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CONTENTS

ARTICLES

RECENT DEVELOPMENTS

Editorial

We are very pleased to publish the second issue of the twenty-sixth volume of the *Coventry Law Journal*, which marks the 25th anniversary of the Journal. This event was marked by a special conference held on September 30-1 October this year, where contributors from past editions presented their pieces, together with appropriate updates.

This gave us an opportunity to reflect on the Journal and what it has achieved over the years. We would like to thank all contributors, but particularly those who presented at the conference. These included regular contributors Dr Stuart MacLennan and Dr Steve Foster (your editors), Professor Barry Mitchell, Dr Mark Ryan and Dr Rona Epstein and Alex Simmonds from Coventry University, Professor Michael Adams from the University of New England, Australia, Chris and Nicola Monaghan from the University of Worcester, Laurence Vick (ex-student and solicitor), Professor Egbewole from Nigeria, and Sukhninder Panesar from the University of Wolverhampton. Special thanks go to Professor Nigel Duncan, and others who chaired panels; and to Dr MacLennan who organised and coordinated the whole event.

This issue contains pieces that reflect on legal developments over the last 25 years, and in particular, Dr Steve Foster examines both the rule of law and the protection of human rights in the UK Constitution in two articles that attack recent proposals for reform in these areas. There are also reflections from Professor Adams on comparative research, Dr Epstein on imprisonment for debt, and Dr Stanford On elections and voter ID. We also, once again, include articles from a colleague from Nigeria, as well as recent developments on various aspects of human rights and constitutional law.

The *Coventry Law Journal* has gone from strength to strength since it first started in 1996 with two principal aims: to inform our students of recent legal developments, and to provide staff and students with an opportunity to publish their research. Both aims have been achieved admirably over the years, but it has also attracted contributions from outside the university, numerous citations in other works, and publication on Westlaw. Thanks go to everyone who have contributed and here is to the next 25 years!

We hope you enjoy reading this issue and we look forward to your contributions in future issues. If you wish to contribute to the Journal and want any advice or assistance in being published then please contact the editors: the next publication date is July 2022, and contributions need to be forwarded by early June.

The editors: Dr Steve Foster and Dr Stuart MacLennan

ARTICLES

CONSTITUTIONAL LAW

The rule of law in modern times: not a Priti sight

Dr Steve Foster*

Introduction

> 'In the United States, anything that is unconstitutional is illegal, however moral it might be; in the United Kingdom, anything immoral is unconstitutional, however legal it may be.'

Many students embarking on, or indeed completing a Constitutional Law course, are adamant that the subject is nothing more than political studies, a continuation of their study of government and politics at school or college and lacking in any substantive law. As a consequence, they are often frustrated that constitutional law, if it exists at all, admits of no correct legal resolution, the answer to the issue in question being entirely dependent on one's political opinion. Thus, you agree that the government has acted *constitutionally* if you agree with the *political* outcome (raised taxes, restrictions on free movement during Covid-19), and disagree if you are against those policies. Of course, Constitutional Law is, more than any other core legal subject, informed by politics. Thus, we must expect that our own constitutional law, operating under an un-entrenched and flexible constitution, will be shaped by the politics of the present government, and its opposition by the politics of anyone opposing those laws.

Yet, however the subject is taught, there is no denying that Constitutional Law has *law*, and that many constitutional principles are contained in the law and must be followed as such.[1] At the heart of this is the idea of the *rule of law*: that government and public bodies are bound to act within and by the law.[2] That principle, it is argued, is not invalidated by the fact that much control over government and public bodies is exerted via non-legal mechanisms, such as constitutional conventions, parliamentary scrutiny and the power of the populace to vote out unpopular governments. Ultimately, the organs of government must be subject to the law, and, as we shall see, in the absence of an entrenched constitution, the rule of law has added significance in the UK.[3] Whatever one's politics, one can justifiably challenge the government and its policies by holding them up to the law and the rule of law. This allows for an objective,

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[1] In the UK constitution, our legal sources include statutes (e.g. the Human Rights Act 1998), case law (e.g. the recent *Miller* cases: *R (Miller) v Secretary of State for Exiting the European Union* [2018] UKSC 5*; R (Miller) v Prime Minister* [2019] UKSC 41), and enforceable international treaties (e.g. the European Convention on Human Rights and Fundamental Freedoms 1950). These sources allocate and regulate state power and identify and enforce fundamental rights, matters normally covered in a written, codified constitution; although these sources are not passed in a different 'constitutional' manner than regular law.

[2] See Joseph Raz, *The Rule of Law and its Virtue* (1977) 93 LQR 195, and A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (MacMillan 1915), Part II.

[3] See Lord Bingham, *The Rule of Law* (Allen Lane 2000); and Stephen Sedley, *Freedom Law and Justice* (Sweet and Maxwell 1999).

although not completely impartial, challenge to such actions, whether it be in private law, judicial review, or via human rights law.

The author makes this point to contextualize what is to follow - a rather scathing attack on the present government's constitutional misbehaviour in recent years, and in particular its disregard and contempt for the rule of law and the law itself. Such criticism is not levelled solely at the government's policies and is not based on any *political* disagreement with such (although the author disagrees with those as well), but on a *legal* insistence of adherence to the rule of law. In that way, it is hoped to illustrate that challenges to the government, and other public bodies are not based (solely) on political point scoring, but an insistence that government follow established principles embedded in the rule of law and constitutionalism. In turn, this can illustrate that the United Kingdom constitution is grounded in legal constitutionalism, and does indeed exist.

This article examines the role of the rule of law within the UK constitution, and how it has been threatened by recent government decisions and tactics, including proposals for reform of various aspects of legal accountability. It argues that such behaviour has threatened our notion of constitutionalism, and warns that the UK Constitution has been opened up to ridicule and challenge as a consequence. The article also attempts to provide the reader with an outline and critical examination of our constitution's main principles and frailties, thereby to assess its legitimacy and its very existence.

The rule of law and the United Kingdom constitution

The United Kingdom constitution often draws wide-eyed amazement from those who live under a written, formal and entrenched constitution, where governmental power and its limits are clearly identified, and breaches of the constitution are enforced, legally, by a constitutional court.[4] As the quote at the beginning of this article shows, we have traditionally judged the constitutionality of our government's actions by standards of morality rather than by strict law. Thus, we expect government to use its theoretically unlimited legal powers (via parliamentary (executive) sovereignty) within restrictions imposed by constitutional convention and principles of constitutional fair play,[5] shouting 'unconstitutional' whenever we witness what we regard as an abuse of power by the government of the day. This situation obviously gives rise to concern about the UK's constitutional legitimacy: the doctrine of parliamentary sovereignty, which determines that there is no higher constitutional authority than Acts of Parliament,[6] means that the courts have no constitutional power to challenge or ignore an Act that transgresses our feelings of constitutional propriety.[7]

This concern, of course, is exacerbated by the fact that the so-called doctrine of parliamentary sovereignty is, in reality, the doctrine of *executive* sovereignty, the constitution adopting a loose form of separation of powers and allowing the government of the day to sit in, and dominate,

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[4] Indeed, most countries adopt this form of constitutionalism, although the most of-cited examples are the United States of America and France.

[5] Some examples are that no executive power should be unlimited (*Padfield v Ministry of Agriculture, Fisheries and Food* [1968] AC 977); that decision-making bodies must follow the rules of natural justice (*Ridge v Baldwin* [1964] AC 40; that no one should be denied access to the courts *Chester v Bateson* [1920] 829; and that law and state power should not be retrospective (*Waddington v Miah* [1974] 2 All ER 377).

[6] See A.V. Dicey, *The Law of the Constitution,* note 2, Part 1.

[7] See, for example, the Privy Council Decision in *Madzimabuto v Lardner-Burke* [1969] 1 AC 645, where it was held that an Act of Parliament that restored the legislative powers of the Southern Rhodesia government to Westminster was legal despite it breaking a constitutional convention.

the main legislative chamber.[8] There appears, on the face of it at least, to be no end to this sovereignty and the use and abuse of government's legal powers; no effective and ultimate legal control of this power by an independent judiciary charged with defending the constitution. Government, therefore, can act 'unconstitutionally' – secure in the knowledge that they are untouchable in terms of binding judicial reprimand and remedy.

This, of course, represents an incomplete and misleading picture of our constitution and the presence of constitutionalism, including *legal* constitutionalism, in the UK constitution. It gives the impression that the UK constitution lacks any legal mechanism to control the actions of government, and that the courts have no power whatsoever to ensure that government follows the law. This would be to ignore Dicey's second pillar of the UK constitution: the rule of law.[9] Thus, in the absence of formal legal constraint, the domestic courts will insist that government acts within, and by the law.[10] The procedure of judicial review (and the application of private law to public bodies),[11] will ensure that government, along with other public bodies, act within the legal powers granted to them, either under statute or by the common law.[12] In addition, those powers must be exercised fairly and reasonably,[13] after following appropriate procedures,[14] and with due regard to human rights or other fundamental principles of the constitution.[15]

The UK constitution is now beginning to resemble a true constitution, based on the rule of law and legal accountability of the government, together with the ability to impose legal remedies on those in office who abuse their legal, and constitutional, powers.[16] Yet the operation of the rule of law in the UK Constitution is inevitably restricted by the other twin pillar of our constitution: the doctrine of parliamentary sovereignty.[17] Thus, although a court can review an

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[8] Lord Hailsham, the former Lord Chancellor, used the phrase 'The Elective Dictatorship' to describe our constitution. See Rod Taylor, 'We are still perilously close to Hailsham's 'Elective Dictatorship'https://blogs.lse.ac.uk/brexit/2019/09/30/we-are-closer-than-ever-to-hailshams-elective-dictatorship/

[9] See Albert Venn Dicey, *The Law of the Constitution,* note 2.

[10] See for example *Chester v Bateson*, note 5 above, *A v Secretary of State for the Home Department* [2004] UKHL 56, and *M v Home Office* [1994] 1 AC 377, considered below

[11] The government and other public bodies can generally sue and be sued in private law. See *Entick v Carrington* (1765) 19 St. Tr. 1030, where the plaintiff was allowed to sue the Secretary of State in trespass for an unlawful interference with his real and personal property.

[12] Common law powers consist of residual royal prerogative powers, formerly exercised by the Monarch, but now carried out by the government of the day, and have in recent years been subject to judicial review. The decision of the House of Lords in *Council of Civil Service Unions v Minister for Minister of State for the Civil Service* (the 'GCHQ' Case) [1985] 1 AC 374 made most exercises of prerogative powers justiciable.

[13] See the principles of *Wednesbury* reasonableness (*Associated Provincial Picture House Ltd. v Wednesbury* Corporation [1948] 1 KB 223. and the rules of natural justice: *Ridge v Baldwin*, note 5, above. These principles have been augmented by 'European' principles of proportionality and necessity, incorporated or given effect to into English Law from both European Union Law and the law of the European Convention of Human Rights (1950).

[14] These procedures may be laid out in the empowering statute itself, or derive from the common law, known as the rules of natural justice, See *Ridge v Baldwin*, note 5, above

[15] See the Human Rights Act 1998, which gives effect to the rights contained in the ECHR, as supported by 'British' principles such as access to the courts, the independence of the judiciary, the presumption of innocence, legal accountability, and the control of unfettered discretion and power.

[16] The Human Rights Act 1998, which allows Convention rights claims to be brought in any legal proceedings, and for the courts to award remedies for breach of such rights (see ss. 7-8 HRA). See also, *M v Home Office*, n. 10, above, establishing that Ministers must obey the law and legal orders as a matter of law and not of grace or polite convention.

[17] See Dicey, note 2 above, Part I; Lord Bingham, 'Dicey Revisited' [2002] *Public Law* 39, and Jeffrey Jowell, 'Parliamentary sovereignty under the new constitutional hypothesis' [2006] *Public Law* 562.

executive act that exceeds the legal powers bestowed by the law;[18] if that same action is sanctioned expressly by an Act of Parliament (passed of course by a Parliament dominated by the government in power), the courts are powerless to intervene.[19] This factor, at least for the time being, has to be accepted as part of our constitution, but this article examines other potential restrictions on the notion of government within and by the law that arise from the nature of the UK constitution.

The first of these factors relates to the question of justiciability: whether a decision or action of government is susceptible to *legal* review or challenge in a court of law. Obviously, Acts of Parliament are not reviewable, save when Parliament itself has decreed that they should be.[20] Acts of government, of course, are, as government must act within a higher authority: parliamentary legislation or the common law. Yet, the more decisions of government are labelled political rather than legal, the less opportunity the courts have to use their legal powers to control government behaviour. In this sense, the recent decisions of the Supreme Court with respect to both the decision to leave Europe,[21] and to suspend Parliament in order to frustrate democratic debate on the withdrawal agreement,[22] are welcome in terms of maintaining the rule of law and supporting a legitimate constitution. This is despite the decision being criticised, by the government and the popular press, as an attack on democracy and the parliamentary process.[23] Equally, the more recent challenge to the Prime Minister's interpretation of the code of practice on ministerial behaviour (and his subsequent refusal to sanction the Home Secretary, Priti Patel, for alleged bullying), provided an opportunity to restore our belief in legal accountability and the rule of law.[24]

The second factor relates to the situation where the government or public official simply ignore the law, or more specifically ignore a court order demanding that they abide by the law. Recently, the government, and the Home Secretary in particular, were reminded that judicial directions to assist with judicial proceedings are *legally* binding and not followed as a matter of governmental discretion or polite constitutional convention.[25] Judicial deference to the government in challenging policies and actions is one thing, but the idea that judicial orders can be ignored is a dangerous practice, and needs to be 'nipped in the bud' clearly and emphatically.[26]

The third factor is the current government's failure, or refusal, to embrace international and European principles of human rights, justice and accountability in its legal and constitutional

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[18] Traditionally, on grounds of illegality, irrationality and procedural impropriety (Lord Diplock in 'the GCHQ' case, note 12, above).
[19] See *IRC v Rossminster* [1980] I AC 952, although now a court might declare such legislation as incompatible with the Human Rights Act 1998; see *A v Secretary of State of the Home Department*, note 10, above.
[20] Thus, the European Communities Act 1972 specifically (in s.2(4) of the Act) stated that Acts of Parliament and other provisions had to be interpreted and given effect to subject to applicable European (Community) Law. In addition, the Human Rights Act 1998 provides the courts with greater powers of review and interpretation of legislative and administrative measures, including the power to declare legislation incompatible with ECHR rights, under s.4.
[21] *R (Miller) v Secretary of State for Exiting the European Union* [2018] UKSC 5.
[22] *R (Miller) v Prime Minister* [2019] UKSC 41.
[23] See Owen Boycott and Heather Stewart, 'MPs condemn newspaper attacks on judges after Brexit ruling' The Guardian 4 November 2016.
[24] This is considered below when discussing justiciability. In December 2021, the High Court ruled that the matter was justiciable, but found that the Prime Minister had not misinterpreted the code: *R (on the application of the FDA) v Prime Minister and Minister of the Civil* Service [2021] EWHC 3279 (Admin).
[25] This is considered below when discussing the enforceability of court orders.
[26] This was highlighted nearly thirty years ago in the case of *M v Home Office,* note 10, above.

order.[27] Buoyed by its recent withdrawal from the EU, and its willingness to isolate itself from Europe and European ideals, the government is now embarking on several proposals to reduce opportunities for legal challenge.[28] This includes watering down the effect of human rights legislation,[29] specifically to derogate from the European Convention on Human Rights and the Human Rights Act 1998 with respect to human rights violations committed by our armed forces overseas), and to circumvent the availability and effectiveness of judicial review.[30] Free, in domestic law at least, from the constraints imposed by international law and standards, government is tempted even more to disregard the rules of justice and human rights. This makes judicial intervention from the domestic courts, using the limited powers it has at its disposal, more fundamental; and the fight against further proposals to provide legal immunity to the government more important.

Court orders, Home Secretaries and the rule of law

The first of our case studies on the rule of law and current government practice concerns the question of whether the government is legally bound to follow a legal order intended to facilitate justice, and whether the courts can legally sanction those who refuse to follow those orders. In what was described as a landmark court ruling,[31] it was held that the Home Secretary, Priti Patel, was legally accountable for failures in ensuring that deaths in immigration detention centres were properly investigated. The court found that three of the Home Secretary's detention policies breached human rights rules and, importantly, that she could not frustrate or undermine inquiries into these deaths by ignoring a previous court ruling and attempting to deport a key witness to the investigation.[32]

The facts were that two friends, Ahmed Lawal and Oscar Lucky Okwurime, both from Nigeria, were in Harmondsworth immigration removal centre when on 12 September 2019 Okwurime was found dead in his cell. Under Article 2 of the European Convention on Human Rights (1950), the Secretary has a legal duty to assist the coronial inquest by identifying and securing evidence from potential witnesses.[33] Instead, she elected to continue with her plans to remove a number of potential witnesses, including Mr Lawal, by charter flight on 17 September 2019. Lawal and a handful of others were able to instruct lawyers through last minute referrals from frontline organisations such as Medical Justice and Movement for Justice. Lawal requested that his removal be deferred to enable a proper investigation into whether he would be a relevant

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[27] Notably under the European Convention on Human Rights and Fundamental Freedoms 1950 , as members of the Council of Europe, and what remains of European Union law after its withdrawal.

[28] See the proposed Judicial Review and Courts Bill 2021: A Bill to Make provision about the provision that may be made by, and the effects of, quashing orders; to make provision restricting judicial review of certain decisions of the Upper Tribunal; to make provision about the use of written and electronic procedures in courts and tribunals; to make other provision about procedure in, and the organisation of, courts and tribunals; and for connected purposes. At the time of writing, it is in its second reading in the House of Commons.

[29] On 7 December 2020, the Justice Secretary, Robert Buckland, announced that Sir Peter Gross, a former Lord Justice of Appeal, would chair a panel tasked with reviewing the operation of the Human Rights Act 1998. See Steve Foster, 'Long in the making: the 'Gross Review' and Conservative Party Policy on the reform of human rights law' (2021) 26(1) *Coventry Law Journal* 17.

[30] See the decision of the Supreme Court in *Smith v Ministry of Defence* [2013] UKSC 41, where it was held that the government was liable for any unlawful deaths committed by British armed forces during its occupancy of Iraq.

[31] See Diane Taylor 'Priti Patel's detention policies found to be unlawful', *The Guardian*, 14 April 2021.

[32] *R (on the application of Lawal) v Secretary of State for the Home Department* (JR/626/2020(V)).

[33] Article 2 provides that everyone's right to life shall be protected by law and the European Court of Human Rights has established that this includes a procedural obligation on the state to investigate deaths that might be in breach of Article 2: *Jordan v United Kingdom* (2003) 37 EHRR 3.

witness for the forthcoming investigation, but the Secretary refused this request. He was thus compelled to issue last minute judicial review proceedings challenging the lawfulness of his removal in circumstances where the Secretary was removing potential witnesses to a death in her custody that was due to be investigated. On 17 September 2019, the High Court ordered an injunction on Mr Lawal's removal on the basis that there was a serious issue that there should not be any removal of persons for whom there are grounds to believe that they may have material evidence to give in relation to the death of Okwurime. On 21 October 2020, the Area Coroner for West London informed the Secretary and Mr Lawal that he was an 'important witness of fact' as the only live witness who can speak to certain parts of the evidence, particularly the presentation of the deceased in the days before his unfortunate death. Mr Lawal gave evidence in person, as directed by the Coroner. Following the hearing that took place in November 2020, the jury found that Mr Okwurime had died unnaturally, as a result of neglect.

Lawal's legal challenge, focused on the question whether the Home Secretary can remove a potential witness to a death in custody before it is clear whether they will be needed as a witness. In particular, the questions were:

> whether the Secretary can lawfully remove a potential material witness to a death in custody, in circumstances where their evidence has not been secured and a coroner has not made a decision as to whether they are required to give evidence at the final inquest hearing; and whether her failure to have in place a policy framework, which makes clear provision for a proper investigation into witnesses to a death in custody prior to any enforcement action being taken, is lawful.[34]

The case was heard by the President of the Upper Tribunal, Mr Justice Lane and Upper Tribunal Judge Canavan, and the court granted Mr Lawal's application for judicial review on both grounds. First, the judges found that the policy in place at the time of the death of Okwurime created an unacceptable risk that the Home Secretary would fail to comply with her Article 2 procedural duties of securing relevant evidence, following a death in immigration detention.[35] Second, her decision to remove the applicant to Nigeria was unlawful, as she had failed to take reasonable steps to secure his evidence and take other minimum steps, contrary to her procedural obligations under Article 2.[36] Third, the replacement DSO policy of 2020 was unlawful as it failed to direct individuals within the immigration detention estate to identify and take steps to secure the evidence of those who may have relevant information concerning the death in detention.[37] Fourthly, the present policy framework concerning removals of foreign nationals (*J*udicial Reviews and Injunctions – Version 20.0 (10 October 2019)) was found to be 'legally deficient' as it failed to make any reference to her Article 2 procedural requirements following a death in detention.[38] Accordingly, the judges held that the absence of a policy to

[34] *R. (on the application of Lawal) v Secretary of State for the Home Department* (JR/626/2020(V)), 22
[35] Further, the court found that the inadequacy of this policy was confirmed and illustrated by the failings of the Home Secretary after the death of Mr Okwurime *R. (on the application of Lawal) v Secretary of State for the Home Department* (JR/626/2020(V)), 77
[36] *R. (on the application of Lawal) v Secretary of State for the Home Department* (JR/626/2020(V)), 84, applying *Jordan v United Kingdom*, n. 33.
[37] *R. (on the application of Lawal) v Secretary of State for the Home Department* (JR/626/2020(V)), 84
[38] *R. (on the application of Lawal) v Secretary of State for the Home Department* (JR/626/2020(V)), 85

govern the position following a death in immigration detention was unlawful and concluded that there needed to be such a policy.[39]

It is important to stress that this is not simply a case where the government has been found to have broken the *law*. All successful judicial review cases are based on the finding that the relevant body has not followed the law in some sense: substantively or procedurally. All unsuccessful parties to legal actions discover, in retrospect, that they have broken the law, and judicial review proceedings are no different in that respect. Rather, the case is an example of the government challenging, and being prepared to flout the *rule of law*, to set themselves above the law (in this case a court order and the requirement to secure relevant witnesses). It is not simply a question of not knowing the rules on securing witnesses and ensuring an effective investigation. Instead ignoring those rules in the belief that they cannot be accountable, or sanctioned for breach. The act of deportation in this case, which had the effect of frustrating the giving of evidence, has thus all the features of the Prime Minister's attempts to suspend Parliament so as to frustrate its attempts to discuss the government's Brexit plans.[40] Jamie Bell, Lawal's solicitor, stated:

> …the case demonstrates the cavalier attitude of the Home Office when enforcing removals. Despite a tragic death within a detention centre, the Home Secretary did not hesitate to maintain her plan to remove potential witnesses by charter flight, ignoring anyone who wished to come forward to give evidence.

The Guardian noted that the case was the first time that a Home Secretary has been found to have breached a detainee's human rights by refusing to allow them to give evidence at an inquest.[41] In its defence, the Home Office spokesperson said that it had noted the judgment and will be refreshing its current processes, such as introducing a new checklist to ensure that all potential witness are identified. An apology too late to hide the fact that the government had no intention of following the law or the legal edicts of the judiciary.

Despite the novelty of the case, there have been previous incidents of government ministers ignoring court orders in the belief that they should be followed by political politeness and convention rather than out of legal obligation. In the infamous case of *M v Home Office*,[42] the House of Lords held that a minister or other officer of the Crown is amenable to the contempt jurisdiction of the court even when acting in his official capacity, and that an injunction could be granted against ministers and other officers under s.31 of the Senior Courts Act 1981. In that case, A, a citizen of Zaire, came to the UK seeking political asylum, but his application was rejected, as was his application for judicial review. He was notified that he would be returned to Zaire, but made a renewed application for review, and in those proceedings the judge indicated that he wished A's departure to be delayed and understood counsel for the Secretary of State to have given that undertaking. In fact, A was then removed, counsel not conceding that he had given any such undertaking. The court ordered A's return forthwith, but the Secretary of State, on legal advice that the mandatory injunction had been made against the Crown without jurisdiction, cancelled the return. Contempt proceedings were brought against

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[39] Finally, the judges found that that the Secretary seriously breached her duty of candour in judicial review proceedings by failing to disclose correspondence sent by the Coroner following the inquest into the unnatural death of Carlington Spencer in IRC Morton Hall in which the Coroner had expressed severe criticism of the Secretary for attempting to remove relevant witnesses. *R. (on the application of Lawal) v Secretary of State for the Home Department* (JR/626/2020(V)), 58-63.

[40] See the Supreme Court's decision in *R (Miller) v Prime Minister* [2019] UKSC 41, considered below.

[41] Jonathan Ames, 'Home Secretary broke law over death of detainee' *The Times*, 15 April 2021, 2.

[42] [1904] 1 AC 377.

the Minister, but at first instance, Simon Brown J. held that the Crown's immunity from injunction was preserved by s.21 of the Crown Proceedings Act 1947.[43]

Both the Court of Appeal and the House of Lords' rejection of the Minister's claim for legal immunity in *M* re-iterated the courts' powers to subject the government to the rule of law.[44] Equally, in the present case, the judges' decision that the Home Secretary had acted unlawfully in frustrating the inquest into a death in detention serves as a potent reminder that governments and Home Secretaries act within the law and have to abide by lawful court orders. Any other finding would be detrimental to legal accountability, the rule of law and basic principles of constitutionalism. It would further leave our Constitution with little or no mechanism for ensuring that the constitution and our principles of constitutional fair play are upheld; fuelling the belief that we do not truly have a constitution, and that our constitutional law is based on no more than being politically right or wrong.[45]

Brexit plans, ministerial codes, justiciability and the rule of law

As stated above, the issue of justiciability is at the heart of enforcing the rule of law in any constitution, particularly the UK's. If government decisions or actions are not justiciable, then strong governments will be able to ride the waves of political or public disapproval and are thus free from effective control. Although certain practices and actions are correctly labelled as political and thus not susceptible to legal challenge,[46] it is crucial that in a constitution that lacks legal entrenchment and strong judicial supremacy, that as many acts of the government as possible are subject to judicial review (in the widest sense). This has been achieved over the years by the expansion of the doctrine of judicial review (in its narrow sense) to cover acts which are not simply *ultra vires* the government's statutory and common law powers. Thus, the courts can now question the exercise of powers and discretion that are activated by improper purpose or abuse of discretion,[47] and the principles of irrationality and proportionality ensure that the courts can question unreasonable use of power where previously this was thought to be beyond the courts' constitutional role.[48] Further, our constitutional law has developed to make certain issues, traditionally thought of as inappropriate for judicial determination, justiciable, particularly in the area of prerogative powers.[49]

Brexit and justiciability

The issue of justiciability in our constitutional law was raised most strikingly in the Brexit saga concerning our withdrawal from the European Union after the 2016 referendum, where a

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[43] [1991] 7 WLUK 352

[44] For commentary, see Mark Gould '*M v Home Office*: government and the judges' [1995] *Public Law* 568; Carol Harlow 'Accidental Loss of an Asylum Seeker' (1994) 57(4) *Modern Law Review* 620; Rodney Brazier 'Ministers in Court: the personal legal liability of Ministers [1994] 44(4) *Northern Ireland Legal Quarterly* 317.

[45] See Frank F. Ridley, 'There is no British Constitution; a dangerous case of the Emperor's new clothes' (1988) 41 (3) *Parliamentary Affairs*, 340.

[46] Such as the rules and procedure of Parliament, including, more controversially, that the courts cannot question how an Act of Parliament proceeded through Parliament: *Pickin v BRB* [1974] AC 765.

[47] *Padfield v Ministry of Agriculture, Fisheries and Food* [1968] AC 997

[48] Proportionality (balancing the aims of the law with the enjoyment of rights) is part of European human rights law, as given effect to by the Human Rights Act 1998. Previously, the courts could not use the doctrine, as it was felt that it allowed the courts to judge the merits of actions and policies: *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696.

[49] See the 'GCHQ' case, n. 12 (prerogative powers generally reviewable), *R v Secretary of State for the Home Department, ex parte Fire Brigade Union* [1995] 2 All ER 244 (decision to bring legislation into effect reviewable on grounds of abuse and fettering of discretion), and *R v Secretary of State for the Home Department, ex parte Bentley* [1994] QB 349 (prerogative power to pardon reviewable on some grounds).

(small) minority voted in favour of withdrawal. Once the government set its sight on a withdrawal plan, legal questions were raised as to whether that could be done without the approval of Parliament. For the government, the people had spoken and any political or judicial attempts to overturn or question that withdrawal would be considered unconstitutional and undemocratic. The counter argument was that that a withdrawal without appropriate parliamentary discussion and approval would provide government with an unlimited power to decide the fate of the county's international position, alongside the rights of citizens to continue enjoying the raft of their acquired European individual rights. With respect to government within the law, and the rule of law, the question was fundamental. Should government be allowed to take such a momentous decision without parliamentary and legal regulation; and if the answer was no, what would that tell us about the state or existence of our constitution as a legal restraint on government?

In the end, both the decision to withdraw from the EU, by triggering Article 51 of the Treaty without Parliamentary involvement,[50] and the decision of the Prime Minister to suspend Parliament in an attempt to frustrate Parliamentary debate on the government's withdrawal plans,[51] were held to be justiciable and then unlawful. Both decisions caused great political, public and indeed legal debate, with the courts being accused of undermining the democratic process and acting beyond their constitutional powers.[52] However, given the fact that the government eventually succeeded in pushing their proposal through, and the initial majority vote won out, does it matter that the law and the rule of law was initially flouted?

It is argued here that it matters very much. The first government decision was to ignore Parliament's contribution to the process and treat the decision to withdraw as a wholly executive decision governed by the royal prerogative. This was not only *democratically* and *politically unconstitutional*, but ignored the fact that *legal* rights, established by virtue of the European Communities Act 1972 and the resultant membership of the European Union, would be affected by withdrawal. The government's wish of course was to side step this process and deal with the legal consequences (if any) after; but the decision of the Supreme Court insisted that that process be carried out before the triggering of Article 51 was affected. True, this required a good deal of judicial guile on the part of the Supreme Court with respect to justiciability,[53] but as with its other decision on the prorogation of Parliament, below, without such a decision, government could change the fundamental legal landscape by executive action. That would have been contrary to the fundamental feature of the UK's democratic constitution and, of course, the rule of law. Simply, something had to be done to prevent this, and the Supreme Court's decision salvaged the constitution from the government's unconstitutional (and as it turned out illegal) behaviour.

Once the government were forced to use Parliament to approve its withdrawal package – now via the EU Withdrawal Bill 2019 – it turned its attention to forcing its plans through Parliament with as little debate and opposition as possible. Hence the Prime Minister decided to ask the Queen to prorogue (suspend) Parliament early, which would have the effect desired by the government and the Prime Minister, as the deadline for triggering Article 51 would have passed

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[50] *R (Miller) v Secretary of State for Exiting the European Union* [2018] UKSC 5.
[51] *R (Miller) v Secretary of State for Exiting the European Union* [2019] UKSC 41.
[52] See Chris Monaghan, *'The Prorogation Litigation: 'which was as if the Commissioners had walked into Parliament with a blank piece of paper'* (2019) 24 (2) *Coventry Law Journal 7.*
[53] See Sir Philip Sales, 'Legalism in Constitutional Law: judging in a democracy [2018] *Public Law* 687. Mark Elliot, 'Constitutional adjudication and constitutional politics in the United Kingdom: the Miller II case in legal and political context' (2020) 16 (4) *European Constitutional Law Review* 625, and Paul Craig, 'The Supreme Court, prorogation and constitutional principle [2020] *Public Law* 248.

by the time Parliament sat again. Neat trick if you can get away with it, but was this potentially *unlawful* (justiciable), or merely *politically unconstitutional* (and non-justiciable)? The Supreme Court held that the Constitution was built on the separation of powers and democratic accountability, including the power and duty of Parliament to control the executive. Hence, the Prime Minister's actions had frustrated those fundamental purposes and thus acted unlawfully: the prorogation was, thus, invalid.[54] Once again, the Prime Minister was forced to act within the law, and the rule of law; he was not allowed simply to plead that this was a politically legitimate (albeit devious and/or fraudulent) way to achieve a political aim; *the law* of the constitution has to be followed.[55]

It is argued that both decisions, although contentious, were vital to the maintenance of our fragile constitution and the role of the rule of law within it. The UK constitution is, of course, heavily dependent on who holds the political power at any given time – the dominant executive in an essentially democratic Parliament. However, without some *legal* control of the government, Parliament is simply bulldozed into accepting government policy, particularly where that policy is given effect through residual prerogative powers. That situation would question the very nature or existence of any UK constitution, and the Supreme Court rescued us from that scenario.

Ministerial codes on bullying and justiciability

It is important to constantly remind government, dare we say *this* government in particular, that its actions and decisions have consequences, including *legal* consequences, and they can be held legally (and politically) to account for them. This is raised by the Prime Minister's decision not to sanction his Home Secretary for alleged bullying, which was claimed to be in breach of the Ministerial Code.[56] Should we have to accept the Prime Minister's finding on this matter, that her conduct did not on 'proper' interpretation, breach the code, or is this a decision that can and should be reviewed by the courts?

The Prime Minister decided to keep Patel in post last year after he found that she had not breached the Ministerial Code, which sets behavioural standards. This followed an investigation in November 2020, via an inquiry carried out by the Prime Minister's head of standards, Sir Alex Allan, who found that she had 'unintentionally' broken the ministerial code; her approach to staff, on occasions, amounting to behaviour that can be described as bullying in terms of the impact felt by individuals.[57]

On its website, the Association of First Division Civil Servants (FDA) explained why it was bringing the action.[58] This was because; despite the evidence of the report, the Prime Minister sought to give weight to the Home Secretary's assertion that any behaviour was unintentional and therefore concluded that she had not breached the code.

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[54] *R (Miller) v Secretary of State for Exiting the European Union* [2019] UKSC 41, 38-52.
[55] See Mark Elliot, 'Constitutional adjudication and constitutional politics in the United Kingdom: the Miller II case in legal and political context' (2020) 16 (4) *European Constitutional Law Review* 625, and Paul Craig, 'The Supreme Court, prorogation and constitutional principle [2020] *Public Law* 248.
[56] Dominic Casciani, 'High Court to look at PM's Patel 'bullying' decision' BBC News, 28 April
[57] 'Findings of the Independent Adviser': https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/937010/Findings_of_the_Independent_Adviser.pdf. The report also stated that Patel – who had offered a fulsome apology - had sometimes 'legitimately, not always felt supported' by others within the Home Office.
[58] See 'Why we've launched a judicial review of the Home Secretary's breach of the Ministerial Code', fda: the union for managers and professionals in public service: https://www.fda.org.uk/.

> Our challenge in the court is essentially that the Prime Minister's decision was irrational given the obligations of the Code, and indeed his own words in its foreword that "there will be no bullying and no harassment". It is entirely a matter for the Prime Minister to consider the factors he feels appropriate in determining any sanction following a breach, and that is not a matter on which we seek to intervene. Our contention, however, is that given the clear obligations under the Ministerial Code in relation to bullying and harassment, the Prime Minister's decision effectively concludes that the Home Secretary did not bully civil servants as she states this was not her intent.

In particular, the FDA pointed out that the Home Office itself deals with the issue of intent in its definition of bullying: 'Bullying is not about whether the perpetrator of the acts intended them or not, but about the impact on the recipient and how it makes them feel'. The FDA's argument is that the elements of the code on bullying - and a judgement on whether someone has been victimised - must be open to scrutiny under employment law. Thus, it had been pointed out that if the FDA did win the case it would mean that some of the Prime Minister's conduct might be open to scrutiny under employment law, as if he were any other kind of boss.[59] That in turn would be a massive constitutional question for the Supreme Court, which could be asked to redefine the boundary between politics and the law.

Thus, although the application and interpretation of the code should, at least initially, be a matter for politicians and not the courts, given the constitutional importance of this issue with respect to accountability and ministerial standards, it cannot be right that the interpretation of the code is left to one person, who might have political reasons for his determination. This is a further example of politicians, and the existing government, taking action in the (hopefully mistaken) belief that as we have spoken and that will be the end of the matter. Such an attitude is damaging to a healthy democracy and the rule of law, despite the possibility of political and electoral accountability for such behaviour.[60]

When the case went to trial, it was held that the Prime Minister had not misinterpreted paragraph 1.2 of the Ministerial Code and had not, therefore, acted unlawfully in failing to take action against the Home Secretary.[61] Positively, the court noted that the issue raised by the claim was the proper interpretation of the words 'harassing, bullying or other inappropriate or discriminating behaviour' contained in paragraph 1.2 of the Code, and accordingly that those words were capable of interpretation by a court of law. Thus, in the Court's view, as a matter of principle, the question of whether the Code excluded offensive conduct from the paragraph 1.2 definition of bullying if the perpetrator was unaware of, or did not intend, the harm caused, was justiciable; and the fact that the Code had no statutory basis did not, of itself, render that question non-justiciable.

Less encouragingly, however, the court made it clear that the scope for review in such cases was limited to pure questions of legal interpretation, and that the Prime Minister's decision to use his powers to discipline a Minister was not reviewable. The ruling on the Prime Minister's

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[59] Dominic Casciani, note 56, above.

[60] A further example of the government's indifference and hostility to regulation and accountability was seen in the recent Owen Patterson affair. In order to thwart an investigation into the Conservative MP's alleged breach of lobbying rules, the government instead called for an overhaul of the MPs standards watchdog instead. Later the government backed down and abandoned the overhaul and the MP resigned: Jennifer Scott, 'Owen Patterson quits as MP over lobbying row 'nightmare, BBC News, 4 November 2021.

[61] *R (on the application of the FDA) v Prime Minister and Minister of the Civil Service* [2021] EWHC 3279 (Admin).

application of the code to the Home Secretary is, thus, disappointing. Under the rules of administrative law, decisions should be supported by evidence and even the most political of decisions should be subject to some review, including basic rationality. The review of that decision does not have to be robust, and can give the decision-maker a certain element of discretion, but to say that a decision-maker must appreciate the legal boundaries of its jurisdiction, but then to give absolute discretion as to how that legal power is applied, makes the initial finding of justiciability fruitless.[62] Further, it again exposes the frailty of our constitution in controlling instances excess of power.

Further attacks on the rule of law: reforming human rights law and judicial review

This section of the article will focus on the government's most recent plans to reform both the Human Rights Act 1998 and the scope of the remedy of judicial review. In the absence of an entrenched constitution, a bill of rights and supreme constitutional court, our constitution relies heavily on adherence to international and European human rights' standards and the common law power of the courts to review the legality and reasonableness of government acts and decisions. These remedies are, of course, subject to parliamentary sovereignty, but in order to comply with basic principles of liberty and constitutionalism, it is essential that our constitution provide an adequate framework for protecting fundamental human rights and holding government legally to account. This article will not detail these plans, but merely highlight some of the proposals in the context of the discussion and concern over the current government's record on accountability and the rule of law.[63]

In the UK, the absence of an entrenched Bill of Rights and formal constitutional review by our courts, the common law protection of rights and liberties, together with the legal remedy of judicial review of administrative action, ensures that the government's powers are legally curtailed, particularly with respect to what other constitutions regard as fundamental human rights.[64] This system has been built up over the years: by the courts in their development of constitutional rights and judicial review,[65] and by Parliament itself, primarily with the passing of the Human Right Act 1998, which ensures as far as possible that our system complies with the European Convention on Human Rights 1950.

Yet for this system to operate effectively, and to allow it to compare favourably with other constitutions, it is essential that government accept the courts' role in enforcing the rule of law, and does not via legislative or other change seek to limit the proper enforcement of human rights and executive review. Thus, our system is particularly vulnerable to the doctrine of parliamentary sovereignty and legislative change inspired by government policy, and several recent government proposals are threatening to restrict or nullify the courts role in both areas.

