Coventry Law Journal

Volume 25(2)

December 2020

Dedicated with thanks to Dr Ben Stanford
Academic, Teacher and Friend

CONTENTS

SPECIAL FEATURE

ARTICLES

RECENT DEVELOPMENTS

CASE NOTES

Editorial

We are pleased to publish the second issue of the twenty-fifth volume of the *Coventry Law Journal*. As with previous issues, this issue contains articles, recent developments and case notes on a wide variety of legal areas, such as human rights, discrimination law, corporate crime, criminal fraud, employment law, environmental law, European Union law, and international law. Our thanks go to those staff who have contributed their research and time to this issue. We are especially pleased to include articles by staff from Law Schools outside Coventry, as well from our students: Anna O'Shea, who has written a joint piece with Dr Steve Foster on facial technology and human rights; and Emmy Tolini, who has contributed her recent dissertation on EU solidarity.

This issue is dedicated to Dr Ben Stanford, our colleague and friend, who is leaving Coventry to join the Law School at Liverpool John Moores. Ben joined the Law School at Coventry four years ago and since that time has excelled in all areas of academic life: as a teacher, a researcher and in carrying out his duties as a course leader. Hugely popular with staff and students, Ben has received praise for his teaching on and organisation of all his modules, and has managed to combine his total commitment to teaching with an excellent research and publication record, publishing in esteemed journals such as *Public Law* and the *European Human Rights Law Review*. In addition, he has carried out a high number of administrative duties with great calm and capability, and organised and participated in staff research activities. We are delighted to include a case note of his in this edition, and hope that he will contribute to the journal in the future. Ben has been a true friend of the School and the Journal and we dedicate this issue to him and wish him every success in his future career.

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 getting published, then please contact the editors: the next publication date is April 2021, which will coincide with our twenty-fifth anniversary, and contributions need to be forwarded by early March.

The editors: Dr Steve Foster and Dr Stuart MacLennan

SPECIAL FEATURE

BREXIT

The Great Beyond

Dr Stuart MacLennan*

At the end of 2020 lawyers face the biggest change to the legal systems in all of the United Kingdom's legal jurisdictions for almost five decades. Although the European Union (Withdrawal) Act 2018 formally withdrew the UK from the EU at the end of January, s1A of that Act had the effect of temporarily vitiating the repeal of the European Communities Act 1972 until the end of the year.

The process of withdrawal has been a tortuous one, and many of the practical aspects of withdrawal remain unresolved. Nevertheless, there is much about the future of EU law in the United Kingdom that we do know, while we have learned much about both the British Constitution, as well as the workings of Article 50 of the Treaty on European Union, too.

We know that from 1 January 2021 European Union law will cease to be dynamic within the UK's legal systems. Instead, on that date, most of the *Acquis Communautaire*, the corpus of EU law, will be crystallised and imported into UK law.[1] 'Retained EU law' will continue to enjoy supremacy over all pre-Brexit domestic law.[2]

While UK courts will no longer be capable of referring questions of EU law to the Court of Justice,[3] and UK courts will no longer be bound by decisions of the Court of Justice,[4] British courts *may* have regard to subsequent jurisprudence of the Court of Justice 'so far as it is relevant to any matter before the court or tribunal'.[5] While British lawyers will no longer have rights of audience before the Court of Justice, EU Citizens in the UK, and *vice versa*, as well as UK traders in the EU single market will find themselves in need of EU lawyers for decades to come.

What we do not know is considerable. At the time of writing this feature it remains unclear whether or not the United Kingdom or European Union will trade with each other within the framework of a free trade agreement, or default to the rules provided for under the World Trade Organisation Agreements. In neither case should any sort of direct legal effect for new trade arrangements be expected. The WTO Agreements, most particularly the General Agreement on Tariffs and Trade (GATT)[6] do not produce any legal effects in domestic legal systems, while the WTO's Appellate Body does not currently have any members. The Comprehensive

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* Associate Professor of Law, Coventry University; Associate Member, Centre for Financial and Corporate Editor.

[1] ss2–5, European Union (Withdrawal) Act 2018.

[2] s7, *ibid.*

[3] Save for questions pertaining to Part Two of the UK-EU Withdrawal Agreement for a period of eight years, cf. Article 158, Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2019] OJ C-384 I/1.

[4] Save in the circumstances provided for, above, as well as those provided for by Article 4, *ibid.*

[5] *Supra* fn1, s6(2).

[6] General Agreement on Tariffs and Trade (GATT) (adopted 30 October 1947, entered into force 1 January 1948) 55 UNTS 187.

Economic and Trade Agreement (CETA) with Canada – by far the EU's most detailed trade agreement to-date, provides that

> [n]othing in this Agreement shall be construed as conferring rights or imposing obligations on persons other than those created between the Parties under public international law, nor as permitting this Agreement to be directly invoked in the domestic legal systems of the Parties.[7]

It is reasonable to expect a similar clause to be contained within any agreement between the UK and EU. It is also reasonable to expect, however, that a trade agreement between the UK and the EU will contain a new dispute settlement mechanism accessible to both the parties to the agreement as well as private parties. What form such a mechanism might take also remains unknown.

Whatever new trading relationship emerges will require new regulatory regimes for goods and services. This is essential if UK exports are to remain competitive and viable in a global market, as well as to ensure that such goods and services continue to be available in the UK. What that new regime will look like is largely unknown.

Also unknown is how British courts will deal with future judgements of the Court of Justice. The UK's courts will have to develop a test for when it will consider that post-Brexit jurisprudence of the Court of Justice is, or is not, relevant to a matter before it. Similarly unknown is how the courts of the UK will regard retained EU law that has been modified. s5(3) of the 2018 Act provides that the principle of supremacy of EU law may still apply to retained EU law that has been modified 'if the application of the principle is consistent with the intention of the modification.' This, too, will doubtless be the subject of extensive legal debate in courts and tribunals.

The process of withdrawing from the European Union has brought with it many lessons as to the current condition of the British constitution and the application of Article 50 TEU. We have discovered some new boundaries to the exercise of the Crown's prerogative, both in the conduct of the UK's actions within supranational legal frameworks, as seen in *Miller*;[8] and also in dissolution of Parliament, as illustrated in *Cherry*.[9] We have learned that programme motions in the House of Commons are amendable, and that without a clear majority government's control over the parliamentary process is substantially diminished. Finally, we have also learned that the process of withdrawing from the EU under Article 50 TEU can be halted, as illustrated by *Wightman*.[10]

These developments have all been covered to a greater or lesser degree by this journal. As we enter into a new era in the UK's legal systems, the Coventry Law Journal will continue to analyse, evaluate, and scrutinise legal developments relating to 'Brexit' in the years to come.

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[7] Article 30.6(1), Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part [2017] OJ L 11/23.
[8] *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.
[9] *Cherry and others (Respondents) v Advocate General for Scotland (Appellant) (Scotland)* [2019] UKSC 41.
[10] Case C-621/18, *Wightman and Others v Secretary of State for Exiting the European Union* [2018] ECLI:EU:C:2018:999.

ARTICLES

CRIMINAL LAW

Coronavirus and fraud in the UK: from the responsibilisation of the civil society to the deresponsibilisation of the state

Dr Lorenzo Pasculli*

Introduction

England, summer 2020 – in the middle of the coronavirus pandemic. In Camden, London, Mohammed – a 20-year old student – is sending texts messages. More than a thousand text messages. One reads: 'UKGOV: You are eligible for a Tax Refund as a result of the COVID-19 pandemic. Please fill out the following form so that we can process your refund.' Another reads: 'Due to the current pandemic we are issuing a refund for your last bill. Please verify your details so we can process your refund.' The plan is to use the personal details of the recipients to steal their money. The scheme will claim almost fifty victims and cause them a loss of more than £10,000.[1] At the same time, in Solihull, a seasoned businessman – he's 57 – shuts his laptop, a troubled expression on his face. We'll call him George – although his identity hasn't been revealed. George has just submitted a fraudulent claim within Coronavirus Job Retention Scheme (CJRS) that might result in a colossal loss (£495,000) for the UK Government.[2] (Later, the authorities will suspect his involvement in multi-million-pound tax fraud and money laundering).[3] Back in London, Jim Winters, Head of Fraud at Barclays, scratches his head as he reads the latest findings from his team, who flags a 66 per cent increase in reported scams in the first six months of 2020 compared with the last six months of 2019, with a 60 per cent increase in fraud volumes only between May and July, as certain lockdown measures were relaxed and customers became more willing to spend[4].

Meanwhile, from dozens living rooms and bedrooms across the United Kingdom (UK), comes the muffled tapping sound of frantic typing, as Her Majesty's Revenue and Customs (HMRC) staff working from home strive to keep pace with the flood of reports coming through the HMRC Fraud Hotline[5]. In just about two months, from the launch of the CJRS in April, up until the end of June, the HMRC will receive more than 4,400 reports of suspected fraud linked

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* Associate Head of Coventry Law School for Research and Associate of the Centre for Financial and Corporate Integrity (CFCI) at Coventry University; Sessional Lecturer at Imperial College London; Visiting Professor at Nebrija University, Madrid (Spain).

[1] Crown Prosecution Service 'CPS Warns - Don't Get Caught by COVID Fraud' (*CPS* 17 July 2020) < https://www.cps.gov.uk/london-south/news/warns-dont-get-caught-covid-fraud > accessed 5 December 2020.

[2] Emma Agyemang, 'Businessman Arrested Over Job Retention Scheme Fraud' *Financial Times* (London, 9 July 2020) < https://www.ft.com/content/45a00e4f-c716-458f-9b92-126695fdb088 > accessed 5 December 2020.

[3] Joanna Partridge 'Man Arrested in Solihull Over Suspected £500k Furlough Fraud' *The Guardian* (London, 9 July 2020) < https://www.theguardian.com/politics/2020/jul/09/man-arrested-in-solihull-on-suspected-half-million-pound-furlough > accessed 5 December 2020.

[4] Matthew Vincent 'UK Financial Scams Surge During Coronavirus Lockdown' *Financial Times* (London, 19 August 2020) < https://www.ft.com/content/fcce8128-4cf8-428b-ac28-3e9d90f66c96 > accessed 5 December 2020.

[5] HMRC 'HMRC Fraud Hotline – Information report' (*gov.uk* 2020) < https://www.tax.service.gov.uk/shortforms/form/TEH_IRF > accessed 4 December 2020.

to the scheme,[6] The same tapping can be heard in the homes of many Action Fraud employees, as they address the 2,866 reports on COVID-19 related fraud received in only a month (from 7 June 2020 to 7 July 2020), with a total loss of £11,316,266 has been reported lost by victims of coronavirus-related scams.[7]

Punctual as a Swiss clock, a predicted[8] fraud upsurge has hit pandemic-stricken Britain. The sudden move of our lives online paved the way to new opportunities for fraud. The personal and economic harms are enormous[9]. The UK is responding with a two-fold approach mirroring the overall response to economic crime and a more general trend in crime control. On the one hand, the Government still relies on traditional law enforcement. On the other hand, it seeks to encourage individuals, businesses and public agencies to take responsibility in controlling and preventing crime by changing their practices,[10] a strategy known as 'responsibilisation'.[11] Examples of this are information campaigns, compliance models, due diligence and risk assessment and management. With the many limitations placed by the pandemic on law enforcement, including the closure of many courts and reduced police and prosecution capabilities, much emphasis has been placed on these strategies. But do they work?

While literature in the last few decades has broadly analysed the social implications of responsibilisation on crime control in general, not many studies have focused on the specific area of financial crime.[12] There's an even more urgent need to assess responsibilisation strategies with specific regard to fraud in the context and the coronavirus pandemic. The purpose of this study is to assess the UK response to Covid19-related fraud risks in light of the literature on responsibilisation. We will do so through a comparative review of different policies and practices by various government agencies. The social and policy implications of such an analysis can be many. On the short term, it could be helpful to improve Covid19-related anti-fraud policies and practices. On a longer term and a broader level, it could help improve, on the one hand, the overall response of the UK to fraud and financial crime and, on the other hand, the future responses to such crime in the context of pandemics and other disasters. Moreover, given that responsibilisation strategies are not exclusive to the UK, hopefully, this paper can provide valuable insights for other jurisdictions. In the first part of our study, we will

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[6] Partridge (n 3).
[7] Action Fraud 'Victims of Coronavirus-Related Scams Have Lost Over £11 Million' (*actionfraud.police.uk* 8 July, 2020') < https://www.actionfraud.police.uk/covid19 > accessed 4 December 2020.
[8] National Crime Agency (NCA) 'Beware Fraud and Scams During Covid-19 Pandemic Fraud' (*nationalcrimeagency.gov.uk* 26 March 2020) < https://nationalcrimeagency.gov.uk/news/fraud-scams-covid19 > accessed 4 December 2020; Michael D'Ambrosio and Terry Wade, 'There's Another Coronavirus Crisis Brewing: Fraud' (*The Washington Post*, 14 April 2020) < https://www.washingtonpost.com/opinions/2020/04/14/theres-another-coronavirus-crisis-brewing-fraud/ > accessed 4 December 2020.
[9] cf Richard Walton, Sophia Falkner and Benjamin Barnard *Daylight Robbery. Uncovering the True Cost of Public Sector Fraud in the Age of COVID-19* (*Policy Exchange* 2020) < https://policyexchange.org.uk/wp-content/uploads/Daylight-Robbery.pdf > accessed 4 December 2020.
[10] Adam Crawford 'Networked Governance and the Post-regulatory State? Steering, Rowing and Anchoring the Provision of Policing and Security' (2006) 10 *Theoretical Criminology* 449.
[11] David Garland 'The Limits of the Sovereign State: Strategies of Crime Control in Contemporary Society' (1996) 36 *The British Journal of Criminology* 445, 452-455 and David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (University of Chicago Press 2001).
[12] See, for instance, Shahrzad Fouladvand 'Corruption, Regulation and the Law: The Power not to Prosecute under the UK Bribery Act 2010' in Nicholas Ryder and Lorenzo Pasculli, *Corruption, Integrity and the Law: Global Regulatory Challenges* (Routledge 2020) 71 and Lorenzo Pasculli and Nicholas Ryder 'The global anti-corruption framework: Lights, shadows and prospects' in Nicholas Ryder and Lorenzo Pasculli (eds) *Corruption, Integrity and the Law: Global Regulatory Challenges* (Routledge 2020), 3-13.

present our methodology. In the second part, we will present a critical analysis of the literature on responsibilisation. In the third part, we will provide a short overview of the Government response to fraud risks during the coronavirus pandemic. In the third part, we will critically assess both the practical and the deeper societal implications of such a response. In the fifth part, we will propose some recommendations for reform. We will then draw our conclusion.

Methodology

This review is based on a comparative analysis of a selected number of policy instruments in the UK as reported in many secondary sources in a multidisciplinary perspective. Why a comparative review? A first glance at these instruments reveals a degree of compartmentalisation. Different government bodies offer different tools and advice related to their specific territorial jurisdiction or subject-related remit – for instance, local governments inevitably focus on local risks, the National Cyber Security Centre (NCSC) focuses on cyber-fraud, while the COVID-19 Counter Fraud Response Team (CCFRT) focuses on policy-related fraud risks. A certain level of compartmentalisation is expected in the complexity of contemporary socio-economic life, but it this might also hinder the understanding of broader developments in fraud (and crime) control at a national level and their social implications. A comparative review supported by a literature review should help paint such a broader picture and assess its impact on society.

Our review relies on research conducted for two inquiries of the House of Commons Treasury Committee respectively on the economic impact of coronavirus in June 2020,[13] and economic crime in November 2020.[14] We relied on secondary sources only. To ensure the highest reliability we have considered only official data, reports, policy documents and online materials from the national Government and local authorities. We started from the general website of the UK Government (*gov.uk*), which also incorporates sources from specific agencies, such as HMRC, and then we have examined sources from agencies and regulators that have primary institutional responsibility for the response to fraud, such as Serious Fraud Office (SFO), the National Crime Agency (NCA), the Crown Prosecution Service (CPS), the Financial Conduct Authority (FCA), Action Fraud, and Take Five, the NCSC, and other agencies that might be less directed involved in the prevention of fraud, especially during the pandemic, such as the National Health Service (NHS), National Trading Standards (NTS) and The Pensions Regulator. Finally, we have scanned the official webpages of a sample of different county councils. Our analysis did not include sources at city council level.

A multidisciplinary literature review, illustrated in the next paragraph, will support our analysis. Since the pandemic is a recent phenomenon, there are not many academic papers directly assessing the sources we will analyse – which is why we hope our analysis might be helpful. Nevertheless, general sociological, criminological and legal literature on crime control and the causes and responses to fraud and financial crime can be of great help in guiding our assessment.

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[13] Treasury Committee 'Economic impact of coronavirus' (*parliament.uk* 2020) < https://committees.parliament.uk/work/224/economic-impact-of-coronavirus/ > accessed 5 December 2020; Lorenzo Pasculli 'Written evidence submitted by Dr Lorenzo Pasculli' EIC0792 (23 June 2020) < https://committees.parliament.uk/writtenevidence/7740/html/ > accessed 5 December 2020.

[14] Treasury Committee 'Economic crime' (*parliament.uk* 2020) < https://committees.parliament.uk/work/726/economic-crime/ > accessed 5 December 2020; Lorenzo Pasculli 'Written evidence submitted by Dr Lorenzo Pasculli' (27 November 2020), unpublished yet.

This study has some limitations. Firstly, it only covers secondary sources. Research on primary data would be required to test our findings. Secondly, the Government's response to any issue related by the pandemic is constantly evolving at a rather speedy pace. The bulk of our analysis was conducted in June 2020. We have tried to update it to more recent developments until the time of our submission (December 2020). But we expect further changes may take place by the time of publication. Nevertheless, we believe our analysis will maintain its usefulness, especially in assessing policies and practices that are not exclusively related to the pandemic but reflect more general contemporary developments in the control of fraud and financial crime.

Responsibilisation and its discontents

The UK response to fraud is part of the more general response to economic crime.[15] The latter can be summarised into two main strategies: law enforcement and 'responsibilisation'. Law enforcement encompasses prevention, investigation and prosecution of economic crime by state agencies, such as the SFO, the CPS and the judiciary. Responsibilisation seeks to compensate for the failure of the state to effectively control increasingly pervasive and volatile forms of criminality by devolving crime control responsibilities to individuals and private organisations.[16] The failure of traditional state-centred strategies is particularly evident in the field of financial crime and fraud, especially in their cyber manifestations, which are deeply affected by the profound economic and societal changes brought about by the globalisation[17]. Policing financial crimes presents special problems because of the social status of some suspects and the relative inaccessibility of most offences to routine observation and traditional police methods.[18]

Responsibilisation strategies are not limited to financial crime. They are the result of a deeper and complex process of adaptation of crime control to new social conditions.[19] This process has seen the emergence of 'new modes of governing crime'.[20] Programmes of offender rehabilitation are abandoned in favour of new programmes of actions directed not towards individual offenders, but towards the conduct of potential victims, to vulnerable situations, and to 'those routines of everyday life which create criminal opportunities as unintended by-product'.[21] The primary actor in the 'business of crime control' is no longer the state, but non-state agencies or organisations, to which the state delegates the competence of reducing criminal opportunities.[22] The state retains its 'steering' role – that is, policy decision-making – while 'rowing' – that is, service delivery[23] – is increasingly delegated to the civil society. This is part of a broader shift in state governance towards what Braithwaite calls the 'New

[15] See HM Treasury and Home Office *Economic Crime Plan 2019-2022* (*gov.uk* 2019) < https://www.gov.uk/government/publications/economic-crime-plan-2019-to-2022/economic-crime-plan-2019-to-2022-accessible-version > accessed 3 December 2020.
[16] cf Garland (n 11).
[17] cf Fouladvand (n 12), Pasculli and Ryder (n 12) and Lorenzo Pasculli 'The Global Causes of Cybercrime and State Responsibilities. Towards an Integrated Interdisciplinary Theory' (2020) 2(1) *Journal of Ethics and Legal Technologies* 48-74 < https://jelt.padovauniversitypress.it/system/files/papers/JELT-02-01-03.pdf > accessed 3 December 2020.
[18] M. Levi 'Policing financial crimes' in Henry N. Pontell, and Gilbert L. Geis (eds) *International Handbook of White-Collar and Corporate Crime* (Springer 2006) 588-606.
[19] Garland (n 11).
[20] ibid 450.
[21] ibid 451.
[22] ibid 452.
[23] On 'steering' and 'rowing' see David Osborne and Ted Gaebler *Reinventing Government* (Penguin 1992).

Regulatory State', emerged with the Thatcher-Major and Bush-Reagan governments.[24] This shift has been also captured by Foucault's governmentality theory, which highlighted the dispersal of surveillance and discipline through a multiplicity of controls and the active involvement of citizens in the governance of their own conduct.[25]

Responsibilisation relies on different techniques. For the purposes of this paper, we can group these into two main categories: on the one hand, public information campaigns to alert individuals and organisations of fraud risks and encourage them to adopt all the necessary precautions; on the other hand, the imposition of duties on private organisations, public bodies and certain individuals, such as company executives, leaders and professionals, for the adoption of specific measures to prevent and counter financial crime and fraud. The implementation of such measures is supervised by both non-governmental self-regulatory organisations, such as professional associations, and governmental regulators, such as the FCA in the UK. The privatisation of crime control responsibilities is accompanied by a managerialist and business-like approach in criminal justice[26]. Moreover, since the focus is on the removal of crime opportunities, risk control plays a major role in responsibilisation[27]. Indeed, many techniques aim at the prompt identification of crime risks and their effective assessment and mitigation. It must be clear, however, that these new adaptations in crime control have not led to dismiss traditional state law enforcement. In a somehow contradictory fashion, the state is not always willing to admit its failures and engage in forms of 'denial' which brings it to reassert its punitive power through 'law and order' 'tough on crime' rhetoric and policies[28]. However, scholars report an increasing shift in the enforcement of criminal law towards non-police agencies, such as financial regulators.[29]

The Economic Crime Plan 2019-2020 developed by the Home Office and the Treasury[30] is an excellent example of this dichotomy. According to the Plan, the Government's response to economic crime involves many diverse private sector organisations and collaborative private-public partnerships.[31] Key stakeholders include banking, finance, accountancy, legal and real estate firms with obligations under the Money Laundering Regulations 2017[32]. Public-private partnerships are a recurring component of each strategic priority outlined in the plan. Reflecting the prominence of a risk-based approach typical of responsibilisation, two of these strategic priorities are dedicated to risk assessment and management, both at a national level and in the private sector: Strategic Priority One seeks to expand the national risk assessments (NRAs) of money laundering and terrorist financing to include a wider range of economic crimes and develop further public-private partnerships to undertake joint and collective threat assessments

[24] John Braithwaite 'The new regulatory state and the transformation of criminology' (2000) 40(2) *British Journal of Criminology* 222-238.
[25] Michel Foucault *Discipline and Punish: The Birth of the Prison*, (Allen Lane 1977) and Michel Foucault 'The subject and power' (1982) 8(4) *Critical Inquiry* 777-795.
[26] Garland (n 11) 455-456; Ronen Shamir 'The age of responsibilization: on market-embedded morality' (2008) 37(1) *Economy and Society* 1-19.
[27] Tim Goddard, 'Post-welfarist risk managers? Risk, Crime Prevention and the Responsibilization of Community-based Organizations' [2012] *Theoretical Criminology* 1; Pat O'Malley 'Risk, power and crime prevention' (1992) 21(3) *Economy and Society* 251-268; Pat O'Malley *Crime and Risk* (Sage 2010).
[28] cf Garland (n 11) 459-461.
[29] Fouladvand (n 12) 71.
[30] HM Treasury and Home Office (n 15).
[31] ibid. paras 1.30-1.31.
[32] Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017.

on economic crime;[33] Strategic Priority Five seeks to enhance the management of economic crime risk in the private sector[34].

The second strategic priority seeks to improve information-sharing between the public and private sectors as a means to enhance both risk/threat analysis and law enforcement.[35] Other strategic priorities aim at enhancing powers, procedures, tools and capabilities not only of law enforcement and the justice system but also of the private sector. Public and private sectors are thus forever married in the control of financial crime: 'Historically, these capabilities have been viewed as separate, with insufficient consideration of how they can be combined and used collectively. We think there is substantial scope to enhance the public-private partnership around how our collective capabilities can be used. For example, the investigation of fraud is a specialist skill, and consequently lends itself to skill transfer or exchange between public and private sectors, where both sectors can learn from each other.'[36] The international strategy outlined in the seventh chapter of the Plan is also focused mostly on 'understanding the threat' (information-sharing and risk assessment) and strengthening transnational law enforcement capabilities.

These developments raise many concerns. A major one is that it might lead the state to neglect (or forget) its responsibilities for the removal of those societal conditions that foster criminality through welfare interventions.[37] The almost obsessive emphasis on micro-management of risks and situations implies a considerable diversion of focus and resources from broader social policies aimed at removing the root causes of criminality. A previous interdisciplinary literature review suggests that a distinction can be drawn between proximate causes and remote causes of crime (these are ideal types: in reality the boundaries between them are nuanced).[38] *Proximate causes* are individual and situational factors that can encourage or facilitate criminal behaviour. These include motivations, opportunities and, especially in the case of fraud and financial crime, rationalisation. Motivations are symbolic constructions that make certain goals and activities desirable.[39] Opportunities are situations that make criminal behaviours possible, such as access to targets/victims, availability of means and the lack of adequate controls.[40] Rationalisation – the third component of Donald Cressey's famous 'fraud triangle'[41] – is the neutralisation of the moral and cognitive dissonances caused by criminal behaviour.[42] *Remote causes* are the deeper biological, cultural, socio-psychological, economic and politico-institutional developments that determine or aggravate criminal motivations or opportunities.[43]

For instance, writing about corruption – but the reasoning applies to any financial crime – Ashforth and Anand add to rationalisation the mutually reinforcing processes of institutionalisation – the embedding and routinising of corrupt practices in organizational structures and processes – and socialisation – the inducement of newcomers to view corruption

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[33] HM Treasury and Home Office (n 15) paras 2.5-2.6.
[34] Ibid. paras 6.1-6.26.
[35] ibid. paras 3.1.
[36] ibid. para 5.10.
[37] cf Garland (n 11).
[38] Pasculli 'The Global Causes of Cybercrime' (n 17) 51-52.
[39] David Cantor and Kennet C. Land 'Unemployment and Crime Rates in the Post-World War II United States: A Theoretical and Empirical Analysis' (1985) 50 *American Sociological Review* 317–332.
[40] Lawrence E. Cohen and Marcus Felson 'Social Change and Crime Rate Trends: A Routine Activity Approach' (1979) 44 American Sociological Review 588–608.
[41] Donald R. Cressey *Other People's Money* (Wadsworth 1953).
[42] Graham Sykes and David Matza 'Techniques of neutralization: A theory of delinquency' (1957) 22(6) *American Sociological Review* 664–670.
[43] Pasculli 'The Global Causes of Cybercrime' (n 17).

as permissible, if not desirable.[44] These go beyond specific situations or individuals and are rooted in more complex socio-cultural and organisational patterns. Other remote causes are prompted by global developments, such as the globalisation of markets and the expansion of economic opportunities or the advance and diffusion of new technologies.[45] Amongst these, the excessive cultural and institutional emphasis on financial success and social prestige and the lack of means to achieve them can be particularly significant in the causation of economic crime, as suggested by anomie and strain theory in all their variations. Anomie is a situation of 'normlessness', in which society fails to regulate the naturally unlimited desires of individuals.[46] Industrialisation first and then global neoliberalism, with its discourses of economic growth, free markets, individualism, consumerism, privatisation and deregulation, have created new needs, desires and fashions. But equal legal means to pursue them are still unavailable to many.[47] Such divergence between means and ends produces a sense of deprivation and frustration in those who fail to achieve the globally valued goals of success.[48] With the right opportunities, such strains can not only compromise mental health (anomie's theory was used by Durkheim to explain suicide) but also motivate criminal behaviours and especially financial crime.[49]

However, removing structural obstacles to legitimate opportunities is not enough to reduce crime rates when all the major social institutions primarily support the quest for material success and fail to promote alternative definitions of self-worth and achievement.[50] Goals must be questioned, other than means. This framework is further complicated by the advent of cyber technologies which not only provide opportunities and instruments for financial criminality and weaken formal and informal controls (proximate causes) but also amplify the reach and intensity of material goals of success[51]. Remote causes do not only operate at a societal level. Pioneering studies suggest that there may be significant correlations between crime, including financial crime, and biological conditions, often rooted in the way our brain works[52]. For instance, neurosciences support and provide a biological explanation to the criminological idea that the perceived lack of victims and short-sighted or impulsive decision-making are often

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[44] Blake E. Ashforth and Vikas Anand 'The Normalization of Corruption in Organizations' (2003) 25 *Research on Organizational Behaviour* 1 and Vikas Anand, Blake E. Ashforth and Mahendra Joshi 'Business as Usual: The Acceptance and Perpetuation of Corruption' (2004) 18(2) *Academy of Management Executive* 39.
[45] ibid. and Lorenzo Pasculli and Nicholas Ryder 'Corruption and globalization. Towards an interdisciplinary scientific understanding of corruption as a global crime' in Lorenzo Pasculli and Nicholas Ryder (eds) *Corruption in the Global Era: Causes, Sources and Forms of Manifestation* (Routledge 2019).
[46] Émile Durkheim *Suicide: A Study in Sociology* (trs A. Spaulding and George A. Simpson, Routledge 1897, 2002).
[47] Joseph Stiglitz *Globalization and Its Discontents* (Norton 2002); Joseph Stiglitz, *The Price of Inequality* (Norton 2012).
[48] Robert K. Merton 'Social Structure and Anomie' (1938) 3(5) *American Sociological Review*672–682; Robert K. Merton *Social Theory and Social Structure* (Free Press 1968).
[49] Nikos Passas 'Anomie and Corporate Deviance' (1990) 14 *Contemporary Crises* 157–178; Nikos Passas 'Global Anomie, Dysnomie, and Economic Crime: Hidden Consequences of Neoliberalism and Globalization in Russia and around the World' (2000) 27(2) *Social Justice* 16–44. See also Robert Agnew 'Foundation for a General Strain Theory of Delinquency' (1990) 30 *Criminology* 47–87; Robert Agnew 'The Nature and Determinants of Strain: Another Look at Durkheim and Merton' in Nikos Passas and Robert Agnew (eds) *The Future of Anomie Theory* (Northeastern University 1997) 27–51; Robert Agnew *Why Do Criminals Offend? A General Theory of Crime and Delinquency* (Roxbury 2005).
[50] Steven F. Messner and Richard Rosenfeld 'Markets, Morality, and an Institutional-Anomie Theory of Crime' in Nikos Passas and Robert Agnew (eds) *The Future of Anomie Theory* (Northeastern University Press 1997) 207–227 and Steven F. Messner and Richard Rosenfeld *Crime and The American Dream* (5th edn, Wadsworth 2013).
[51] Pasculli (n 17) 55.
[52] Adrian Raine T*he Anatomy of Violence. The Biological Roots of Crime* (Penguin 2013) 175-180.

behind the commission of financial crimes.[53] These studies suggest that a better knowledge of our biological processes can usher more humane and cost-effective policies[54], such as 'prefrontal workout' and customised rehabilitation of offenders[55]. Without digging any further into the remote causes of fraud and financial crime, it is evident that the combination of responsibilisation and law enforcement merely addresses the proximate causes of crime. Information-sharing, awareness-raising and risk management, on the one hand, and policing, prosecution and sanctions, on the other hand, intervene directly on situational opportunities and controls, and, less directly, on immediate criminal motivations and pressures, but do little to resolve the deepest social drivers of criminality. These require broader welfare interventions aimed at levelling social inequalities, promoting education and the physical and mental wellbeing of individuals, and an overall reflection on the values promoted by society and its institutions. Otherwise, the responsibilisation of civil society will result in the deresponsibilisation of the state.[56]

Another concern is that the large transfer of crime control responsibilities to private organisations – mostly businesses – and the business-like approach to criminal justice entails a commodification of security,[57] and even of legal prescriptions.[58] This can have several adverse consequences. Firstly, it might exacerbate anomie by fuelling cultural emphasis on market-oriented goals, methods, targets, and institutions. Secondly, the emphasis on commercial risk mitigation has created a growing industry which works through logics and mechanisms which serve to expand the demand for private security services. The suggestion that political responses alone are insufficient and risks can only be effectively contained by 'bespoke' commercial services might contribute to the perpetuation of a culture of risk in which the demand for security can never be satisfied and guarantees continuous profits.[59] Finally, once security becomes a commodity it tends to be distributed by market forces, rather than according to need, thus leaving the poorest and least powerful in our societies unprotected.[60]

The response of the UK Government to fraud risks during the pandemic: an outline

The UK approach to Covid19-related fraud risks reflects the dichotomy law enforcement-responsibilisation. Law enforcement during the pandemic has suffered inevitable limitations. The criminal justice system continued to operate, although partially. As of 23 June 2020, 93 courts were still not open to the public.61 The CPS has prioritised the prosecution of all

[53] cf Eugene Soltes Why They Do It. Inside the Mind of the White-Collar Criminal (Public Affairs 2016) 18-19 and David Eagleman Incognito. The Secret Lives of the Brain (Canongate 2011) 112 and David Eagleman The Brain. The Story of You (Canongate 2015) 118-143.
[54] Eagleman *The Brain* (n 53) 141.
[55] Eagleman *Incognito* (n 53) 180-186.
[56] Pasculli (n 17) 62–65.
[57] cf Garland (n 11) 463 and Elke Krahmann 'Security: Collective Good or Commodity?' (2008) 14(3) *European Journal of International Relations* 379-404.
[58] Shamir (n 26) 2, citing Orly Lobel 'The renew deal: The fall of regulation and the rise of governance in contemporary legal thought' (2004) 89 Minnesota Law Review 342.
[59] Elke Krahmann 'Beck and Beyond: Selling Security in the World Risk Society' (2011) 37(1) *Review of International Studies* 349-372.
[60] Garland (n 11) 463.
[61] From 17 July 2020, the government is no longer publishing the tracker list as most courts and tribunals buildings are now open in line with public health advice. The numbers in this paper are based on the government's court and tribunal tracker list as published at < https://www.gov.uk/guidance/courts-and-tribunals-tracker-list-during-coronavirus-outbreak#changes-to-status-23-june-2020 > accessed 23 June 2020.

