Secondly, the article considered the legal historical reality of the contract, questioning the interpretation of Shylock’s bond in Venice and the possible Venetian court for its enforcement. The article established that Venice was the sole city in Italy rejecting the *ius commune*, as the only binding laws in Venice were the ones promulgated by the Venetian legislator. In particular, the *Statutum Novum* of Jacopo Tiepolo dating 1242 was one of the most fundamental collections of Venetian civil law that remained in force until the end of the Republic in 1797. Within the collection, Liber I Chapter XXXIII providing that “promises must be kept” was emblematic to understand the contractual experience in Venice. The norm provided that Shylock’s bond would have been inviolable in Venetian reality and according to the *glossa* n. 189 both *verba* and *voluntas* of the contracting parties were instrumental to the interpretation of the contract. Moreover, considering the court of law where Shylock should have sought enforcement of his contract in Venice, the research identified the *Curia di Petizion*. The court in

²⁰² Shakespeare (n 1) act IV.I vv 215-216.

²⁰³ Capitolare della Curia di Petizion (n 168).

question had competences over disputes of default of payments of a least fifty ducats between Venetians and a foreigner. Furthermore, the essay underlined how the judges of this court were able to award extra-legal judgements to ensure fairness, as provided by Chapter XII of the *Capitolare* of the court. Third, the article compared the Shakespearean narrative of Shylock's bond in the play to the reality pointed out in the second part of the article. For the purpose of evaluating to what extent Shakespeare stemmed from legal historical reality, the article found that the first depiction of the bond by the characters of the play was in line with Liber I Chapter XXXIII, as the bond was seen as inviolable. Nonetheless, the second interpretation of the bond, namely Portia's literal interpretation, and Shakespeare's choice of court were not in accordance with the legal historical reality of its Venetian setting. On the one hand, Portia's literal interpretation did not consider the *voluntas* of the contracting parties as it was provided in the *glossa* n. 189 of the Venetian norm. On the other hand, the court in the play seemed to be a court of appeal, the *Quarantia*, as the characters were pleading in front of the Duke of Venice. Shylock should have first sought enforcement before a court of first instance, namely the *Curia di Petizion*. Additionally, Shakespeare was probably not aware of the peculiar power of the judges of this particular court, as the Duke was represented as powerless before the law, while the judges had the competence to give extra-legal judgments to ensure fairness.

Finally, concerning the evaluation of the "flesh bond" plot between reality and fiction, the article found that Shakespeare drew from the imaginary of the myth of Venice to build his setting, and he was truthful to Venetian contract law as far as the first interpretation of the bond is considered. On the other hand, in regard to the second interpretation of the Shylock's bond and the choice of court, Shakespeare either was not aware of the legal historical reality or voluntarily chose to deviate from it. Nonetheless, considering the limits of this research question, the article could have also investigated other Shakespearean legal elements from *The Merchant of Venice* and their relationship with the legal historical reality of Venice. For example, it would be interesting for future research papers to explore the role of lawyers during the sixteenth century in Venice. In this regard, the figure of Portia could be further analyzed as far as her role of Antonio's lawyer stems from legal historical reality.²⁰⁴ Without reservations, Shakespeare is a continuous source of inspiration for academics, as he touched upon several social-legal issues in his plays. All of those issues are worth exploring for the purpose of better understanding the role of law in literature.

²⁰⁴ For readings on the profession of lawyers in Venice, see S Gasparini (n 16).

RECENT DEVELOPMENTS

HUMAN RIGHTS

Segregating prisoners: judicial review and complying with human rights' law

(*R (Abu) v Secretary of State for Justice* [2025] EWHC 3026 (Admin))

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Introduction

In November 2025, the Justice Secretary was found by the High Court to have transgressed both her public law powers and human rights obligations by segregating prisoners serving sentences for terrorist offences.¹ Importantly, the secretary (and her predecessor) was found to have breached Article 3 of the Convention (prohibition of inhuman and degrading treatment and punishment), in what is believed to be the first such ruling against a minister.² The decision is important with respect to the enforcement of prisoners' rights generally but also serves as a stark reminder to Ministers and the prison authorities to act within their legal powers and to take into consideration its duties under equality and human rights law.

The facts and decision in *Abu*

The prisoner is serving a minimum 19-year life sentence for terrorism offences and is suffering from mental illness. Under Rule 45 of the Prison Rules, he was segregated from all other inmates from April until October – save for a short period when he was permitted to associate with one other prisoner. The decision to segregate him and other prisoners followed an attack on three prison officers by another prisoner - a terrorist involved in the Manchester Arena bombing - at a different prison. Following that incident, prisoners who had previously been housed in separation centres because of concerns that they might radicalise other inmates were segregated until responsible prison staff could be provided with protective body armour.

As a result, the claimant prisoner was locked in his cell for 22 hours each day and had no contact with other prisoners, and very limited contact with prison staff, mental health nurses and chaplains. The prisoner, who had existing mental health difficulties, claimed that this prolonged segregation had been severely detrimental to his mental health, referring to auditory hallucinations, panic attacks, suicidal thoughts and acts of self-harm, as well as the lack of timely psychological intervention. The claimant relied on psychiatric evidence that he had manifested symptoms consistent with complex post-traumatic stress disorder. The claimant challenged the segregation decision on five grounds:

- it was *ultra vires* the Prison Rules 1998 (made under the Prison Act 1964) as the decisions were effectively made by the Secretary of State, instead of the Governors as the legislation required.
- it was a breach of the *Tameside* duty,³ due to failure to inquire into the effects of segregation on the claimant's mental health.

¹ *R (Abu) v Secretary of State for Justice* [2025] EWHC 3026 (Admin).

² Haroon Sadique, 'Mahmood and Lammy breached human rights law over segregation of prisoner, judge finds', *The Guardian*, 19 November 2025.

³ From the test laid down in *Secretary of State for Education and Science v Tameside BC* [1977] 1 AC 1104

- it constituted a breach of Articles 3 and 8 (private life) of the European Convention on Human Rights 1950.
- it was a contravention of the public sector equality duty (PSED) under the Equality Act 2010 to have due regard to the disproportionate impacts of the segregation decisions on Muslim prisoners.
- and it constituted procedural unfairness due to a failure to provide the claimant with even a gist of the intelligence material relied upon to segregate him.

The judge upheld the *ultra vires* claim because the decisions to segregate were not taken independently by the governors, and because decisions to segregate after a short period were effectively an implementation of the Secretary's policy on segregating terrorist prisoners. Thus, it was not open to the governor to make any other decision without the approval of the Secretary of State. Further, in the judge's view, the court found that the language and structure of Rule 45 required a segregation decision to involve consideration of the circumstances of any prisoner who was removed from association. Hence, Rule 45 referred to "prisoner" in the singular, and in the context, it was clearly intended to refer to the prisoner as a specific individual. As a matter of common law, procedural fairness would require that an individual had the right to know why they were being segregated and to have meaningful input in that decision, which included their individual circumstances. Further, even where the regime applied, the governor had the discretion to permit the prisoner to associate with one or more prisoners.⁴

With respect to the *Tameside* appeal, it was held that, considering research showing the deleterious effects of segregation on mental health as reflected in prison policy documents, there was no doubt that a prisoner's health, including their mental health, was a mandatory relevant consideration for segregation decisions. Also, the claimant was known by governors to potentially have mental health issues, including trauma in his early life requiring trauma-related work. Thus, it was essential, and not just merely sensible or desirable, for a *Tameside* inquiry into the claimant's mental health condition to be undertaken. The Court noted that those working in the separation centres knew that the claimant might have mental health issues, so it was essential to obtain further information about his mental health condition and ensure that an assessment was carried out expeditiously. Thus, no reasonable decision-maker could have failed to seek further information from shortly after the claimant was put on the segregation regime.⁵

In finding a breach of Article 3 ECHR, the judge found that the regime had subjected him to intense mental suffering which went way beyond the inevitable element of suffering inherent in segregation. Further, the mental health support provided to him had not mitigated his symptoms of trauma and distress. Although the segregation regime had a legitimate aim — to ensure the good order of the prison pending the arrival of protective body armour — the impact on the prisoner was so severe that it outweighed the risk that he posed to staff. In the judge's view, although the same segregation regime would not have contravened article 3 in the case of a prisoner who had an ordinary level of mental health, it did so in these circumstances. Thus, given the cumulative conditions experienced by the Claimant over a period of six months to the date of the hearing, including over four months in which he has not been permitted to associate with any other prisoner, and in the context of a prisoner who has a history of trauma and where there was a failure to obtain an assessment of his needs even though he was known to have mental health issues, and a failure to provide him with any therapeutic treatment to address his trauma, a contravention of Article 3 was made out. Thus, there had been a breach of his art.3 rights from 21 August onwards, when he had written to staff to say that he would self-harm.⁶

⁴ *R (Abu) v Secretary of State for Justice* [2025] EWHC 3026 (Admin), at 230-236. However, relief was refused as the judge felt that the governors would have made the segregation decisions even if the central steer policy had not applied.

⁵ *R (Abu) v Secretary of State for Justice* [2025] EWHC 3026 (Admin), at 266-268.

⁶ *R (Abu) v Secretary of State for Justice* [2025] EWHC 3026 (Admin), at 299-304, citing *Ahmad v United Kingdom* (2013) 56 EHRR 1

The court also found a breach of Article 8 as the unlawfully made decisions were not in ‘accordance with law’ or justified in the circumstances, as required by Article 8(2). In the court’s views, the segregation regime interfered with the claimant’s right to private life as he had been deprived of the normal associations an individual would have in prison, as well as the opportunities for personal development that were ordinarily available to prisoners.⁷

With respect to the breach of the PSED, the judge noted that **none** of the segregation decisions made specific reference to the PSED, and no evidence was presented showing explicit consideration was given to it in making the decision to segregate or continue segregating the claimant. Thus, although the claimant’s needs as a Muslim was not completely ignored (he had access to an Imam and a Qur’an), there was an absence of consideration at the macro level as to whether the segregation decisions had an impact on the equality duty, and of the real and perceived impacts of Islam being treated in a particular way.⁸

Finally, with respect to procedural unfairness, the judge found that the secretary and the governors had failed to present a gist of material obtained from Dynamic Risk Assessment Meeting (a multidisciplinary meeting including counter-terrorism analysts, an Imam, and a governor) so that the claimant could have made meaningful representations.⁹ However, the judge refused relief on the basis that the “central steer” policy meant that there was nothing the claimant could have realistically said which would have made a substantial difference.¹⁰

Commentary and conclusions

Under Rule 45 prisoners may be segregated from other prisoners for their own safety or to promote good order and discipline within the prison:

Removal from association

(1) Where it appears desirable, for the maintenance of good order or discipline or in his own interests, that a prisoner should not associate with other prisoners, either generally or for purposes, the governor may arrange for the prisoner’s removal from association [for up to 72 hours]

(2) Removal for more than 72 hours may be authorised by the governor in writing who may authorise a further period of removal of up to 14 days.

(2A) Such authority may be renewed for subsequent periods of up to 14 days.

(2B) But the governor must obtain leave from the Secretary of State in writing to authorise removal under paragraph (2A) where the period in total amounts to more than 42 days starting with the date the prisoner was removed under paragraph (1).

(2C) The Secretary of State may only grant leave for a maximum period of 42 days, but such leave may be renewed for subsequent periods of up to 42 days by the Secretary of State.

(3) The governor may arrange at his discretion for a prisoner removed under this rule to resume association with other prisoners at any time

(3A) In giving authority under paragraphs (2) and (2A) and in exercising the discretion under paragraph (3), the governor must fully consider any recommendation that the prisoner resumes

⁷ *R (Abu) v Secretary of State for Justice* [2025] EWHC 3026 (Admin), at 305.

⁸ *R (Abu) v Secretary of State for Justice* [2025] EWHC 3026 (Admin), at 318.

⁹ *R (Abu) v Secretary of State for Justice* [2025] EWHC 3026 (Admin), at 324, citing *R (King) v Secretary of State for Justice* [2015] UKSC 54.

¹⁰ *R (Abu) v Secretary of State for Justice* [2025] EWHC 3026 (Admin), at 325.

association on medical grounds made by a registered medical practitioner or registered nurse working within the prison.