Reform of human rights law

Since the passing of the Human Rights Act 1998, there have been many attempts by consecutive governments to reform or repeal the Act and to return to the common law system

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[62] For a criticism of the High Court' decision, see See Steve Foster 'Interpreting ministerial codes, justiciability and the rule of law' (2021) 26(2) Cov. Law J 101.
[63] See Steve Foster 'Should it go or should it stay? The coming of age of the Human Rights Act 1998, or time to say goodbye? (2021) 26(2) Cov. Law J 23
[64] See Helen Fenwick, *Civil Liberties and Human Rights,* 4th edn. Routledge 2017, chapter 2, and Steve Foster, *Human Rights and Civil Liberties,* 3rd edn. Longman 2011, chapter 3.
[65] Sir John Laws, 'Is the High Court the Guardian of Fundamental Constitutional Rights?' (1992) 18 (4) *Commonwealth Law Bulletin* 1385.

of rights protection.[66] These proposals have been spurred either by landmark decisions of the domestic courts or the European Court of Human Rights,[67] or the more general desire to free the state and society from the strict principles and supervision of the European Convention and the European Court.[68] In either case, the proposals desired to give power back to our courts, and of course, to the government, to devise and maintain our own human rights principles based on traditional British notions of justice.[69]

The system used under the Human Rights Act has never threatened the doctrine of parliamentary (and executive) sovereignty; certainly not to the extent that the European Communities Act 1972 did. Nevertheless, the power of the domestic courts to employ Convention principles, and their duty to, at least, take into account the decisions of the European Court of Human Rights,[70] caused concern that the Act was disturbing our traditional separation of powers and the proper constitutional role of our judges. More specifically, it was feared that the Act had replaced our own notions of rights and justice with those imposed by the European order. In any case, the reform of the Human Rights Act, and in particular the freeing of domestic law and judges from the case law of the European Court, is clearly back on the political table. Thus, unveiling details of planned reform to the Act, the Justice Secretary has said British soldiers and institutions such as the police and NHS should not be "dictated to" by the European Court of Human Rights (ECtHR), and that he was planning a "mechanism" to allow the Government to introduce ad hoc legislation to correct judgments that ministers believe are incorrect.[71]

Before examining the most recent plans to challenge the 1998 Act, let us consider the rationale behind the wish to return to our own common law system. Before the Act was passed, our common law method of rights' protection was found wanting because there were insufficient means to challenge government acts and parliamentary legislation.[72] This was largely due to the feeling that it would be unconstitutional for our courts to question parliamentary legislation or government autonomy beyond asking whether it was within the relevant legal powers.[73] The Act allowed the courts to consider the proportionality of administrative action,[74] and to declare legislation incompatible with Convention rights,[75] and thus the *balance* between rights and state power had altered. Now, rights were to be given an enhanced status and it was more

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[66] For example, proposals were included in both the 2010 general election manifesto and the Coalition Agreement, which committed the government to establish a Commission to investigate the creation of a British Bill of Rights that incorporates and builds on all our obligations under the European Convention on Human Rights. The Commission commenced work on 18 March 2011 under the chair of Sir Leigh Lewis. Its final report entitled *A UK Bill of Rights? - the Choice Before Us*, was published on 18 December 2012.

[67] Most notably the decision of the House of Lords in *A v Secretary of State for the Home Department*, n. 10. (Detention without trial), and the European Court's decisions in *Othman v United Kingdom* (2012) 55 EHRR 1 (deportation and fair trials) and *Hirst v United Kingdom (No. 2)* (2006) 42 EHRR 41 (prisoner voting rights).

[68] In particular, to allow the domestic courts to ignore European ideals of proportionality and necessity and decisions of the European Court, and instead to apply 'British' standards of justice.

[69] Steve Foster, 'Repealing the Human Rights Act: no not delay, just don't do it' (2015) 20 (1) *Coventry Law Journal* 9.

[70] Under s.2 of the Act.

[71] See Michael Cross, 'HR reform: Raab plans mechanism to correct "incorrect" judgments' *Law Society Gazette* 17 October 2021

[72] Steve Foster 'The Protection of Human Rights in Domestic Law: Learning Lessons from the European Court of Human Rights' [2002] 53 (2) NIQL 232.

[73] *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696.

[74] This was effected by s.2 of the Act, which states that the domestic courts must take into account the decisions of the European Court of Human Rights, which, of course, employs the doctrine of proportionality when assessing whether an interference is 'necessary in a democratic society'.

[75] Section 4 of the Human Rights Act 1998.

difficult to justify any interference with these rights;[76] often impossible to do so without breaching international law.[77] Thus, a return to a system where rights are enjoyed alongside appropriate duties of rights holders to obey the law and respect the rights of others, and where the courts were to pay more respect to parliament and government, is welcomed by those who felt that the balance had swung too far in favour of individual rights.[78]

Turning to the latest government proposals, an independent review pal was tasked with examining the relationship between domestic courts and the European Court, and the impact of the HRA on the relationship between the judiciary, the executive and the legislature.[79] As a result, it is feared that domestic courts could be encouraged to diverge more from European Court of Human Right's rulings and the Act's central provisions.[80] In particular, the review is considering whether to update the law to remind judges that they are not bound by the European Court's rulings; Lord Pannick suggesting to the Review Panel that s.2 of the Act be amended so that after the words 'must take into account', the words 'but shall not be bound by' be inserted. This, of course assumes that the domestic courts will be more willing to defer to Parliament and the government than the European Court,[81] but in any case it attracts the possibility that UK human rights law would fall short of the standards laid down in the Convention and by the European Court of Human Rights. This was the situation before the Act was passed,[82] and the proposals present a further risk that government is allowed to act outside the constraints imposed by international standards of human rights and the notion of the rule of law. Lord Pannick attempts to argue that often decisions of the European Court are followed despite them having little relevance on matters in the UK. However, the government is more concerned with cases that *do* have relevance, but where the European Court imposes liability on the state where Parliament and the courts, if left to its own devices, would, or might, choose not to impose such liability.[83]

The independent review reported in December 2021, and was accompanied by the Ministry of Justice's consultation paper on the reform of the Act and its replacement with a modern Bill of Rights.[84] The review courted strong criticism from a coalition of charities, trade unions and other groups, who fear that it is a threat to freedom and justice,[85] and the Ministry's plans have attracted similar criticisms.[86] Defending the Act, the group claimed that while every system

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[76] See Lord Steyn in *R v Secretary of State for the Home Department, ex parte Daly* [2001] UKHL26

[77] This is the case where the right in question is absolute, such as the right to be free from torture and inhuman or degrading treatment or punishment, in Article 3 of the Convention.

[78] The government often referred to this switch as the 'mission creep' of the Human Rights Act and the case law of the European Court of Human Rights.

[79] Launched by the Ministry of Justice to consider how the Human Rights Act is working in practice and whether any change is needed: https://www.gov.uk/guidance/independent-human-rights-act-review

[80] Henry Zeffman, 'UK judges not bound by human rights rulings' *The Times*, 21 June 2021, 6.

[81] See Steve Foster, 'Finally, a Bill of Rights for the UK?' (2008) 13(2) Cov. Law J 8.

[82] Foster note 69, above.

[83] One example cited in minutes of a meeting between police chiefs and the panel on 13 April is the Supreme Court ruling in *Commissioner of Police of the Metropolis v DSD* [2018] UKSC where it was held that the police were liable under Article 3 of the Convention for not investigating allegations of rape made by two women. A long line of domestic authority had provided immunity to the police with respect to the investigation of crime, but such authority had to be re-examined in the light of European Court case law: *Osman v United Kingdom* (1998) 29 EHRR 245.

[84] Ministry of Justice, 'Human Rights Act Reform: A Modern Bill of Rights – a consultation to reform the Human Rights Act 1998, December 2021.

[85] Haroon Siddique 'More than 220 groups criticise UK review of Human Rights Act' *The Guardian*, 22 July 2021.

[86] Rajeev Syal, 'Raab's human rights proposals condemned as 'blatant power grab'' *The Guardian*, 14 December 2021. In the article, Martha Spurrier, the director of the human rights group Liberty, is reported as

could be improved, and protecting rights and freedoms for all is a balancing act, the Act is a proportionate and well-drafted protection for the fundamental liberties and responsibilities of everyone in this country. At the same time as the release of the consultation paper, the Policy Exchange released its findings on the Act's reform, outlining why the Act needed to be reformed and the best methods by which to achieve this.[87]

It is clear, therefore, that the present government is hell bent on tilting that balance back in favour of parliamentary and government autonomy, and we should all be concerned with the impact of that on human rights and the rule of law. This is made more worrying by further attempts to restrict or abolish judicial and legal review of certain executive action. For example, the Overseas Operations (Service Personnel and Veterans) Act 2021 makes provision about legal proceedings in connection with operations of the armed forces outside the British Islands, creating a presumption against prosecution of armed service personnel with respect to alleged conduct during overseas operations.[88] The provision is in conflict with decisions of the domestic courts in this area,[89] and will lead to a clash with the European Court of Human Rights.[90] Further, the recent Judicial Review Bill, considered below, limits the ability of migrants to challenge decisions of public bodies, in clear breach of the separation of powers and the courts' duty to ensure that public bodies have acted legally, fairly and in conformity with any human rights engaged in the case.[91] This, it should be pointed out, is different from the need for judicial deference, where the courts are expected to show due respect to Parliament and government when questioning acts and decisions in sensitive areas such as national security.[92]

A further concern is that now that Brexit has been achieved, the government feels that it is free from the constraints and principles of the European Union, and indeed the remainder of the international arena. This will leave the UK isolated on many human rights and justice issues, adding credence to the argument that the UK constitution is incapable of maintaining the rule of law and acceptable standards of rights protection. Thus, it has been reported that not one European country has decided to support the UK government's controversial asylum plans, with the UN criticising the proposals as so damaging that they risked Britain's "global credibility".[93] Despite the government's membership of the Council of Europe, there is clear evidence that the government is prepared to stand alone on many fundamental issues. The recent ratification of Protocol No. 15 of the European Convention (recognising the subsidiarity of the Convention machinery to domestic enforcement), gives rise to further concern that the

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saying that the was a blatant, unashamed power grab from a government that wants to put themselves above the law.

[87] Policy Exchange: Richard Ekins and John Larkin QC, 'How and Why to Amend the Human Rights Act 1998' December 11 2021.

[88] Sections 1-5 of the Act.

[89] *Smith v Ministry of Defence* [2013] UKSC 41.

[90] See the European Court's decision in *Al-Skeini and others v United Kingdom* (20110 53 EHRR 18.

[91] A similar provision already exists with respect to the court's challenge of deportation orders that impact on the individual's family law rights under Article 8 of the European Convention: s. 19 of the Immigration Act 2014 amended the Nationality, Immigration and Asylum Act 2002, so that the courts must take into account, and give weight to, certain factors when making a decision to uphold a deportation of a foreign criminal. In *R (Kiarie and Byndloss) v Secretary of State for the Home Department* [2017] UKSC 42, the Supreme Court held that the Home Secretary had not established that 'deport first, appeal later' struck a fair balance between the rights of the appellants and the interests of the wider community.

[92] See the decision of the Supreme Court in *R (Begum) v Special Immigration and Appals Tribunal* [2020] UKSC 7, noted by Stevie Martin, 'Deference, fairness and accountability in the national security context' [2021] *Cambridge Law Journal* 209.

[93] Mark Townsend*, '*EU countries snub Priti Patel's plans to return asylum seekers'*, The Guardian,* 9 May 2021

UK government in particular will welcome and apply a wide margin of appreciation in the recognition and enforcement of human rights.[94] Together with the proposed reform of the Human Rights Act, above, and the reform of judicial review, below, the government's *modus operandi* with respect to following legal and other advice and following international law and the rule of law in general is casting severe doubts as to the fitness for purpose of our constitutional arrangements.

Reform of judicial review

Turning now to the government's recent proposals for reform of the remedy of judicial review. The Judicial Review and Courts Bill, published in July 2021, introduces further restrictions on how we challenges government decision-making in the courts.[95] As stated earlier, the development and extension of judicial review has been a shining example of constitutionalism at play in the UK constitution. Under this procedure, government and other public bodies have to act within their legal powers, must follow any statutory or common law procedures, and must arrive at decisions that are rational (or at least not irrational) and, where the decision impacts on human rights, necessary and proportionate. Despite the presence of parliamentary (executive) sovereignty, it has achieved much of what other constitutional courts do under a written and entrenched constitution, and has enabled us to follow the fundamental rules of constitutionalism. Thus, a coalition of charities, trade unions and belief groups has described judicial review in the following terms:

> Judicial review is an indispensable mechanism for individuals to assert those rights and freedoms against the power of the state. Any government that cares about freedom and justice should celebrate and protect these vital institutions and never demean or threaten them.[96]

In July 2020, the UK government commissioned former minister Lord Faulks QC to conduct an independent review of the judicial review process in England and Wales, inviting the review to consider restricting the grounds for bringing judicial review claims and the remedies available for successful claims; and using the costs regime to discourage weak judicial review claims.[97] The review was published on 18 March 2021, concluding that judicial review is, in general, working well, but the government response was to launch a consultation on a number of reform proposals, suggesting a number of reforms that would both streamline the process but make it more difficult to judicially review government actions. A full account of the Faulk's

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[94] Council of Europe, Treaty Series 213, Protocol No 15 amending the Convention on the Protection of Human Rights and Fundamental Freedoms. The Protocol, which entered into force on August 1, 2021, stresses (in Article 1) that the Convention machinery is subservient to the national system of protecting human rights by inserting after the existing preamble: "…the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention," Also, article 4 reduces the time limit for applications from 6 to 4 months.

[95] See Michael Zander, 'Reform of Judicial Review' (2021) 171 *New Law Journal* 10.

[96] Haroon Saddique, 'More than 200 groups criticise UK review of Human Rights Act', n. 80. In addition, it is proposed that there would be a presumption or even a requirement that a quashing order will be suspended or prospective only. For suspension, this would apply to all acts or decisions that are challenged; for prospection, it would apply only to statutory instruments. In both cases, a mandatory approach would include an "exceptional public interest" exception.

[97] Haroon Sadique 'Plans to restrict judicial review weaken the rule of law, say MPs' *The Guardian*, 2 June 2021.

Review, and the government response,[98] is available elsewhere,[99] but we shall examine some of the desired reforms in the context of our examination of the rule of law and constitutionalism in the UK constitution.

With respect to remedies for judicial review, the review suggested that in relation to quashing orders (formerly *certiorari*) the courts could be given a power to suspend such an order, giving the body an opportunity to correct any illegality or failure. Alternatively, a court could give such an order a prospective effect only, allowing previous unlawful actions to remain valid and lawful. It is suggested that given the Home Secretary's behaviour in the migrants' case, above, this would provide dangerous encouragement to the government or other public bodies. Thus, a Law Society parliamentary briefing on the Bill strongly opposes both the introduction of prospective-only quashing orders and the inclusion of the statutory presumption, asserting that these proposals will: weaken judicial discretion; deny remedy to those affected by unlawful acts, and have a chilling effect on judicial review.[100]

More specifically, there are proposals relating to 'ouster' clauses (provisions that seek to exclude any jurisdiction for the courts to review a particular matter). Generally, although these clauses are usually worded in plain and clear language to prohibit the courts reviewing the decision, the courts have in general succeeded in nullifying them. This they have done by assuming that Parliament did not want an illegal decision to escape review, and thus the courts can carry out their essential constitutional function of upholding the rule of law.[101] No government has fully responded to this judicial ingenuity, but given the present government's record, it would not be difficult to imagine it initiating such legislation. The review points out that such clauses would be justified in certain circumstances; although it stressed the lack of wisdom in Parliament taking such an action because of the threat to the rule of law.[102] Although the Faulk's Review proposes some welcome reforms to the procedural aspects of judicial review,[103] if the above substantive proposals, are accepted, this will severely curtail the ability of citizens to challenge the actions of administrative bodies, including the government. Together with the proposals on the reform of human rights law, and examples of the government's disregard for the law and the rule of law in recent years, the changes to judicial

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[98] Judicial Review Reform, the Government Response to the Independent Review of Administrative Law CP408.

[99] The terms of reference for the Independent Review is available at: https://www.gov.uk/government/groups/independent-review-of-administrative-law. See Martin Carter, 'Proposed Reform of Judicial Review: the Conservative Manifesto to the Judicial Review and Courts Bill [2021] *Encyclopaedia of Local Government Law Bulletin* 4.

[100] The Law Society, Parliamentary briefing: Judicial Review and Courts Bill – House of Commons second reading, 18 October 2021.

[101] For example in *Anisminic v FCC* [1968] 2 AC 147, the House of Lords held that an attempt to stop any appeal or review of a determination of the FCC was not effective to prevent judicial review, because determination meant a valid determination, in other words one that was intra vires.

[102] More specifically, the government's agree with the review's recommendation to abolish the judicial review, appeals on errors of law, which is available when the Upper Tribunal has refused to grant someone permission to appeal against a decision of a First-tier Tribunal in cases on immigration and social security. Under the government's proposal, the Upper Tribunal will revert to having the final say on whether First-tier Tribunal decisions can be appealed, as it did before the 2011 Supreme Court decision in *R (Cart) v Upper Tribunal* [2011] UKSC 28. However, see *R (Privacy International) v Investigatory Appeals Tribunal* [2020] UKSC 22.

[103] They include, removing the requirement for a claim to be issued "promptly" and replacing it with a simple time limit of three months applies; allowing parties to agree between themselves extensions to the three-month time limit; establishing formal multi-track procedural timetables according to the complexity of cases; and establishing a clear right for a claimant to issue a reply to a defendant's acknowledgement of service.

review give rise to further concern about accountability and the constitution's ability to impose adequate control on government power. [104]

The Bill has received wide criticism,[105] but specifically has resulted in a paper written by Richard Edkins, Head of Policy Exchange's Judicial Power Project, entitled *How to Improve the Judicial Review and Courts Bill*.[106] The paper responds to the two clauses of the Bill that deal specifically with judicial review with a view to improving those clauses, but makes a number of proposals for further reform, which support the recent views in restricting the courts role in adjudicating on many legal and constitutional matters. In the introduction it is explained that the paper (which draws on submissions to the Independent Review of Administrative Law (IRAL) and the Government Consultation on Judicial Review Reform), sets out a number of amendments that Parliament may wish to consider making to the Bill. The first two amendments concern the Bill's first two clauses, whereas other amendments would introduce new clauses to the Bill - some reversing particular judgments, and others making general (but targeted) changes to the procedures and grounds of judicial review.

In your author's view, some, or indeed most of these proposals provide unnecessary and dangerous support to the government's desire to free itself from judicial control, seriously limiting the role of the domestic courts in enforcing our already fragile constitution and its increasingly weak association with the rule of law. In the introduction, the recent Bill is described as a welcome, if modest, first step in the wider project of restoring the balance of the constitution, referring to the Lord Chancellor's keynote lecture at Policy Exchange where he reasoned that the Supreme Court, under the leadership of Lord Reed, had begun to correct some of the excesses of recent years. It then states that while there are reasons to hope that the Supreme Court is beginning to mend its ways, the Bill's modesty with respect to its proposals is excessive. Specifically, Parliament enjoys primary responsibility for legal change, and the Bill provides an opportunity to make some corrections to recent legal developments, thus helping to restore principled limits on judicial power.

The main thrust of the paper, therefore, is to allow government to identify and rectify what is seen as a general trend for the courts to go beyond their traditional constitutional role, and to restore the supremacy of Parliament, and of course, parliamentary government, within the UK constitution.[107] Specifically, it proposes clauses that would reverse the effect of several Supreme Court decisions that have challenged the government on several issues. These include legal aid and access to the courts,[108] prorogation of Parliament, parliamentary accountability and constitutional conventions,[109] delegation or devolution of ministerial powers,[110] freedom of information,[111] ministerial responses to the reports of the Ombudsman,[112] the review of

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[104] Haroon Siddique 'Judicial review changes will make government 'untouchable' warns Law Society' *The Guardian* 30 April 2021.
[105] See the Law Society's briefing paper, n. 95, above. See also Aubrey Allegretti, 'Ex-Ministers says judicial review plan is assault on the legal system', *The Guardian*, 26 October 2021, reporting on David Davies' plans for a Conservative rebellion against the Bill.
[106] The paper was published in October 2021 and is available on: https://judicialpowerproject.org.uk/how-to-address-the-breakdown-of-trust-between-government-and-courts-2/
[107] This 'judicial overreach' is denied by Paul Craig, who finds little evidence of it in the period following the Human Rights Act: Paul Craig 'Judicial Review, Methodology and Reform' [2022] *Public Law* 19.
[108] *R (UNISON) v Lord Chancellor* [2017] UKSC 51.
[109] *R (Miller) v Prime Minister; Cherry v Advocate General for Scotland* [2019] UKSC 41, discussed above.
[110] *R (Adams) v Attorney-General* [2020] UKSC 19.
[111] *R (Evans) v Attorney General* [2015] UKSC 21.
[112] *R (Bradley) v Secretary of State for Work and Pensions* [2008] 3 All ER 1116; *R (Equitable Members Action Group) v HM Treasury* [2009] EWHC (Admin) 2495.

legislation from the devolved legislatures,[113] the review of the application of foreign or defence policy,[114] and the review of ministerial decisions to hold, or not to hold, a public inquiry.[115] Further, it suggests including clauses in the Bill would re-inforce the importance of parliamentary sovereignty and exclude the courts' power to adopt proportionality as a ground of review beyond its application under the Human Rights Act 1998 and EU Law.[116] These proposals were followed by an announcement, in December 2021, that the PM was planning to introduce measures whereby unpopular judicial decisions would automatically lapse after a one-year period.[117]

In effect, this would restore the constitutional role of the courts to a situation that reflects what many thought (wrongly) to be the traditional and limited role of the judiciary, both in the legal system generally and the constitution specifically. That is to uphold the strict meaning of parliamentary legislation and to refrain from ruling, directly or indirectly, on the constitutionality of government behaviour. The paper seems to accept that such judicial behaviour is inevitable, and acceptable, when specifically authorised by Parliament, but that otherwise any attempt to introduce limitations to the powers of government and government is tantamount to judicial legislation or a breach of the separation of powers.

This would leave Parliament and government free to act within their own powers, with a presumption that they are acting lawfully (and that legislation is unexceptional in terms of its constitutional propriety). As stated above, this ignores the fact that the legitimacy of the UK constitution has always been dependent on the courts interpreting the constitution and in limiting government power in line with fundamental constitutional values. These values are expressly recognised and protected in most constitutions, and our constitution exists on the assumption that the courts will restrict official power; not on the assumption that such power is lawful and cannot be questioned. So too, although the reversal of unpopular judicial decisions are an inevitable consequence of our democratic constitution,[118] wholesale reversal of decisions from our domestic courts that are viewed as unpopular and inappropriate would set a dangerous precedent and signal a serious attack on the independence of the judiciary. These concerns are reflected in the Joint Committee's response,[119] who called on the Government to amend its proposals, saying that they have the potential to deny effective judicial remedies and, in particular, to remove safeguards against flawed asylum decisions.[120]

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[113] *AXA General Insurance Ltd v Lord Advocate* [2011] UKSC 46.
[114] *R (Palestine Solidarity Campaign) v Secretary of State for Communities and Local Government* [2020] UKSC 16.
[115] *R (Litvinenko) v Secretary of State for the Home Department* [2014] EWHC 194. The paper does not clarify whether this would be the case where such a refusal would be in breach of Article 2 of the European Convention on Human Rights, as given effect to in the Human Rights Act 1998.
[116] *How to Improve the Judicial Review and Courts Bill*, 18.
[117] Tom Newton Dunn and Jonathan Ames, 'Yearly Bill to strike out judicial findings being considered' *The Times,* 6 December 2021, 1, 2 and 4
[118] See the reversal of the House of Lords' decision in *Burmah Oil Ltd v Lord Advocate* [1965] AC 75 by the War Damage Act 1965.
[119] Legislative Scrutiny: Judicial Review and Courts Bill: Tenth Report of Session 2021-22, December 10, 2021 HC 884, HL 120.
[120] In relation to courts' powers to make quashing orders, it calls on the Government to remove the requirement for them to be used in certain circumstances as it would place an unnecessary limit on the courts' freedom to decide on the appropriate remedy. It further calls for the Bill to be amended so that when courts consider whether to make a suspended or prospective-only quashing order they must have regard for the human rights of any individual affected. It also warns the Government to exercise great caution in the use of ouster clauses to ensure that accountability is maintained and human rights protected

In the meantime, we have seen several instances of the courts challenging government action, and raising severe questions about the government's constitutional behaviour.[121] As stated above, there is nothing unusual in this, provided the government is prepared to accept the court's ruling, and to abide by the rule of law. Yet some recent cases are not simply examples of inadvertent unlawful behaviour waiting to be challenged; but rather represent the current government's intention to deliberately depart from acceptable standards of behaviour, most notably those imposed by, and generally accepted by European Law and other European countries.

An extraordinary example of the government's attitude to the notion of government within and by the law was evident when Home Secretary, Priti Patel, was accused in the High Court of attempting to unlawfully evict thousands of migrants during the pandemic.[122] The judge, Garnham J, said he found it "extremely troubling" after one of her Home Office officials admitted the Home Office might have acted unlawfully in changing its asylum accommodation policy during the pandemic. The judge also raised concerns that she could have been distributing public funds without legal authority. Hearing four linked cases from asylum seekers challenging the lawfulness of the Home Secretary's policy to evict some refused asylum seekers during the pandemic, a witness statement admitted that at the relevant time 'we did not consider what power, or whether we had the power, to implement what we saw as administrative changes'. The judge noted that the secretary is saying that she was acting without lawful authority, a most serious submission to be making in court, adding that it was "extremely troubling" if she was acknowledging that she was acting without power when she set up this system for distribution of public funds she did so without legal authority. Thus, this is not simply a case of being caught out after the courts have revisited and interpreted the appropriate legal power; rather it is a case of a flagrant and deliberate or at least reckless disregard of the law and its character and scope.[123]

Conclusions

The issues highlighted in this article regarding the UK constitution and the rule of law are of particular concern with respect to governments who feel that they are beyond the law and judicial control, and, of course, to political or public opposition. The present government is not, of course the first to flout the law or to treat it with disdain. Judicial review of the government (in its widest sense) is a common practice, and it is natural that governments will attempt to carry out their business in potential breach of the law until they are found out in judicial proceedings. Having said that, the present government is, perhaps, more than any other before it, testing the frailty of our constitutional arrangements, relying on its, astonishingly,

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[121] See, for example *Mahabir v Secretary of State for the Home Department* [2021] EWHC 1177 (Admin). Here it was held that the refusal by the Secretary of State to waive entry application fees for the family of a victim of the Windrush scandal breached the victim's rights under both article 8 (family life) and 14 (right to enjoyment of rights free from discrimination). See further, *R (NB) v Secretary of State for the Home Department* [2021] 1489 (Admin), where the decision by the Home Secretary to accommodate asylum seekers in former army barracks was unlawful. The court found that the accommodation, which was basic, run down and required the residents to sleep in dormitories, was unsuitable particularly in light of the COVID-19 pandemic.

[122] Diane Taylor, 'Judge criticises Priti Patel over policy for asylum seekers in pandemic' *The Guardian,* 6 May 2021.

[123] Further, despite being told by Public Health England that it could not advise that anyone "should be enabled to become homeless from a public health perspective" during the pandemic, the Home Office was planning to resume the evictions process "with immediate effect". The legal challenge to the evictions had been paused for almost a year due to the pandemic and focused on the public health risks attached to evicting asylum seekers who were likely to end up rough sleeping or sofa surfing during the Covid-19 pandemic.

public popularity, and in particular the deference it has been given by the courts, politicians and the public during the period of the pandemic.[124] Indeed some of the examples used in this article suggest that the present government are not necessarily concerned with whether they are properly invested with legal power. Now, as if the present government needs any further encouragement to ignore the law and the legal constitution, the Policy Exchange is proposing further restrictions on the courts' review powers, including the reversing of decisions felt to be unfair or incorrect, and thus labelled unconstitutional.

The article has featured examples where government actions have threatened democratic accountability and in particular the rule of law. Fortunately, in most cases, the courts have been willing and able to fight back and regard certain issues as justiciable, thus restoring a belief in the rule of law and constitutional decency. Further proposals to dilute human rights law and judicial review are even more worrying, and there may in these cases be no opportunity for the courts to impose their will. This will leave the UK isolated from international and European law, and our constitution and constitutional law in an even more precarious position.

It is now time to re-instate the importance of the rule of law, the constitutional role of the courts, and insist that government cannot ignore fundamental notions of justice, human rights and general principles of government accountability. Government is, of course, ultimately responsible to the electorate, and this government, as with any other, will survive or fall on its ability to maintain political power; that is the nature of parliamentary sovereignty in its political and democratic sense. However, political sovereignty must co-exist with legal accountability, and governments need constant and robust reminders of this. It is suggested, therefore, that recent efforts by the judiciary to make constitutional impropriety justiciable should not be thwarted or reversed on the spurious grounds that the courts are exceeding their democratic and constitutional powers. Indeed, there may be good reason to extend those judicial powers if our constitution is to survive and be taken seriously.

Further, with respect to the UK constitution, recent events and proposals for reform have highlighted the frailty of our constitutional arrangements and its ability to impose and maintain acceptable standards of constitutionalism. Those who believe that the UK has a workable constitution because it possesses sufficient political and legal mechanisms for controlling executive power are now revisiting their assessment; your author included. The success of the UK constitution depends fundamentally on both government and Parliament accepting legal and other restraints on its strict *de jure* powers. In other words, if government and Parliament do not follow the conventions of constitutional behaviour, including the acceptance of the courts' role in enforcing the rule of law, then we are left without a true constitution, but, simply, a mechanism to ensure the will of the current government. That would be damaging to our international reputation and to the basic notions of constitutionalism. Further, it will fuel the argument among students of the UK constitution, that constitutional law, and the UK constitution, are myths.

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[124] See Steve Foster and Ben Stanford, 'Human rights in times of emergency: COVID-19 taking the United Kingdom into uncharted territory', in Steve Foster, Ben Stanford and Carlos Espaliu Berdud, *Global Pandemic, Security and Human Rights: Comparative Explorations of COVID-19 and the Law* (Routledge 2022), (forthcoming). See also, Lord Sumption, 'Covid-19 and the courts' [2021] 137 LQR 353, criticising the Court of Appeal's decision in *R (Dolan) v Secretary of State for Health and Social Care* [2020] EWCA Civ. 1605.

HUMAN RIGHTS

Should it go or should it stay? The coming of age of the Human Rights Act 1998, or time to say goodbye?

Dr Steve Foster

Introduction

This year marks the twenty-fifth anniversary of the *Coventry Law Journal* and it is time to look back to explore the law and the legal landscape as reported by various articles and other pieces published in the *Journal* over this period. Although there have been many fundamental events and changes during this period, the area of human rights and their protection has dominated both the law and the content of the *Journal*. In particular, this period has seen the passing and coming into force of the Human Rights Act 1998, the copious case law under the Act, and various calls for reform and abolition of the Act by successive governments.

With that in mind, this article will revisit an article written by your author in 2001 in the second issue of the sixth volume of the Journal.[1] The article examined the UK's record before the European Court of Human Rights at a time when the UK's Human Rights Act 1998 was just coming into force – in October 2000. In that sense, it was both looking back at our record before the Act, and forward, in guessing how human rights protection might be enhanced by the passing of the Act and the incorporation of European Convention rights and principles into domestic law.

The article was very critical of our traditional method of protecting human rights. It chronicled a large number of defeats before the European Court of Human Rights, and attached blame for this record to a number of factors. These included parliamentary sovereignty; the refusal or inability of the courts to develop the domestic law in order to accommodate certain human rights claims; the granting of excessive discretion to the executive; undue judicial deference and, most importantly, the unavailability of international and European principles of human rights in the adjudication of human rights disputes. The article concluded that the passing of the Act should enhance our record before the European Court and provide a system for rights protection that would be fit for purpose in the twenty-first century. However, it warned that such success would only come if both law-makers and judges were prepared to embrace the true spirit of the Convention rights and the principles of adjudication employed by the European Court of Human Rights.

Now, twenty-one years later, we are in the middle of the latest plan to reform the Human Rights Act, and replace it either with a British Bill of Rights, or to reform the Act. Ostensibly, this is so that our legal system and the domestic courts are less reliant on the jurisprudence of the Strasbourg Court, and free to adopt more traditional principles of rights and justice. Such reforms are in response to concerns that the European method gives too much weight to individual freedom, often at the expense of wider social justice and interests; and that the European Court has become too powerful in laying down judgments that gainsay our efforts to balance human rights with wider individual or social interests.

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[1] Steve Foster 'The protection of human rights in domestic law and the European Court of Human Rights' (2001) 6(2) Cov. Law J 1.

This article will revisit the piece written in 2001 to re-iterate the points it made about our traditional system and how it had failed to ensure that we met our international obligations to recognise and protect human rights in the United Kingdom. The article will then highlight certain developments in our legal system since the passing and coming into operation of the Act, including those that enhanced the enjoyment of Convention, and common law, rights since the Act came into force. The article will then attempt to appraise the workings of the Act in the last 21 years, and examine whether the concerns over its scope, and the influence of the European Court, have been borne out.

Finally, the article will argue that the Human Rights Act, in its present form, has served both the interests of human rights protection and international law compliance on the one hand, and our constitutional arrangements and principles on the other. This will include a warning that the repeal or substantial reform of the Act would return us to the unsatisfactory state of affairs presented in the original article.

The position before the Human Rights Act 1998

As explained in the original article, with no constitutional or higher law as such, and no formal bill of rights, individuals had to rely on the common law, statute and public opinion to safeguard their civil liberties. Under this system, the enjoyment of civil liberties was governed by the principle of residual liberty: we are free to do anything that the law does not forbid.[2] In addition, the rights of individuals were (and still are) bolstered by statutory provisions that either provide specific protection of civil liberties,[3] or which temper the restriction of civil liberty that has otherwise been authorised by the law.[4] The courts developed a human rights jurisprudence that assumed that Parliament did not intend to interfere with certain fundamental rights,[5] and subjected any *prima facie* lawful interference to a more intense judicial review.[6] More specifically, albeit to a limited degree, domestic law embraced the rights, and to a certain extent the case law, of the European Convention on Human Rights (1950),[7] and the Convention was allowed to be used in cases of statutory ambiguity[8], or where the Convention was needed to develop uncertain common law.[9] In addition, the courts eventually, after some initial

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[2] See McGarry VC in *Malone v Metropolitan Police Commissioner* [1979] Ch 344, at 366E.
[3] In addition to the Human Rights Act 1998, various legislation provides protection against discrimination: The Sex Discrimination Act 1975, the Race Relations Act 1976 and the Disability Discrimination Act 1988. See also the Sex Discrimination (Gender Reassignment) Regulations 1999. These provisions have since been consolidated into the Equality Act 2010.
[4] For example, the Police and Criminal Evidence Act 1984 contains a variety of safeguards against arbitrary use of the police powers contained in the Act. See also s.4 of the Obscene Publications Act 1959, which provides a public good defence to a charge of publishing obscene material.
[5] See *Chester v Bateson* [1920] 1KB 829; *Raymond v Honey* [1983] 1 AC 1 and *R v Secretary of State for the Home Department Ex parte O'Brien and Simms* [1999] 3 All ER 400 on the citizen's right of access to the courts.
[6] See *R v Ministry of Defence Ex parte Smith* [1996] 1 All ER 257.
[7] Even before October 2000, the courts have begun to consider some cases in the light of the Human Rights Act 1998. See *R v X; R v Y; R v Z* (*The Times*, May 23, 2000). In that case, the Court of Appeal held that the case, considering whether the admissibility of evidence gathered by means of telephone intercepts, should be dealt with as if the Act was in force. This was because any appeal would be heard after October 2.
[8] *R v Secretary of State for the Home Department Ex parte Brind* [1991] AC 696.
[9] *Attorney General v Guardian Newspapers (No 2)* [1990] 1 AC 109; *R v Chief Metropolitan Magistrate ex p Choudhury* [1991] 1 QB 429; and *Derbyshire CC v Times Newspapers* [1993] AC 534.

reticence,[10] started referring to the case law of the European Court of Human Rights when determining rights issues in domestic law.[11]

Yet the article noted that despite the existence and application of these constitutional techniques, the domestic arrangements for securing civil liberties continued to come under fire.[12] Thus, the United Kingdom government had been repeatedly brought before the European Commission and Court of Human Rights to defend, mostly unsuccessfully, domestic laws and practices that violated the Convention rights of individuals within their jurisdiction. As a consequence, the Act had been introduced primarily to meet the government's responsibilities under the Convention and so to offer a human rights protection equivalent to the one provided by the European Court.[13]

The article then provided an analysis of the case law of the European Court involving the United Kingdom government, revealing not only the deficiencies of our domestic system of protecting civil liberties, but providing domestic authorities with an insight into the philosophy of a human rights protection which they needed to embrace with the passing of the Act. The article detailed the cases lost by the United Kingdom government since 1966 (when the European Court was seized with jurisdiction to hear individual cases), and 2001 (when the article was written), dealing with cases that had initially been decided under the traditional method. It then placed those cases into two broad categories: those where there was held to be a violation because the human right in question was not recognised in domestic law, and those where the right, although recognised, was given insufficient weight or recognition by the law or its application. With respect to those cases where there was no equivalent domestic law right, it examined the inability of domestic law to formulate a distinct law of privacy; the injustice of which was exposed by both the domestic courts,[14] and by the European Court of Human Rights.[15] Then, within that second broad category, the article examined a number of cases where the government was held accountable for what, it was submitted, were the natural consequences of its human rights arrangements. This included the interference of liberty via the granting of excessive executive discretion,[16] and the violation of the rights of minority and other vulnerable groups, such as prisoners and sexual minorities.[17] Then, with respect to the balancing of rights, the article examined a number of cases where the lack of proportionality

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[10] See *R v Morrissey and Staines (The Times,* May 1, 1997, and the High Court decision in *Camelot v Centaur Communications (The Times,* July 17, 1997)

[11] See the Court of Appeal decision in *Camelot v Centaur Communications* [1998] 1 All ER 251. See also the decision of the High Court in *R v DPP Ex parte Kebeline* (*The Times,* March 31, 1999). In that case the High Court held that the DPP, in considering whether to authorize prosecutions under ss.16 A and 16B of the Prevention of Terrorism (Temporary Provisions) Act 1989, should have taken into account the fact that the provisions were contrary to Article 6 of the Convention, and that anyone charged under them would bring a successful application before the European Court. The decision was overturned by the House of Lords on the more general ground that the Director's decisions were not generally amenable to judicial review: [1999] 4 All ER 801.

[12] See Richard Gordon and Wilmott-Smith (eds), *Human Rights in the United Kingdom* (Clarendon 1996); Michael Zander, *A Bill of Rights?* (Sweet and Maxwell 1997 4th ed); and Singh, *The Future of Human Rights in the United Kingdom* (Hart 1997) chapters 1 and 2.

[13] *Bringing Rights Home: Labour's Plans to incorporate the ECHR into UK law*.

[14] *Kaye v Robertson* [1991] FSR 63.

[15] *Malone v United Kingdom* (1984) 7 EHRR 14 and *Wainwright v United Kingdom* (2007) 44 EHRR 40.

[16] Particularly with respect to life sentences: *Stafford v United Kingdom* (2022) 38 EHRR 32.