COVID-19-related cases62, including fraud and dishonesty offences against vulnerable victims and the SFO is continuing its investigations.63 This prioritisation should ensure that, despite the constraints of the current circumstances, resources are allocated to the investigation and prosecution of COVID-19-related fraud.

As for responsibilisation, our review suggests us to distinguish between measures adopted in the private sector and measures adopted in the public sector. Private sector responsibilisation targets mainly individual citizens and businesses. Public sector responsibilisation addresses leaders and fraud experts in government bodies and local authorities that are administering emergency programmes on behalf of the Government.[64] Some responsibilisation measures are common to both private and public sectors. These are awareness-raising and information campaigns – mostly online – to help citizens, businesses and potential victims and are encouraged to take any precaution to minimise fraud risks. The central Government website (gov.uk) has published various webpages to COVID-19-related anti-fraud advice for individuals,[65] businesses,[66] charities,[67] and public bodies.[68] In addition, various government agencies, such as the CPS and NCA,[69] the FCA,[70] the NHS,[71] NTS,[72] the NCSC,[73] The Pensions Regulator,[74] Action Fraud,[75] and Take Five[76] have published their own online advice, often

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[62] National Police Chiefs' Council (NPCC) 'Interim CPS Charging Protocol – Covid-19 crisis response' (*cps.gov.uk* 2020) < https://www.cps.gov.uk/sites/default/files/documents/legal_guidance/Interim-CPS-Charging-Protocol-Covid-19-crisis-response.pdf > accessed 2 December 2020.
[63] Serious Fraud Office (SFO) 'Covid-19 update' (*sfo.gov.uk* 7 May 2020) < https://www.sfo.gov.uk/2020/05/07/covid-19-update/ > accessed 2 December 2020.
[64] Cf. Cabinet Office 'Guidance. Fraud control in emergency management' (*gov.uk* 26 March 2020) < https://www.gov.uk/government/publications/fraud-control-in-emergency-management-covid-19-uk-government-guide > accessed 2 December 2020.
[65] Home Office 'Coronavirus (COVID-19): Advice on how to protect yourself and your business from fraud and cyber-crime' (*gov.uk* 27 April 2020) < https://www.gov.uk/government/publications/coronavirus-covid-19-fraud-and-cyber-crime/coronavirus-covid-19-advice-on-how-to-protect-yourself-and-your-business-from-fraud-and-cyber-crime > accessed 2 December 2020; HM Revenue & Customs 'Check a list of genuine HMRC contacts' (*gov.uk* 2020) < https://www.gov.uk/guidance/check-a-list-of-genuine-hmrc-contacts > accessed 2 December 2020.
[66] Home Office (n 65); The Insolvency Service 'Be vigilant against coronavirus scams' (*gov.uk* 26 March 2020) < https://www.gov.uk/government/news/coronavirus-covid-19-increased-risk-of-fraud-and-cybercrime-against-charities > accessed 2 December 2020;
[67] The Charity Commission 'Coronavirus (COVID-19): increased risk of fraud and cybercrime against charities' (*gov.uk* 12 May 2020) < https://www.gov.uk/government/news/coronavirus-covid-19-increased-risk-of-fraud-and-cybercrime-against-charities > accessed 2 December 2020.
[68] Cabinet Office (n 64).
[69] CPS 'Beware fraud and scams during COVID-19 pandemic' (*cps.gov.uk* 25 March 2020) < https://www.cps.gov.uk/cps/news/beware-fraud-and-scams-during-covid-19-pandemic > accessed 2 December 2020; NCA (n 8).
[70] FCA 'Avoid coronavirus scams' (*fca.org.uk* 1 May 2015) < https://www.fca.org.uk/news/news-stories/avoid-coronavirus-scams > accessed 2 December 2020.
[71] NHS Counter Fraud Authority 'Protecting the NHS from fraud during COVID-19' (*cfa.nhs.uk* 2020) < https://cfa.nhs.uk/fraud-prevention/COVID-19-guidance/ > accessed 2 December 2020.
[72] NTS 'Beware of COVID-19 scams' (*nationaltradingstandards.uk*, 24 March 2020) < https://www.nationaltradingstandards.uk/news/beware-of-covid19-scams/
[73] NCSC 'Coronavirus (Covid-19): NCSC Guidance' (*ncsc.gov.uk* 2020) < https://www.ncsc.gov.uk/ > accessed 2 December 2020.
[74] The Pensions Regulator 'Avoid pension scams' (*thepensionregulator.gov.uk* 2020) < https://www.thepensionsregulator.gov.uk/en/pension-scams > accessed 2 December 2020.
[75] Action Fraud 'Covid-19 related scams – News and resources' (*actionfraud.police.uk* 26 March 2020) https://www.actionfraud.police.uk/covid19 > accessed 2 December 2020 (the page has now been archived).
[76] Take Five 'Covid-19 fraud and scams' (*takefive-stopfraud.org.uk* 2020) < https://takefive-stopfraud.org.uk/coronavirus-fraud-and-scams/ > accessed 2 December 2020.

articulated in different webpages. County and city councils have also introduced online guidance against fraud.

In addition to such campaigns, more specific action target private organisations and public bodies. As for private bodies, various government agencies and regulators have made available specific tools to support businesses in implementing adequate precautions and internal controls to prevent them or their employees from becoming victims of fraud or to commit fraud. The NCSC, for instance, published a clear and well-structured Guidance on Home Working[77] which includes links to many helpful practical tools, such as a clear infographic[78] and further guidance. The FCA's webpage 'Avoid coronavirus scam'[79] is also effective: short and well organised, it contains specific guidance on different fraud schemes with links to helpful tools such as the Financial Services Register,[80] the FCA Warning List,[81] and ScamSmart.[82] Most of these tools support and complement the implementation of crime control duties and responsibilities imposed on companies and their executives by pre-existing regulation – so there's nothing innovative about them.

The responsibilisation of the public sector has been more creative. To help the public sector understand its fraud risks – especially those generated by stimulus spending – and design adequate countermeasures, the Cabinet Office's centre of the Counter Fraud Function has established the Covid-19 Counter Fraud Response Team (CCFRT). The team is proactively monitoring the Covid-19 fraud threat utilising expertise, intelligence and analytics from its partnerships with law enforcement, the public sector, the private sector and our international relationships with the Five-Eyes countries. It is combining this intelligence with expert fraud risk assessment of the stimulus spending to help the public sector understand its fraud risks and to design and develop countermeasures, alerts and guidance. By doing this, the CCFRT aims at making the funding go further and support more of the community through the pandemic. Once again, the focus is on risk assessment, but, interestingly, the CCFRT is applying the risk-based approach to policy design and delivery.

The limits of the two-fold responsibilisation-law enforcement approach

Our comparative review exposes many failings in the Government's response to Covid-19-related fraud risks. On a more superficial level, many practical flaws that can hinder crime control activities, both from civil society and from state law enforces – these include, for instance, excessive fragmentation and poor coordination between different measures, confusing or inaccessible advice or limited enforcement capabilities. These mostly depend on how the responsibilisation-law enforcement strategies have been implemented by the Government. On a deeper level, the limits of the Government's overall approach can have a more substantial and long-lasting impact on society, by failing to address the root causes of crime and even by aggravating criminogenic conditions. These seem to be more intrinsic flaws

[77] NCSC 'Home working: preparing your organisation and staff' (*ncsc.gov.uk* 2 April 2020) < https://www.ncsc.gov.uk/guidance/home-working > accessed 2 December 2020.
[78] NCSC 'Home working: Managing the cyber risks' (*ncsc.gov.uk* 2020) < https://www.ncsc.gov.uk/files/home%20working%20v1.pdf > accessed 2 December 2020.
[79] FCA (n 70).
[80] FCA 'The Financial Services Register' (*fca.org.uk* 2020) < https://register.fca.org.uk/s/ > accessed 2 December 2020.
[81] FCA 'About the FCA Warning List' (*fca.org.uk* 14 August 2017) < https://www.fca.org.uk/scamsmart/about-fca-warning-list > accessed 2 December 2020.
[82] FCA 'Be a ScamSmart investor' (*fca.org.uk* 2020) < https://www.fca.org.uk/scamsmart > accessed 2 December 2020.

of the developments in crime control analysed above. Below we will illustrate these shortcomings with the support of the findings of our review.

Law enforcement

Apart from the above-mentioned court closures and limited police and prosecution capabilities during the pandemic, a major obstacle to effective prosecution is that there are too many reporting channels. These include Action Fraud's hotline and online reporting tool,[83] Citizens Advice's channels, the NCSC's email address report@phishing.gov.uk, FCA's Consumer Helpline,[84] or online reporting form,[85] the SFO's online reporting form,[86] HMRC's various reporting channels,[87] plus the long and confusing list of prescribed entities for whistleblowing.[88] This makes it difficult for certain groups of citizens, particularly the most vulnerable ones – such as the elderly, or those with limited access to or experience of the Internet – to identify the right reporting channel. Reporting to the wrong channel requires to spend additional time and resources to redirect the victim towards the appropriate channel and can cause delays in investigations. Moreover, some of these channels are providing a reduced service. From June 2020 until the time at which we're writing (December 2020), Action Fraud's website has been warning that 'Due to the ongoing COVID-19 situation, unfortunately, our contact centre is currently providing a reduced service. If you do need to chat to us, we have a small number of advisors on hand to help but please be advised that waiting times will be longer. We apologise for any inconvenience caused. If your UK business, charity or organisation is currently under cyber-attack and data is potentially at risk please call 0300 123 2040 immediately and press 9. You can continue to make reports of fraud in the normal way via the website.' There are many problems with such a message. First, it can encourage fraud. Second, it can discourage reporting. Third, it creates a perception of inequality between individuals and organisations, reflecting the assumption that the interests of business are valued more than those of citizens. As a result, it can foster anomie, frustration and social mistrust.

Regulators also struggle to cope with their law enforcement duties, particularly in response to stimulus fraud. HMRC is responsible for investigating cases of irregular CJRS and Self-Employment Income Support Scheme (SEISS) payments and can audit retrospectively any claim[89]. To facilitate this, HMRC set up an online form for the reporting of HMRC-administered coronavirus (COVID-19) relief scheme fraud,[90] and urged anyone concerned that

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[83] Action Fraud 'Reporting fraud and cyber-crime' (*actionfraud.police.uk* 2020) < https://www.actionfraud.police.uk/reporting-fraud-and-cyber-crime > accessed 4 December 2020.
[84] FCA 'Contact us' (*fca.org.uk* 25 April 2016) < https://www.fca.org.uk/contact > accessed 4 December 2020.
[85] FCA 'Report a scam to us' (FCA, 1 October 2020) https://www.fca.org.uk/consumers/report-scam-us > accessed 4 December 2020.
[86] SFO 'Reporting serious fraud, bribery and corruption' (*sfo.gov.uk* 2020) < https://www.sfo.gov.uk/contact-us/reporting-serious-fraud-bribery-corruption/ > accessed 4 December 2020.
[87] HMRC 'Report fraud to HMRC' (*gov.uk* 2020) < https://www.gov.uk/government/organisations/hm-revenue-customs/contact/report-fraud-to-hmrc > accessed 4 December 2020.
[88] Department for Business, Energy & Industrial Strategy 'Whistleblowing: list of prescribed people and bodies' (*gov.uk* 13 February 2020) < https://www.gov.uk/government/publications/blowing-the-whistle-list-of-prescribed-people-and-bodies--2/whistleblowing-list-of-prescribed-people-and-bodies > accessed 4 December 2020.
[89] Pete Duncan and Nicholas Lord 'Furlough, fraud and the Coronavirus Job Retention Scheme' (*Policy@Manchester Blogs*, 22 June 2020) < http://blog.policy.manchester.ac.uk/posts/2020/06/furlough-fraud-and-the-coronavirus-job-retention-scheme/ > accessed 4 December 2020.
[90] HMRC 'HMRC Fraud Hotline' (n 5).

their employer might be abusing the scheme to report them.[91] More recently, facing increasing numbers of reports (almost 1900 as of 29 May 2020),[92] the Finance Act 2020 gives HMRC new powers to recover irregular payments and impose penalties for those who make deliberately incorrect claims and fail to notify the HMRC within the prescribed terms. Unfortunately, HMRC lacks the capacity for random audits. The sheer volume of demands attracted by Scheme,[93] together with the capacity constraints created by its implementation,[94] makes effective and extensive preventive auditing improbable and costly, meaning that most investigation will have to be retrospective.[95] The model also places excessive reliance on employee reporting. Despite the number of reports received by HMRC so far, researchers suggest that many cases could go unreported due to the many barriers to individual reporting.[96] Furloughed employees might feel 'blackmailed into working' and fear to lose their job by not doing so,[97] or by reporting the company. Even if anonymity was assured, employers might refrain from reporting for fear that the withdrawal of government funding or the imposition of sanctions might put the company out of business,[98] or force it to stop paying their colleagues.[99] Finally, there is insufficient psychological and personal support for those who wish to report. The above-mentioned barriers can affect the mental wellbeing of employees. HMRC encourages reporting, but there is no evidence of any special care measures to support employees victimised by furlough frauds or those who have reported their employees.

Responsibilisation of the private sector

The information and guidance published are far from ideal, especially for private citizens. They are highly fragmentary, scattered as they are throughout the Internet. We have counted at least 20 webpages from national agencies, without considering the further advice published by most county councils, city councils and police forces. While a certain level of diversification is required to address different fraud risks and different sectors, the fragmentariness of guidance from government bodies at all levels is excessive and can compromise its effectiveness in many ways. The unnecessary multiplication and complexity of online sources make any relevant information difficult to access and understand. Even expert researchers would struggle to identify all the relevant sources and reconstruct a coherent set of messages. Moreover, the choice of the Internet as the primary (if not exclusive) means of information is debatable, as not everyone, and especially vulnerable groups, can easily access it or use it properly. We could find no evidence of information campaigns launched through other media (press, television and radio). Such piecemeal advice is not only difficult to access, but it is also confusing and contradictory as its various sources are not appropriately coordinated. The information provided differs from one website to another, and so does its format. Some websites are very

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[91] Sarah Butler 'Nearly 800 reports of people defrauding UK furlough scheme' *The Guardian* (London, 13 May 2020) < https://www.theguardian.com/politics/2020/may/13/nearly-800-reports-of-people-defrauding-uk-furlough-scheme > accessed 4 December 2020.
[92] Jessica Beard 'Employers given 30 days to "confess" to abusing furlough bailout scheme' *The Telegraph* (12 June 2020) < https://www.telegraph.co.uk/money/consumer-affairs/employers-given-30-days-confess-abusing-furlough-bailout-scheme/ > accessed 4 December 2020.
[93] Hilary Osborne and Julia Kollewe '140,000 UK companies apply for coronavirus job furlough scheme' *The Guardian* (London, 20 April 2020) < https://www.theguardian.com/money/2020/apr/20/fears-of-flood-as-uks-covid-19-furlough-scheme-opens > accessed 4 December 2020.
[94] Financial Times 'HMRC suspends some tax investigations due to pandemic' *Financial Times* (15 April 2020) < https://www.ft.com/content/70471597-dc42-4c70-aff2-d7e03eeabdac > accessed 4 December 2020.
[95] Duncan and Lord (n 89).
[96] ibid.
[97] Butler (n 91).
[98] Duncan and Lord (n 89).
[99] Butler (n 91).

specific, others are more generic. Many sources do not follow the general 'Stop, Challenge and Protect' approach adopted by the Government in the *gov.uk* and Action Fraud websites.[100] The Cambridgeshire County Council webpage[101] even refers citizens to the website Which?,[102] which is not backed or checked by the Government and offers commercial products and services. Moreover, different sources suggest different reporting channels. The Suffolk County council website,[103] for instance, does not advise citizens to report fraud cases to Action Fraud, but only to call National Citizen's Advice helpline. Moreover**,** some of the online advice is incomplete and out of date. Some *gov.uk* webpages are months old and date back to spring 2020,[104] despite a second lockdown was called in November. Other online guidance does not cover some important fraud risks. None of the main anti-fraud agencies or relevant government bodies has published informative videos on COVID-19-related fraud risks and some of the videos currently available are years old. The latest video uploaded on YouTube by Action Fraud dates back to August 2019,[105] while the latest video uploaded by Financial Fraud Action UK dates back to February 2018.[106] Some websites include broken links to other webpages: from June to November 2020 the Staffordshire County council website,[107] for instance, referred to a wrong link to Take Five's advice.[108] The NHS's COVID-19 counter fraud guidance[109] is mostly addressed to NHS staff, rather than the general public and it does not mention the risks of fraud related to the 'Test and Trace' system flagged by the Local Government Association.[110] Such risks are briefly mentioned in the general 'Test and Trace' webpage[111] but no extensive advice is provided. Similarly, we could not find any official guidance on the recently uncovered scam designed to steal personal and financial details of millions of self-employed workers using the SEISS.[112]

As we mentioned above, the guidance for business appears to be overall more impactful. However, the FCA published an ambiguous message on its website concerning the controls

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[100] Home Office (n 65) and Action Fraud (n 75).
[101] Cambridgeshire County Council 'Coronavirus (COVID-19) Beware of Coronavirus scams' (*cambridgeshire.gov.uk* 2020) < https://www.cambridgeshire.gov.uk/residents/coronavirus/beware-of-coronavirus-scams > accessed 3 December 2020.
[102] Which? 'How to spot an email scam' (*Which?* 2020) < https://www.which.co.uk/consumer-rights/advice/how-to-spot-an-email-scam > accessed 3 December 2020.
[103] Suffolk County Council 'Report a business or scam during coronavirus (COVID-19) pandemic' (*suffolk.gov.uk* 2020) < https:/www.suffolk.gov.uk/coronavirus-covid-19/latest-information/report-business-scam-coronavirus > accessed 3 December 2020.
[104] See, for instance, nn 63-77 above.
[105] Action Fraud 'Commander Baxter interview on BBC Radio 4 Today programme' (*YouTube* 15 August 2019) < https://youtu.be/oAynaIIz224 > accessed 3 December 2020.
[106] Financial Fraud Action UK 'Take Five Phase 2 – Brandon – Manchester' (*YouTube* 23 February 2018) < https://youtu.be/RLABIRQO_pk > accessed 3 December 2020.
[107] Staffordshire County Council 'Cybercrime and fraud' (*staffordshire.gov.uk* 2020) < https://www.staffordshire.gov.uk/Coronavirus/Cyber-crime-and-fraud.aspx > accessed 23 June 2020. That page is now unavailable, as has been replaced by the following: < https://www.staffordshire.gov.uk/Coronavirus/Help-and-support/Cyber-crime-and-fraud.aspx > accessed 3 December 2020.
[108] < https://takefivestopfraud.org.uk/news/scam-alert-coronavirus/ > accessed 3 December 2020.
[109] NHS Counter Fraud Authority (n 71).
[110] Local Government Association 'Test and Trace scam alert issued by councils' (*local.gov.uk* 20 June 2020) < https://www.local.gov.uk/test-and-trace-scam-alert-issued-councils > accessed 3 December 2020.
[111] NHS 'Help the NHS alert your close contacts if you test positive for coronavirus' (*nhs.uk* 2020) < https://www.nhs.uk/conditions/coronavirus-covid-19/testing-and-tracing/nhs-test-and-trace-if-youre-contacted-after-testing-positive-for-coronavirus/ > accessed 3 December 2020.
[112] FTAdviser 'Self-employed targeted with new tax scam' (*FTAdviser* 20 June 2020) < https://www.ftadviser.com/companies/2020/06/10/self-employed-targeted-by-new-tax-scam/ > accessed 3 December 2020.

that companies are expected to adopt during the coronavirus crisis.[113] While the FAC clearly states that 'firms should not seek to address operational issues by changing their risk appetite', it also recognises that 'firms may need to re-prioritise or reasonably delay some activities', including 'customer due diligence reviews, or reviews of transaction monitoring alerts'. This would be considered 'reasonable' by FCA as long as 'the firm does so on a risk basis' (e.g. not for high-risk activities, such as terrorist financing) and plans to return to the business as usual review process as soon as possible. The ambiguous wording leaves firms a considerable discretion to determine what activities are 'low' and 'high' risk and can encourage relaxation of controls on risks of criminal offences, such as many fraudulent schemes, that might not be as 'high' as terrorist financing, but can still cause considerable harm to private customers and vulnerable individuals.

Responsibilisation of the public sector

The risk-based approach adopted by CCFRT is promising and welcome. Research from various disciplines suggests that policy and regulation can inadvertently create or increase risks of crime,[114] by unintendedly providing opportunities for criminal schemes or strengthening criminal motivations or otherwise aggravating other criminogenic factors.[115] Stimulus programmes such as the CJRS and SEISS are excellent examples of policies having legitimate purposes which also create the risk of fraudulent exploitation.[116] To mitigate the unintended criminogenic effects of regulation, researchers have suggested regulatory risk assessment mechanisms to evaluate and mitigate any crime risks entailed by any proposed regulation (so-called 'crime proofing').[117] A similar risk-based approach has been adopted to proof legislation against corruption risks throughout Eastern Europe.[118]

Recent studies recommend an even broader approach targeting not only written regulation but also policymaking and administrative and judicial decision-making and including appropriate training and capacity-building for lawmakers and policymakers at large.[119] The approach

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[113] FCA (n 70).
[114] Hans-Jörg Albrecht et al (eds), *Criminal Preventive Risk Assessment in the Law-Making Procedure* (Max Planck Institute for Foreign and International Criminal Law 2002) and Ernesto U. Savona et al, 'Proofing EU Legislation against Crime' (2006) 12(3-4) *European Journal on Criminal Policy and Research* (double thematic issue).
[115] Lorenzo Pasculli 'Foreign Investments, the Rule of Corrupted Law and Transnational Systemic Corruption in Uganda's Mineral Sector' in Rafael Leal-Arcas (ed) *International Trade, Investment and the Rule of Law* (Eliva Press 2020) 84-110.
[116] cf Russell Morgan and Ronald V. Clarke, 'Legislation and unintended consequences for crime' (2006) 12(3-4) *European Journal on Criminal Policy and Research* 189–211.
[117] Ernesto U. Savona et al (n 114); Ernesto U. Savona et al *A Study on Crime Proofing. Evaluation of the Crime Risk Implications of the European Commission's Proposals Covering a Range of Policy Areas* (Università degli Studi di Trento, Università Cattolica del Sacro Cuore, Transcrime 2006) < http://www.transcrime.it/wp-content/uploads/2013/11/Final_Report-A_study_on_Crime_Proofing.pdf > accessed 4 December 2020; Francesco Calderoni, Ernesto U. Savona and Serena Solmi *Crime Proofing the Policy Options for the Revision of the Tobacco Products Directive* (Transcrime, Università degli Studi di Trento 2012); Stefano Caneppele, Ernesto U. Savona and Alberto Aziani *Crime Proofing of the New Tobacco Products Directive* (Transcrime, Università degli Studi di Trento 2013)
[118] Alexander Kotchegura 'Preventing Corruption Risk in Legislation: Evidence from Russia, Moldova, and Kazakhstan' (2018) 41(5-6) *International Journal of Public Administration* 377; Tilman Hoppe *Anti-Corruption Assessment of the Laws ("Corruption Proofing"). Comparative Study and Methodology* (Regional Cooperation Council 2014).
[119] Pasculli (n 115) and Lorenzo Pasculli '*Corruptio Legis*: Law as a Cause of Systemic Corruption. Comparative Perspectives and Remedies also for the Post-Brexit Commonwealth' (2017) *Proceedings of 6th Annual International Conference on Law, Regulations and Public Policy (LRPP 2017), 5-6 June 2017, Singapore* (Global Science and Technology Forum 2017) 189.

adopted by the CCFRT seems to go precisely in this direction: the CCFRT helps leaders and policymakers to understand and assess fraud risks related to the stimulus policies and helping public bodies design and deliver adequate countermeasures. Nevertheless, there are various shortcomings. The first concern a lack of transparency and accountability. It is very difficult to assess the CCFRT's work as few sources about it are publicly available. The CCFRT does not have a dedicated webpage and the only information accessible online is included in a handful PDF documents scattered in various random websites (e.g. gov.uk,[120] NHS websites.[121] the British Vehicle Rental & Leasing Association (BVRLA)'s website).[122] One of these documents claims that the CCFRT 'have built an expert team who can provide a variety of expertise',[123] but there is no indication of who these experts are, what their background is and how they were appointed. The first issue of a newsletter (April 2020) can be found in the MIAA/NHS website,[124] but there is no trace of further issues. The lack of transparent information prevents full, impartial scrutiny by independent experts, relevant stakeholders and the general public, reduces the opportunities for improvement and prevents the dissemination of good practices beyond the public sector. A second problem concerns the limited scope of the CCFRT's work. This focuses especially on protecting public money, rather than protecting businesses and individuals. The Counter Fraud Measures Toolkit, released by the CCFRT,[125] suggests various due diligence measures, such as identity and account verification, to avoid irregular payments, but fails to address the risk that scammers exploit support schemes to try to steal money from people;[126] as it happened in a case of scam designed to steal personal and financial details of millions of self-employed workers through fake HMRC text messages and website.[127] Moreover, the CCFRT focuses primarily on stimulus spending, but crime and fraud risks can be triggered by many other types of government policies and schemes.

There is also a lack of *ex post* evaluation. The measures to assess and control fraud risks suggested by the Counter Fraud Measures Toolkit cover only the phases of policy design and implementation. A systematic mechanism to assess the crime and fraud risks triggered by government policies after their termination is still missing. *Ex post* assessments are fundamental to learn from past mistakes and avoid repeating them – that is, to become

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[120] Cabinet Office 'Fraud control in emergency management: COVID-19 UK Government guide' (*gov.uk* 26 March 2020) < https://www.gov.uk/government/publications/fraud-control-in-emergency-management-covid-19-uk-government-guide > accessed 4 December 2020.

[121] MIAA Anti-Fraud Service 'Anti-fraud client briefing 2' (*MIAA* 2020) < https://www.miaa.nhs.uk/media/Briefings/Corona/Fraud%20Briefing%20Note%202.pdf > accessed 4 December 2020; Government Counter Fraud Function 'COVID-19 Counter Fraud Response Team' (*cfa.nhs.uk* 2020) < https://cfa.nhs.uk/resources/downloads/fraud-awareness/covid-19/COVID-19_Fraud_Response_Team.pdf > accessed 4 December 2020.

[122] Government Counter Fraud Function 'COVID-19 Mandate Fraud' (*bvrla.co.uk* 2020) < https://www.bvrla.co.uk/uploads/assets/9e0d92a8-c292-41af-9f4e50ab71c2a95e/COVID19-Mandate-Fraud-Guidance.pdf >

[123] Government Counter Fraud Function (n 121).

[124] Government Counter Fraud Function 'COVID-19 Counter Fraud Response Team NEWSLETTER Issue #1 / April 2020' (*cfa.nhs.uk* 2020) < https://cfa.nhs.uk/resources/downloads/fraud-awareness/covid-19/COVID-19_Fraud_Team_Newsletter_April_2020.pdf > accessed 4 December 2020.

[125] Government Counter Fraud Function 'COVID-19 Financial Support Schemes Counter Fraud Measures Toolkit' (*miaa.nhs.uk* 2020) < https://www.miaa.nhs.uk/media/Briefings/Corona/COVID-19%20Financial%20Support%20Schemes.pdf > accessed 4 December 2020.

[126] FTAdviser 'FCA warns on coronavirus scams' (*FTAdviser* 27 March 2020) < https://www.ftadviser.com/regulation/2020/03/27/fca-warns-on-coronavirus-scams/ > accessed 4 December 2020.

[127] FTAdviser 'Self-employed targeted with new tax scam' (*FTAdviser* 10 June 2020) < https://www.ftadviser.com/companies/2020/06/10/self-employed-targeted-by-new-tax-scam/ > accessed 4 December 2020.

acquainted with risks that had not been anticipated in the design and implementation of a policy and be able to address them in future policymaking[128]. The CCFRT's engagement with foreign and international institutions is also limited. The Team claims to use 'intelligence and analytics' from partnerships with Five Eyes countries. These are the members of the Five Eyes Intelligence Oversight and Review Council (FIORC)[129] and the International Public Sector Fraud Forum (IPSFF);[130] the UK, Australia, Canada, New Zealand, and the USA. It is unclear why the CCFRT should limit its international partnerships to such countries. Surely intelligence from other (and closer) jurisdictions, such as European states, and international organisations, such as the European Anti-Fraud Office (OLAF), is equally important. Furthermore, although the CCFRT claims to use intelligence from partnerships with the public and private sectors, there is no evidence of engagement with scientific research and academia. The CCFRT's Counter Fraud Measures Toolkit does not rely on the findings of previous research on crime risk assessment of policy and regulation. Instead, it is largely based on IPSFF's Principles for Effective Fraud Control in Emergency Management and Recovery,[131] – which does not refer to academic literature at all. There is no evidence of any involvement of academics in the work of the CCFRT. Perhaps, some of the above shortcomings could have been avoided by preventatively consulting academic experts.

The offender vanishes

The greatest failure of the above-mentioned government strategies is the lack of efforts to mitigate criminal motivations or the remote causes of fraud. While there is a commitment to prevent victimisation through awareness-raising and risk management (responsibilisation) and to dissuade offenders through the threat of traditional law enforcement, there is no trace of any commitment to a serious understanding of the cultural, social, economic and psychological conditions that can trigger or aggravate individual motivations to commit fraud during the pandemic. Nor can we assume that such commitment is included in the overall government strategy against financial crime. The Economic Crime Plan 2019-2022 does not include any action or strategic priority aimed at understanding and assessing any such development. 'Understanding the threat' merely refers to the identification and assessment of situational risks. Crime prevention is thus reduced to prevention of victimisation, situational prevention and deterrence, with the exclusion of any broader or deeper social intervention. This is a clear, albeit perhaps unnecessary, confirmation of Garland's suggestion that the rehabilitative ideal is indeed in decline.[132] The offender, with their issues, needs and reasons (or lack thereof), disappears in the thousand pieces of advice for potential victims and micro-activities to securitise things, practices and situations. It might also be a product of an implicit assumption, based on the level of sophistication of certain fraudulent schemes, fraudsters and financial criminals are relatively educated and socially integrated. This assumption might be true for

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[128] Pasculli '*Corruptio legis*' (n 119).
[129] The National Counterintelligence and Security Centre 'Five Eyes Intelligence Oversight and Review Council (FIORC)' (*dni.gov* 2020) < https://www.dni.gov/index.php/ncsc-how-we-work/217-about/organization/icig-pages/2660-icig-fiorc#:~:text=Five%20Eyes%20Intelligence%20Oversight%20and%20Review%20Council%20(FIORC),Kingdom%2C%20and%20the%20United%20States. > accessed 4 December 2020.
[130] Cabinet Office 'International Public Sector Fraud Forum guidance' (*gov.uk* 10 February 2020) < https://www.gov.uk/government/publications/international-public-sector-fraud-forum-guidance > accessed 4 December 2020.
[131] International Public Sector Fraud Forum 'Fraud in Emergency Management and Recovery Principles for Effective Fraud Control' (*gov.uk* February 2020) < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/864310/Fraud_in_Emergency_Management_and_Recovery_10Feb.pdf > accessed 4 December 2020.
[132] David Garland 'The Limits of the Sovereign State' and *The Culture of Control* (n 11).

fraudulent schemes at the expenses of stimulus programmes, as much as for other high-profile frauds, but it does not imply that even such offences can be motivated by a criminogenic mix of individual strains (financial, biological, psychological etc.) and social developments. Indeed, the pandemic has aggravated some of the factors, such as social and economic inequality,[133] which, more than destitution itself, can cause psychological pressures that can drive individuals to crime,[134] especially of financial nature.