In such cases, the authorities must comply with the necessary procedures, ensuring that the prisoner is not subject to segregation or confinement for inadequate or irrelevant reasons, and receives procedural justice before the decision is made. Such decisions can, therefore, be subject to judicial review to ensure that the authorities have acted legally (*intra vires*), rationally, and in compliance with the rules of natural justice and fairness. In addition, decisions on segregation must comply with the prisoner's human rights, found in the European Convention on Human Rights, as given effect in domestic law through the Human Rights Act 1998. Thus, such decisions must not pose an unnecessary risk to the prisoner's life (under Article 2 of the Convention); or subject the prisoner to torture or inhuman or degrading treatment or punishment (Article 3); or amount to an unnecessary interference with their right to private life (Article 8) or the right of association with others (Article 11). Consequently, any public law challenge (judicial review) will examine the legal powers to make that decision and their enforcement by the relevant public authorities to see whether the power has been exercised as Parliament wished. Further, whether there is a breach of any Convention rights will be determined by the national and European Courts; considering all the facts and whether the treatment exceeds the necessary effect and consequence of imprisonment and thus constitutes a violation (and whether it can be justified under any of the qualifying provisions in the Convention).

The present decision, together with previous cases, re-iterates that any segregation or removal of association must be within the law. Thus, if the decision to segregate or restrict association is *ultra vires*, then not only is the decision reviewable at common law, but this might also lead to a breach of article 8 ECHR, as the decision (and the interference with the prisoner's private life was not 'in accordance with law' so as to justify any interference with his Convention rights. For example, in *R (Bourgass and another) v Secretary of State for Justice*,¹¹ it was held that the decision to segregate two prisoners had been unlawful under Rule 45(2) because the Secretary had not authorised the segregation and had purported to delegate that task to a Segregation Board. Similarly, in *Shahid*,¹² a case where a prisoner has spent a total of 56 months in segregation, it was held that as several orders made on behalf of the ministers authorising Shahid's continued segregation had been granted after the period of 72 hours which was permitted under the relevant Prison Rules had expired; his segregation, therefore, was unlawful.

Breaches of the common law can also impact on the proportionality of the decision and in *Shahid* the Supreme Court noted that consideration should have been given to moving him to another prison elsewhere in the UK and that no meaningful plan for his reintegration into the prison population had been put in place until he had already been in segregation for more than four and a half years. Further, the Supreme Court noted that fairness at common law required that prisoners should usually have a meaningful opportunity to make representations before a decision was made by the secretary of state. This was because of the serious consequences of further segregation for 14 days and the common law insistence that the exercise of administrative power should be fair. In that case, therefore, as neither prisoner had been provided with sufficient information about the central aspects of the basis of their segregation, the prisoners were entitled to the gist of those reasons. However, as is our present case, in *Shahid*, the Supreme Court refused to grant any damages as just satisfaction as it considered that the prisoner had not suffered any prejudice; if the Article 8 violations had not occurred then there was no evidence to show he would have been returned to the general population sooner. Additionally, the extent to which his right to respect for his private life under Article 8 had been infringed was limited considering the negative attitudes other prisoners had towards him.

Although the courts are prepared to insist on full and fair procedure in challenging such decisions, they often fail to defend the prisoner's procedural rights when they are unprepared to offer a real

¹¹ [2015] UKSC 54.

¹² *Shahid v Scottish Ministers* [2015] UKSC 58.

and effective remedy. A simple finding of a violation of both common law (and Convention rights) has some use in that it reminds the authorities of the limits of their powers. However, that finding loses its utility if lessons do not appear to be learnt; perhaps leading to the situation that the authorities know that in each and every case where they do not follow the rules, and as a consequence breach prisoners' common law and Convention rights, they will not be forced to pay real compensation, but will simply be asked to make the decision again, but this time follow the right procedure.

The findings in the present case display the wide number of grounds that a decision on segregation – or decisions impacting on other restrictions imposed on prisoners – can be challenged. In this case, the Secretary's general policy on segregating such prisoners took the decision away from prison governors and was thus *ultra vires* as the Rules envisioned governors making individual decisions. However, such a breach did not provide a public law remedy as the court found that the governors would have made the same decisions had they acted individually and thus lawfully. So too, the procedural breach failed to afford a remedy for the same reason – the prisoners could have said nothing significant had they been given the gist of the reasoning and an opportunity to argue against the segregation. This shows the flexibility and discretion of public law remedies, which can consider the proper functioning of public duties, rather than breach of individual rights.

However, the decisions on the other grounds have found substantive breaches of the prisoners' rights (under Articles 3 and 8) and the court will have a separate hearing to consider compensation for such breaches. The finding of a breach of Article 3 is particularly relevant as the harm caused by a breach of public law duties will not usually cross the threshold required to find a breach of Article 3. Further, it is rare for a breach of Article 3 to be found with respect to general prison conditions; and the fact that the prisoner had specific mental problems which were ignored by the Secretary were instrumental in this case. Under ss. 7 and 8 of the Human Rights Act 1998, domestic courts must take into account to the European Court's jurisdiction of providing just satisfaction for Convention breaches, and as it has already found a breach of Article 3, the damages awarded to this prisoner are likely to be substantial; or at least with respect to compensation under the Act for breach of Convention rights.¹³

This finding under Article 3 is especially important in that in most Article 3 claims with respect to detention, the courts, including the European Court of Human Rights, are unwilling to find a violation in the absence of treatment or conditions that clearly exacerbate the normal discomfort experienced by detention. Thus, the Court has found that inhuman treatment involves severe physical or mental suffering that causes intense physical or mental suffering, and degrading treatment that is grossly humiliating and undignified, causing a feeling of fear, anguish, and inferiority that debases the victim.¹⁴

Whether there has been a breach of Article 3 in the context of imprisonment depends on the particular conditions of detention, including the stringency of the measure, its duration, the objective pursued and its effects on the person concerned. Further, the Court has ruled that solitary confinement does not of itself constitute a violation of Article 3.¹⁵ This is despite the Court accepting that it is:

... one of the most serious measures which can be imposed within a prison and, as the Committee for the Prevention of Torture has stated, all forms of solitary confinement without appropriate mental and physical stimulation are likely, in the long term, to have damaging effects, resulting in deterioration of mental faculties and

¹³ In 2003, in *McGlinchy v United Kingdom*, Application No. 50390/99) decision of the European Court, 29 April 2003, the Strasbourg Court awarded 1150 Euros in just satisfaction, to a prisoner who had received inadequate treatment and care to deal with her mental illness and her drug addiction whilst in prison.

¹⁴ See *Ireland v United Kingdom* (1978) 2 EHRR 25.

¹⁵ *Ahmad v United Kingdom* (2012) 56 EHRR 1. See Steve Foster, *Ahmed v United Kingdom: extradition and prison conditions* (2010) 15(1) *Coventry Law Journal* 30.

social abilities. Indeed, as the Committee's most recent report makes clear, the damaging effect of solitary confinement can be immediate and increases the longer the measure lasts and the more indeterminate it is.¹⁶

Despite that initial observation, the Court held that the prohibition of contact with other prisoners for security, disciplinary or protective reasons does not in itself amount to inhuman treatment or punishment, and that whilst prolonged removal from association with others is undesirable, whether such a measure falls within the ambit of article 3 of the Convention depends on the particular conditions, the stringency of the measure, its duration, the objective pursued and its effects on the person concerned.¹⁷ Although the court has never laid down precise rules governing the operation of solitary confinement (it has never specified a period of time beyond which solitary confinement will attain the minimum level of severity) required for article 3, it has emphasised that solitary confinement, even in cases entailing relative isolation, cannot be imposed on a prisoner indefinitely.¹⁸

Thus, the threshold is not easily met in the context of solitary confinement, or imprisonment generally. For example, in *Kuda v Poland*,¹⁹ the European Court dismissed an Article 3 claim by a prisoner with pre-existing psychological conditions. Although the Court accepted that the very nature of the applicant's psychological condition made him more vulnerable than the average detainee and that his detention may have exacerbated to a certain extent his feelings of distress, anguish and fear (and that he was kept in custody despite a psychiatric opinion that continuing detention could jeopardise his life because of a likelihood of attempted suicide), on assessing the relevant facts as a whole, the Court did not find that the applicant was subjected to ill-treatment that attained a sufficient level of severity to come within the scope of Article 3 of the Convention.

It should be pointed out, however, that *Kuda* was not a case involving segregation, and that the court in the present case was able to distinguish the present case with the decisions of the European Court in both *Ahmad* and *Kuda*. Thus, the court held that it had to weigh in the balance the effects of the segregation regime on the claimant with the regime's aim.²⁰ This proportionality test is usually only found in cases involving a conditional right, such as the right to private life; where the court has to determine that the violation is within the law and necessary in a democratic society to achieve a legitimate aim (such as public order). Although Article 3 is an absolute right, the Strasbourg Court nevertheless employs a proportionality test where the measure in question is not in violation of the Convention *per se* but can be excused if carried out for a good reason, and does not, in the round, cause excessive suffering.

Returning to this case, the judge's view, the cumulative conditions experienced over a period of six months to the date of the hearing, including over four months in which he has not been permitted to associate with any other prisoner, and in the context of a prisoner who has a history of trauma and where there was a failure to obtain an assessment of his needs even though he was known to have mental health issues, and a failure to provide him with any therapeutic treatment to address his trauma, a contravention of Article 3 is made out.²¹ In the judge's view, the suffering that the claimant has experienced goes way beyond the inevitable element of suffering that relates to segregation. Although segregation will inevitably suffer isolation and an element of distress and anxiety, what the claimant experienced was much more severe than that: he is suffering from post-traumatic stress disorder, brought on (at least in part) by the segregation. Further, the mental health support provided to the Claimant has not mitigated his symptoms of trauma and distress, and will not do so for some time, if at all, if he remains within the full strictures of the segregation regime.²² Further, the evidence did not demonstrate that it was impossible to relieve the Claimant

¹⁶ *Ahmad v United Kingdom* (2012) 56 EHRR 1, at 207.

¹⁷ *Ahmad v United Kingdom* (2012) 56 EHRR 1, at 208-209.

¹⁸ *Ahmad v United Kingdom* (2012) 56 EHRR 1, at 210.

¹⁹ *Kudla v Poland* (2002) 35 EHRR 11.

²⁰ *R (Abu) v Secretary of State for Justice* [2025] EWHC 3026 (Admin), at 299.

²¹ *R (Abu) v Secretary of State for Justice* [2025] EWHC 3026 (Admin), at 300.

²² *R (Abu) v Secretary of State for Justice* [2025] EWHC 3026 (Admin), at 301.

of the stresses, or at least some of the stresses, of the segregation regime without unduly compromising the safety of the staff working with him.²³

Conclusion

It is surprising that given the number of cases brought before the superior courts in this area, that the prison authorities and the Government have learned little from those decisions, and continue to breach both the rules of administrative law and the Convention rights enforceable under the Human Rights Act 1998. Recently, in *Awale*,²⁴ the High Court found that a prisoner's detention in a close supervision centre had been unlawful because he had been confined to his cell for almost 23 hours a day and where his detention had not been subject to monthly reviews as required by Rule 46. The High Court also found that the prisoner's Article 8 rights had been violated because the legal framework lacked clarity as to the manner of the exercise of removing a prisoner from association. In other words, that process was not clearly 'prescribed by law' as required by Article 8(2), irrespective of whether the detention was necessary and proportionate.²⁵

The decisions in *Abu*, and *Awale*, tell us a great deal about public and human rights' claims in cases involving prisoners. Primarily, that ministers and other prison authorities owe legal and moral duties to act fairly and to comply with human rights and statutory obligations when making decisions that impact on individuals (and in this case prisoners). If they do that, then the court is likely to give them a good deal of discretion to balance those rights with the management of prisons and prisoners. In this case, however, government policy allowed those authorities to ignore their duties to follow the law and to consider the rights of individual detainees. This was because the Secretary felt that the protection of prison officials and public safety overrode any consideration of the prisoner's public and private law rights. The court therefore stepped in and provided a remedy to those affected by that breach – albeit a limited one given the finding that most breaches were nominal and that the decisions were ones that could have been made lawfully.

The finding on Article 3 in *Abu* was particularly brave, and rare in cases of unlawful segregation, and it will be interesting to see what damages the court awards for breach of the claimant's Convention rights, although they may be nominal with respect to Article 8. That finding might focus the government's mind on following the law and its legal duties in the future, particularly if the court's approach to Article 3 is followed in cases involving general prison conditions.²⁶

²³ *R (Abu) v Secretary of State for Justice* [2025] EWHC 3026 (Admin), at 302.

²⁴ *R (Awale) v Secretary of State for Justice* [2024] EWHC 2322 (Admin)

²⁵ The court also found that the policy breached the public sector equality duty under s.49 of the Equality Act 2010, and had failed to provide reasons to the prisoner, as required by the common law rules of fairness. In this case the court held that the breach of Article 8 should be compensated by damages, under s.8 of the 1998 Act, to be assessed at a later date.