[17] For prisoners' rights, see *Golder v United Kingdom* (1975) 1 EHRR 124 (prisoners' access to the courts), and *Campbell and Fell v United Kingdom* (1984) 7 EHHR 165 (prisoners' disciplinary rights); and *Dudgeon v United Kingdom* (1982) 4 EHRR 149 (discrimination against homosexuals), and *Goodwin v United Kingdom* (2002) 35 EHRR 18 (discrimination against transsexuals).

in the balancing exercise led to defeats before the European Court in areas such as freedom of expression,[18] and the right to private life.[19]

The article then drew several conclusions relating to the arrangements for protecting human rights, and the United Kingdom government's record before the European Court of Human Rights. The UK's constitutional and legal arrangements for protecting human rights were described at best as a genuine but inconsistent attempt to protect fundamental rights, but at worst, leaving individual rights vulnerable to the doctrine of parliamentary sovereignty, to the inconsistency of judicial activism and to the threat of majority public opinion.

The United Kingdom's record before the European Court of Human Rights was then explained on one of two accounts. On the one hand, there was clear evidence of the lack an effective domestic 'filtering' system. Had domestic law possessed a constitutional mechanism to deal with human rights cases then the European Court would not have been required to pronounce upon the compatibility of our law with the Convention on so many occasions. If the domestic arrangements *are* sound then although in the absence of a domestic constitutional court cases will be *tested* in the formal arena of Strasbourg, the majority of those cases should be defended successfully. The evidence did not support this and it was clear that in certain areas the government and the domestic system is continually open to challenge as being incompatible with the Convention and other instruments of international human rights law.

The article pointed out that notwithstanding the development of a human rights jurisprudence in domestic law, it was clear that a number of laws and practices continued to be in violation of the European Convention.[20] It was also noted that our judiciary had shown a reluctance to interfere in certain areas and with certain decisions, and that it was by no means certain that judges, armed with the doctrine of proportionality and other human rights norms, would be any more generous to certain human rights claims than they have in the past. However, your author stated that what the Act should bring is a more consistent and coherent system of human rights protection, leading to the development of human rights previously unrecognised in domestic law and a reasonably consistent application of human rights law to human rights disputes. Nevertheless, for this to happen it was not sufficient merely to equip them with the tools of European and international human rights law. For the Act to succeed in practice all departments of government, including the judges, have to fully understand and appreciate those 'European' principles and the general principles of human rights protection.[21]

Protecting human rights under the Human Rights Act 1998

So what changes, and challenges, did the Act bring; and have the concerns raised by the ant-Human Rights Act lobby been realised and proved? It is inevitable that because bills of rights (or in our case our Human Rights Act) appear to put rights first, many will question whether individual rights should have an enhanced status over and above other individual rights and

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[18] *Sunday Times v United Kingdom* (1979) 2 EHRR 245; and *Observer and Guardian v United Kingdom* (1991) 14 EHRR153,

[19] *Smith ad Grady v United Kingdom* (2000) 29 EHRR 413; and *ADT v United Kingdom* (2001) 31 EHRR 33.

[20] A comprehensive account of such laws and practices were available at that time by examining the audit carried out by Francesca Klug, Keir Starmer and Stuart Weir, *The Three Pillars of Liberty* (Routledge 1996), 296-304.

[21] See Luke Clements and Alison Young, Human Rights: Changing the Culture; Campbell, Human Rights: A Culture of Controversy; Hunt, The Human Rights Act and Legal Culture: The Judiciary and the Legal Profession; and Young, The Politics of the Human Rights Act, all in (1999) 26 *Journal of Law and Society*. See also Adjoin, Human Rights Theory and the Human Rights Debate (1995) 58 *Modern Law Review,* 17.

social claims. Equally, they ask whether judges should have the power to question parliamentary or executive acts that are alleged to be incompatible with such fundamental rights. These dilemmas are particularly acute in the United Kingdom where the British Constitution and the traditional common law system of rights protection are subject to the doctrine of parliamentary sovereignty, thus limiting the constitutional role of the judges.

The passing of the Human Rights Act 1998, thus, raised a number of constitutional arguments from those who felt that the traditional system would be replaced by one allowing judges to employ European human rights principles that would undermine national sovereignty and the general public good. It is argued here that these fears were largely groundless, principally because of the method of incorporation of the European Convention on Human Rights chosen under the 1998 Act. Nonetheless, as some of the Act's provisions were intended to shift the balance of power from government and Parliament to the courts, the Act raised genuine constitutional concerns.

The main constitutional arguments revolved around the new powers of the courts to resolve human rights disputes by going beyond its traditional constitutional role of simply applying the law, instead allowing them to judge the merits and reasonableness of particular laws and practices. This included the courts' power, under s.2 of the Act, to consider the case law of the European Convention and to apply the doctrines of necessity and proportionality when judging the compatibility of legislative or other acts that infringe the applicant's Convention rights. The Act thus allowed the courts to adopt the principle of proportionality that had been rejected as part of the common law powers of review.[22]

Despite this power, in practice the courts have been prepared to offer decision-makers, including Parliament, a great degree of discretion in balancing rights with wider social interests. For example, in *R v Countryside Alliance v Attorney General*,[23] the House of Lords held that the ban on hunting with hounds by the Hunting Act 2004 was not incompatible with the hunters' Convention rights, stressing that the provision had been passed by a democratically elected Parliament who felt that there were sound moral grounds for the ban. However, the Act would be futile if it did not allow the courts to challenge legislation that conflicted with the basic values of the Convention. Thus, in *A and others v Secretary of State for the Home Department*,[24] in deciding that the detention of foreign nationals was a disproportionate response to the threat of terrorism, and not strictly required by the exigencies of the situation, Lord Bingham stressed that the traditional *Wednesbury* approach was no longer appropriate. Thus, the domestic courts themselves had to form a judgment whether a Convention right was breached. Further, given the importance of article 5, judicial control of the executive's interference with individual liberty was essential, and the courts were not precluded by any doctrine of deference from scrutinizing such issues.[25]

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[22] *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696. In *R (Daly) v Secretary of State for the Home Department* [2002] 1 AC 532 Lord Steyn held that there was a material difference between '*Wednesbury*' review and proportionality, the latter requiring the reviewing court to assess the balance that the decision-maker had struck, and requiring attention to be directed to the relevant weight accorded to the various interests. Further, any limitation of the right had to be necessary in a democratic society, in the sense of meeting a pressing social need and being truly proportionate to any legitimate aim being pursued. Despite this, Lord Steyn did not believe that there had been a shift to merits review

[23] [2007] 3 WLR 922.

[24] [2005] 2 AC 68

[25] The decision was upheld by the decision of the Grand Chamber of the European Court in *A v United Kingdom*, (2009) 49 EHRR 29, which might, of course, vindicate the lack of trust in the Court by the anti-Human Rights Act lobbyists.

Similar constitutional concerns were raised regarding the courts' powers under s.3 of the Act to interpret both primary and secondary legislation 'so far as is possible' in a way that is compatible with Convention rights. A robust approach was taken by the House of Lords in *R v A (Complainant's Sexual History),*[26] where the House of Lords held that the interpretative obligation under s.3 applied even where there was no ambiguity, and placed a duty on the court to strive to find a possible interpretation compatible with Convention rights. This case met with fierce criticism from those who felt that Parliament had already struck the necessary balance in the legislation, and was perhaps the most controversial decision under that provision.[27]

Under s.4 of the Act the court have the power to declare primary and secondary legislation incompatible with Convention rights. This, of course, was a novel power for domestic courts brought up on the doctrine of parliamentary sovereignty. However, this power has been used with a good deal of caution and the courts have shown some reluctance to question primary legislation passed by the democratically elected Parliament.[28] Nevertheless, the courts have been prepared to issue such declarations where the law appears to be in clear conflict with a decision of the European Court, or contravenes the fundamental values of the Convention. Thus in *A and others v Secretary of State for the Home Department* (above), the House of Lords held that detention provisions were not justified under article 15 of the Convention, which allows derogation in times of war or other emergency threatening the life of the nation. The decision was seen by many as being in breach of the separation of powers by not offering the government and Parliament appropriate deference on matters of national security and public safety. However, the decision was confirmed by the European Court,[29] such consistency of course being the main aim of the Act and indeed membership of the Council of Europe.

Sections 2-4 no doubt increased the courts' powers to provide redress for human rights violations, but it should not be forgotten that this power has been bestowed by Parliament itself, who through the Act has expressed an intention that the court's constitutional powers be extended in this area. Thus, in *A*, Lord Bingham rejected any assertion that the court's interference would be undemocratic, noting that the courts had been given a wholly democratic mandate by Parliament. Further, the Act has been carefully constructed so as to avoid any direct conflict with the doctrine of parliamentary sovereignty. Thus, the courts have no power to strike down any incompatible primary legislation, or secondary legislation clearly authorised by

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[26] [2002] 1 AC 45

[27] However, in *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2001] 2 WLR 1546, Lord Woolf CJ warned that s.3 does not entitle the courts to legislate, and that a court should not radically alter a statute in order to achieve compatibility. Further, in *Re S and W* [2002] 2 AC 291, the House of Lords stressed that the 1998 Act maintained the constitutional boundary between the interpretation of statutes and the passing and repeal of legislation, and that a meaning that departed substantially from a fundamental feature of an Act of Parliament was likely to have crossed the boundary. See also *Bellinger v Bellinger* [2003] 2 AC 467 the House of Lords held that it was not possible to use s.3 to interpret the words 'man and woman' to include a person who had undergone gender reassignment, so as to comply with the decision of the European Court in *Goodwin v United Kingdom* (2002) 35 EHRR 18.

[28] See, for example, *R v Shayler* [2002] 2 WLR 754, where the House of Lords held that the Official Secrets Act 1989 was compatible with article 10 of the Convention despite the absence of a public interest defence, and *R v DPP, ex parte Pretty and another* [2002] 1 AC 800, where the House of Lords held that s.2(1) of the Suicide Act 1961 was not incompatible with Article 8 of the European Convention.

[29] *A v United Kingdom* (2009) 49 EHRR 29.

primary legislation. The ultimate legislative power is thus still vested in Parliament and it still has the power to pass new legislation, correcting the court's interpretation.[30]

Therefore, although the new doctrines of necessity and proportionality depart from the more restrictive traditional grounds of review, there is evidence that the courts are willing to display a good deal of judicial deference where they feel that a matter is better resolved by a government official or by Parliament itself. Despite that, it is argued that such powers are constitutional in a more general sense because in most jurisdictions it is accepted that the courts' constitutional role includes the power to strike down legislative and executive acts that conflict with fundamental constitutional rights.[31]

The 1998 Act has no doubt extended the power of the courts, and such powers still raise constitutional concerns, particularly as many believe that our law has become too heavily influenced by the Convention and the Strasbourg Court. However, given the scope and content of the Act, in particular its retention of parliamentary sovereignty, it would be wrong to allege that these new powers are unconstitutional, or that the Act and the Convention influence is in desperate need of reform. The Act was passed for the specific purpose of giving effect to the rights and principles of the European Convention. Thus, unless the courts deliberately or clearly seek to go beyond that remit, these powers should be viewed as entirely constitutional, and necessary for a method of rights protection that is fit for purpose and sufficiently compatible with international human rights law. From the evidence thus far, the courts have taken a moderate stance, and the fact that they have on occasion challenged laws and practices that have become established in domestic law, should not lead us to the conclusion that European principles are distorting our legal system and legal values.

Reforming the Human Rights Act

As noted above, the system used under the Human Rights Act has never threatened the doctrine of parliamentary (and executive) sovereignty; certainly not to the extent that the European Communities Act 1972 did. Nevertheless, the power of the domestic courts to employ Convention principles, and their duty to, at least, take into account the decisions of the European Court of Human Rights,[32] caused concern that the Act was disturbing our traditional separation of powers and the proper constitutional role of our judges. More specifically, it was feared that the Act had replaced our own notions of rights and justice with those imposed by the European order.

Consequently, since the passing of the Human Rights Act 1998, there have been many attempts by consecutive governments to reform or repeal the Act and return to the common law system of rights protection.[33] These proposals have been spurred by either landmark decisions of the

[30] Thus, following the Supreme Court's decision in *HM Treasury v Ahmed and others* [2010] 2 AC 534 – that freezing orders were contrary to individuals' due process rights – Parliament enacted the Terrorist Asset Freezing (Temporary Provisions) Act 2010 to retrospectively validate such orders

[31] Steve Foster, 'The rule of law in modern times: not a Priti sight' (2021) 26(2) Cov. Law J 1.

[32] Under s.2 of the Act.

[33] For example, proposals were included both in the 2010 general election manifesto and the Coalition Agreement, which committed the government to establish a Commission to investigate the creation of a British Bill of Rights that incorporates and builds on all our obligations under the European Convention on Human Rights. The Commission commenced work on 18 March 2011 under the chair of Sir Leigh Lewis. Its final report entitled *A UK Bill of Rights: the Choice Before Us* was published on 18 December 2012.

domestic courts or the European Court of Human Rights,[34] or the more general desire to free the state and the law from the strict principles and supervision of the European Convention and the European Court.[35] In either case, the proposals desired to give power back to our courts, and of course, to the government, to devise and maintain our own human rights principles based on traditional British notions of justice.[36]

Thus, despite the long battle to introduce a Bill of Rights into our legal system, and our eventual 'incorporation' of Convention rights via the Human Rights Act 1998, there has been much discussion as to the efficacy of the Human Rights Act 1998. Some of these discussions have centred (rather disingenuously) on the *strengthening* of the Act's provisions and ambit and have called for the extension of rights' protection in the United Kingdom. In addition, there have been attempts to reduce the Act's impact, centred on whether the Act has been successful in securing a fair balance between human rights and the more general interests such as national security, public safety and the prevention of crime. Specifically, there has been concern over the European Court's stance on the protection of the rights of those suspected of terrorism, and who are being threatened with deportation and extradition.[37]

Before examining the most recent plans to challenge the 1998 Act, let us consider the rationale behind the wish to return to our own common law system. As seen above, before the Act our common law method of rights protection was found wanting because there were insufficient means to challenge government acts and parliamentary legislation.[38] This was largely due to the feeling that it would be unconstitutional for our courts to question parliamentary legislation or government autonomy beyond asking whether it was within the relevant legal powers.[39] The Act allowed the courts to consider the proportionality of administrative action,[40] and to declare legislation incompatible with Convention rights,[41] and thus the *balance* between rights and state power had altered. Now, rights were to be given an enhanced status and it was more difficult to justify any interference with these rights;[42] and often impossible to do so without breaching international law.[43] Thus, many have welcomed a return to a system where rights are enjoyed alongside appropriate duties of rights holders to obey the law and respect the rights of others, and where the courts were to pay more respect to parliament and government.[44]

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[34] Most notably the decision of the House of Lords in *A v Secretary of State for the Home Department*, n. *. (Detention without trial), and the European Court's decisions in *Othman v United Kingdom* (2012) 55 EHRR 1 (deportation and fair trials) and *Hirst v United Kingdom (No. 2)* (2006) 42 EHRR 41 (prisoner voting rights).
[35] In particular, to allow the domestic courts to ignore European ideals of proportionality and necessity and decisions of the European Court, and instead to apply 'British' standards of justice.
[36] Steve Foster, 'Repealing the Human Rights Act: no not delay, just don't do it' (2015) 20 (1) Cov. Law J. 9.
[37] John Hyde 'Tory manifesto pledges end to human rights 'mission creep'' Law Society Gazette, 14 April 2015.
[38] Steve Foster 'The Protection of Human Rights in Domestic Law: Learning Lessons from the European Court of Human Rights' [2002] 53 (2) NIQL 232.
[39] *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696.
[40] This was effected by s.2 of the Act, which states that the domestic courts must take into account the decisions of the European Court of Human Rights, which, of course, employs the doctrine of proportionality when assessing whether an interference is 'necessary in a democratic society'.
[41] Section 4 of the Human Rights Act 1998.
[42] See Lord Steyn in *R v Secretary of State for the Home Department, ex parte Daly* [2001] UKHL26.
[43] This is the case where the right in question is absolute, such as the right to be free from torture and inhuman or degrading treatment or punishment, in Article 3 of the Convention.
[44] The government often referred to this switch as the 'mission creep' of the Human Rights Act and the case law of the European Court of Human Rights. See 'Lord Sumption criticises 'mission creep' of European Convention on Human Rights' *Scottish News,* 5 June 2019.

The Joint Committees Proposals for a British Bill of Rights

One possible reform was to replace the Act with a domestic Bill of Rights, which would more reflect 'British values' and allow the introduction of a *more appropriate* bill of rights and responsibilities for the citizen. Thus, in its Green Paper on Constitutional Reform,[45] the government conceded that repealing the 1998 Act would prevent citizens from exercising their fundamental rights in British courts and lead to lengthy delays while individuals appealed to Strasbourg.[46] However, it stressed that the Act should not necessarily be regarded as the last word on the subject, and that a Bill of Rights and Duties could give people a clear idea of what we can expect both from public authorities and from each other. Specifically, it could provide recognition that human rights come with responsibilities and must be exercised in a way that respects the human rights of others.[47] Consequently, the possibility of a Bill of Rights for the UK, including introducing a constitutionally entrenched bill of rights re-surfaced,[48] and it is in this context it is pertinent to look at the recommendations of the Joint Committee.

The Joint Committee of Human Rights was commissioned to investigate a British Bill of Rights and made the following recommendations.[49] First, the Committee concluded that despite its consideration of the arguments against a Bill of Rights, there was considerable scope for a Bill of Rights to add to what is already in the Human Rights Act 1998. In particular, the Committee saw it as necessary to enhance the rights of vulnerable and marginalised groups such as asylum seekers and children in custody. However, it stressed that any bill of rights should not in any way weaken the existing machinery contained in the Act for the protection of Convention rights and sought an assurance from the Justice Secretary that there was nothing in the government's plans to weaken the Act.

The Committee expressed some concern that the Green Paper had linked fundamental human rights with citizenship, portraying the idea that such rights only belonged to UK citizens rather than to all individual human beings within the jurisdiction of the UK. Equally, the Committee felt that the term 'British' Bill of Rights would not only isolate non-citizens, but also cause dissent from UK citizens who would not consider themselves British, but as Irish or Scottish etc. Nevertheless, the Committee recognised that a domestic bill of rights could and should provide the opportunity to reflect particular values that are fundamental to a particular nation sate, such as the UK. It concluded, therefore, that a UK Bill of Rights would constitute an accurate description of a document that sought to express the state's national identity and definition.

The Committee also agreed that a UK Bill of Rights should have a preamble, which sets out the purpose of having a UK Bill of Rights and the values which are considered fundamental in UK society; the content of which the government should research and consult on. In its Outline of a UK Bill of Rights (included in Annex 1 of the Report) the preamble reads as follows:

> This Bill of Rights and Freedoms is adopted to give lasting effect to the values which the people of the United Kingdom consider to be fundamental.

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[45] *The Governance of Britain 2006-2007* (CM. 7170).
[46] Ibid, at para 207.
[47] Ibid, at 208-210.
[48] See Francesca Klug, A Bill of Rights: do we need one or do we already have one? [2007] PL 701.
[49] *A Bill of Rights for the UK?* 10 August 2008. HL Paper 165-1; HC 150-1

The preamble then listed the rule of law, liberty, democracy, fairness and civic duty as those values. The outline then includes an interpretative clause, requiring anybody interpreting the Bill to strive to achieve its purpose and to give practical effect to the fundamental values that underpin it. Specifically, the Committee recommended the classification of rights into Civil and Political Rights, Fair Process Rights, Economic and Social Rights, Democratic Rights and the Rights of Particular Groups, and the inclusion of a (qualified) right to trial by jury and a right to administrative justice. In addition, it recommended giving better effect to the UN Conventions on the Rights of the Child and on the Rights of Persons with Disabilities.

With respect to the relationship between parliament, the executive and the courts, the Committee felt that a Bill of Rights with the power of the courts to override Acts of Parliament would be at odds with the UK's traditional constitutional structure. So too the Committee was against the idea of entrenching the Bill of Rights from further amendment save by special procedure. It felt that the existing arrangements for rights' protection contained in the Human Rights Act were the most appropriate and democratic.

It is pertinent to note, especially in the light of the most recent proposals for reform, that the Committee firmly rejected the idea that a UK Bill of Rights be called either a Bill of Rights and *Duties* or a Bill of Rights and *Responsibilities.* In its view, a Bill of Rights was not the place to impose general obligations on the individual to obey the law. Further, the enjoyment of human rights could not be made contingent on the fulfilment of responsibilities; the limitations on the enjoyment of human rights - including the respect of the rights of others - had already been built into the Convention rights.

Finally, the Committee recommended that any process for reform must build on the Human Rights Act without weakening it as well as supplementing the European Convention protection and be in accordance with universal human rights standards. In addition, it should protect the weak and vulnerable against the strong and powerful; be aspirational and forward-looking; apply to the whole of the UK and to all people within the UK; provide strong legal protection for human rights; and enhance the role of parliament in the protection of human rights.

Cameron's proposals

Needless to say, the Joint Committee's proposals were rejected or ignored; this was not what the government wanted and subsequent proposals concentrated on the reduction of the Act's scope and the power of the European Court to influence our legal and constitutional order.

Before the 2010 election, the Conservative government promised to repeal the Human Rights Act 1998 and replace it with a British Bill of Rights and Responsibilities, and after the election, the Prime Minister appointed Michael Gove as the new Minister of Justice, providing him with the mandate to repeal the Act.[50] The details of this repeal and any new provisions for protecting human rights were unclear, but it was apparent from the manifesto that the main aim was to reduce the domestic law's reliance on European law and principles – most significantly the jurisprudence of the European Court of Human Rights. Accordingly, it tentatively suggested that the domestic courts should no longer have to rely on the case law of the European Court,[51] and that the UK Supreme Court should instead have the 'final say' on human rights matters.

[50] Coleman, C 'Human Rights Law is Gove's big challenge' BBC news: bbc.co.uk/news 15 May 2015.
[51] As is currently required by s.2 of the Human Rights Act 1998.

More significantly, the government wished to introduce a *British* Bill of Rights *and Responsibilities*, not only entrenching essential principles of British justice and tradition, but also encompassing corresponding duties on individuals that would act as conditions of their entitlement.[52] Previous governments had been warned against such a proposal, yet the Cameron government was set on a departure from a Convention compliant system of recognising rights and a return to a more traditional process, by which rights are protected by common law and traditional constitutional principles. The government withdrew the repeal of the Act from the Queen's speech on their legislative programme, instead delaying any legislative plans, perhaps for a year, to allow time to draw up a Draft Bill and, possibly, to allow consultation.[53]

The Conservative Party Manifesto made these promises with respect to repealing current human rights law:

> We have stopped prisoners from having the vote, and have deported suspected terrorists such as Abu Qatada, despite all the problems created by Labour's human rights laws. The next Conservative Government will scrap the Human Rights Act, and introduce a British Bill of Rights. This will break the formal link between British courts and the European Court of Human Rights, and make our own Supreme Court the ultimate arbiter of human rights matters in the UK.[54]

Further on it states

> We will…introduce a British Bill of Rights which will restore common sense to the application of human rights in the UK. The Bill will remain faithful to the basic principles of human rights, which we signed up to in the original European Convention on Human Rights. It will protect basic rights, like the right to a fair trial, and the right to life, which are an essential part of a modern democratic society. But it will reverse the mission creep that has meant human rights law being used for more and more purposes, and often with little regard for the rights of wider society. Among other things, the Bill will stop terrorists and other serious foreign criminals who pose a threat to our society from using spurious human rights arguments to prevent deportation. 55

The Joint Committee on Human Rights had of course warned against a concept of a 'British' Bill of rights' as it would alienate non-British residents and fails to comply with the international and universal nature of human rights.[56] These warnings were ignored by the government, as were many other concerns about the constitutional ramifications of such a Bill.[57] As to content, presumably the Bill would have included rights similar to the ECHR and included reference to other values such as the rule of law, the right to judicial and administrative justice. However, it would likely adjust certain rights by, for example, diluting the right to

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[52] See Helen Fenwick, 'Protecting Human Rights in the UK – Conservative Plans post-2015 (2015) 74 *Student Law Review* 3.
[53] Coates, S 'Government delays the introduction of a British Bill of Rights' *The Times,* 27 May 2015 (Online edition).
[54] Conservative Party Manifesto 2015, at page 60.
[55] *Ibid*, at page 73.
[56] '*A Bill of rights for the UK*?' Report of the Joint Committee of Human Rights, 10 August 2008, HL Paper 165-1; HC 150-1.
[57] Ross, T 'How the Human Rights Act escaped the Tory Axe' *Daily Telegraph*, 30 May 2015

private and family life in cases involving deportation or extradition; a major concern of this and subsequent governments, as expressed in its election manifesto, above.[58]

The Bill was also made specific reference to *responsibilities* with respect to qualified and conditional rights, ensuring that the enjoyment of these rights will be dependent on the right holder carrying out their responsibilities to society and other rights' holders. Such a proposal would have to comply with Convention standards of rights' restriction, unless the government was proposing to free itself from European human right law all together. In any case, the Convention already accommodates restrictions on human rights to facilitate compliance with the law and the rights of others. It does not, however, in general, expressly limit the enjoyment of any rights by insisting on compliance with responsibilities, as this concept is inconsistent with fundamental rights.[59]

What was unclear was whether the domestic courts would be able to even consider ECHR case law; interpret legislation in conformity with the ECHR as well as the new British Bill of Rights; or declare legislation incompatible with the new Bill of Rights. It was also unclear whether the Bill would allow the domestic courts to employ the principles of legality and proportionality when balancing and interpreting rights. If that was not the case, that would have led to multiple applications to the European Court; unless, as noted above, the government wished to free itself from European human rights law. The proposals also ignored the fact that the courts can and do depart from European case law when there is no clear line of authority from the ECHR which binds domestic law (as in the admissibility of hearsay evidence).[60] Further, the domestic courts have made it clear that they have the power and duty to interpret and apply Convention rights, and their limitations, as domestic rights (the right to die).[61] Thus, the domestic courts have often chosen to follow the wide margin of appreciation offered by the European Court to justify their refusal to interfere with parliamentary and executive actions (e.g. the right to die, control of assemblies etc.).[62]

The government, of course, hoped that the Supreme Court would offer due deference and respect to the executive and legislative bodies where in the past the European Court has refused to extend the margin of appreciation to those bodies (for example, in cases concerning stop and search,[63] and admissibility of torture evidence abroad).[64] However, many of the defeats to legislation and executive acts have come from the British courts, applying traditional principles to cases involving detention without trial,[65] admissibility of torture evidence in domestic proceedings,[66] and freedom of information.[67] All governments thus need to ask whether the

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[58] Already, s.19 of the Immigration Act 2014 dictates to the courts the factors it must take into account, including their weight when considering expulsion from the UK under the Nationality, Immigration and Asylum Act 2002.

[59] The sole exception to this, is article 10, relating to freedom of expression, where that right is expressly stated to be subject to *duties and responsibilities*.

[60] *R v Horncastle* [2009] UKSC 14, approved by the European Court of Human Rights in *Horncastle v United Kingdom*, judgment of the European Court of Human Rights, 16 December 2014.

[61] *Nicklinson v Ministry of Justice and others* [2014] UKSC 38.

[62] See *Nicklinson*, above, note 29 and *Austin v MPC* [2009] 1 AC 564.

[63] *R (Gillan) v MPC* [2006] 2 AC 307; overturned by the European Court in *Gillan v United Kingdom* (2010) 52 EHRR 45.

[64] *Othman (Qatada) v United Kingdom*, (2012) 55 EHRR 1.

[65] *A v Secretary of State for the Home Department* [2005] 2 AC 68.

[66] *A v Secretary of State for the Home Department (No. 2)* [2006] 2 AC 221.

[67] *Kennedy v Charity Commission* [2014] UKSC 20.

domestic courts, including the Supreme Court, will become compliant, or in contrast react to any attempted curtailment of their judicial powers.

The above proposals to abolish the Human Rights Act 1998 placed our relationship with international and European human right law in jeopardy. To secure the proposals' complete success, we would have had to re-think our relationship with the Council of Europe as well as our standing in the international community. However, is it all worth it? Are the concerns over European human rights law and the power of the European Court of Human Rights justified; particularly given the fact that the Council is already considering changes to those powers in the light of general concerns over the Convention and adherence to the doctrine of subsidiarity?

With that question in mind, let us consider the most recent proposals for reform.

The most recent proposal for reform: the Gross Review and beyond

Turning to the latest government proposals, an independent review panel was asked to examine the relationship between domestic courts and the European Court, and the impact of the HRA on the relationship between the judiciary, the executive and the legislature.[68] This, as with the above proposals, caused fears that domestic courts would diverge more from European Court of Human Right's rulings and the Act's central provisions.[69] In particular, the review considered whether to update the law to remind judges that they are not bound by the European Court's rulings. Lord Pannick suggested to the Review Panel that s.2 of the Act be amended so that after the words 'must take into account', the words 'but shall not be bound by' be inserted. This, of course assumes that the domestic courts will be more willing to defer to Parliament and the government than the European Court,[70] but in any case it attracts the possibility that UK human rights law would fall short of the standards laid down in the Convention and by the European Court of Human Rights. This was the situation before the Act was passed,[71] and the proposals present a further risk that government is allowed to act outside the constraints imposed by international standards of human rights and the notion of the rule of law. Lord Pannick attempts to argue that often decisions of the European Court are followed despite them having little relevance on matters in the UK. However, the government is more concerned with cases that *do* have relevance, but where the European Court imposes liability on the state where Parliament and the courts, if left to its own devices, would, or might, choose not to impose such liability.[72]

The independent review reported in December 2021, and was accompanied by the Ministry of Justice's consultation paper on the reform of the Act and its replacement with a modern Bill of Rights.[73] The review courted strong criticism from a coalition of charities, trade unions and

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[68] Launched by the Ministry of Justice to consider how the Human Rights Act is working in practice and whether any change is needed: https://www.gov.uk/guidance/independent-human-rights-act-review
[69] Henry Zeffman, 'UK judges not bound by human rights rulings' *The Times*, 21 June 2021, 6.
[70] See Steve Foster, 'Finally, a Bill of Rights for the UK?' (2008) 13(2) Cov. Law J. 8.
[71] Foster note 38, above.
[72] One example cited in minutes of a meeting between police chiefs and the panel on 13 April is the Supreme Court ruling in *Commissioner of Police of the Metropolis v DSD* [2018] UKSC where it was held that the police were liable under Article 3 of the Convention for not investigating allegations of rape made by two women. A long line of domestic authority had provided immunity to the police with respect to the investigation of crime, but such authority had to be re-examined in the light of European Court case law: *Osman v United Kingdom* (1998) 29 EHRR 245.
[73] Ministry of Justice, 'Human Rights Act Reform: A Modern Bill of Rights – a consultation to reform the Human Rights Act 1998, December 2021.

other groups, who fear that it is a threat to freedom and justice,[74] and the Ministry's plans have attracted similar criticisms.[75] Defending the Act, the group claimed that while every system could be improved, and protecting rights and freedoms for all is a balancing act, the Act is a proportionate and well-drafted protection for the fundamental liberties and responsibilities of everyone in this country.

At the same time as the release of the consultation paper, the Policy Exchange released its findings on the Act's reform, outlining why the Act needed to be reformed and the best methods by which to achieve this.[76] In a foreword to the paper, Lord Sumption outlines his concerns about the Human Rights Act, the European Convention and the role of the European Court of Human Rights. In his Lordship's view, in terms of our constitution, the Act gives rise to three main problems. The first is that it treats broad areas of public policy as questions of law, and not as proper matters for political debate or democratic input. The second major problem is, in his view, the role of the Strasbourg court: adopting an analytical method at odds with the way that international treaties are normally interpreted, and treating the Convention as a "living instrument". Thirdly, the Strasbourg court has gratuitously expanded the geographical and the temporal range of the Convention well beyond anything that was envisaged when it was made or the Human Rights Act passed.[77] Most worryingly, Lord Sumption notes that in practice the Convention has had most influence in the countries which are least in need of an international system of rights protection (presumably the United Kingdom leads this list), and very little influence on those which routinely disregard human rights.[78] This of course is typical of the rhetoric aimed at the Act and the Convention itself, and of the national arrogance towards international human rights, and our duty to abide by it.[79]

It is clear, therefore, that the present government is hell bent on tilting the balance back in favour of parliamentary and government autonomy, and we should all be concerned with the impact of that on human rights and the rule of law. This is made more worrying by further attempts to restrict or abolish judicial and legal review of certain executive action. For example, the Overseas Operations (Service Personnel and Veterans) Act 2021 makes provision about legal proceedings in connection with operations of the armed forces outside the British Islands, creating a presumption against prosecution of armed service personnel with respect to alleged conduct during overseas operations.[80] This provision conflicts with decisions of the domestic courts in this area,[81] and will lead to a clash with the European Court of Human Rights.[82]

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[74] Haroon Siddique 'More than 220 groups criticise UK review of Human Rights Act' *The Guardian*, 22 July 2021

[75] Rajeev Syal, 'Raab's human rights proposals condemned as 'blatant power grab'' The Guardian, 14 December 2021. In the article, Martha Spurrier, the director of the human rights group Liberty, is reported as saying that the was a blatant, unashamed power grab from a government that wants to put themselves above the law.

[76] Policy Exchange: Richard Ekins and John Larkin QC, 'How and Why to Amend the Human Rights Act 1998' December 11 2021.

[77] 'How and Why to Amend the Human Rights Act 1998' December 11 2021, foreword, 5-6

[78] Ibid, 7

[79] Whatever the merits of the government's proposals and the Policy Exchange's suggestions, it is of great concern that a former Justice of the Supreme Court should take such a negative attitude towards the Convention and the role of the independent judiciary in securing human rights and controlling executive and parliamentary measures which seek to restrict them.

[80] Sections 1-5 of the Act.

[81] *Smith v Ministry of Defence* [2013] UKSC 41.

[82] See the European Court's decision in *Al-Skeini and others v United Kingdom* (2011) 53 EHRR 18.

A further concern is that now Brexit has been achieved, the government feels that it is now free from the constraints and principles of the European Union, and indeed the remainder of the international arena. This will leave the UK isolated on many human rights and justice issues, adding credence to the argument that the UK constitution is incapable of maintaining the rule of law and acceptable standards of rights protection. Thus, it has been reported that not one European country has decided to support the UK government's controversial asylum plans, with the UN criticising the proposals as so damaging that they risked Britain's "global credibility".[83] Despite the government's membership of the Council of Europe, there is clear evidence that the government is prepared to stand alone on many fundamental issues. The recent ratification of Protocol No. 15 of the European Convention (recognising the subsidiarity of the Convention machinery to domestic enforcement), gives rise to further concern that the UK government in particular will welcome and apply a wide margin of appreciation in the recognition and enforcement of human rights.[84] Together with the proposed reform of the Human Rights Act, above, and the reform of judicial review, below, the government's *modus operandi* with respect to following legal and other advice and following international law and the rule of law in general is casting severe doubts as to the fitness for purpose of our constitutional arrangements.

Conclusions and recommendations

With a combination of foresight, hindsight, and an examination of 21 years of case law under, and proposed reforms of the Human Rights Act, your author's conclusion is that the Human Rights Act should stay, principally in its current form. The reasons for this conclusion are based mainly on the desire to maintain the highest level of rights' protection within an already precarious constitution.[85] However, there are other more pragmatic reasons. Not least of which is that the Act accommodates the arguments of both sides – for an enhanced protection of human rights than seen before the passing of the Act, and the retention of parliamentary sovereignty, government autonomy and the limited role of the courts (domestic and European) when balancing individual rights with wider social interests.

First, there was ample evidence that the UK's pre-Act method of protecting human rights, with the presence of parliamentary sovereignty and the vulnerability of unpopular and minority rights, together with its lack of sound human rights principles, was unsatisfactory and failed to comply with our international human rights obligations. A return to this method would lead to an inevitable clash with our commitments to the European Convention, together with a rise in the number of applications made to the European Court. It would also, inevitably, result in a restriction of effective legal remedies for human rights violations of those who might otherwise be excluded from protection because they were felt unworthy of being rights holders. The Human Rights Act provides a framework for the equal enjoyment of fundamental rights *for all*

[83] Mark Townsend, 'EU countries snub Priti Patel's plans to return asylum seekers', The Guardian, 9 May 2021
[84] Council of Europe, Treaty Series 213, Protocol No 15 amending the Convention on the Protection of Human Rights and Fundamental Freedoms. The Protocol, which entered into force on August 1, 2021, stresses (in Article 1) that the Convention machinery is subservient to the national system of protecting human rights by inserting after the existing preamble: "…the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention," Also, article 4 reduces the time limit for applications from 6 to 4 months.
[85] See Steve Foster 'The Rule of Law in Modern Times: not a Priti sight' (2021) 26(2) Cov. Law J 1

and a retreat to the traditional system, and to undue deference to Parliament and the executive, would leave many individuals' right susceptible arbitrary interference.

Second, the system used by the Act and the Convention – that certain rights are absolute, but that other can be interfered with when necessary and proportionate – accommodates restrictions on rights that are necessary to protect social values and other individual rights. It is a popular myth that bills of rights or international treaties do not allow restrictions on individual behaviour; allowing individuals to act irrespective of others' rights. That of course is nonsense: convicted, and sometimes suspected, criminals are punished within the law, as are those who abuse their rights of private life, free speech or general liberty. The Human Rights Act has never interfered with that principle, but it does attempt to restrict interferences with *fundamental* rights by insisting that the basic principles of legality and proportionality are followed. Thus, the Convention does not prohibit individuals being sent to prison and thereby being subjected to hardship and loss of liberty, but it insists that any such imprisonment follows a fair trial by an independent court (as opposed to the decision of the executive), that the sentence be proportionate, and that the conditions of imprisonment be humane. Bills of Rights and treaties do not outlaw restrictions on basic liberty (freedom to do as you choose), but control the methods and manner of interfering with *fundamental* human rights – the right to life, private life, freedom from torture and inhumane and degrading treatment.

Third, as stated above, both the European Convention machinery and the Human Rights Act preserve the autonomy and features of each state's constitutional and legal order. The European Court of Human Rights has made it clear that the Convention machinery is subsidiary to the domestic protection of human rights, and this is evident in its application of the margin of appreciation, and the most recent Protocol No. 15, which underlines the principle of subsidiarity in the Convention's order. The fact that on occasions (much less than in the pre-Act period) the Court has found UK law and judicial practice out of line with the Convention does not contradict this. Equally, the Human Rights Act 1998 preserves all of our constitutional fundamentals: parliamentary sovereignty, executive autonomy and the limited role of our judiciary. The Act is careful to preserve the right of Parliament to pass and retain laws in breach of Convention rights, and the right to judicially review parliamentary and executive acts is limited by that reality. Parliament has the ultimate say in how the balance between the enjoyment of rights and social and other interests is to be struck. However, to concede to judicial rulings that find such law in breach of the Convention accords with diplomatic and common sense; to do otherwise risks the government being in breach of its obligations in international law, and further applications and defeats in Strasbourg.