One could argue that addressing the root causes of fraud and financial crime requires time and the temporariness and urgency of the pandemic does not allow for planning and implementing broader and long-standing social programmes, such as education or mental care, which should instead be pursued by other policy areas not necessarily related to crime. But, in fact, not all root causes require sophisticated and long-lasting initiatives, as we shall see in the next paragraph. Nor can the complexity of the causes of crime or the challenges of studying them be a valid excuse for inaction. As we saw, social sciences and even natural sciences already provide important indications for policy and more investment on and engagement with academic research can help identify specific objectives and actions.

Recommendations

We suggest the following measures to remedy the above shortcomings.

Guidance and information

Any information, guidance and advice on COVID-19-related fraud risk issued by national and local government agencies should be coordinated and accessible through one comprehensive and constantly updated online portal to avoid unnecessary repetitions, confusion and multiplication of sources. A good example of a similar portal is provided by the centralised coronavirus information website published by the USA.[135] Advice which is applicable across the country and any sector should be given by the central Government through the above portal, which should, in turn, refer to the website of other entities (e.g. local councils, sectorial regulators or organisations) for specific advice relevant to particular geographical or policy areas. Information and guidance should not only be provided online but also through extensive campaigns via more traditional media, such as newspapers, radio and television, to the benefit of the elderly and other groups who might be unable to access the Internet. Governmental agencies and regulators should refrain from publishing ambiguous messages that can inadvertently discourage reporting, encourage relaxation of corporate crime controls or fuel criminal motivations. Public communication campaigns should focus not only on potential victims but also on potential offenders, with a view to reducing criminal motivations and criminogenic mindsets and discourses, as we will explain more in detail in the last paragraph of this section.

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[133] Abi Adams-Prassl, Teodora Boneva, Marta Golin and Christopher Rauh 'Inequality in the impact of the coronavirus shock: Evidence from real time surveys' (2020) 189 *Journal of Public Economics* and Abi Adams-Prassl, Teodora Boneva, Marta Golin and Christopher Rauh 'Inequality in the impact of the coronavirus shock: New survey evidence for the UK' (2020) 10 *Cambridge-INET Working Paper Series* / 2023 *Cambridge Working Papers in Economics* < https://www.repository.cam.ac.uk/bitstream/handle/1810/305395/cwpe2023.pdf?sequence=1 > accessed 4 December 2020.

[134] Pasculli (n 17) 53-54.

[135] The White House, Centers for Disease Control and Prevention (CDC) and Federal Emergency Management Agency (FEMA) 'Find answers about Coronavirus' (2020) < https://faq.coronavirus.gov/ > accessed 4 December 2020.

Reporting channels

Reporting channels should be rationalised. There should be a central national online portal for those who wish to report any kind of financial crime. The portal could include a preliminary questionnaire relying on AI to direct the applicant to the appropriate authority according to the type of fraud to be reported (Action Fraud, HMRC, FCA, SFO etc.). This centralised system could be used also to receive reports of misconduct from whistle-blowers. A similar, although pretty basic, online questionnaire is incorporated in the SFO website.[136] A national whistle-blowers authority should be established to coordinate, advice and supervise prescribed entities, act (at least) as last-resort reporting channel when other channels prove ineffective and advice and support whistle-blowers. The United States' (US) Office of the Whistleblower, the Dutch Whistleblowers Authority are good examples of such institutions.

Policy risk management

The work of the CCFRT should be better publicised, possibly through a dedicated website and by making any relevant policy document (newsletter, toolkits etc.) released by the Team publicly available online to allow thorough public scrutiny and continuous improvement through external feedback. The focus of the CCFRT should be expanded to cover not only risks of irregular payments of public money but, more broadly, any risk of criminal harm caused to the public sector, as well as to private individuals and organisations, by frauds related to any other government policy/scheme. *Ex post* risk assessment mechanisms should be introduced to understand the risks created by government policies that could not be foreseen during the design and implementation stages. The work of the CCFRT should benefit from a broader international partnership (beyond the Five-Eyes) and continuous engagement with academia. The Government could also consider establishing (or developing the CCFRT into) a national coordinating authority dedicated to improving the detection, prevention, investigation, and prosecution of criminal conduct related to natural and man-made disasters and other emergencies, such as the coronavirus, similar to the US National Centre for Disaster Fraud (NCDF)[137]. Given that any government policy and regulation in any area can inadvertently create/increase risks not only of fraud but of any other crime, the Government should take advantage of the experience of the CCFRT to start establishing permanent mechanisms to perform a thorough crime risk assessment of any policy and regulation before and after their adoption and to adopt appropriate measures to control such risks.

Tackling the root causes of financial crime

The UK Government's approach to fraud and economic crime should address all the possible causes of crime, not just opportunities. The two-fold approach responsibilisation-law enforcement should be integrated with a third component dedicated to the identification, understanding and mitigation of remote causes of financial crime. This requires both short-term and long-term interventions. On the short term, solid communication campaigns can be used to counter the anomic focus on financial success and social prestige with messages promoting notions of self-worth and self-achievement based on human dignity, integrity, honesty, and solidarity. Public communication can also be helpful to remind potential offenders that support is available to them and that there are alternatives to crime. But this support cannot be merely financial. As we saw above, stimulus programmes alone can be an opportunity for fraud, as much as an opportunity for legitimate financial recovery. Clear and continuing

[136] SFO (n 86).
[137] The United States Department of Justice 'National Centre for Disaster Fraud (NCDF)' (*justice.gov* 2020) < https://www.justice.gov/disaster-fraud > accessed 4 December 2020.

information on the importance of mental wellbeing should and on the availability, even during the pandemic, of free and accessible care is essential. At a socio-psychological level, more efforts are required to counter the processes of rationalisation, socialisation and institutionalisation of fraud. Communication, information, education and training can be employed to counter the opportunistic and profit-oriented mind sets that both facilitate and are fuelled by such normalisation processes. On the longer term, the Government should take stock of the lessons learned during the pandemic about the fragility of our socio-economic system and the dangers of overemphasising business-like approaches and financial interests. The Government should conduct a thorough assessment of the failures of current social policies and start planning appropriate welfare measures to address the deepest criminogenic conditions of the British society, such as social inequality, lack of integration, the cognitive distortions caused by an excessive emphasis on economic life and interests, and the social distortions caused by the commodification of essential services and values – not only in crime control but also in other areas, such as, for instance, education. Research is also paramount. Mechanisms and platforms for better integration of policy and academia should be established and the Government should invest more in interdisciplinary scientific research on the remote causes of crime.

Conclusions

The coronavirus pandemic has exposed the limits of the UK Government's approach to fraud, financial crime and crime in general, confirming the worries and predictions of many scholars. Such limits go beyond practical or situational shortcomings, such as the inevitable restrictions to law enforcement capabilities imposed by the pandemic or by poor policy design and implementation. Instead, they are rooted in the inherent insufficiency of the two-fold approach responsibilisation-law enforcement approach to effectively and comprehensively address the problem of crime, especially easily normalised forms of crime such as fraud and especially in times of crisis. Strained law enforcement agencies and regulators struggle to cope with the high numbers of reported frauds. As a result, both deterrence and retribution are undermined. On the other hand, the fixation on the surgical identification, dissection and rectification of a myriad of micro-situations that can entail a risk of crime is both illusory and deceiving. For as the state keeps his eyes focused on this or that situation, he loses sight of the greatest risk factor: human beings, with their complex and delicate histories, biologies, psychologies, and social interactions.

If the state hopes to effectively prevent fraud and financial crime, it must go back to the offender. The approach to crime control should be three-fold. Law enforcement and responsibilisation must be complemented by the identification and removal of the remote causes of crime. This is especially important for fraud and financial crime, which often defy traditional criminological theories and require more research and new approaches. Common places and assumptions on the motivations of fraudsters and financial criminals must be challenged through engagement with the scientific community. 'Understanding the threat' must acquire a new meaning. Not only understanding situational risks and opportunities but especially understanding motivations and deeper social, cultural, psychological and even biological developments that drive financial crime. Forgetting the offender is never a good idea.

ENVIRONMENTAL LAW

Iona Teitiota v New Zealand: A landmark ruling *for climate refugees?*

Dr Katrien Steenmans* Aaron Cooper**

Introduction

Climate change is having, and is expected to have, many far-reaching and hugely detrimental impacts on health, livelihoods, food securities, and sea level rise.[1] The most detrimental impacts of climate change (will) afflict those who have contributed least, including Small Island Developing States (SIDS). SIDS are identified as particularly vulnerable to climate change; for example, SIDS' livelihoods are expected to be eliminated as a result of changes to ecosystems. Further, significant proportions of SIDS' lands are expected to become inhabitable and submerged in sea, and SIDS may experience changes to their freshwater supplies as a result of seawater contaminating fresh water sources.[2]

With such expectations of disappearing habitable land and fundamental changes to quality of life in SIDS, there has been an increased focus on climate change related displacement in academic literature,[3] litigation,[4] and policy-making.[5] This is part of wider discussions on and recognition of the link between climate change and human rights (not just in relation to SIDS but also more widely).[6] Recently, Ioane Teitiota aimed to become the first climate refugee, and his case, *Ioane Teitiota v New Zealand,*[7] is the focus of this article.

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* Lecturer in Law, Coventry Law School and Research Associate, Centre for Business in Society, Coventry University. Email: katrien.steenmans@coventry.ac.uk
** Lecturer in Law, Coventry Law School, Coventry University. Email: ab8918@coventry.ac.uk

[1] Myles Allen et al, 'Summary for Policymakers' in Valérie Masson-Delmotte and others (eds), *Global Warming of 1.5oC. An IPCC Special Report on the Impacts of Global Warming of 1.5oC above Pre-industrial Levels and Related Global Greenhouse Gas Emission Pathways, in the Context of Strengthening the Global Response to the Threat of Climate Change, Sustainable Development, and Efforts to Eradicate Poverty* (IPCC 2018).

[2] *ibid* 9; Ilan Kelman and Jennifer J West, 'Climate Change and Small Island Developing States: A Critical Review' (2009) 5(1) Ecological and Environmental Anthropology 1, 3-5; Jan Petzold and Beate M W Ratter, 'Climate Change Adaptation under a Social Capital Approach – An Analytical Framework for Small Islands' (2015) 112 Ocean & Coastal Management 36, 36.

[3] Angela Williams, 'Turning the Tide: Recognizing Climate Change Refugees in International Law' (2008) 30(4) Law & Policy 502; Sumudu Atapattu, 'A New Category of Refugees? "Climate Refugees" and a Gaping Hole in International Law' in Simon Behrman and Avidan Kent (eds), *'Climate Refugees': Beyond the Legal Impasse* (Routledge 2018).

[4] Elisa de Wit, Sonali Seneviratne and Huw Calford, 'Climate Change Litigation Update' (*Norton Rose Fulbright*, February 2020) <www.nortonrosefulbright.com/en/knowledge/publications/7d58ae66/climate-change-litigation-update> accessed 8 June 2020; United Nations Environment Programme, *The Status of Climate Change Litigation – a Global Review* (United Nations Environment Programme 2017) 25 and 32.

[5] The Global Compact on Refugees recognises that 'climate and environmental degradation and natural disasters increasingly interact with the drivers of refugee movements' – United Nations General Assembly, *Report of the United Nations High Commissioner for Refugees: Global Compact on Refugees* (2018) A/73/12 (Part II) ch 1, B, para 8.

[6] For example, a search on the UN Environment Web Intelligence database (https://unep.ecoresearch.net) of the use of the terms 'climate change' and 'human rights' together over the past ten years shows an increase in use. See also: United Nations Human Rights Special Procedures, 'Safe Climate: A Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment' (2019) A/74/161 ch III.

[7] *Ioane Teitiota v New Zealand*, CCPR/C/127/D/2728/2016, UN Human Rights Committee (HRC), 7 January 2020.

The ruling in *Teitiota* by the United Nations Human Rights Committee (HRC) has been hailed as 'landmark'.[8] This article briefly sets out why and its possible impact on wider climate refugee issues. For this purpose, the next section summarises the case and its ruling. The following section then reviews the possible effects the case may have on the debate in climate change and human rights law intersections, in particular on debate on the term 'climate refugee', and the call for universal legal instruments for climate migrants. The final section offers concluding remarks on these issues.

The decision in *Ioane Teitiota v New Zealand*

The claim was brought by Ioane Teitiota, a national of the Republic of Kiribati. Kiribati is a SIDS located in the central Pacific Ocean that has received much attention in the literature as a result of its geography, population pressures, and limited infrastructure, which exacerbate the impacts of climate change.[9] Teitiota claimed that the effects of climate change and sea level rise, including that fresh water had become scarce because of saltwater contamination and overcrowding on Tarawa, forced him to migrate from the island of Tarawa in Kiribati to New Zealand. Teitiota therefore sought asylum in New Zealand, but was refused by the Immigration and Protection Tribunal.[10] The Court of Appeal,[11] and Supreme Court,[12] denied Teitiota's appeals on the same matter.[13] Teitiota therefore brought a case against the government of New Zealand at the HRC claiming that New Zealand violated his right to life under the International Covenant on Civil and Political Rights (ICCPR 1966).[14] Article 6(1) of the Covenant provides that 'Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life', with no derogation permitted.[15]

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[8] Amnesty International, 'UN Landmark Case for People Displaced by Climate Change' (20 January 2020) <www.amnesty.org/en/latest/news/2020/01/un-landmark-case-for-people-displaced-by-climate-change> accessed 10 June 2020; Kate Lyons, 'Climate Refugees Can't be Returned Home, Says Landmark UN Human Rights Ruling' *The Guardian* (20 January 2020) <www.theguardian.com/world/2020/jan/20/climate-refugees-cant-be-returned-home-says-landmark-un-human-rights-ruling> accessed 18 May 2020; Adaena Sinclair-Blakemore, 'Teitiota v New Zealand: A Step Forward in the Protection of Climate Refugees under International Human Rights Law?' *Oxford Human Rights Hub* (28 January 2020) <https://ohrh.law.ox.ac.uk/teitiota-v-new-zealand-a-step-forward-in-the-protection-of-climate-refugees-under-international-human-rights-law> accessed 18 May 2020.

[9] World Health Organization and United Nations Framework Convention on Climate Change, 'Climate and Health Country Profile 2017: Kiribati' (2018) <https://apps.who.int/iris/rest/bitstreams/1097480/retrieve> accessed 10 June 2020; John P Cauchi, Ignacio Correa-Velez and Hilary Bambrick, 'Climate Change, Food Security and Health in Kiribati: A Narrative Review of the Literature' (2019) 12 Global Health Action 1, 7.

[10] *AF (Kiribati)* [2013] NZIPT 800413.

[11] *Teitiota v The Chief Executive of the Ministry of Business Innovation and Employment* [2014] NZCA 173.

[12] *Teitiota v The Chief Executive of the Ministry of Business, Innovation and Employment* [2015] NZSC 107.

[13] For an analysis of these decisions, see: Ben Boer, 'Climate Change and Human Rights in the Asia-Pacific: A Fragmented Approach' in Ottavio Quirico and Moulou Boumghar, *Climate Change and Human Rights: An International and Comparative Law Perspective* (Routledge 2016) ch 14; Hélène Ragheboom, *The International Legal Status and Protection of Environmentally-displaced Persons: A European Perspective* (Brill Nijhoff 2017) 98-290; Matthew Scott, *Climate Change, Disasters, and the Refugee Convention* (Cambridge University Press 2020) ch 3.

[14] International Covenant on Civil and Political Rights (New York City, 16 December 1966; in force 23 March 1976).

[15] Article 4(1) of the ICCPR allows derogations '[i]n time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed', but Article 4(2) states that no derogation is permitted from Article 6.

The Committee published its ruling on 7 January 2020, that Teitiota's rights under Article 6(1) of the Covenant were not violated. The HRC concluded that there was no violation of Article 6 on the following grounds:

1. There was no arbitrariness or error in the New Zealand authorities' assessment of a real, personal, and reasonably foreseeable risk of a threat to Teitiota's right to life as a result of violent acts resulting from overcrowding or private land disputes in Kiribati;[16]
2. Teitiota provided insufficient information to indicate a reasonably foreseeable threat of a health risk as a result from an inaccessible, insufficient or unsafe supply of fresh water that would impair his right to enjoy a life with dignity or cause his unnatural or premature death;[17]
3. Teitiota provided insufficient information to indicate a reasonably foreseeable risk that he would be exposed to a situation of indigence, deprivation of food, and extreme precariousness that would threaten his right to life;[18] and
4. Although the Committee accepted that sea level rise is likely to render Kiribati uninhabitable, it found the timeframe of 10 to 15 years (as noted in Teitiota's comments submitted in 2016):[19]

> …could allow for intervening acts by the Republic of Kiritbati, with the assistance of the international community, to take affirmative measures to protect and, where necessary, relocate its population. The Committee notes that the State party's authorities thoroughly examined this issue and found that the Republic of Kiribati was taking adaptive measures to reduce existing vulnerabilities and build resilience to climate change-related harms.[20]

Despite the HRC not recognising Teitiota as a climate refugee*, Teitiota* has nonetheless been hailed as a 'landmark' ruling,[21] because the HRC recognised that climate change effects could give rise to a violation of the right to life. Thus, the HRC noted:

The Committee is of the view that without robust national and international efforts, the effects of climate change in receiving states may expose individuals to a violation of their rights under articles 6 or 7 of the Covenant, thereby triggering the *non-refoulement* obligations of sending states. Furthermore, given that the risk of an entire country becoming submerged under water is such an extreme risk, the conditions of life in such a country may become incompatible with the right to life with dignity before the risk is realized.[22]

Thus, the HRC recognised that there is scope for climate change effects to violate Article 6 (and 7)[23] of the ICCPR and allow possible future refugee claims. This is in contrast to previous cases, where individuals were seeking asylum as a result of environmental harm and climate, which had been unsuccessful. For example, in *RTT Case No. N96/10806,*[24] the Tribunal stated that 'the environmental problem of the rise in the sea level around Tuvalu is not [Refugee]

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[16] *Ioane Teitiota v New Zealand*, para 9.7
[17] *ibid* para 9.8.
[18] *ibid* para 9.9
[19] *ibid* para 9.10.
[20] *ibid* para 9.12.
[21] See n 8.
[22] *Ioane Teitiota v New Zealand*, para 9.11.
[23] Even though Article 7 was mentioned in this paragraph, it was not a key consideration in this ruling.
[24] *RRT Case No N96/10806* [1996] RRTA 3195 (7 November 1996).

Convention related'.[25] This latter case was based on the 1951 Refugee Convention,[26] so it is important to note that the ICCPR, rather than the Convention, was the focus in *Teitiota*.

Interestingly, there were two dissenting opinions from Committee members Vasilka Sancin and Duncan Laki Muhumuza. In Sancin's opinion, New Zealand had not provided sufficient evidence of Teitiota and his children's access to safe drinking water in Kiribati, because 'safe drinking water' had (in his opinion) been wrongly equated with 'potable water'. Muhumuza dissented because, in his opinion, New Zealand, placed an unreasonable burden of proof on Teitiota to establish a real risk and danger of arbitrary deprivation of life, and considered the conditions of life presented by Teitiota 'significantly grave to pose a real threat to his life under Article 6(1).[27] Muhumuza was, overall, very critical of the HRC's position and stated that:

New Zealand's action is more like forcing a drowning person back into a sinking vessel, with the "justification" that after all there are other voyagers on board. Even as Kiribati does what it takes to address the conditions; for as long as they remain dire, the life and dignity of persons remains at risk.[28]

Muhumuza then states that to protect the right to life, we should not 'wait for deaths to be very frequent and considerable' for the risk threshold to be met, and the fact that Teitiota's child had already suffered significant health hazards as a result of environmental conditions should have been sufficient (to establish a breach).[29]

Analysis

Before discussing the ways in which the ruling may impact on some of the key discussions in the literature, two issues are covered in relation to the ruling:

(1) Acknowledgement by the HRC that climate change effects may provide scope for climate refugees is not completely surprising, and
(2) A critique of the 10-15 years being sufficient time for intervening actions.

First, the link between the right to life and change effects made by the Committee should not be completely surprising, as it has previously stated that a broad approach should be taken to the right to life under Article 6 of the ICCPR:[30]

> [t]he expression 'inherent right to life' cannot properly be understood in a restrictive manner and the protection of this right requires that States adopt positive measures.[31]

Thus there is scope for climate change effects to be included under the right as acknowledged by the HRC in their ruling. Moreover, General Comment No. 36,[32] a document providing guidance for interpreting the ICCPR, notes that:

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[25] *ibid*. See Scott (n 13) ch 3 for a detailed discussion of this case and others.
[26] Convention Relating to the Status of Refugees Rights (Geneva, 28 July 1951; in force 22 April 1954).
[27] ICCPR, Annex 2, Individual opinion of Committee member Duncan Laki Muhumuza (dissenting), para 1.
[28] *ibid* para 6.
[29] *ibid* para 5.
[30] *Ioane Teitiota v New Zealand*, para 9.4.
[31] Bertrand G Ramcharan, 'The Concept and Dimensions of the Right to Life' in Bertrand G Ramcharan (ed), *The Right to Life in International Law* (Martinus Nijhoff Publishers 1985) 5.
[32] Human Rights Committee, General Comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life (30 October 2018) CCPR/C/GC/36.

> Environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life. Obligations of States parties under international environmental law should thus inform the contents of article 6 of the Covenant, and the obligation of States parties to respect and ensure the right to life should also inform their relevant obligations under international environmental law. Implementation of the obligation to respect and ensure the right, and in particular life with dignity, depends*, inter alia*, on measures taken by States parties to preserve the environment and protect it against harm, pollution and climate change caused by public and private actors.[33]

Therefore, General Comment No. 36 again evidences previous recognition that climate change effects can be covered by Article 6 of the ICCPR. Instead, it is the HRC acknowledged link between climate change effects, the right to life, and refugees that is possibly 'game-changing',[34] particularly as it is generally accepted that the international legal definition of 'refugee' does not cover 'climate refuge'.[35]

The 1951 Refugee Convention and 1967 Protocol[36] define a refugee as those who have a:

> well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality, and is unable to or, owing to such fear, is unwilling to avail himself of the protection of that country.[37]

Climate migrants are not considered as falling under this definition, because (1) they are not persecuted; (2) climate change is not one of the accepted reasons; and (3) climate displacement can be internal rather than to another country (though it was to another country in this case). Under international refugee law, the obligation not to extradite, deport or otherwise transfer under Article 6 of the ICCPR may be broader and require protection of aliens not entitled to refugee status. This should mean that asylum seekers claiming real risk of violation of their right to life in their state of origin should have access to refugee procedures.[38]

The question warranting further investigation is what changed for there to be explicit acknowledgement of the possibility of seeking asylum as a result of climate change effects? Particular questions may include: Why has the possibility been recognised now, and has increased media focus triggered this shift? For example, was the shift triggered as a result of individuals like Greta Thunberg and declarations of a climate crisis causing climate change issues to gain traction? This would then be similar to how other areas of law experienced legal change, such as European Union waste law. Here proposed changes gained public support as a result of, for example, David Attenborough's *Planet Earth II* and the Chinese ban on the import

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[33] *ibid* para 62.
[34] Yvonne Su, 'UN Ruling Could be a Game-changer for Climate Refugees and Climate Action' *The Conversation* (28 January 2020) <https://theconversation.com/un-ruling-could-be-a-game-changer-for-climate-refugees-and-climate-action-130532> accessed 10 June 2020.
[35] Jane McAdam, 'Swimming Against the Tide: Why a Climate Change Displacement Treat is Not the Answer' (2011) 23(1) International Journal of Refugee Law 2, 6; UNSW, 'Seven Reasons the UN Refugee Convention Should Not Include "Climate Refugees"' (7 June 2017) <www.kaldorcentre.unsw.edu.au/publication/seven-reasons-un-refugee-convention-should-not-include-climate-refugees> accessed 10 June 2020; Atapattu (n 3).
[36] Protocol Relating to the Status of Refugees (New York, 31 January 1967; in force 4 October 1967).
[37] Refugee Convention, art 1(A)(2) as a result of art 1(1) of the Protocol.
[38] *Ioane Teitiota v New Zealand*, para 9.3.

of certain plastic wastes.[39] Or is it as a result of the increased urgency emphasised by the scientific community? Answers to these questions may help understand how the concept of a climate refugee in international law may transition from a non-binding possibility to a binding reality.

Second, in its ruling the HRC noted that there is still time for affirmative action on climate change and that Kiribatian authorities are taking adaptive measures.[40] However, according to recent research by Cauchi and others, climate change interventions have had 'little success' to date in Kiribati.[41] Adopting further adaptation and mitigation actions would be costly (though *not* taking action is often estimated to be more costly).[42] Furthermore, the very nature of climate change means that Kiribati cannot mitigate climate change on its own. Climate change is a *wicked* and *collective action* problem, meaning that there is no single, simple, one-off solution,[43] which no country can solve on its own. Kiribati had the third lowest fossil carbon dioxide (CO_2) emissions in 2017[44] and has one of the lowest carbon dioxide (CO_2) emissions per capita. For example, Kiribati emits less than 0.6 metric tonnes of CO_2 per capita compared to Qatar's 43.9 metric tonnes of CO_2 per capita, the United States of America's 16.5 metric tonnes of CO_2 per capita, and United Kingdom's 6.5 metric tonnes of CO_2 per capita.[45] Thus, even though there are ways Kiribati can lower its emissions, it is likely to be insignificant in 'solving' climate change,[46] leaving it at the frontline of sea level rise and other climate change effects as a result of emissions by other countries.

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[39] Sid Hayns-Worthington, 'The Attenborough Effect: Searches for Plastic Recycling Rocket after Blue Planet II' (*Resource*, 5 January 2018) <https://resource.co/article/attenborough-effect-searches-plastic-recycling-rocket-after-blue-planet-ii-12334> accessed 10 June 2020; Laura Parker and Kennedy Elliott, 'Plastic Recycling is Broken. Here's How to Fix It' (*National Geographic*, 20 June 2018) <https://news.nationalgeographic.com/2018/06/china-plastic-recycling-ban-solutions-science-environment>; Katrien Steenmans, 'Extended Producer Responsibility: An Assessment of Recent Amendments to the European Union Waste Framework Directive' (2019) 15(2) Law, Environment and Development Journal 108, 108.

[40] See text to n 20. See also *Ioane Teitiota v New Zealand*, para 9.12.

[41] Cauchi, Correa-Velez and Bambrick (n 9) 7.

[42] Joeri Rogelj, David McCollum, Andy Reisinger, Malte Meinshausen and Keywan Riahi, 'Probabilistic Cost Estimates for Climate Change Mitigation' (2013) 493 Nature 79; Carolyn Kousky, 'Informing Climate Adaptation: A Review of the Economic Costs of Natural Disasters' (2014) 46 Energy Economics 576.

[43] In relation to climate change as a wicked problem, see for example: Brian W Head, 'Wicked Problems in Public Policy' (2008) 3(2) Public Policy 101; Simin Davoudi, Jenny Crawford and Abid Mehmood, *Planning for Climate Change: Strategies for Mitigation and Adaptation for Spatial Planners* (Earthscan/James & James 2009); Frank P Incropera, *Climate Change: A Wicked Problem* (Cambridge University Press 2016). In relation to climate change as a collective action problem, see for example: Paul G Harris, 'Collective Action on Climate Change: The Logic of Regime Failure' (2007) 47 Natural Resources Journal 195; Elinor Ostrom, 'A Multi-scale Approach to Coping with Climate Change and Other Collective Action Problems' (2010) 1 Solutions 27; Elinor Ostrom, 'Polycentric Systemcs for Coping with Collective Action and Global Environmental Change' (2010) 20(4) Global Environmental Change 550.

[44] Marilena Muntean, Diego Guizzardi, Edwin Schaaf, Monica Crippa, Efisio Solazzo, Jos Olivier and Elisabetta Vignati, *Fossil CO2 Emissions of all World Countries* (JRC Science for Policy Report, European Commission 2018).

[45] Based on 2014 data. The World Bank, 'CO2 Emissions (Metric Tons per Capita' (28 May 2020) <https://data.worldbank.org/indicator/EN.ATM.CO2E.PC?end=2014&most_recent_value_desc=true&start=1960> accessed 4 June 2020.

[46] Steven R Brechin, 'Climate Change Mitigation and the Collective Action Problem: Exploring Differences in Greenhouse Gas Contributions' (2016) 31(S1) Sociological Forum 846; Philip Rossetti, 'Primer: No Country Can Fix Climate Change on Its Own' (*American Action Forum*, 20 May 2019) <www.americanactionforum.org/insight/primer-us-cant-fix-climate-change-on-its-own> accessed 9 June 2020; Angel Hsu, 'National Governments Can't Solve Climate Change Alone: Cities, Regions and Businesses are also Crucial Players' (*Scientific American*, 13 October 2019)

Although 10 to 15 years may seem a significant amount of time, as discussed in the previous paragraph, there are few measures that Kiribatian authorities can implement beyond adaptation actions in the context of climate change that will have a noticeable effect. Moreover, almost five years have passed since Teitiota submitted evidence, so the timeframe is now closer to five to ten years, which leaves even less time for climate action to have an impact. As lands are expected to be submerged in sea,[47] it is recognised both by policy-makers and researchers that climate displacement and migration are inevitable.[48] For example, Allgood and McNamara, in their research on local perspectives on climate displacement in Kiribati, found that displacement is expected to be more international than internal:

Of the people that considered migration, most agreed that moving to another country would be most beneficial, over moving to another island in Kiribati or a nearby village. The majority of respondents emphasized that *migration would be a distressing but necessary aspect of their future*.[49]

This thus echoes Muhumuza's dissenting opinion;[50] at what stage is the situation sufficiently grave that a threat to life is recognised. Does disaster have to be less than five years away?

In the sub-sections below we discuss two of the (non-exhaustive) ways in which the ruling may feed into wider discussions in different areas of human rights and climate change law intersections. These only cover some of the issues that warrant investigation in further research, and are not intended to be detailed discussions of these issues.

Climate refugee v (forced) migrant v displaced individual

Gaps remain within climate change and environmental law regimes. Whether those who have been displaced should be labelled as *climate refugees* or *(forced) climate migrants* is a contentious issue in both the literature and in policy-making.[51] In this case, Teitiota was applying for 'refugee' status in New Zealand. The Immigration and Protection Tribunal that initially denied asylum emphasised in its decision that their denial 'did not mean that environmental degradation from climate change or other natural disasters could never create a pathway into the Refugee Convention or protected person jurisdiction'.[52] The HRC did acknowledge scope for this, but ultimately did not recognise Teitiota as a climate refugee. Therefore, overall, the use of refugee in the case has not definitively changed current discourse on the term climate refugee.

<https://blogs.scientificamerican.com/observations/national-governments-cant-solve-climate-change-alone> accessed 9 June 2020.

[47] See n 2.

[48] McAdam (n 35) 8.

[49] Lacey Allgood and Karen E McNamara, 'Climate-induced Migration: Exploring Local Perspectives in Kiribati' (2017) 38 Singapore Journal of Tropical Geography 370, 381 (emphasis added).

[50] See text to n 27 - 29.

[51] International Organization for Migration, 'Migration and Climate Change' (2008) IOM Migration Research Series No. 31, 13-15 <www.ipcc.ch/apps/njlite/srex/njlite_download.php?id=5866> accessed 2 June 2020; Romain Felli, 'Managing Climate Insecurity by Ensuring Continuous Capital Accumulation: "Climate Refugees" and "Climate Migrants"' (2013) 18(3) New Political Economy 337; Dina Ionesco, 'Let's Talk About Climate Migrants, Not Climate Refugees' (6 June 2019) <www.un.org/sustainabledevelopment/blog/2019/06/lets-talk-about-climate-migrants-not-climate-refugees> accessed 10 June 2020.

[52] *Teitiota* (n 12).

The ruling also did not address the issues surrounding this contentious term. First, refugees remain a politically charged topic.[53] Second, the ruling has not made a definition for 'climate refugee' more likely – although it is not agreed that it would be helpful or conducive to have such a definition as it would have to apply to 'any of the diverse climate vulnerable populations around the world'.[54] Third, there are those that do not want to be seen as climate refugees, but instead as skilled migrants.[55] Finally, the label climate refugee simplifies the solution; it is not a 'solution' to climate change effects to move people as it ignores numerous other issues.[56]

A universal legal instrument for climate migrants?