²⁶ See *Steve Foster, 'HMP Wandsworth: illegal conditions' (2024) 174 (8060) New Law Journal, 13-14*

EUROPEAN UNION LAW

Recalibrating causation and operational responsibility in EU Agency Law: Case C-679/23 *P WS and Others v Frontex*

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Introduction

The operational transformation of EU agencies has altered European administrative governance significantly. Agencies such as Frontex are no longer limited to technical coordination between national authorities; they now participate directly in border surveillance, joint return operations and the broader externalisation of migration control.¹ Yet while operational integration has deepened, the Union's non-contractual liability regime under Article 340(2) TFEU has remained demanding.² Actions for damages require proof of unlawful conduct, actual damage and a sufficiently direct causal link;³ and in practice, the causal requirement has often proved decisive.⁴

In *WS and Others v Frontex*,⁵ the Grand Chamber confronted this issue. The case arose from a joint return operation coordinated by Frontex in which the applicants alleged that their fundamental EU rights were infringed. Although the Court ultimately did not impose liability, it recalibrated how causation must be assessed in composite operational settings involving both EU and Member State actors. By rejecting a strict exclusivity requirement and confirming that meaningful operational contribution can be enough, the judgment represents an important step in strengthening the accountability of EU agencies.⁶

The Legal and Factual Context

Under Article 340(2) TFEU, the Union must make good any damage caused by its institutions or servants in the performance of their duties.⁷ In *Bergaderm*,⁸ the Court brought institutional liability in line with the *Francovich* approach, ruling that liability arises only where there has been a sufficiently serious breach of a rule intended to confer rights on individuals. As a result, EU liability is contingent on three cumulative conditions being met: an unlawful act, actual damage and a direct causal link between the two.⁹

Causation has, historically, been interpreted strictly. In *Dumortier*,¹⁰ the Court held that damage must be the direct consequence of the unlawful conduct. Later cases such as *Trubowest* and *Gascogne Sack* emphasised that independently operative conduct may break the causal chain.¹¹

¹ Paul Craig, *EU Administrative Law* (OUP 2012) Ch 6.

² Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C202/47 art 340(2)

³ Case C-352/98 P *Bergaderm* EU:C:2000:361 para 42.

⁴ Phedon Nicolaides, 'Non-contractual liability of the EU: Need for a 'diligent' administrator test' (2024) 31 *Maastricht Journal of European and Comparative Law* 3.

⁵ Case C-679/23 P *WS and Others v Frontex* [2025] ECLI:EU:C:2025:976.

⁶ *Ibid* paras 150-153.

⁷ Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C202/47 art 340(2).

⁸ Case C-352/98 P *Bergaderm* [2000] ECLI:EU:C:2000:361; Joined Cases C-6/90 and C-9/90 *Francovich* [1991] ECLI:EU:C:1991:428.

⁹ Case C-352/98 P *Bergaderm* [2000] ECLI:EU:C:2000:361 para 42.

¹⁰ Case 64/76 *Dumortier v Council* [1979] ECLI:EU:C:1979:223 para 21.

¹¹ Case C-419/08 P *Trubowest Handel* [2010] ECLI:EU:C:2010:147 paras 61-63; Case C-138/17 P *European Union v Gascogne Sack Deutschland* [2018] ECLI:EU:C:2018:1013.

Even in *Ledra Advertising*, decided in the sensitive context of the euro-crisis, the Court maintained a restrictive approach to institutional liability.¹²

This doctrinal framework encountered difficulty in the context of Frontex operations. Regulation 2016/1624 established the European Border and Coast Guard and expanded the Agency's operational functions.¹³ Whilst Member States retain formal responsibility for adopting return decisions, Frontex coordinates operations, participates in planning, deploys officers and operates under a binding fundamental rights framework.¹⁴ Regulation 2019/1896 further strengthened these functions and introduced, in Article 46, a mechanism enabling the suspension or termination of operations in cases of serious fundamental rights violations.¹⁵

The litigation in *WS* arose from a joint return operation coordinated by Frontex; the applicants sought damages before the General Court (Case T-600/21), alleging that fundamental rights violations occurred during the return, and that Frontex failed to comply with its monitoring and coordination obligations under Regulations 2016/1624.¹⁶ They argued that the Agency's omissions contributed causally to the harm suffered by them.

The General Court dismissed the action, emphasising that the return decisions had been adopted by national authorities, and concluded that there was no sufficiently direct causal link between Frontex's conduct and the alleged damage.¹⁷ The Court also relied on intervening acts in the chain of events and excluded certain travel costs from recoverable damage.¹⁸ Its reasoning reflected a formal distinction between national competence and EU coordination, effectively insulating the Agency from liability in composite settings.¹⁹

The Grand Chamber Judgment

On appeal, the Grand Chamber set aside part of the General Court's reasoning.²⁰ While it did not ultimately establish liability, it clarified the legal test for causation under Article 340 TFEU.

First, the Court rejected the suggestion that the unlawful conduct must be the exclusive cause of the damage. Nor, in the Court's view, must it be immediate in a strictly temporal sense; instead, the appropriate question is whether it played a decisive role in bringing about the harm.²¹ This clarification is doctrinally significant because it makes it clear that shared operational responsibility does not – by itself – negate the existence of a causal link.

Second, the Court addressed the role of intervening acts. Although earlier case law suggested that independently operating conduct could sever the chain of causation,²² the Grand Chamber emphasised that such acts cannot be assessed in the abstract and must instead be evaluated in their specific factual and legal context.²³ Thus, the involvement of Member State authorities does not automatically sever the link between an EU agency's conduct and the damage suffered.

¹² Case C-8/15 P *Ledra Advertising v Commission* [2016] ECLI:EU:C: 2016:701.

¹³ Regulation (EU) 2016/1624 [2016] OJ L251/1.

¹⁴ *Ibid.*

¹⁵ Regulation (EU) 2019/1896 [2019] OJ L295/1 art 46.

¹⁶ Case T-600/21 *WS and Others v Frontex* [2023] ECLI:EU:T:2023:492.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ Stanisław Kusiak, 'Non-Contractual Liability: WS and Others as a Blockade to Keeping Frontex Accountable' (EuroProspects, 8 March 2025) <<https://europrospects.eu/non-contractual-liability-ws-and-others-as-a-blockade-to-keeping-frontex-accountable/>> accessed 23rd February 2026.

²⁰ Case C-679/23 P *WS and Others v Frontex* [2025] ECLI:EU:C:2025:976.

²¹ *Ibid* paras 150-153.

²² Case C-419/08 P *Trubowest Handel*, n11, paras 61–63; Case C-138/17 P *European Union v Gascogne Sack Deutschland*, n11.

²³ n16.

Consequently, in coercive return contexts, applicants' actions cannot be treated mechanically as freely chosen interruptions of causation.²⁴

Third, the Court examined the nature of Frontex's obligations under Regulation 2016/1624. It confirmed that the Agency's monitoring and coordination responsibilities are legally binding.²⁵ These obligations are not merely political or programmatic commitments; if sufficiently serious breaches of those duties occur, they may satisfy the unlawfulness requirement under *Bergaderm*.²⁶ By recognising the binding character of these operational duties, the Court opened the possibility that omissions in monitoring or coordination could contribute causally to damage.

Importantly, the Court's reasoning reflects an understanding of composite administration where EU and national authorities act jointly within integrated procedures.²⁷ In such settings, a purely formal focus on who adopted the final decision risks obscuring the functional contribution of coordinating actors. The Court's approach reframes causation as a normative assessment of operational contribution rather than a mechanical tracing of formal competences.²⁸

Constitutional and structural significance of the case

The broader significance of *WS* lies in its response to the accountability challenges generated by externalised migration control. The European Court of Human Rights has addressed similar issues in *Hirsi Jamaa v Italy*, where Italy was held responsible for maritime pushbacks conducted beyond its territory on the basis of effective control.²⁹ Further, in *MSS v Belgium and Greece*,³⁰ the Court emphasised effective protection against refoulement in cooperative arrangements.

Academics have identified a structural accountability gap in EU border governance, in which operational control is dispersed across multiple actors while legal responsibility remains difficult to attribute.³¹ Frontex's embeddedness within composite administrative structures has been criticised for limiting effective judicial protection.³²

The Grand Chamber's recalibration does not abandon the cumulative structure of Union liability. For example, it does not impose strict liability on agencies, nor does it dilute the requirement of a sufficiently serious breach. However, by rejecting exclusivity and immediacy and by focusing on determining contribution grounded in binding operational obligations, the Court has moved away from rigid competence formalism.³³ This approach remains anchored in EU constitutional principles, including effective judicial protection under Article 47 of the Charter,³⁴ and the broader logic of Charter applicability articulated in *Åkerberg Fransson*.³⁵ At the same time, it

²⁴ Antje Kunst, 'Advocate General Ćapeta's Opinion in *WS and Others v Frontex* before the Grand Chamber: The End of Frontex's Shielding?' Joint Liability of Frontex and Member States in Return Operations' (EU Law Analysis, 2025) < <http://eulawanalysis.blogspot.com/2025/06/the-advocate-general-capetas-opinion-in.html> > accessed 23rd February 2026.

²⁵ n13.

²⁶ n9.

²⁷ Herwig CH Hofmann, Gerard C Rowe and Alexander H Türk, 'The Present and Future Condition of European Union Administrative Law' in Hofmann, Rowe and Türk (eds), *Administrative Law and Policy of the European Union* (OUP 2011) Ch 26.

²⁸ Antje Kunst, 'Frontex before the EU Courts: Damage, Causation, and Liability under Article 340(2) TFEU' (EU Law Analysis, 2026) < <http://eulawanalysis.blogspot.com/2026/01/frontex-before-eu-courts-damage.html> > accessed 23rd February 2026.

²⁹ *Hirsi Jamaa and Others v Italy* (2012) 55 EHRR 21 paras 73–82.

³⁰ *MSS v Belgium and Greece* (2011) 53 EHRR 2 paras 342–359.

³¹ Cathryn Costello and Itamar Mann, 'Border Justice' (2020) 21(3) *German Law Journal* 459.

³² Salvatore Nicolosi, 'The European Border and Coast Guard Agency (Frontex) and the limits to effective judicial protection' (2024) 30 *European Law Journal* 149.

³³ Mariana Gkliati, 'Shaping the Joint Liability Landscape? The Broader Consequences of *WS v Frontex* for EU Law' (2024) 9 *European Papers* 69.

³⁴ Charter of Fundamental Rights of the European Union [2012] OJ C326/391 art 47.

³⁵ Case C-617/10 *Åkerberg Fransson* [2013] ECLI:EU:C:2013:105.

resonates functionally with Strasbourg's emphasis on effective control without collapsing the autonomy of EU law.

Conclusions

WS and Others v Frontex represents a measured but meaningful development in EU agency liability. The Court did not find Frontex liable, yet it clarified that causation under Article 340 TFEU does not require exclusivity, nor is it defeated automatically by shared operational responsibility within composite administration.³⁶ By recognising that binding operational obligations may constitute a determining cause of damage, the Grand Chamber thus narrowed the structural accountability gaps.³⁷

Whether this recalibrated framework will lead to successful actions for damages in future cases remains unclear. Nonetheless, the judgment marks an important step in aligning EU liability doctrines with the operational realities of contemporary European border governance.

³⁶ Elmin Omičević and Salvatore Nicolosi, 'Righting Wrongs at Home: The Potential of Domestic Judicial Remedies in Determining and Allocating Responsibility for Human Rights Violations in European Integrated Border Management' (2025) 21(4) *European Constitutional Law Review* 555.

³⁷ Stanisław Kusiak, 'Non-Contractual Liability: WS and Others as a Blockade to Keeping Frontex Accountable' (EuroProspects, 8 March 2025) < <https://europrospects.eu/non-contractual-liability-ws-and-others-as-a-blockade-to-keeping-frontex-accountable/> > accessed 23rd February 2026.

CASE NOTES

Freedom of expression – protection from harassment – right to private life - proportionality

R v Graham Linehan, Westminster Magistrates' Court, 25 November 2025

Introduction

In this case a district judge found the defendant not guilty of harassment under the Protection of Harassment Act 1997; although guilty of criminal damage for destroying a phone owned by the complainant. The complainant was Sophie Brooks, a born male who presents as a woman and who champions trans rights, and who was 17 at the time of the incidents. The case raised extra media awareness as the defendant, who has spoken in strong terms on the topic of trans rights, is a well-known writer and speaker, and responsible for the brilliant comedy series *Father Ted*, and *The IT Crowd*. The case also raised more general issues concerning the acceptability of free speech (on social media) and the rights of others not to be exposed to speech and conduct amounting to harassment.