Fourth, there is increasing evidence that the Convention machinery and the European Court has become less interventionist, and more tolerant of each state's prerogative to strike the balance itself. This is accommodated by Protocol No. 15, above, and is evident in the areas such as prisoner voting rights,[86] the imposition of whole life sentences,[87] hearsay evidence,[88] and restrictions on peaceful assemblies.[89] In other words, the level of interference with national sovereignty that concern politicians and the public is far less impactful as the reasons for reforming the Act suggest. True, there are cases where the Convention jurisprudence has made us reform our law, or the domestic courts' interpretation of human rights. The development of

[86] *Scoppola v Italy No 3,* judgment of the Grand Chamber, 22 May 2012, Application No. 126/05.
[87] *Hutchinson v United Kingdom* (Application no. 57592/08), judgment of the Grand Chamber, 17 January 2017
[88] *Al Khawara and Tahery v United Kingdom, Application Nos.* 26766/05 and 22228/06, judgment of the Grand Chamber 15 December 2011.
[89] *Austin v United Kingdom* (2012) ECHR 459.

various elements of the common law of privacy is perhaps the best example. However, no one denies the need for such development, although they may disagree on the balance taken by the European Court in that area. Equally, the Court's jurisprudence on the use of torture evidence, and the balancing of deportees' rights with immigration and deportation policies, have naturally led to allegations of human rights legislation skewing the balance between individual rights and wider social policy. Yet such jurisprudence reflects the Council of Europe's commitment to principles of equality and human dignity that form the basis of the Convention, our membership of the Council of Europe and, of course, the UK's constitution. To argue for reform of our human rights law on the basis of a handful of Strasbourg Court decisions displays a worrying failure to appreciate the wider benefits of the Convention and the Human Rights Act. More specifically, to attempt to draft exemptions from the Act, for example to prohibit or limit actions in respect of human rights violations committed by our armed forces abroad, undermines both our commitment to equal rights and justice, and risks unnecessary conflict with the Strasbourg Court.

Fifthly, an examination of the domestic courts' post-Act jurisprudence fails to reveal the 'mission creep' that the Strasbourg machinery has been accused of. Although the domestic courts have used European principles to challenge practices of detention without trial, restrictions on the right to a fair trial, and restrictions on the rights of homosexuals and transsexuals, such decisions have upheld fundamental principles of justice, dignity and equality. These are surely part of the set of traditional British values that many wish to see replacing the principles of the European order. Indeed some of these decisions have been achieved by using traditional common law values; and there is no guarantee that the domestic courts will relax their challenge to such laws simply because they were told to do so in a government paper.

Finally, we need to ask - can we afford to do without the Human Rights Act in its present form? Further, can the UK constitution survive another attack on human rights, the rule of law and the compatibility of our law with international and European law? In a constitution without entrenched human rights, or the constitutional right of the courts to override the acts of a sovereign parliament (executive), the Human Rights Act and our membership of the Council of Europe have proved fundamental in restraining government and providing real and consistent remedies for those whose rights have been violated. To provide another break from international standards and control, after Brexit, may well sound the death knell for human rights and constitutionalism in our constitution. That should be resisted on any account.

LEGAL RESEARCH

The value of comparative legal scholarship

Professor Michael A Adams*

Introduction

It is such a pleasure to write on comparative legal scholarship for the 25th anniversary of the *Coventry Law Journal*. This is an area of research and teaching I have conducted for over 25 years, and it is a celebration of the importance of legal scholarship across so many disciplines and jurisdictions. This article will address when and why I became interested in comparative law and the seven articles I have published in the journal. At a deeper level, it explores the substantive reason why law students, legal academics and lawyers need to understand comparative law.

1984 'The Power to Punish Pupils' dissertation

During my time studying law at Coventry (Lanchester) Polytechnic, the former institution before Coventry University, I had studied predominantly domestic UK law (England and Wales, not even Scotland or Ireland!). Although the European Union had been formed, the UK joining (and later exiting in 2020) was a recent event and EU laws had only started to really impact on UK laws. Legislation started to be passed that were driven by EU Directives rather than domestic legal problems.

My personal tutor and honours dissertation supervisor, Dr Brobbey, had an interest in international law (although taught Property/Land Law), and encouraged me to select a comparative topic. I was also dating a high (secondary) schoolteacher, who believed in corporal punishment (smacking). I had a fundamental and philosophical objection to corporal punishment and thought it would be a great topic. My honours dissertation was entitled "The Power to Punish Pupils" and examined the UK law on children and compared it to the European Court of Human Rights decision in *Campbell & Cosans v UK*.[1] The issue was whether a Scottish teacher had the legal right and protection to cane or smack a child under the school's care. The Court found that the teacher was not *in loco parentis* and was not protected in the same way a parent of the child could administer reasonable force to correct a child. The case was controversial and was the beginning of the abolition of corporal punishment in UK schools.[2]

The other area of law in my final year was an elective subject called Intellectual Property, which included a Privy Council case on the tort of passing off. This case, *Cadbury Schweppes Pty Limited v Pub Squash*,[3] had colour photographs in the paper law reports ([1981] 1 WLR 193) of the two products in question. They were cans of soft drink, one called Solo and one called Pub Squash.[4] On my first trip to Australia in 1986, I tracked down a can of both and

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* Academic Dean and Head of Law School, University of New England, Australia. This article is based on the plenary paper presentation at the 25th anniversary of the Coventry Law Journal, via ZOOM, on 1st October 2021 entitled "Value of Comparative Legal Scholarship" – hosted by Dr Steve Foster and Dr Stuart MacLennan, Coventry University Law School.

[1] [1982] ECHR 1, https://www.bailii.org/eu/cases/ECHR/1982/1.html

[2] Corporal punishment at school: the origins of its abolition in the United Kingdom - Newsroom (coe.int)

[3] [1980] UKPC 30, https://www.bailii.org/uk/cases/UKPC/1980/1980_30.html

[4] https://swarb.co.uk/cadbury-schweppes-pty-ltd-and-others-v-pub-squash-co-pty-ltd-pc-13-oct-1980/

could see the confusion – both fizzy lemonades with real lemons! This obviously set my mind to examine comparative law, but also multi-disciplinary approaches (particularly the impact of economics and finance research.

Australian legal academic life

Australia is a Federated country under a constitution passed by Queen Victoria, to establish the Commonwealth of Australia in 1901.[5] The Federal government was created and specific powers granted to the Commonwealth, with all other powers belonging to the jurisdiction of the States and Territories.[6] Thus, in my main area of corporate (company) law research in 1989, the relevant law was based in a New South Wales (NSW) Act of Parliament (which was based upon a Commonwealth model legislation). But, each State and Territory had a slightly different version. In 1990, the Commonwealth attempted to pass a Federal Corporations Act, which was challenged in the High Court of Australia and found to be unconstitutional. *New South Wales v Commonwealth* is better known as the Incorporations Case,[7] and showed the comparative law issues. It took another decade to finally have the States and Territories agree to refer their constitutional powers to the Commonwealth to pass the Corporations Act 2001 (Cth).[8] This law is still in power, but it causes challenges with the Federal regulator, and which court should matters be brought in – the Federal Court of Australia or a State Supreme Court, such as the NSW Supreme Court? Forum shopping and expedience of court processes impact where litigation may take place and whether the matter involves equity or common law matters (breach of contract, breach of fiduciary duties of a director etc.).

Australian courts, particularly the appellant courts of States and the Commonwealth, rely upon persuasive authorities for the final courts in other jurisdictions. This can include other common law countries, such as the UK, New Zealand, South Africa, Canada, Malaysia, Singapore and sometimes the United States of America Supreme Court. In researching corporate law issues, it was often advantageous to examine at concepts from other common law jurisdictions and see if the concepts would work in an Australian context. For example, I wrote on small business entities (in Australia called Propriety Limited companies) with the South African Close Corporations legislation and the USA Limited Liability Companies.[9]

Previous Coventry Law Journal articles

From 1998 (Volume 3 Cov. Law Journal) to 2018, I have published seven separate articles. Most of the articles deal with issues relating to corporate law, but more significantly they have been comparative – a focus on comparing Australian legal issues with the equivalent issue in the UK.

The first in 1998 was entitled "Corporate law developments in Australia and UK"[10] and this was followed with my co-author, Michael Whitehead, in 1999, called "Recent developments

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[5] Commonwealth of Australia Constitution Act 1900 - http://classic.austlii.edu.au/au/legis/cth/consol_act/coaca430/index.html

[6] New South Wales; Victoria, Tasmania, Queensland, South Australia and Western Australia are the states. Australian Capital Territory and Northern Territory are the two territories which apply both Commonwealth powers and Territory powers.

[7] [1990] HCA 2 http://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/1990/2.html

[8] http://www5.austlii.edu.au/au/legis/cth/consol_act/ca2001172/

[9] Adams, M; "20 Year Snap-Shot of the Developments in the Regulation of Small Corporations" in (2010) 4(4) *Journal of Business Systems, Governance and Ethics*, 7.

[10] (1998) 3(2) *Coventry University Law Journal* 17.

in Australasian law".[11] The next year, 2000, Whitehead and I were joined by a third University of Technology Sydney (UTS) law lecturer, Christopher Clark, to produce "Recent developments in Australian Corporate Law".[12] The following article was a sole authored around comparative law and also had the title "Latest developments in Australian corporate law".[13]

Then I moved institutions from UTS to be Dean of Western Sydney University (WSU) School of Law in 2007. In 2017, I published a large international comparative article on board of directors' diversity. This article was published as "Board diversity and corporate governance: Lessons from Australia, India and Asia".[14] Finally, just before I moved from WSU to be the Head of the University of New England (UNE) Law School, I published with my PhD student, Dr Kardel, an article "The development of a legal framework for Iran's oil and gas industries: from the 1979 revolution to Iranian Petroleum Contracts".[15]

Rationale for comparative law scholarship

There is a real value in looking at different jurisdictions, whether it be within one country or across the European Union or between different countries. It is generally easier to compare common law jurisdictions, as there is a clear interplay between case law and legislation. However, although language barriers can be an issue, comparing a common law country, like Australia with a Civil Code country like China, can provide valuable insights on a global scale.

Approximately a third of the world applies a common law system and a third applies the Civil Code. The final third is either a mixed or hybrid system, with *Sharia* (Islamic law system) as an integral part of the country's legal system. Some countries like South Africa have a particularly complex system of law covering common law and Civil Code and traditional (indigenous) laws.

There is no doubt that over the 25 years of the *Coventry Law Journal*, technology has developed in such a way that it is much easier to access primary legal materials than ever before. Today, with a few clicks via the Google search engine, I can directly compare the UK Companies Act 2006[16] with the Australian Corporations Act 2001 (Cth)[17] from their official government websites. Other electronic free versions are available from the databases of BAILII[18] and AUSTLII[19]. To make accessing all the comparative free legal databases, the work of WORLDLII[20] is amazing, covering over 30 different countries legal systems. As well as the free case law and legislation that the legal information institutes provide, the major commercial legal publishers have great legal databases. Most university law school libraries have access to LexisNexis and Thomson Reuters (WestLaw), as well as more local law publishers.

Thus, a legal practitioner (solicitor, barrister, in-house lawyer) as well as legal academics and students, can now easily access both primary materials and the vast amount of secondary commentaries. These secondary sources often include journal articles and practitioner works,

[11] (1999) 4(2) *Coventry University Law Journal* 1.
[12] (2000) 5(2) *Coventry University Law Journal* 52-55; (2000) 6(1) *Coventry University Law Journal* 12.
[13] (2001) 6(2) *Coventry University Law Journal* 98.
[14] (2017) 22(1) *Coventry Law Journal* 1.
[15] (2018) 23(1) *Coventry Law Journal* 1.
[16] https://www.legislation.gov.uk/ukpga/2006/46/contents
[17] https://www.legislation.gov.au/Details/C2019C00216
[18] British and Irish Legal Information Institute: https://www.bailii.org/
[19] Australasian Legal Information Institute: http://www.austlii.edu.au/
[20] World Legal Information Institute: http://www.worldlii.org/

as well as the classic textbooks. All these materials are often cited in courts as proof of statements or concepts to help (both) parties in litigation.

Some difficulties

The power of language should never be under estimated. Ignoring the issues of translation, even in official language documents for the United Nations or the European Union, there can be challenges with English speaking nations. For example, one of my former doctoral students was working on a question in corporate law in respect of "enforceable undertakings" by regulators. This term does not come up in UK or USA legal databases, as it is unique to Australia. However, once through the academic literature, it became obvious that a similar concept called a "consent order" was used, the comparative legal scholarship became more interesting and more in depth. What are the similarities and more important what are the distinctions?

Another example from my personal experiences was teaching corporate law in China (Shanghai Justice Bureau) in 2004, when two Mandarin-English translators could not agree on the meaning of "civil penalty". This is a corporate law concept whereby a director of a company can commit a criminal offence (criminal law) or have a shareholder bring a civil action (such as the tort of negligence - civil law). But under the Corporations Act 2001 (Cth), Parliament created a civil penalty, which is a hybrid of civil law (single judge in court without a jury), although the penalties involve major fines and banning directors from continuing to be company officers for five years. This was a difficult concept for a Chinese lawyer to understand, as they do not have any equivalent provisions in their law. This is found in Part 9.4B of the Corporations Act 2001, commencing at section 1317E.[21]

Conclusion

Over the last 30 years, I have enjoyed an academic career in corporate law teaching and research, which is predominantly based around one developing statute – the Corporations Act. However, it has been wonderful to make it more interesting to place it in an historical context and a multi-jurisdictional context for students and researchers (as well as government policy-makers and law reformers). We have greater awareness of the legal world and the easy access to free legal materials, such as WORLDLII, has developed the ability to apply new theories and developing principles. One final example is the final court in Australia, the High Court of Australia helped determine the conflicts of law for comparing Civil Code (French) negligence law with the UK common law tort of negligence in *Renault v Zhang*.[22] Similarly, the issue of who and where is there jurisdiction for the tort of defamation, when it is in cyber-space has been resolved in *Dow Jones v Gutnick,*[23] and *Australian News Channel v Voller*.[24]

[21] http://www5.austlii.edu.au/au/legis/cth/consol_act/ca2001172/s1317e.html
[22] [2002] HCA 10, http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2002/10.html
[23] [2002] HCA 56; 210 CLR 575; 194 ALR 433; 77 ALJR 255 (10 December 2002) (austlii.edu.au)
[24] *Fairfax Media Publications Pty Ltd v Voller*; *Nationwide News Pty Limited v Voller*; *Australian News Channel Pty Ltd v Voller* [2021] HCA 27 (8 September 2021) (austlii.edu.au)

CONSTITUTIONAL LAW

The Elections Bill: the arrival of voter ID (and a whole lot more)

Dr Ben Stanford*

Introduction

At the end of 2017, I began to research and write extensively on the Conservative Party proposals to introduce compulsory voter ID laws for several types of elections in the United Kingdom, including General Elections.[1] At the time of writing then, and still today, voters in Great Britain do *not* need to produce any formal identification when visiting a polling station to cast their vote in *any* type of election.[2] A series of pilot schemes in England were held in 2018,[3] and again in 2019, to test the water for this fundamental reform. The authorisation of one such pilot scheme in the 2019 local elections was subject to judicial review, with both the High Court and Court of Appeal considering the issue,[4] albeit with a narrow focus on the legality of the schemes rather than any consideration of the merits of voter ID. This prompted my most recent piece on the issue in the *Coventry Law Journal*.[5]

Since then momentum has gathered pace considerably with the formal introduction of the Elections Bill in July 2021, which is, at the time of writing, at the House of Commons Report stage.[6] Whilst the inclusion of voter ID in the Bill has received the most attention so far,[7] the Bill also includes several other significant proposals that will impact the conduct of elections, the rights of candidates, voters and campaigners, as well as matters of transparency, scrutiny and accountability. These include reforms to the functions of the Electoral Commission, the introduction of "votes for life" for UK nationals residing overseas, arrangements for making reciprocal agreements with European states for EU citizens' voting rights, tagging of electronic campaigning material, changes to the voting system for some elections, conditions of so-called "third party" campaigning, as well as several other issues affecting candidate eligibility, political party registration and expenditure.

This article will focus on arguably the two most significant reforms in the Bill, namely, the introduction of voter ID and reforms to the functions of the Electoral Commission. These two

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[1] Ben Stanford, 'Compulsory voter identification, disenfranchisement and human rights: electoral reform in Great Britain' (2018) 23(1) EHRLR 57-66; Ben Stanford, 'Voter ID plans could disenfranchise millions' *The Conversation* (18 Dec 2017) at https://theconversation.com/voter-id-plans-could-disenfranchise-millions-89096.

[2] Voters in Northern Ireland, however, have had to produce some form of ID since 1985 and photo identification since 2003.

[3] Ben Stanford, 'The 2018 English local elections ID pilots and the right to vote: a vote of (no) confidence?' (2018) 23(6) EHRLR 600; Ben Stanford, 'The results of the 2018 voter ID pilots and why this is not the time for a national roll-out' *LSE Politics and Policy Blog* (31 July 2018) at https://blogs.lse.ac.uk/politicsandpolicy/the-results-of-the-2018-voter-id-pilots/.

[4] *R (Coughlan) v Minister for the Cabinet Office* [2020] EWCA Civ 723; [2019] EWHC 641 (Admin).

[5] Ben Stanford, 'Electoral reform and the authorisation of voter ID pilot schemes' (Case Comment) (2019) 24(2) *Coventry Law Journal* 77-83.

[6] UK Parliament, Parliamentary Bills: Elections Bill (Session 2021-22) at https://bills.parliament.uk/bills/3020#timeline.

[7] See for example Elise Uberoi and Neil Johnston, 'Voter ID' *House of Commons Library Research Briefing* (3 September 2021); Aubrey Allegretti, 'Millions in UK face disenfranchisment under voter ID laws' *The Guardian*, 4 July 2021; Richard Wheeler, 'MPs support voter ID plans despite claims they amount to "far right" tactics' *Evening Standard*, 7 September 2021.

issues have undoubtedly attracted the most public attention and commentary thus far. Whilst they concern very different issues, they both strike at the heart of democracy and matters of accountability in the United Kingdom. Ultimately, this article argues that these reforms follow an increasingly noticeable and troubling pattern of democratic backsliding in the UK.

Why it matters

The introduction of voter ID and reforms to the functions of the Electoral Commission, as well as the other reforms contained in the Elections Bill, raise a number of a fundamental issues which necessitate close scrutiny. First and most importantly, the proposals strike at the very heart of British democracy insofar as they concern the ability of the electorate and other interested parties to directly participate in the electoral process and have a stake in parliamentary democracy. Some of the measures also engage the rule of law given that they concern the power of the executive and matters of scrutiny and accountability.

An important preliminary observation concerns the context in which these reforms are being proposed. Much of the electoral law system that currently underpins elections in the United Kingdom is outdated and complex. In recent years, a variety of stakeholders have expressed concern at the state of the UK's electoral framework. The Electoral Commission has said that there is an "urgent need for simplified and modernised electoral law" which is "increasingly complex and outdated".[8] Going further, the Commission stated that this presents "risks for voters, candidates and campaigners, electoral administrators, regulators and governments".[9] On this point, critics often point to the sheer volume of legislation governing elections in the UK. Writing in 2016, the Electoral Commission noted 17 pieces of primary legislation and 27 pieces of secondary legislation governing UK elections.[10] However, if we also factor in other sources of lesser importance or significance, this framework can stretch to more than 50 Acts of Parliament and 220 pieces of other legislation.[11] Moreover, the last consolidation of electoral law occurred in 1983 with the Representation of the People Act,[12] and some aspects of modern electoral law such as the need for a secret ballot can actually be traced back to the Ballot Act 1872.

Emerging technological and digital challenges have also prompted much criticism of the current framework's relevance and suitability for the 21st century. In 2019, the House of Commons Digital, Culture, Media and Sport Committee described the current electoral legal framework as "not fit for purpose" in relation to advertising and political campaigning due to digitalisation and changing techniques.[13] Shortly after, the Electoral Reform Society went further and described the overall framework of UK electoral law as unfit for purpose, suggesting that "elements of our electoral law date back to Victorian times, with legislation

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[8] Electoral Commission, 'Reforming electoral law' (October 2021) at https://www.electoralcommission.org.uk/sites/default/files/2021-10/Reforming-electoral-law-PACAC-booklet.pdf page 2.
[9] Ibid.
[10] Law Commission, Scottish Law Commission and the Northern Ireland Law Commission, 'Electoral law: a joint interim report' (4 February 2016) p. 5.
[11] Michela Palese, 'We've told Parliament the case for updating our campaign rules – now it's time to act' *Electoral Reform Society* (28 June 2019) at https://www.electoral-reform.org.uk/weve-told-parliament-the-case-for-updating-our-campaign-rules-now-its-time-to-act/.
[12] Ibid.
[13] House of Commons Digital, Culture, Media and Sport Committee, 'Disinformation and "fake news": final report' (HC 1791, 2017-19), para. 211.

failing to keep up with societal and cultural changes, and developments in digital technology".[14]

There is, therefore, a wholly legitimate need to update and modernise the UK's electoral legal framework. This was, to some extent, recognised by the Government when the Bill was introduced. At the second reading in the House of Commons, the Minister for the Constitution, Chloe Smith, claimed that the Bill would have the "overall effect of keeping our elections safe, modern, transparent, fair and inclusive".[15]

The significant reforms envisaged in the Elections Bills should, however, be viewed in a wider context given the recent and sustained pressure on accountability and scrutiny mechanisms in the UK. We need only consider a few examples of recent and ongoing legislative reforms and reviews to see how the scope for challenging the actions and decisions of the state are arguably diminishing. Some have gone so far to label this sliding trend of unaccountability as a "disease within Government".[16] For example, the Overseas Operations (Service Personnel and Veterans) Act 2021 has imposed a statutory presumption against the prosecution of soldiers for alleged offences committed in the course of duty that occurred more than five years prior,[17] as well as additional hurdles and time limits for bringing a criminal or civil case.[18] On a similar note, the Covert Human Intelligence Sources (Criminal Conduct) Act 2021 allows for a "Criminal Conduct Authorisation",[19] essentially authorising conduct that would amount to a crime and thus guaranteeing immunity for undercover agents who break the law in the conduct of their role. Most recently, it has been claimed that the UK's Border Force could be given legal immunity from prosecution for harm or death caused to migrants whilst conducting so-called "pushbacks" in the English Channel.[20]

Looking to the future, Part 2 of the Police, Crime, Sentencing and Courts Bill, currently at the House of Lords Report stage,[21] will allow the police to impose significant restrictions upon static protests, for example with start and finish times as well as maximum noise limits. The Judicial Review and Courts Bill, currently at the House of Commons Report stage,[22] will reform quashing orders to allow public authorities an opportunity to address an issue before further court intervention i.e. a suspended quashing order. The Bill will also eliminate the possibility of subjecting Upper Tribunal refusals to allow an appeal from the First Tier in certain cases (known as *Cart* judicial reviews) to judicial review by the High Court. Lastly, the Independent Review of the Human Rights Act is soon expected to report its findings and

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[14] Palese, note 11, above.
[15] HC Deb vol 700 col 208 (7 September 2021) per Chloe Smith.
[16] Ronan Cormacain, 'Unaccountability – the disease within government' *UK Constitutional Law Association* (17 May 2021) at https://ukconstitutionallaw.org/2021/05/17/ronan-cormacain-unaccountability-the-disease-within-government/.
[17] Overseas Operations (Service Personnel and Veterans) Act 2021 s.2. This presumption does not, however, apply to genocide, crimes against humanity, and war crimes (Schedule 1 to the Act).
[18] Ibid, Parts 1 and 2.
[19] Covert Human Intelligence Sources (Criminal Conduct) Act 2021 s.1. The conduct must be necessary for the purposes of either national security, preventing or detecting crime or preventing disorder, or for the economic well-being of the UK, and it should be considered whether the objective could be reasonably achieved by other lawful conduct.
[20] Rajeev Syal, 'UK Border Force could be given immunity over refugee deaths' *The Guardian,* 13 October 2021.
[21] UK Parliament, Parliamentary Bills: Police, Crime, Sentencing and Courts Bill (Sessions 2019-21; 2021-22) https://bills.parliament.uk/bills/2839#timeline.
[22] UK Parliament, Parliamentary Bills: Judicial Review and Courts Bill (Session 2021-22) https://bills.parliament.uk/bills/3035.

recommendations, amidst concerns from Government that the UK courts are deferring too much to the European Court of Human Rights when applying certain provisions of the Human Rights Act 1998.[23] These reforms should also be viewed in the context of the appointment of the new Justice Secretary, Dominic Raab, who has previously voiced criticism of the Act as well as economic and social rights.[24]

Whilst each of these matters address a particular and specific issue, the mechanisms being subject to review and reform are all essential as they contribute to the safeguarding of democracy. Most importantly, they all engage the rule of law – a fundamental constitutional principle of even greater importance in the absence of a codified constitution – in the sense that they all in some way help to ensure transparency, accountable government and some means of scrutiny.

Returning to the Elections Bill and the introduction of voter ID, this reform arguably engages the greatest power that individuals have over government, namely, the power to remove officials from office in parliamentary and local elections. At the same time, the functional independence of the Electoral Commission is under threat, bringing into question whether it will be able to provide genuine and effective oversight of elections in future.

The Elections Bill

Before the voter ID pilots were held in 2018 and 2019, the first indication of the proposal to introduce compulsory voter identification laws for elections came in 2017 in the build up to the June 2017 General Election. The Conservative Party Manifesto for that election pledged to "legislate to ensure that a form of identification must be presented before voting".[25] As discussed earlier, a series of pilot schemes were then held in the May 2018 and May 2019 local elections, with mixed results and receiving much critique in the aftermath. These pilot schemes are authorised by s.10 of the Representation of the People Act 2000. In essence, s.10(2)(a) permits voter ID pilots that allow modifications to electoral rules in respect of "when, where and how voting at the elections is to take place". The legal challenge to the Cabinet Office's authorisation of a pilot scheme in 2019 pursuant to this provision was rejected.[26]

Then, shortly prior to the December 2019 General Election, the Queen's Speech in October pledged to address "Electoral Integrity" with the purported objectives to "tackle electoral fraud and protect our democracy, whether people are casting their votes at the polling station or elsewhere" and to "make it easier for disabled voters to vote at polling stations".[27] The proposals could loosely be grouped into three categories: first, on voting methods such as the introduction of voter ID as well as reforms to postal and proxy voting; second, on providing greater assistance for blind and other disabled voters; and lastly, a series of responses to emerging challenges such as online campaign material.

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[23] Ministry of Justice, Independent Human Rights Act Review (last updated 31 August 2021) at https://www.gov.uk/guidance/independent-human-rights-act-review.
[24] Rajeev Syal and Haroon Siddique, 'Labour fears Dominic Raab will target rights act in new justice post' *The Guardian*, 16 September 2021.
[25] Conservative Party Manifesto 2017, 'Forward together: our plan for a stronger Britain and a prosperous future' page 43.
[26] Note 4, above.
[27] The Queen's Speech and Associated Background Briefing, on the Occasion of the Opening of Parliament on Monday 14 October 2019 (14 October 2019) at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/839370/Queen_s_Speech_Lobby_Pack_2019_.pdf.

Little progress was made with the proposals until the Queen's Speech in 2021, where a specific "Electoral Integrity Bill" was outlined with the purpose "to tackle electoral fraud, prevent foreign interference and to make it easier for British expats to participate in elections".[28] Finally, the Bill was renamed simply the "Elections Bill" and given its first reading in the House of Commons on 5 July 2021.

The Bill in its current form has seven Parts, which address the following issues: the integrity of the electoral process including the introduction of voter ID; reforms to postal and proxy voting, and several other issues concerning the administration and conduct of elections (Part 1); the registration process and voting rights for British electors overseas, as well as voting and candidacy eligibility of EU citizens post-Brexit (Part 2); the issuing of strategic direction for the Electoral Commission as well as removing its power to initiate prosecutions for breaches of electoral law (Part 3); political finance and expenditure in elections with a particular focus on third-party spending and campaigning (Part 4); disqualification rules if a person is convicted of an intimidatory criminal offence towards a candidate, campaigner or office-holder (Part 5); imprints for digital campaigning material (Part 6); and lastly other miscellaneous and general provisions (Part 7).[29] The Bill is further supplemented by 11 Schedules of considerable length and complexity to implement these changes.

Whilst all of these proposals will have a significant impact upon electoral law in the UK, some raise particular concerns about the future conduct of elections, rights of voters and campaigners, as well as matters of transparency, scrutiny and accountability. Such is the potential impact of these reforms, David Howarth, a former Electoral Commissioner, has warned that the "bill will benefit the Conservative Party at the expense of British democracy".[30] Attention will now turn to two particular reforms that have attracted the most interest so far.

Voter ID

With the exception of Northern Ireland, voters in the rest of the UK have historically been able to cast votes in person in polling stations simply by confirming their name and address. Section 1 of the Elections Bill proposes to introduce the requirement for voters to produce identification at polling stations, which will apply to UK General Elections as well as Local Elections in England, and Police and Crime Commissioner Elections in both England and Wales. Schedule 1 to the Bill sets out the technicalities of the reforms in considerable detail, reflecting the complexity of the UK's electoral framework alluded to earlier.

The potential and likely issues to arise with the introduction of voter ID laws in Great Britain have been commented on extensively elsewhere and so will not be repeated in detail here.[31] In essence, the Government's rationale for the introduction of compulsory voter identification has been questioned given the minimal evidence that impersonation takes place at polling stations. Moreover, concerns have been raised about the possible negative impact on voter turnout and

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[28] The Queen's Speech 2021 (11 May 2021) at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/986770/Queen_s_Speech_2021_-_Background_Briefing_Notes..pdf.

[29] See the Explanatory Notes to the Elections Bill at https://publications.parliament.uk/pa/bills/cbill/58-02/0138/en/210138en.pdf.

[30] David Howarth, 'Government's poisonous Elections bill is designed to cement Tory rule' *OpenDemocracy* (6 September 2021) at https://www.opendemocracy.net/en/opendemocracyuk/governments-poisonous-elections-bill-is-designed-to-cement-tory-rule/.

[31] See above notes 1, 3 and 5, and Heather Green, 'The voter ID pilots: an unlawful electoral experiment' [2019] *Public Law* 242-250.

the risk of disenfranchisement, in particular the disproportionate impact that voter ID requirements may have on ethnic minorities, the elderly, the young, women and the poorest in society who are statistically less likely to possess acceptable forms of photographic identification. Some political stakeholders have gone so far as to call the proposals a form of voter suppression similar to the phenomenon in the United States of America.[32]

These proposals directly impact on the ability of members of the electorate to exercise the right to vote to determine the elected representatives and law-makers of the United Kingdom. In that respect, the right to vote in national elections is guaranteed by Article 3 of the First Protocol to the European Convention on Human Rights (ECHR).[33] Whilst some conditions upon this right can of course be applied, such as age, nationality or residence requirements, any conditions must not curtail the right in question in a way that impairs its very essence and effectiveness, and such conditions must be proportionate and pursue a legitimate aim.[34]

In light of these concerns, the Elections Bill is already encountering difficulties in Scotland and Wales where, pursuant to the Sewel Convention, legislative consent is required when a UK Parliamentary Bill contains provisions that will impact on devolved matters or the legislative or governmental powers of the nations. In quick succession, the governments of both nations refused to give consent to Westminster, exposing what might already be considered a tense relationship between the governments of the nations of the UK and the British Government. Consent was refused first by the Welsh Government on 9 September 2021,[35] followed by the Scottish Government on 21 September 2021.[36] This is significant given the infrequency of refusals for legislative consent in Scotland, Wales and Northern Ireland, with the Institute for Government suggesting that, since 1999, "out of more than 350 legislative consent motions, on just 13 occasions has consent been denied, in part or in full".[37]

To alleviate some of the initial concerns about the proposals, the Bill will allow a wide range of acceptable forms of identification and the creation of a free electoral identity document; similar to that already offered in Northern Ireland. However, many questions remain about the necessity, contents and consequences of the reforms. First, the need for this significant reform remains unconvincing given the clear infrequency of allegations and prosecutions of voter fraud by means of impersonation.[38] Second, it has been estimated that the reform could cost up to £180 million over the next 10 years,[39] or up to £20 million per General Election,[40] which at a time of economic stagnation and recovery following the COVID-19 pandemic is not to be ignored. Third, the range of acceptable identification outlined in Schedule 1 of the Bill has also

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[32] Aubrey Allegretti, 'Millions in UK face disenfranchisement under voter ID plans' *The Guardian*, 4 July 2021.
[33] Article 3 of the First Protocol to the ECHR states: 'The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature'.
[34] *Mathieu-Mohin v Belgium* (1988) 10 E.H.R.R. 1, at [52]; *Hirst v United Kingdom (No.2)* (2006) 42 E.H.R.R. 41 at [62]; *Sitaropoulos v Greece* (2013) 56 E.H.R.R. 9, at [64].
[35] Legislative consent memorandum: Elections Bill at https://senedd.wales/media/se2pxiww/lcm-ld14517-e.pdf.
[36] Legislative consent memorandum: Elections Bill at https://www.parliament.scot/-/media/files/legislation/bills/lcms/elections-bill/splcms068.pdf.
[37] Akash Paun, Jess Sargeant and Elspeth Nicholson, "Sewel Convention" *Institute for Government* (8 December 2020) at https://www.instituteforgovernment.org.uk/explainers/sewel-convention.
[38] Michela Palese and Chris Terry, 'A sledgehammer to crack a nut: the 2018 voter ID trials' *Electoral Reform Society* (September 2018).
[39] Cabinet Office, Elections Bill Impact Assessment (1 July 2021) at https://publications.parliament.uk/pa/bills/cbill/58-02/0138/2021-05-07ImpactAssessmentREV.pdf para. 62.
[40] Electoral Reform Society, 'Voter ID: an expensive distraction' at https://www.electoral-reform.org.uk/campaigns/upgrading-our-democracy/voter-id/.

drawn criticism due to the exclusion of student identification and concessionary travel cards, whilst certain forms of concessionary travel passes for people over the age of 60 will be permitted.[41] These issues have not helped to allay the most fundamental concern: that the reforms will effectively disenfranchise large portions of the electorate to the advantage of the Conservative Party.

The Electoral Commission

The Electoral Commission was established by the Political Parties, Elections and Referendums Act 2000, following a recommendation from the Committee on Standards in Public Life and several other non-governmental bodies.[42] The functions of the Commission are extensive and include reporting on the conduct of elections, regulating political finance, and the registration of political parties in the UK. With the exception of four Commissioners who are nominated by the largest political parties, eligibility requirements for the appointment of the majority of Commissioners are designed to ensure that the Commission remains impartial.[43] According to its website, the Electoral Commission is an independent body that works "to promote public confidence in the democratic process and ensure its integrity".[44] Thus, its independence from Government and role in safeguarding British democracy is immediately apparent. Part 3 of the Elections Bill, however, proposes three major reforms that will undoubtedly reduce the independence of the Electoral Commission.

First, the Bill proposes to introduce a "Strategy and Policy Statement" which will be drafted by a Secretary of State and subject to the approval of Parliament and the Speaker's Committee. This Statement will determine the "strategic and policy priorities" of the Government relating to elections and, crucially, the "role and responsibilities" of the Commission in enabling the Government to meet these priorities. The Statement may also set out guidance relating to particular matters. Moreover, the Bill will impose an obligation upon the Commission to have regard to this statement when carrying out its duties. Second, the Bill will allow the Speaker's Committee – a House of Commons committee chaired by the Speaker – to "examine the performance" of the Commission with respect to its fulfilment of the proposed Strategy and Policy Statement. The Speaker's Committee is a statutory body, established by the Political Parties, Elections and Referendums Act 2000, which currently has nine members. Whilst the political composition of the Committee has historically been balanced,[45] five out of nine members of the present Committee are Conservative Party MPs, thus giving a clear controlling stake to the party of Government.[46] Third, the Bill will strip the Electoral Commission of its powers to initiate criminal proceedings in England and Wales, leaving the Crown Prosecution Service alone with the task. This comes in the wake of several high-profile examples where the Commission has investigated the Prime Minister, Boris Johnson, for the refurbishment of his

[41] Fair Vote, Analysis: July 5th Elections Bill (6 July 2021) at https://fairvote.uk/analysis-july-5th-elections-bill/.
[42] Committee on Standards in Public Life, 'The funding of political parties in the United Kingdom (Fifth Report, Cm 4057-I, 1998).
[43] Political Parties, Elections and Referendums Act 2000, Part 1.
[44] Electoral Commission, 'Who we are' at https://www.electoralcommission.org.uk/who-we-are-and-what-we-do/who-we-are.
[45] Alan Renwick and Charlotte Kincaid, 'Why we need an independent Electoral Commission' *The Constitution Unit* (7 October 2020) at https://constitution-unit.com/2020/10/07/why-we-need-an-independent-electoral-commission/.
[46] See UK Parliament, Speaker's Committee on the Electoral Commission at https://committees.parliament.uk/committee/144/speakers-committee-on-the-electoral-commission/.

private flat at 11 Downing Street, as well as the imposition of fines against the "Vote Leave" organisation for breaking spending limits during the EU Referendum campaign.[47]

Given the significant impact of the proposals in the Bill to its operational independence, the Electoral Commission has unsurprisingly commented publicly. On the first issue – the Strategy and Policy Statement – the Commission has stated:

> Within the context of this measure, and the statements which result from it under the current and future governments, it is important that we can continue to work independently and deliver all the duties we have been given. There should be no actual or perceived involvement from government in our operational functions or decision-making. Our independence must be clear for people to see, as this underpins fairness and trust in the electoral system.[48]

On the second issue – the removal of the Commissions' powers of prosecution – the Commission responded:

> When the rules are broken, effective enforcement gives voters confidence in the electoral system. The UK Government does not consider this to be an area of work we should undertake. In the public interest, in order to fill any regulatory gap, the Police and Crown Prosecution Service will need to work with us to take forward appropriate prosecutions. This means prosecuting the full range of offences, from the lower order criminal offences often brought to light through our investigatory work, right through to the more significant offences. We would welcome the government making it clear in the passage of the Bill that this will be the case. Voters have the right to expect that any political party or campaigner which deliberately or recklessly breaks electoral law will face prosecution.[49]

Thus, whilst the Electoral Commission has not expressly criticised the proposals, it has voiced clear concerns about the impact of the reforms to its operational independence and how maintaining this is essential for public trust in the electoral process.

Other bodies have similarly stressed the importance of *independent* election monitoring bodies and the need for them to be protected from Government control or pressure. For example, in its recent report on regulating election finance, the influential Committee on Standards in Public Life has expressed similar sentiments, noting their belief in "the value of an independent regulator, insulated from political pressures and at arm's length from the government".[50] Beyond the UK's particular framework, the Office of the United Nations High Commissioner for Human Rights has expressed similar views, stressing the importance of "independent electoral management bodies and procedures to deal with electoral disputes",[51] and the need

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[47] Rob Merrick, 'Electoral Commission to be stripped of power to prosecute after probe into Boris Johnson's flat makeover' *The Independent*, 18 June 2021.
[48] Electoral Commission, A strategy and policy statement for the Electoral Commission (5 July 2021) at https://www.electoralcommission.org.uk/who-we-are-and-what-we-do/our-views-and-research/elections-bill/a-strategy-and-policy-statement-electoral-commission.
[49] Electoral Commission, The Electoral Commission's ability to bring prosecutions (5 July 2021) at https://www.electoralcommission.org.uk/who-we-are-and-what-we-do/our-views-and-research/elections-bill/electoral-commissions-ability-bring-prosecutions.
[50] Committee on Standards in Public Life, 'Regulating election finance: a review by the Committee on Standards in Public Life' (July 2021) p. 6.
[51] Office of the United Nations High Commissioner for Human Rights, Manual on human rights monitoring, chapter 23: monitoring human rights in the context of elections (United Nations 2011) p. 11.

for "an impartial and independent election management body exempt from provisions leading to discriminatory treatment, political bias or government pressure".[52]

Given recent revelations about conflicts of interest in politics, this move to subject the Electoral Commission to greater Government oversight and control should be firmly resisted. Any political interference with the functions and activities of the Electoral Commission would clearly risk undermining its independence and purpose, and thus risk undermining the integrity of UK elections and democracy more generally.