There is some debate on how climate migrants should be protected. Some scholars have argued for an international legal instrument to protect climate refugees.[57] McAdam, however, states that currently a new treaty would not 'without wide ratification and implementation, "solve" the humanitarian issue'[58] particularly as a universal treaty, because localised and regional responses are more likely to be appropriate to address different geographical, demographical, cultural and political circumstances.[59] Other difficulties that would also need to be overcome include the fact that a treaty would need to differentiate between those displaced because they need to be protected from climate change effects, and those who are 'victims of "mere" economic or environmental hardship.'[60] The issue of causation between displacement and climate change effects would also need to be addressed to ensure individuals are not using climate change effects a disguise for other possible motives and reasons to move.[61]

Acknowledging that there may be scope for recognising climate refugees, further supports arguments against another instrument, as it demonstrates that there is a possible alternative avenue available. Although this case centred on a national of one of the most vulnerable countries,[62] and one of the dissenting opinions questioned at what point a sufficient threat to life would be recognised,[63] it does not completely remove or negate arguments for an instrument. However, the time it would take to negotiate such an instrument may arguably still favour waiting for these other avenues to be realised.

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[53] Roland Bleiker and others, 'The Visual Dehumanisation of Refugees' (2013) 48(4) Australian Journal of Political Science 398; Julie Matthews, 'Refugee Policy: A Highly Charged Political Issue' (2013) 32(2) Social Alternatives 3.
[54] Carol Farbotko and Heather Lazrus, 'The First Climate Refugees? Contesting Global Narratives of Climate Change in Tuvalu' (2012) 22 Global Environmental Change 382, 384.
[55] ABC News, 'Pacific Islanders Reject "Climate Refugee" Status, Want to "Migrate with Dignity:, SIDS Conference Hears' (5 September 2014) <www.abc.net.au/news/2014-09-05/pacific-islanders-reject-calls-for-27climate-refugee27-status/5723078> accessed 10 June 2020; Farbotko and Lazrus (n 54) 383 and 388.
[56] Farbotko and Lazrus (n 54) 383 and 388.
[57] Frank Biermann and Ingrid Boas, 'Protecting Climate Refugees: The Case for a Global Protocol' (2008) 50(6) Environment: Science and Policy for Sustainable Development 8; Mike Hulme, Frank Biermann and Ingrid Boas, 'Climate Refugees: Cause for a New Agreement' (2008) 50(6) Environment 50; Williams (n 57); Bonnie Docherty and Tyler Giannini, 'Confronting a Rising Tide: a Proposal for a Convention on Climate Change Refugees' (2009) 22 Harvard Environmental Law Review; Rana Balesh, 'Submerging Islands: Tuvalu and Kiribati as Case Studies Illustrating the Need for a Climate Refugee Treaty' (2015) 5 Environmental and Earth Law Journal 78.
[58] McAdam (n 35) 4.
[59] *ibid* 4.
[60] i*bid* 13. See also: Dennis Wesselbaum, 'The Influence of Climate on Migration' (2019) 52(3) The Australian Economic Review 363; Dennis Wesselbaum, 'Revisiting the Climate Driver and Inhibitor Mechanisms of International Migration' [2020] Climate and Development 1.
[61] McAdam (n 35) 13.
[62] See text to n 2 and 9.
[63] See text to n 27 - 29.

Conclusions

Climate change is already having a major impact on a wide range of human rights issues. Unless affirmative action is taken, there will be grave consequences. The protection of the environment within the framework of human rights, and *vice versa,* must, therefore, be recognised, not only in principle, but also in practice. The decision in *Ioane Teitiota v New Zealand* is one of many recent developments to recognise that climate change poses a threat to human rights,[64] and the intersections between human rights law and climate change law.[65]

The case is both timely (perhaps even behind with the rapidly deteriorating situation and detrimental effects as a result of climate change) and progressive. It is significant that the HRC recognised that there is scope for seeking asylum as a result of climate change effects, but it is important to remember that it is currently only a possibility, rather than a reality. It has also not significantly informed some of the existing debates on, *inter alia*, the definition of climate refugees and the need for an international legal instrument on climate refugees. This disparity between existing issues and response is a recurring theme within law as a result of climate change; other examples include the development of geoengineering technologies to mitigate climate change is outpacing regulation. Overall, climate change is outpacing legal development. Throughout this article, the policies behind climate refugees have not been investigated thoroughly. There is scope for an argument for 'climate refugees' (or migrants) to be the focus of a designated legal instrument. This could take the form of a possible additional protocol to the United Nations Framework Convention on Climate Change,[66] as it neither features nor fits currently within the frameworks of international and environmental law. Recognising climate refugees should, however, not be seen as a 'solution' to climate change – international policy on climate refugees 'tend to commodify people, reducing their relocation to reemployment plans.'[67] Also, as mentioned above, people themselves do not necessarily want to be described as climate refugees.

There are thus many environmental and climate justice dimensions that need to be explored that were not addressed by this case, and judicial involvement is invariably limited.[68] Although, jurisprudence in this area is limited, at the time of writing, the European Court of Human Rights has ordered 33 European governments to respond to a landmark climate lawsuit lodged by six youth campaigners, in a case described by the applicants' British barrister as the most important case ever tried by the Strasbourg-based judges.[69] The case was filed in September and in a sign

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[64] Derek Bell, 'Does Anthropogenic Climate Change Violate Human Rights' (2011) 14(2) Critical Review of International Social and Political Philosophy 99.

[65] For example, John H Knox, 'Climate Change and Human Rights Law' (2009) 50(1) Virginia Journal of International Law 163; John H Knox, 'Linking Human Rights and Climate Change at the United Nations' (2009) 33 Harvard Environmental Law Review 477; Stephen Humphreys (ed), *Human Rights and Climate Change* (Cambridge University Press 2010).

[66] United Nations Framework Convention on Climate Change (UNFCCC) (9 May 1992) 1771 UNTS 107.

[67] Becky Alexis-Martin, 'Climate Crisis: Migration Cannot be the Only Option for People Living on "Drowning" Islands' *The Conversation* (3 July 2019) <https://theconversation.com/climate-crisis-migration-cannot-be-the-only-option-for-people-living-on-drowning-islands-117122> accessed 8 June 2020.

[68] In the context of European human rights, the European Court of Human Rights has accepted that there is a positive obligation under Article 2 of the European Convention on Human Rights 1950 to protect individuals from 'unreasonable' environmental hazards: *LCB v United Kingdom* (1999) 27 EHRR 217.

[69] 'Portuguese children sue 33 countries over climate change at European court', The Guardian, November 30, 2020. Also, the Guardian reported that in a landmark legal case, a coroner's inquest is to consider evidence that illegal levels of air pollution caused the death of 9 year old Ella Kissi-Debrah. The coroner will be asked to rule that toxic levels of nitrogen dioxide, from the South Circular road in London, led to the acute asthma attacked that killed her in 2013. A finding that air pollution was a causative factor would make legal history. The inquest begins on 30 November 2020; The Guardian, 30 November 2020, 18.

of the urgency of the climate crisis, the Court will announce on Monday that it has green-lighted the case as a matter of priority. It is reported that the states – the EU27 plus Norway, Russia, Switzerland, the UK, Turkey and Ukraine – are obliged to respond by 23 February to the complaints of the plaintiffs, who claim that governments are moving too slowly to reduce the greenhouse gas emissions that are destabilising the climate. Their lawyers claim that if the defendant countries fail to convince the Strasbourg-based judges, hey will be legally bound to take more ambitious steps and to address the contribution they and multinational companies headquartered in their jurisdictions make to overseas emissions through trade, deforestation and extractive industries. Such claims are, of course dependent on the Court's ruling and the nature of the remedy it orders, but more consistent case law in this area could certainly assist the development of environmental law in general.

EMPLOYMENT LAW

Clowning around? Expanding the right to being accompanied in workplace disciplinary proceedings in English law

Alex Simmonds*

Introduction

A recent newspaper article claims that the government are presently considering changes to the scope of the right to be accompanied in workplace hearings related to discipline.[1] This article examines the provisions of the present law and explores a number of overseas jurisdictions to consider whether or not this is a practice that should be welcomed and, if so, whether the expansion of such a right impacts on the balance of the law relating to disciplinary hearings generally.

Shortly before COVID-19 struck the UK, it was reported that the government are presently considering substantial amendments to the Employment Relations Act 1999 on accompaniment at workplace disciplinary or grievance hearings.[2] The right to accompaniment is a fundamental tenet of natural justice and the principle *audi alteram partem,* or the right to be heard in one's own defence. The importance of the right to accompaniment was articulated in the 13th edition of *Waud's Employment Law*, where the author states that without accompaniment:

> …An employee might become inarticulate or confused, or be 'reduced to jelly' when confronted by senior members of management. He might fail to put his case effectively, which could lead to a dismissal on the basis of erroneous information.[3]

Presently, an employee has the right to be heard in disciplinary hearings along with a limited right to accompaniment and representation under s10 of the Trade Union and Labour Relations (Consolidation) Act 1992. Under s.10 a worker can make a reasonable request to be accompanied when invited or required to attend such a hearing, but only by individuals coming within the scope of subsection 3:

> A person is within this subsection if he is—
>
> (a) employed by a trade union of which he is an official within the meaning of sections 1 and 119 of the Trade Union and Labour Relations (Consolidation) Act 1992;

* Lecturer in Law, Coventry University. PhD candidate in Labour Law. Special thanks to Sukhwinder Chhokar.

[1] Edward Malnick, *'Boris Johnson's aides plan to break 'stranglehold' of trade unions',* The Telegraph, 23/02/2020, online at: https://www.telegraph.co.uk/politics/2020/02/23/boris-johnsons-aides-draw-plans-break-stranglehold-trade-unions/?WT.mc_id=tmgliveapp_iosshare_At4PyF7hkrYV accessed 28/02/2020.

[2] *Ibid.*

[3] Peter Chandler, *Waud's Employment Law*, 13th Edition, Kogan Page, 2001, endorsed by the Institute of Directors, 94.

> (b) an official of a trade union (within that meaning) whom the union has reasonably certified in writing as having experience of, or as having received training in, acting as a worker's companion at disciplinary or grievance hearings; or
>
> (c) another of the employer's workers.

Section 11 gives the employee the right to make a complaint to a tribunal if such a reasonable request for accompaniment is refused.

The proposals are contained in a paper from *Edapt*, a self-proclaimed educational legal support organisation that offers legal casework support to teachers in return for monthly or yearly subscriptions; similar in some respects to the sort of relationship between a Trade Union and its members. The thrust of the argument is that non-union members are being denied the opportunity to accompaniment by 'reasonably qualified companions,'[4] highlighting that "any other request for accompaniment from a companion not in one of the above categories can be refused by the employer. In contrast, the employer is free to have whoever they choose present to support, including a legally qualified person."[5] This is argued, with some justification, as giving an 'unfair advantage' to union-members over non-union members.

This view is certainly nothing novel and coincides with the reasoning of the Court of Appeal in the 1941 case of *Moscrop v London Passenger Transport Board*[6] which involved the terms and conditions of an employee's contract with the Transport Board and their contravention of s6 (1) of the, since repealed, Trade Disputes and Trade Unions Act 1927.[7] That prohibited the imposition of any term or condition into a contract which placed non-union members "either directly or indirectly under any disability or disadvantage as compared with other employees" by a public authority.[8]

Whilst reforms in this area may, on the surface, appear commendable, it is submitted that any modification of the right to accompaniment will necessarily require the consequential amendment of other relevant legislative provisions, or else risk creating imbalance and unfairness (and potentially spiralling costs) on both sides of the employment relationship.

Disciplinary and grievance procedures

There was no legislative mandate regarding the conduct of internal procedures until 1971 with the passing of the Industrial Relations Act.[9]. Section 22 of that Act imported the concept of 'fairness' into the dismissal apparatus:

> (1) In every employment to which this section applies every employee shall have the right not to be unfairly dismissed by his employer; and accordingly, in any such employment, it shall be an unfair industrial practice for an employer to dismiss an employee unfairly.

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[4] N1 above
[5] *Ibid*.
[6] [1941] Ch. 91.
[7] c 22.
[8] N6 above p92.
[9] c 72.

Although the right to be accompanied was not specifically mentioned in the Act, paragraph 35 of the accompanying Code of Practice conferred an explicit right to be heard upon the employee.[10]

Initially there was very little statutory dictation regarding the internal procedure. This resulted from a spirit of 'voluntarism'. The logic being that:

> If employers know that employees have the right to challenge dismissal in a statutory tribunal then there is a clear incentive for them to see that dismissals are carried out under a proper and orderly procedure, so as to ensure both that as many cases as possible are settled *satisfactorily without recourse to an outside appeal and that in* those cases where appeal is made it can be shown that the dismissal was fair and justified' (italics added).[11]

Over the years, the legislative provisions were refined and the modern definition of a 'disciplinary hearing' is contained in s.13 (4) of the Employment Relations Act 1999 as:

> A hearing that could result in:
>
> (a) the administration of a formal warning to a worker by his employer.
>
> (b) the taking of some other action in respect of a worker by his employer, or
>
> (c) the confirmation of a warning issued or some other action taken.

In the natural course of things, the EAT provided further guidance with the joined cases of *London Underground Ltd v Ferenc-Batchelor,*[12] and *Harding v London Underground Ltd*.[13] In the first case, the employee was a train driver who went through a red light. The employers held an investigation into the incident during which it was possible that she could have been issued with what the employer classed as an "informal warning." She asked to be allowed representation by her Union at this series of hearings, but was told that she was "not allowed trade union representation at this level." At the conclusion of their investigations the management decided that further action was needed and that her case should be taken to a formal disciplinary procedure. The employee argued that what management were calling an "informal warning" was in fact a "formal warning" due to the implications that would follow from being given one.

In the second case, the employee, Mr Harding, had been called to an interview under London Underground's attendance at work procedure. At the interview Mr Harding insisted that in the circumstances he should be allowed union representation. When this was refused he left the room. In his absence he was issued with an informal warning of the kind we have previously discussed. The appeal tribunal agreed with Mr Harding that he should have been offered representation. The EAT made a detailed examination at what London Underground were classifying as an "Informal Warning," finding that it was confirmed in writing; had a formal timescale for its 'live' period; and became part of the employee's disciplinary record. It was

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[10] *Earl v Slater & Wheeler Airlyne Ltd* [1973] 1 WLR 51.
[11] Report of the Royal Commission on Trade Unions and Employers Association 1968 (Cmnd 3623) at para 533.
[12] [2003] ICR 656
[13] *Ibid.*

held that this amounted to a formal warning and that, consequently, the employees should have been availed of their right to accompaniment.

These criteria are very broad as regards the type of hearing where union representation is available. In respect of any proposed changes, it is submitted that legislators should seriously consider the level of hearing that such 'reasonably qualified' companions would be allowed into. A blanket provision would potentially render the procedure susceptible to the type of delays which can arise when dealing with third parties. Under the present rules, in most instances, work colleagues and union representatives exist under the same roof.

For the sake of completeness, the case of *Toal v GB Oils Ltd*[14] should also be considered. In this case the employee's choice of companion at a grievance hearing had been refused by the employer who argued that the choice of companion by the employee should be 'reasonable' owing to the fact that the right to accompaniment can only be granted subject to a 'reasonable' request being made under s.10(1)(b) of the Employment Relations Act 1999. It was held by the EAT that Parliament did not intend for the choice of companion to be subject to a test of reasonableness:

> This is a right conferred upon the worker. It is possible to conceive of circumstances in which an employer might wish to interfere with the exercise of that right without proper reason in a manner that would put the worker at a disadvantage. Consequently, Parliament has, in our view, legislated for the choice to be that of the worker, subject only to the safeguards set out in subsection 3 as to the identity or the class of person who might be available to be a companion.[15]

It was further argued that the employees in this case, having chosen another representative, effectively waived their right to be represented by the first representative they chose (who the employers refused). This argument was also unsuccessful as in the EAT's view it offended the statutory prohibition on waiver under s.203 Employment Rights Act 1996.[16] Subsequently, the ACAS Code of Practice on Disciplinary and Grievance Procedures was amended in 2015,[17] taking into account a public consultation it had launched in response to the case of *Toal.*[18]

The present role of the companion at such hearings

Under s.2B of the 1999 Act, the employer must permit the worker's companion to:

> (a) address the hearing in order to do any or all of the following:
>
> (i) put the worker's case;

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[14] [2013] I.R.L.R. 696
[15] *Ibid* at para 16.
[16] C18.
[17] ACAS, Code of Practice 1, *Code of Practice on Disciplinary and Grievance Procedures* online at https://www.acas.org.uk/acas-code-of-practice-for-disciplinary-and-grievance-procedures/html accessed 11/11/2020.
[18] ACAS, *ACAS response to the public consultation on the revision of paragraphs 15 and 36 of the ACAS Code of Practice Disciplinary and Grievance*, January 2015, online at https://archive.acas.org.uk/media/4213/Acas-response-to-the-public-consultation-on-the-revision-of-paragraphs-15-and-36-of-the-Acas-code-of-practice-disciplinary-and-grievance-procedures/pdf/Acas-response-to-the-public-consultation-on-the-revised-paragraphs-of-Acas-code-of-practice-discipli.pdf accessed 11/11/2020.

(ii) sum up that case;

(iii) respond on the worker's behalf to any view expressed at the hearing;

(b) confer with the worker during the hearing.

Regarding the scope of the companion's role, in *Santamera v Express Cargo Forwarding,*[19] it was stressed by Mr Justice Wood that:

> The employer has to act fairly, but fairness does not require a forensic or quasi-judicial investigation, for which the employer is unlikely in any event to be qualified, and for which he, she or it may lack the means.[20]

And further that

> we do not exclude the possibility that there will be cases in which it would be impossible for an employer to act fairly or reasonably unless cross-examination of a particular witness is permitted. The question, however, in each case is whether or not the employer fulfils the test laid down in *British Homes Stores v Burchell*, and it will be for the tribunal to decide whether or not the employer has acted reasonably, and whether or not the process has been fair.[21]

As can be seen presently, with no automatic right of cross examination, the role of the representative is limited insofar as presenting a comprehensive case is concerned. Thus, people who have paid substantial fees to solicitors for disciplinary representation could, under present rules, feel short-changed.

Article 6(1) of the European Convention on Human Rights

It has been argued by Sanders, that Article 6(1) of the European Convention on Human Rights (ECHR) could be applied to disciplinary procedures importing the right to legal representation.[22] Cases from the European Court of Human Rights such as *Le Compte, Van Leuven & de Meyere v Belgium,*[23] and the English cases of *Kulkarni*[24] and *Mattu*[25] suggest that this right may exist when an employee is in danger of being deprived of their 'civil right to practice their chosen profession.' The logic behind this is that the consequences are potentially so far-reaching that the disciplinary hearing effectively becomes a quasi-judicial determination. Sanders also rightly points out that, in the words of Burnton LJ in *Mattu*, "Article 6 'in particular' is supposed to be 'blind to social class and social professional and economic status."[26]

If such reforms are indeed undertaken, consideration should be given to this point. Why is the determination of a 'civil right to practice one's chosen profession' any more potentially serious

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[19] *Santamera v Express Cargo Forwarding t/a IEC Ltd* [2003] IRLR 272
[20] *Ibid* at para 35
[21] *Ibid* at para 42.
[22] Sanders, Astrid. 'Does Article 6 of the European Convention on Human Rights Apply to Disciplinary Procedures in the Workplace?' (2013) 33 (4) OJLS 791.
[23] (1982) 4 EHRR 1.
[24] [2009] EWCA Civ 789.
[25] *Mattu v University Hospitals of Coventry & Warwickshire NHS* Trust [2012] EWCA Civ 641.
[26] Above note 22 at p 809.

than a person with family commitments, bills, rent and possibly a mortgage, being dismissed from a low-level warehouse or clerical position?

As was stated in the Donovan Report:

> 'In reality people build much of their lives around their jobs. Their incomes and prospects for the future are inevitably founded in the expectation that their jobs will continue. For workers in many situations, dismissal is a disaster. For some workers it may make inevitable the breaking up of a community and the uprooting of homes and families. Others, and particularly older workers, may be faced with the greatest difficulty in getting work at all."

Moreover, should the status quo be preserved and such changes only allow representation from third party organisations in the case of 'professional' positions, then argument, semantic-gymnastics and hair-splitting are all likely to ensue on the shop floor when it comes to the question of entitlement.

The international experience

The reporting source[27] contains an assertion that the practice of 'most other countries' in the world is to allow individuals other than work colleagues or trade union representatives into disciplinary meetings. It is important, therefore, to briefly consider whether this is the case. Rules relating to the right to accompaniment from a range of jurisdictions have been investigated to test the veracity of this assertion below. A range of jurisdictions have been chosen including several who share the common law tradition which, due to their similarity with the UK, have been examined in closer detail.

Other common law jurisdictions

Ireland

A recent decision from the Irish Court of Appeal[28] borrowed from the English case of *R v Secretary of State for the Home Department ex parte Tarrant*in the area of prison law,[29] specifically the factors that ought to be taken into account when determining whether or not legal representation should be allowed. Geoghegan J listed the following considerations imported from Webster J in the English case.

> (1) The seriousness of the charge and severity of the likely penalty;
> (2) Whether any points of law are likely to arise;
> (3) Whether or not the individual prisoner can present their own case adequately;
> (4) Whether there is likely to be any procedural difficulty- i.e. if cross examination is likely to arise;
> (5) Whether or not time is of the essence;
> (6) The need for fairness between prisoners and between prisoners and prison officers.

In this respect, Geoghegan J was keen to point out that:

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[27] N1 above.
[28] *Iarnród Éireann/ Irish Rail v. Barry McKelvey* [2018] IECA 346 at para 38.
[29] [1985] Q.B. 251

> Whilst an employee facing a disciplinary in respect of alleged misconduct may be at risk of inter alia dismissal from their employment and significant damage to their good name, it should nonetheless generally be possible, save in exceptional circumstances, for such an employee to obtain a fair hearing in accordance with the principles of natural justice without the need for legal representation.[30]

Further, whilst the regulations[31] on disciplinary procedures formally grant an employee 'the opportunity to avail of the right to be represented during the procedure',[32] they appear to exclude the possibility of representation by any 'intermediate' body other than a trade union or a fellow colleague:

> 4.4. For the purposes of this Code of Practice, "employee representative" includes a colleague of the employee's choice and a registered trade union but not any other person or body unconnected with the enterprise.

Whilst legal representation may be easier to procure for a disciplinary hearing in Ireland, it appears that there is little room for deviation from the 'union rep' or 'colleague' recipe within the present state of English Law.

The United States

The right to accompaniment by a union representative in the United States stems from the National Labour Relations Act of 1935:[33]

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

Employers are expressly prohibited from interfering with this right under s.8(a)(1):

> It shall be an unfair labor practice for an employer–
>
> > (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

The decision in *NLRB v J. Weingarten, Inc*[34] is the leading case on the right to union accompaniment in the United States. This case refined guidelines on when a union member could request union representation with protection from Section 7,[35] the bedrock of United States employment legislation. Quoting from *Mobil Oil Corp,*[36] Brennan J, stated that:

> An employee's right to union representation upon request is based on Section 7 of the Act, which guarantees the right of employees to act in concert for mutual aid and

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[30] Above note 27 at para 89.
[31] SI 146 2000.
[32] At 4.6.
[33] NLRA, 29 U.S.C. §§ 151-169
[34] 420 U.S. 251 (1975)
[35] Above note 33.
[36] *Mobil Oil Corporation* and *Oil Chemical and Atomic Workers International Union* 196 N.L.R.B. 1052

> protection…it is a serious violation of the employee's individual right to engage in concerted activity by seeking the assistance of his statutory representative if the employer denies the employee's request and compels the employee to appear unassisted at an interview which may put his job security in jeopardy. [37]

The right was further refined as arising:

> only in situations where the employee requests representation. In other words, the employee may forgo his guaranteed right and, if he prefers, participate in an interview unaccompanied by his union representative.38

And being limited to:

> situations where the employee reasonably believes the investigation will result in disciplinary action."[39]

Brennan J also stated that the employer could also refuse Union representation, which would give the employee the option of either refusing to participate in the interview, or not having the benefit of any facts being ventilated during such an interview.

These so-called '*Weingarten'* rights were extended to non-union members who wished to call in co-workers by the decision of the National Labour Relations Board in *Epilepsy Foundation of Northeast Ohio.*[40] However, this decision was reversed four years later in the case of *IBM Corp.,*[41] where it was held that there is no general right to have a co-worker present at a disciplinary hearing.

Canada

In Canada the jurisprudence in the area of union representation derives largely from the case of *Weingarten,*[42] where it was held that a failure to allow union representation can lead to disciplinary findings being rendered void.[43] However, it is also *well established that the right to representation does not extend to the investigatory process…"*[44]

Moreover, there is no general right to have legal counsel present,[45] and there is also no general obligation on the part of the employer to deal with an employee's lawyer.[46]

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[37] At 257
[38] *Ibid*.
[39] *Ibid*.
[40] 331 NLRB 676 (2000).
[41] 341 NLRB 1288 (2004),
[42] William Johnson QC, *'Labour and Employment Law: Be Careful What You Wish F*or', an examination of practical workplace issues commissioned by the Canadian Bar Association at the 12th Annual National Administrative Law and Labour and Employment Law Conference November 25 – 26 2011, Part 2 at page 1, online: <http://www.cba.org/cba/cle/PDF/ADM11_johnson_paper.pdf> accessed 27/02/2020.
[43] Flamboro Downs Ltd. (2010) 194 L.A.C. (4th) 416.
[44] *Naidu v. Canada Customs and Revenue Agency* 2001 PSSRB 124, at para 54.
[45] Above note 42.
[46] *Honda Canada Inc. v Keays* (2008) S.C.C. 39.

Australia

The position in Australia is somewhat confusing. There does exist the right for an employee to have a 'support person' present at a disciplinary meeting and, under s.387(d) of the Fair Work Act of 2009, a request for such a 'support person' should not be unreasonably refused. However, as was stated in the explanatory memorandum to the Act,[47] the section:

> does not impose a positive obligation on employers to offer an employee the opportunity to have a support person present when they are considering dismissing them.'

There is wide discretion on who can be a support person at such a meeting. A lawyer would be allowed to perform this role, however, the support person is not expected to advocate the case of the employee, as was explained in the case of *Gomes v Qantas Airways Ltd:*[48]

> The Act allows a person the subject of investigation and interview to have a support person to 'assist in any discussion'. A support person cannot assist if they are refused permission to speak. Although there is a fine line between assisting a colleague and advocating for a colleague which must be considered, a support person must, at the very least, be able to speak for and on behalf of the person they are supporting when providing assistance.

This was also stated in the case of *Victorian Association for the Teaching of English Inc v Debra de Laps*.[49] The support person may be required to state at the outset of the meeting whether they intend to act as an 'observer' or a representative / advocate.[50] An employer will not be expected to tolerate a support person who oversteps their remit and also retains a discretion as to whether they will allow certain individuals to act in this capacity. For example, an employer will not be expected to allow a support person to attend if they perceive there to be a conflict of interest.[51]

The role of union representatives at such hearings will be subject to rules contained in any collective agreements,[52] but there is no further, general right to legal representation at such meetings.[53]

New Zealand

With respect to representation, s.236 of the Employment Relations Act 2000 is extremely broad, providing that:

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[47] Explanatory Memorandum to Fair Work Bill 2008, para 1542, as reported by the Australian Fair Work Commission, online >https://www.fwc.gov.au/unfair-dismissals-benchbook/what-makes-dismissal-unfair/unreasonable-refusal-support-person#ftnref1> accessed 28/02/2020.
[48] [2014] FWC 3432 at para 72.
[49] [2014] FWCFB 613 at para 52.
[50] *Vong v Sika Australia Pty Ltd* [2010] FMCA 1021.
[51] *Trembath v RACV Cape Schanck Resort* [2017] FWC 4727 at para 54.1
[52] Government of Queensland, online at https://www.forgov.qld.gov.au/role-support-person#managing-overly-enthusiastic-or-obstructive-support-persons
[53] (2015) 80 AIAL Forum, at 82.

> (1) Where any Act to which this section applies confers on any employee the right to do anything or take any action—
>
> > (a) in respect of an employer; or
> >
> > (b) in the Authority or the court - that employee may choose any other person to represent the employee for the purpose.
>
> (2) Where any Act to which this section applies confers on an employer the right to do anything or take any action—
>
> > (a)in respect of an employee; or
> >
> > (b)in the Authority or the court, that employer may choose any other person to represent that employer for the purpose.
>
> (3) Any person purporting to represent any employee or employer must establish that person's authority for that representation.

The flexibility of these provisions are perhaps best illustrated with reference to an incident in 2019, reported in the *New Zealand Herald* where an advertising executive chose a professional clown to act as his representative during a redundancy meeting.[54] In that case the clown's contributions to the hearing allegedly consisted of making balloon animals and miming a flow of tears as the redundancy paperwork was produced,[55] but the preferred ambit of a representatives role was outlined in the case of *Air New Zealand Ltd v Hudson*:[56]

> Such a person must be able to speak on behalf of an employee, to intervene in the process and to give explanations where necessary.

South Africa

Representing a 'hybrid' legal system with features of both the common law and civil law systems, South Africa's position on this problem is refreshingly decisive. Under s.14(4)(a) of the Labour Act 1995 a trade union representative has the right to *'assist and represent the employee in grievance and disciplinary proceedings.'* Under the accompanying Code of Good Practice annexed by Schedule 8, s.4(1) on Fair Procedure states that:

> The employee should be entitled to a reasonable time to prepare the response and to the assistance of a trade union representative or fellow employee.

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[54] Damien Venuto, 'Auckland adman hires professional clown for redundancy meeting', New Zealand Herald, 13/09/2019, online at https://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=12267350 accessed 28/02/2020.
[55] *Ibid*.
[56] [2006] ERNZ 415 (Emp C) at para 161.

Civil Law Jurisdictions

Germany

Known for its strong labour laws, the right to be accompanied in Germany appears to be surprisingly narrow. Section 82(1) of the Works Constitution Act[57] embodies a general right to be heard in respect of 'any operational matter concerning his own person,' whilst 82(2) gives the right to be accompanied by a member of the works council in respect of a meeting regarding the assessment of the employee's remuneration. There does not appear to be any provision made for the attendance of a companion not connected with the company.

France

A more permissive approach seems evident in France. Article L1232-7 of the Code du Travail makes provision for employee advisers to assist at dismissal hearings in the absence of a trade union agreement. An employee advisor does not necessarily have to be someone associated with the company itself, but must be from a list "drawn up by the administrative authority after consultation with representative organizations of employers and employees at national level, under conditions determined by decree." Further, 'the list of advisers includes, in particular, the name, address, profession as well as possible union membership of the advisers' and cannot 'include active labour counsellors' (the rough equivalent of an Employment Tribunal panel member).[58]

Other civil law jurisdictions

From a sample of seven former eastern-bloc and transitioning economies,[59] apart from the Labour Code of Romania[60] there is no express mention of a right to be accompanied by any individual in any of the labour legislation examined. Similarly, the Labour Code of the Russian Federation of 2001 is silent on this matter.

Further afield, the Labour Law of the Syrian Arab Republic, under Article 101(b), provides that "The trade union organization of the worker may send a representative to attend the investigation" but is otherwise silent on such matters. In Iraq, Article 140 of the 2015 Labour Code provides that "No disciplinary penalties shall be imposed on the worker unless after the latter is given a chance to defend himself in the presence of the workers representatives." Article 64 of the Egyptian Labour Code of 2003 states that '…the trade union organization to which the worker is attached may delegate a representative for it to attend the investigation'. Further south, Rwanda Law No13/2009 of Regulating Labour in Rwanda: Art 140: states that 'Should there be any individual labour dispute between a worker and an employer; the concerned party shall request the workers' delegate to settle it amicably'.

Heading to the Far East, Chapter 10 on Labour Disputes of the Labour Law of the People's Republic of China, 2007, Articles 77 through to 84 make divers reference to bodies and individuals such as trade unions and their representatives through to workers representatives and representatives of the employer. The Socialist Republic of Vietnam, however, specifically

[57] As promulgated by the Act of 25 September 2001
[58] Online at https://www.jurifiable.com/conseil-juridique/droit-du-travail/conseillers-prudhommes accessed 28/02/2020.
[59] Labour Codes of Azerbaijan, Bulgaria, Kazakhstan, Lithuania, Moldova, Romania and Tajikistan.
[60] Romanian Labour Code Art 267.

provides for access to a lawyer in such hearings under Article 123(1)(c) of the 2012 Labour Code, which states that:

"The employee must be physically present and is entitled to self-defence or to have a lawyer or other persons to assist in his/her defence; if the employee is under 18 years of age, his/her father, mother or a legal representative must be present."

Observations on the international experience

The reporting source states that the proposed reforms echo the practice of "most other countries" in the world.[61] A non-exhaustive comparative look at the textual practices and adjudicated practices from various legal traditions, cultures, political backgrounds and methodology does not wholly support this contention. Whilst the picture is certainly nuanced, there is clearly no universal or unfettered right to choose companions outside of the workplace context. Where this does exist, as is the case with Australia and New Zealand, there is substantial confusion regarding the extent of the representative's role and ability, which, in any case, falls short of the reach of trade union representatives in the United Kingdom under the present rules.