Section 1(1) of the 1997 Act provides that a person must not pursue a course of conduct, (a) which amounts to harassment of another, and (b) which he knows or ought to know amounts to harassment of the other. Under, s.1(3)(c), there is a defence where the course of conduct was reasonable, which allows the courts to consider free speech norms and to balance free speech with the other interests of the claimant. Thus, the behaviour must reach a certain level of seriousness before it amounts to harassment, and there is a boundary between conduct which was unattractive, even unreasonable, and conduct which was oppressive and unacceptable. Thus, the Act provides a suitable framework for balancing both the interests in free speech and private life.

Facts and decision

The defendant posted more than 20 posts about the complainant over a period of 11 days. The messages included phrases which the judge described as 'deeply unpleasant and unattractive'. Using phrases such as 'sociopath', 'psycho', 'domestic terrorist' 'homophobic brats', 'grooming' 'scumbags', 'malignant narcissists' and 'buffalo bill' (serial killer in "Silence of the lambs"), he also posted pictures online of the complainant and referred to obtaining information about the complainant including where the complainant may study. He also regularly referred to the complainant with male pronouns, which the complainant described as rude, but not alarming or distressing under the 1997 Act.

In the judge's view this course of conduct did not cross the threshold of being 'oppressive and unacceptable' beyond being merely *unattractive, annoying or irritating*. Further, the gravity of the conduct was not sufficient to sustain criminal liability, given the context of the dispute and the exchanges. That context included the defendant's genuine belief that the complainant had been infiltrating and disrupting gender-critical events. This belief is also protected by Article 9 of the European Convention on Human Rights, provided it is not inconsistent with basic notions under the Convention, or constitutes an unreasonable attack on the democratic rights of others. Other factors included the complainant's online conduct towards others – in other words a strong

defence of the counter argument – and the fact that most of the posts had not tagged the complainant. Further the court found that the evidence showed that the complainant was not as alarmed and distressed as had been portrayed in the case brought against the defendant. This was because she had not articulated those feelings before the court and had continued the general debate online and at conferences.

Commentary

Domestic law places several restrictions on individuals who use their right to free speech to send messages that might cause them distress or other harm. These include the harassment laws applicable in the above case and other public order laws (ss. 4 and 5 of the Public Order Act 1986). Further, recently the ex-footballer Joey Barton received a suspended jail sentence for sending a ‘grossly offensive’ message to three public figures, in breach of s.1 of the Malicious Communications Act 1988. The Joey Barton case will be considered below, but in all these cases, the judge, or jury, must determine whether the defendant has crossed the boundary between free speech and a breach of the criminal or civil law, balancing established principles of freedom of expression and the rights of others, as articulated in the Human Rights Act 1998, with the rights of those targeted by such speech.

The 1997 Act can be used to restrain or seek redress for various acts of personal intrusion, such as persistent abuse, criticism and other personal attacks; including speech that causes alarm and distress. The Act is used when the defendant’s conduct is persistent, and under the Act there must be a course of conduct (established in this case) which then amounts to harassment. The Act thus protects various personal and privacy rights of the complainant; in addition to claims for defamation (protecting reputation), misuse of private information (the domestic law’s breach of privacy claim), and data protection. As these rights need to be weighed against the defendant’s right to free speech, cases under the Act require a careful balance between the right to private life (under Article 8 of the European Convention), and freedom of expression under Article 10. Both rights are given effect in domestic law under the Human Rights Act 1998, and the domestic courts must consider the jurisprudence of the European Court of Human Rights in deciding claims, and defences, under the Act. Failure to achieve a proportionate balance in that respect might lead to an appeal to the European Court (*Pal v United Kingdom*, Application No. 44261/09, decision of the European Court of Human Rights 30 November 2021). This is particularly the case where both parties are discussing and exchanging views on matters of public debate, where it is common to see heated exchanges between both sides.

In the present case, the judge considered all the surrounding facts before making his decision but was obviously influenced by free speech norms that govern the distinction between acceptable and unacceptable speech. This is specially the case when the dispute involves a matter of public debate and interest, which both sides in this case had entered without reservation. However, there are limits to permissible speech, where it goes beyond being shocking and offensive, or annoying, and constitutes oppressive and unreasonable conduct.

The decision in this case can be contrasted with the recent decision of the High Court in *Hibbert v Hall* [2024] EWHC 2677 (KB), involving an action brought by an individual who had suffered life-changing injuries during the bombings at the Manchester Arena in 2017, together with her relatives. They brought a harassment action against an independent journalist, who repeatedly claimed that the attack was an elaborate hoax orchestrated by public sector agencies, and involved ordinary citizens, including the claimants, portraying fake injuries. The claimants also complained of the defendant’s continued publication of four videos, a film and a book in which he accused them of lying about their presence at the arena and their injuries, and that he had attended the daughter’s home and secretly filmed her without permission. The High Court held that that course of conduct was unacceptable and oppressive, not merely unattractive or unreasonable. Although the defendant’s Article 10 (freedom of expression) rights were engaged in this case, it was held that the defendant had repeatedly published false allegations over many

years on a variety of platforms and had done so for commercial gain. Further, that conduct had a natural tendency to cause serious distress, especially when those targeted were vulnerable.

In *Hibbert*, the defendant claimed that he had engaged in the course of conduct for the purposes of the detection and prevention of crime, and that it was reasonable in all the circumstances. However, the court found that although the subject-matter of the attack was important, the words spoken and written by the defendant were not. The false allegations were grave and had led a very large number of people to wrongly believe that the attack was a hoax, that the claimants were not injured in the attack, which amounted to unreasonable conduct. The defendant was subsequently ordered to pay £45,000 by way of damages to the claimants, an award that might deter such attacks in the future as well as compensating the complainant for the loss they had suffered.

The facts and decision in *Hibbert* are obviously very different from the present case, where the defendant in the present case was merely commenting on matters attracting subjective opinion, whereas the defendant in *Hibbert* refused to accept the truth surrounding the bombings. Hence the normal caution showed by the courts in finding a breach of the 1997 Act, where there is a genuine attempt to engage in a public debate, was, rightfully, not followed in *Hibbert*. Obviously, not all cases fall into the broad categories represented by these two cases, but the courts can usually detect the factors that draw a distinction between oppressive speech and actions and ones that are merely (annoying). These factors include whether there was a matter of public debate, the motivation of the defendant, the repetition of the behaviour, and, particularly relevant in this case, whether the complainant was truly and adversely affected by the defendant's speech and conduct.

As in *Hibbert*, the courts will often assess motivation of the defendant's course of conduct; to decide whether there is still a link between the defendant's speech and actions and an attempt to take part and continue a debate on a matter of public interest. Thus, in *Hibbert*, the defendant persisted with his behaviour when any reasonable person would have known that the assertions were untrue and causing further harm to the family. In contrast, in the present case, however hurtful the defendant's words were, he was continuing the public debate on trans issues, never losing sight of that debate for purely personal reasons; even though we might accept that the exchanges had also become personal after a certain time.

The present decision will be seen as a victory for those who advocate free speech, including the right to disagree with prevalent views on sexual diversity and equality. This is particularly important when the words used by the defendant are in response to counter views expressed by the complainant (or their supporters). The law thus allows a certain level of 'tit-for-tat' in this context (*Pal v United Kingdom*), and the involvement of the complainant in the national debate on trans issues was vital to the judge's finding in this case. On the other hand, the law should ensure that the boundary separating strong, but acceptable speech, and harassment, does not justify unreasonable and harmful attacks on individuals, and groups, particularly because of their beliefs or sexual orientation and practices. This is particularly so as the state owes a duty (in domestic law and under the European Convention – under Articles 8 and 14 (freedom from discrimination) - to secure equality and diversity and provide redress in appropriate cases. Failure by the law or the domestic courts to achieve the correct balance can, therefore, lead to further claims by unsuccessful litigants.

Whether the magistrates achieved that balance in this case is debatable, and as the law is being developed on a case-by-case basis, another court, on similar facts, might have convicted. In the meantime, speakers are allowed to employ shocking and distasteful speech and terms to express their views on controversial topics. This is the hallmark of a democratic society, which practices broadmindedness, pluralism and tolerance (*Handyside v United Kingdom* (1976) 1 EHRR 737). There is certainly no general duty on individuals to respect the rights and sensitivities of others when exercising their right to free speech, despite Article 10 stating that the right carries with it

‘duties and responsibilities.’ All restrictions on free speech must relate to a legitimate aim (including the rights of others), and there is no general right to be free from shock or offence or annoyance. This makes free speech, and this area of the law so unpredictable and interesting, particularly where social media is available to express one’s view immediately and freely. It is not the role of the law to improve the quality of speech and police how (intelligent) people express their views on matters of public interest. This applies even where the defendant is a former public officer (*R (on the application of Miller) v College of Policing* [2021] EWCA Civ 1926). Thus, it is not usually valid for the state or the authorities to claim that a view could have been expressed in a less offensive way. The courts appear to accept that hurtful things will be directed at opponents, including on social media, and that both sides should tolerate the hurt and discomfort that follows from such exchanges. That might, for many, be a sad reflection of modern society, and the use on social media to disseminate views and opinions in a ‘crude’ fashion, but provided the speaker keeps within those very broad boundaries, it represents a belief in free speech, and a desire to keep such exchanges out of the courts.

The Malicious Communications Act 1988

The present decision can also be contrasted with the recent conviction of ex-footballer Joey Barton under s.1 of the Malicious Communications Act 1988 for posting several ‘grossly offensive’ messages with intent to cause distress or anxiety to television broadcaster Jeremy Vine, and sports broadcasters Lucy Ward and Eni Aluko. A jury had found him guilty on six counts of sending grossly offensive messages, including referring to Vine as a ‘bike nonce’ and superimposing the female broadcasters’ faces on a photograph of (serial killers) Fred and Rosemary West. Sentencing Barton, the judge noted that ‘robust debate, satire, mockery and even crude language may fall within permissible free speech’, but ‘when posts deliberately target individuals with vilifying comparisons of serial killers or false insinuation of paedophilia, designed to humiliate and distress, they forfeit their protection.’

Although the two cases were brought under different statutory provisions, Joey Barton verbally attacked the broadcasters without any prompt or excuse, whereas Lineham’s comments were part of an existing public debate which the complainant had actively taken part in. Further, although Lineham had used disparaging remarks, Barton had crossed the line by referring to one complainant as a ‘nonce’ (inferring that he was unsafe in children’s company), and with respect to the female broadcasters had been activated by racism and sexism in making many of his comments. It is also worth noting that one purpose of the ‘grossly offensive’ offences (particularly under s.127(1) of the Communications Act 2003), is to dissuade individuals and groups from misusing public messaging facilities: there being an element of public nuisance in the offence, which outlays the sending of indecent and obscene messages. That is not the aim of the offence under the Malicious Communications Act 1989, but that Act was passed for the specific purpose of regulating ‘poison pen’ letters, and thus a less tolerant approach to speech might be seen in cases brought under the 1988 Act.

The term ‘grossly offensive’ is not defined in either state, leading to the Law Commission recommending that they be replaced with a harm-based offence. That recommendation was not accepted, and the offences remain in force, despite the passing of the Online Safety Act 2023. In the meantime, the courts are charged with distinguishing between ‘grossly offensive’ messages and ones which merely cause shock and offence, which is tolerated in a democratic society. Thus, in *R. (on the application of Watson) v Chief Constable of Greater Manchester* ([2025] EWCA 954 (Admin)), the Court of Appeal held that a political commentator and blogger had not committed a breach of ss.1, or 127, below, of the 1998 Act when she had written social media posts about the murder of a transgender teenager in which he expressed the opinion that gender was biologically determined. In the Court’s view, the posts did not meet the threshold of “grossly offensive” as it was accepted that the commentator’s opinion about gender was one that should be tolerated in a democratic society and reflected society’s fundamental values of free speech. This included the need for tolerance of statements and opinions that some might find offensive or upsetting.

In addition, s.127(2) of the 2003 Act contains the offence of persistent use of communication networks to cause annoyance, inconvenience and needless anxiety to another; and it might be argued that Barton should have been charged with that offence. In *Scottow v CPS* ((2020] EWHC 3241), it was held that the provision could be read in line with s.3 of the Human Rights Act 1998 to ensure that it was consistent with the right to freedom of expression under Article 10 of the European Convention (as given effect to by the 1998 Act). Overruling a conviction under s.127(2) Warby J held that the trial judge had wrongly considered that that a conviction was justified in cases of ‘unkindness’ and ‘calling others names’, and that such a finding was inconsistent with Article 10.