Conclusions: democratic backsliding

Whilst the inclusion of the long-anticipated voter ID proposals in the Elections Bill has attracted most commentary, it is clear that other provisions in the Bill equally warrant closer scrutiny and careful deliberation. The proposed reforms concern very different issues but are united by the fact that they all strike at the heart of democracy and engage issues of scrutiny and accountability. Changing the process of voting in polling stations in such a significant way engages arguably the most fundamental principle of democracy of all, namely, the ability of the electorate to determine the legislature. At the same time, reducing the independence of the UK's election watchdog risks making the oversight of elections subject to political manipulation and pressure. Moreover, when considering other recent and ongoing reforms, a clear and troubling pattern of democratic backsliding and undermining of accountability mechanisms is clear.[53] Reminding the Government of the importance of the rule of law – and the necessity of independent scrutiny bodies and accountability mechanisms for that purpose – remains essential.

[52] Ibid, page 12.
[53] See The Constitution Unit, 'Is this what democratic backsliding feels like?' Monitor 79 (November 2021) at https://www.ucl.ac.uk/constitution-unit/sites/constitution_unit/files/monitor_79.pdf.

CRIMINAL LAW

A comparative analysis of the defence of provocation under statutory and Islamic law

Abdulrazaq Adelodun Daibu*

Introduction

The defence of provocation, as with other defences to criminal liability, is of common law origin as a result of Nigeria history as a British colony.[1] It is based on the law's compassion for human weakness, as it has been recognised that human beings are prone to losing control under extreme anger.[2] Hence, if they react spontaneously in a violent manner, justice demands that the cause of their spontaneous reaction be taken into consideration when inflicting punishment.[3] Provocation has received legislative and judicial recognition over time and is contained in both the Penal Code Act and the Criminal Code Act, applicable in the Northern and Southern parts of Nigeria respectively.[4] Although the Penal Code merely describes its legal consequence, the Criminal Code gives a lucid and comprehensive definition of provocation and its scope. However, unlike the Criminal Code, the Penal Code does not recognise provocation as an absolute defence to the crime of assault.[5] Both Acts are *ad idem* on the fact that provocation as a legal defence to criminal responsibility does not exonerate completely; rather if successfully proved and accepted by the court, it will merely reduce the finding of murder to manslaughter.[6] The test of what constitutes provocation is not settled, as what may be taken as extreme rage varies from person to person and even from society to society. This is why it is based on the objectivity test as, what might inflame an individual in certain circumstances might not have such an effect on others.

This article analyses the nature and essential elements of the defence of provocation in Nigeria. It also examines how the courts have interpreted some salient principles of the defence and found that provocation ameliorates but never eliminates criminal liability under statutory law. The article further analyses the defence of provocation under Islamic law and reveals that while the defence of provocation is admissible under statutory law, controversy surrounds its admissibility under Islamic law. This is because both the Qur'an and the Hadith, which are the main sources of Islamic law, do not specifically provide for the defence. The article makes a

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1 See generally Kharisu Sufiyan Chukkol, The Law of Crimes in Nigeria, (2010) Ahmadu Bello University Press, 69-281; Cyprian Okechukwu Okonkwo, Okonkwo and Naish: Criminal Law in Nigeria, (1980) Spectrum Books Limited, 97-155.

2 Adeleke L. A. 'Psycho-social Analysis of Elements of Provocation in Nigerian Criminal Justice: A Jurisprudential Desideratum' (2014) University of Bostwana Law Journal, 18 & 19: 28; Hart H. L. A., 'Prolegomenon to the Principles of Punishment' (1991) Feinberg, Joel, Gross, Hyman, (eds.) Philosophy of Law, Wadsworth publishing: 662; Clarkson C. M. V., *Understanding Criminal Law*, (1995) 2nd ed., Fontana Press :73.

3 Chukkol, note 1, above, 202.

4Adeleke, note 2, 27-28; 6ixthform, 'Reforms - provocation' <http://sixthformlaw.info/01_modules/mod3a/3_70_reforms/13_provocation.htm> accessed on 24th July, 2019. See Section 222 of the Penal Code Act, Cap. P. 17 Laws of the Federation of Nigeria 2004 and section 318 of Criminal Code Act Cap C38 Laws of the Federation of Nigeria 2004.

5 Chukkol, note 1, 202.

6 Fitzpatrick B. & Reed A., 'Provocation: A Controlled Response' (2000) 12 Transnational Lawyer 393; Hart, note 2, 73-74; Adeleke note 2, 28; Clarkson, note 2, above, 73.

case for the admissibility of the defence of provocation under Islamic law since there is no clear textual basis for its exclusion.

The nature of provocation

Provocation is any act or word that may make another person to whom it is directed angry.[7] It is an intentional causing of annoyance or anger to another person that makes them react violently.[8] Provocation has also been defined as something (such as words or action) that arouses anger or animosity in another, causing that person to respond in the heat of passion.[9] It is a defence based on common law concession to human weakness to certain words or action in the heat of passion.[10]

Sections 318 and 222 of Criminal and Penal Code Acts respectively provides for provocation.

Section 318 of Criminal Code provides as follows:

> When a person who unlawfully kills another in circumstances which but with provision of this section would constitute murder, does an act which caused the death in the heat of passion caused by grave and sudden provocation and before there is time for his passion to cool, he is guilty of manslaughter only.

Also, section 222 of Penal Code provides that:

> Culpable homicide is not punishable with death if the offender whilst deprived of the power of self-control by grave and sudden provocation causes the death of a person who gave the provocation or causes the death of any other person by mistake or accident.[11]

The above provisions are similar to the position under English criminal law.[12] The Supreme Court of Nigeria defined provocation as act(s) done by the victim to the defendant, which causes the defendant a sudden and temporary loss of self-control, thereby making him for that period not master of his mind.[13] Hence, provocation includes acts, words and insults that cause loss of self-restraint on a reasonable person causing them to assault the person who propelled it.[14] The exact nature of words or conduct that amount to provocation is not settled, and there are disparate opinions of scholars and jurists on the subject. The former position of the common law, that words alone are not sufficient to constitute provocation, was modified in the case of *Holmes v DPP*,[15] where it was held that words alone could amount to provocation in circumstance of a most extreme and exceptional character. This position was approved in *R v Adekanmi,*[16] where the trial judge held that words alone could constitute provocation to reduce

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[7] Longman Dictionary of Contemporary English (1995) 3rd edition, Persons Education Ltd, 1138; Adeleke note 2, 28.
[8] John Koni Ifeolu, *Appreciating Criminal Law in Nigeria* (2012) Iqra Books Nigeria Limited, 117-118.
[9] *Black's Law Dictionary* (1999) 8th edition, Bryan A. Garner West Crown Publishing Company, 1262; Adeleke, note 2, 28; Ifeolu , note 8, 118.
[10] Adeleke, note 2, 28.
[11] See also s.283 of the Criminal Code Act.
[12] See s.3 Homicide Act 1957.
[13] See *Ekeozor v State* (2019) 17 NWLR (Pt.1654) 5I3 at 534-535; *Azuogu v State* (2018) 16 NWLR (Pt.1644) 46, 57.
[14] See s.283 of the Criminal Procedure Code; Chukkol, note 1, 203.
[15] *Holmes v D.P.P.* [1946] A.C. 588.
[16] (1944) 17 N.L.R. 99 at 101.

the offence of murder to manslaughter. Also in *Ejelofu Edache v Queen,*[17] the Federal Supreme Court held that insulting words might amount to provocation pursuant to s.222 of the Penal Code. In *Abubakar Dan Shallah v The State,*[18] the Supreme Court stated that words alone can amount to provocation in certain circumstances, depending on the actual words used and the effect of such words on a reasonable person having a similar background to the defendant. The court further held that where the exact words said or uttered by the deceased are not known, heard or disclosed, as in the instant case, it will be difficult and impossible to determine whether the defence of provocation is available and open to the defendant.

As noted earlier, the defence of provocation is not a complete defence that exonerates the accused; rather it only reduces the charge and punishment;[19] if it is accepted by the court, it simply reduce punishment to manslaughter instead of murder. Hence, discovering a wife committing adultery may be sufficient provocation to reduce an offence of murder to manslaughter; while a mere confession of adultery may not be accepted as provocative, depending on all the circumstances. In *Holmes v DPP*,[20] the wife's act of calling her husband impotent and informing him of her sexual escapade with another man was held to be sufficient provocation. Also in *R v Adekanmi,*[21] it was held that the abusive remarks of a pregnant and nursing mother, referring to her husband as a fool because the latter demanded to know who was responsible for her five-month old pregnancy, were sufficient to constitute provocation. For a woman to taunt her husband with impotence and then spit in his face might in certain circumstance reduce murder to manslaughter in local communities. On the other hand, a wife's refusal to prepare food for her husband has been held to be insufficient for this purpose.[22]

Dicta in certain cases tend to suggest that the defence of provocation will not be available when actual intent to kill or inflict grievous bodily harm exists. This view has been discredited as archaic and anachronistic because provocation might well arise where a person actually intends to inflict grievous bodily harm or kill, if such intention was as a result of sudden loss of self-control occasioned by provocation. [23] Devlin LJ[24] affirmed this position, and further stated that if it was the law that whenever provocation excites any sort of intention to kill or cause grievous bodily harm the offence is murder, then provocation would not exist as a defence in criminal jurisprudence. However, in *Musa Yaro v The Stat*e,[25] the appellant and five other persons alleged that the deceased insulted the prophet Muhammed (S.A.W.) with certain derogatory words and comments, although the exact words that were claimed to be insulting, derogatory and provocative were not given in evidence. The appellant and others had killed the deceased, purportedly in accordance with the provision of the Holy Qur'an. They were tried and sentenced to death by the trial judge. The Court of Appeal affirmed the decision and on a final appeal to the Supreme Court, it was held that there was plainly no evidence on record to enable the court to consider the defence of provocation or any other defences. This is because the appellant failed to call any evidence to show how the exact words or acts that provoked the appellant and other accused persons to justify the killing.[26]

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[17] (1962) 1 ALL NLR 22.
[18] *Abubakar Dan Shallah v The State* (2007) 18 NWLR (Pt.1066) 240, at 273, 282.
[19] *Ekeozor v The State*, supra, note 13.
[20] *Holmes v D.P*.P. note 15.
21 *R v Adekanmi* (1944) 17 N.L.R. 99 at 101.
22 *Oladiran v The State* (1986)1 NWLR (Pt. 14)75.
23 Lord Goddard C.J in *A G of Ceylon v Perera* [1953] A.C 200, 206
24 *Lee Chun Chuen v R* [1962] 3 WLR 1461.
25 *Musa Yaro v The State* (2007) 18 NWLR (Pt.1066) 215.
26 Ibid, 234.

Elements of provocation

There are certain elements that an accused person must prove in order to succeed in their defence of provocation. These elements will determine the admission or otherwise of the defence. The Nigerian courts appear to be inconsistent with respect to these elements. For example, in *Abubakar Dan Shallah v The State*,[27] the Supreme Court, following its earlier decisions,[28] held the elements of provocation were, the act of provocation must be sudden and grave; the accused must have reasonably lost his self-control in the heat of passion; and the degree of retaliation by the accused must be proportionate to the provocation in question.[29] This has always been the approach of the Supreme Court and other subordinate courts in Nigeria. However, the Supreme Court appears to have altered its position slightly in the more recent cases of *Eze v The State,*[30] *Ndubisi v The State,*[31] and *Azuogu v The State.*[32] In these cases, it has held that an accused person will only be entitled to the defence if it is shown that there was an act of provocation from the deceased; that such provocation caused his loss of self-control, actual and reasonable; that he killed the deceased in the heat of passion; and at the time of killing the heat of passion had not waned

The sudden and grave act of provocation and loss of self-control resulting in the killing are paramount considerations in both the earlier,[33] and recent[34] cases. However, the Supreme Court did not consider the fact that the degree of retaliation by the accused must be reasonably proportionate to the provocation in question in the cases of *Eze v The State,*[35] *Ndubisi v The State,*[36] and *Azuogu v The State*[37] as laid down in the earlier cases.[38] In order words, the element that the mode of resentment must bear a reasonable relationship to the provocation was left out as an element in the latter cases. [39] Although the court in the three later cases,[40] did not rely on the former cases of *Musa Yaro v The State*[41] and *Abubakar Dan Shallah v The State,*[42] it did not in any way overrule the decisions on the basis of being erroneous. In fact, the court heavily relied and cited with approval all the earlier decisions of the Supreme Court, the Federal Supreme Court and West Africa Court of Appeal relied upon in the *Yaro* and *Shallah's* cases. The basis for the court's silence on this element is not clear and could be simply an inadvertence of the panel of justices that heard the cases and legal practitioners involved in the cases. Nevertheless, our discussion of the basic elements of provocation is based on the following - the act of provocation is grave and sudden; the accused must have lost self-control actual and reasonable in the heat of passion; and the mode of resentment must bear a reasonable

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27 Abubakar Dan Shallah v The State note 18 at 272-273, 281-2812, 291-292.
28 See the cases of Amala v The State (2004) 12 NWLR (Pt. 888) 520; Shande v The State (2005) 12 NWLR (Pt 939) 301; Onyia v State (2006) 11 NWLR (Pt 991) 267; *Ahmed v The State* (1999) 7 NWLR (Pt, 612) 641.
29 *Abubakar Dan Shallah v The State* note 18, 272-273, 281-282.
30 (2018)16 NWLR (Pt.1644) 1, at 20.
31 (2018)16 NWLR (Pt. 1644) 24, at 41-42.
32 (2018) 16 NWLR (Pt.1644) 46, at 62, 65.
33Amala v The State note 28, Shande v The State note 28, Onyia v State note 28, Abubakar Dan Shallah v The State note 18, Ahmed v. The State, note 28.
34 Eze v The State note 30, Ndubisi v The State note 31, Azuogu v The State note 32.
35 Note 30.
36 Note 31.
37 Note 32.
38 See the cases of *Ahmed v The State*, note 28, Abubakar Dan Shallah v The State, note 18, Amala v The State, note 28.
39 *Eze v The State*, note 30; *Ndubisi v The State*, note 31 and *Azuogu v The State*, note 32.
40 *Eze v The State,* note 30; *Ndubisi v The State,* note 31 and *Azuogu v The State*, note 32.
41 *Musa Yaro v The State*, note 25.
42 *Abubakar Dan Shallah v The State* note 18.

relationship to the provocation This captures the former and recent decisions of the Supreme Court in the cases analysed above and must co-exist before the defence can succeed.[43]

Firstly, provocation must be such that cause a reasonable man to lose his self-control. The test is that of a reasonable man and not necessarily the accused person. A question that readily comes to mind is who is that reasonable man who is to be so reasonably provoked? It is submitted that a reasonable man in this context is a man in the accused person's state in life who will most likely do the same thing like the accused person in such circumstance.[44] The court however seems to assume that an illiterate and primitive person is more easily provoked than an educated and enlightened person. In *R v Adekanmi,*[45] Francis J was of the view that reasonable men are men of education and civilization, who have the attributes of sobriety, who are not hot-tempered and cannot be easily aroused. He thus attributed aggression and high passion to illiterates and primitive people. This view is speculative, imaginary and baseless in that there is no scientific and empirical evidence to prove the same. In response, Okonkwo argued that the assertion is fallacious and debatable because whether a person is peevish or not has nothing to do with his standard of education or civilization.[46] It is submitted that the question of a reasonable man is subjective and confined to the discretion of the court, bearing in mind the facts and circumstance of each case as well as the status of the accused in life.[47]

Another important element is that the act that causes the sudden provocation resulting in the death must be done in the heat of passion. If there is any "cooling time" between the provocation and the retaliation, then the defence of provocation will fail. In *R v Green,*[48] the period of waiting (about four hours) negated the defence of sudden provocation because in the opinion of the court the accused had more than enough time for reflection. The facts of the case were that the accused's wife abandoned him and went to her mother's house. The husband tried in vain to win her back, and one day, at approximately 9 p.m., the husband went to see his wife in his mother-in-law's house and found his wife and another man having sexual intercourse. The husband returned home immediately, and came back at about 1 a.m. with a machete to see if the man was still there. He found his mother-in-law snoring and heard the voice of his wife and the man talking in a dark room. He killed the wife and her mother with the machete. His plea of provocation was rejected on the ground that between the provocation and the killing, there was enough time for his passion to cool. Clearly if he had killed the pair at 9 p.m. when he first saw them, the plea would have been good.[49]

It can be noted that provocation by one person is no excuse for killing another person who does not offer any provocation to the accused. In *R v Ebor,*[50] the accused met four women, one of whom was his ex-wife who had married another man on a farmland. He demanded the cloth she was wearing and as she was untying it in the presence of another woman he stabbed her. It was held that even if he (the accused) lost his self-control as a result of the provocation given by his ex-wife, he was nevertheless guilty of murder because the second woman did not provoke him in anyway. However, provocation given by a group of persons acting in concert

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[43] *Shade v The State* note 28, *Onia v State* note 28.
[44] See Adesola M.A, 'Provocation; A Ruck in the Texture of justice in' (1997) *The Jurist*, 3:56; Chukka, note 1, 230-232.
[45] *R v Adekanmi note 21.*
[46] Okonkwo, note 1, 242.
[47] *Oladiran v The State*, note 22, 83.
[48] (1955) 15 WACA 73. See also the recent decision in *Onyia v The State*, note 28 at 298.
[49] However, see *Phillip v the Queen* [1969] 2 AC 130.
[50] (1950) 19 NLR 84.

or unison might be successfully pleaded where the person so provoked kills a member of such a group.[51]

Lastly, the mode of resentment or retaliation must be commensurate and reasonably proportionate to the provocation offered.[52] This is known as the principle of proportionality. Provocation that may cause a reasonable man to retaliate against a slap on the face may not reduce murder to manslaughter where the accused savagely batters the offender to death with a deadly weapon. For example, if a man who is provoked retaliates with a blow with his fist on another grown man, a jury may well likely consider that there was nothing excessive in the retaliation even though the blow might cause the man to fall and fracture his skull, for the provocation may well merit a blow with a fist. It would be quite another thing if the person provoked struck the man and continue to rain blows upon him or hit his head against the ground.

In *R v Adelodun,*[53] A was provoked by an abusive song against his family. He lost his self-control and killed one of the singers with a machete. The plea of provocation failed because the injury inflicted on the deceased was so severe and the weapon used (a machete) was held not to be proportionate to what the deceased said or did to him. The courts, however, seem to be inconsistent in addressing this important element. For example, in *The State v Mohammed*,[54] the court took into account the fact that the dagger used by the accused, who is a kanuri man, is usually worn by his tribe as an ornament and therefore held that the defence of provocation availed him. With respect to the court, one wonders if this reasoning is relevant to the dispensation of justice. Thus, a kanuri man can use a dagger to retaliate against a mere abusive word simply because he has a dagger that he wears as an ornament. Should this form part of the consideration at all? This remains a question in need of urgent answer. Also in *R v Philip,*[55] where the accused used a deadly weapon on the deceased, one finds it difficult to reconcile the use of a deadly weapon to retaliate against abusive words on his mother (the deceased), yet the plea of provocation succeeded and mitigated his punishment. The reasoning behind the court's decision in first case was that it is not every slight provocation that justifies retaliation with a lethal object or weapon. However, in the latter two cases, the courts are of the view that it will be illogical to expect someone who is no longer master of his mind as a result of provocation to be mindful of the object used while reacting to the provocation from his victim.

The defence of provocation under Islamic law

There is disagreement between traditional and contemporary Islamic law scholars on the exact position of the defence of provocation under Islamic law. While the traditional Islamic scholars rely mostly on the primary sources of Islamic law to justify their positions that provocation is not recognised as a defence under Islamic law, contemporary scholars appear to rely on secondary sources such as *ijtihad* and *maslaha al mursala* to argue that the defence of provocation should be recognised and applicable under Islamic law. This controversy necessitates an examination of the defence of provocation under Islamic law of crime.

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[51] See the cases of *R v Dummemi* (1955) 15 WACA 75; 76; R v Hall 24 App, Rep, 48. See Also the Unreported decision of the Nigerian Supreme Court in the case of *The State v Onoko,* Appeal no SC72/I969 cited in Peter Ocheme, *The Nigerian Criminal Law*, (2006) Liberty Publications Ltd, 134.
[52] *Abubakar Dan Shallah v The State,* note 18, 272-273, 281.
[53] (1959) NN R 144. See also *R v Bassey* (1963) 1 All NLR 280.
[54] (1969) 1 WNLR 296.
[55] [1969] AC 130. 281.
[55] (1959) NN R 144. See also *R v Bassey* (1963) 1 All NLR 280.
[55] (1969) 1 WNLR 296.

Islamic law makes no provision for the defence of provocation. A sane and adult Muslim is responsible and answerable for all his deeds or misdeeds.[56] Islam cherishes and adores human life and thus forbids unlawful killing in whatever guise, thereby making provocation alien and unknown to Islamic law. The Qur'an has several verses that prohibits unlawful killing. In *Surat al-An'Am,*[57] it provides that: "Take not life which Allah Hath made sacred, except by way of Justice and Law."

The Prophet (SAW) has also said that the first action to be judged on the Day of Judgment is the spilling of blood.[58] He also said that God has forbidden Muslims from three things: to spill the blood of another or deprive him of his life, to deprive him of his property, and to deprive him of his honour or integrity.[59] Thus, unlawful termination of human life is a capital offence under Islamic criminal jurisprudence.[60] The heirs of a deceased may, however, decide indemnify for the murder of their deceased family members.[61] Allah says in the Glorious Quran thus:

> O you who believe! *Al-Qisas* is prescribed for you in case of murder: the free for the free, the slave for the slave, and the female for the female. But if the killer is forgiven by the brother (or relatives) of the killed against blood money, then adhering to it with fairness and payment of the blood money to the heir should be made in fairness.[62]

Jurists have, however, divided this offence into several categories for the purpose of determining the appropriate punishment for each type. These include deliberate homicide (*Qatl amd*), quasi-deliberate homicide (*Shibh al 'amd*), and killing by mistake (*Khata'*).[63] For there to be murder, the *mens rea (al qasd al jinai')* and *actus reus (al fi'l al Mubashir)* must be established.[64] However, intention is difficult to determine since it is a thing of the mind of the accused at the material time. The Qur'an considering the sanctity of life says:

> If a person kills a believer intentionally, his recompense is hell to abide therein (forever) and the wrath and the curse of God are upon him.[65]

In another verse on murder, the Qur'an stated thus:

> And slay not the life which Allah has made sacred, save in the course of justice. This, He has commanded you, in order that you may discern.[66]

It is evident from the above authorities that where an individual wilfully kills another, he is guilty of murder and liable to the requisite punishment i.e. *Qisas.* However, it becomes more complex when the element of wilfulness is removed. Without doubt, the punishment cannot remain the same because intention is a crucial element of every crime under Islamic law; the

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[56] Jawahir Al-Ilkhil, Sharh Mukhtasar Al-Khalil 8, 70; Hashiyatul Adawi, 2, 290; *Shalla v The State*, note 45, 271-285.
[57] Qur'an 6:151.
[58] Bulugh Al-Maram Min Adillatil Ahkam by Asqalani, 244.
[59] Forty Traditions of Imam An-Nanawi.
[60] Homicide in Islam, 14; Karim M.F; Mishkat-ul-Masabih, Law Publishing Co, Lahore. Pakistan, 11: 508.
[61] Muhammad M.A; Al-Fiqhul-Muyassaru (2004) Dar al-Manarah, Egypt, 952.
[62] Quran 2:178.
[63] al Tashri' al jinai' al islami, 450-452.
[64] Anwarullah; *The Criminal Law of Islam*, 21-24.
[65] Quran 4: 93.
[66] Quran 6: 151.

absence of which creates doubt regarding the validity of the action and whether it can be excused totally or partially.[67] Thus, where the killing was clearly unintentional, as when a person kills another lurking in the bush and whom he did not see while hunting for animals, then payment of *Diyah* is sufficient as expiation for the same.[68]

A very complex middle ground between intentional and unintentional homicide is the quasi-intentional homicide, which although recognised by the majority of scholars, is absolutely rejected under the *Maliki* school of thought.[69] This category of homicide implies that although murder has occurred through a wilful act, the accused had not intended the result of his actions.[70] It occupies a position between wilful offence and accident or mistake, and the degree of accountability it entails is lesser than wilful offence.[71] A good example is where a person hits another person with a stick or pushes him and he dies while playing. It is trite that the accused while hitting or pushing the deceased to death as the case may be did not mean to kill the deceased, but to hurt him. This implies that there is a doubt over the intention behind the killing as it occurred as a result of accident that may affect and reduce the penalty for the offence from murder to manslaughter. Similarly, where an individual throws a stone hitting another in the head in the course of a quarrel and injures him, he shall be guilty of the crime of quasi-wilfully causing bodily hurt and shall incur a penalty lighter than one who is wilfully guilty.[72] This is because while the act of throwing an object at an opponent during a quarrel is usually intended, the resultant effect, whether grievous bodily hurt or death is not always intended.[73] It is therefore, submitted that if doubt as to the intention of a crime and accident are admissible defences under Islamic law, provocation can as well conveniently come under defences to criminal responsibility to mitigate punishment as obtainable under common law and penal states in Nigeria.

The prophet was reported to have decided a case whereby two women from *Hudhayl* fought each other, and one of them flung a stone that hit and killed the other woman and the child in her womb. He had ordered the *Diyah* of both the victim and the foetus.[74] This hadith is very illustrative. It not only confirms the punishment for quasi-intentional murder as payment of *Diyat* and not *Qisas,* but also seems to have taken into consideration the fact that the killing occurred during a fight as a result of anger and loss of self-control. Of course, this is the central idea of provocation.[75] It was also reported that a man who confessed to a killing was brought before the prophet by the deceased's brother. The man accepted responsibility but pleaded provocation saying; 'He insulted me and I got angry and hit him with my hatchet'. The prophet then requested the heirs of the deceased to pardon the killer.[76] The combined effects of all these authorities are that it gives credence to provocation as a possible defence under Islamic law. The prophet's lenient involvement in reducing the crime of murder to a lesser degree of punishment implies that provocation suffices as a defence that ought to be admissible under Islamic criminal jurisprudence.

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[67] Khan T. M. *Criminal Law in Islam* (2007) Pentagon Press, India, 139.
[68] 4:92.
[69] Anwarullah, *The Criminal Law of Islam* (2006) Kitab Bhavan, New Delhi, 55.
[70] Ibn Manzur: Lisan al 'Arab (2011) Dar Sadir, Beirut, 504.
[71] Khan note 67 :155-56
[72] Ibid, 156.
[73] Ibid.
[74] Sahih al Bukhari: Kitab al-Diyat, 4: 40-46.
[75] Muhammad ibn Abi Bakr ibn Qayyim al-Jawziyyah: Zad al-Mu'ad (1979) 5 Muassisat al-Risalah, Beirut, 9-10.
[76] Sahih al-Muslim, Kitab al-Qasamah, 5, 109-110.

Admissibility of the defence of provocation under Islamic criminal law

Traditional jurists claim that the defence of provocation is not recognized under Islamic law. This has not, however, ruled out the debate as to its legal status and its applicability to the Islamic criminal justice system. Modern scholars see provocation as a form of human infirmity and argue that provocation like other human weaknesses such as mistake, accident, forgetfulness, insanity and duress is recognised as a valid reason to mitigate criminal liability.[77] Indeed, there is no reason why the *Fuqaha* should interpret forgetfulness to include forgetting to pray and exclude someone who loses his self-control as a result of extreme rage.[78] Scholars are unanimous on the principle of Islamic law that in cases of doubt with regard to culpability, *hudood* punishment should be suspended rather than executed.[79] *Hudood* is the penalty prescribed by the Islamic law not only for specific designated crimes involving *Qisas* and *Diyah*.[80] Doubt exists where there is a strong suspicion and or allegation of commission of crime without substantial evidence to prove it.[81]

A good example is where there is uncertainty brought about by absence of proof, backing out of witnesses, and stealing and larceny of unprotected properties that have little significance such as wood or straw.[82] The Hanafi jurists classify doubt into two categories:[83] the doubt involved in the act and the one involved in the place.[84] The first category of doubt is relevant in that the act in question is ambiguous and the doubt inherent therein is termed as doubt of affinity.[85] A doubt such as this is involved in an act about whose legitimacy or illegitimacy the perpetrator of the action is uncertain of because there is no traditional proof of its legitimacy.[86] Clearly, provocation can be situated here in that the accused person is not denying his criminal liability, but claiming it was as a result of loss of self-restraint at the material time.

All three *imams*[87] regard the intention of the accused in cases of homicide as the sign of distinction between them.[88] The popular hadith that says actions shall be judged according to intention supports this point. However, intention is a mental activity and as such cannot be ascertained except by external evidence, and this confirms that intention is a matter of doubt. Provocation affects the clear intention of the accused at the time when he hit the victim. Thus, these scholars differ about external evidence.[89] Imam Shafi'ee and Ahmad opine that homicidal intention should be proven by external evidence as obtainable under conventional criminal justice system by witnesses' testimony or confession of the accused. On the other hand, Imam Abu Hanifa is of the view that due consideration should be given to external evidence in this regard as homicidal intent could prove by conventional means of establishing offence through

[77]Nyazee Imran Ahsan Khan, 'Grave and Sudden Provocation in Islamic Law' www.nyazee.org/islaw/exercises/ex3.pdf accessed on 16 June 2019.
[78] Ibid.
[79] Abdul Qadir Oudah, *Criminal Law of Islam* (2005) Kitab Bhavan, India 252-62.
[80] Ibid. p253.
[81] Proof here includes not only proof of an act but also the proof of an injunction.
[82] Oudah, note 79: 254-58.
[83] Ibid, 259.
[84] Muhammad Ash Shawkani; Sharh Fathul Qadeer (Dar al-Fikr, Lebanon) 4 :140-141
[85] Sharh Fathul Qadeer, 140-141.
[86] Ibid.
[87] Imams Shafi'ee, Ahmad and Abu Hanifah
[88] Oudah, note 79, l5:35.
[89] Ibid, 36.

testimony of witnesses, confession of the accused and by consideration of the weapon used in killing.[90]

Imam Maliki's, however, does not believe in provocation as a defence because to him murder can only be wilful or inadvertent and there is no middle ground.[91] He opines that it is enough to establish if the act had been committed transgressively.[92] Of course, this opinion is against the possibility of viewing murder committed in the heat of passion as a defence. Even though, it is usual that the accused who is provoked will grab just about any available implement to strike his victim, the *Malikites* vehemently oppose any line of distinction between an implement that always kills and one that seldom kills. To him, all cases of transgressive murder are wilful homicide and should be meted out with *Qisas,* as the prophet (p.b.u.h) has said the punishment for wilful murder is retaliation.[93]

In contrast, Imam Abu Hanifa says that in as much as the punishment for wilful murder is severe to the highest degree, it requires that the criminal intent required to ground the penalty should be correspondingly high, intense, and clear beyond doubt.[94] He considers the mode of killing or weapon used as of high importance. He opines that even in a case where the victim was subjected to incessant blows by the accused, which resulted in death, the accused can only by guilty of quasi-intentional homicide because it is unusual for a person to intend killing with blows.[95] He further contends that since it is unusual for a person to intend killing with blows and/or that blows are generally unlikely to result in death, the doubt arising from such probability should be in favour of an accused and thus restrict the penalty of *Qisas.*[96]

From the above, it is clear that Abu Hanifa constantly tilt towards the principle that any iota of doubt must necessarily affect the application of the penalty of *Qisas* in murder cases**.** This, of course, is not a general opinion, but finds support under a category of doubt the *Shafii'tes* classify as formal doubt, which basically has to do with the legitimacy or illegitimacy of an act springing from disagreement among the jurists.[97] Thus, whenever jurists differ over the legitimacy or illegitimacy of any act the relevant *Hud* will be removed. A number of effects follow from the implementation of this doubt principle. Sometimes, the relevant *Hud* is totally nullified and the accused is acquitted as when, for instance, there are no witnesses to prove *Zina.* While at other times, the *Hud* is replaced by a penal punishment, as when murder is proved to be quasi-intentional by way of provocation and where the punishment of *Qisas* is replaced by *Diyat.*

It is thus submitted that even though murder cannot be justified with the defence of provocation under Islamic law, nevertheless provocation can be a cause for the reduction of punishment from a death penalty to life imprisonment because of the doubt as to the intention of the act that results in the death.[98] This by no means is intended to exculpate criminal liability, but to reduce the punishment ordinarily due based on the twin principles that it is better to err in forgiving than in punishing, and that every doubt invalidates *Hud* inclusive of Qisas and

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[90] Ibid, 35-36.
[91] Ibid.
[92] Ibid
[93] Ibid
[94] Ibid, 36
[95] Ibid, 7
[96] Ibid
[97] Oudah, note 79, 258-59
[98] Khan, note 67, 306-307

Diyat.[99] Thus, the defence of provocation is not acceptable to the maliki school of thought based on Qur'anic authorities on sanctity of life,[100] and the outright prohibition of any form of unlawful killing. Hence, inadvertent killing shall only be punishable by *Diyat* as a means of compensating the heirs for the loss of their loved relative under Islamic Criminal Justice. However, all other classical scholars; Imam Ahmad, Imam Shafi'ee and Imam Hanafi, agreed on a third category of murder i.e. the quasi-intention murder which is the middle ground between intentional and unintentional murders. Therefore, the defence of provocation can conveniently fit as a defence admissible under the Islamic law and killing pursuant to the same shall be regarded as quasi-intentional to mitigate, not to exculpate, an accused person of criminal liability, but to reduce or mitigate punishment as obtainable under common law. Indeed, no amount of provocation can serve as an excuse to justify murder, but considering the twin principles of criminal justice mentioned earlier, it is more close to justice that the intention of the accused be considered and elements of doubt carefully considered. This is in line with the position under statutory law and the criminal/penal code**.**

A comparative analysis of the defence of provocation under statutory and Islamic law

The general belief in every society is that most accused persons are deliberate offenders. This is not always so as some of them are inadvertent offenders whose crimes for one reason or another are not regarded as highly culpable as the former class. Crime under Islamic law and statutory law is generally the same. It also involves an act or omission contrary to a law for which punishment is stipulated. The elements of crime being the same, the concept of *mens rea* is a key factor in the determination of culpability. Thus, a defendant who kills another under provocation under the Nigerian statutory law is guilty of only manslaughter. The defence of provocation originally emerged as a recognition of human weaknesses. Its primary purpose was to ensure that a culpable person who committed murder in the heat of passion would not be given the mandatory death penalty**.**

Under statutory law, a successful plea of provocation reduces the punishment from the death penalty to life imprisonment. This is also the position of other Islamic jurists apart from Imam Maliki. The rationale for the reduction of the punishment is entirely based on the absence of *mens rea, which* creates doubt as to the state of mind of the accused as at the time of commission of the criminal act. Conversely, the punishment due to the accused under Nigerian law after the successful plea of provocation is discretionary in that it gives the judges the liberty to decide whether or not to give the maximum sentence of life imprisonment. Islamic law does not give room for such discretion and this can lead to a miscarriage of justice. Where it is proven that an accused committed the crime under provocation, the judge is bound to administer the fixed penalty under Islamic law. Hence, the accused shall be liable to pay the heavy *Diyat* and a judge has no discretion to reduce it.

Conclusions and recommendations

This article has analysed the nature and elements of the defence of provocation under statutory and Islamic law and reveals that successful proof of provocation is not a total exculpation of liability but will only reduce the punishment stipulated for the offence of murder to manslaughter. This is because as the victim is entitled to his life, the murderer must be accountable for his act. Under statutory law, provocation is based on its effect on a reasonable man and the objective test. The objective test is not required under Islamic because of the belief

[99] Oudah,, note 79, 252-53
[100] Quran17:33.

that individuals do not have the perception even for the same sets of facts. It is therefore important to look beyond specific individuals and to a reasonable man. This is perhaps the reason why some scholars oppose the defence of provocation under Islamic criminal law. It is submitted that even though the application of provocation under Islamic criminal appears not to be settled, it could be admissible as a valid defence.

Accordingly, it is hereby recommended that:

1. The court should in determining whether there has been enough cooling time, take into account the degree of provocation offered; the more serious the provocation, the longer the time required for passion to cool.

2. The court should in applying the reasonable man test take into account everything including the physical peculiarities of the accused such as his status in life, age, sex, physical and mental disabilities as well as their emotional condition. The court should also note that the "reasonable man" is a person having the power of self-control expected of an ordinary person of the same sex, age and status of the accused person.

3. The silence of Islamic law on reasonable man/objectivity test should be adopted under the statutory law so that a provoked accused will be judged on what he felt and his reaction to it, not anyone else's.

4. Further, the statutory law on provocation should take into consideration factors such as the sex, age, condition, marital status, residence etc. of the accused, yet, genetics is left out. Scientifically of course, this has a great role to play in feeling and reactions to the same. That a person be judged on what another individual in his situation would have felt, and done is skewed and untenable.

5. Nigerian penal law should be amended to contain a provision where a murderer can pay compensation to the family or heirs of the deceased at their own request. This would be in line with the Islamic law principle of the payment of diyat, which gives them a feeling of actively taking a decision that purges them of hurt and hatred for the accused. More often than not, the heirs during or after the payment of the blood money dismiss, albeit gradually, their thirst for revenge and any grudge therein since the killer has shown remorse by paying them compensation for killing their relative. A situation where the family of the deceased have no say or choice such matter exclusively left in the hand of the state is not fair, just and effective, because the jail imposed or execution may not benefit the family of the victim and the accused person.

6. The focus of the Nigerian Criminal law jurisprudence on punitive punishment rather than deterrence should be revisited and the position should be shifted basically on deterrence, which is the focus of the Islamic law. The Islamic law progresses from deterrence to retribution through Qisas. This allows for the desired reformation of the individual and other members of the society. The conventional statutory system places undue focus on the restoration of social order in the state or society rather than the people who indeed, make up the state. This is why, given the findings that provocation serves a partial defence to murder under Islamic law, the accused is liable only to pay diyat, but under the statutory law, he still has to serve a jail term.

SPACE LAW

The Space Industry Regulations 2021: Another Giant Leap?

Alexander Simmonds*

Introduction

Following the seminal Space Industry Act 2018,[1] the Space Industry Regulations 2021[2] were promulgated following two consultations that drew 52 responses from a range of industry specialists, including Orbital Operators, users of satellite services, launch operators and academic institutions;[3] the author amongst those responding. From this came the voluminous Draft Space Industry Regulations 2021, which were laid before both Houses of Parliament on 24 May 2021 and came into force on 29 July 2021, having passed the affirmative resolution procedure. Whereas the Space Industry Act 2018 greatly expanded the landscape of UK Space Legislation, the Space Industry Regulations 2021 greatly expanded on the Space Industry Act 2018, laying the foundations for the budding UK Space Industry to become fully operational as per the government's ambitions. As a follow-up to the author's original piece on the Space Industry Act,[4] this article will seek to examine the scope of the new regulations and seek to highlight any potential gaps or problems that may arise as the countdown begins to the UK's new space age.

International space law

For a lay reader or even a seasoned international lawyer, international Space Law is largely obscure. The impetus for international regulation followed the seminal launch and successful orbit of the Soviet Sputnik 1 satellite in 1957. Shortly thereafter, UN General Assembly Resolution 1348 of 1958 posed the 'Question of the Peaceful Use of Outer space'.[5] Following this, there was Resolution 1472 - on 'International co-operation in the Peaceful uses of Outer Space.'[6] This foreshadowed the 'Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space'. All of these relatively 'soft' measures led to the seminal 1967 Outer Space Treaty[7], still the most famous legal instrument in this field.

Due to the prevailing Cold War tensions, the 1968 'Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space' - [8] known as the "Rescue Agreement" - was then promulgated. Next came the 1972 Convention on

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[1] C5. For an overview of the main parts of the Act, see the author's previous article, Alex Simmonds 'The Space Industry Act 2018: a giant leap?' (2020) 24 (2) *Coventry Law Journal* 95.

[2] SI 2021No. 792.