Conclusions and potential reform

In *Stevens v University of Birmingham*[62] it was held that the respondent University's refusal to allow the claimant the right to be accompanied by a representative of the Medical Protection Society - a body other than the trade union - breached the implied term of mutual trust and confidence. This was because the representative, rather than appearing as an advocate or to give encouragement, would, as a subject matter expert, have allowed the claimant to have given a fuller, more accurate and powerful account of his side of events.

As commendable as any efforts may be to increase the scope for employee representation within such hearings, there are several other important issues which the government must be mindful of when considering reform of this area. Any such broadening of the scope of who can be a companion at disciplinary hearings could open a Pandora's Box, and, although Edapt are arguing in favour of more rights for teachers, it is unlikely that any such reforms would be limited to just one profession. Edapt are arguing for 'reasonably qualified companions' to be allowed to enter the fray, but what criteria would be used to determine who is and isn't a 'reasonably qualified companion'? Further, what level of hearing would such 'reasonably qualified companions' be allowed into: those likely to result in a mere verbal warning or only those where dismissal is a possibility?

At the most innocuous end of the spectrum, more organisations such as Edapt may spring to life offering casework services at such hearings to non-union members, with those employed to do such work acting in a similar fashion to accredited Police station representatives. At the far end of this trajectory, however, the door may also be open to fully qualified solicitors and barristers (possibly including retired or active members of the legal profession who are related to the employee and acting on a Pro Bono basis). The introduction of lawyers will undoubtedly lead to more technical and sophisticated legal arguments being proffered before lay decision makers with little or no legal training whatsoever. It is worth bearing in mind the words of Lord

[61] Above note 1.
[62] [2017] I.C.R. 96

Denning in the case of *Ward v Bradfield Corporation,*[63] that 'we must not force these disciplinary bodies to become entrammelled in the nets of legal procedure.'

It helps to consider the position of a small – medium sized employer faced with a solicitor or barrister specialising in unfair dismissal law at a disciplinary hearing. Assuming the investigating officer has no legal knowledge, skills or training, this is likely to cast a severe imbalance in terms of the expertise at hand. As a result, any such reform in this area may lead to an increase in costs for employers as they attempt to provide extra training for their existing staff or pay for specialist legal advice in such cases. In turn, this would have the effect of strengthening the employers hand even more so against employees who may not be able to afford the full power of legal representation. Moreover, as mentioned previously, cross-examination is not usually standard procedure in such hearings, but if lawyers become more involved it is to be expected that this will be requested as a matter of course. As Mr Justice Wood has stated,[64] the employer is not likely to be qualified or equipped for a quasi-judicial investigation.

It is worth noting here that when it was suggested to ACAS that their Code of Practice should be expanded to explain that an employer may allow companions outside the class of persons within s.10(3), their response was that this

> could encourage more workers to request companions that the employer feels to be unsuitable, such as close relatives or lawyers, thereby creating a burden on employers who may wish to refuse such companions for legitimate reasons.[65]

If such reforms are to be made to the right to be accompanied, it is submitted that reform of the entire landscape of procedural fairness in this area will have to be undertaken. Parliament should provide clear legislative guidance to investigating officers, decision-makers and employees regarding standards of procedural fairness which go beyond the provisions of the ACAS Code of Conduct and which, in turn, prescribe conditions of fair treatment which can be upheld universally from case to case. Without such guidance the entrammelling could prove rather costly.

[63] [1971] LGR 27, CA.
[64] Note 20 above.
[65] Note 18 above at para 18.

Is the principle of (EU) solidarity under threat as a consequence of the Covid-19 crisis?

Emmy Tonoli*

Introduction and legal framework

The principle of EU solidarity is one of the fundamental values of the European Union. Research demonstrates, however, that EU solidarity is often under threat in times of crisis. The EU is currently facing a new major crisis, since the outbreak of the COVID-19 pandemic in December 2019. The deadly virus inflicts major economic and public health challenges and costs worldwide. Both Member States and EU institutions are taking measures to mitigate the impact of the crisis, and different socio-economic and healthcare measures are introduced accordingly.[1] It is, however, questionable whether all measures that have been taken are governed by the principle of EU solidarity.

Since the introduction of the Treaty of Lisbon, the principle of solidarity has been broadly incorporated in the fragmented landscape of EU law provisions.[2] Article 3 TFEU describes the promotion of solidarity among Member States as one of the main objectives of the EU. The principle of solidarity appears in different areas of EU legislation, such as immigration, security, economic emergencies and free movement. The CJEU attempted to define the meaning and scope of solidarity in its judgments, and the current reluctance of the Court to employ solidarity as a legal tool may be due to the fact that solidarity is a political concept. Case law further shows that the Court chooses technical and conventional arguments over solidarity-based arguments when solving issues. On the other hand, in certain solidarity-related cases the principle of solidarity is employed in a consistent and comprehensive way and appears to be a tool for the creation of common interest.[3]

A lack of EU solidarity in times of crisis

Since 2010, the EU have faced several crises, such as the Eurozone crisis, the European Migrant crisis and the Brexit crisis. These crises have tested the EU's eagerness to show solidarity towards EU Member States.[4]

The Eurozone crisis,[5] or sovereign debt crisis, demonstrated clear problems with exercising EU solidarity. The crisis was characterised by tensions and divergence between the EU periphery Member States and the dominant economic Northern Member States. In addition, inadequate governance, inflexibility and the failure of EU governments to respond quickly,

[1] European Commission, 'Timeline of EU action' https://ec.europa.eu/info/live-work-travel-eu/health/coronavirus-response/timeline-eu-action_en Accessed 28 May 2020.
[2] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ *C 306/1.*
[3] Esin Kucuk, 'Solidarity in EU Law: An Elusive Political Statement or a Legal Principle with Substance' (2016) 23 Maastricht Journal of European and Comparative Law, 965.
44 Jürgen Gerhards, *European Solidarity in Times of Crisis* (Routledge 2019) 296.
[5] The economic and financial crisis of 2008 had a major impact on the EMU Member States and as a result the Eurozone (sovereign debt crisis) emerged.

caused the spread of the currency crisis.[6] Some Member States, including Greece, Spain, Portugal, Italy and Ireland, had doubts about the functioning of the Eurozone, showing their inability to fight against the economic and financial crisis and its weak economic performance. The Eurozone crisis raised concerns about principles such as democracy, unity and solidarity.[7] The lack of EU solidarity concerned EU agenda matters, including public finance, immigration and foreign policy matters. The Eurozone crisis also identified that the creation of the Economic and Monetary Union (EMU) was unfair and unequally arranged, whereby some Member States lose and some benefit. Despite all efforts and measures taken to counter the impact of the Eurozone crisis, many challenges are still present, including continuing macroeconomic imbalances, high public deficits and a persistent risk between sovereigns and the banking sector. In addition, the post crisis period demonstrates more inequalities, with high level of employees at risk of poverty and youth unemployment.[8]

The European Migrant crisis led critics to doubt the role of EU solidarity in policy solutions taken by the EU and the Member States.[9] During the European Migrant crisis, from 2010 until 2019, a high number of refugees arrived in Italy and Greece. Tragic situations caused concerns about EU responsibility and solidarity between the Member States, and there was a lack of solidarity from other Member States when the burden on Greece and Italy proved too high. The EU called Member States, such as Germany, to accept more asylum seekers, and there was an urgent need for a reconsideration of EU asylum and immigration policy.[10]

The decision of the UK to leave the EU, commonly referred to as Brexit,[11] is, remarkably, described as "a triumph of EU solidarity", considering that the 27 Member States have shown clear EU solidarity and unity during Brexit negotiations. The 27 national governments formed a clear united front against the UK, when discussing the exit conditions,[12] and the remaining Member States insisted with one voice that the Brexit process be governed by EU law.[13]

EU Member States

The EU is a political and economic union of 27 Member States which are currently facing the unprecedented challenge of responding to the COVID-19 pandemic.[14] In order to manage the crisis, solidarity within the EU is essential for the protection of the economy, public health and

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[6] Yannis Panagopoulos, 'A European Strategy for Solidarity, Employment and Rights' in Solidarity *in the Economic Crisis Challenges and Expectations for European Trade Unions* (FES 2011) 11.
[7] Maria Kontochristou and Evi Mascha, 'The Euro Crisis and the Question of Solidarity in the European Union: Disclosures and Manifestations in the European Press' (2014) 6 Review of European Studies, 50.
[8] European Parliament, 'A decade on from the crisis: Main responses and remaining challenges' https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/642253/EPRS_BRI(2019)642253_EN.pdf Accessed 26 July 2020.
[9] Sofia Fernandes, *Solidarity within the Eurozone: how much, what for, for how long?* (Paper, 2012) https://institutdelors.eu/wp-content/uploads/2018/01/solidarityemus.fernandes-e.rubionefeb2012.pdf Accessed 5 July 2020.
[10] Maria Kontochristou and Evi Mascha, 'The Euro Crisis and the Question of Solidarity in the European Union: Disclosures and Manifestations in the European Press' (2014) 6 Review of European Studies, 55.
[11] The Brexit is the withdrawal of the United Kingdom from the European Union on 31 January 2020.
[12] Thierry Chopin, 'Brexit has not won over European opinions, quite the contrary' https://institutdelors.eu/en/publications/opinions-publiques-europeennes/ Accessed 31 July 2020.
[13] Tom Mctague, 'How the UK lost the Brexit battle' https://www.politico.eu/article/how-uk-lost-brexit-eu-negotiation/ Accessed 31 July 2020.
[14] Austria, Belgium, Bulgaria, Croatia, Republic of Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain and Sweden.

the entire EU society.[15] According to EU law, the national governments of the Member States have a primary role in managing public health emergency matters. As public health policy is a national competence, Member States are, therefore, responsible for the risk assessment and management of the COVID-19 crisis.[16]

Socio-economic and healthcare measures are taken by the Member States since the current crisis brings unavoidable and negative consequences for all Member States. Therefore, it is crucial to avoid unnecessary national measures which may cause additional costs for businesses and consumers within the EU.[17] More specifically, free movement of goods and access to services should be ensured in order to avoid damage to the entire EU business system. Unfortunately, Member States have instituted individual measures, such as export bans and restrictions on essential goods, to prevent domestic shortages. The essential goods mainly include medical equipment, protective equipment and food supplies,[18] but it is questionable whether these export bans conform to the principles of the free movement of goods and EU solidarity.

Export bans and restrictions are generally in conflict with the free movement of goods,[19] and are therefore prohibited under article 35 TFEU. Freedom of goods is a keystone for the creation of the internal market, whereby all national barriers are removed. It is, however, not absolute and prohibitions are acceptable in exceptional circumstances. Export bans can, for example, be justified under article 36 TFEU by concrete public health reasons, taking into account proportionality and non-discrimination principles.[20] Consequently, export bans on medicines and medical devices can be legitimised, since patient safety is at risk due to a current supply shortage of medical goods. These measures are only lawful under the following three conditions: the measure must be a reaction to an actual public health risk; the measure must be appropriate to reach the public health objective and the measure may not restrict more than is needed to reach the objective.[21] It is furthermore questionable whether the export bans are still acceptable in the case of a global crisis, while many Member States are suffering from supply shortages and EU solidarity is most at stake.[22]

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[15] Business Europe, *Responsibility, action and solidarity is urgently required to protect businesses, society and our economy* (Paper, 16 March 2020) https://www.businesseurope.eu/publications/responsibility-action-and-solidarity-urgently-required-protect-businesses-society-and Accessed 11 June 2020.
[16] Articles 2 (5), 6 a) and 168 TFEU.
[17] OECD, 'COVID-19 and international trade: Issues and actions' http://www.oecd.org/coronavirus/policy-responses/covid-19-and-international-trade-issues-and-actions-494da2fa/ Accessed 18 June 2020.
[18] Carmen Verdonck, 'Can a Member State during the coronavirus crisis prohibit a life science/healthcare company from delivering certain products (such as testing kits or protective medical gear) or medicines to other EU/EEA countries?' https://www.altius.com/coronavirus-updates/598/can-a-member-state-in-times-of-corona-crisis-prohibit-a-pharmaceutical-company-to-deliver-certain-products-such-as-testing-kits-or-protective-medical-gear-to-other-countries-within-the-eu-and-order-it-to-give-full-priority-to-the-local-market Accessed 20 June 2020.
[19] Articles 34-36 TFEU.
[20] Anniek de Ruijter, 'EU solidarity in fighting COVID-19: State of play, obstacles, citizens' attitudes, and ways forward' https://voxeu.org/article/eu-solidarity-fighting-covid-19 Accessed 25 June 2020.
[21] Carmen Verdonck 'Can a Member State during the coronavirus crisis prohibit a life science/healthcare company from delivering certain products (such as testing kits or protective medical gear) or medicines to other EU/EEA countries?' https://www.altius.com/coronavirus-updates/598/can-a-member-state-in-times-of-corona-crisis-prohibit-a-pharmaceutical-company-to-deliver-certain-products-such-as-testing-kits-or-protective-medical-gear-to-other-countries-within-the-eu-and-order-it-to-give-full-priority-to-the-local-market Accessed 20 June 2020.
[22] Ibid.

In *Dassonville*,[23] it was stated that Member States may only rely on article 36 TFEU in the case of protecting their own interests, and not the interests of other Member States. This statement clashes with the fundamentals of the EU and in particular with EU solidarity. The principle of EU solidarity seems to be no more than a simple desire or aspiration of the EU, hence it will never prevail over Article 36 TFEU. It is argued that what the law allows is in complete contrast with what is politically appropriate and wise for Member States to do during a global health crisis.[24]

When Italy faced a deadly outbreak of COVID-19, unease was caused, since EU countries started to imply export restrictions on medical equipment. In particular, France, Germany and the Czech Republic restricted their export of medical equipment while their EU neighbours were in distress. This was found to be "deeply against the idea of a united Europe and fundamentally against the spirit of EU solidarity.''[25] Italy urgently requested emergency equipment, but had been let down by the other Member States. When no member state responded to Italy's urgent demand for clinical equipment, China and Russia finally helped Italy.[26]

Looking at the Eurozone and the Migrant crisis, EU solidarity from the northern neighbours was also sorely lacking. During the Eurozone crisis, Germany and the Netherlands were not eager to support Italy financially and delayed decisions of rescue packages. During the Migrant crisis, when the burden on Italy and Greece was too high, Germany was also reluctant to support them financially.[27] The individual and divergent reactions of Member States to the pandemic once again revealed a lack of solidarity and unity in times of crisis. Consequently, the local political economy may undermine the effectiveness of the healthcare protection within the EU.[28] In addition, health experts expressed their concerns about the wealthy Member States, which introduced export restrictions on protective materials and therefore could cause a further spread of COVID-19 in the poorer Member States.[29]

Limitations towards the free movement of persons are also adopted by different EU countries. Some Member States have introduced selective border controls and other limitations on the border access for EU citizens, in order to prevent further spreading of COVID-19. As a result, cross-border access for EU citizens is no longer ensured and the principles of equality and solidarity are no longer followed across the EU.[30] The Chancellor of Germany, Angela Merkel, warned that the problem of these border controls could have a serious impact on the economy

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[23] Case C-8/74 *Procureur du Roi v Benoît and Gustave Dassonville* [1974] ECR I-837.
[24] Peter Olivier, 'Analysis: "COVID-19 and the Free Movement of Goods: Which Prevails?"'https://eulawlive.com/analysis-covid-19-and-the-free-movement-of-goods-which-prevails-by-peter-oliver/ Accessed 2 July 2020.
[25] Gavin Lee, 'Coronavirus: EU offers 'heartfelt apology' to Italy' *BBC News* (16 April 2020) https://www.bbc.com/news/world-europe-52311263 Accessed 2 July 2020.
[26] Teresa Coratella, 'The dangers of crisis diplomacy: Italy, China, and Russia' https://www.ecfr.eu/article/commentary_the_dangers_of_crisis_diplomacy_italy_china_and_russia Accessed 5 July 2020.
[27] Maria Kontochristou and Evi Mascha, 'The Euro Crisis and the Question of Solidarity in the European Union: Disclosures and Manifestations in the European Press' (2014) 6 Review of European Studies, 50.
[28] Alessio Pacces and Maria Weimer, 'From Diversity to Coordination: A European Approach to COVID-19' (2020) 11 European Journal of Risk Regulation, 283.
[29] Ibid.
[30] Philippe Vlaemminck, 'The free movement of persons (tourists and workers) in the European Union and COVID-19' https://www.pharumlegal.eu/blog/the-free-movement-of-persons-tourists-and-workers-in-the-european-union-and-covid-19/ Accessed 20 June 2020.

of the EU.[31] With respect to tourists, multiple national governments implemented individual measures restricting the freedom of traveling within the EU in order to mitigate the COVID-19 crisis. According to secondary EU legislation, restrictions on the free movement and residence of EU citizens are only justified for exceptional reasons of public security, public policy or public health. In addition, EU legislation specifically states that these reasons may not be purely economic.[32]

Limitations on the fundamental freedom of persons still remain within the legal framework of EU law and thus must comply with some vital principles, such as EU solidarity.[33] The Member States try, however, to shield themselves from the risks of the pandemic by different containment policies whilst not respecting EU unity and solidarity. Divergent responses to COVID-19 may result in conflicts of interest and cross-border spill-overs which threaten EU cooperation.[34]

On the other hand, examining the healthcare measures, Member States supported each other by taking care of EU intensive care patients. For example, German hospitals treated French, Dutch and Italian patients, infected with COVID-19. Some Member States also repatriated and airlifted intensive care patients for treatment to clinics in other EU countries, by ambulance jets, helicopters and planes.[35] Regarding protective equipment, Member States supported each other by delivering masks, gloves, protective suits and medical disinfectant for medical staff. Both healthcare workers and vulnerable groups, such as refugees and migrants in need, were protected by Member States.[36] Yet, although the EU factsheets show some solidarity among the Member States, there was still a lack of solidarity towards the most affected EU countries, including Italy and Spain. Their urgent call for medical goods was initially ignored when they were heavily hit by the crisis. Since the COVID-19 outbreak, Member States also provided intra-European flights on a daily basis. Austria, for example, organised the repatriation for citizens of 25 different Member States from inside and outside the EU. People were repatriated not only by airplanes, but also by ferry and train.[37]

Cooperation between Member States is crucial for the vaccine search and development in order to mitigate the global health and economic crisis. The Member States are responsible for the vaccine policy and therefore responsible for finding an effective and safe vaccine against COVID-19.[38] Since the Commission introduced the EU Vaccine Strategy, four Member States

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[31] Peter Oliver, 'Analysis: "COVID-19 and the Free Movement of Goods: Which Prevails?"' https://eulawlive.com/analysis-covid-19-and-the-free-movement-of-goods-which-prevails-by-peter-oliver/ Accessed 2 July 2020.

[32] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) [2004] OJ L158/77, art. 27.

[33] Philippe Vlaeminck, 'The free movement of persons (tourists and workers) in the European Union and COVID-19' https://www.pharumlegal.eu/blog/the-free-movement-of-persons-tourists-and-workers-in-the-european-union-and-covid-19/ Accessed 25 June 2020.

[34] Alessio Pacces and Maria Weimer, 'From Diversity to Coordination: A European Approach to COVID-19' (2020) 11 European Journal of Risk Regulation 283.

[35] European Commission, 'European solidarity in treating patients' https://ec.europa.eu/info/live-work-travel-eu/health/coronavirus-response/coronavirus-european-solidarity-action_en Accessed 28 May 2020.

[36] European Commission, 'European solidarity in protecting health workers and citizens' https://ec.europa.eu/info/live-work-travel-eu/health/coronavirus-response/coronavirus-european-solidarity-action_en Accessed 28 May 2020.

[37] European Commission, 'European solidarity in bringing people home' https://ec.europa.eu/info/live-work-travel-eu/health/coronavirus-response/coronavirus-european-solidarity-action_en Accessed 28 May 2020.

38 European Commission, 'Vaccination' https://ec.europa.eu/health/vaccination/overview_en Accessed 3 July 2020.

agreed to cooperate on the development of a potential vaccine. These four Member States, namely Germany, France, Italy and the Netherlands, decided to set up the Inclusive Vaccines Alliance (IVA).[39] Together, they aim to ensure that all Member States have a vaccine at their disposal as soon as possible. Since China and the United States are doing everything to get control over vaccines, the need for cooperation between Member States is necessary.

The role of EU institutions

The EU institutions are the decision-making bodies of the EU and are responsible for adherence to EU principles.[40] As previously mentioned, Member States have a primary role in managing public health emergencies, such as the COVID-19 crisis. Accordingly, the EU plays only a limited role in this regard. Therefore, the EU institutions are granted limited competence for public health matters.[41] According to EU law, the EU is merely authorised to support the national crisis management of the Member States. This signifies that the EU institutions are responsible for the coordination of the national emergency responses and the good flow of information exchange.[42] The lack of EU authority seems to influence the capability of the EU to properly manage risk in a public health crisis. [43] It is argued that the limited role of the EU can only turn into a source of strength if the Member States effectively use the EU coordination and support mechanisms, whilst recognising legitimate diversity. These sources could promote more EU solidarity and mutual learning in times of public health crisis.[44] Regarding the COVID-19 crisis, the Commission states that Member States will only be able to manage and overcome the humanitarian crisis by means of an efficient EU-wide solution and EU solidarity. As with the Member States, the EU institutions have taken socio-economic and healthcare measures to mitigate the impact of the current crisis.

Solidarity is a keystone in the current COVID-19 crisis, particularly in ensuring that essential goods reach Member States in need. In order to secure availability and production of the necessary medical goods within the EU, transparent cooperation is crucial. Consequently, unilateral export restrictions towards other Member States should be avoided. In response to the announced export bans of different Member States, such as Germany, France and the Czech Republic, the Commission stated that vital medical goods must be directed to the most affected EU countries in need.[45] The EU must therefore take control of the supply chain of medicinal countermeasures in order to ensure proper distribution of essential goods for all Member

[39] DW, 'Germany plans coronavirus vaccine development EU alliance: report' https://www.dw.com/en/germany-plans-coronavirus-vaccine-development-eu-alliance-report/a-53681991 Accessed 5 July 2020.
[40] EUR-Lex, 'European institutions' https://eur-lex.europa.eu/summary/glossary/eu_institutions.html Accessed 28 May 2020.
[41] Alessio Pacces and Maria Weimer, 'From Diversity to Coordination: A European Approach to COVID-19' (2020) 11 European Journal of Risk Regulation, 283-296.
[42] Decision No 1082/2013/EU of the European Parliament and of the Council of 22 October 2013 on serious cross-border threats to health.
[43] Alessio Pacces and Maria Weimer, 'From Diversity to Coordination: A European Approach to COVID-19' (2020) 11 European Journal of Risk Regulation, 283.
[44] Maria Weimer, *Risk Regulation in the Internal Market* (OUP 2019) 2.
[45] Lili Bayer, 'EU moves to limit exports of medical equipment outside the bloc' *Politico* (3 May 2020) https://www.politico.eu/article/coronavirus-eu-limit-exports-medical-equipment/v Accessed 25 June 2020.

States.[46] The EU is taking measures to facilitate the free movement of goods within the EU and thus to supply the hospitals, shops and manufacturers, accordingly.[47]

As previously mentioned, in exceptional circumstances export bans are legitimate under article 36 TFEU in conformity with proportionality and non-discriminatory principles. Remarkably, the Commission gave the principle of proportionality a new interpretation, whereby health solidarity is described as an EU objective that overrides the Member States' rights and privileges. In case of a global crisis, where many Member States are suffering from supply shortages, EU solidarity has a crucial role. Therefore, the EU officials are asking to place EU solidarity above the Member States' interests. On 6 March 2020, Janez Lenarcic, the Crisis Management Commissioner, stated that Member States still hold the right to impose export restrictions on medical goods, but stressed that such measures could complicate the EU's ability to manage the COVID-19 crisis. This shows again that the principle of EU solidarity does not prevail over EU law and that the statements of the Commission are merely expressing a preference.[48]

In the Coordinated economic response to the COVID-19 outbreak,[49] the Commission stressed that Member States' measures should give priority to the public health objective of the EU in terms of EU solidarity. Furthermore, the Commission states that the export restrictions disrupt the flow of the supply chains and logistics of essential goods within the EU. Also, the Commission reminds the Member States that every restriction taken under article 36 TFEU to protect public health requires justification, which must be proportional, necessary and appropriate. This means the restrictions should not create or aggravate a shortage of essential goods in another EU country. For these reasons, the Commission assesses every planned export restriction on medical and protective goods in order to protect the Member States in need. When the Commission identifies that a restrictive measure does not comply with the conditions and rules, it will take legal action against the concerned member state. Finally, the coordinated response of the Commission provides Member States guidance on how to provide security of supply within the EU by appropriate control mechanisms. [50]

The Commission took the same approach by implementing the temporary Regulation (EU) 2020/402, which makes the export of certain personal protective equipment (PPE) subject to the production of an export authorisation. The purpose of this regulation is that any national restriction, taken by a member state should be revoked if it does not give priority to Member States who need the medical goods the most.[51] The EU is taking further measures to facilitate

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[46] Anniek de Ruijter, 'EU solidarity in fighting COVID-19: State of play, obstacles, citizens' attitudes, and ways forward' https://voxeu.org/article/eu-solidarity-fighting-covid-19 Accessed 25 June 2020.

[47] European Commission, 'Covid-19: Commission sets out European co-ordinated response to counter economic impact of coronavirus', https://ec.europa.eu/commission/presscorner/detail/en/IP_20_459 Accessed 25 June 2020.

[48] Carmen Verdonck, 'Can a Member State during the coronavirus crisis prohibit a life science/healthcare company from delivering certain products (such as testing kits or protective medical gear) or medicines to other EU/EEA countries?' https://www.altius.com/coronavirus-updates/598/can-a-member-state-in-times-of-corona-crisis-prohibit-a-pharmaceutical-company-to-deliver-certain-products-such-as-testing-kits-or-protective-medical-gear-to-other-countries-within-the-eu-and-order-it-to-give-full-priority-to-the-local-market Accessed 20 June 2020.

[49] The Coordinated economic response to the COVID-19 outbreak of 13 March 2020, COM (2020) 112 https://ec.europa.eu/info/sites/info/files/communication-coordinated-economic-response-covid19-march-2020_en.pdf Accessed 20 June 2020.

[50] European Commission, 'European Coordinated Response on Coronavirus: Questions and Answers' https://ec.europa.eu/commission/presscorner/detail/en/QANDA_20_458 Accessed 29 June 2020.

[51] Guidance note implementing regulation 2020/426 https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020XC0320(04)&from=EN Accessed 29 June 2020.

the free movement of persons, especially of EU citizens returning home and cross-border EU workers. The Commission adopted guidelines concerning the exercise of the free movement of workers during the COVID-19 outbreak. These guidelines must remind Member States that if an exception on the free movement of workers is to be justified, it must also be proportionate, necessary and non-discriminatory.[52] Furthermore, the Commission recalls that border controls may only be used as a last resort solution and must be temporary. Moreover, the restrictions must be proportionate to the seriousness of the virus in the concerned member state.[53] It is the task of the Commission to identify and assess the restrictions on the free movement of persons.[54]

The most affected sectors by the COVID-19 crisis are transport, tourism and retail. First, since the COVID-19 outbreak, the transport sector has been hit hard,[55] as the industry is not merely hit by the virus itself, but also by the national containment measures, taken to manage the pandemic.[56] The Commission recognises the enormous impact of the COVID-19 crisis on EU transport systems and on the international aviation industry in general. Therefore, the EU introduced a Regulation on airport slots, which will temporarily relieve the airports from the "use-it-or-lose-it" obligations under EU legislation. These obligations require air carriers to use no less than 8 per cent of their airport slots, so they could hold the slots for another year. Alongside these measures, the Commission attempts to ease the major impact of the virus on the aviation industry.[57]

Secondly, the United Nations' World Tourism Organisation[58] ('UNWTO') states that the global tourism industry will be the hardest-hit by the pandemic, due to national lockdowns. According to the World Travel and Tourism Council, 75 million jobs worldwide are at risk in the industry. Some Member States, such as Italy, Spain and France, are expected to be hit the hardest. These EU countries are very reliant on tourism and heavily affected by the COVID-19 outbreak. Furthermore, Greece is also a vulnerable EU country, as in 2017 it was shown that more than a third of the national employment was within the tourism industry.[59] The Commission is takings steps to monitor the impact on this industry and to coordinate supporting actions and measures and it works together with professional associations, international

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[52] Guidelines concerning the exercise of the free movement of workers during COVID-19 outbreak [2020] OJ C 102 I/12 https://eur-lex.europa.eu/legal-content/ENG/TXT/PDF/?uri=CELEX:52020XC0330(03)&from=FR Accessed 29 June 2020.

[53] Philippe Vlaemminck, 'The free movement of persons (tourists and workers) in the European Union and COVID-19' https://www.pharumlegal.eu/blog/the-free-movement-of-persons-tourists-and-workers-in-the-european-union-and-covid-19/ Accessed 27 June 2020.

[54] Willem Maas, *Democratic Citizenship and the Free Movement of People* (Nijhoff 2013).

[55] José Rivas, 'The EU Commission recognises the major impact of the COVID-19 in EU transport systems and aviation sector' *Concurrences* (18 March 2020) https://www.concurrences.com/en/bulletin/news-issues/march-2020/the-eu-commission-recognises-the-major-impact-of-the-covid-19-in-eu-transport Accessed 29 June 2020.

[56] European Commission, 'COVID-19: EU Member States join forces to keep priority traffic moving', file:///C:/Users/emmyt/AppData/Local/Packages/Microsoft.MicrosoftEdge_8wekyb3d8bbwe/TempState/Downloads/covid-19_eu_member_states_join_forces_to_keep_priority_traffic_moving_mobility_and_transport%20(1).pdf Accessed 30 June 2020.

[57] European Commission, 'Covid-19: Commission sets out European co-ordinated response to counter economic impact of coronavirus', https://ec.europa.eu/commission/presscorner/detail/en/ip_20_459 Accessed 30 June 2020.

[58] The UNWTO is responsible for the promotion of responsible, sustainable and universally accessible tourism.

[59] Alice Tidey, 'Coronavirus in Europe: Tourism sector 'hardest hit' by COVID-19' *Euronews* (16 April 2020) https://www.euronews.com/2020/04/16/coronavirus-in-europe-tourism-sector-hardest-hit-by-covid-19 Accessed 2 July 2020.

authorities and the EU countries to that end.[60] A press release of the conference with the EU Tourism ministers states that the mission of the EU is to be "a leader in the recovery of tourism". The EU tourism industry covers 10 per cent of the EU's GDP and 12 per cent of EU's employment. In addition, the tourism sector is the EU's fourth biggest export category. The importance of creating a joint solution to the crisis of the tourism industry and creating plans and programmes to be able to combat comparable future crises, was highlighted.[61] Furthermore, the representatives focused on the need for allocating budgetary funds, facilitating transport connections and measures protecting consumers and tourism operators. In addition, they underlined the need for an EU strategy supporting the exit from the crisis, and the resumption of the tourism sector. Finally, the Tourism ministers voiced strong support for new measures on national and EU level for the recovery of the tourism industry.[62] Lastly, Member States are taking national measures which require local shops to close for public health reasons. As a result, the retail business is hit hard through these actions. In response, the Commission President announced that the EU budget will financially support small and medium businesses. The European Investment Fund, for example, will provide 8 billion euro in loans for approximately 100,000 small and medium enterprises and small and medium capital enterprises.[63]

The Commission introduced a temporary framework that relaxes the State aid rules during the COVID-19 crisis. The framework supports businesses, workers and consumers affected by the economic crisis caused by COVID-19. It also presents multiple support measures for Member States where the involvement of the Commission is not needed. Consequently, EU State aid control is not required.[64] During the Eurozone crisis, a similar temporary framework was used to support access to finance.[65] On 17 March 2020, the Commission President announced the immediate activation of the escape clause of the Stability and Growth Pact ('SGP').[66] This escape clause can be put into force only in "severe economic downturn", and even though there is no definition for a "severe economic downturn", all Member States agreed the COVID-19 crisis is the biggest crisis since the Second World War. The suspension temporarily relieves Member States from structural adjustments, which they normally carry out in order to meet fiscal targets.[67] Ecofin explains that the suspension will allow Member States to take all necessary measures to support the healthcare systems and the economy in the EU. [68]

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[60] European Commission, 'Covid-19: Commission sets out European co-ordinated response to counter economic impact of coronavirus', https://ec.europa.eu/commission/presscorner/detail/en/ip_20_459 Accessed 25 June 2020.
[61] EU2020, 'Ministers voiced strong support for national and EU measures for the swift and effective recovery of tourism sector' https://eu2020.hr/Home/OneNews?id=259 Accessed 2 July 2020.
[62] Ibid.
[63] GTP, 'Commission: €37bn to Support EU States in Coronavirus Fight' https://news.gtp.gr/2020/03/13/commission-e37bn-support-eu-states-coronavirus-fight/ Accessed 25 June 2020.
[64] European Commission, 'Communication on Temporary framework for state aid measures to support the economy in the current COVID-19 outbreak' COM (2020) 1.
[65] European Commission, 'Communication on Temporary Union framework for State aid measures to support access to finance in the current financial and economic crisis' COM (2011) 5.
[66] The Stability and Growth Pact 1997.
[67] Jorge Valero, 'EU countries warn of 'severe economic downturn', suspend Stability Pact' *Euroactiv* (24 March 2020) https://www.euractiv.com/section/economy-jobs/news/eu-countries-warn-of-severe-economic-downturn-suspend-stability-pact/ ; Council of the European Union, 'Statement of EU ministers of finance on the Stability and Growth Pact in light of the COVID-19 crisis' https://www.consilium.europa.eu/nl/press/press-releases/2020/03/23/statement-of-eu-ministers-of-finance-on-the-stability-and-growth-pact-in-light-of-the-covid-19-crisis/ Accessed 5 July 2020.
[68] Economic and Financial Affair Council (EU).