In any case, the cases show that ‘grossly offensive’ free speech can be restricted for the purpose of protecting (the rights of others), but that shock and offence alone is insufficient to activate the provisions. Which provisions are chosen will depend on the type and regularity of the message, but in all cases the court must balance the purpose of the law with the speakers’ rights of free speech. Such a balance will also be undertaken in relation to civil cases brought by complainants; both under the laws of defamation and misuse of private information, with the defendant able to raise defences of truth and honest opinion, or that the statements were in the public interest. Such defences will be raised by Barton when he is sued in defamation by Jeremy Vine and Eni Aluko in 2026. His recent criminal conviction, above, will not settle those civil claims in defamation, although the basis on which he was convicted in that case is likely to influence the outcome of any decision of whether he had defamed the claimants, and what defences he may have under the Defamation Act 2013 (of truth and fair comment).

Steve Foster, Honorary Fellow, Coventry University

Discrimination – harassment – sex and gender equality – same sex toilets

Peggie v Fife Health Board, Employment Tribunal (Scotland), 8 December 2025

Introduction

Recently, the Supreme Court held that the terms "sex", "woman" and "female", and the male equivalents used in the Equality Act 2010 were to be construed as a matter of biology, and that sex was binary and immutable (*For Women Scotland Ltd v Scottish Ministers* ([2025 UKSC 16]). That decision is being responded to by government agencies and employers, and one burning issue is how it affects access of trans persons to female toilets, and the general issue of same sex toilets.

The answer is complex, and in *Peggie* an Employment Tribunal ruled that a health board's grant of permission to a trans woman junior doctor to use the female staff changing room was unlawful under the 2010 Act. However, that ruling only covered a specific period following the female complainant's initial complaint to her employers that a trans person was allowed to use the toilet. The overall decision is more nuanced and does little to resolve the dilemma.

Facts and decision

In August 2023, the Trust gave X (a trans woman who identified as a woman) permission to use the female staff changing room, and on 27 August, the claimant (a woman who held gender critical beliefs) informed senior management that X's use of the changing room made her feel embarrassed and uncomfortable. On 24 December, when the parties were in the changing room at the same time, the claimant stated that it was not appropriate for X to use the changing room, explaining that she felt intimidated because of the presence of X, who was a man, in the women's changing room. She further explained that X could not be there, that it was wrong, and that lots of others felt that way. X explained that the trust employers had permitted X to change there and that if the claimant had concerns, she should raise them formally.

X immediately reported the incident to senior colleagues, who reported it to the claimant's line manager, and on 30 December, the claimant was placed on special leave. In January 2024, the claimant was later suspended to allow an investigation of the allegations. After the trust carried out an internal investigation the claimant was informed that she would face a disciplinary hearing, and the disciplinary investigation began the following month. A month later, it was intimated to the claimant that part of the investigation related to patient care. The claimant returned to work on April 14, 2025, and the rotas were drawn up by the trust to ensure that she and X did not work at the same time. Three months later, the Trust decided that there was insufficient evidence to uphold the key allegations against the claimant. It did not impose any formal disciplinary sanction.

The claimant brought the following claims against her health board employer and a junior doctor: for direct discrimination because of sex or belief, under s.13 of the Act; indirect discrimination in relation to a protected characteristic, being sex or belief, under s.19; a claim for harassment related to sex or belief, under s.26(1); for sexual harassment, under s.26(2); a claim for harassment by rejection of harassment, under s.26(3); and victimisation under s.27.

Upholding the claim in part, the tribunal held as follows. First, the employer's grant of permission to X to use the female changing room was not inherently unlawful under 2010 Act. Although the Supreme Court had held that "sex", "woman" and "female" were to be construed as a matter of biology, and that sex was binary and immutable, and that X's sex for the purposes

of s.11 of the Act was male, the protected he protected characteristic of gender reassignment was of equal status to sex (as were the claimant's and X's respective beliefs). Thus, it was potentially, but not necessarily lawful under the 2010 Act to permit a trans woman to use a female only space in the context of work. In the light of the Supreme Court decision the claimant could argue the claims of direct and indirect discrimination and of harassment if a trans woman was granted permission to use the female changing room. However, equally, X could make arguments of indirect discrimination and harassment if excluded from that changing room.

The tribunal then turned its attention to the balancing of those characteristics and claims, applying the proportionality test in Bank Mellat v HM Treasury ([2013] UKSC 39). The Trust in this case sought to pursue the following legitimate objectives: (a) protecting and upholding X's rights under the Human Rights Act 1998 and the 2010 Act; (b) promoting and upholding diversity and inclusion in the workplace; and (c) appropriate use and provision of available facilities in the workplace. The tribunal found that the measure of granting permission to use the changing room was rationally connected to the objectives, but that after the claimant's initial August 2023 complaint, both parties could have chosen to use spaces other than the changing room on an interim basis pending a permanent solution. In the tribunal's view, an investigation and consideration of the claimant's complaint would have taken about three weeks until 16 September, when X's permission ought to have been revoked pending a long-term solution. There was a strong likelihood that at least one of the options would have been a less intrusive measure whilst meeting the overall objectives. Thus, the Trust had not proved that the grant of permission was the least intrusive measure to achieve the objectives between October 2023 and April 2024, and the severity of the impact on the claimant was not overridden by the objectives. Consequently, during that period the grant of permission to X was not lawful under the Act, and the claimant had a reasonable perception of harassment when X was in the changing room within those dates.

The tribunal then considered whether the claimant manifested her protected beliefs in an objectively impermissible manner. In the tribunal's view, certain of the claimant's comments were impermissible and amounted to harassment of X related to the protected characteristic of gender reassignment. Those comments were reasonably perceived by X to be impermissible and thus constituted a breach by the claimant of s.26 of the 2010 Act. Accordingly, the trust was entitled, in principle, to act on the complaint. X was also entitled to regard the claimant's actions as a breach of X's Article 8 ECHR rights (the right to enjoy private life).

With respect to the respective claims for harassment, under s.26 of the Act, the tribunal found that X's use of the changing room when the claimant was also present was unwanted conduct related to the protected characteristic of sex and thus a breach of s.26. The claimant's perception of harassment from X using the changing room from 16 September 2023 to 14 April 2024 was reasonable in so far as it related to the grant of permission and arose from the trust not meeting the *Bank Mellat* test, above. However, it then concluded that the conduct otherwise did not have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating, or offensive environment as required by s.26. Thus, the claimant's objection to X's presence in the changing room was a part of her gender critical belief and the trust engaged in unwanted conduct relating to the claimant's protected gender critical belief by intimating to the claimant on 28 March 2024 that part of the investigation related to patient care, which constituted a detriment and harassment related to belief. Further, the trust had failed to progress the disciplinary investigation promptly; the time taken (almost a year) being unexplained, disproportionate and not because of the claimant's impermissible manifestation of her belief. Finally, the trust had prohibited discussion of her case with colleagues; the instruction being ambiguous and not the least intrusive measure from 3 to 22 July 2024. This contributed to a hostile environment for that period and the claimant's perception of that was reasonable.

The tribunal then dismissed the claims of direct sex discrimination (s.13). In the tribunal's view, by giving X permission to use the changing room the employers did not treat the claimant differently from another not in that protected category. The claimant had not been required to use the changing room, or not to do so, and if there had been any treatment it was of X when

permission was given. That there was an impact on the claimant, as was her claim, is insufficient. The tribunal also dismissed the claim for indirect sex discrimination on grounds of sex (s.19). In the tribunal's view as the claimant has been the only member of staff raising any complaint to the first policy it concluded that there had been no breach of s.19, as under s.19(2)(d) a discriminatory provision, criterion, or practice (PCP) is justified if the person applying it can show it was a proportionate means of achieving a legitimate aim.

The tribunal also rejected the claim for victimisation under s.29, the tribunal finding no evidence of victimisation by the employers (whereas the claimant had subjected X to harassment, above). Finally, it found that there was no basis to establish X's personal liability under the 2010 Act.

Commentary

The finding of the Supreme Court in *Sex Matters* that the term sex was based on biological criteria was seen by many as a final victory over those espousing trans views. However, the current case reminds us that the Equality Act 2010, and the rights under the European Convention on Human Rights 1950, apply to both protected groups. That is because the 2010 Act includes both sex and transgender rights as protected categories; and that both groups are protected by the right to private life (under Article 8) and the right not to be discriminated on those grounds (under Article 14) of the ECHR. Further, the dilemma over same sex toilets, or allowing trans people into female, or male, toilets, is certainly not clarified by this decision.

Thus, in *Peggie*, the tribunal states quite clearly that the policy of allowing X into the female toilets was not, at the outset at least, unlawful and could have been legitimate had the conflict between the claimant and X been dealt with differently or more sympathetically. The decision, therefore, represents a *procedural* victory for those objecting to such facilities, and sends a clear message to those enforcing them to consult with all affected parties to ensure that their respective rights and concerns are being accommodated. Indeed, X's interests in this case were recognised by the tribunal as it found that X had been subject to harassment by the claimant with respect to the manner in which she raised her concerns. Whether such claims succeed will depend, therefore, on all the circumstances and the way in which the facilities are imposed, how complaints are dealt with and what practical impact the policies have on the respective individuals or groups.

There have been other decisions after this case, which provide fuller protection of the claimant's rights than the one in *Peggie*. Thus, in *Hutchinson v County Durham and Darlington NHS Foundation Trust* (Newcastle Employment Tribunal, 12 January 2025), a tribunal upheld claims against an NHS Trust in both harassment and indirect sex discrimination after the claimants were required to share a female changing room with a transgender colleague and where their concerns were dismissed. In *Hutchinson*, the claimant alleged harassment, victimisation and indirect sex discrimination with respect to the Trust's policy permitting transgender staff to use the changing room corresponding to their affirmed gender. In this case, the tribunal upheld the complaint of harassment against the Trust, who had subjected the claimants to harassment without providing *suitable alternative facilities*; and by not taking seriously and declining to address the claimants' concerns. That included referring to the need for the claimants to be educated on trans rights and to broaden their mindsets as well as the later provision of inadequate and unsuitable changing facilities for those who had objected to sharing the female changing room with a trans person.

The tribunal also upheld the claims for indirect sex discrimination as the policy put women at a particular disadvantage when compared to men, in that women were more likely than men to experience feelings or apprehensions of, fear, distress and humiliation by being required to change their clothes in front of a member of the opposite sex. The Trust had also been in breach of the Workplace (Health, Safety and Welfare) Regulations 1992 - which require "suitable and sufficient sanitary conveniences" and separate rooms for men and women unless each convenience is in a lockable room - had infringed the claimants' right to respect for private life

under Article 8 ECHR, as they had been unable to show that the policies were a proportionate means of achieving its aims.

However, that decision can be contrasted with the tribunal decision in *B M Kelly v Leonardo UK Ltd* (24 November 2025), which dismissed a challenge to the employer's policy permitting employees to use toilets aligned with their gender identity; the tribunal dismissing claims of harassment related to sex, and direct sex discrimination and indirect sex discrimination under the Equality Act 2010. Although in *Kelly* the tribunal accepted that the policy was unwanted by the claimant and related to sex because it determined access to facilities by gender rather than sex, it found, on the facts, that the policy did not have the effect of violating her dignity or creating an intimidating or hostile environment. Her objection was rooted in her gender-critical philosophical beliefs rather than in any actual experience of harassment, and her perception of the toilet access policy as "mixed-sex" depended on her ideological belief that gender identity is not real and that trans women are men. Thus, it noted that the policy had no practical effect on her day-to-day use of facilities, as she continued using the same toilets, did not report any negative encounters and her grievance focused on ideological disagreement with "gender identity theory" rather than any hostile or degrading environment. In addition, the availability of single-occupancy toilets further mitigated any potential impact.

The Tribunal also rejected her claim for direct sex discrimination, finding that the correct comparator was a man using male toilets that were also accessed by trans men. Thus, it found that the policy applied equally to men and women, as both sexes were subject to the same rule: employees could use facilities aligned with their gender identity. The Tribunal also dismissed the claim that the presence of trans women in female toilets violated women's privacy more than the presence of trans men in male toilets violated men's privacy. The tribunal found that there was no such disparity, as both sets of facilities had lockable cubicles and additional single-occupancy toilets were available throughout the site. Also, with respect to the claim for indirect discrimination, although the tribunal acknowledged that women's greater fear of men and privacy needs during menstruation, pregnancy and menopause are matters of common knowledge, these effects were not shown to operate in this workplace. There had been no complaints from other female staff, and the claimant did not report fear or safety concerns.