[3] *Unlocking Commercial Spaceflight for the UK',*8, 5 March 2021 online <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/968535/Space-Industry-Regulations-Consultations-summary-of-views-and-government-response-accessible.pdf> accessed 12 September 2021

[4] N1 above.

[5] UNGA Res 1348 (XIII) (13 December 1958).

[6] UNGA Res 1472 (XIV) (12 December 1959).

[7] Treaty on Principles Governing the Activities of States in Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (adopted 27 January 1967, entered into force 10 October 1967) 610 UNTS 205 (Outer Space Treaty).

[8] UNGA Res 2345 (XXII) (22 April 1968).

International Liability for Damage Caused by Space Objects[9], which expanded on Article 7 of the 1967 Treaty.[10] The Convention established one of the important cornerstones of international Space Law, that *"*A launching State shall be absolutely liable to pay compensation for damage caused by its space object on the surface of the Earth or to aircraft in flight."[11] The Liability Convention was shortly followed by the 1975 Convention on Registration of Objects Launched into Outer Space,[12] which obliged all parties to establish a domestic registry for any space objects they were responsible for. Lastly came the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies.[13] In addition to these treaties, there have been many other agreements that do not need to be mentioned in any detail here.[14]

Other relevant national law

Prior to the Space Industry Act, the Outer Space Act 1986[15] was the only piece of national space legislation, and was created primarily to safeguard the UK's treaty obligations,[16] with s.4 giving life to Article VI of the Outer Space Treaty,[17] and s.7 creating the "Register of Space Objects" in honour of the Registration Convention.[18] There was a licensing regime under the Act, whereby issues of "public health or the safety of persons or property", or inconsistency with the "international obligations of the United Kingdom," or "national security of the UK." could result in rejection[19]. Since s.1(3) of the Space Industry Act, however, the Outer Space Act 1986 now only applies in respect of spaceflight activities taking place outside of the UK-by-UK based entities.

The Space Industry Act positively exploded the national space legislation scene bringing with it 72 sections and 12 schedules, in contrast to the Outer Space Act's 15 sections. Whilst, at the time, this seemed like a dramatic change, the new Space Industry Regulations effectively dwarf their parent Act.

The Space Industry Regulations 2021

Overview

The Space Industry Regulations 2021 (hereafter 'the regulations') put a considerable amount of flesh on the substantial bones of the Space Industry Act 2018. There are 17 Parts, many containing multiple chapters and 8 Schedules. The first substantial Part, Part 3, focusses on the granting of licenses to spaceport operators and range control services, laying down conditions that must be fulfilled by applicants, in the hope of preventing unsuitable individuals from being

[9] UNGA Res 2777 (XXVI) (29 March 1972).
[10] Ibid 8.
[11] Ibid article 2.
[12] UNGA Res 3235 (XXIX) (14 January 1975).
[13] UNGA Res 34/68 (5 December 1979).
[14] See, for example, 'The Principles Relating to Remote Sensing of the Earth from Outer Space', UNGA Res 41/65 (3 December 1986), 'The Principles Relevant to the Use of Nuclear Power Sources in Outer Space', UNGA Res 47/68 (14 December 1992). 'The Declaration on International Cooperation in the Exploration and Use of Outer Space for the Benefit and in the Interest of All States, Taking into Particular Account the Needs of Developing Countries', UNGA Res 51/122 (13 December 1996).
[15] C38.
[16] Impact Assessment: Review of the Outer Space Act 1986, online <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/493187/OSA_Impact_Assessment_FINAL_BIS0067.pdf> accessed 4th November 2019, 5.
[17] Ibid 8.
[18] Ibid 15.
[19] The Outer Space Act 1986 c38, s.4(2)(a)-(c).

granted such potentially destructive capabilities. Relatedly, Part 4 seeks to define and lay down the parameters of acceptable risks and how such risks should be assessed. Part 5 concerns the granting of 'spaceport licenses' in a similar fashion to Part 4. Part 6, 'Range Control Services', lays down rules regarding the range of spaceflight activities and the identification of 'hazard areas.'[20] Part 7 on 'Training, qualifications and medical fitness' prescribes minimum standards for personnel directly involved with spaceflight activities including those who would be tasked with actually flying into space in addition to the training manager responsible and the details of the training manager themselves.[21] Part 8, the largest Part within the Regulations, covers safety as it relates to the operator's spaceflight activities covering the specific safety personnel who must be appointed as a condition of being granted a license[22] in addition to launch and return preparations[23] and emergency response.[24] Chapter 5 of Part 8 lays down further safety requirements for flights involving 'human occupants, and delineates specific duties as regards the 'pilot in command' and 'flight crew'.[25] There are also a number of new criminal offences created under this part relating to failures of the pilot in command and other associated personnel.[26] Part 9 makes provisions regarding the limitation of exposure to cosmic radiation for all such 'human occupants' and Part 10 deals with Spaceport Safety. Part 11 considers all aspects of security from that associated with the launch site itself and cyber security in addition to the vetting of personnel. Part 12 relates to the 'Informed Consent' to be given by human occupants prior to undertaking a spaceflight activity and includes such details as what the consent form should contain[27] and the information to be given to the occupant prior to signing[28] in addition to procedural and evidential requirements of this process. Part 13, the shortest chapter of the Regulations, but possibly one of the most important, concerns liability and indemnity. The lengthy Part 14 considers Monitoring and Enforcement including the obligation to provide information to the regulator,[29] and the appointment of inspectors.[30] Part 15 concerns Civil Sanctions and Part 16 relates to Occurrence reporting with Part 17 being titled 'Miscellaneous' covering offences and penalties not considered elsewhere. The eight comprehensive schedules cover a wide range of matters chiefly related to safety. It is worth mentioning here that an important revelation comes in the form of Regulation 3, which confirms the Civil Aviation Authority as being the Regulator.

Demarcation of the Regulations

Questions of semantics aside, the Regulations could be crudely split into three categories; Regulations directly concerned with spaceflight activities, Regulations indirectly concerned with spaceflight activities and Regulations peripherally concerned with spaceflight activities.

In the former category, are regulations regarding the actual launch and subsequent spaceflight activities, i.e. whereby an object has been physically launched from a spaceport? In the second category are Regulations concerned with matters such as risk assessment and licensing of spaceports and spaceflight operators and in the third category are regulations concerned with

[20] Chapter 4.
[21] Chapter 2.
[22] Section 3.
[23] Section 5.
[24] Section 8.
[25] Chapter 5, Section 4.
[26] Chapter 6.
[27] Chapter 3.
[28] Chapter 4.
[29] Chapter 2.
[30] Chapter 3.

the safety and security of such installations. Although it is true that 'all roads lead to Rome' and that, by definition, each of these regulations is concerned with spaceflight by virtue of being part of the regulations themselves, some regulations are much more relevant to the physical act of spaceflight than others and it is those on which this article will mainly concern itself.

The Regulations

With the aim of establishing a clear framework for space activities from within the UK, the Regulations are extremely detailed, laying down an extensive licensing regime for those who wish to conduct spaceflight activities and making the grant of any such license contingent on an array of strict factors. Safety appears to be well and truly at the forefront in this regard, as the applicants must provide detailed safety information to the regulator where necessary and conduct their own safety analyses and risk assessments.

Although the Regulations all pertain to 'Space Flight', some are much more directly related than others. However, there is far from a clear-cut distinction in some cases, particularly as regards those related to licensing and safety. Some of the regulations are only concerned with Spaceflight in a very peripheral sense. These are judged to be Part 11 (Security), Part 14 (Monitoring and Enforcement), Part 15 (Civil Sanctions), Part 16 (Occurrence Reporting) and Part 17 (Miscellaneous) and do not contribute anything significant to the law on actual 'Space Flight'.

The Regulations which are most directly concerned with Space Flight are those concerned with the personnel directly and indirectly involved with the actual launch and the safety provisions that have been drawn up surrounding them in addition to regulations connected with the actual launch-sites. Those that are not as directly related are those that pertain to the licensing arrangements in respect of the various functions the regulations have laid down, specifically Operators, Range Control, and Spaceport Operators. This article will first inspect these more peripheral regulations before moving on to inspect those directly related to Space Flight.

Peripheral Regulations

Licenses

Should anybody wish to conduct space activities, they will have to apply for an operator license. Depending on the type of activities to be conducted, a different license will have to be applied for. The available licenses are a 'Launch Operator License', a 'Spaceport License', a 'Range Control License' or a 'Return Operator License'.[31]

Regulation 6 specifies that certain individuals will be ineligible to apply for a Space Port or Operator License. These are undischarged bankrupts or those under similar debt-related sanctions, those who have been disqualified from being a Company Director and those who have been convicted of offences of dishonesty or an indictable offence where this conviction is not considered spent under the Rehabilitation of Offenders Act 1974 or the equivalent measure in Northern Ireland.[32] If a license is obtained for any of these activities, the licensee must then appoint an 'accountable manager', a 'safety manager' and a 'security manager'[33]. Likewise, a Range Control Licensee must appoint a 'range safety manager' a 'range operations

31 Part 1.
32 Reg. 6(1)(a).
33 R7.

manager', an 'accountable manager', a 'security manager' and a 'training manager'. By virtue of Regulation 5(1)(b) and (c) the conditions regarding ineligibility also apply to these managers.

The mandatory appointment of such managers may mean that licensees are able to discharge themselves from liability by assigning blame lower down the pecking order in the event of a catastrophe, but Regulation 12 provides that licensees must ensure that individuals appointed "have the necessary resources and means to carry out their duties". If a legal argument could be sustained that this has not been the case, managers may have a fighting chance at avoiding or at least mitigating liability should a licensee attempt to indemnify themselves from the consequences of a disaster. Moreover, licensees are under a duty to keep the regulator informed as to changes to these individuals and keep them updated if there is a change in circumstances such as a death or the manager leaving their post in whatever capacity. Failure to do this could result in a conviction under Regulation 14; the maximum punishment on summary conviction under reg. 14(2)(a) being a fine and under (c) on indictment, imprisonment for up to 2 years or a fine or both. Furthermore, nothing in the Space Industry Act or Regulations suggests that the doctrine of Vicarious Liability would not arise in any case.

Part 4 of the Regulations is entitled 'Grant of a spaceflight operator license: risk'. Chapter 2 is headed 'Risks to persons who are not crew or spaceflight participants' and Section 1 is headed 'Steps applicant must take to ensure that risks are as low as reasonably practicable'. Under Regulation 26 a Flight Safety Analysis must be carried out by the applicant in which they '(a) identify the major hazards that could, whether or not the launch vehicle malfunctions - i) arise from, or cause a major accident during the proposed spaceflight activities or ii) arise from the launch vehicle or any part of it during the proposed spaceflight activities.' The applicant must then comply with Regulation 28 in respect of each identified hazard and under 26(c) 'estimate numerically the risk of death or serious injury arising from the identified hazards 'referred to in paragraph 18(2) of Schedule 1. These are (a) the locations of individuals who could be harmed by any of the identified hazards; (b) the applicant's own and each proposed range control service provider's capabilities in— (i) tracking; (ii) telemetry; (iii) communications; (c) how any flight safety system will be activated if its activation is necessary; (d) how the applicant will coordinate and communicate with air traffic control service providers, meteorological information providers and emergency services; (e) any legal requirements relevant to the applicant's proposed use of airspace; (f) information available about any known space object with which there is a risk of the launch vehicle colliding.

The further matters in paragraph 18(2) that the applicant must consider as a possible consequence of the activities are (a) blast overpressure; (b) fragmentation debris; (c) thermal radiation; (d) toxic release; (e) major accident hazards arising from— (i) any discarded part of the launch vehicle and any object, including any payload, released or separated from the launch vehicle; (ii) collision with a space object; (iii) meteorological or environmental conditions; (iv) the use of a carrier aircraft, if applicable; (v) re-entry of the launch vehicle, or any part of it, from orbit, if applicable'

Regulation 27(1) stipulates that, in the case of applicants for launch operator licenses, a 'ground safety analysis' must also be carried out to identify 'major accident hazards that could arise- (a) during, or cause a major accident during, preparations for the launch from the time when the launch vehicle or its components arrive at the spaceport or other place from which the launch is to take place, or (b) from the launch vehicle, or any part of it, or from a payload, upon or after landing, whether or not the launch vehicle malfunctions.

Under Regulation 29 an applicant for a 'launch operator' or 'return operator' license must also provide a- not insubstantial- 'safety case' to the regulator which contains the information required under Schedule 1- essentially all the expected details about the flight, such as the details of the vehicle itself, the payload and details about the surrounding area.[34] In addition, Schedule 1(2) also requires information about 'the applicant's organisation and management structure'. Curiously, under Regulation 33, the applicant only appears to be compelled to submit a risk assessment to the regulator if the spaceflight activities concerned would involve 'human occupants'[35]. In practice, this may be counterbalanced by the stringent requirements of the Safety Case discussed previously.

Part 5 governs the grant of Spaceport Licenses and is similar in scope and depth to Part 4 as regards Spaceflight Operator Licenses. Regulation 36 likewise lays down a 'Safety Case' requirement, additionally, a description of the aerodrome must be included if the spaceport would be a horizontal spaceport along with a description of the surrounding areas in any case. Under Reg. 36(4)(d) a plan of the proposed spaceport is also to be submitted containing details of the infrastructure that would reside there along with hangars and storage facilities for hazardous waste. Interestingly it also enquires as to the location of any 'proposed static engine or other test areas'.

Regulation 35 makes provision for horizontal spaceports, stating that these must be both CAA licenced and Certified under sections 12,13,13A 14 and 15 of the Aviation Security Act 1982(a). Vertical spaceports are not mentioned in the Regulations. Regulation 37 requires that the Applicant be able to demonstrate that it can put in place an 'appropriate safety clear zone to ensure that the risk to any person from blast overpressure, fragmentation debris, thermal radiation or toxic release will be as low as reasonably practicable during any hazardous pre-flight and post-flight operations. However, the above does not apply if the safety case shows that a safety clear zone will not be required.

Part 6 covers Range Control Services. This Part essentially lays down rules for the organisation of Range Control Licensees in respect of such services. It compels the Licensee to ensure that they are capable of discharging the duties that they have assumed such as identifying an appropriate range or tracking the progress of a flight and a space object's return to earth. R46 compels the licensee to identify an appropriate range subject to the characteristics of the launch vehicle and its planned trajectory, in addition to prevailing environmental and meteorological conditions. Reassuringly, R46(e)(i) and (i) provide that this must also extend to considering the populated areas in the vicinity of the proposed activities or in any area where they could be impacted upon. Areas whereby the launch vehicle (or parts thereof) could fall to earth must also be identified as part of the range control activities. All such details must be reported to the regulator. Under R47, 'hazard areas' must also be identified. These areas may be designated as 'exclusion zones' whereby 'persons or things' who either may pose a hazard to or be exposed to potential hazards, could be forbidden to enter. There must also be a time limit stipulated but no limit is placed on this.

The licensing application process appears to be rigorous. Regulation 19 also provides that, as part of the process, the applicant may be required to surrender to an inspection of the 'site, facility, craft or equipment to be used in connection with the activities which are the subject of the application as the regulator may specify'.

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[34] Schedule 1(2).
[35] 33(1)(b).

Some activities connected with space flight do not require a license. For example, under Regulation 15, operators of carrier aircraft are not required to hold an operator license if the aircraft is being used merely to transport a space object or launch vehicle (or components thereof) from one place to another, as opposed to carrying a space object to the required altitude prior to launch. For anybody interested in applying for a license, the Civil Aviation Authority have published guidance on the process.[36]

One point of legal interest here regarding the granting of such licenses, perhaps particularly to Contract Lawyers, is the potential situation whereby a proposed operator enters into an agreement with a Spaceport licensee to launch a satellite from the spaceport in question. What would be the effect of the flight being rejected on the basis of a deficient safety case (or, vice versa, the Spaceport License being rejected)? This is quite possible given the amount of information that must be provided to the regulator, as the requirements appear very exacting and is too voluminous to recount here. Would such a situation amount to frustration of Contract or would the failed licensee seek to indemnify themselves by attempting to claim damages from the Regulator? In any case, the Space Industry Act 2018 enables a refused applicant to appeal[37] and such a process is supported by the Space Industry Appeals Regulations 2021[38]. Regulation 24(8)(a) - on deleting information on appeals from the internet if a judicial review is brought- may prove to be a harbinger of sorts should an appeal be disputed.

There is also no elaboration on s11 of the Space Industry Act 2018 – "Grant of licenses: assessments of environmental effects" although this is referenced by footnote within Regulation 20(9). This indicates that the legislator considers the environment to be a closed matter in terms of space activities.

Other Important Peripheral Matters

'Members of the Public'

Chapter 3 of Part 5 is entitled 'Members of the public'. It fleshes out the provisions of the Space Industry Act under s2(7) on duties and powers of the Regulator and s10 on the 'Grant of Spaceport License'. For the sake of clarity, the Regulator's main duty under s.2(1) of the Space Industry Act is to "exercise the regulator's functions with regard to spaceflight activities with a view to securing public safety" which takes priority over a number of other important matters, including environmental objectives,[39] and national security.[40]

Under R39 and 40, various people are excluded from this definition such as human occupants of spacecraft and others 'taking part in spaceflight activities' and individuals attending spaceports at the invitation of licensees. Controversially, perhaps, employees of the regulator or those acting on behalf of the regulator are also not so classed, and are neither employees of the emergency services, members of the armed forces of the Crown or employees of qualifying health and safety authorities. Essentially these classes of individual appear expendable in the event of a catastrophe. Taking a purposive approach to this regulation would surely disclose, however, that it is not supposed to mean 'employees of the emergency services' or 'members

[36] The Civil Aviation Authority, *Applying for a License under the Space Industry Act 2018* online <https://publicapps.caa.co.uk/modalapplication.aspx?appid=11&mode=detail&id=10550> accessed 7 October 2021.
[37] Section 60; Schedule 10.
[38] SI No 186.
[39] Section 2(2)(e).
[40] Section 2(2)(f).

of the armed forces' at large, but rather those who may be working in connection with the space activities at the time of any relevant catastrophe. With these distinctions drawn, however, Chapter 3 of Part 5 throws the legislative thrust of this new regime into sharp relief - safety for those not connected with space activities is paramount.

Notification Requirements

Chapter 5 of Part 6 imports some important notification requirements. Under Regulation 49 local authorities, emergency services, property owners, lessees and occupiers or any other person deemed relevant who fall within the identified range within Regulation 46 must be notified of the proposed spaceflight activities 'no longer than 4 weeks prior.' The notification must also contain such information relating to the activities so that those notified- in particular, owners, lessees or occupiers of land- do not pose a hazard or put themselves at risk of such hazards. A curious point arises under Regulation 51(2)(C) which states that a warning must "be issued in a manner which is reasonably necessary to alert the individuals referred to in paragraph (3) to the operator's spaceflight activities". Paragraph 3 contains two classes of individual:

> (a) an individual whose regular place of work is situated on any part of the land falling within the designated range, and
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> (b) any individual who might enter or traverse any part of the land falling within the designated range in exercise of a legal right, entitlement or privilege including, but not limited to, an easement or a public right of way

The designation of individuals under subsection (a) is relatively uncontroversial but a curious point arises in relation to subsection (b), particularly as regards individuals such as tourists. Hill walkers and mountaineers- from across the UK- famously and frequently exercise legal rights of way over the countryside of Scotland. In particular, the Land Reform (Scotland) Act 2003[41] provides under s.1 that "everyone" has the right to "be on land" and has "the right to cross land" for recreational purposes. Unsurprisingly the Act does not mention excluding land from these provisions on the basis of nearby 'Space Activities' but section 8 gives Ministers the power to 'Adjust land excluded from access rights' 'by order'. Section 8(3) states, however, that before this can be done there must be consultations of potentially interested people. Using s.8 to exclude land being used for recreational purposes could be a rather cumbersome and time-consuming process. More pressingly insofar as notice requirements are concerned, launches in Scotland will need to be accompanied by alerts sent to every potential hill walker in the UK if the requirements of Chapter 5 are to be satisfied.

Regulations Specifically Concerned with Spaceflight

The most novel and exciting aspect of the Space Industry Regulations 2021 is perhaps the fact that they legislate for what could be termed the minutiae of human spaceflight, certainly a first in British legislative history. Chapter 5 of Part 8, for example, details 'Specific obligations of pilot in command, flight crew or remote pilot',[42] and Chapter 6 lays down criminal penalties for failing to meet said obligations. Part 7 deals with training, qualifications and medical fitness in respect of those participating in space activities and Part 9 puts forward rules attempting to mitigate expected levels of exposure to 'Cosmic Radiation'. An entire part of the Regulations, Part 12, is even dedicated to 'Informed Consent' of spaceflight participants, building on s.17

[41] ASP 2.
[42] Section 4.

of the Parent Act. This part of the article will address these regulations in ascending order beginning with Part 7.

As above, Part 7 of the Regulations is concerned with 'Training, qualifications and medical fitness'. Regulation 56 defines the following as 'specified roles' for the purpose of the eponymous s18(4)(b) of the Space Industry Act 2018: the launch director,[43] the flight termination personnel,[44] the flight crew and remote pilots[45], the sub-orbital aircraft engineer,[46] the range operations manager,[47] and the range safety manager.[48] Part 1 of Schedule 3 then lays down what could be termed competence criteria for people assigned to these specified roles, for example, members of flight crew ("MFC") for sub-orbital craft must hold either a commercial pilots license with instrument rating or an ICAO compliant commercial pilots license with instrument rating and also be qualified to fly a turbo-jet aircraft. Interestingly, "(3) An MFC who is a pilot of a launch vehicle which is a balloon must hold — (a) a commercial pilot's licence for balloons issued by the CAA, or (b) an ICAO compliant commercial pilot's licence for balloons.". The idea of using a balloon as a launch vehicle may seem strange but, in fact, 'Rockoons' have been used by NASA at least as far back as 1955,[49] to research levels of radiation in the upper atmosphere. Essentially a 'Rockoon' is a balloon that lifts a rocket to a high altitude. The rocket will then ignite and head into space. Modern research indicates that they could be an effective way of launching microsatellites.[50] Other advantages of such air launch methods are considerable including the potential for greater efficiency and hence less pollution.[51] Whether a launch has ever taken place from a manned balloon or not is beyond the scope of the author's knowledge and, likewise, is the feasibility of launching a manned vehicle from a balloon (manned or unmanned). The law relating to the use of unmanned balloons is contained in Regulation (EU) No 923/2012 of 26 September 2012 retained under the European Union (Withdrawal) Act 2018. No license appears to be required as such but rule 1.1 at p 286 states that a high-altitude balloon shall not be operated without permission of the state, and, further, rule 5.1.1. states that at least 7 days' notice should be given as regards the launch of a balloon in the medium-heavy category. Rockets or 'Rockoons' do not feature in this legislation and balloons only receive minimal attention in the 2021 regulations. This is possibly one area where further legislative input is required.

Section 17 of Schedule 3 also requires that "An MFC must be able to demonstrate the MFC's ability to withstand the mental and physical stresses of spaceflight including disorientation, illusory effects, rapid acceleration, microgravity, noise and vibration, in sufficient condition to be able to operate the launch vehicle throughout all phases of flight safely and competently". Further, s.18 states that "(2) Whether the MFC satisfies the criteria in sub-paragraph (1) must be tested in a centrifuge device or an aircraft, or in a combination of the two, that is able to

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[43] Section 4(a).
[44] Section 4(b).
[45] Section 4(c).
[46]Section 4 (d).
[47] Section 4 (e).
[48] Section 4 (f).
[49] Eugene M. Emme, '*Aeronautics and Astronautics Chronology, 1955-1957*', online at <https://history.nasa.gov/Timeline/1955-57.html> accessed 7 October 2021.
[50] Michael Hepfler, *'Successful "rockoon" launch makes space more accessible to microsatellites'* online at <https://engineering.purdue.edu/IE/news/2019/hepfer-leo-rocket-launch.> accessed 7 October 2021.
[51] Marti Sarigul-Klijn, Nesrin Sarigul-Klijn, *'Flight Mechanics of Manned Sub-Orbital Reusable Launch Vehicles with Recommendations for Launch and Recovery'* online <http://www.spacefuture.com/archive/flight_mechanics_of_manned_suborbital_reusable_launch_vehicles_with_recommendations_for_launch_and_recovery.shtml> accessed 7 October 2021.

replicate the effects on the human body of the forces of acceleration, the rate of change of those forces and their duration, in conditions equivalent to the periods of the flight when those forces are most acute.". Moreover, "20. An MFC must have previous experience as a member of the flight crew or as a remote pilot in a launch vehicle or aircraft that exposed the MFC— (a) to a workload which is equivalent to that expected of an MFC or a remote pilot undertaking the spaceflight activities, and (b) to effects on the body of rapid onset and diminution of acceleration at least equivalent to those which would be experienced during a typical flight of the spaceflight operator's launch vehicle."

Unsurprisingly, Regulation 58 specifies that individuals within such specified roles must be medically fit and competent to fulfil the role they have assumed. Part 7 is also concerned to a significant degree with training and Chapter 2 is dedicated entirely to the role of the 'training manager'. Regulation 61 provides for the appointment of a Training Manager, outlines their functions and duties and provides rules relating to their approval. Chapters 3 and 4 relate to the Training Manual and Training Program respectively and follow broadly similar structures. Regulation 70 provides for 'Competence Assessments' which must be conducted by the training manager at regular intervals.

Chapter 5 of Part 7 is connected with medical fitness, with Regulation 72 requiring the licensee to ensure that flight crew and other roles hold a valid medical certificate issued by an 'approved aeromedical examiner'[52] and that none of the crew has "…suffered a decrease in fitness due to illness or injury since the date of issue of their medical certificate which might affect their ability to— (i) withstand the physical and mental rigours of spaceflight; (ii) perform safety-critical functions reliably during the spaceflight activities; (iii) carry out any emergency procedures which may be required during the spaceflight activities, including the evacuation of the launch vehicle" and, further establishing that "no person takes part in spaceflight activities, either as a crew member or a spaceflight participant, if that person is not medically fit to fly". Regulation 75 however, states that spaceflight participants with a disability or reduced mobility may be allowed to fly if they are certified as fit under regulation 73(1) and that their presence on board would not compromise flight safety or otherwise obstruct other members of the crew in the exercise of their duties.

An interesting feature of Part 7 is that Regulation 60 states that records relating to a number of important training matters should be kept for 'at least 2 years. This does not square with the 1982 Limitation Act whereby the limitation period for claiming in the case of an accident is taken to be 3 years from the date that an individual could reasonably be expected to know they could claim from. Surely, for evidential purposes it would be more sensible to keep training records for longer than 2 years.

Where Part 7 lays down the requirements for the qualification and fitness of the actual spaceflight participants and associated personnel, Part 8 revisits the idea of 'safety', but this time in the context of the actual spaceflight activities themselves. It is the longest chapter, containing 55 regulations and is arguably the most interesting and novel part of the instrument.

Chapter 2 – 'A spaceflight operators' duty' – places a duty to ensure that "spaceflight activities are carried out safely" squarely on the shoulders of the spaceflight operator. The definition of carrying such activities out safely is defined by Regulation 79(2) as carrying them out 'in accordance with the current safety case by…(i) preventing a major accident from occurring, and (ii) mitigating the consequences of such an accident if it does occur and… (b) by securing

[52] Regulation 73(1).

the safety of a human occupant" as required by the current risk assessment. Chapter 3 requires that the Safety Case be kept under review at all material times with the operator obligated to do this should a range of circumstances arise which may affect the parameters of the spaceflight activities,[53] with the overarching imperative that the safety duty mentioned in Chapter 2 is always considered.[54] In pursuance of the safety agenda, regulation 83 provides that the Operator must demonstrate compliance with Regulations 84 – 104. 83(2) provides that the operator's risk assessment must cover certain regulations beyond these where the activity is a crewed flight with human occupants. Regulation 84 places the onus on the operator to ensure they have adequate resources to handle the space activity they intend to carry out. Section 3 of Chapter 4 lists requirements of roles specific to safety, such as the safety manager[55], the accountable manager[56], the launch director[57] and, in cases where there is a non-autonomous flight safety system, flight termination personnel[58]. Section 5 provides details on launch preparation and the qualities of the launch vehicle[59] along with other such details about the range and a duty to observe the weather conditions[60] and the situation regarding dangerous goods on board a spacecraft.[61] The bottom line is that the operator should not seek to use any equipment or vehicles etc. which are not fir for purpose, i.e., which "do not conform to (certain) technical requirements."[62] Regulation 99 of s.6 lays down conditions that must be met before the spaceflight activities begin. There are 12 in total, including requirements that the vehicle,[63] spaceport,[64] and designated range,[65] are all fit for the purpose of whatever the activities may be. Other requirements are that the 'relevant emergency services have confirmed that they are on stand-by"[66] and a suitable rehearsal has been carried out.[67] Regulations 100 and 101 provide for the monitoring of and, if necessary, the possible termination of the flight in the event of an emergency.

Regulation 101(1)(c)(i), borrowing language from the first UN Convention on Space Law, puts an obligation on the spaceflight operator to ensure that the spaceflight is carried out both safely and 'in compliance with the international obligations of the United Kingdom'. In particular, "the spaceflight operator must after a launch vehicle has reached a stable orbit…take reasonable steps to…avoid the launch vehicle interfering with the space activities of other persons in the peaceful exploration and use of outer space". Regulation 101(1)(c)(iii) also places the obligation to take reasonable steps to "…prevent contamination of outer space arising from the launch vehicle in orbit or adverse changes in the environment of the earth from that vehicle in orbit". 101(3) makes special provisions for disposing of launch vehicles by re-entering the earth's atmosphere. For the uninitiated, re-entering the earth's atmosphere at the

[53] Regulation 80(2).
[54] Regulation 80(3).
[55] Regulation 86.
[56] Regulation 87.
[57] Regulation 88.
[58] Regulation 89.
[59] Regulation 91/93.
[60] Regulation 97.
[61] Regulation 98.
[62] See Regulation 93 (2) (b) (i).
[63] Regulation 99(2)(a).
[64] Regulation 99(2)(b).
[65] Regulation 99(2)(c).
[66] Regulation 99(2)(e).
[67] Regulation 99(2)(d).

'wrong' angle will cause a space object to burn up[68]. Under these provisions, the operator must take care to ensure that this is done safely and in the least hazardous way in the circumstances.

Section 7 sets out some important provisions on the retaining of information relating to the space activity. Regulation 102 requires that a list of the names and addresses of all human occupants must be made along with a list of any dangerous goods on board and stored for a period of 3 years. Although this is longer than the 2-year period required for training records under Regulation 60, it should still be borne in mind that claims in respect of personal injuries can arise beyond this strict 3 year period in certain cases where the knowledge that a claim could be made is said to arise.[69] This could be an important legal point since there are unknown hazards in connection with spaceflight, which could lead to a claim developing several years down the line. The same is also true of data associated with the flight such as correspondence between the spaceflight operator and the regulator 'before launch and during the operator's spaceflight activities'[70] amongst a host of other data pertinent to the flight. Under Regulation 103(4) this information must also be retained for a period of 3 years with the notable exception of information recorded on the vehicle's flight recorder when the "launch vehicle has not been involved in a spaceflight accident arising from or in the course of the operator's spaceflight activities.". Regulation 103(4) even states that "Where no spaceflight accident arose from or in the course of the operator's spaceflight activities, information recorded by the launch vehicle's flight recorder must only be retained until the completion of those activities.". The use of the word 'must' is curious here. Why shouldn't this be at the operator's discretion? Regulation 78 on interpretation states that a ""flight recorder" means any device for recording data relating to the flight of the launch". This is an extremely broad definition and could relate to a number of things – on board cameras and voice-recorders perhaps, as with the classical 'black boxes' installed on commercial airlines. Surely, such data could be crucial in the event of a personal injury claim. Indeed, the definition of 'accident' is very broad. Section 20(3) of the Space Industry Act 2018 states that "accident" "includes any fortuitous or unexpected event by which the safety of any spacecraft or person is threatened". Furthermore, in the separate instrument, The Spaceflight Activities (Investigation of Spaceflight Accidents) Regulations 2021[71], it is stated in the footnote to Regulation 2 that "The definition of "accident" in s.20(3) (investigation of accidents) of the 2018 Act is wide and includes unexpected events which threaten the safety of any spacecraft or person, whether or not any person is injured or the spacecraft is damaged.". It stems from this that what and what is not classed as an "accident" is not particularly cut and dry and could ultimately lie to be anointed at the behest of a steward's enquiry sometime after the event. In such cases, the absence of flight recorder data would certainly make matters tricky, if not ultimately impossible to resolve.

Regulation 104 lays down the requirement for the spaceflight operator to have an emergency response plan as regards the operator's spaceflight activities. Such a plan must be fairly comprehensive and must also be tested and reviewed at intervals not exceeding 3 years.[72] The results of such a test must be communicated to the regulator along with the details of any revisions.[73]

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[68] For a vivid illustration of this concept, see the film 'Apollo 13' (1995).
[69] Limitation Act1980 s.11(4)(b).
[70] Regulation 103(2)(b).
[71] SI 2021 No.793.
[72] Regulation 104(3).
[73] Regulation 104(4).

Chapter 5 lays down 'Additional Safety requirements for launch vehicles with human occupants. Regulation 105 puts the central duty of those in charge of a space craft in stark terms: "(2) A pilot in command, pilot or a remote pilot carries out the flight safely by carrying it out— (a) in accordance with the current safety case by— (i) preventing a major accident from occurring, or (ii) mitigating the consequences of such an accident if it does occur, and (b) in accordance with the current risk assessment, by securing the safety of a human occupant."

Section 2 requires that a spaceflight operator must ensure that, on crewed flights, the members of the crew are aware of their roles and responsibilities,[74] and that the crew must have all necessary information regarding the flight in order for it to be carried out safely.

Under section 3, there exists a layer of extra conditions where a launch vehicle is crewed by a human occupant. If a human occupant is on board, a launch vehicle must have adequate life support systems in place[75] in addition to redundancies in the event of depressurisation or accidental oxygen depletion in the inhabited areas.[76] There must also be a system to warn the pilot in command/remote pilot of ice build-up on the launch vehicle's exterior,[77] a smoke detection system,[78] and, interestingly, "a system capable of restraining any member of the crew or any spaceflight participant in their seat when necessary to ensure that the flight is carried out safely". It is uncertain what kind of circumstances are foreseen here – does it mean a system to restrain unruly passengers or something akin to a safety belt on a commercial airliner which should be fastened when the pilot in command warns of turbulence or severe weather? Under aviation law, the pilot in command "must take all necessary measures so as to minimise the consequences on the flight of disruptive passenger behaviour"[79]. Additionally, s.52(1) of the Space Industry Act provides that, by statutory instrument, a regulation could provide that ss.94 and 95 of the Civil Aviation Act 1982[80] apply to a spacecraft. Section 94(2) provides that:

> If the commander of an aircraft in flight, wherever that aircraft may be, has reasonable grounds to believe in respect of any person on board the aircraft—
>
> (a) that the person in question has done or is about to do any act on the aircraft while it is in flight which jeopardises or may jeopardise—
>
> (i) the safety of the aircraft or of persons or property on board the aircraft, or
>
> (ii) good order and discipline on board the aircraft, or
>
> (b) that the person in question has done on the aircraft while in flight any act which in the opinion of the commander is a serious offence under any law in

[74] Regulation 106.
[75] Regulation 109(a).
[76] Regulation 109 (b).
[77] Regulation 109 (c).
[78] Regulation 109 (d).
[79] Regulation (EU) 2018/1139 of the European Parliament and of the Council of 4 July 2018 on common rules in the field of civil aviation and establishing a European Union Aviation Safety Agency, and amending Regulations (EC) No 2111/2005, (EC) No 1008/2008, (EU) No 996/2010, (EU) No 376/2014 and Directives 2014/30/EU and 2014/53/EU of the European Parliament and of the Council, and repealing Regulations (EC), No 552/2004 and (EC) No 216/2008 of the European Parliament and of the Council and Council Regulation (EEC) No 3922/91, Annex V, Article 3(g).
[80] C 16.

> force in the country in which the aircraft is registered, not being a law of a political nature or based on racial or religious discrimination,
>
> Then, subject to subsection (4) below, the commander may take with respect to that person such reasonable measures, including restraint of his person, as may be necessary—
>
> (i) to protect the safety of the aircraft or of persons or property on board the aircraft; or
>
> (ii) to maintain good order and discipline on board the aircraft…"

Such regulations have yet to materialise. On a more important note, the extent to which the Civil Aviation Act is to govern the actions of pilots of launch vehicles is wholly unclear. The fact that regulations have to be made in order to import certain parts of the Act implies that it has no automatic application. Furthermore, nowhere is this explicitly stated unless it is to be somehow assumed. Nor is it clear whether Regulation (EU) 2018/1139 is to apply. This could cause significant issues as regards the interpretation of the duties of pilots in command and other crew listed within these regulations as can be seen with the provisions of Part 8 of these regulations when contrasted with the EU Regulation - which, itself, does not appear to cover launch vehicles or spacecraft. Another telling distinction maybe that the term 'flight' is used throughout the Civil Aviation Act as defined under s105 as meaning "…a journey by air beginning when the aircraft in question takes off and ending when it next lands". By way of contrast, the Space Industry Act is concerned with regulating "space activities… sub-orbital activities (and) associated activities"[81]. Section 1(4) defines "space activity" as "launching or procuring the launch or the return to earth of a space object or of an aircraft carrying a space object…operating a space object" or "any activity in outer space".[82] Moreover, Regulation 2 of the Space Industry Regulations makes clear that a "launch vehicle" is a separate entity to a "carrier aircraft" and is specifically used for "spaceflight activities". Moreover, "pilot in command" is defined as the "pilot who takes part in the operator's spaceflight activities on board the launch vehicle". "Spaceflight", then, appears both semantically and legally distinct from "flight".

Regulation 110 states that a safe number of crew must be chosen by the spaceflight operator in accordance with the launch vehicle's safe capacity and the general mission parameter in addition to "any medical needs of a human occupant"[83]. Regulation 111 places the onus on the spaceflight operator to ensure "that instruments, systems and equipment within the launch vehicle are readily operable and accessible from the station where… (a) any pilot in command who needs to use them is seated, and (b) another member of the flight crew who needs to use them is seated. This seems like an unusual duty to place on a spaceflight operator since the user interface of any vehicle is usually determined at the design stage and, it is to be assumed, would be beyond the control of the spaceflight operator unless they are also to commission such vehicles. Astronauts during the Apollo program and, even before, were intimately involved with the design of the functional dimensions of the spacecraft interior and key instruments such as the 'hand controller' – the spacecraft equivalent of a control stick in a fighter jet- and other facilities such as environmental control systems[84]. It is to be presumed that, unless the systems

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[81] Section1(1)(a)-(c).
[82] Ibid, (a)-(c).
[83] Regulation 110 (g).
[84] Andrew Chaikin, *A Man on The Moon; the Voyages of the Apollo Astronauts*, Penguin, 1994, p46. Also see Michael Collins, *Carrying the Fire*, Pan Books, 1974 in which the author- the recently deceased Command

referred to in Regulation 111 are a purely aftermarket affair, that any launch vehicle must have gone through, or been inspired by, a similar design process. Contrastingly, under aviation law, the instruments in this sense are the pilot in command's responsibility. Annex V, Article 2 (c) (iii) of Regulation (EU) 2018/1139 on common rules in the field of civil aviation[85] stipulates that "instruments and equipment as specified in point 5 required for the execution of that flight are installed in the aircraft and are operative, unless waived by the applicable MEL (Minimum Equipment List) or equivalent document" No such limitation is included in Regulation 111.