The ECB aims to support the eurozone economy and EU citizens. Therefore, it announced it will spend 750 billion euros for a special Pandemic Emergency Purchase Programme ('PEPP').[69] The PEPP will prevent threats on the price stability and the functioning of the monetary policy transmission mechanism. Through this programme, the ECB aims to ensure that all sectors are able to absorb the impact of the crisis by offering financial support.[70]

Further, in response to the Eurozone crisis, the ECB has taken multiple actions in order to maintain price stability and to counter the effects of the crisis, and these measures made liquidity available for the banking systems.[71] The ECB's actions consisted not only of bond-buying programmes, but also actions, such as long-term refinancing operations and lower collateral standards.[72] However, the ECB acted slowly since there was prolonged uncertainty over whether or not the ECB would bail out the most affected states. This uncertainty led to very high borrowing costs and thus resulted in a liquidity crisis in periphery Member States. In the current COVID-19 crisis, the ECB acted more urgently and consequently kept borrowing costs low for all Member States.

The initial response from the EU towards the COVID-19 pandemic was fragmented and lacked strong coordination. In early March, the Prime Minister of Italy urgently asked for help when a deadly COVID-19 outbreak was threatening Italy. There was an urgent request for medical equipment for hospitals, but it took several days before any member state responded to the demand. The President of the Commission stated that the EU owed a duty towards Italy, since the EU failed to respond and act appropriately and sufficiently. The Commission admitted responsibility and apologised for not helping at the beginning of the deadly COVID-19 outbreak in Italy. Critics argue that the principle of EU solidarity did not show itself during the deadly outbreaks in several Member States.[73]

As response to the lack of EU support, the head of Eurogroup announced an agreement on a 500 billion euro rescue package for Member States that were badly affected by the pandemic. The deal was agreed by 19 finance ministers of the Member States. This EU rescue plan should limit the impact on the EU economy by creating safety nets for public finances, businesses and workers.[74] In particular, the rescue deal provides a safety net for the overwhelmed healthcare systems during the coronavirus outbreak. A total of 240 billion euros has been made available under the European Stability Mechanism ('ESM'). The only condition for Member States to access the fund is using it as support for their domestic financing of COVID-19 crisis costs, such as healthcare, prevention and cure. Moreover, the rescue deal provides a safety net for

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[69] European Central Bank, 'Our response to the coronavirus pandemic' https://www.ecb.europa.eu/home/search/coronavirus/html/index.en.html;
European Central Bank, 'ECB announces €750 billion Pandemic Emergency Purchase Programme (PEPP)' https://www.ecb.europa.eu/press/pr/date/2020/html/ecb.pr200318_1~3949d6f266.en.html Accessed 5 July 2020.

[70] NNB, 'ECB announces €750 billion Pandemic Emergency Purchase Programme (PEPP)' https://www.nbb.be/en/articles/ecb-announces-eu750-billion-pandemic-emergency-purchase-programme-pepp Accessed 5 July 2020.

[71] European Commission, 'A comprehensive EU response to the financial crisis: substantial progress towards a strong financial framework for Europe and a banking union for the eurozone' https://ec.europa.eu/commission/presscorner/detail/fi/MEMO_14_244 Accessed 2 July 2020.

[72] Gavin Thompson, 'The Eurozone crisis: action taken by the European Central Bank (ECB)' https://researchbriefings.files.parliament.uk/documents/SN06448/SN06448.pdf Accessed 2 July 2020.

[73] Gavin Lee, 'Coronavirus: EU offers 'heartfelt apology' to Italy' *BBC News* (16 April 2020) https://www.bbc.com/news/world-europe-52311263 Accessed 2 July 2020.

[74] Alasdair Sandford, 'Coronavirus in Europe: How will the EU €500bn rescue deal help people and businesses?' *Euronews* (10 April 2020) https://www.euronews.com/2020/04/10/coronavirus-in-europe-how-will-the-eu-500bn-rescue-deal-help-people-and-businesses Accessed 5 July 2020.

small and medium-sized businesses. In particular, an EU-wide loan scheme is created to help companies affected by the COVID-19 crisis. Finally, the deal provides safety nets for the self-employed and employees. Finally, a 100 billion euros is to be used to help self-employed and employees. The Commission aims to prevent businesses from dismissing employees and keep businesses running as much as possible. This plan will be carried out through loans to national governments, whilst providing guarantees to the EU-budget.[75]

The Finance Minister of France describes the agreements as "the most important economic plan in EU history" and as a sign of EU solidarity in this crisis. In addition, the Italian President hails the 500 billion euro deal as an expression of his faith in Europe again. [76] Although this effort to protect the most affected EU countries, the ECB[77] suggests 1.5 trillion euros is necessary to tackle the crisis. It is argued that the EU is stumbling through this crisis, as with the Eurozone crisis. Furthermore, resentment will remain within the Member States that felt they were affected by the absence of EU solidarity during the COVID-19 outbreak.[78] In addition, the aforementioned rescue deal addresses only short-term economic measures. There is no deal on how to handle the longer-term reconstruction of the EU. Moreover, the deal does not mention that debts should be shared through "corona bonds".[79]

The Eurozone crisis made clear that large and financially strong economies, such as Germany, play a key role in funding bail-out packages for Member States in need. During the Eurozone crisis a new permanent rescue scheme was established, namely the ESM. Germany was heavily criticised since it continuously interrupted agreement on the bail-out packages, which subsequently made them more expensive. Also, Germany's slow reaction to the crisis was not accepted by the Member States. Eventually Greece, Spain, Portugal, Cyprus and Ireland received bailout loans from the EU.[80] In the current crisis, the 'Franco-German engine" has eventually led to calls for financial support. The "frugal four" - including Sweden, Denmark, Austria and the Netherlands - still however prefer rescue funds financed predominantly by loans.[81]

In 2002, the European Union Solidarity Fund ('EUSF') was created for the purpose of supporting and showing EU solidarity towards Member States which were affected by major nature disasters. The fund covers 80 disasters, such as forest fires, storms and floods. Twenty-four different Member States are part of this fund which consists of over 5 billion euros.[82] Since April 2020, the scope of the EUSF is extended to major public health emergencies, as a

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[75] Ibid.

[76] Jan van der Made, 'EU agrees €500 billion coronavirus rescue package, but ECB says €1.5tr needed' *RFI* (10 April 2020) http://www.rfi.fr/en/europe/20200410-eu-500-billion-euros-rescue-coronavirus-hit-countries; Brussels Bureau, 'Coronavirus: EU finance ministers agree on €500 billion emergency fund' *Euronews* (10 April 2020) https://www.euronews.com/2020/04/09/coronavirus-eurogroup-finance-ministers-agree-on-500-billion-emergency-fund Accessed 2 July 2020.

[77] The European Central Bank.

[78] Katya Adler, 'Coronavirus pandemic: EU agrees €500bn rescue package' *BBC News* (10 April 2020) https://www.bbc.com/news/business-52238932 Accessed 2 July 2020.

[79] Alasdair Sandford, 'Coronavirus in Europe: How will the EU €500bn rescue deal help people and businesses?' *Euronews* (10 April 2020) https://www.euronews.com/2020/04/10/coronavirus-in-europe-how-will-the-eu-500bn-rescue-deal-help-people-and-businesses Accessed 2 July 2020.

[80] Rainer Hillebrand, *Germany and the Eurozone crisis: evidence for the country's "normalisation"?* (Discussion Paper No 10, October 2014) https://d-nb.info/1059718537/34 Accessed 5 August 2020.

[81] Stella Ladi, 'Coronavirus recovery – lessons from the Eurozone crisis' *The Conversation* (9 July 2020) https://theconversation.com/coronavirus-recovery-lessons-from-the-eurozone-crisis-142191 Accessed 5 August 2020.

[82] European Commission, 'EU Solidarity Fund' https://ec.europa.eu/regional_policy/en/funding/solidarity-fund/ Accessed 3 July 2020.

response to the outbreak of COVID-19. The application for support from the EUSF may be requested by any EU country or a country which is planning to join the EU. The application conditions require that the estimated expenditure on national measures concerning COVID-19 is over 0.3 per cent of the Member States' gross national income or over 1.5 billion euros within a period of four months. The EUSF supports the affected Member States by covering some of the public expenses on assistance and care for COVID-19 patients. Furthermore, the fund covers part of the public expenditures on controlling, preventing and monitoring the further outbreak of the virus. Finally, it covers the expenses on mitigating the impact of the public health emergency.[83]

The main objectives of the EU recovery plan of 21 July 2020 are described as the need to repair the COVID-19 damage, to reform the economies, and to redesign the societies of the EU. The EU leaders have come to an agreement on a recovery package and budget for the period of 2021-2027. This recovery plan aims to rebuild the EU and to invest in green and digital transformations.[84] The EU will need to borrow 750 billion euros on the financial markets to obtain the recovery budget, which will be repaid by means of future EU budgets. Both loans and non-repayable grants will be divided between the Member States, dependant on their situation. The negotiations on the recovery plan were characterised by difficulties on the division of the 750 billion euro fund. Several northern Member States, including Austria, Denmark, Sweden, Finland and the Netherlands blamed some Member States as being too eager to spend money on the most affected states.[85]

With regard to healthcare measures, to deal with the international shortage of medical and protective equipment, the Commission is taking all measures to ensure sufficient supply of essential goods within the EU. The President of the Commission states that the EU will focus on the protection of all health workers in the EU. This group is at the front line of the COVID-19 virus and therefore the EU must provide them with protective material.[86] On 19 March 2020, the Commission created for the first time a common rescEU stockpile of medical equipment. The Commission President express that this common EU reserve puts EU solidarity in action, since it aims to benefit all Member States. The extension of the implementing act under the EU Civil Protection Mechanism is taken by the Commission to that end.[87] Furthermore, an accelerated joint procurement procedure was launched for essential goods. The Commission has announced the launch of a joint public procurement with Member States for respiratory ventilators and testing kits and other facilities.[88] Moreover, the Commission has taken steps to increase the supply of particular Personal Protective Equipment ('PPE'), such as disposable facemasks.[89]

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[83] European Commission, 'COVID-19 - EU Solidarity Fund' https://ec.europa.eu/regional_policy/en/funding/solidarity-fund/covid-19 Accessed 3 July 2020.
[84] European Council, Conclusions (17, 18, 19, 20 and 21 July 2020) CO EUR 8 CONCL 4 https://www.consilium.europa.eu/media/45109/210720-euco-final-conclusions-en.pdf Accessed 30 July 2020.
[85] DW, 'EU leaders meet for 'very difficult' coronavirus recovery talks' https://www.dw.com/en/merkel-eu-rescue-deal-coronavirus/a-54211579 Accessed 5 August 2020.
[86] Lili Bayer, 'EU moves to limit exports of medical equipment outside the bloc' *Politico* (3 May 2020) https://www.politico.eu/article/coronavirus-eu-limit-exports-medical-equipment/v Accessed 25 June 2020.
[87] European Commission, 'COVID-19: Commission creates first ever rescEU stockpile of medical equipment' https://ec.europa.eu/commission/presscorner/detail/en/ip_20_476 Accessed 2 July 2020.
[88] Lili Bayer, 'EU moves to limit exports of medical equipment outside the bloc' *Politico* (3 May 2020) https://www.politico.eu/article/coronavirus-eu-limit-exports-medical-equipment/v Accessed 25 June 2020.
[89] European Commission, 'European Coordinated Response on Coronavirus: Questions and Answers' https://ec.europa.eu/commission/presscorner/detail/en/QANDA_20_458 Accessed 29 June 2020.

On 14 March 2020, the President of the Commission announced the implementation of an EU-wide export ban, also called "implementing act."[90] The Commission allocated certain personal medical equipment as a selection needed to prevent the further spread of COVID-19 in the EU.[91] The purpose of the export ban is to ensure that sufficient medical equipment stays within the EU. The export of such goods to third countries will only be possible by means of authorisation, valid for six weeks. The authorisation requirement is assigned to the Member States' governments, not to the European Council ('EU Council'),[92] and since the introduction of the EU-wide export ban, the Commission organises export controls.[93]

The Council of Europe Development Bank ('CEB') provided Italy with a 300 million euro healthcare loan in order to immediately cover the costs associated with the COVID-19 emergency. The Governor of the CEB, Rolf Wenzel, stated that the CEB wants to respond quickly to the impact of the pandemic. For this reason, the CEB will adapt its procedures and financially support the CEB members who are heavily affected by COVID-19. The approval of the healthcare loan for Italy proves CEB's commitment in this regard.[94] Both Italy and Spain receive extra loans for healthcare purposes, but not for social or economic purposes. In addition, both Member States remain subject to the European savings regulations. For these reasons, it is arguable whether the limited actions of the CEB promote EU solidarity.

The Commission introduced specific guidelines for Member States regarding border management measures.[95] The Commission demands that national restrictive measures on the free movement of people should be non-discriminatory, proportionate and governed by the principle of EU solidarity. The Guidelines for border management measures permit internal border controls on a temporary basis and for the specific reason of protecting public health. Furthermore, the reintroduction of border controls by Member States should be notified to the Commission. The guidelines allow to organise health checks to non-EU and EU citizens.[96]

Vaccination is the most crucial tool to stop the further outbreak of COVID-19 and to control the impact on health and the economy. Since the vaccination policy is delegated to the national authorities of Member States, the EU has a limited role to this regard. The Commission is merely authorised to support and assist Member States in coordinating their programmes and policies in finding a vaccine against COVID-19. Accordingly, the EU can support vaccine

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[90] Commission Regulation (EU) 2020/402 on making the exportation of certain products subject to the production of an export authorisation [2020] OJ L0077I/1.
[91] Isabelle van Damme, 'Analysis: "European Union imposes export restrictions on personal protective equipment"'https://eulawlive.com/analysis-european-union-imposes-export-restrictions-on-personal-protective-equipment-by-isabelle-van-damme/ Accessed 2 July 2020.
[92] The European Council is responsible for general political direction and priorities of the European Union. This body is composed of all heads of the Member States.
[93] Lili Bayer, 'EU moves to limit exports of medical equipment outside the bloc' *Politico* (3 May 2020) https://www.politico.eu/article/coronavirus-eu-limit-exports-medical-equipment/v Accessed 25 June 2020.
[94] CEB, 'Italy: CEB approves € 300 million for immediate expenditure associated with COVID-19 pandemic'https://coebank.org/en/news-and-publications/news/italy-ceb-approves-300-million-for-immediate-expenditure-associated-with-covid-19-pandemic/ Accessed 29 June 2020.
[95] European Commission, 'Guidelines for border management measures to protect health and ensure the availability of goods and essential services'COM (2020) 1753 final.
[96] EULawLive, 'Commission's Guidelines for border management measures to protect health and keep goods and essential services available during the COVID-19 crisis' https://eulawlive.com/commissions-guidelines-for-border-management-measures-to-protect-health-and-keep-goods-and-essential-services-available-during-the-covid-19-crisis/ Accessed 2 July 2020 ; European Commission, 'Guidelines for border management measures to protect health and ensure the availability of goods and essential services' COM (2020) 1753 final.

research and development and assist the national authorities to prevent vaccine hesitancy.[97] The primary goal of the EU is currently to develop and distribute a safe and effective vaccine as soon as possible. The EU aims to find a vaccination within 12 to 18 months. For these reasons, on 17 June 2020 the EU introduced an EU Vaccine Strategy.[98] The EU strategy should accelerate the development, manufacturing process and distribution of the vaccination against COVID-19. The objectives of the strategy are described as to ensure efficacy, safety and quality in the development of the vaccines. In addition, the strategy explains that, since the free movement of goods and persons, Member States are more interdependent from an economic and social perspective. Accordingly, the EU aims to provide affordable and equitable access to vaccines for all Member States in time.

In particular, the EU Vaccine Strategy aims for an EU approach with solidarity and efficiency. In order to achieve this goal, the strategy proposes a joint action on EU level, whereby centralising the vaccine procurement is key. An EU approach would prevent competition and enhance solidarity between Member States.[99] Finally, the Commission announced that it will partly finance the upfront costs for the vaccination producers. The Emergency Support Instrument[100] will partly fund this initiative.[101] The Commission President states that this search is "a moment for science and solidarity". Furthermore, the President argues that the development of a decent vaccine will only be achieved if Member States cooperate and put their resources, research and minds together.

Possible ways forward

EU institutions seem to be berated by the public for insufficient coordination and their late actions. Certain southern Member States are hit harder with COVID-19 than others, and the pandemic affects not only many victims, but also causes economic disasters in these Member States. Despite the principle of EU solidarity, multiple northern Member States have been reluctant to support the weaker states, financially or economically. In particular, Germany and the Netherlands have shown limited solidarity towards the southern states since the outbreak of COVID-19. After the Eurozone crisis, the fundamental contradictions and deficiencies of the EMU have not been fully eliminated. Consequently, the current public health crisis affects the weaker Member States of the Eurozone crisis even harder. The problem of the differences between Member States will thus continue to exist. Therefore, "a Europe of solidarity and cooperation" is more than ever an important goal.

Thierry Breton, EU Commissioner for the Internal Market, suggests that a "new Marshall Plan" is necessary to overcome and to cope with the economic fallout once the COVID-19 virus is over.[102] In 1948, the US Congress passed a so-called "Marshall Plan" on the request of George Marshall. This plan provided a more than 12 billion dollar funding to restore the Western part of Europe economically. The Marshall Plan recovered EU's industrialisation and generated

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[97] European Commission, 'Vaccination' https://ec.europa.eu/health/vaccination/overview_en Accessed 3 July 2020.
[98] European Commission, 'EU Strategy for COVID-19 vaccines' COM (2020) 245 final.
[99] Ibid.
[100] Council Regulation (EU) 2016/369 of 15 March 2016 on the provision of emergency support within the Union as amended by Council Regulation (EU) 2020/521 of 14 April 2020 activating the emergency support under Regulation (EU) 2016/369, and amending its provisions taking into account the COVID-19 outbreak [2020]OJ L 117/3.
[101] European Commission, 'Coronavirus vaccines strategy' https://ec.europa.eu/info/live-work-travel-eu/health/coronavirus-response/public-health/coronavirus-vaccines-strategy_en Accessed 3 July 2020.
[102] European Parliament, 'Parliamentary questions' https://www.europarl.europa.eu/doceo/document/E-9-2020-002329_EN.html Accessed 15 July 2020.

major investments in Western Europe.[103] Breton points out that a similar EU recovery plan with a powerful budget is necessary to overcome the current crisis and to make the EU more resilient. Further, he opines that the recovery will need "fast action, pragmatism and creativity". Most importantly, Breton refers to an urgent call for EU solidarity as priority number one, since no member state can overcome the consequences of the COVID-19 crisis alone.[104]

The EU recovery plan should not just provide the EU economy with capital. The new Marshall Plan should ensure alignment of the EU's industrial strategy with China and the US, and investments in technology and promotion of digital free trade. The EU recovery should focus on the free flow of data and digital free trade within the EU. Although there has been development towards a more digital single market, businesses are still facing difficulties in expanding and exploiting new technologies. Full cross-border access to online services and information for EU citizens does not yet exist. When an EU citizen needs health care in another EU country, for example, the access and exchange of relevant electronic health data is not always ensured. This is found to be a major issue in times of a public health crisis. The development of an integrated digital EU market is not sufficient, and in order to acquire a proper digital economy, EU businesses need to expand and reach more globally. The businesses are, however, limited in their competences to do so; in particular, the EU limits flows of cross-border data to trade partners as China and the US.[105] Overall, the EU's digital future should be characterised by new opportunities, such as e-Health, e-Government, digital education, broadband connectivity and data sharing. Regarding future mobile telecommunications, the introduction of 5G spectrum frequencies should be ensured by the end of 2020.[106]

The European Green Party further states that the current COVID-19 crisis is another emergency, such as climate change, which calls the organisation of societies and the way of living into question. For these reasons, it is argued that new transformational initiatives are required. Once the COVID-19 crisis is over, reform is suggested which should concentrate more on the self-employed and SME's. Further, the reconstruction should focus on investments in quality public services, particularly health care services. Finally, it should transform the whole EU economy in a more social and ecological economy.[107] Moreover, the need to improve healthcare systems in the EU is one of the main lessons learned from the COVID-19 crisis. The current crisis has a serious impact on all heath systems of the Member States, but some Member States are under more stress and tension than others. The heavily affected Member States are often less outfitted than others in terms of medical staff, devices, capacity and the number of qualified experts. Consequently, EU institutions and Member States should cooperate more to ensure the most efficient use and production of medical equipment across the EU. Also, information and expertise about the pandemic should be exchanged in a more equal way.

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[103] Office of the Historian, Foreign Service Institute, 'Marshall Plan 1948' https://history.state.gov/milestones/1945-1952/marshall-plan Accessed 15 July 2020.
[104] EU2020HR, 'Ministers voiced strong support for national and EU measures for the swift and effective recovery of tourism sector' https://eu2020.hr/Home/OneNews?id=259 Accessed 15 July 2020.
[105] Eline Chivot, 'The EU's post-coronavirus Marshall Plan must have a focus on improving its digital economy' *Euronews* https://www.euronews.com/2020/05/14/the-eu-post-coronavirus-marshall-plan-must-focus-on-improving-its-digital-economy-view Accessed 20 July 2020.
[106] European Commission, 'Europe's moment: Repair and prepare for the next generation' https://ec.europa.eu/commission/presscorner/detail/en/ip_20_940 Accessed 15 July 2020.
[107] European Greens, 'It is time for the Europe of Solidarity: Coronabonds now' https://europeangreens.eu/news/it-time-europe-solidarity-coronabonds-now Accessed 20 July 2020.

Although health care is a national matter, the COVID-19 virus is not bound by borders and thus affects the EU entirely. For this reason, a common EU response to ensure more resilient health systems in the future, is required. To tackle cross-border health threats in the future, the EU should focus more on prevention and preparedness. Furthermore, the EU should build emergency reserves of medical supplies and establish a EU health emergency team to provide technical and expert advice. Finally, the EU should provide more coordination on emergency health care capacity.[108]

The current healthcare crisis also demonstrates that the EU is often dependent on non-EU countries in terms of medical equipment. Accordingly, the EU needs to support investments in health protection, health care and long-term care aid. Moreover, this should be governed by preventive, occupational healthcare and safety policies. Further, the creation of a research and development fund is required for new vaccines and medication in order to tackle the problem of the EU's dependence on giant pharmaceutical companies. Finally, the EU institutions should provide more coordination on prices, and distribution and supply of vital protective and medical material within the EU market.[109] Accordingly, the EU should support the Member States with the acquisition and validation of testing kits for immunity and infection. The testing kits could be used to set up safe workspaces and to put an end to the border closures and export restrictions.[110]

Once the health systems are strong enough to fight against a future public health crisis, national measures, such as restrictions on free movement of goods and persons, will become less necessary. Furthermore, due to the number of border restrictions and border closures, the tourism industry is one of the most affected sectors in the ongoing crisis. Tourists and EU citizens can no longer freely travel, and this heavily affects the EU tourism industry, one of the key players of the EU economy. A proper coordinated EU effort in order to ensure safe travel and free movement across all EU countries is required. In addition, the EU should support the tourism sector financially in order to rebuild the industry.

According to EU officials, the re-launch of the tourism industry after the COVID-19 crisis will need to adhere to the following series of phases. First, a steady relaunch is essential in order to prevent new COVID-19 outbreaks. Second, during the process of recovery, the impact of the virus on the business industry should be managed and mitigated through economic measures. Third, it will be necessary to concentrate on the domestic flows of tourism in order to rebuild and boost the industry. Lastly, it is fundamental to persuade and give tourists the confidence again to travel across the EU.[111]

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[108] European Commission, 'EU4Health programme' https://ec.europa.eu/health/sites/health/files/funding/docs/eu4health_factsheet_en.pdf Accessed 5 August 2020.
[109] European Economic and Social Committee, 'EESC proposals for post-COVID-19 crisis reconstruction and recovery: "The EU must be guided by the principle of being considered a community of common destiny."' https://www.eesc.europa.eu/en/documents/resolution/eesc-proposals-post-covid-19-crisis-reconstruction-and-recovery-eu-must-be-guided-principle-being-considered-community Accessed 19 July 2020.
[110] Alessio Pacces and Maria Weimer, 'From Diversity to Coordination: A European Approach to COVID-19' (2020) 11 European Journal of Risk Regulation, 283-296.
[111] Jacqueline-Nathalie Harba, 'From growth, to chaos, to uncertainty: the impact of the COVID-19 pandemic on European tourism' https://www.researchgate.net/profile/Bassel_Diab/publication/342124082_BASIQ_2020_Conference_proceedings/links/5ee37056458515814a583fe1/BASIQ-2020-Conference-proceedings.pdf#page=1249 Accessed 15 July 2020.

The COVID-19 crisis have also disrupted supply chains in the EU. It has been demonstrated that the disruptive supply chains cause problems in terms of medical supplies across the EU. During a public health crisis, the need for medical equipment, products and devices to provide healthcare to the infected EU citizens, is very high. After the tsunami in 2011, large organisations decided to focus more on risk mitigation to tackle the supply chain issues. Also in the current situation, it is recommended for all businesses to invest more in risk mitigation strategies and policies. It is, however, argued that risk mitigation processes are not strong enough to protect an organisation against a major and unprecedented crisis, such as COVID-19. An alternative for the business industry is to invest in the elasticity of their supply chains. Engaging with new suppliers, investing in online sales and increasing stocks are prudent ways for organisations to secure their supply chains in a future crisis. These recommendations will only be beneficial if businesses take timely and proactive actions.[112]

Finally, critics argue that the current crisis and previous crises, clearly demonstrate the weaknesses of the EU and hence the need for EU reform. In particular, the EU and its institutions have demonstrated carelessness in their responsibilities and actions. Critics argue that the EU manages the COVID-19 cases on the grounds of Darwin's natural selection theory, instead of an EU strategy for which EU citizens have been paying taxes the past years. The EU had knowledge of the COVID-19 outbreak in China, but nevertheless failed to act on time. Hereafter, the EU still failed to take a uniform approach and timely measures for the Member States. Consequently, Member States faced a number of challenges including capacity and individual measures, clashing with other Member States. Finally, several Member States could not yet use the EU funds, due to the EU bureaucracy.[113]

Critics suggest that there are two alternatives for the EU once the COVID-19 crisis is over. A first option would be turning back to the origin. This would mean the EU would be nothing more than a mere economic and trade union. Other aspects would remain the responsibility of the Member States, as individuals. A second option is the opposite of the first, namely a major reformation of the EU which would allow the EU to face all global challenges as a single body, where no individual measures are at stake. This would enhance the speed, efficiency and efficacy of the functioning of the EU. From the perspective of EU solidarity, the first option would not enhance solidarity, but the second option could definitely ensure more solidarity across the EU. It is questionable whether one of these reform options will be realised, considering the different political opinions of the Member States.

Conclusions

The legal framework around EU solidarity shows that a clear definition and scope is lacking in the fragmented EU legislation. This may explain the reluctance of the CJEU in employing EU solidarity as a legal instrument. The principle appears, however, in different areas of EU law and thus has different interpretations. Further, EU solidarity is often under threat in times of crisis, as demonstrated in the Eurozone crisis and the Migrant crisis. With regard to the Member States, it is demonstrated that national governments are primarily responsible for the risk

[112] Wharton, 'Coronavirus and Supply Chain Disruption: What Firms Can Learn' https://knowledge.wharton.upenn.edu/article/veeraraghavan-supply-chain/ Accessed 15 July 2020.
[113] Bashkim Smakaj, 'COVID-19 and the need for deep EU reform' *Euractiv* (22 April 2020) https://www.euractiv.com/section/future-eu/opinion/covid-19-and-the-need-for-deep-eu-reform/ Accessed 22 July 2020.

assessment and management in a public health crisis. This results in divergent approaches and measures from Member States as a reaction to the COVID-19 crisis.

Looking at the socio-economic measures of the Member States, the measures were not always in conformity with EU solidarity. In particular, the restrictions on the free movement of goods and persons clashes with the EU solidarity principle. The Member States are, however, allowed to adopt export restricting measures on goods and services in exceptional public health situations. It is argued that this might be in conflict with what it is politically wise to do in a public health crisis. The individual measures often failed to respect the principle of EU solidarity, since they resulted in conflicts of interests and cross-border spill-overs. Further, financial aid for the most affected Member States seems to be subject of difficult debates in terms of conditions. In particular, the wealthier Member States are rather reluctant to cooperate and slow down decisions on rescue packages.

Looking at the healthcare measures, the Member States have shown some clear examples of solidarity towards each other. Several Member States helped others with the treatment of COVID-19 infected patients. Furthermore, a number of Member States supported each other with the protection of health workers and EU citizens by means of sharing protective material. Additionally, intra-European flights were organised to repatriate EU citizens. Finally, solidarity was shown in the search and development of a vaccine against COVID-19, since four Member States decided to cooperate to this end. Although healthcare is a national competence, the research demonstrates some signs of solidarity between Member States.

With regard to the EU institutions, it is illustrated that they have only limited powers and responsibility in managing a public health crisis. The EU is only responsible for the coordination of national responses and the information exchange. Consequently, it is argued that the EU lacks competences to properly manage a public health crisis.

Examining the socio-economic measures taken at EU level, EU solidarity is supported in some respects. The EU demonstrates solidarity since it supports and focuses on the most affected industries. Also, both the EU rescue deal and the EU solidarity fund show commitment in that regard. Further, the relaxation of certain rules and suspension of certain pacts give Member States the opportunity to rebuild their affected economy. However, these efforts lacked a proper coordination on the national restrictions on goods and people.

Looking at the healthcare measures taken at EU level, EU institutions made positive progress in the promotion of EU solidarity, despite healthcare being a national competence. The Commission aims to handle the Member States' shortages of medical equipment by introducing a rescEU stockpile of medical equipment. In addition, the Commission implemented an EU-wide export ban to ensure that specific medical equipment stays in the EU. Also, the EU supported Member States' healthcare systems by means of healthcare loans. Further, the EU provided guidelines on border management to prevent as much as possible inappropriate measures against the principle of EU solidarity. Finally, the EU supported solidarity by introducing an EU Vaccine Strategy to ensure cooperation between the Member States in the search for a vaccine.

In conclusion, differences in solidarity engagement between the Member States still exists and hence there is no evidence of aligned EU solidarity. On the other hand, EU institutions stimulate and promote solidarity, particularly the EU organised and coordinated solidarity, by providing Member States with the necessary mechanisms, resources and strategies. The effectiveness of these efforts depends nonetheless on the eagerness of the Member States to show EU solidarity. Overall, it has been demonstrated that more EU solidarity and an efficient EU-wide solution are required to overcome the COVID-19 crisis.

CORPORATE LAW

Interrogating challenges of corporate crime control in Nigeria

Dr. Khairat Oluwakemi Akanbi* and Kafilat Omolola Mohammedlawal **

Introduction and background

Corporate crime and criminality is an increasingly global problem, probably because of the growth in technology and industry. Thus, there has been a growing need to control this menace through the law in different jurisdictions. From the United Kingdom, Australia, South Africa and other countries, there has been witnessed continuous law reform with respect to controlling corporate crime. Nigeria, as a developing nation, is not left out of the challenge of the increase in crimes committed by corporations. It has had its share of violent and non-violent crimes, from adulterated drugs and foods, economic and financial crimes, collapsed buildings and generally substandard goods and services. Almost on a daily basis, there are reports of criminal acts committed by corporations in Nigeria.