Shortly after this decision, the High Court rejected a legal challenge brought by the Good Law Project, relating to the Equality and Human Rights Commission interim update published after the judgment in *For Women Scotland Ltd, In R (Good Law Project) v EHRC* [2026] EWHC 279, it was noted that the Commission accepted that it issued the update because it was concerned that organisations and individuals could be subject to misinformation and misrepresentation regarding the judgment and its consequences, and that it will consider further legal proceedings in line with its statutory duties. Thus, the court rejected claims that the Commission had broken any of its statutory duties or that the advice was contrary to any relevant ECHR rights. That statement, and the court's dismissal of the proceedings against the Commission, show that there are still ambiguities in the law and its application, and that further legal action will be needed to resolve these dilemmas.

The High Court in *Good Law* held that read as a whole, the guidance accurately reflected the law after the Supreme Court's decision, and that the guidance was not required to be comprehensive, provided it appropriately focused on the provision of single-sex facilities. The guidance correctly stated the legal position in relation to such facilities and included important caveats, including advising that specialist legal advice should be sought, that proportionality must be assessed, and that provision for trans people should be made where possible. The Court did not accept the assertion that the guidance proposed that service providers could require trans people to use lavatories that correspond to their biological sex. Instead, the guidance encouraged that, where single-sex facilities are provided, additional provision should be made for trans people. It also made clear that single-sex provision is permitted only to the extent that it is proportionate.

Conclusion

These recent decisions are bound to excite appeals to the Employment Appeal Tribunal and to the Court of Appeal and the Supreme Court. Although each case is decided on its own facts, and the tribunals take into consideration the impact of the policies on the claimants, there are still many issues regarding the interpretation of the Act and the effect of *Sex Matters* to be resolved. The Good Law decision attempts to resolve some of those difficulties, but does little more than make some broad, aspirational statements of equality and diversity. Both employers and employees need further and clearer guidance on these issues to avoid litigation and industrial unrest. Further, those advocating rights, based, alternatively, on sex and gender identity, will be unhappy that they have not succeed to gain a dominant position in the conflict, and that both groups will need to be accommodated in this, and other similar conflicts.

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Prisoners' rights – right to private life – smoking in prison – European Court of Human Rights - margin of appreciation

Vainak and others v Estonia, Decision of the European Court, 4 November 2025; Applications Nos. 17982/21 and 3 others)

Introduction

In *Vainak and others*, the European Court of Human Rights upheld three prisoners' claims that the total smoking ban imposed in Estonian prisons was a disproportionate interference with their rights under Article 8 of the European Convention – the right to private life. The decision impacts on the enforcement (and restriction) of prisoners' rights generally, but has a particular relevance to those European states, including the United Kingdom, who have imposed a (near total) ban on smoking, and who may now have to re-visit their policies in this area.

The facts and decision in *Vainak*

The applicants are all long-term smokers and were prisoners at the time when the smoking ban entered into force in Estonia in 2017. They challenged the ban in the domestic courts, but in 2019 the Supreme Court of Estonia declared that the ban was constitutional, finding that it was necessary for the protection of non-smokers' health and prison security. The Supreme Court also considered that less restrictive means – such as special smoking rooms, separating smokers and non-smokers or allowing smoking only outdoors – would not be as effective as a complete ban, and that treatment and counselling for withdrawal symptoms was provided if a prisoner gave up smoking. Before the European Court, the prisoners relied on Article 3 (prohibition of inhuman or degrading treatment) and Article 8 (right to respect for private and family life), complaining about the adverse withdrawal symptoms they had suffered because of the ban – including weight gain, sleeping problems, and depression and anxiety.

The European Court held that there had been a violation of Article 8 as concerned three of the applicants (one prisoner's claim was declared inadmissible under Article 35 ECHR for failure to use effective domestic remedies), but that there had been no violation of Article 3 on the facts.

With respect to Article 8, the Court relied on the notion of 'personal autonomy' and 'the possibility to make choices' about one's own life and health, noting that in a context of already limited personal autonomy, the freedom for prisoners to decide – in this case whether to smoke – was even more precious for them. It then found that the state, in deciding to bring in the ban, failed to assess the impact on the personal autonomy of prisoners who smoked. Thus, such a far-reaching and absolute ban had not been justified by the limiting provisions under Article 8(2), which allow interferences provided they are necessary in a democratic society for achieving a legitimate aim (in this case the health and other rights of others). Thus, the state had exceeded Estonia's considerable margin of appreciation (the area of discretion allowed to member states in balancing various rights and interests).

By a majority of 5-4, the Court accepted that the choice to smoke and the question of providing treatment to counter withdrawal symptoms came under the scope of Article 8. It then held that the ban had interfered with prisoners' right to respect for private life, accepting that that interference served a legitimate aim and was intended to protect others from passive smoking. However, it noted that the ban had not benefitted from direct parliamentary review and debate, and that the domestic analysis had focused on health protection, prison security and the possibility of counselling and treatment, thus failing to consider at all personal autonomy and prisoners' freedom of choice in matters concerning their own body and health.

Noting that smoking tobacco was still legal for persons at liberty, and that there was no consensus among the member States on the need to ban smoking in prison settings, the Court found that the States' margin of appreciation to regulate smoking in prisons, while considerable, was not without limits. Thus, such a far-reaching and absolute ban with no assessment of the impact on the personal autonomy of prisoners who smoked had not been justified and exceeded Estonia's freedom to decide on such matters. There had, therefore, been a violation of Article 8.

However, the Court declared the claims under Article 3 as inadmissible (manifestly ill-founded). In the Court's view, although giving up smoking had caused the applicants some stress or anguish, it had not attained the minimum level of severity for Article 3 to come into play – causing substantial physical or mental harm or debasement and humiliation (*Ireland v United Kingdom* (1978) 2 EHRR 25). Further, there was no evidence that the prisoners had complained in the domestic courts about the lack of appropriate treatment and counselling provided at the prison.

Commentary: impact on prisoners' rights and prisons

Before delivering judgment, the European Court noted that it had already ruled on cases concerning smoking in prisons from the opposite angle (passive smoking). In those cases, the Court had to consider whether exposing non-smoking prisoners to secondary smoking was a breach of Article 3 and 8 of the Convention. The ruling in this case was, therefore, important in terms of prisoners' rights to private life and not to be subjected to inhuman and degrading treatment; but equally important on the authorities' duty to safeguard the rights of others and the amount of discretion a human rights court should give to them in that balancing act.

As seen in this case, the prisoner's argument was that banning smoking in prisons violated their right to enjoy their private life, and not to be subject to inhuman or degrading treatment caused by withdrawal symptoms. On the other hand, smoking bans, or at least the refusal to impose or enforce them, can impact on the health and human rights of other prisoners. Thus, a prisoner's health might impose a positive duty on the state under Article 2 of the Convention to protect the right to life of prisoners affected by a smoking environment; or – under Article 3 – to ensure that they are not subject to inhuman or degrading treatment caused by passive smoking. Further, a smoking environment in prisons can impact on the non-smoking prisoner's private life, under Article 8.

The decision in this case raises a number of important issues on prisoners' claims under the Convention and the role of the Court in reviewing the state's laws and practices in line with the rights laid down by the Convention. Thus, the Court normally provides each state with a wide margin of appreciation (discretion) in such cases, showing a reluctance to interfere unless the defendant state's law is clearly out of line with fundamental principles and other states' practice. Here, however, the Court warns us that that discretion is not unlimited, and that the state must at least consider the inherent rights and liberty of prisoners before deciding to restrict those rights. This approach is similar to the one taken by the Strasbourg Court with respect to prisoner voting rights (*Hirst v United Kingdom* (2006) 42 EHRR 41) – that each state is allowed its own prisoner voting regulations, but all policies should not be absolute (blanket bans) or fail to take into account relevant circumstances, including the inherent and democratic right to vote. The difference between those claims, however, is that with the right to vote, we are talking about a right which is clearly laid down in the Convention (Article 3 of the First Protocol), and which is fundamental to democracy; whilst it is debatable whether the right to private life includes every life choice, such as smoking. Indeed, there was a powerful dissenting speech on this issue: that there was no right to smoke under Article 8, either for those at liberty or in prison.

The Court in this case were also critical of the state's decision to introduce the ban by ministerial power rather than through Parliament. In the UK, current policies on prisoner voting rights, and, indeed, smoking in prisons, were taken by administrative action (rather than by Parliament), and

the present case suggests that parliamentary consideration is more consistent with the Convention than governmental administrative measures. This appears to be a bold decision of the Court, where previously they have not insisted on direct parliamentary intervention, provided the measure is supported by the law and the Constitution (*Scoppola v. Italy (No. 3)* (Grand Chamber), Application No.126/05), 22 May 2012).

Conclusion

If the decision of the Court in this case stands – it will be appealed to the Grand Chamber of the Court – then many states will need to revisit smoking bans in prisons (and other places of detention) to ensure that they achieve a better balance between public safety and health on the one hand, and the rights of prisoners to autonomy over their individual health and life style. At the very least, human rights law (and the decision in this case) insists that those *seriously* affected by the smoking ban – either as smokers or those affected by passive smoking - are provided with suitable treatment and protection to cope with those consequences. It will be interesting to see, therefore, how states respond to this ruling.

The decision also raises more general concerns about the European Court's role in interpreting Convention rights, and when it is permissible to gainsay the efforts of the domestic authorities to decide those issues. The decision of the Grand Chamber in this case will be eagerly awaited: not only by prisoners and the prison authorities, but by all Member States of the Council of Europe who are concerned about the European Court's power to question its policies where they have attempted to balance the rights and interests of all parties.

Steve Foster, Honorary Fellow, Coventry University

Right to demonstrate – right of association - proscription – terrorism legislation - proportionality

R (Ammori) v Secretary of State for the Home Department [2026] EWHC 292 (Admin), High Court

Introduction

The High Court has recently ruled that the Home Secretary had acted unlawfully in proscribing (banning) the action group Palestine Action under s.1 of the Terrorism Act 2000 (*Ammori v Secretary of State for the Home Department* [2026] EWHC 292 (Admin)). However, it also ruled that the effect of that proscription will remain in place until the end of February, when a further hearing is due to take place to discuss what happens next, including the possibility of a government appeal to the Court of Appeal.

The decision of the High Court was welcomed by Palestine Action and by those who support the right of free speech and the right to demonstrate, but the real importance of the decision is what it tells us about the difference between penalising unlawful protest action, and criminalising a particular group (and those who support that group) independently from any unlawful actions.

The facts and claims

The claimant, one of the co-founders of Palestine Action, challenges the decision of the Home Secretary to proscribe Palestine Action under s.3 of the Terrorism Act 2000. Under ss. 3(3) and (4) of the Act, if the Home Secretary believes an organisation is concerned in terrorism, she has a power to proscribe. The term “concerned in terrorism” is defined in s. 3(5) as follows:

For the purposes of subsection (4) an organisation is concerned in terrorism if it – (a) commits or participates in acts of terrorism, (b) prepares for terrorism, (c) promotes or encourages terrorism, or (d) is otherwise concerned in terrorism.

“Terrorism” is defined in s. 1 as the “use or threat of action” when the use or threat is “designed to influence the government ... or to intimidate the public or a section of the public” and “is made for the purpose of advancing a political, religious, racial or ideological cause”. By s.1(2), action must involve either “serious violence against a person” or “serious damage to property”.

Palestine Action was proscribed as a terror group by the UK government in July 2025 under s.1 of the Terrorism Act 2000 (under the Proscribed Organisations) (Amendment) Order 2025)). This was approved by both Houses of Parliament and came into force on 5 July 2025. The purpose of the group was to lend support to the Palestine cause in and against Israel. The government voted to proscribe the group weeks after the group’s activists broke into an RAF base and spray-painted two military aircraft, resulting in £7m of damage. The consequence of a proscription includes being a member of that group, and, of particular relevance to the action in judicial review, below, expressing support for a proscribed group (under s.13 of the 2000 Act). Thus, many protestors who help up placards supporting the group were arrested under the Terrorism Act, and many were detained in prison awaiting trial.

The claimant brought an action challenging the proscription: (i) that the Home Secretary acted unlawfully by failing to give Palestine Action the opportunity to make representations that it should not be proscribed before deciding to lay the Order before Parliament; (ii) that the Home Secretary failed to have regard to relevant considerations when deciding to seek an order proscribing Palestine Action; (iii) that the decision to seek the Order proscribing Palestine Action

was made by the Home Secretary in breach of her own policy on when she would exercise her discretion to seek an order proscribing an organisation; and (iv) that the decision to proscribe was contrary to the Human Rights Act 1998 because it amounted to an unjustified and disproportionate interference with the rights under Article 10 (freedom of expression) and Article 11 (freedom of association and peaceful assembly) of the European Convention on Human Rights (as given effect by the Human Rights Act 1998).