Regulation 112 dictates that the spaceflight operator must ensure that adequate emergency equipment and an emergency evacuation procedure are in place. Moreover, the onus is also on the spaceflight operator to ensure that emergency procedures and the location of emergency equipment is known to each human occupant[86]. Akin to the procedure in commercial air travel, the operator must also ensure that "immediately before the flight, each human occupant is provided with information about how to use the emergency equipment and means of emergency evacuation and that such information is available on board the launch vehicle"[87]. Regulation 113 obligates the spaceflight operator to ensure the adequacy of the atmospheric conditions on board the launch vehicle.

Section 4 deals exclusively with the "specific obligations of pilot in command, flight crew or remote pilot". Similar to aviation law, Regulation 114 obliges the pilot in command or remote pilot to "(a) perform an inspection of the launch vehicle and its systems and equipment to the extent that it is practicable to do so, and (b) consult any of the spaceflight operator's written records relating to the fitness, condition and preparation of the launch vehicle, in so far as necessary to ensure the flight is carried out safely".

Regulation 115 sets out the scope of the obligations on the pilot in command to 'carry out flight safely', with 115(1) stipulating that the pilot (or remote pilot) 'must give commands, make appropriate decisions and take appropriate actions during the flight of that vehicle which are necessary to ensure that the flight is carried out safely'. Reg. 115(2) places an obligation on the pilot in command to report to the spaceflight operator and regulator should any such command, decision or action not comply with either this instrument or the Space Industry Act 2018. Regulations 117. 118 and 119 are all concerned with the obligations of crew, spaceflight participants and the Launch Director/Safety Manager alike regarding duties vis-a-vis human occupants to remain at stations before launch, on landing and '…during periods of flight when the effects on the human body of the forces due to acceleration and their duration are most acute'[88]. Section 5 on 'Space Flight Participants' likewise places an obligation on spaceflight participants to remain at their station. Underpinning the above provisions is Chapter 6, which creates a raft of criminal offences and penalties to be incurred by the launch director, flight termination personnel, pilot in command /remote pilot in the event of various safety related failures. Spaceflight participants also come under this chapter with regulation 132 creating the offence of 'Failure of a spaceflight participant to remain at station'. The available punishment for these transgressions on summary conviction is a fine and, on trial on indictment. Imprisonment for two years, a fine or both. Whether two years in prison is a proportionate

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Module Pilot of the Apollo 11 moon mission- explains that the aircraft flight instruments of a fighter jet are purposefully placed as close as possible to the middle of the dashboard so that the pilot can still read them, even if so affected by g-force that their vision begins to suffer from radial blur or peripheral blackening.

[85] Above, note 79.

[86] Regulation 112 (2)(a).

[87] Regulation 112(2) (b).

[88] Regulations 117(b), 118(b) and 119(b).

punishment in respect of acts or omissions which could potentially endanger the lives of hundreds, if not thousands of people, is debatable and beyond the scope of this article.

Although the duties of the pilot in command et al under Section 4 may seem, at first blush, prescriptive, it is worth noting further the content of Annex V of Regulation (EU) 2018/1139[89] on common rules in civil aviation that applies in the UK. It is more expansive than the provisions within Space Industry Regulations as regards the responsibilities of commercial pilots. Additionally, there is a requirement under s.2(g) regarding the amount of fuel on board an aircraft – "the amount of fuel/energy for propulsion and consumables on board must be sufficient to ensure that the intended flight can be completed safely, taking into account the meteorological conditions, any element affecting the performance of the aircraft and any delays that are expected in flight. In addition, a fuel/energy reserve must be carried to provide for contingencies. Procedures for in-flight fuel/energy management must be established when relevant." Fuelling is not mentioned anywhere in the Space Industry Regulations but is mentioned in Schedule 1 of the Space Industry Act which specifies that "requirements regarding the assembling, integration and fuelling of spacecraft or carrier aircraft, mating of spacecraft or carrier aircraft to their payloads and fuelling of payloads" may require compliance as a license condition.[90] This seems to be a strange place to provide for such things given the potential gravity of the subject matter. Adequate fuelling is surely as important to the successful flight of a spacecraft as it is a commercial aircraft.

Regarding 'human occupants', the next most important part of these regulations is Part 12 on 'Informed Consent'. An interesting feature from the outset of Part 12 is that a 'human occupant' as defined in Regulation 2(1) means crew members or spaceflight participants. Regulation 206 (1)–(2) shows that both 'space tourists' and crew members have to give informed consent prior to launch. From an employment law perspective, this could raise some interesting questions. The author has been unable to find much material on the legality of an employer requiring an employee to sign a consent form, indeed, the only case that has been found so far bearing any similarity to situations envisaged here is *Cassley and ors v. GMP Securities Europe LLP and anor,*[91] whereby a waiver that an employer issued to an employee did not mean that the duty of care no longer applied in circumstances where a company executive was killed in an air accident. Coulson J stated that, in his view, if the waiver- which, in this case, had not been signed, had in fact, been signed, it '…would have been invalid under the Unfair Contract Terms Act 1977as an attempt to exclude liability for death or personal injury'[92]. It would be reasonable to assume that this would also apply in the case of independent contractors.

Vastly expanding upon s.17 of the Space Industry Act 2018, this part legislates the requirements for informed consent to be given by those engaged in 'space activities' to the possibility and occurrence of death or personal injury. Regulation 205 begins by establishing that, to give valid consent, a person must be at least 18 years of age[93] and have capacity within the definition given in the Mental Capacity Act 2005 or equivalent instrument if in Scotland or Northern Ireland.[94] Chapter 3 is dedicated to the format of the consent form itself, stipulating the details that it must contain, i.e. the full name, address and date of birth of the human occupant, the name and address of the spaceflight operator and details about the vehicle to be

[89] Note 79, above.
[90] Schedule 1(1)(b).
[91] [2015] EWHC 722.
[92] Ibid, para 292.
[93] Regulation 205.
[94] Regulation 205(2).

used and certain details from the risk assessment which must be in an 'easily understandable form'.[95] Regulation 207 provides that certain statements are to be given in the consent form, pinning the human occupant to assertions that they have received and understood training given in paragraphs 50 and 52 of Schedule 3, has read and understood the details of the risk assessment in addition to information under Regulations 209 and 210 and have also been given the opportunity to ask questions and to have received answers thereto. Crucially, Regulation 207 (d) pins the human occupant to the important undertaking that they accept and understand "…that the operator's spaceflight activities carry an inherent risk of danger and in particular that— (i) the activities may result in death or injury, (ii) the regulator has not certified that the launch vehicle complies with any national or international safety standards". The author has a special interest in Regulation 209 having submitted a published article as evidence under the open consultation on the draft regulations[96]. The essential elements of Regulation 209 are that the human occupant must receive and consider certain information before signing the consent form. Such information must include " a copy of any safety recommendations made as a result of a safety investigation relating to the operator's spaceflight activities"[97] "information in writing and in an easily understandable form about any actions taken to improve safety following a spaceflight accident relating to the operator's spaceflight activities"[98] in addition to the number of launches the space flight operator has undertaken, the number of people who have died or sustained injury/suffered a medical emergency thereon, and the number of accidents the operator's spaceflight activities have been subject to[99].Under Regulation 210 information must also be given about the risk assessment 'in an easily understandable form'.

The essential gist of the author's previous article on the matter of informed consent was that under current medical law practices, informed consent can be vitiated if it can be shown that a patient has been 'bombarded' or 'overwhelmed' with information. Giving a human occupant too much information could prove, in a legal sense, to be just as bad as not giving them enough under the present law. Within the draft instrument, proposed Regulations 197 and 198– drafted in essentially identical terms to Regulations 209 and 210- stipulated that the information should be given to the human occupant 'at least 12 hours' before the consent form is signed[100]. The evidence given by the author and corresponding argument was that 12 hours would not be enough because such information given – no matter how clear – could still be difficult to understand for a lay person and, having too little time to read and understand such information could possibly result in what the law may term 'bombardment' and therefore invalidate consent. The actual regulations now stipulate 24 hours rather than 12, which is a desirable improvement. However, the effects of this could be undermined by Regulation 123 which asserts that before "…an operator's spaceflight activities commence, the spaceflight operator must give each human occupant the information referred to in regulations 209 and 210 which has become available since that occupant signed the consent form referred to in section 17". There are seemingly no requirements for a second consent form to be signed assenting to the

[95] Regulation 206 1(a)-(d).
[96] Alex Simmonds, 'The UK Perspective on Informed Consent in Commercial Space Travel, (2020) 45 Air & Space Law, 367.
[97] Regulation 209(2)(b).
[98] Regulation 209(2)(c).
[99] Regulation 209 (3)(a)-(c).
[100] The Draft Space Industry Regulations 2020 available online at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/904345/the-space-industry-regulations-2020.pdf> accessed 6 October 2021.

new information or any time for the asking of questions, nor is there a minimum timeframe as per Regulations 209 and 210.

Part 9 is concerned with cosmic radiation requirements: crew of a launch vehicle and crew of a carrier aircraft. The effect of Cosmic Radiation on 'Space Crew' has been the subject of regulations previously in 2019[101] made under the authority of the Civil Aviation Act 1982.[102] The general standard is that a spaceflight operator should not expose individuals engaged in space activities to a dose of cosmic radiation 'that exceeds 6mSv in a calendar year unless the individual is a classified crew member'. "mSv" is an abbreviation of "Millisievert", a unit of measurement for radiation exposure,[103] 6mSv being a threshold laid down in European Council Directive 2013/59/EURATOM[104]. Article 40 of the Directive makes the distinction between 'category A' and 'category B' workers – 'category A' workers are those 'liable to receive an effective dose greater than 6 mSv per year…'[105], hence, the provision in the Regulations regarding 'classified' crew members. With what could perhaps be regarded as remarkable foresight, the Directive makes specific reference to 'spacecraft crew' under Article 52(1)(a) stating that such individuals could be made the subject of a 'Specially Authorised Exposure' by the competent authority providing that such exposure is managed accordingly.[106] The remainder of this part of the Regulations gives life to the provisions of the EU Directive. Regulation 141 obliges the operator to investigate should they have 'reasonable cause' to suspect overexposure in the case of a crew member.

Somewhat out of sequence, Part 10 deals with 'Spaceport Safety' and retains similar sentiments to the preceding safety-related parts- a safety duty is placed upon the spaceport licensee under Regulation 152, as is the requirement for a safety case. A marked difference is Chapter6 which relates to hazardous material storage facilities,[107] a requirement that propellants 'etc.' are fit for purpose[108] and a requirement that any 'static engine test area' be located at 'an appropriate area' for the purpose of conducting tests if such tests are to be conducted at the spaceport.[109] An emergency response plan is required under Regulation 165 and under Regulation 166 "firefighting personnel, facilities and equipment" must be provided at the spaceport "in a timely manner."[110] Regulation 167 confers powers on spaceport firefighters, enabling them to act pre-emptively should they suspect a fire is about to break out at a spaceport,[111] or otherwise do what they believe to be 'reasonably necessary' to avoid damage to persons or property.[112] Under Regulation 167(4), any individual obstructing such actions taken by firefighters could suffer a fine or two years in prison.

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[101] The Air Navigation (Cosmic Radiation: Protection of Air Crew and Space Crew and Consequential Amendments) order 2019 No.1115.
[102] C. 16.
[103] Radioactivity.eu.com, 'MilliSievert; A unit for low doses of radioactivity' online <https://www.radioactivity.eu.com/site/pages/MilliSievert.htm> accessed 4 October 2021.
[104] Council Directive 2013/59/EURATOM of 5 December 2013 laying down basic safety standards for protection against the dangers arising from exposure to ionising radiation, and repealing Directives 89/618/Euratom, 90/641/Euratom, 96/29/Euratom, 97/43/Euratom and 2003/122/Euratom.
[105] Ibid, Article 40(1)(a).
[106] Article 52(3).
[107] Regulation 158.
[108] Regulation 160.
[109] Regulation 161.
[110] Regulation 166(1).
[111] Regulation 167(1)(a)-(c).
[112] Ibid.

Another important aspect to these regulations is Part 13 on Liabilities and Indemnities. Regulation 218 sets out a long list of individuals who are 'prescribed' under s.34(3)(a) of the Space Industry Act 2018. This section excludes these individuals from the no-fault liability regime established under s.34(2). The individuals in the list consist largely of those who could be classed as being at the launch site of their own volition in a variety of capacities connected with the space activities themselves. Regulation 219 outlines the circumstances in which the operator must indemnify the government against claims brought for loss or damage in respect of its space activities. These are where damage has arisen under gross negligence/ wilful misconduct or otherwise through non-compliance of the license conditions or the Act / regulations made thereunder[113]. Regulation 220 requires the operator to place a limit on their liability for any such injury or damage with such a limit being subject to the regulators' approval.[114] Regulation 220(3) prescribes that this limit does not apply in cases of gross negligence/wilful misconduct or non-compliance with the license conditions or other obligations under the Act or associated regulations. Regulation 221 also makes clear that in cases of non-compliance with license conditions, the Act or Regulations or where there is gross negligence or wilful misconduct, the Secretary of State is under no obligation to indemnify the operator for damage thereto caused.

Regulations not specifically concerned with Space Flight

Part 11 on Security raises few points of interest for this article, other than to highlight the important role that 'US Technology' may play in the UK Space Program. This is defined in the Regulations as being "any US launch vehicles, US related equipment, US technical data or US spacecraft".[115] Predictably, the rest of this part deals with obligations to ensure that sites- and items/materials stored therein- which are connected with space activities are secure, both in a physical,[116] and 'cyber'[117] sense. Regulation 187 lays down a stringent vetting procedure for those applying for key roles in this area. Regulation 189 exposes another inconsistency within the regulations on retention periods with records relating to training and qualifications for security functions connected with an individual engaged in such a capacity need only be kept for as long as the individual is so engaged. As a matter of common sense, it would seem wise to keep such records for longer than this in case of any retrospective enquiry on a related matter. Underscoring the importance of 'US Technology', Chapter 6 is dedicated to the specific security provisions such technology is to enjoy whilst at a UK site. An element of extra-territoriality is implied under Regulation 196, which specifies that the US government must be permitted to oversee and monitor the launch activities of a 'special launch operator'.

Part 14 deals with monitoring and enforcement regarding space activities and connected sites, and particularly relates to the duty to provide inspectors acting on behalf of the regulator with accurate information and/or access to sites of interest with Regulation 241 giving the inspector power of entry to space ports, space sites or other associated places. Relatedly, Part 15 deals with stop notices issued in respect of activities under the regulations. Essentially the Regulator can issue a stop notice to an operator should they have reason to believe their activity may cause, or risk causing serious harm to, inter alia, public safety.

[113] Regulation 219(a)-(b).
[114] Regulation 220(2).
[115] Regulation 168.
[116] Regulation 170.
[117] Chapter 3.

Conclusions

These regulations are certainly a huge expansion of existing legislation, widening the scope of the law greatly in the relatively short time that the Space Industry Act has been live for. The new rules are, in many ways, extremely comprehensive and, in many areas, no stone is, it seems, left unturned. The emphasis on public safety that can be seen throughout the regulations is, likewise, very encouraging. It is good to see that practice in other industries is brought to bear on such matters, for example, the Offshore Installations (Offshore Safety Directive) (Safety Case etc.) Regulations 2015[118] require that operators in the oil industry provide safety cases for certain activities.[119]

As comprehensive as the Regulations are, there are still a number of matters, which require clarity or further expansion. There is no particular treatment of vertical spaceports within the regulations, whereas horizontal spaceports are mentioned several times. Perhaps these will be the subject of future regulations or maybe there is no particular need for the time being owing to the expected initial launching methods. As also noted, there may also be contractual issues in respect of licenses being refused and the cancellation of certain arrangements – a potential spaceport operator may have their license application rejected leaving their prior agreement with a spaceflight operator in tatters. These kind of problems, however, would probably be regarded as being beyond the scope of regulations save for an option for joint applications to be made.

A further disappointing matter is the absence of any further treatment of environmental matters although it is to be hoped that this will be legislated on in future. Under s.2(2)(d) of the Space Industry Act 2018, the regulator must exercise its functions in a way that respects "any environmental objectives set by the Secretary of State". Section 11 also makes the granting of licenses subject to an assessment of the environmental impact but is silent on the circumstances in which a license would be so rejected.

There are some areas where further expansion is needed. The notification regime for members of the public needs to ensure that it covers those in transit close to remote launching sites, namely proposed sites in the Scottish Highlands for the reasons detailed above and there also needs to be some consideration given to the matter of 'Rockoons'. There is also inconsistency across the board regarding limitation periods. Given that a claim for personal injury or tort could foreseeably arise in respect of such dangerous activities, it seems strange that so many records are required to be kept for less than 3 years.

One potential thorny issue lies with the duties of the pilot in command under these regulations and with the EU Regulation on rules relating to civil aviation[120]. The duties under the latter are more extensive than the former. An important question is whether pilots in command of spacecraft would, in addition to the duties enshrined in these regulations, also have to follow the laws as they relate to aircraft more generally, particularly since they are licensed by either the CAA or ICAO. It is not hard to envisage circumstances where an operator seeks to avoid liability by arguing that damage resulting from their space activities was the result of the pilot in command not following their duties as prescribed in other areas of aviation law of which they are also bound.

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[118] SI 2015 No.398.
[119] See for example Regulation 17.
[120] Above, at note 83.

A final remark lies in respect of respect of one of the perceived strengths of this instrument – its comprehensiveness and attention to detail. If one looks at the United States rules in this area, it is clear that, whilst there have been some great strides made in this area, the UK still has a long way to go. The rules are to be found in Title 14 of the United States Code of Federal Regulations.[121] Although there are many similarities and, in some cases, the wording has been lifted almost verbatim,[122] in some parts the rules are far more detailed and technical, in some cases extending to importing complex mathematical equations for the purposes of risk analysis[123] and the complex diagrams contained within Appendix A and B for rule 420.

Thus, whilst these Regulations may have been, yet another giant leap for the U.K., they are still a relatively small step by some standards.

[121] 14 CFR Ch. III §400.
[122] See §460.45 on Informed Consent.
[123] See § 420, App C.

RECENT DEVELOPMENTS

LEGAL STYSTEM

Crash, bang, wallop, what a photograph: a very British confidentiality claim

Dr Steve Foster*

Introduction

Viewers of the recent television drama series *A Very British Scandal* were 'treated' to the very public divorce proceedings between the Duke and Duchess of Argyll 60 years ago, the Duke obtaining a divorce on grounds of the Duchess's adulterous behaviour. The divorce and the events leading up to it were very much a *cause celebre*, perhaps equalling the Profumo scandal for public interest and curiosity. The programme very clearly highlighted the public morals, and misogyny, of the day, the Duchess being portrayed as the scarlet woman, not only by her husband and a male-dominated society, but by women generally. This included her female 'friends' who were afraid that her behaviour would besmirch the reputation and ideal of women, whose conjugal duties towards her husband excluded her right to actually enjoy sexual relations. This is not to condone the Duchess's behaviour (my condonation is completely irrelevant in any case), but merely highlights the hypocrisy and arrogance of the age; where husbands were allowed mistresses, and it was quite common for the male aristocracy to produce both an heir and a spare.

As the programme showed, the Duke was certainly the winner in all this; being granted his divorce, and marrying a wealthy American heiress shortly afterwards; whilst the Duchess was publically shamed and lost her marital home. It was certainly a divorce case from a, thankfully, different age, yet for those who study human rights the Duke and Duchess provided a different legal precedent, for we subsequently witnessed the first real privacy case in the British courts. After the divorce was granted, the Duke sold the marital story to the newspapers, and the Duchess sought an injunction to stop him and the newspapers from disclosing this information.[1] Those who know anything about modern privacy law would instantly recognise this scenario as a classic battle between the right to private life and freedom of speech. However, at this time, there was no privacy law as such, and any actions for breach of confidence had been founded on a contractual duty of confidentiality, usually between employers and employees, or between business people.

The finding in this case was, therefore, fundamental to individual privacy rights.[2] Were the intimate facts of their relationship capable of creating a duty of confidentiality, thus preventing the Duke from disclosing them, or selling them to the newspapers? Further, if there was such

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[1] *Duchess of Argyll v Duke of Argyll and others* [1967] Ch. 302

[2] Surprisingly, the case has attracted very little academic commentary, apart from mention of the judgment in various textbooks on tort and (because of the potential breach of the Judicial Proceedings (Regulation of Report) Act 1926, criminal law. However, see 'The Argyll Charade' 1999 *Journal of the Law of Society in Scotland* 22. For a historical account of the life of the Duchess and the affair, see Charles Castle, *The Duchess who Dared: the life of Margaret, Duchess of Argyll,* Swift Press 2021.

a duty, had the Duchess's right of confidentiality been lost by her promiscuity, as established in the divorce proceedings? This article will provide the background facts to the case as well as the High Court's decision, and then examine the significance of the ruling with respect to the development of modern privacy law. It will then assess the original claim with respect to the principles of modern privacy actions.

The facts and decision in *Argyll v Argyll*

The plaintiff (the Duchess) and the first defendant the Duke) were married in March 1951. In 1959, the Duke presented a petition for divorce from the Duchess on the ground of her adultery. Initially the proceedings were defended, but her cross-petition was withdrawn. In 1963, a decree of dissolution of the marriage was made, and in the same year, articles by the Duchess were published in a Sunday newspaper, in which certain statements were made in relation to the first defendant's personal conduct and financial affairs. In 1964, she issued a writ and sought an interlocutory (interim) injunction to restrain the Duke from communicating to the second and third defendants (the editor and proprietors, respectively, of another Sunday newspaper). It further attempted to stop them from publishing information of, *inter alia*, secrets of her relating to her private life, personal affairs or private conduct communicated to the Duke in confidence during the subsistence of their marriage, and not previously made public and any particulars relating to the proceedings for divorce in Scotland other than those authorised under s.1(1)(b) of the Judicial Proceedings (Regulation of Report) Act 1926. The claim was that such publication was in breach of marital confidence and in contravention of the 1926 Act.

Although the details of the intended articles were never published in the report, the Duchess outlined the basis of her claim that publication would be in breach of the couple's marital bond:

> During a number of years before our marriage began to deteriorate, my ex-husband and I had a very close and intimate relationship in which we freely discussed with each other many things of an entirely private nature concerning our attitudes, our feelings, our hopes, aspirations and foibles, our past lives and previous marriages, our business and private affairs, and many other things which one would never have discussed with anyone else. Apart from explicit discussion, we naturally discovered many things about each other which, but for our close relationship, we would not have done. These things were talked about and done on the implicit understanding that they were our secrets and that we allowed the other one to discover them only because of the complete trust and mutual loyalty which obtained between us and created an absolute obligation of confidence.[3]

In the Chancery Division of the High Court, Ungoed-Thomas J held that a contract or obligation of confidence need not be expressed, but could be implied, and that a breach of contract or trust or faith could arise independently of any right of property or contract (other than any contract which the imparting of the confidence might itself create). Accordingly, in the exercise of its equitable jurisdiction a court would restrain a breach of confidence independently of any right at law.[4] The judge then held that, with the object of preserving the marital relationship, it was the policy of the law that communications, not limited to business

[3] *Duchess of Argyll v Duke of Argyll and others* [1967] Ch. 318.
[4] *Duchess of Argyll v Duke of Argyll and others* [1967] Ch. 302, 322, B-C, citing *Prince Albert v. Strange* (1849) 1 H. & T. 1; 1 Mac. & G. 25, and *Pollard v. Photographic Company* (1889) 40 Ch.D. 345.

matters, between husband and wife should be protected against breaches of confidence.[5] Thus, where the court recognised that such communications were confidential and that there was a danger of their publication within the mischief that it was the policy of the law to avoid, it would interfere; further, on the facts publication of some of the passages complained of would be in breach of marital confidence.[6]

In the judge's view, marriage was accepted as the highest legal consideration, representing more than mere legal contract and relationship and status. But, if, for the court's protection of confidence, the confidence must arise out of a contractual or property relationship, it does not lack its contract: the confidential nature of the relationship is of its very essence and so obviously and necessarily implicit in it that there is no need for it to be expressed.[7] Importantly, the judge held that the law's policy to preserve the close confidence and mutual trust between husband and wife was not extinguished by the subsequent adultery of one spouse resulting in divorce; such conduct did not, therefore, relieve the other spouse from the obligation to preserve their earlier confidences.[8] Accordingly, the plaintiff's adultery did not entitle the first defendant to publish the confidences of their married life, and an injunction would be granted restraining him from so doing.

Turning to the previous publication of the plaintiff's articles, the judge held that such articles did not relate to the confidences betrayed in the first defendant's articles and were not of the same order of perfidy (treachery or disloyalty). Thus, the plaintiff was not thereby disentitled to any injunction that might be granted to her. Although a person coming to equity must come with clean hands, the cleanliness required is to be judged in relation to the relief sought.[9]

The judge then confirmed that an injunction might be granted to restrain the publication of confidential information, not only by the person who was a party to the confidence (The Duke) but by other persons into whose possession that information had come (for example the press). Accordingly, injunctions would be made against the second and third defendants in respect of publication of the marital confidences.[10] Finally, the judge held that the fact that the 1926 Act created an offence of publishing evidence in divorce proceedings, other than that referred to by the judge, did not make prosecution the only remedy or debar an individual injured or threatened with injury by unlawful publication from remedy.[11]

The development of the law of privacy in domestic law

The decision in the *Argyll* confidentiality proceedings is worth revisiting in order to gauge how the case would be dealt with today, but before we examine that, it is instructive to see how this judgment developed the modern law of privacy.

In the absence of a distinct law of privacy, and with Article 8 of the European Convention having no force in domestic law at the time of this action, plaintiffs (now claimants) would resort to the laws of defamation and confidentiality to enforce their reputational or privacy

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[5] *Ibid*, 329 F-330A.
[6] *Ibid*, 330 F-G, *Rumping v Director of Public Prosecutions* [1964] A.C. 814 considered.
[7] *Ibid*, 322, D-E.
[8] *Ibid*, 332, G. Contrast the subsequent decision in *Lennon* v *Mirror Group Newspapers* [1978] FSR 573, where an injunction was refused because both parties had brought their private affairs into the public domain to such an extent that an injunction to protect confidential information would have been inappropriate.
[9] *Ibid*, 332, A-B.
[10] *Ibid*, 333, C; *Ashburton v. Pape* [1913] 2 Ch. 469 followed.
[11] *Ibid*, 338G-339 A, D-E, 341C-D, G, 343A, dictum of Willmer LJ in *Windeatt v. Windeatt* [1962] 1 W.L.R. 527, 532 applied.

interests. In particular, although the original purpose of the law of confidentiality was to protect the commercial interests of the claimant, the law could in rare circumstances be used to safeguard privacy interests. This would allow individuals to seek a remedy, either by the payment of compensation, and as the law of confidentiality allows remedies based on prior restraint, injunctive relief could be effective tool in protecting the privacy rights of the individual. For example, the law of confidentiality (and copyright) was used to protect private confidential information in *Prince Albert* v *Strange*[12] in order to prevent an employee from exploiting private drawings owned by the plaintiffs, members of the Royal Family, which had been given to his employers by the plaintiffs. The court found that the employee had obtained the drawings in breach of confidence, and awarded an injunction to prevent any commercial exploitation; thus protecting not only the commercial rights of the plaintiffs, but, indirectly their privacy and family interests. The significance of *Argyll*, however, was that in this case the law was extended to protect information pertaining to private confidential relationships, such as marriage. That then allowed the court to grant an injunction to the Duchess to stop the Duke and the newspapers from disclosing intimate details of the marriage relationship, which had been provided by his wife.

Despite the decision in *Argyll*, the law appeared to require some form of *contractual* agreement to attach liability for breaches of confidence, but in *Stephens* v *Avery*[13] it was held that it was not necessary that the relationship in question was legally binding. In that case, the plaintiff had confided in her friend about a sexual relationship that she had had with a woman who had subsequently been killed by her husband. In breach of a promise to keep the information confidential, the defendant had told the story to the newspapers and the plaintiff sought an injunction to prevent publication. Significantly, the court held that the relationship of the parties was not the determining factor in an action of confidentiality; rather it was the acceptance of the information on the basis that it would be kept secret that affected the conscience of the recipient. In this case, the court found that the plaintiff's clear statement of secrecy imposed the clearest duty on the defendant. Significantly, the fact that the matter was concerned with sexual relations outside marriage did not take away the law's protection, and in any case, the sexual conduct of the plaintiff was not so morally shocking in this case as to stop the newspaper from spreading the story all over its pages.[14] In the court's view, the wholesale revelation of the sexual conduct of an individual could not properly be called trivial 'tittle tattle'. In the *Argyl*l case, it was argued that the Duchess's behaviour was indeed that shocking, yet the judge appears to have favoured the preservation of the marital bond, rather than deny the Duchess her confidentiality.

The cases of *Argyll and Stephens'* were, therefore, perhaps unwittingly, instrumental in developing the trend for future privacy cases under what is now known as the law of misuse of private information.[15] First, marital, and then other relationships, were covered by a duty of confidentiality. Secondly, that duty extended to others (such as the press) who had come into possession of such information as a consequence of that breach of duty. The law at that time could not protect the plaintiff where the information was acquired outside such a breach; thus the Duchess was powerless to prevent the general disclosure and discussion of her sexual and

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[12] (1842) 2 De G & Sm 652.
[13] [1988] 2 WLR 1280.
[14] See also *Barrymore* v *Newsgroup Newspapers Ltd* [1997] FSR 600, where an injunction was granted to stop the further publication of extracts of letters written by the claimant, a television personality, to his homosexual lover. In this case, the court held that the information about the relationship is for the relationship and not for a wider purpose.
[15] The term was derived from various cases, most notably *Campbell v MGN Ltd* [2004] 2 AC 457.

personal affairs, including the publication of the infamous photograph of her carrying out a sex act with one of her lovers. The present law, see below, would protect her in such a case, public interest defences notwithstanding, but the judgment in *Argyll* was instrumental in protecting privacy interests where the disclosure was in breach of that personal relationship. Thirdly, the law would protect the plaintiff even if the conduct was promiscuous or immoral, as was thought the behaviour that the Duchess was attempting to keep secret.

Yet despite the development of the law of confidence to protect certain aspects of privacy, it is important to stress that the law did not protect the right of privacy as such. Thus, the law did not protect the individual simply because private information was disclosed or an individual's privacy was invaded. For example, in *Kaye* v *Robertson*[16] the Court of Appeal stated that although it was satisfied that the action of the newspapers in conducting and publishing an interview with the claimant when he lay critically ill in hospital was a monstrous invasion of privacy, domestic law provided no remedy.[17] However, subsequent cases seemed to suggest that there was no need to establish any duty to keep such information private, along with a breach of that duty. Most famously, an injunction was granted in *HRH Princess of Wales* v *MGN Newspapers,*[18] where photographs of the Princess of Wales had been taken while she was exercising in a private gymnasium. These cases established that the duty of confidentiality could be imposed unilaterally and did not have to be founded on the breach of any express or implied agreement of the parties[19] and provided the basis of the development of the law of confidentiality under the Human Rights Act 1998.

Confidentiality, privacy and the Human Rights Act 1998

Since the coming into operation of the Human Rights Act 1998, the law of confidentiality has been used to develop a law of privacy that is consistent with Article 8 of the European Convention, which guarantees respect for private and family life. For example, in *Douglas* v *Hello! Magazine,*[20] the Court of Appeal recognised that celebrity claimants had an expectation of privacy and confidentiality with respect to photographs taken at their wedding. Privacy protection has been achieved, however not by the creation of a new tort or action in privacy, but by the development of the law of confidentiality, using Article 8 of the Convention and the case law of the European Court as a guide.[21] Thus, in *A* v *B plc and Another*,[22] the Court of Appeal held that it was not necessary for the courts to develop a separate tort of privacy, and this confirmed by the House of Lords in *Campbell* v *MGN Ltd*,[23] where the majority concluded that the information in question – details of the claimant's drug treatment – was such that the claimant had a *reasonable expectation of privacy*.

Of relevance to the situation in *Argyll*, in *A* v *B plc* it was confirmed that the law of confidence could apply to information regarding a sexual relationship outside marriage.[24] However, in the

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[16] [1991] FSR 62.
[17] For a coverage of that case, see Steve Foster 'Listen very carefully' (2016) 167 NLJ 22.
[18] Unreported, 8 November 1993.
[19] See also *Creation Records Ltd* v *Newsgroup Newspapers Ltd* [1997] EMLR 444, where the court granted an injunction to stop the further publication of a photograph of the pop group Oasis, taken surreptitiously at a photo session to promote the group's new album.
[20] [2001] 2 WLR 992. See Morgan, Privacy, Confidence and Horizontal Effect: 'Hello' Trouble [2003] CLJ 442.
[21] The leading decision of the European Court in this area is *Von Hannover v Germany* (2005) 40 EHRR 1, which established the general principles that public figures have a general expectation of privacy, and that there is no general public interest in the revelation of private matters.
[22] [2002] 3 WLR 542.
[23] [2004] 2 AC 457.
[24] This general position had been accepted in *Stephens* v *Avery* [1988] 2 All ER 477, above, n. 13.

opinion of Lord Woolf CJ, there was a significant difference between the confidentiality that attached to sexual relations in transient relationships, and that attached to sexual relations within marriage or other stable relationships. The Court of Appeal also felt that although those in the public eye were entitled to a private life, they must expect and accept that their actions would be more closely scrutinised by the media and that even trivial facts could be of great interest to readers and other observers of the media. Thus, in *Theakston* v *MGN Ltd*,[25] it was held that the principle of confidentiality could not be extended to all acts of intimacy and that a transitory engagement with a prostitute in a brothel was far removed from sexual activities in a private home. Further, a public figure might hold a position where higher standards of conduct might rightly be expected from the public, and the higher the profile the more likely that might be the position.[26]

Notwithstanding these cases, the decision of the Supreme Court in *PJS v News Group Newspapers Ltd*[27] reaffirmed the more general approach, that both public and private figures had a reasonable expectation of privacy in the details of extra marital relationships. The Supreme Court held that disclosure or publication of purely private sexual encounters would, on the face of it, constitute the tort of invasion of privacy, and that repetition of such disclosure or publication on further occasions was capable of constituting a further tort of invasion of privacy, especially if it occurred in a different medium. The Supreme Court also upheld the Court of Appeal's decision that kiss and tell stories about a public figure, which did no more than satisfy readers' curiosity concerning someone's private life did not serve the public interest. Further, it held that the information which the newspaper proposed to publish would not advance any public debate or provide support for competing opinions in circulation.

Thus, although a number of decisions in recent years have justified the revelation of such information where public figures are featured, that is usually when the claimant has previously lied to the public in respect of their private life and publication is necessary to correct that misinformation,[28] or where there is a wider and genuine public interest in that information. Thus, in *AAA v Associated Newspapers*,[29] it was held that there existed an exceptional public interest in the professional and private life of an elected politician (Boris Johnson) so as to justify the publication of a newspaper article claiming that a child had been born as a result of an extra martial affair that he had had. The general rule, therefore, is against the revelation of the sexual activities, of celebrities, public figures and private individuals; the domestic court's ruling that such information does not serve the public interest and in any case will not generally overrule the high expectation of privacy that those individuals enjoy with respect to their own, and their family's privacy

The controversy surrounding such an approach was seen in the high profile decision in *Mosley v News Group Newspapers Ltd*,[30] a case involving the publication by the press of photographs and graphic details of the sexual antics of Max Mosely, the president of the governing body of Formula 1 and son of the fascist leader Oswald Mosely. The case is important in that it assesses both the legal expectation of sexual privacy of public figures and whether the press are entitled to claim a public interest defence in such cases. In this case the claimant sought damages from

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[25] [2002] EMLR 22.
[26] See *Ferdinand v MGN Ltd* [2011] EWHC 2454. See Steve Foster 'The Public Interest in Press Intrusion into the Private Lives of Celebrities (2011) 16(4) *Communications Law* 129.
[27] *PJS v News Group Newspapers* [2016] AC 1081
[28] *Ferdinand* above, n 26, and *McLaren v News Group Newspapers* [2012] EWHC 2466
[29] [2013] EWCA 554
[30] *The Times*, 30 July 2008

the defendants after they had published an article entitled ‘‘F1 Boss Has Sick Nazi Orgy With 5 Hookers’’ together with video footage of him taking part in a sado-masochistic event attended by him and 5 women. The articles alleged that the sex sessions had a Nazi theme and had mocked the way in which Holocaust victims had been treated in concentration camps. A follow up story was published by the defendants, based on the confessions of one of the women who had taken clandestine photographs of the event. The claimant alleged that publication constituted a breach of his right of privacy.

In giving judgment for the claimant, it was held that the claimant had a reasonable expectation of privacy in relation to sexual activities, albeit unconventional, carried on between consenting adults on private property, and that consequently, the clandestine recording of that event on private property engaged the claimant’s rights under Article 8. Consequently, serious reasons had to exist to justify any interference with that right and the court had to determine whether the degree of intrusion in the present case was proportionate to publication of such information.[3132] In the court’s view, it was highly questionable that in modern society, the principle of iniquity could be applied so as to deprive the claimant of his right of privacy in cases involving sexual activity, fetishist or otherwise, that had been conducted in private. Consequently, the woman had committed both a breach of confidentiality and a violation of the claimant’s Article 8 rights.

Turning to the public interest defence, the court found that despite the defendant’ assertions, there was no evidence to suggest that the events had a Nazi theme or that the participants had mocked victims of the Holocaust. In the absence of that evidence, although there had been bondage, beatings and domination typical of sado-masochistic behaviour, there was no public interest or other justification for the recording and publication of these private events. Although such behaviour would be viewed by some people with distaste and moral disapproval, in the light of modern rights-based jurisprudence such did not justify intrusion on the personal privacy of the claimant. The court thus found an unjustified breach of his rights in confidentiality and privacy.

The principles laid down in *Mosely* reflect the jurisprudence of the European Court of Human Rights,[33] and of course have particular relevance to the situation in the *Argyll* case: privacy is preserved whatever the perversity of the activities in question, and the interest of the public is not the same as the public interest.

Photographs and privacy

The *Argyll* affair revolved significantly around the publication and discussion of that infamous photograph, and the decisions in cases such as *Campbell* and *Mosley* reflect the domestic courts’ robust approach in defending individuals from the distress and intrusion caused by the publication of photographs. Thus, the courts recognise that they involve a more intimate and distressing violation of privacy, and in *Jagger* v *Darling*,[34] an injunction was granted to Elizabeth Jagger (the daughter of Sir Mick Jagger) to stop further publication of CCTV footage taken in the defendant’s nightclub, showing the claimant engaged in sexual activities with another celebrity. Granting the injunction the judge held that there was no genuine public

[31] The court also recognized that the woman in question owed a duty of confidentiality towards the claimant and the other participants as those taking part in such activities might be expected not to reveal private conversations and activities.

[33] *Von Hannover v Germany*, note 21, above.
[34] [2005] EWHC 683.

interest in the publication of the images and that repeated publication of the images would only serve to humiliate the claimant. The claimant had a reasonable expectation of privacy and the balance clearly was in favour of restricting publication.[35]

The robust protection of privacy rights against the publication of intimate photographs is perhaps best illustrated by the decision in *Rocknroll v News Group Newspapers Ltd*.[36] In this case, a court granted an interim injunction restraining the publication in a national newspaper of photographs taken at a private party of a partially naked man who, some years later, married a well-known actress. Delivering judgment, Briggs J held that the claimant's article 8 rights were plainly engaged by the threat to publish the photographs. They showed him at a private party on private premises, behaving in a manner in which he would be entirely unlikely to behave in public. Further, it was most unlikely that the defendant could establish at trial that he had intended to consent to publication in a national newspaper. Nor was it likely that the defendant could establish that, when posting them in 2010, the claimant had anticipated that the photographs would become accessible to anyone with a Facebook account, let alone to a national newspaper.[37]

This again reflects the jurisprudence of the European Court, and would now be material in deciding whether the photograph of the Duchess should be published; assuming that she acted in time before it was indeed published by the newspapers to coincide with the divorce proceedings. Of course, today the Duchess would not be able to effectively control the dissemination of the stories and photograph on social media, but that would not prevent her getting injunctions to stop further publication, particularly by the press who are capable of causing more distress by such publication.[38]

Conclusions

It remains to summarise as to how the Duchess of Argyll would have fared in her action under the modern law of privacy, and to note that despite the dramatic changes to privacy laws since that time, the result would probably be the same as it was in November 1964, when the original judgment was delivered.