A peculiar challenge to the control of corporate crime in Nigeria is the absence of an adequate legal framework, as there are loopholes in the existing legal and constitutional framework. Essentially, the criminal law was developed with the natural person in mind and Nigerian criminal laws have not evolved towards adapting the criminal law to the corporation, which is an artificial person.[1] Therefore, there is the challenge of determining the *actus reus* and *mens rea* of a corporation.[2] Different jurisdictions have found ways of reforming the law to cater for the peculiarity of the artificial person. In Commonwealth countries such as the United Kingdom, Malaysia and Australia, the identification theory has been used to determine the corporate *mens rea* and thus enhance the legal framework for corporate criminal liability.[3] However, both the United Kingdom and Australia has since adopted liability theories other than the identification theory. The United Kingdom, via the Corporate Manslaughter and Corporate Homicide Act,[4] created the management failure theory, while the Australian Criminal Code Act created the corporate culture theory.[5] However, Nigeria is still grappling with identifying the corporate *mens rea*, although with respect to homicide, the management

* Senior Lecturer, Faculty of Law, University of Ilorin. Nigeria. E-mail:khairatakanbi@rocketmail.com
** Lecturer, Al-Hikmah University, Ilorin, Nigeria. Email: kmohammedlawal@gmail.com

[1] Akanbi, Khairat Oluwakemi, "The Legal Framework for Corporate Liability for Homicide: The Experience in Nigeria and the United Kingdom" *IIUM Law Journal* 22 (1) 2014, 116-136.

[2] The *Actus reus* which is the external element of a crime and the act or omission constituting the crime has been described as the acts of the general meeting, the board of directors and officers and members delegated to act as the corporation. The greater challenge is the *mens rea* or the mental element. This is difficult to determine as the corporation is an artificial entity incapable of any emotive feeling. However, there have been attempts by different jurisdictions over time to determine the corporate *mens rea*. For a more detailed analysis on the challenge of the corporate *mens rea*, see K.O.Akanbi and D.A.Ariyoosu, 'Corporate Criminal Liability: Imperatives of Criminalising Corporate Wrongs' (2014) (9) *University of Ilorin Law Journal* (9) 184.

[3] The identification theory identifies certain categories of persons in the corporation as the alter ego of the corporation who acts not for the corporation but as the corporation. It is the *mens rea* of these categories of persons in relation to a crime that is treated as the corporate *mens rea*. See the case of *Bolton Engineering Co. Ltd v. Graham and Sons* (1957)1QB 159

[4] Corporate Manslaughter and Corporate Homicide Act 2007

[5] Criminal Code Act 1995

failure theory has been proposed in the current Corporate Homicide Bill. Also, the identification theory has been adopted in Nigeria, but only in respect of civil liability.[6]

An inadequate legal framework is not the only obstacle to efficient and effective corporate crime control. This article argues that there are political challenges to corporate crime control in Nigeria and finds that if the political challenges are not surmounted, there cannot be an efficient control of corporate crime. An example is the case of *A.G Kano State v Pfizer International Inc*.[7] In this case the multinational pharmaceutical company Pfizer conducted a clinical drug trial in 1996 in Kano, Nigeria. This eventually led to the death of eleven children and several others with permanent injury and disability.[8] As a result of the national outcry and condemnation of the drug trial, the Kano State government attempted the prosecution of Pfizer Inc. for the deaths. This prosecution was stopped and an out of court settlement was reached between the government and Pfizer.

Similarly, Julius Berger Nigeria Limited was indicted as serving as a conduit through which a bribe was offered and accepted between Halliburton and some Nigerian government officials. While Halliburton was prosecuted and convicted in the US,[9] there was no equivalent prosecution in Nigeria, rather Julius Berger entered into a plea bargaining agreement with the government and paid approximately twenty six million dollars in exchange for which the government dropped the criminal charges bordering on corruption against it.[10] Thus, in addition to the inadequate legal framework, there is need for constitutional and political reforms.

Corporate crime

Generally, there are challenges in adapting the traditional definition of crimes to a corporate body because the criminal law evolved with the natural person in mind. Besides, the idea of a corporation committing a crime is contradictory to the existence of a corporation, as a corporation should ordinarily be formed for a lawful purpose. Thus, a corporate crime will be *ultra vires* the powers of a corporation.[11] However, the recognition of a corporation as a person in the eyes of the law is a justification for corporate crime, for it means, like a natural person, a corporation is a rights and duties bearing entity who can do both right and wrong.

Crime generally has been subject to different definitions. According to Curzon *et al*, law is dynamic and changes with the society, and therefore what constitutes crime at a specific time is a response to the prevalent needs of the society.[12] Crime is an act or omission prohibited by public law for the protection of the public and made punishable by the State in a judicial proceeding in the State's name. Thus, corporate crime has been defined as a deviant behaviour within the context of a corporation and by a corporation.[13]

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[6] For example, it was used in *Delta Steel (Nig) Ltd v. American Computer Technology Incorporated* (1999) 4NWLR pt.597

[7] *A.G Kano State v. Pfizer International Inc*. (Unreported) Suit No K/233/2007

[8] www.bbc.co.uk/news/world-africa14493277 posted on 11th August, 2011, accessed on 7th January, 2019.

[9] http://www.cnn.com/2010/WORLD/africa/12/21/nigeria.halliburton/index.html accessed on 21st June, 2018

[10] Sunday Trust Newspapers, 26th December, 2010. See K.O. Akanbi, 'Corporate Criminal Liability as a Catalyst for Effective Anti-Corruption War in Nigeria' *K.I.U Journal of Humanities* 3(1) 2018, 95- 104.

[11] Akanbi and Ariyoosu supra note 2, p.189-190

[12] C.M.V. Clarkson, H.M. Keating and S.R.Cunningham, *Criminal Law Text and Materials* London: Sweet & Maxwell, 2007, 3.

[13] R. Kramer, 'Defining the Concept of Crime: A Humanistic Perspective' *Journal of Sociology and Social Welfare* (5) 1985, 469- 487

Political challenges in prosecuting corporations

Politics plays a vital role in human endeavour. After all, it has been said that man is a political animal. Essentially, the attitude, policies and ideology of government play a crucial role in crime control because it is the government through its various arms that defines what constitutes crime, and which interprets and enforces the law on crime.

The three arms of government in Nigeria play important roles in crime control. They are recognised as the reflection of government in Nigeria and their powers are identified in the 1999 Constitution.[14] Thus, an effective discharge of the constitutional powers of the three arms will go a long way in crime control generally and corporate crime control specifically. The political challenges to this are discussed below.

Lack of effective checks and balances

In principle, the doctrine of separation of powers operates in Nigeria.[15] The 1999 Constitution clearly sets out the powers of the three arms of government in its Chapter One, Part Two. Section 4(1)[16] provides:

> The legislative powers of the Federal Republic of Nigeria shall be vested in a National Assembly for the Federation which shall consist of a Senate and a House of Representatives.
>
> (2) The National Assembly shall have power to make laws for the peace, order and good government of the Federation or any part thereof with respect to any matter included in the Exclusive Legislative List set out in Part I of the Second Schedule to this Constitution.'
>
> Also, section 5 (1) vests the executive powers of the Federation in the President which can be exercised by him directly or through the Vice President or Ministers, while section 6 provides:
>
> (1) The judicial powers of the Federation shall be vested in the courts to which this section relates, being courts established for the Federation.
>
> (2) The judicial powers of a State shall be vested in the courts to which this section relates, being courts established, subject as provided by this Constitution, for a State.[17]

Closely related to the principle of the separation of powers, is the doctrine of checks and balances. This means that each arm of government serve as a form of check on the powers of the other two arms of government. The 1999 Constitution contains provisions on ways by which the three arms of government can check the excesses of each other. For example, s.80 gives the legislature, power over public funds in the Consolidated Revenue Fund. Also, section

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[14] 1999 Constitution of Nigeria as amended.
[15] The principle of separation of powers propounded by Baron de Montesquieu in his book The Spirit of the Laws (1748) divides the institution of government into three branches with the powers and functions of each separate.
[16] Section 4(6) vests the legislative powers of a State in the federation in the House of Assembly of a State.
[17] The courts are listed in section 6(5) 1999 Constitution.

88 provides that the legislature can investigate the activities of the executive arm of the government. s.88 (1) Provides:

> Subject to the provisions of this Constitution, each House of the National Assembly shall have power by resolution ….to direct or cause to be directed an investigation into-
>
> any matter or thing with respect to which it has power to make laws; and
>
> the conduct of affairs of any person, authority, ministry or government department charged, with the duty or responsibility for-
>
> (i) executing or administering laws enacted by the National Assembly, and
>
> (ii) disbursing or administering moneys appropriated or to be appropriated by the National Assembly.

In addition, the legislature also checks executive powers through the provisions of s.85 which empowers it to audit the public accounts of the federation.[18]

Section 231(1) and (2) provides that the executive appoints Justices into the Supreme Court but subject to the approval of the Senate. This provision serves as a form of executive and legislative check on judiciary. The judiciary serve as a check on both the executive and legislative arms through the powers confirmed on it by s.235 of the Constitution which provides that the decision of the Supreme Court shall be final and not subject to any form of review by any other person or body in Nigeria.

Despite the existence of separation of powers and the attendant checks and balances stated above, the doctrine of checks and balances as contained in the Constitution is inadequate. This is because too much power is concentrated in the executive arm of government. The President as the Executive Head wields enormous powers and control over the Armed Forces and the Police. Section 130 (2) provides that the President is the Chief Executive of the Federation and is also the Head of State and the Commander in Chief of the Armed forces. Thus, appointments into the office of the Inspector General of Police and Head of the Armed Forces are within the exclusive of the President. In addition, sections 153(1) and 154 provide that the President appoints the Chairman and members of the Nigeria Police Council, Police Service Commission and the National Defence Council. In the same vein, section 154 confers powers on the President to appoint the Chairman and members of the Federal Judicial Service Commission and the National Judicial Council.[19] Appointments of Justices are also made by the President.[20]

Similarly, appointment of Chairman and members of the Independent National Electoral Commission is made by the President. He may therefore influence and determine who gets elected into the legislative arm of government.

The wide executive powers of the President can affect the independence of the judiciary. Besides the President's power of appointment of judicial officers, the judiciary is also funded by a consolidated revenue fund which is in control of the Accountant General who is a political

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[18] Section 162 also gives legislature power over public revenue as it provides that the president make proposal of revenue allocation from the federation account.
[19] Section 154 However, such appointments are subject to confirmation by the Senate.
[20] Sections 231 and 238 the appointments are however subject to confirmation by the Senate.

appointee of the executive. Yet, an efficient and truly independent judiciary is important for effective crime control.

There have been instances where the Nigerian judiciary have made some pronouncements suggesting government patronage. For example, in *Yusuf v. Obasanjo,*[21] the Supreme Court held that financial contributions to the campaign fund of then President Olusegun Obasanjo by corporate bodies did not constitute undue influence. In this case, some private and public companies were alleged to have contributed to the campaign funds of then President Olusegun Obasanjo, in clear violation of the provisions of s. 221 of 1999 Constitution which provides that no association other than a political party should contribute funds to a political party or the election expenses of a candidate. Also, the donations also violate the provisions of s. 8(2) the Companies and Allied Matters Act (CAMA)[22] which provides that a registered company shall not directly or indirectly donate funds or property to a political party.

It may be argued that the Supreme Court exercised its power of judicial review by the decision in *Yusuf v. Obasanjo*.[23] This is more so because corporate donation to the funding of political parties is allowed in jurisdictions such the United Kingdom: s.54(2) of the UK's Political Parties, Elections and Referendums Act[24] allows corporate donations to political parties. However, the position in the UK is not apposite, as there is no express prohibition of corporate funding of political parties in the UK's electoral legislation. Besides, it is submitted that the power of judicial review should be exercised to ensure fairness and the smooth operation of government and should be used to prevent tyrannical government.[25]

Thus, the correct interpretation of s.221 of 1999 Constitution and s.38(2) of CAMA is that corporate funding of political parties and candidates is prohibited. Thus the decision of the Supreme Court in *Yusuf v. Obasanjo* was reached in error and suggests executive influence over the decision. It is therefore hoped that the Supreme Court will overrule itself in due cause. Further, in *A.G Ondo v. A.G. F,*[26] the Supreme Court held that the provision of s.26(3) of the Anti-Corruption Act, which states that prosecution of corruption should be carried out within ninety days, is unconstitutional because it constitutes interference with judicial powers. It is submitted however that s.26(3) was meant to facilitate speedy and diligent prosecution of corruption cases. Judgements like this tend to frustrate successful prosecution and ultimately work against the interest of justice.

Also, besides the judiciary, many regulatory agencies which include the Economic and Financial Crimes Commission (E.F.C.C), the Independent Corrupt Practices and the Other Related Offences Commission (I.C.P.C), the National Drug Law Enforcement Agency (N.D.L.E.A), are under the control of the President. For example, the EFCC Act provides in s.2(3) that the Chairman and members of the Commission, excluding ex officio members, shall be appointed by the President subject to confirmation of the senate. It also provides that any member of the Commission may be removed by the President at any time. Section 3(2) provides:

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[21] (2003) 16 N.W.L.R Pt. 847.
[22] Cap C20, L.F.N 2004.
[23] (2003) 16 N.W.L.R Pt.847.
[24] 2000.
[25] For a detailed discussion on the exercise of power of judicial review, see Abdulfatai O.Sambo and Hunud Abia Kadouf, 'The Intensity of Judicial Review in Political Disputes: Measuring the Merits and the Risks' *Pensee Journal* (2014) 76 (2) 263.
[26] (2002) 9 N.W.L.R Pt. (772) 222.

> A member of the Commission may at any time be removed by the President for inability to discharge the functions of his office (whether arising from infirmity of mind or body or any other cause) or for misconduct or if the President is satisfied that it is not in the interest of the Commission or the interest of the Public that the member should continue in office.

Therefore, the E.F.C.C Act places a high discretion on the President as he can remove any member if *he is satisfied* that it is in the best interest of the public to do so.[27] This can affect the impartial discharge of the activities of the Commission, for as stated above, the Inspector General of Police is appointed by the President. The President wields a lot of powers over stakeholders in the criminal justice system.

Thus, the executive arm of government through the President wields a great deal of power and control over the other arms of government. The constitutional checks and balances are thus inadequate and wide executive powers can be subject to abuse and affect the impartial discharge of duties by the stakeholders in the criminal justice system.

Corruption and lack of political will

Corruption has been defined as conduct violating established norms in order for selfish gain at the expense of the public.[28] The fight against crimes generally, and specifically corporate crime, cannot be won without the necessary political will. Political leadership must therefore show that the government is willing to control crimes by setting examples and showing that no one is above the law. In the absence of decisive signs by the leadership, the law enforcers may feel inhibited. However, the attitude of successive governments in Nigeria leaves much to be desired in the fight against crimes generally, and corporate crimes in particular. As stated above, the executive is the most powerful arm of government in Nigeria, and the absence of a political will in the executive to fight corporate crime is therefore a challenge to corporate crime control.

There have been over time allegations of criminal activities against the executive arm of government which send out a wrong signal to the stakeholders in the criminal justice system and society at large. An example of brazen executive disregard for the rule of law is seen from the earlier cited case of *Yusuf v. Obasanjo,* which seemed to encourage corporations to violate specific provisions of the Constitution and the Companies and Allied Matters Act. One of the effects of the open violation of the law is that the executive sets a poor example and shows that it lacks the moral right to fight crimes generally and to enforce the criminal law. Another example is evident in the attitude of successive governments in the handling of the Halliburton saga which indicted Nigerian companies. It shows clearly that the attitude of the executive has remained a challenge to the enforcement of laws and the control of corporate crimes in Nigeria.

This fact is encouraged by the fact that the Attorney General of the Federation (AG), described in the Constitution as the chief law officer of the country, is a political appointee with no security of tenure. Therefore, it is doubtful if the AG can discharge his functions without fear or favour. Also, the Supreme Court in *State v. Ilori*,[29] held that the powers of the Attorney-General are not subject to any review by any court. These near absolute powers given to the AG by the Constitution encourage executive abuse. For example, a former Nigerian Attorney

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[27] Emphasis added

[28] Chukwuemeka E., Ugwuanyi, B.J. and Ewuim N., 'Curbing Corruption in Nigeria: The Imperatives of Good Leadership.' *A.R.R.* 6(3) (26) 2012, 348.

[29] *State v. Ilori* (1983)2 SC 155 where the Supreme Court held that the powers of the Attorney General are not subject to review by any court.

General was reported[30] to have abused his office by frustrating plans by the Economic and Financial Crimes Commission to prosecute James Ibori, former Executive Governor of Delta State.[31] The acts of abuse of power by the then Attorney-General was such that it affected the international perception of the President Yar' Adua's government.[32] In fact, the United States threatened to review some bilateral agreements with Nigeria.[33] Political appointment is also reflective of the attitude of government towards crime control. For example, the police fall under the exclusive legislative list, and is therefore under the control of the Federal Government.[34]

Thus, the head of police, the Inspector General, is appointed by the President.[35] The will and attitude of the executive can influence the calibre of persons appointed as an Inspector General, and a serving Inspector General of Police under the regime of Former President Olusegun Obasanjo was convicted of corruption for having embezzled millions of naira.[36] If the Police is corrupt, it becomes almost impossible to fight crimes generally and worse still corporate crimes, because corporations usually have more money at its disposal to bribe. Also, a corrupt police force may affect the public perception of the police who should ordinarily report crimes. The people tend to lose confidence in the police and may be reluctant to report corporate crimes especially as the corporation is viewed as a powerful entity with more resources to bribe the police.[37]

Accordingly, corporate crimes cannot be effectively fought in the absence of the political will to do so. It is important that the executive sends the right signals to the Police, the judiciary and all other stakeholders for effective crime control.

The challenge of plea bargaining

Another political challenge to corporate crime control is the wide discretionary powers given to regulators by some regulatory legislation. This discretion has given rise to the situation whereby the regulators now explore alternatives to criminal prosecution. Specifically, the EFCC Act gives wide discretion to the regulators in the investigation and prosecution of offences. Section 6(f) of the EFCC Act provides that the Commission may adopt measures which includes preventive and regulatory actions and investigative and control techniques for the purpose of preventing economic and financial crimes.[38] Also, s.6(e) provides that the Commission may adopt measures to eradicate the commission of economic and financial crimes. Section 14(2) also gives the Commission discretion to compound any offence by

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[30] Olusegun Adeniyi, *Power Politics and Death: A front row account of Nigeria under the late President Yar' Adua.,* Lagos: Kachifo Limited 2011, 9.
[31] James Ibori was alleged to have misappropriated and embezzled funds belonging to his State, Delta State in the South South region of Nigeria while serving as the Executive Governor. He was eventually convicted in the UK on charges of money laundering. See www.theguardian.com/gloal-development/2012/apr/17/nigeria-governor-james-ibori-sentenced accessed on 30th January, 2019.
[32] President *Umaru Musa Yar' Adua* was Nigeria's President between May 2007 and May 2010. He died in office in May 2010.
[33] This was expressed by the United States Deputy Assistant Secretary of State, Todd Moss in a meeting with the Deputy Chief of Mission of the Nigerian Embassy. See also Olusegun Adeniyi, 2011 supra note 30, 17.
[34] Sections 215 and 216 1999 Constitution.
[35] ibid
[36] See https://www.dailytrust.com.ng/where-is-tafa-balogun.html accessed on 12th June, 2019.
[37] Some corporations especially multinationals have more resources than some States. Examples are ExxonMobil, Walmart, Apple Unilever, and HSBC amongst others.
[38] The Act establishes the Economic and Financial Crimes Commission in Section 1.

accepting any sum of money which it thinks fit, but exceeding the amount that the offender would have been liable to pay on conviction. It provides:

> Subject to the provisions of section 174 of the Constitution of the Federal Republic of Nigeria 1999 (which relates to the power of the Attorney-General of the Federation to institute, continue, takeover or discontinue criminal proceedings against any person in any court of law), the Commission may compound any offence punishable under this Act by accepting such sums of money as it thinks fit, exceeding the maximum amount to which that person would have been liable if he had been convicted of that offence.

It is on the basis of these provisions that the concept of plea bargaining is introduced into the Nigerian criminal laws. It must be stated that countries such as the United Kingdom, the United States and Canada also recognise the plea-bargaining system though in different stages of development. Plea bargaining, described as a form of condemnation without adjudication,[39] is a situation where an accused enters into an agreement with the prosecutors during a criminal trial. It may involve pleading guilty to a lesser offence or to the same offence but with a lighter sentence.[40] The concept of plea bargaining has been subject to much discourse and criticism.[41] A major criticism is that the doctrine of separation of powers places the duty of determining whether there has been a violation of law on the courts or the judicial arm of government, while the role of regulators is investigating violations and instituting legal proceedings as appropriate.[42] Therefore, empowering regulators to bargain with supposed violators of regulatory laws violates this basic constitutional doctrine.[43]

Also, the concept of plea bargaining diminishes the criminal process because the accused person is denied the constitutional right to fair hearing or fair trial and proof of guilt beyond reasonable doubt.[44] The accused, by bargaining with the prosecutor foregoes the right to defend himself at trial. A former Chief Justice of Nigeria, Dahiru Musdapher, condemned the EFCC for introducing plea bargaining which he described as a dubious introduction into the Nigerian legal system.[45] It can therefore be argued that plea bargaining is a tactical commercial solution to enable an offender escape punishment, since the offender parts with money in exchange for his freedom or for a lesser punishment; this practice also being unjust to the victim of the crime. Plea bargaining can thus be an obstacle in the wheel of the fight against corporate crime in Nigeria.

However, plea bargaining is not without some benefits. One benefit is that it saves time and money that could otherwise be used for trial. The prosecutor is spared the need to prove the

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[39] J. H Langbein, 'Torture and Plea Bargaining' *U. Chi. L. Rev.* (46) 1978-1979, 3.
[40] It has been criticized that it is a political tool used to prevent the criminal prosecution of the rich and mighty in Nigeria. Instances shows that plea bargaining has been used in high profile cases involving politicians and business mogul. An example is the case against *Lucky Igbinedion* who was the Governor of Edo State from 1999 - 2007. He was arraigned on a 191 count bothering on corruption by the Economic and Financial crimes Commission but the 191 counts was reduced to just 1 count after a plea bargaining where he agreed to forfeit three properties and the sum of five hundred million naira to the Federal Government.
[41] A.O Olubo, J. Barde, O.H. Lar and M. Zechariah, 'Plea Bargaining Mechanism in the Judicial Determination of Corruption Cases: A Critical Inter-Jurisdictional Assessment' NALT 46TH Annual Conference Proceedings Unilorin 2013, 235
[42] Karen Yeung, 'Better Regulation, Administrative Sanctions and Constitutional Values' http://onlinelibrary.wiley.com accessed on 5th July, 2019
[43] As stated, the principle of separation of powers is enshrined in the 1999 Constitution in sections 4, 5 and 6
[44] For example, section 36 (1) 1999 Constitution provides that an accused person has a right to fair hearing.
[45] Vanguard Newspapers, March 6, 2012.

case beyond reasonable doubt and the court is relieved of the need to adjudicate. In *Santobelleo v. New York*,[46] the Supreme Court of the United States in giving vent to the cost saving benefits of plea bargaining held that if every criminal charge went to trial, there would be the need to multiply the judges, courts and other facilities. In addition, the bargaining process can be flexible and adaptable to suit particular circumstances.

While agreeing to the fact that plea bargaining is faster and cheaper to litigation and therefore this can be a compelling reason for its use in the Nigerian criminal laws. More so, as Nigerian prisons are over-populated with obsolete facilities and most of the inmates are on awaiting trial list.[47]. Plea bargaining can aid in decongesting the prisons and facilitate speedy dispensation of cases. Yet, bearing in mind the nature of corporate crimes and the artificial nature of the culprit being unable to enjoy the sanction of imprisonment; this may not be a benefit for the control of corporate crime.

Besides, the abuse of the plea bargaining process constitutes a challenge to corporate criminal liability because it sends the wrong signal to the society and corporations are not deterred[48] from committing crimes since the costs of plea bargaining can be built into the normal cost of doing business. Also, the stigma of conviction is absent when the case is plea bargained. An example is the corruption case against Construction Company *Julius Berger (Nigeria) Ltd* relating to its indictment in the Halliburton saga. It entered a plea bargain agreement with the Federal Government and gave up about twenty six million dollars to the coffers of the Federal Government of Nigeria.[49]

Financial challenges of regulators

Inadequate funding is another challenge to corporate crime control in Nigeria. The Police, Counsel and regulators who are stakeholders in the fight against corporate crime needs to be financially empowered. Inadequate budgetary allocation will have a negative effect on performance and efficiency.[50] Comparatively, other regulators look at funding as a measure of whether enforcement is considered important by the regulator. This is because low budgetary allocation may lead to shortage of staff, insufficient training and inadequate equipment, which in turn affects general efficiency. In fact, international organisations such as the World Bank, United Nations and International Monetary Fund usually set up benchmarks to serve as guidelines for budgetary allocation in critical areas of the economy.[51] Also, emphasising the

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[46] 404 US 257, 260 (1970)

[47] Nigerian prisons are overly congested and the obsolete prison facilities overstretched. See A. Odinkalu and O. Ehonwa, *Behind the Wall: A Report on Prison Congestion in Nigeria and the Nigerian Prison System*. Lagos, CLO, 1991,113. See also C Gahia, *Human Rights in Retreat: A Report on the Human Right Violations of the Military Regime of General Babangida* Lagos, CLO, 1993,114.

[48] N. O.O.Oke, 'The Concept of Plea Bargain System and its Effects on Administration of Criminal Justice in Nigeria' in *Current Legal Issues in Contemporary Nigeria* Adebayo Adenipekun ed, (Ibadan: Afe Babalola University, 2013), 358.

[49] According to the then Chairman of the Economic and Financial Crimes Commission, *Farida Waziri*, It also paid an additional 3.5 million dollars to the Federal Government to cover the cost of investigation. Sunday Trust Newspapers, 26th December, 2010.

[50] Olurankinse Felix 'Is Budget Performance a function of funds adequacy? The Case of Selected Local Governments in Ondo State Nigeria.' *Interdisciplinary Journal of Contemporary Research in Business* 3(9) January 2012, 71.

[51] For example, the United Nations Education, Scientific and Cultural Organisation in its Global Monitoring Reports, Education For All Global Monitoring Reports for 2013/2014 has advocated that at least twenty percent of budgetary allocation should be committed to providing education for developing countries. See www.unesco.org/new/en/education/themes/leading-the-international-agenda/efareport/reports/ accessed on 18th

importance of budget, the Director of International Monetary Fund's African Department, Antoinette Sayeh, claims that a well formulated and implemented budget lies at the core of good governance.[52]

Therefore, inadequate funding of stakeholders such as the police can inhibit and has indeed affected the prosecution of corporations, as some private corporations under the guise of corporate social responsibility give aids to the police.[53] It is doubtful that a police that collects aids from a corporation can take impartial steps to investigate such corporation on allegations of crime. Besides, lack of adequate funding can affect prosecution because if victims of crimes who often serve as witnesses at trial are not adequately catered for in terms of funding logistics such as transportation, then diligent prosecution becomes impossible. The absence of witnesses leads to incessant adjournments, which then prolong the life of cases and the interests of justice is not served.

However, the financial challenge to corporate crime control can also be a result of overlapping of regulatory functions. This is mainly a result of duplication of some regulatory agencies. For example, there is an overlap between the functions of the Economic and Financial Crimes Commission and the Independent Corrupt Practices and Other Related Offences Commission. The EFCC is created by the EFCC (Establishment) Act,[54] which provides in s.1 that the EFCC shall be the financial intelligence unit in Nigeria and shall enforce all laws on economic and financial crimes in Nigeria. It goes further in s.46 to define economic and financial crimes to include bribery and any form of corrupt practices. Similarly, the ICPC Act[55] was established as the law to prohibit and prescribe punishment for corrupt practices and related offences. Section 3 of this Act establishes the Independent Corrupt Practices and Other Related Offences Commission to administer the Act. Thus, the effect of the above provisions of both the ICPC Act and the EFCC Act is that both commissions can investigate and prosecute bribery and other corrupt practices. In fact, the ICPC seems to recognise this fact when it provides, in s.67, that prosecution of an offence can be done by the officials of the commission, the Police or any other officers with the power to prosecute.

It is conceded that the scope of the powers conferred on the EFCC is wider than that of the ICPC. This is because the ICPC is focused solely on bribery and corruption related offences, while the scope of the powers of the EFCC includes, illegal arms smuggling, human trafficking, drug trafficking, bribery and corruption, smuggling, tax evasion and illegal oil bunkering. It is thus submitted that the ICPC has become unnecessary and should therefore be merged with the EFCC and compressed into one strong and better funded agency. This will save costs in areas such as staff salary and training, maintaining offices and provision of equipment.[56]

Curiously, s.35(3) of the ICPC Act provides that the Commission may receive gifts both within and outside Nigeria provided that such gifts are not contrary to the objectives of the

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March, 2019. See also the World Bank Report on World Bank Support on Public Sector Reform, http://ieg.worldbankgroup.org/evaluations/public-sector-reform accessed on 18th March, 2019.

[52] www.odi.org.uk/events/3608-cape-conference-2013-budget-pfm-day-one accessed on 18th March, 2019.

[53] Arik Air, a privately owned commercial airline on December 11th, 2013 donated a Toyota Hilux Pick Up van to the Murtala Muhammed International Airport Police Command. www.arikair.com/arik-air-donates-patrol-van-airport-police-command accessed on 8th January, 2019.

[54] 2004.

[55] No 5 2000, Cap C31, L.F.N 2004.

[56] Although, there was a recommendation by a Presidential committee on merging the two bodies but machinery has just been put in place to implement them after about eight years. See also http://www/punchnig.com/news/fg-to-merge-efcc-icpc/ accessed on 25th June, 2019.

Commission.[57] This provision is ambiguous and contradictory and can affect the honest discharge of the Commission's duties. The Commission may not be able to investigate and prosecute organisations that have given it gifts, and an alternative is that the Commission should be funded from the Consolidated Revenue Fund

Conclusions

There are political challenges to corporate crime control in Nigeria. The political challenges affect the implementation of the laws on corporate crime. Therefore, in order to effectively control corporate crime the government must provide the appropriate leadership. Good leadership not only entails providing the right legal and institutional framework, it also includes setting good examples. However, bad leadership has been as a stumbling block to the development of Nigeria as the largest and most populous country in Africa.[58]

[57] There has been international support of funds to regulatory agencies in Nigeria. For example, the European Union supported the Economic and Financial Crimes Commission with more than twenty four million euros between 2006-2010 through a project implemented by the United Nations Office on Drugs which includes specialized training and operational equipment. http//efccnigeria.org/efcc/index.php/external-cooperation/eu-unodc-project-1 accessed on 16th March, 2019.

[58] The population of Nigeria is currently estimated to be around one two hundred million.

INTERNATIONAL LAW

Towards global nuclear disarmament: the treaty on the prohibition of nuclear weapons

Dr Andrew G Jones*

Introduction

Declaring its deep concern 'about the catastrophic humanitarian consequences that would result from any use of nuclear weapons, and recognizing the consequent need to eliminate such weapons', the General Assembly of the United Nations adopted the Treaty on the Prohibition of Nuclear Weapons on 7 July 2017.[1] A little more than three years later, on 24 October 2020, Honduras ratified the Treaty; the 50th nation to do so. This activated the Treaty's entry into force provision, meaning that it would become active 90 days later, on 22 January 2021.[2]

This has been hailed as a big step in the fight against the threat of nuclear arms and the threat they pose to international security. This sentiment was expressed in a statement released by the office of UN Secretary General, António Guterres, who recalled that the entry into force of the treaty 'is the culmination of a worldwide movement to draw attention to the catastrophic humanitarian consequences of any use of nuclear weapons. It represents a meaningful commitment towards the total elimination of nuclear weapons, which remains the highest disarmament priority of the United Nations.'[3]

Certainly, this new piece of international legislation pushes efforts to denuclearise the world forward, demonstrating some commitment amongst the international community to achieve something that has been called for since nuclear weapons were first invented. The true scope of the Treaty's impact though may in fact be somewhat modest. At least for now.