The decision of the High Court

The Divisional Court rejected ground (i), above – opportunity to give reasons – because of the likely practical difficulties that would arise with respect to any general obligation to give prior notice and invite representations. Thus, although executive powers provided under statute were to be exercised in a manner that was fair in all the circumstances, including all aspects of the nature and context of the decision, fairness did not require the secretary to give Palestine Action notice, to provide reasons, or to give it the opportunity to make representations. In this case, the national security context meant that a court should be cautious to supplement the statutory procedural requirements, and to require consultation with an organisation provisionally believed to be concerned in terrorism was not an obvious step. Any communication would necessarily be guarded and in some cases the secretary might conclude that no information could be disclosed. There would also be practical difficulties with a notice requirement: such an organisation might not be open about how to be contacted, and the secretary's knowledge of its leadership might rest on sensitive intelligence material.

It also rejected ground (ii) – failure to take into account relevant factors when seeking to proscribe the group. In the claimant's view, the Home Secretary had failed to take into account the following factors:

- the fact that Palestine Action sought to prevent conduct which it reasonably considered to constitute the aiding and abetting or facilitation of genocide and other serious violations of international law;
- the adequacy of alternative criminal and civil measures to address any criminal conduct for which Palestine Action was responsible;
- the fact that the proscription of Palestine Action would have a wider impact on freedom of expression including speech in favour of direct action against arms companies supplying military equipment to Israel;
- acts of low-level direct action and civil disobedience against arms companies by persons not associated with Palestine Action";
- and the fact that the decision to proscribe Palestine Action amounted to differential treatment viz other protest groups using direct action.

In the court's view, however, the secretary had obviously considered the aims of the group in challenging acts of genocide; and the remainder of the claims were relevant to other, more successful, claims, considered below.

However, the Divisional Court allowed the claim on grounds (iii) and (iv) above. In the court's view, the Home Secretary had a long-standing policy in respect of the exercise of the power to proscribe:

...the Home Secretary may proscribe an organisation if they believe it is concerned in terrorism, and it is proportionate to do...In considering whether to exercise this discretion the Home Secretary will take into account other factors including the nature and scale of the organisation's activities, and the specific threat that it poses to the UK.

When the Home Secretary reached an unchallenged conclusion that Palestine Action was an organisation concerned in terrorism, in deciding to proscribe Palestine Action she relied on the

fact that proscription would be advantageous because it would mean that the offences at ss. 11 to 13 of the 2000 Act could be used against any person supporting Palestine Action, the statutory consequences of proscription providing further powers to disrupt Palestine Action. The purpose of the policy was to limit the Home Secretary's power to proscribe, and the additional factor was not consistent with the purpose of that policy. In particular, any "other factor" had to explain the particular need to proscribe an organisation above and beyond the necessary belief that the organisation is concerned in terrorism.

The court stressed that the requirement of proportionality in the secretary's policy did not require her to make a decision that satisfied the test that a court would normally apply in accordance with established case law (*Bank Mellat v HM Treasury (No 2)* [2013] UKSC 38). However, taking into account the stated proportionality factors meant weighing them against the consequences of proscribing the organisation. This obliged the secretary to approach her discretion comprehensively: to appreciate the likely consequences of proscribing Palestine Action on its members/supporters and others; to understand the nature of Palestine Action by reference to the stated factors and/or other relevant considerations; and then to assess the need for proscription. Further, the "nature and scale of an organisation's activities" in the stated factors did not refer to the totality of an organisation's activities; but meant only such activities as amounted to terrorism within s.1. Thus, the proscription power was to proscribe organisations because they acted in ways that meant they were concerned in terrorism, not because of other activities falling short of terrorism.

Regarding the stated factors, the secretary of state had adopted an appropriate approach of treating the nature and scale of Palestine Action's activities, and the extent of the threat it posed in the UK, as pertinent factors. Thus, her assessment of those matters as weighing in favour of proscription had been reasonably open to her. Although only three of Palestine Action's many actions had been assessed to amount to acts of terrorism, the secretary had been entitled to attach significant weight to any act occurring in the UK that came within the s.1 definition. Thus, she had received evidence that further serious property damage amounting to acts of terrorism would occur in the UK and had been entitled to attach weight to the risk that Palestine Action's activities would deter development of the UK defence industry, thereby causing prejudice to the UK's strategic defence objectives. However, her approach to "other factors" had not been consistent with the policy. A theme in the documents leading to the decision had been that proscription would be advantageous because it would mean that the offences at s.11, s.12 and s.13 could be used against persons supporting Palestine Action. That, in the court's view, was not a relevant consideration: the purpose of the policy was to limit use of the discretionary power to proscribe, and any "other factor" considered when applying the policy had to explain the particular need to proscribe the organisation *above and beyond the belief that the organisation was concerned in terrorism* (authors italics).

With respect to the claim under the HRA, the court concluded that Palestine Action is an organisation that promotes its political cause through criminality and the encouragement of criminality. However, that does not provide the Home Secretary with the answer to the claimant's claim under the HRA. Palestine Action's ability to persist in its campaign of undertaking and encouraging damage to property, needs to be justified with respect to actions comprising peaceful protest consistent with Convention rights, under the Palestine Action banner.

The court considered that the proscription of Palestine Action did not mean that those wishing to support the Palestinian cause or protest against companies such as Elbit Systems UK Ltd could not do so. The court also attached little weight to the circumstances of people who have been explicit in their support of Palestine Action since its proscription and have consequently been arrested. Instead, the Court measured the interference with the Convention rights by reference to

the restrictions imposed by criminal offences consequent on proscription, and by the extent to which people would exercise self-restraint in conducting lawful activities.

Even discounting Palestine Action's non-peaceful activities, proscription resulted in a very significant interference with the right to freedom of speech and the right to freedom of assembly. Thus, since the Home Secretary's policy had not been properly applied, it followed that the interference with the right of freedom of speech and freedom of association did not meet the requirement under s.6 of the HRA that any interference with Convention rights by a public authority had to be prescribed by law.

Despite the court ruling against the Home Secretary on whether her decision was 'prescribed by law', the court then considered the proportionality of the measure. The court attached real weight to the fact that Palestine Action has undertaken activities amounting to terrorism as defined by s.1(1), and great weight to the opinion formed by the Home Secretary who has both political and practical responsibility to ensure public safety. However, the court considered that the proscription of Palestine Action was disproportionate. First, a very small number of Palestine Action's activities amounted to acts of terrorism within the definition of s. 1, and for these, and for Palestine Action's other criminal activities, the general criminal law remained available. Thus, the nature and scale of Palestine Action's activities falling within the definition of terrorism had not yet reached the level, scale and persistence to warrant proscription.

Notwithstanding the court's acceptance of those two claims - that the ban of Palestine Action under terrorism legislation is unlawful - it ruled that the ban remains in place until the court considers the next steps; in particular whether the government wishes to appeal the finding to the Court of Appeal. Thus, in the meantime, expressing support for Palestine Action or taking part in its activities will remain a serious criminal offence.

Commentary

The power to proscribe a particular organisation, and thus criminalise its activities, membership and the activities of others in support of the organisation, is a form of 'prior restraint.' Thus, instead of waiting for the group or its supporters to commit a breach of the regular law (trespass, criminal damage, obstruction of the highway, etc.), a proscription order will allow the automatic application of anti-terrorism law to that group, its members and those supporting it. This obviously has a 'chilling effect' on the right of association, peaceful assembly and freedom of expression, as those who are affected by the ban will desist from becoming members or lending support to its views. Although this form of restraint is not automatically in breach of human rights, exceptionally strong and convincing evidence should be present to justify it.

Further, if people are willing to disobey the proscription order, they will face severe penalties under the 2000 Act, often for an activity that would not be a breach of general public order laws. For example, thousands of people have been arrested, and some charged under the 2000 Act, for holding up signs declaring support for Palestine Action. Such actions are, generally, entirely peaceful, and are not likely to be in breach of even the lowest level of public order offences (s.5 of the Public Order Act 1986). Yet, if that group is proscribed, that activity appears to be a breach of the 2000 Act, and the police do not have to show that the activity has caused any further harm beyond supporting the group.

That begs the question whether the group's existence and previous activities warranted the measure of proscription? The question is important for the group and its members and supporters, for they will be committing a breach of the 2000 Act however they go about their activities in the future. Palestine Action had committed several acts of severe damage to property before their proscription, and under the 2000 Act the group appeared to come within the, very wide, definition of terrorism – acts of violence and damage to property intended to further an ideological change. Indeed, the court in the present case accepted that some of its activities came within the 2000

Act. However, in the court's view, those activities – which could have been dealt with under the general law - did not cross the threshold under the Act to warrant proscription.

On a strict interpretation of the Terrorism Act 2000, Palestine Action appeared to be a proscribed group, and its supporters clearly were supporting its cause. So how is a court allowed to decide that the act of proscription was unlawful? The traditional principles of judicial review allow the courts to question the legality and rationality of the Minister's decision. In this case, the Minister appeared to depart from her original reasons for prescribing groups, and, arguably, had failed to take into account relevant facts and policy. On the other hand, it is unlikely that without resorting to human rights law (the 1998 Human Rights Act) that a judge would find that the Home Secretary had 'taken leave of her political senses' in deciding to proscribe this group.

The courts' role in reviewing the minister's decision is now clearly focused on judging its compatibility with the rights in the European Convention on Human Rights, and its powers of review under the Human Rights Act 1998. Whether the wording of the 2000 Act was clear, the domestic courts are now allowed to ask the following questions: was the use of that statutory power proportionate and necessary in a democratic society to achieve the aims of the Act itself and the reasons the Minister gave in using the legislation? In addressing those questions the court is allowed, under s.2 of the 1998 Act, to take into account the jurisprudence of the European Court in this area, and to consider the fundamental importance of the right in question, together with the constitutional and democratic dangers involved in an act of proscription. Thus, it is relevant to ask whether any subsequent appeal to the European Court would be successful (perhaps causing an international conflict between the government and the Council of Europe)?

Article 11 of the European Convention on Human Rights provides for the right of association, and restrictions (including proscription) are allowed under Article 11(2) provided they are prescribed by law and necessary in a democratic society for the purpose of achieving (in this context) national security, public safety and the prevention of disorder and crime. The European Court would normally require that the group incites violence or infringes the rules of democracy (*Socialist Party v Turkey* (1998) 27 EHRR 51), or that the purpose of the group is inconsistent with the basic values of the Convention (Article 19 ECHR). The Court has also insisted that the term 'membership' is applied clearly and fairly, and does not include those who may have taken part in support of its ideas, perhaps at a demonstration (*Isikirik v Turkey* ((App. No 41226/09)). It is clear, therefore, that the Court would have real difficulties with accepting the legitimacy and proportionality of the measures applied against Palestine Action, but most importantly, its followers.

Equally important is the question whether the measure of proscription is damaging to our own constitutional values and feelings of justice? The domestic courts are supposedly the guardians of our fundamental rights, and in the past have ruled as unlawful detention without trial (even at a time of national emergency), and the acceptance of torture evidence in deportation proceedings; the government failing to provide convincing evidence for such measures. Domestic courts are no strangers to protecting human rights (or civil liberties as we once called them) and legal justice – witness their enforcement of the basic rules of natural justice and the duty to act fairly, and their insistence that everyone should have access to the courts and legal representation. Such judicial powers have been buttressed by the European Court's rulings, and the passing of the Human Rights Act 1998, but were part and parcel of the domestic judiciary's belief in freedom and justice.

Shortly after the ruling in *Ammori*, the Supreme Court provided guidance the trial courts on the interpretation and application of s.12 of the 2000 Act (*R v ABJ; R v DDN* ([2026] UKSC 8). The Court held that once the elements of the offence were proved, any interference with the defendant's Article 10 rights would then be proportionate, and that there was no need for a trial judge to conduct an assessment of proportionality. Section 12(1A) provides that a person commits an offence if they expressed an opinion or belief that was supportive of a proscribed organisation (in this case Hamas), and in doing so were reckless as to whether a person to whom

the expression was directed would be encouraged to support a proscribed organisation. This makes the ruling in *Aamori* more fundamental, as once a group is lawfully proscribed, it might be difficult for an offence of supporting that group to be challenged.

The Supreme Court noted that under s. 12(1) (A), an offence was not committed by a person holding an opinion or belief: that opinion had to be expressed. This, simply, confirms the absolute character of freedom of thought, conscience and religion under Article 9 ECHR, and places the focus on Article 10 (freedom of speech) and the right to manifest that (thought) under Article 9. The Court then stressed that under the provision the opinion or belief had to be objectively supportive of an organisation, which was a question of fact, depending on how the defendant's words (spoken or written) would naturally and reasonably have been understood in the circumstances. The Supreme Court made it clear that expressing an opinion or belief which coincided with the aims or beliefs of an organisation was insufficient. However, although an opinion or belief which was supportive of an organisation would often refer expressly to the organisation, there was no requirement for an express reference in every case, because a sufficiently clear reference might be made by implication. This had to be judged objectively and was a question of fact for the court (*R v Choudary* [2015] EWCA Crim 1436). At this point, therefore, it might be noted that those 'supporting' Palestine Action by holding up placards bearing its name would pass this test (although many protestors made it clear that they were not supporting the group but were against genocide). It is also unclear whether a placard stating that a group should not be proscribed under the Act would amount to supporting the group?