Today, the Duchess would no doubt have a reasonable expectation of privacy in those matters relating to her marriage and her private sexual conduct and affairs. Further, following *Mosely*, and other cases, that expectation would not have been destroyed by her sexual promiscuity, however much the public may have disapproved of her conduct. The conduct, however peculiar or extreme was not illegal, or so immoral that it would deprive her of her expectation of privacy. So too, any defence of public interest would, in all likelihood, fail, because the publication of the information was not of, or in the public interest, despite being of great interest to the public. Further, her previous revelations relating to the Duke's behaviour, and his incompetence

[35] See also the decision in *Theakston*, note 25, above.
[36] [2013] EWHC 24 (Ch).
[37] [2013] EWHC 24 (Ch), at paras. 12-13. Further, it was held that there was nothing to suggest that the claimant had deprived himself of a reasonable expectation of privacy, either by being a public figure or because he had contributed to publicity about his first marriage. He was not prominent in the public sphere in his own right, and public figures were entitled to article 8 rights on the same basis as anyone else. Whether a person had waived privacy rights by courting publicity called for fact-sensitive evaluation rather than the application of some general principle (at para. 19)
[38] See *PJS v News Group Newspapers*, n. 27, above, where injunctions were continued despite the stories leaking on various social media sites.

regarding financial matters, were not of the same nature or seriousness to doubt her desire for such matters to remain private.

The decision in *Argyll* was, therefore, of great interest and significance, for not only did it pave the way for the protection of privacy interests, specifically with respect to sexual conduct and secrets, but the court appears to have employed a number of principles which are fundamental to the resolution of modern disputes between individual privacy and free speech and press freedom. Having said that, we were, and are now, free to read and watch all the lurid details because of the law's inability at that time to protect privacy outside the law of confidentiality. Had the present law and remedies been available to the Duchess at that time, she would have sought injunctions against the press reporting the details before her husband attempted to sell the story; and compensation had she not acted in time. In addition, given the absence of social media, perhaps the details would not have come out, or at least to the general public, and we would not be talking about the events to this day. Whether that is a good thing is a matter of opinion, but the programme, and the undiminished interest in this tale of aristocracy and sexual misbehaviour, has allowed us to revisit the events and examine their legal and social significance.

CONSTITUTIONAL LAW

Interpreting ministerial codes, justiciability and the rule of law

R. (on the application of the FDA) v Prime Minister and Minister of the Civil Service [2021] EWHC 3279 (Admin)

Dr Steve Foster*

Introduction

In an eagerly awaited decision, the High Court has now held that the Prime Minister had not misinterpreted paragraph 1.2 of the Ministerial Code on bullying when deciding that the Home Secretary had not breached the Code, following allegations that she had shouted and sworn at civil servants.[1] This followed an investigation in November 2020, via an inquiry carried out by the Prime Minister's head of standards, Sir Alex Allan, who found that she had 'unintentionally' broken the ministerial code; her approach to staff, on occasions, amounting to behaviour that can be described as bullying in terms of the impact felt by individuals.[2] The Prime Minister had thus not acted unlawfully in failing to take action against the Home Secretary.

The main question for the court to consider raised the issues of justiciability and accountability: should we have to accept the Prime Minister's finding on the matter, that her conduct did not on 'proper' interpretation breach the code, or is this a decision that can and should be reviewed by the courts? The case is an important one with respect to the control of executive power in the UK constitution, as it raises questions about the appropriate role of the courts in what many see as a matter of purely political behaviour, which should be addressed in the political arena. As we shall see, the High Court accommodated the legal challenge insofar as finding it to be justiciable, but the final outcome suggests that it would be rare for any such challenge to succeed and that the courts might find it uncomfortable in ruling on such issues despite having initial jurisdiction to do so.

The facts and decision in *FDA*

In this case, a civil servants' union sought a declaration from the High Court that the Prime Minister had misinterpreted paragraph 1.2 of the Ministerial Code when he concluded that the Home Secretary had not breached that paragraph by her conduct. In 2020, allegations had been made that the Home Secretary (Priti Patel) had behaved inappropriately towards civil servants, primarily by shouting and swearing at them. Paragraph 1.2 of the Code provided that harassing, bullying or other inappropriate or discriminating behaviour was not consistent with the Code and would not be tolerated. The Prime Minister was advised by the independent adviser on ministers' interests that the Home Secretary had not consistently treated her civil servants with consideration and respect, and that on occasion her behaviour could be described as bullying in terms of the impact felt by individuals. It concluded therefore that, to that extent, she had breached paragraph1.2 of the Code, even if unintentionally. However, the Prime Minister

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1 Dominic Casciani, 'High Court to look at PM's Patel 'bullying' decision' BBC News, 28 April

2 'Findings of the Independent Adviser': https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/937010/Findings_of_the_Independent_Adviser.pdf. The report also stated that Patel – who had offered a fulsome apology - had sometimes 'legitimately, not always felt supported' by others within the Home Office.

concluded that the Code had not been breached and that the Home Secretary retained his confidence. The union argued that he had misinterpreted para.1.2 by effectively taking the view that conduct would only constitute bullying for the purposes of that paragraph if the perpetrator was aware that their conduct was upsetting or intimidating. In defence, the Prime Minister argued that, firstly, the claim was for a declaration as to the interpretation of the Code and was therefore non-justiciable; and secondly, that in any event, he had not misdirected himself as to the meaning of paragraph 1.2.

In dismissing the application, the High Court first held that the matter was indeed justiciable. The Court noted that the issue raised by the claim was the proper interpretation of the words 'harassing, bullying or other inappropriate or discriminating behaviour' contained in paragraph 1.2 of the Code, and accordingly that those words were capable of interpretation by a court of law. In the Court's view, as a matter of principle, the question of whether the Code excluded offensive conduct from the paragraph 1.2 definition of bullying if the perpetrator was unaware of, or did not intend, the harm caused, was justiciable; and the fact that the Code had no statutory basis did not, of itself, render that question non-justiciable. Further, in the Court's view, the fact that some parts of the Code were non-justiciable because they involved political matters did not mean that all parts should be treated as non-justiciable. Thus, in its view, certain decisions, such as the decision to dismiss or retain a minister in office, were not justiciable, being a political matter for the Prime Minister; but that did not take questions of legal interpretation beyond the role of the courts.

However, despite that initial finding, the Ministerial Code did more than merely describe the standards that ministers had to meet in order to retain the Prime Minister's confidence. In addition, it prescribed the standards with which they were expected to comply and gave guidance on how they should act and arrange their affairs. In the Court's view, if a dispute about the interpretation of a part of the Code was impossible to separate from a decision to dismiss or retain a minister, then the dispute might not be justiciable. However, the Court stressed that that was not the situation in this case, and the question of whether the PM had misinterpreted paragraph 1.2 was justiciable.[3]

The Court then turned to the question of whether the Prime Minister had indeed misinterpreted the Code. The Court noted that the Code was intended to set a standard of behaviour for ministers in respect of their treatment of civil servants, and the context was that working relationships should be proper and appropriate. It also noted that within the various departmental policies, there was a broad consensus that conduct would be 'bullying' if it was either: (a) offensive, intimidating, malicious or insulting; or (b) an abuse or misuse of power in a way that undermined, humiliated, denigrated or injured the recipient. On the court's interpretation of that provision, conduct could fall within (a) above, and thus constitute bullying within the meaning of paragraph1.2, whether or not the perpetrator intended their behaviour to be, or was unaware that it was, offensive, intimidating, malicious or insulting. In the Court's view, the alleged conduct of the Home Secretary fell clearly within limb (a) of the code.[4]

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[3] *R. (on the application of the FDA) v Prime Minister and Minister of the Civil Service* [2021] EWHC 3279 (Admin), at paras. 37-43.
[4] *R. (on the application of the FDA) v Prime Minister and Minister of the Civil Service* [2021] EWHC 3279 (Admin), at paras. 49-50.

However, despite that finding, the Code was different from workplace policies governing the behaviour of employees. Such policies would typically include grievance and disciplinary policies and would provide for all relevant factors to be taken into consideration in determining how to deal with a breach. Such factors might include the nature and seriousness of the conduct; the reasons, understanding and intentions of the perpetrator; questions of mitigation; and the ability to ensure proper work practices in future. On the other hand, the language and structure of the Code did not reflect an ability to consider such matters. In his written decision, following the report, the Prime noted the independent adviser's observations that the Home Secretary had become frustrated (sometimes justifiably) by the lack of responsiveness by her department. He also noted that she had been unaware of the impact of her behaviour and was sorry for inadvertently upsetting civil servants; and that the culture in the Home Office was now much improved. The Prime Minister then indicated that she retained his confidence, but it was important to stress that his conclusion that she had not breached the Code was not a finding that her conduct did not amount to bullying. Rather, the Prime Minister was saying either that it would not be right to record that the Code had been breached, or that her conduct did not warrant a sanction such as dismissal. The Court stressed that contrary to what was alleged by the union, he had not proceeded on the basis that conduct would not be 'bullying' within the meaning of paragraph 1.2 if the perpetrator was unaware of, or did not intend, the harm or offence caused.

That finding, in the Court's view, was reinforced by the fact that the Prime Minister was the arbiter of the Ministerial Code. Although the Court stressed he could not give its language any interpretation he chose, it was for the Prime Minister alone to determine whether a minister had departed from it to such an extent that he could no longer have confidence in them.[5] Accordingly, the application was dismissed.

Commentary

It is important to note that the claim was based on the Prime Minister's alleged misinterpretation of the code, rather than his failure to take any action against the Home Secretary. On its website, the Association of First Division Civil Servants (FDA) explained why it was bringing the action.[6] This was because; despite the evidence of the report, the Prime Minister sought to give weight to the Home Secretary's assertion that any behaviour was unintentional and therefore concluded that she had not breached the code.

'Our challenge in the court is essentially that the Prime Minister's decision was irrational given the obligations of the Code, and indeed his own words in its foreword that "there will be no bullying and no harassment". *It is entirely a matter for the Prime Minister to consider the factors he feels appropriate in determining any sanction following a breach, and that is not a matter on which we seek to intervene*. Our contention, however, is that given the clear obligations under the Ministerial Code in relation to bullying and harassment, the Prime Minister's decision effectively concludes that the Home Secretary did not bully civil servants as she states this was not her intent. (italics added)

In particular, the FDA pointed out that the Home Office itself deals with the issue of intent in its definition of bullying: 'Bullying is not about whether the perpetrator of the acts intended

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[5] *R. (on the application of the FDA) v Prime Minister and Minister of the Civil Service* [2021] EWHC 3279 (Admin), at paras. 49-60.

[6] See 'Why we've launched a judicial review of the Home Secretary's breach of the Ministerial Code', FDA: the union for managers and professionals in public service: https://www.fda.org.uk/.

them or not, but about the impact on the recipient and how it makes them feel'. The FDA's argument was, therefore, that the elements of the code on bullying - and a judgement on whether someone has been victimised - must be open to scrutiny under employment law. Thus, it had been pointed out that if the FDA wins the case it would mean that some of the Prime Minister's conduct might be open to scrutiny under employment law, as if he were any other kind of boss.[7] That in turn would be a substantial legal and constitutional question for the courts, who could be asked to redefine the boundary between politics and the law.

It should be pointed out that the union's claim that the code was to be treated as akin to an employment contract, thus attracting the rules of employment law, failed in the High Court. Thus, although the interpretation of the code was justiciable, the reason for that lies in public, administrative law, rather than private, employment law. The Code was a public law source of controlling ministerial behaviour, with the Prime Minister being the initial arbiter of its application. That did not exclude the court's intervention if he misinterpreted his powers, but he was not bound to take into account particular substantive principles when deciding whether the code had been violated, or what sanction, if any to impose. That would be the case if this was an employment issue, but not in this context.

The issue of justiciability over matters of the UK constitution was raised in the Brexit saga concerning our withdrawal from the European Union after the 2016 referendum. Challenging the government's decisions to withdraw, and then to suspend Parliament so as to frustrate the political debate over the conditions of withdrawal, raised fundamental questions of government within the law, and the rule of law. In other words, should government be allowed to take such a momentous decision without parliamentary and legal regulation; and if the answer was no, what would that tell us about the state or existence of our constitution as a legal restraint on governmental power? In the end, both the decision to withdraw from the EU, by triggering Article 51 of the Treaty without Parliamentary involvement,[8] and the decision of the Prime Minister to suspend Parliament in an attempt to frustrate Parliamentary debate on the government's withdrawal plans,[9] were held to be justiciable and then unlawful. Both decisions caused great political, public and indeed legal debate, with the courts being accused of undermining the democratic process and acting beyond their constitutional powers.[10]

To sum up, should such decisions and actions be considered as matters of law in a court of law? It is argued that both decisions, although contentious, were vital to the maintenance of our fragile constitution and the role of the rule of law within it. The UK constitution is, of course, heavily dependent on who holds the political power at any given time – the dominant executive in an essentially democratic Parliament. However, without some *legal* control of the government, Parliament is simply bulldozed into accepting government policy, particularly where that policy is given effect through residual prerogative, or in the present case, administrative powers. That situation would question the very nature or existence of any UK constitution, and the Supreme Court rescued us from the possibility that executive powers would be beyond legal control.

In the present case, the High Court found no difficulty in finding the interpretation of the code to be a justiciable matter, but that of course was tempered by the finding that the Prime

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[7] Dominic Casciani, note. 1.
[8] *R (Miller) v Secretary of State for Exiting the European Union* [2018] UKSC 5.
[9] *R (Miller) v Secretary of State for Exiting the European Union* [2019] UKSC 41.
[10] See Chris Monaghan, *'The Prorogation Litigation: 'which was as if the Commissioners had walked into Parliament with a blank piece of paper'* (2019) 24 (2) *Coventry Law Journal 7.*

Minister's decision on whether she had broken the code, and whether to take any disciplinary action against her was not so justiciable. It is conceded that the interpretation and application of the code should, at least initially, be a matter for politicians and not the courts. That is the case in other areas where the courts are unwilling to intervene until the relevant authorities have had the opportunity to rule on the matter internally.[11] However, given the constitutional importance of this issue with respect to accountability and ministerial standards, it cannot be right that the interpretation and application of the code is left to one person, who might have political reasons for their determination. In this sense, the judgment of the Court on justiciability is to be welcomed. However, the ruling on the Prime Minister's *application* of the code to the Home Secretary is disappointing. Under the rules of administrative law, decisions should be supported by evidence and even the most political of decisions should be subject to some review, including basic rationality.

The courts have developed the principle of excess of jurisdiction, where a decision can be questioned if it contains an error of law or jurisdictional fact.[12] That would include a decision which is based on the misinterpretation of the relevant legal power (in this case the code, but in most other cases the enabling statute or prerogative), but also where the decision is clearly not supported by the evidence which is necessary in order to substantiate the decision, and the decision-maker's understanding of the legal power.[13] The review of that decision does not have to be robust, and can give the decision maker a certain element of discretion, but to say that a decision maker must appreciate the legal boundaries of its jurisdiction, but then to give absolute discretion as to how that legal power is applied, makes the initial finding of justiciability fruitless. Further, there does not appear to be a good reason why the application of the code should not be subject to the rules on fettering and abuse of discretion,[14] or the principles of irrationality.[15] Such supervision would not destroy the distinction made in the present case between the interpretation of the code on the one hand, and its application and enforcement on the other hand. Greater discretion can be afforded to the latter as it involves matters of politics and policy, but that should not forbid the courts from examining the decision so as to satisfy itself that there has been no further illegality or abuse beyond its base misinterpretation.

As it stands, this case is a further example of politicians, and the existing government, taking action in the belief that as we have spoken and that will be the end of the matter. Such an attitude is damaging to a healthy democracy and the rule of law, despite the possibility of political and electoral accountability for such behaviour.[16] The decision in *FDA* is encouraging in some respects, but provided the Prime Minister did not make the error of admitting that he had misinterpreted the code or other legal document, he is given *carte blanche* to apply or not apply it in whatever way he chooses. That cannot be right, or consistent with true judicial review, and an appeal to the Court of Appeal on this issue would be very welcome.

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[11] For example, the courts either insist on or encourage internal disciplinary procedures in employment, universities and other associations.
[12] *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147.
[13] *Ashbridge Investments Ltd v Minister of Housing and Local Government* [1965] 3 All ER 371.
[14] *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997.
[15] The 'Wednesbury' test: *Associated Provincial Picture House v Wednesbury Corporation* [1948] 1 QB 223.
[16] A further example of the government's indifference and hostility to regulation and accountability was seen in the recent Owen Patterson affair. In order to thwart an investigation into the Conservative MP's alleged breach of lobbying rules, the government instead called for an overhaul of the MPs standards watchdog instead. Later the government backed down and abandoned the overhaul and the MP resigned: Jennifer Scott, 'Owen Patterson quits as MP over lobbying row 'nightmare, BBC News, 4 November 2021.

LEGAL SYSTEM

Contempt of court imprisonment: what are the human rights issues?

Dr Rona Epstein[*] Dr Anton van Dellen[**]and Dr Samrat Sengupta[***]

Introduction

On 22 February 2021 − in full lockdown because of the Covid-19 pandemic − Clerkenwell and Shoreditch County Court committed Mr Tack to six weeks' immediate imprisonment, for breaking an injunction not to make a noise in the early hours.[1] On 16 February 2021, Leicester County Court committed Mr Batty, a drug addict, to one year's immediate imprisonment for two breaches of an injunction against begging. Mr Batty was not in court and was not represented. On 12 April 2021, Milton Keynes County Court sentenced Keith Connett to three months immediate imprisonment for making a noise in a prohibited area.[2] Immediate imprisonment, at a time when, according to the recent Prison Reform report,[3] Covid-19 restrictions meant that prisoners were held in conditions that amount to solitary confinement, being deprived of all activity and social contact, with, unsurprisingly, a devastating impact on their mental health and wellbeing. This is also arguably inhuman and degrading treatment, and thus in breach of Article 3 of the European Convention on Human Rights.

The relevant law

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 civil injunctions to Prevent Nuisance and Annoyance (IPNA).[4] Local councils, the police, or any social landlord can apply for an IPNA to stop anti-social behaviour.

On 23 March 2015, Part 1 of the Anti-Social Behaviour Crime and Policing Act 2014 came into force, introducing new powers for the police and the courts, including the imposition of a civil injunction, an ASBI − Anti-Social Behaviour Injunction. Breaching an injunction is not a criminal offence, but can carry significant penalties imposed in civil proceedings. The breach comes before a County Court and is heard as contempt of court, under civil, not criminal law. Breaching an ASBI is, thus, not a crime. The court may issue a fine or impose a suspended or immediate term of imprisonment of up to two years, with the contemnor generally serving half the sentence. None of the usual protections available under the criminal law − a pre-sentence report, for example − are available in these civil court hearings.

Analysis of contempt of court cases 2019 - 2021

We have analysed 122 contempt of court decisions in 38 different county courts from 2019-2021: 91 men and 31 women.[5] Many of these concerned people who appeared to be particularly

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[1] Case G01EC872 *Poplar Housing v Tack*
[2] Case F00MK072 *Vale of Aylesbury Housing Trust v Ken Connett*.
[3] www.prisonreformtrust.org.uk/Portals/0/Documents/CAPPTIVE3_Healthcare_FINAL.pdf
[4] https://www.legislation.gov.uk/ukpga/2014/12/part/1/enacted
[5] https://www.judiciary.uk/judgment-jurisdiction/committal-for-contempt/

vulnerable. Sixty-four immediate imprisonments were ordered and 52 suspended. Three fines were imposed, ranging from £120 to £250. The reports do not indicate whether or how a means enquiry was made before these fines were imposed. The largest group of 32 cases concerned nuisance to neighbours, including noise, bad language, threats, and shouting. Twenty-five cases involved individuals found to be in prohibited areas. There were seven cases related to drug dealing or possession, and five of begging and sleeping rough.

For example, James Maguire was sentenced to 26 weeks' immediate imprisonment for breaching an injunction by begging. The same punishment was imposed on Martin G for sleeping rough and possession of a crack pipe. Reading the reports, there are an array of mental health issues. Sentencing Evelyn C to four weeks' suspended imprisonment, the court noted that 'there are underlying mental health issues' and that there has been involvement with mental health professionals. She was 76 years-old, and was threatened with eviction; her offence was making a noise outside her flat, banging doors, shouting and swearing. On 12 August 2021, Kingston-Upon-Thames County Court imposed a 12 week suspended sentence on Kate Mehmet, stating that the court has taken account of her 'mental health conditions.' Karen P, recently in a rehabilitation centre for substance abuse, was committed to prison for 12 weeks, suspended, for shouting, swearing and being abusive.

The court may also make an order of a fine or costs. Michael R, a man who was homeless and an alcoholic, was found to be in a prohibited place (his father's home) and was ordered to pay costs of £2,093 by Kingston-Upon-Thames County Court on 17 March 2020. Brentford County Court imposed a fine of £120 on two contemnors.

Prison in times of pandemic

Covid-19 precautions have had a dreadful effect on prison conditions. That is the background to the 46 cases of immediate committal ordered between March 2020 and March 2021, when one would have expected that the courts would be making every effort to avoid sending people to prison. Nicholas M fed pigeons on his balcony, which caused mess from the birds: he was committed to 15 weeks' immediate custody on 12 June 2020.[6] Joyce N was committed to eight weeks' immediate imprisonment on 19 June 2020 by Manchester County Court for breaking an injunction not to be in a prohibited place.[7] As noted above, on 21 February 2021, Mr Batty was sent to prison for one year for two incidents of begging. In July 2021, Truro County Court sentenced Lisa Jones to four months immediate imprisonment for swearing.[8]

The limited powers of the court

Judges in the County Courts who hear these cases are, of course, aware of the limits of their powers. HHJ Ralton, hearing the case of Natalie Walker, who had breached an injunction against making noise in her flat, stated:

> The sentencing powers of the County Court are very limited in comparison to the powers of the magistrates or the Crown Court. I can sentence to a term of imprisonment of up to 2 years and can suspend any term of imprisonment. I can

[6] *Bristol City Council v Nicholas Momber*, 16 Jun 2020 — 12 June 2020). Committal for Contempt | Jurisdictions | Courts and Tribunals https://www.judiciary.uk › judgment-jurisdiction
[7] *One Manchester Ltd v Joyce Nyathi*, Claim No G00MA281, County Court in Manchester 19 June 2020.
[8] *Cornwall Council v Lisa Jones*, Case No: G00PL326, County Court in Truro 19 July 2021:

> make financial penalties (such as in the form of fines) or can make no order at all. But that represents the limit of my powers.

In that case the judge observed that Ms Walker was highly stressed, stating:

> I can see that Ms Walker has a number of vulnerabilities herself. I am told that these emanate from the very tragic loss of her baby some time ago, which has no doubt left a marked impact on her mental health, which continues. I further understand that the COVID-19 pandemic has limited the amount of assistance that Ms Walker has been able to receive to help her with her mental health issues. I am very sorry to hear that she also has no support network. She has also lost her home and is going to be excluded from the road for another four months by agreed variation to the injunction order.

He sentenced her to 4 weeks imprisonment, suspended, and concluded:

> I very much hope that Ms Walker secures the help that she very obviously needs and I am sorry to see her in such a state of distress.[9]

From psychiatric hospital to prison

On 19 October 2021, Milton Keynes County Court made the decision that Charlotte Nudd was to be taken from a psychiatric hospital to serve a prison sentence of six months.[10] The judge stated:

> You remain an inpatient on a ward at the hospital in Warrington where several patients have tested COVID +ve. I am concerned about your vulnerability and safety.

The judge described her life in these terms:

> You were a looked-after child from aged 4 due to your mother's own mental health difficulties and you were placed in various care homes and foster care placements between aged 4 -14yrs. Whilst in a children's home you were the subject of sexual assault, including gang rape by older males. As an adult, you had a short marriage during which you suffered sexual and domestic abuse. You have a history of overdosing and self-harming behaviours

She breached the injunction by making a noise with a wheelie bin, which disturbed and annoyed her neighbours, let the property become dilapidated, and directed a flow of vile, obscene, racist abuse at an employee of the housing trust as he was doing his job by trying to enter her flat. She had been told by the court to engage with mental health services, but declined to do so.

Appeals are rare, but a Court of Appeal case heard in 2000, prior to the Anti-Social Behaviour Crime and Policing Act 2014, is instructive. In the case of *Hale v Tanner*,[11] a case of harassment, Lady Justice Hale (as she then was) stated:

The full range of sentencing options is not available for contempt of court. Nevertheless, there is a range of things that the court can consider. It may do nothing, make no order, it may

[9] https://www.judiciary.uk/judgments/committal-for-contempt-of-court-in-open-court-at-bristol-walker/
[10] Case No. G70MK058.
[11] [2000] EWCA Civ 5570.

adjourn…There is a power to fine. There is a power of requisition of assets and there are mental health orders.

Mental health orders appear to be used very rarely. In the 122 cases studied, only in the case of Charlotte Gadd, is there mention of a court ordering a defendant to engage with mental health services.

The Civil Justice Council Report

Amid some concern at the way the system was working, the Civil Justice Council report was published in July 2020.[12] It made 15 recommendations, among them the following:

1. Urgently requesting the Home Office and Her Majesty's Courts and Tribunals Service to collect data on these cases to allow for full analysis of their use and efficacy;
2. Widening the scope and provision of the NHS Liaison & Diversion service to ensure a joined-up approach by local agencies to tackle the underlying causes of anti-social behaviour;
3. Widening the scope and provision of legal aid to ensure that no individual faces the prospect of being sent to jail without access to legal advice; and
4. Adopting a new sentencing guideline to be used by the judiciary when hearing cases of anti-social behaviour.

The report stated, 'Given the seriousness of imposing a custodial penalty, attendance at a module which covers committals should be a compulsory part of judicial training.' *Nudd* highlights that imprisonment is not an effective way of managing breaches of Anti-Social Behaviour Injunctions (ASBIs), and that it is arguably not compliant with Articles 3 and 5 of the European Convention on Human Rights. *Nudd* also underlines the importance of alternatives to imprisonment.

Conclusions

The guidance given in contempt of court cases by the Civil Justice Council should have led to improved training for judges in handling and sentencing contempt of court cases. Given the continuing imposition of suspended and immediate imprisonment on vulnerable people suffering from addiction and other mental health issues, it has to be questioned whether the system has actually been reformed, as the Civil Justice Council hoped it would be. Seen through the lens of human rights and social justice, contempt of court law and practice appears to be a prime example of the justice system being (mis)used as a rod with which to punish the poor, the disadvantaged, the most damaged and despised, and the least supported people in our society. We would argue that imprisonment should be restricted to those who have broken the criminal law. The current anti-social behaviour legislation is unjust and should be repealed. In our society, as in others, there is, of course, anti-social behaviour, but there should be welfare provisions to deal with and support those individuals who, for various reasons, are unable to behave in socially acceptable ways.

[12] Anti-Social Behaviour and the Civil Courts, Civil Justice Council, July 2020.

The 'gay cake' case before the European Court Human Rights; more than a little misunderstanding

Lee v United Kingdom, application No. 188060/19, decision of the European Court (admissibility) 6 January 2022.

Dr Steve Foster*

Introduction and background

The European Court has recently ruled inadmissible an application brought by Mr. Lee, the unsuccessful claimant in the 'Gay Cake' case - *Lee v Ashers Baking Co. Ltd*. [1]

In that case, the Supreme Court ruled that the claimant had not been discriminated against on grounds of his sexual orientation when a bakery refused to sell him a cake with a pro-gay message on it. In the domestic proceedings, the applicant brought an action for breach of statutory duty against the bakery with respect to the provision of goods, facilities and services, claiming he had been discriminated against contrary to the provisions of the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 and/or the Fair Employment and Treatment (Northern Ireland) Order 1998. After several judgments and appeals, the Supreme Court ruled that any discrimination had not been based on the customer's sexual preference or association with the gay community, but on the shop's objection to the political message that the words on the cake portrayed. In addition, as the difference in treatment was due to the political opinion of the customer, the *supplier's* Convention rights to freedom of expression were at issue and justified their refusal.[2]

The claimant subsequently brought an application under the European Convention, claiming that his rights under Article 8 (respect to private life) and 14 (enjoyment of Convention rights without discrimination) had been violated by the ruling, asking the European Court to rule that the law and the Supreme Court had given insufficient protection to his Convention rights. However, as we shall see, the European Court declared that application inadmissible, stating that the applicant had failed to exhaust all domestic remedies because he had used domestic law (the Equality Act 2010 and the regulations) rather than Convention rights to argue his rights.

This short piece will analyse that decision and consider its effect on both the adjudication of human rights in domestic law and the relationship between domestic law and the machinery under the European Convention on Human Rights.

The decision of the European Court of Human Rights

The Court first set out the general principles with respect to the requirement to exhaust all domestic remedies, as set out in *Vučković and Others v. Serbia;*[3] that the specific Convention complaint presented before it must have been aired, either explicitly or in substance, before the national courts. Thus, in the Court's view, it would be contrary to the subsidiary character of the Convention machinery if an applicant, ignoring a possible Convention argument, could rely on some other ground before the

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[1] [2018] UKSC 49.
[2] For an account of the case, see Steve Foster, 'Let them eat cake but don't expect me to make it; sexual orientation discrimination, religious objections and the Supreme' (2018) 23(2) Cov. Law J. *
[3] Preliminary objection, Grand Chamber, Application nos. 17153.

national authorities for challenging an impugned measure, but then lodge an application before the Court based on the Convention argument.[4]

The Court then noted that the applicant in this case did not invoke his Convention rights expressly at any point in the domestic proceedings, but rather he formulated his claim by reference to the 2006 Regulations and the 1998 Order. Further, he now contends that he raised his Convention arguments in substance, as the domestic law provisions relied on were enacted to protect his rights under Articles 8, 9, 10 and 14 of the Convention, and that, in any event, the violations now complained of only crystallised with the handing down of the Supreme Court's judgment.[5]

The Court rejected those arguments. First, even if the relevant provisions of the 2006 Regulations and the 1998 Order were enacted to protect the Convention rights of consumers, those provisions protect consumers only in a very limited way; that is, against discrimination in access to goods and services. They cannot, in the Court's view, be said to protect consumers' substantive rights under Articles 8, 9 or 10 of the Convention.[6] Secondly, insofar as the applicant complained under those Articles read in conjunction with Article 14 of the Convention, the domestic court was required to consider whether the applicant was treated differently from other consumers because of his sexual orientation and/or political opinion. So too, the courts had to decide whether the difference in treatment was objectively justified, having regard to the defendant's rights under Articles 9 and 10 of the Convention. However, although the Court noted that the test under Article 14 is similar, insofar as it requires an assessment of whether an applicant has been treated differently based on an identifiable characteristic or status, there was a difference. Thus, while the protection against discrimination in the 2006 Regulations and the 1998 Order is free-standing, Article 14 is ancillary in nature: there can be no room for its application unless the facts at issue fall within the ambit of one or more substantive Convention rights.[7]

Thus, in the Court's view, it was not self-evident that the facts of the present case – in which the applicant complains only about the judgment of the Supreme Court – fall within the ambit of Article 8, 9 or 10. In particular, it was not immediately apparent how the findings of the Supreme Court and the consequences of those findings for the applicant either constitute one of the modalities of or are linked to the exercise of a right guaranteed by any of those Articles. The Supreme Court found on the facts of the case that the applicant was not treated differently because of his real or perceived sexual orientation. Thus, what was principally at issue was not the effect on the applicant's private life or his freedom to hold or express his opinions or beliefs, but rather whether the bakery was required to produce a cake expressing the applicant's political support for gay marriage.[8] That was not to say that the facts of the case could not fall within the ambit of Articles 8, 9 and 10. The preliminary question of whether Article 14 of the Convention is applicable to the facts of the present case is a fundamental one, being highly fact-sensitive and to date no similar issue has been addressed by the Court. However, by relying solely on domestic law, the applicant deprived the domestic courts of the opportunity to address this important issue themselves before he lodged his application with the Court.[9] In the Court's view, the domestic courts were tasked only with balancing the applicant's very specific rights under the 2006 Regulations and the 1998 Order against the defendant's rights under Articles 9 and 10. At no point were they tasked with balancing his Convention rights against those of the defendants.[10]

At this point, however, the Court conceded that the applicant's arguments before the Court did raise important issues respecting Convention rights. Thus, the Court conceded that the balancing exercise above is a matter of great import and sensitivity to both LGBTIQ communities and to faith communities.

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[4] *Lee v United Kingdom*, application No. 188060/19, para 68.
[5] *Lee v United Kingdom*, application No. 188060/19, para 69.
[6] *Lee v United Kingdom*, application No. 188060/19, para 70.
[7] *Lee v United Kingdom*, application No. 188060/19, paras 71-72, citing *Konstantin Markin v Russia*, Grand Chamber Application No. 30078/06.
[8] *Lee v United Kingdom*, application No. 188060/19, para 73.
[9] *Lee v United Kingdom*, application No. 188060/19, para 74.
[10] *Lee v United Kingdom*, application No. 188060/19, para 75.

Further, as the Supreme Court of the United States pointed out in *Masterpiece Cakeshop Ltd*,[11] these disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market. This was particularly so in Northern Ireland, where there is a large and strong faith community, where the LGBTIQ community has endured a history of considerable discrimination and intimidation, and where conflict between the rights of these two communities has long been a feature of public debate.[12]

Then, in a statement that more reflected the Court's acceptance of jurisdiction, it held that given the heightened sensitivity of the balancing exercise in the particular national context, the domestic courts were better placed than this Court to strike the balance between the competing Convention rights of the applicant, on the one hand, and the defendants, on the other.[13] This indeed was the expected result of the application, had the Court accepted jurisdiction to hear the case on its merits. In other words, it was within the Court's right to accept that the balancing of these conflicting interests (which had in fact taken place in the Supreme Court), was best resolved by the Supreme Court when interpreting and applying domestic law, rather than by the European Court. That indeed would reflect the principle of subsidiarity that the Court refers to in its judgment in this case, rather than denying itself jurisdiction at all.

Yet the Court continued to rule the case inadmissible. As the Human Rights Act 1998 gave litigants the right to invoke their Convention rights directly before the domestic courts, and obliges those courts, so far as it is possible to do so, to read and interpret both primary and subordinate legislation in a way which is compatible with those rights, it did not consider that the applicant has provided a satisfactory explanation for not advancing his Convention rights in the domestic proceedings. In its view, where the applicant is complaining that the domestic courts failed properly to balance his Convention rights against those of another private individual, who had expressly advanced his or her Convention rights throughout the domestic proceedings, it was axiomatic that the applicant's Convention rights should also have been invoked expressly before the domestic courts. That was the case even if the alleged breach was contingent on the outcome of their assessment. In choosing not to rely on his Convention rights, the applicant deprived the domestic courts of the opportunity to consider both the applicability of Article 14 to his case and the substantive merits of the Convention complaints on which he now relies. Instead, he invited the Court to usurp the role of the domestic courts by addressing these issues itself. Such an approach is contrary to the subsidiary character of the Convention machinery and the Court considered that the applicant has failed to exhaust domestic remedies.[14]

Commentary

The lawyers for Lee are now considering a further appeal to the domestic courts, presumably using ECHR rights as the direct claim; although they (quite rightly) maintain that they have already pleaded Convention rights in the original claim. However, should they launch this appeal, and is the European Court's admissibility decision correct?

Under the Convention (Article 35), all applicants must exhaust all domestic remedies before applying to the Court; that is clear and acts as an effective filter, and opportunity for the domestic law to provide a remedy. The question in this case, however, is whether a domestic claimant must expressly and specifically raise ECHR rights in the claim. According to the Court in this case, the answer is yes, but surely, that is not within the spirit or sense of the Convention and its machinery.

First, in order to comply with the Convention, member states must provide an effective remedy for breach of Convention rights (Article 13) and secure the rights in their own jurisdiction (Article 1).

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[11] reference
[12] *Lee v United Kingdom*, application No. 188060/19, para 76.
[13] *Lee v United Kingdom*, application No. 188060/19, para 76, citing *Handyside v United Kingdom*, 7 December 1976, § 48, Series A No. 24.
[14] *Lee v United Kingdom*, application No. 188060/19, para 77.

However, that does not require them to incorporate the ECHR or name such rights as ECHR rights, provided those rights are protected in reality. The fact that the Equality Act protects Articles 8 and 14 in practice, and allows arguments based on those articles, should suffice. Secondly, Lee's Art 8 and 14 rights *were* raised in the domestic proceedings, as were the bakery's Article 9 (religion) and 10 (free speech) rights. The case was brought under the appropriate domestic proceedings and law (which are imbued with Convention rights by virtue of the Human Rights Act 1998), and the domestic courts undoubtedly considered those rights when applying the relevant domestic law. Had the Supreme Court found that there had been discrimination on the facts, then it would have balanced Lee's rights (under statute and under the Convention), with the defendant's right to religion and free speech. As with other cases of this type, it would have had to decide where the balance lay, and whether the need to protect people from discrimination could be outweighed by religious rights. That decision would then surely be reviewable by the European Court.[15] Although the Supreme Court may have had the right to decide against Lee under domestic law, that should not stop the European Court from claiming jurisdiction in that case and asking whether the Supreme Court had given insufficient weight to Lee's claims.

The European Court's decision also ignores the basic fact that domestic human rights claims are fought not solely by human rights claims, but within relevant domestic rules and cases. For example, a person who is sued for breach of privacy (under the tort of misuse of private information) makes use of the defence of public interest, which is shaped by Article 10 ECHR, as is the claimant's private law action (which uses Article 8 in support). Both the action and defence are informed by Convention rights, but are not the basis of the action. So too, in our case, the action has to be brought under the domestic legislation, but at the heart of the claim is the argument that the law breaches Convention rights. True, the defendant's in the domestic proceedings expressly relied on their Convention rights in defending the domestic claim, and the applicant merely relied on the statutory framework. However, that framework was set up to provide a remedy to those who felt that they had been the subject of unjustified discrimination, on grounds of sexual orientation. Such remedies had been introduced to protect basic human rights, or, at the very least, to bolster legal claims that raised such rights. Given that opportunity, a claimant is naturally going to use those statutory rights, and the defendant, naturally on the back foot, will claim that the law should be read and applied in such a way as to accommodate their Convention rights.

Conclusion

What the Court should have done was to accept the case, and then decide whether the law, and the Supreme Court, had adequately recognised and protected Lee's Convention rights. At that point, using the established doctrine of the margin of appreciation, the Court may well have decided that the law achieved the correct balance. However, to accept the Court's ruling as it stands risks great confusion (more so than the Supreme Court's original ruling) and a reduction in the Court's power to resolve human rights disputes.

Moreover, the reality is that we are no further forward in knowing whether the existing law is compatible with specific Convention rights, or how the domestic courts should balance those conflicting Convention claims in cases of this type. This may be discovered if Lee brings a claim based specifically on his Convention rights, as the European Court suggested that he did in the first place, although one would expect the Court's decision to reflect its jurisprudence on subsidiarity and the margin of appreciation. Whoever is to blame for this misunderstanding, opportunities have been missed to add clarity to this area of law and to cases where two Convention rights collide.

[15] See for example, the Supreme Court's decision in *Hall v Bull* [2013] UKSC 73, where the Supreme Court held that the hotelier's religious objections did not provide a defence to an otherwise discriminatory act (of refusing accommodation to a homosexual couple).