Further, in the Court's view, the offence was not one of strict liability, as the defendant had to know that they were expressing an opinion or belief which was supportive of the organisation. Also, the opinion or belief had to be expressed at a time when the organisation was proscribed, although there was no requirement of knowledge that the organisation was proscribed. In addition, under s.12(1A) (b), the person expressing the opinion or belief had to be reckless as to whether it would encourage a person to whom the expression was directed to support a proscribed organisation. That required, first, that the defendant had to be aware of a risk that the result would occur, and second, that in the circumstances known to the defendant, it had to be objectively unreasonable to take the risk.

The Supreme Court then found that the provision was compatible with Article 10 ECHR. The terms of s.12(1A) were clear enough to enable individuals to regulate their conduct, so as to be "prescribed by law" under Article 10(2). Further, the provision served several legitimate aims, such as protecting the citizens of the UK against terrorism, and enabling a democratic society to operate without fear. It also contained measures designed to prevent the UK from being used for the purpose of terrorism outside the UK and was specifically intended to address the danger of radicalisation.

Moving to the proportionality of the interference with freedom of expression under s.12(1A), and whether it was necessary in a democratic society, the Court stressed that it had to be recognised that a content-based restriction on freedom of expression, particularly in the context of political speech, required a compelling justification. However, in this case, it had been clearly established that there was a real risk of terrorist attacks in the UK and elsewhere, carried out by individuals who had been encouraged by the words of others. Deciding how to balance the value of freedom of expression against the need to combat terrorism was a highly sensitive matter and was primarily within the responsibility of the elected national authorities. Accordingly, the courts had to provide those authorities with a wide margin of appreciation; or, in domestic law, judicial deference. In this regard, the Supreme Court offered a wider margin to the Government than offered by the High Court in *Ammori*, and the government may be hopeful that the Court of Appeal will adopt a similar approach when it hears the appeal later this year.

As is required by s.2 of the Human Rights Act 1998, the Supreme Court referred to the jurisprudence of the European Court in this area. It noted that the Strasbourg had adopted a fact-sensitive approach, but taking into account: the context in which the words in question were spoken or written; whether the words could be understood as encouraging *violence* (author's italics); the size of the relevant audience; and whether the words amounted to an "apology for terrorism"; and the nature and severity of the penalties imposed (*Zana v Turkey* 1999 27 EHRR 66; and *Internationale Humanitare Hilfsorganisation eV v Germany* (Application no 11214/19, 10 October 2023)). Thus, in the Supreme Court's view, it was reasonable to conclude that, where all the elements of an offence under s.12(1A) were established, the interference with freedom of expression was, in principle, justifiable. Thus, there was no requirement that after the ingredients of the offence had been proved, a separate assessment had to be carried out of whether a conviction would be a proportionate interference with a defendant's right to freedom of expression. Both Government and Parliament had carried out that assessment when the legislation was brought forward and enacted.

Having made its ruling the cases of the defendants were then referred to the Crown Court for trial, where the judge would repeat the elements of that ruling to the juries, so that they understand the requirements of the offence, and the extent to which human rights can be pleaded in such proceedings. In those cases, under the ECHR case law, the jury will have to decide whether the words used by the defendants were an 'apology for terrorism' or legitimate democratic opinion. Following the Supreme court decision, however, those elements of proportionality might be irrelevant.

Conclusions

The decision in *Ammori* will, no doubt, reignite dissatisfaction from those who advocate the reform of the Human Rights Act and the withdrawal of the UK from the Council of Europe: the retreat from European human rights law. The government is appealing the decision, and permission was granted on 28 February, but it is to be hoped that the Court of Appeal, and the Supreme Court, will remind us of the dangers of reactionary and disproportionate measures to deal with a situation that needs to be resolved within the regular law and not via exceptional anti-terrorism law. The recent Supreme Court ruling in *ABJ*, above, tells us that once a group is proscribed, liability for supporting that group can be established reasonably simply, but not without proving some intention (recklessness) and clear connection with the causes of the proscribed group. That might be difficult to prove in many, but not all, of the 'supportive' actions connected with Palestine Action.

The decision to proscribe the group was perhaps genuinely introduced by the government, at that time, to be necessary in protecting national security and public safety. However, now that the courts have provided judicial guidance on the legality and reasonableness of such measures, it is questionable whether it is wise to press on with the measure, or seek an appeal to the Court of Appeal, or then to the Supreme Court. The High Court's approach is certainly sympathetic to a government's desire to regulate terrorist groups and their supporters. However, it is equally clear that a disproportionate application of that power, with little consideration to its impact on peaceful protest, and the possibility of using the regular criminal law to punish unlawful acts of protest, is likely to be challenged by the courts. In that sense, the Supreme Court's recent ruling on s.12 of the Act is certainly more deferential to government and Parliament, making the ruling of the High Court in *Ammori* even more critical to human rights and adherence to the rule of law.

In any case, Parliament might be wise to amend the existing legislation so that those groups whose *main aim* is not to commit acts of terrorism, but to engage in political protest (whether peaceful or not) are removed from the definition. That might make it easier and more logical to distinguish between other proscribed groups and Palestine Action. Groups such as Palestine Action, and its supporters, will then be subject to the traditional criminal and civil law when going beyond entirely peaceful protest; and those 'supporters' will be spared the extremes of terrorist legislation. Failure to address these issues may well lead to actions being brought before

the Strasbourg Court, with the possibility of legal and political conflict between the Convention and the domestic protection of Convention rights.

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BOOK REVIEWS

Kirsty Hughes, Stevie Martin and Stephanie Palmer, *Human Rights in the UK: Themes and Principles*, Cambridge University Press 2025

At a time when the textbook market on domestic human rights law has been largely replaced by texts on international human rights and specialist tomes on burning human rights issues, Cambridge University Press have published what at first sight appears to be a 'standard' text on the protection of human rights in the United Kingdom. The movement away from general texts in this area reflects the international and domestic concern for specialist and minority rights – such as environmental rights and the rights of the vulnerable – and this has affected the teaching of human rights, where traditional human rights courses are being replaced by studies of more specialist human rights concerns, and/or the institutions and process of enforcement of rights.

Civil Liberties texts began their life in the 1960's, concentrating primarily on police powers, aspects of the right to free speech (national security and the protection of morals) and the right to demonstrate. *Freedom, the Individual and the Law*, written by Harry Street and published by Penguin, was the set text, offering a readable and political insight into the battle between civil liberties and the state, and as (the most interesting) part of the student's study of constitutional and administrative law. Civil liberties and human rights texts (and courses) became popular from the 1990's when the law was being informed by the growing jurisprudence of the European Court of Human Rights, and the expected incorporation of the Convention into domestic law via the passing of the Human Rights Act 1998. Consequently, many human rights courses were shaped by books by leading experts such as Helen Fenwick and David Feldman, who provided outstanding academic commentary on rights' values, the process of protecting rights in the UK and in Europe, and the wide range of civil and political rights covered in the Convention and in domestic law. Other texts followed, written by academics and practitioners, following and explaining the case law under the Human Rights Act and the jurisprudence of the Strasbourg Court (together with the political and constitutional dialogue over the extent and enforcement of those rights).

Despite the legal and political growth of human rights in the UK, recently the publishers of human rights texts were reluctant to publish new editions, reflecting perhaps the change of focus in higher education to international human rights modules, or ones specialising in topics such as environmental rights, asylum and immigration law, discrimination and equality, and a wide range of economic and social rights. Domestic human rights law was largely being placed back into constitutional courses, as it was for many years, and the need for general human rights texts has been reduced.

The present text offers students, academics and practitioners a welcome return to expert and detailed coverage of domestic human rights issues, including those representing various new challenges to rights' protection in the last ten years or so. Written by three leading academic publishers and researchers in the enforcement of human rights in this jurisdiction, and in international and European law, the text offers a fascinating mix of human rights and their essential institutions and themes; an expert coverage of Convention and HRA rights (such as the right to life, freedom from torture, free speech, freedom of religion, the right to demonstrate, privacy and freedom from discrimination); and, importantly, a fascinating examination of some of the key and controversial rights and dilemmas in modern human rights law.

The initial chapters of the text follow the format of previous texts, covering the (critical) nature of rights, the enforcement of various rights in the United Kingdom, and the machinery for

enforcement of 'Convention' rights under the European Convention on Human Rights (and, where appropriate, EU and international law). The critical discussion in these chapters has been informed by the authors' research into specialist rights covered in the text, and we are introduced to many of the political and legal dilemmas that will help us understand the central arguments covered in those chapters. Much of the text then stays on reasonably traditional grounds in its coverage of the right to life, freedom from torture, inhuman and degrading treatment, the right to demonstrate, terrorism and human rights, freedom of religion and freedom from discrimination. These chapters are expertly written, successfully providing the reader with a critical awareness of the central themes and dilemmas, and the enormous amount of case law that has been produced in this jurisdiction and in Europe with respect to the recognition, enforcement and balancing of human rights.

The text stands out, however, because of its coverage and treatment of rights' issues and dilemmas not covered (in detail) in other general texts, but which are very much on the political and legal agenda in the early part of the twenty-first century. For example, after the chapter on the right to life and torture etc., we are provided with a chapter discussing issues on the beginning and end of life, including abortion rights and the current dilemmas raised by various aspects of assisted dying. This allows the reader to digest the substantive laws and case law in the context of the fierce debate from both sides, including the overruling of *Roe v Wade* in the USA, and the support and opposition to 'the right to die' in the United Kingdom (and in Europe). Such issues have been covered in other general texts, but the authors allow us to examine those dilemmas in detail based on their intense and critical research and considering current discussions and conflicts. Further, after the chapter on the battle between privacy and freedom of expression and press freedom, we are provided with chapters on the right to private and family life under Article 8 ECHR as it affects Immigration Law; incorporating political and moral discussions on the present government's new approach to immigration. Again, a specific chapter on hate speech then feeds into their examination of freedom of religion and equality and discrimination laws in subsequent chapters. Those chapters explore the current conflicts between free speech and the recognition of equality and diversity (including in universities), and the balancing of free expression with the protection of the rights of others to be free from discrimination and the enjoyment of their right to private life. There is also a chapter on Modern Slavery and Human Trafficking, including Article 4 of the ECHR's incorporation into domestic law via the Modern Slavery Act 2015. These areas reflect the authors' expertise and research into some of the modern dilemmas of rights' enforcement and are likely to reflect the interests of many law teachers who shape the content of their human rights modules. The text will also provide an invaluable resource to those in practice, or students, who must undertake assignments in these areas, or who are looking for inspiration for undergraduate or postgraduate dissertations.

The text thus successfully offers us both a welcome return to the general human rights text covering domestic and European law, together with a focus on controversial areas not usually included in those texts, but which are presently dominating political and legal discussion and arguments on human rights and their enforcement. In that sense, the book achieves both goals: an expert coverage of human rights law, themes and enforcement, with an opportunity to focus on pressing, specialist rights' dilemmas and challenges. The content and focus of the text are obviously affected by the authors' expertise and previous and current research, and consequently certain areas and rights are not covered – prisoners' rights, the right to a fair trial, liberty of the person (including police powers of arrest) – are not covered specifically. The text also fails to cover many aspects of Article 8, such as surveillances, instead focussing on privacy versus free speech. Such observations can be made of most general texts on human rights, and as the market for standard texts on human rights has now been severely affected by the concentration on specific rights and their enforcement, your reviewer offers no criticism with respect to those omissions. As stated above, universities have moved on from offering general modules covering all Convention and domestic human rights and have subsumed those discussions in modules covering constitutional law (or the criminal or civil justice system) or ones examining specific rights and institutions.

This text, and the authors' critical expertise, is particularly welcome at a time when human rights, and the rule of law (both domestically and internationally) are under threat from political opposition and right-wing populism. Echoing Phillipe Sands' recommendation of the book, it represents a 'vital, necessary, meticulous and magisterially accessible account of human rights law in Britain'. As stated in the preface, the authors are aware of the limitation of rights, and the inevitable conflict between different rights' holders (free speech versus privacy; free speech versus religion and freedom from discrimination), asking the reader to be aware of those limitations and conflicts, rather than abandoning the concept of rights all together.

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