Existing international law on nuclear weapons

Nuclear disarmament has been a core aim of the modern international order since the earliest days of its existence.[4] Despite this being the subject of the very first General Assembly Resolution, however, disarmament has hardly been realised in any significant way in the years since. That is not to say that no law on the subject exists, with the Prohibition Treaty certainly not being the first treaty to take a step towards restricting nuclear arms. It in fact joins several existing international laws, including a treaty ban on atmospheric, submarine or outer space nuclear tests.[5] This treaty, drafted by the US, UK and USSR, brought the testing of nuclear weapons to an end in all but underground facilities, eliminating their negative impact on the

* Lecturer in Law, Coventry Law School

[1] UN General Assembly, *Treaty on the Prohibition of Nuclear Weapons* (7 July 2017) A/CONF.229/2017/8 [Prohibition Treaty], Preamble

[2] Ibid, art. 15

[3] Stéphane Dujarric, 'UN Secretary-General's Spokesman - on the occasion of the 50th ratification of the Treaty on the Prohibition of Nuclear Weapons' (New York, 24 October 2020) UN Secretary-General < https://www.un.org/sg/en/content/sg/statement/2020-10-24/un-secretary-generals-spokesman-the-occasion-of-the-50th-ratification-of-the-treaty-the-prohibition-of-nuclear-weapons> accessed 30/11/2020

[4] UN General Assembly, *Establishment of a Commission to Deal with the Problems Raised by the Discovery of Atomic Energy* (24 January 1946) A/Res/1/1

[5] UN, *Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water Status of the Treaty Text of the Treaty* (5 August 1963) 480 UNTS, 43 [Test-Ban Treaty]

environment. It was expanded upon in 1996 by the Comprehensive Nuclear-Test-Ban Treaty, although this has yet to come into force.[6]

Then in 1968, the Non-Proliferation of Nuclear Weapons Treaty was also adopted.[7] This works to prevent the spread of nuclear weapons, whilst also encouraging disarmament and calling for the adoption of a treaty on general and complete disarmament; an aim that has now become a reality through the Prohibition Treaty.[8] The Non-Proliferation Treaty has been particularly successful, becoming the world's most widely ratified arms limitation and disarmament treaty.[9] Its provisions prohibit the transfer of nuclear weapons, as well as their development. However, this only applies to those States that do not already have such weapons when they become bound by the Treaty.[10] For nuclear armed States, the obligation is merely to refrain from supplying other nations with arms, and to not encourage or facilitate development.[11]

This obviously leaves a large gap in the prohibition, effectively maintaining the status quo between nuclear armed nations and those not so armed. The more absolute terms of the new Prohibition Treaty, however, do not allow for such an exemption. Instead, the Treaty applies to all States equally, providing a more complete prohibition.[12] Unfortunately, there is a rather obvious flaw with this; with such a clear prohibition of nuclear arms, it perhaps should not be surprising to see that the nuclear armed nations have opted not to make themselves subject to the treaty. The USA, UK, France, China, Russia, India, Pakistan, North Korea and Israel, have all opted to not sign the treaty.[13] As such, the only States known to possess nuclear weapons remain unhindered by this general prohibition. This begs the question of whether the Prohibition Treaty will actually have a significant impact on disarmament efforts.

Legality of using nuclear weapons

Regardless of its ratification status, perhaps one of the Prohibition Treaty's most important elements is its actual ban on the threat of use of nuclear weapons.[14] This means that the threat of nuclear war could essentially be nullified, as much as anything ever is, by a clear provision of international law.

This builds upon the already existing norm of international law that prohibits the threat or use of force, enshrined in Article 2(4) of the UN Charter.[15] This is considered a cornerstone rule of the international legal order, essentially outlawing any use or threat of military force by Member States of the United Nations.[16] However, there is an exception to this general rule. Under Article 51, a State might be permitted to use of force as a necessary and proportional act

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[6] UN General Assembly, *Comprehensive Nuclear-Test-Ban Treaty* (10 September 1996) A/RES/50/245
[7] UN, *Treaty on the Non-Proliferation of Nuclear Weapons* (1 July 1968) 729 UNTS, 161 [Non-Proliferation Treaty]
[8] Ibid, arts. 1-6
[9] There are currently 191 States Parties to the Convention; UNODA, 'Treaty on the Non-Proliferation of Nuclear Weapons' <http://disarmament.un.org/treaties/t/npt> accessed 30/11/2020
[10] Non-Proliferation Treaty, art. 2
[11] Ibid, art. 1
[12] Prohibition Treaty, art. 1
[13] While 84 States have signed the Treaty, and 50 have ratified it, there are no nuclear armed nations subject to the restrictions; UN Treaty Series, 'Treaty on the Prohibition of Nuclear Weapons' <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVI-9&chapter=26> accessed 30/11/2020
[14] Prohibition Treaty, art. 1(d)
[15] UN, *Charter of the United Nations* (24 October 1945) 1 UNTS XVI [UN Charter], art. 2(4)
[16] *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda) Judgment [2005] ICJ Reports 2005, 168 [Armed Activities], para. 148

in self-defence where it has been the victim of an armed attack.[17] In such circumstances, the force used will be considered justified, and therefore not a breach of international law, provided it is limited to the purpose of defence.

With this being the case, it is perhaps surprising that the use of highly destructive and entirely indiscriminate nuclear weapons has not been conclusively ruled out by international law. Rather, the potential use of such nuclear weapons has been established to be a possibility in situations of extreme necessity, as explained by the International Court of Justice in 1996.[18] In its landmark Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, the ICJ considered the various impacts of nuclear weapons, recognising that it would be difficult to reconcile their nature with the limitations provided in both human rights and humanitarian law.[19]

Despite this, the Court's ultimate opinion on the matter was that in a situation which threatened the survival of a nation as a whole, the right to self-defence potentially included the right to use nuclear weapons. As such, the judges concluded that they '[could not] reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake.'[20] This somewhat unsatisfying conclusion on such an important question has left open the possibility of using nuclear weapons in cases of extreme self-defence. Certainly, the Court's determination does not leave much room for States to manoeuvre, but it also fails to clearly establish an absolute rule against the employment of nuclear arms.

With the entry into force of the Prohibition Treaty, it seems that the potential to unleash these weapons has now been closed, at least amongst those 50 States that have so far ratified it. Unlike the general prohibition of force, the treaty allows for no exception to its rules. The absolute language of the first article makes it clear that nuclear weapons can never be used 'under any circumstances.'[21] This removes even the limited possibility of extreme self-defence where the life of the nation is under threat. While this might certainly be considered more satisfactory given the devastating potential of nuclear arms, it should be noted here that the reality of such a situation would not necessarily see international law upheld. Afterall, when faced with a choice between oblivion and even a grave breach of international norms, it is questionable whether any State would remain true to its legal obligations.

Impact of the prohibition treaty

While still somewhat limited, the fanfare that has come from the 50th ratification of the Prohibition Treaty can certainly be understood from the viewpoint of those seeking total disarmament. The codification of a ban on nuclear arms is no doubt a step in the right direction, and the Treaty's drafters have provided a strong stance on the issue. Its extensive first Article alone entirely prohibits a number of key activities, including the development, testing, production and transfer of nuclear weapons, and requires States not to stockpile nuclear weapons, on top of establishing the general prohibition of their threat or use.[22] This potentially closes the gap in the law that has been left by existing treaty provisions, eliminating the divide

[17] UN Charter, art. 51
[18] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion (8 July 1996) ICJ Reports 1996, 226
[19] Ibid, para. 85-97
[20] Ibid, para. 97
[21] Prohibition Treaty, art. 1
[22] Ibid

between armed and non-armed States, and providing a general and unhindered prohibition of nuclear weapons and their use.

The Treaty goes further still, obligating States to report on whether they possess or have ever possessed nuclear weapons, whether they are present on their territory and whether they have eliminated any nuclear-weapons programmes or facilities.[23] There is also a requirement to cooperate with procedures to verify the elimination of all such programmes, ensuring any assurances of disarmament are genuine.[24] This not only serves to prevent any further development or stockpiling of nuclear weapons, but could also avoid the danger that often accompanies suspicions of such development, and the potential conflicts that could arise between States over this issue.

These elements are of vital importance to global efforts to steer away from the threat of nuclear war, something that has plagued humanity since the end of the Second World War. It is fitting, therefore, that the series of ratifications that have brought it to this point come as the world commemorates the 75th anniversary of the end of the Japanese campaign in 1945. This being the only time in history which saw the deployment of nuclear weapons outside of testing, resulting in the deaths of more than 200,000 people in just two attacks.[25] In fact, it was efforts of the survivors of those attacks, as well as those that have suffered in the years since the advent of nuclear arms, amongst others, that led to the adoption of this new prohibition.[26]

The recognition of the suffering caused to those who have been impacted by the use and testing of nuclear weapons is thus rightly included in the Prohibition Treaty. Article 6 establishes an undertaking to provide assistance to the victims of the use of testing of nuclear weapons, including medical care, rehabilitation, psychological support and social and economic inclusion.[27] This same Article also calls on States to 'take necessary and appropriate measures towards the environmental remediation' of areas under their control that have been contaminated the use of nuclear weapons.[28] These provisions acknowledge the extent of the devastation caused by these weapons, both to human lives, and to the planet itself.

All of these elements make for a much stronger and more complete international prohibition and restriction of nuclear weapons than those already in force. Nonetheless, when considered in the light of those other legal norms, the impact of the Prohibition Treaty might not be as substantial as it might seem. Since non-nuclear armed States are already prohibited from developing and stockpiling nuclear arms under the Non-Proliferation Treaty, a second prohibition merely reaffirms this existing legal regulation. This adds strength to the call for disarmament, but doesn't actually alter the legal position in any significant way. Unfortunately, without the agreement of the world's nuclear armed countries, the prohibition is as much symbolic of the continued drive towards the elimination of nuclear weapons as it is an effective legal hurdle to their existence.

This is especially true given the already well-established pattern of behaviour of certain nuclear powers in the prevention of further development or stockpiling of nuclear weapons by other States. Recent years have certainly seen hints at the lengths to which countries like the US

[23] Ibid, art. 2
[24] Ibid, art. 4
[25] 'Hiroshima bomb: Japan marks 75 years since nuclear attack' (6 August 2020) BBC News <https://www.bbc.co.uk/news/world-asia-53660059> accessed 30/11/2020
[26] Stéphane Dujarric (n.3)
[27] Prohibition Treaty, art. 6(1)
[28] Ibid, art. 6(2)

might be willing to go to prevent currently unarmed States from attaining nuclear arms.[29] As such, this new element of international law is likely to have little real impact on the legality of nuclear arms for those who already possess them, or to the existing status quo, which anyway prevents further development of nuclear arms.

Conclusion

Overall, the Prohibition is certainly something to be celebrated. Its entry into force demonstrates the continued development and acceptance of the view that nuclear weapons and their use in any circumstance is not acceptable under international norms. Many of the core provisions build upon existing international norms, closing certain gaps in the law, and carrying the international legal regime in this area forward, strengthening those protections and principles already established.

However, while it may inspire some optimism for the future, real change in this area will only occur with the compliance of the nuclear armed nations; currently a somewhat unlikely, or at least very far off, reality. For now, the treaty can be recognised as a signal of the declared aspiration of the world to see the elimination of nuclear weapons and nuclear weapons programmes. It calls upon parties to it to encourage its acceptance by all states, with the aim of achieving universal adherence to its provisions, something that should most assuredly be pursued.[30] Where such wide acceptance can be achieved, the Treaty has the potential to make a significant contribution to the development of a new customary norm of international law, prohibiting the threat or use of nuclear arms in all circumstances. For now, however, this will remain aspirational, with a significant distance still to go. Nevertheless, the Prohibition Treaty could be seen as a major step forward in this journey, and a victory for the cause of global nuclear disarmament.

[29] In particular, the US has consistently targeted both Iran and North Korea, seeking to prevent their attainment of nuclear arms; see William J. Perry & Brent Scowcroft, *Independent Task Force Report No. 62: US Nuclear Weapons Policy* (Council on Foreign Relations, 2009)
[30] Prohibition Treaty, art. 12

A global regime for data protection regulation: a cross-border analysis of the challenges of privacy ideas and coercion

Mason Parfitt*

Introduction

The technological revolution has generated a "'third wave' civilisation" that has pushed the issue of data protection to the fore. [1] Recent cases, such as the Facebook-Cambridge Analytica data scandal, has made the issue perhaps the foremost of our time and has crystallised the idea that "information [is] the currency of the post-industrial economy".[2] Of course, as with any resource, information must be owned and it is with this ownership that control over its use and promulgation rests. Data protection laws (particularly the EU's General Data Protection Regulation ("GDPR"),[3] to which this article will later refer) aim to protect the (often private) information of data subjects on the basis that they own information about themselves. There is a large degree of consensus amongst nation states that data protection laws are necessary.[4] However, whilst there is this broad consonance of motivation and concern[5] that data subjects should be protected, the problem occurs when states disagree as to *how* this protection might best be achieved.

Bennett points out that states have already "largely converged" around a set of data protection norms or principles which provide the bedrock for all data protection legislation across the world.[6] These principles include the purpose specification and use limitation principles, for example.[7] The implementation of such principles alone would be insufficient however; they would "necessarily rely on other mechanisms." [8] The specific implementation and enforcement of these mechanisms across states are, however, largely inconsistent. Informational platforms arguably transcend nation states and so, according to McKnight, "there is a logic to addressing them globally".[9] The GDPR is a set of detailed rules relating to data protection and has, by many, been donned the best hope for a global regime.[10]

This article will consider some of the difficulties that the establishment of a set of globally applicable data protection laws would face. Specifically, this article will consider: the issue

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* Lecturer in Law, Coventry Law School

[1] Alvin Toffler, *The Third Wave* (New York: Bantam Books 1980) 72.

[2] Daniel Bell, *The Coming of Post-Industrial Society* (New York: Basic Books 1973) 12.

[3] Council Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (Data Protection Directive) OJ L119/4 (hereafter "GDPR").

[4] Colin J Bennett, *Regulating Privacy: Data Protection and Public Policy in Europe and the United States* (Ithaca and London: Cornell University Press 1992) 6.

[5] *ibid*.

[6] *ibid*.

[7] OECD, 'Organisation for Economic Cooperation and Development 1980 Guidelines on the Protection of Privacy and Trans-border Flows of Personal Data' (OECD 2001) 15 <https://dx.doi.org/10.1787/9789264196391-en> accessed 4 November 2020.

[8] Joel R Reidenberg, 'The Simplification of International Data Privacy Rules' (2005) 29 Fordham Int'l LJ 1128, 1132.

[9] AFP, 'Facebook's Call for Global Internet Regulation Sparks Debate' (*Security Week*, 2 April 2019) <www.securityweek.com/facebooks-call-global-internet-regulation-sparks-debate> accessed 4 November 2020.

[10] Jan P Albrecht, 'How the GDPR Will Change the World' (2016) 2 Eur Data Prot L Rev 287, 288.

of privacy (the core theme of data protection) from different perspectives in light of different philosophies; whether states may lose their sovereignty by being coerced into a global regime; and other practical frictions between states that demonstrate difficulties in harmonisation. In doing so, this article will draw upon multiple jurisdictions throughout.

These issues constitute only a sample drawn from a much wider pool of complications. However, the author of this article has chosen the above issues due to them being less prevalent in the relevant literature. These difficulties alone support this article's submission that forcing what would inevitably become an uncomfortable international situation is not preferable. Instead, an overseeing body, such as the United Nations or World Trade Organisation (although the latter was criticised as unsuitable due to commercial bias[11]), would best solve the problems associated with harmonising data protection laws by providing tools to bridge the inconsistencies between states.[12]

Privacy perspectives

The difficulty in establishing a global data protection regime starts from the most foundational point: what the objective of data processing regulation is. This article has stated that most countries with data protection legislation have adopted fundamental 'fair information principles'. While this is true, states may still differ in their philosophy of the purpose of data protection which is problematic when attempting to harmonise the detail of an instrument such as the GDPR. To demonstrate the difficulties in reconciling differing stances to data protection, this article will consider three different approaches to the concept of privacy: that of the EU, the US and China.

Article 8(1) of the European Convention on Human Rights provides that "everyone has the right to respect for his private and family life, his home and his correspondence".[13] The European notion of privacy is as a fundamental human right; for the preservation of human dignity.[14] A person, according to Birnhack, should be "treated as a moral, independent agent" and the collection of data (especially big data) "slowly transfers our personhood to the control of others."[15] Indeed, in some European jurisdictions (such as Germany) courts can directly derive rights from the concept of human dignity.[16]

Conversely, in the US, privacy has not been elevated to a matter of human dignity; in fact, privacy is not even mentioned in the US Constitution. Instead, the US Supreme Court established in *Griswold v Connecticut* that the Constitution contained "zones of privacy".[17] Privacy in the public sphere usually concerns those "physical places" [18] which constitute "private space that the… state should allow the citizen"[19] and it is to this extent that Americans would refer to privacy as a human right. Privacy in the private sphere operates in the realm of tort law, allowing for much narrower common law causes of action.[20] Protection

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[11] Bennett (n 4) 7.
[12] Reidenberg (n 8).
[13] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos 11 and 14*, 4 November 1950, ETS 5, Art 8(1).
[14] Michael D Birnhack, 'The EU Data Protection Directive: An engine if a global regime' (2008) 24(6) CLSR 508, 509.
[15] *ibid*.
[16] Basic Law for the Federal Republic of Germany (1949), Art 1(1). See also Israeli Basic Law: Human Dignity and Liberty (1992), s 4.
[17] *Griswold v Connecticut* (1965) 381 US 479, 481.
[18] *Charles Katz v United States* (1967) 389 US 347, 347.
[19] Birnhack (n 14).
[20] Restatement (Second) of Torts § 402A cmt b (Am Law Inst 1965).

of privacy is consequently not as robust as in Europe. The US has opted, instead, for sector specific federal laws.[21]

The distinction between the European and American philosophies on privacy can largely be attributed to the differences in the constitutional orders of each. Posner has also suggested that the US has a more economic approach to privacy; in that privacy is essentially detrimental to the economy.[22] He states that data protection is an "unwarranted intervention in the free market,"[23] and this, it is suggested, may provide some context for the US's reluctance to subscribe to the terms of the GDPR, for example.

Many Eastern states also do not share the view that privacy is a fundamental human right. In fact, it has been said that China's "operational potential is rendered nugatory by a political culture that traditionally shows scant respect for personal privacy".[24] The Chinese notion of privacy is that it is an "*instrumental* good, rather than an *intrinsic* good". Cao suggests that privacy protection in China is "at least ten years behind that of Western countries".[25] This article challenges this view however; it suggests that Chinese notions of privacy are not merely less developed than Western notions, but fundamentally different. Chinese culture holds the "family and the state above the individual"; individual rights (including the right to privacy) have been relegated in this way arguably since the Yin Dynasty, which marks the beginnings of recorded Chinese culture.[26]

Some academics, such as McDougall, defensively claim that the concept of privacy in China was re-examined within the context of the family home in the post-Mao era, "giving rise to a new appreciation of privacy… values".[27] Indeed, the introduction of the PRC Cybersecurity Law in 2017 would seem to support this view; however, there is still much uncertainty as to how this law will be applied.[28] In fact, "there is [currently] not a single comprehensive data protection law in… China" and the regulatory landscape changes almost weekly.[29] While Chinese attitudes towards privacy are becoming increasingly globalised, information ethics in China is still in its infancy.[30]

The fact that China has such little regard for privacy is concerning, considering that they are the world's largest market for smart mobile terminals. There are consequently serious concerns relating to big data security in China.[31] In addition to China's political and cultural views on privacy, China is an economic-centric country. The accumulation of big data is necessary for many businesses in China, but the big data business model is "antithetical to the principles of data minimisation and purpose limitation – as it requires [evermore] data, often for unspecified purposes".[32] The Chinese view is that the commercial interests of China

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[21] Birnhack (n 14).
[22] R A Posner, *An economic analysis of privacy* (Cambridge: Cambridge University Press 1984) 333-45.
[23] *ibid* 337.
[24] Lee A Bygrave, 'Privacy and Data Protection in an International Perspective' [2010] Stockholm Institute for Scandinavian Law 166, 168.
[25] Cao Jingchun, 'Protecting the Right to Privacy in China' (2005) 36 Victoria U Wellington L Rev 645, 645.
26 Lu Yao-Huai, 'Privacy and data privacy issues in contemporary China' (2005) 7(1) Ethics and Information Technology 7, 8.
[27] Bonnie S. McDougall, 'Privacy in Modern China' (*History Compass,* 21 December 2004) <https://doi.org/10.1111/j.1478-0542.2004.00097.x> accessed 4 November 2020.
[28] Cyber-Security Law of the People's Republic of China 2017, art 12.
[29] DLA Piper, 'Data Protection Laws of the World: China' (*DLA Piper,* 4 January 2019) <www.dlapiperdataprotection.com/index.html?t=law&c=CN> accessed 4 November 2020.
[30] Lu (n 26).
[31] Dongpo Zhang, 'Big Data Security and Privacy Protection' (2018) 77 Advances in Computer Science Research 275, 276.
[32] Birnhack (n 14).

are more important than the protection of individual privacy rights; whereas the EU view is the opposite. The US is somewhere in the middle (although much closer to the EU than to China, evidenced by the seemingly successful EU-US Privacy Shield, which attempts to reconcile the differences between EU and US standards[33]). It is nevertheless clear that the discrepancies between interpretations by countries of what privacy should mean and their different economic, cultural, political and philosophical perspectives – each ordering such things into different hierarchies of importance – demonstrate how difficult it is for all countries to agree on a common data protection regime. Sometimes however, in absence of agreement, economically-minded states (increasingly those in the Far East) may be forced into regimes, potentially threatening their sovereignty.

Sovereignty at stake

Global convergence of data protection law will only occur when all countries realise that the problems faced by data processing "cannot be properly or completely resolved at the national level".[34] This is especially true in the context of cross-border data transfers. Where the security offered by one jurisdiction is higher than that offered by another (the third country), transfers of data from the former to the latter could potentially put the data subject at risk. Under the GDPR, third countries must ensure that they have an "adequate level of protection," [35] such that it falls generally in line with EU data protection standards. Many countries now seek to join this 'exclusive club' of adequacy status. For example, India is keen to develop its regime in line with the GDPR through "fear that its burgeoning outsourcing industry will flounder without such legislation in place."[36] This article makes the case that this type of fearmongering is not an appropriate method for the convergence of states' individual data protection regimes.

It is true that the policy technique repertoires of some countries may be sparse, especially when considering that data protection is an emerging regulatory field in an age of constant technological flux. As such, these countries may need to look to others to "bring foreign evidence to bear on [their] domestic decision-making process[es]."[37] However, it has been suggested by Bennett that Article 45 of the GDPR is not a *harmonising* tool, but a "*penetrative*" one.[38] This means that countries are effectively forced to comply with the GDPR if they are to carry out data transfers with EU countries or businesses. They could refuse to comply of course, but this would inevitably harm their economies as they could no longer adequately fulfil their obligations under international trade deals or private business deals.

Unsurprisingly, "the perceived value and benefits of electronic commerce… [is] the driving force behind the quest to seek compatibility" with the GDPR.[39] It is due to fear of economic interests being damaged that countries, such as India and Hong Kong, have introduced data protection legislation with the view to entry into that 'exclusive club'. EU officials have therefore played a hand in dictating (or, at the least, influencing) the domestic policies of other states. The sovereignty of these states is consequently under threat from a regime

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[33] Commission Implementing Decision (EU) 2016/1250 of 12 July 2016 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the EU-US Privacy Shield (notified under document C(2016) 4176) OJ L207.
[34] ibid.
[35] GDPR, Art 45(1).
[36] Bygrave (n 24) 167.
[37] Bennett (n 4) 5.
[38] ibid.
[39] Birnhack (n 14) 515.

mandating compliance. If states do not comply then they risk the prospect of economic detriment. This article submits that a global data protection regime, whether based upon the GDPR or otherwise, would require this coercive element. It would be difficult to implement a global regime in the face of this obstacle.

On the other hand, Hood suggests that it is some states' own doing that they are forced into compliance as "the same… tools appear again and again as governments face up to 'new' problems".[40] Bennett supports this view, adding that some governments simply lack the imagination to innovate new instruments or problem-solving methods.[41] The result is that they either stick to outdated methods or play copycat. It is conceivable therefore, that it is simply a lack of parliamentary imagination that grinds countries into a stasis, such that they have no other choice but to conform to others' methods and standards. Thus, it would not be a threat to the sovereignty of states if they surrendered it of their own free will and voluntarily collaborated with the proponents of the global regime. This is in accordance with Bennett's observation that "evidence of convergence *per se* should not [necessarily] be interpreted as evidence of lack of autonomy" or sovereignty.[42]

In fact, it is arguable that the EU's approach is less coercive and more collaborative. As an example of what a global data protection regime may conceivably look like, The GDPR– commits to entering into negotiations with prospective members of the 'adequacy club' and commits to consultations to remedy any existing 'club member' falling below its required protection levels.[43] These consultations are collaborative in nature. However, the final destination of the collaboration has already been prescribed by the EU (i.e. subscription to the GDPR). This article therefore maintains that, notwithstanding those countries that genuinely and voluntarily subscribe to the regime, any global regime will necessarily employ a 'penetrative' strategy and may not, as a result, be constitutionally viable for many states. International tensions would increase as a result of the proponents of the regime leaving states with no choice but to comply with it. Indeed, those who seek to join the 'exclusive club' openly confess that their primary (if not only) motive is economic gain. It is hard to believe that a data protection regime, supposedly founded upon human rights and human dignity, would not inevitably implode from the insincerity and misplaced motives of its constituent members.

Between a rock and a hard place

In addition to the problems already discussed, many less developed countries would find themselves 'between a rock and a hard place' on the basis that they would be *required* by penetrative means to implement the global regime. Developing countries face problems with pulling themselves up to strict EU levels of data protection. For example, according to the World Bank, South Africa is an upper-middle-income economy;[44] desperately striving to join the economic upper echelons which characterise its main international trading partners. In order to achieve this, the South African Law Commission have acknowledged that the country must "ensure that it provides adequate information protection in terms of international standards".[45]

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[40] Christopher C Hood, *The Tools of Government* (Chatham NJ: Chatham House 1986) 8.
[41] Bennett (n 4) 7.
[42] ibid.
[43] GDPR, Art 45(6).
[44] The World Bank, 'Data for Upper middle income, South Africa' (*The World Bank Group,* 23 April 2019) <https://data.worldbank.org/?locations=XT-ZA> accessed 3 November 2020.
[45] South African Law Reform Commission, *Privacy and Data Protection* (Law Com DP 109, 2005) 372.

However, the Law Commission also notes that convergence with the GDPR (or another equivalent regime) would "isolate [South Africa] from the rest of the [African] continent".[46] South African businesses have many offices throughout Africa and cross-border data transfers would therefore be made very difficult, especially since many of these African countries are a long way off from adopting any data protection legislation. While ten African nations have adopted the African Union Convention on Cyber Security and Personal Data Protection,[47] "change will not happen overnight".[48] This is especially the case in light of the socio-political problems that many of the African countries are currently facing.[49] This article therefore submits that harmonisation of data protection laws would create problematic frictions between countries in different states of both infrastructural and legal development.

Conclusion

There are many issues which would make a global data protection regime very difficult to implement. This article has not considered the problems of finding an appropriate overseeing body and ensuring that such a body could effectively enforce sanctions for data breaches. It would suffice to say that these tasks would be similarly difficult to overcome.

Different states have different philosophical and legal perspectives on data protection. It is conceivable that global regulation would strip countries of their sovereign right to decide their own laws and, instead, coerce them into unwinnable positions. This article maintains that tools (some of which are provided for within the GDPR, such as binding corporate rules), although presenting problems themselves,[50] would be the best way forward to reconcile startlingly different approaches in an increasingly globalised world.

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[46] *ibid* 371.
[47] African Union Convention on Cyber Security and Personal Data Protection (2014) EX CL (846) XXV.
[48] Cynthia O'Donoghue, 'New Data Protection Laws in Africa' (*Technology Law Dispatch: Reed Smith LLP,* 19 February 2015) <www.technologylawdispatch.com/2015/02/data-cyber-security/new-data-protection-laws-in-africa/> accessed 4 November 2020.
[49] South African Law Reform Commission (n 45) 370-71.
[50] See Bygrave (n 24) 162.

EMPLOYMENT LAW/LEGAL HISTORY

Ale not be accepting that as payment, thank you. Payment in beer and the decision in *Shore v Sawyer*.

John Sawyer* and Dr Steve Foster**

Introduction

As an occasional visitor to the *Somerville Arms* in Leamington Spa, I have witnessed, and taken part in many weird and wonderful discussions, ranging from the utter uselessness of comedy records made in the 1960's, including the complete canons of the likes of Charlie Drake and Tommy Cooper, to the merits or otherwise of Lenny the Lion (don't even ask!). But for once, I walked in on a conversation that was both half-sensible and legally relevant. It concerned a nineteenth century employment law dispute between a relative of one of the regulars – John Sawyer, my co-author – and one of the relative's fellow workers. The dispute raised the question whether a worker had to accept beer instead of cash as a bonus payment; and it needs to be pointed out that John was at a loss to understand why any human being would object to such method of payment.

Instantly recognising that the dispute and story raised legal rules and issues of importance, John and I offered to write a legal/historical piece on the case - with me highlighting the legal issues and dilemmas and John providing the historical and family background.

Facts and decision in *Shore v Sawyer*

In this case,[1] the plaintiff, Jas. Shore (along with 12 other men of whom the defendant was one and acted as their 'captain') formed themselves into a company or sheep-shearers, travelling from farm to farm in the neighbourhood and undertaking the shearing of farmers' flocks. The court accepted that in some localities it was the custom (independently of the price for which the men were paid for their work) to give them a certain quantity of beer; and that where this was not done, half a crown was given for every 100 sheep that are shorn.

The judge noted that this practice appeared to have been adopted in most of the places where the men were engaged. However, as the plaintiff is a teetotaller, and did not wish that the extra money should afterwards be spent at the public house, he claimed to be paid his share in cash, which, according to his statement, amounted to 10s. 10d (approximately 55 pence). The defendant, Sawyer, who acted as the cashier of the company, refused to pay him, arguing that an agreement had been assented to by the plaintiff previous to his joining the party to the effect that the whole of the "usage" or extra money should be spent on beer. He further argued that the plaintiff was at full liberty to have taken his share of the beer purchased with it, if he had liked; and that not having done so, he had no right to claim it in any other way.

In determining the case, the Judge stated if such an agreement had been entered into, it was in his view a most inequitable and most improper agreement. Mr. Hulbert, appearing for Sawyer, argued that it was perfectly optional for the plaintiff to have assented or not, as he pleased. However, the judge questioned counsel as to what would have happened had the plaintiff not assented to it, to which Mr. Hulbert replied that he would have been turned off.

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* MA, former social worker, and resident of Leamington Spa.
** Associate Professor of Law, Coventry University.
[1] *Shore v Sawyer* (1865) Devizes Court, *Devizes Gazette*, 19 August 1852.

The judge then responded by stating ‘more shame to his companions, believing that if there was any merit on either side, it is with the temperate man. The judge then stated that ‘that a man shall be actually placed under a ban because he will not drink beer, is most unreasonable. Dealing with Mr. Hulbert’s plea that the court must bear in mind that there was a distinct understanding between the parties, the judge proclaimed that a contract may be so grossly contrary to reason that the law will not allow it to be enforced. Consequently, that men who drink beer should avail themselves of the proceeds of the industry of a temperate man for such a purpose seems to be a hardship which the law can hardly allow to be practised.

Mr. Hulbert then argued that if the plaintiff had not fully understood the matter before he commenced, it would be conceded that that it would be a great hardship upon him. However, that was not the case here: he did understand it, and fully acquiesced in the agreement. The judge noted that according to the defendant’s statement, a body of men associate themselves together and go round the country seeking joint employment; and then they say to one if you will not allow us to take your share of money for beer, you shall not join us. Mr. Hulbert’s argument was that it was quite open to the plaintiff to seek employment with other parties, but the judge stated that he felt so strongly that the defendant is not entitled to make this defence, that he could not allow it.

Counsel for the defendant further argued, that when they first met the plaintiff said he should not shear with the men unless he had his money instead of beer; upon which the other men said that if that was the case they would not shear with him. He was then told that if he wanted to go with the men he could, but that he should have no money allowed to him. Thus, it was upon this understanding that plaintiff joined the company. In response, the judge stated that the money was that of the employers of these men, and was paid to them for work done, and as such, each was entitled to his share of it. In the judge’s view, the case assumed the nature of conspiracy against the plaintiff, and he was doubtful if it is not punishable as such.

It was then stated by the defendant that on one or two occasions, where the plaintiff was present and when beer was purchased, be had requested his share to be given to other parties. To this, the judge stated that whatever might have been done by the plaintiff, he was acting all along under a pressure of compulsion forced upon him. In the judge’s view, if other persons were, by his orders, supplied with beer, of course that will be taken into account; but it never can be allowed that a body of men shall bind themselves together and exclude any man who won't give up to them his proper share of that gratuity awarded him by his master. This assumed, in the judge’s view, the nature of a conspiracy: to deprive a man of his lawful employment, and which is a matter in which the amount of money is secondary consideration.

The judge thereupon gave judgment for the plaintiff for the amount due to him having been agreed upon between the parties.

Historical background

Since his retirement as a social worker, much time has been spent by our co-author researching the Sawyer family tree. This has also stimulated a reawakening of academic interest in labour studies, including research on Joseph Arch,[2] the Swing Riots and the Tolpuddle Martyrs. The dispute in question is of interest in this area because it provides an

[2] Joseph Arch (10 November 1826–12 February 1919) was an English politician who born in Barford, Warwickshire and who played a key role in unionising agricultural workers and in championing their welfare. Following their enfranchisement, he became a Member of Parliament

example of collective bargaining by a self-managing team of contractors. Further, what seems to be unusual in this case is the willingness of a judge to get involved in the internal arrangements of the team, and his challenge to what appears to have been custom and practice.

The defendant, Thomas Sawyer (1821 - 1885), was the eldest of three sons of Thomas and Hannah Sawyer, the co-author's Great-Great-Great Grandparents, and the family lived in West Lavington, just north of Salisbury Plain. Most of the men in the village were agricultural labourers, who had experienced decades of low wages. The experience of agricultural labourers, and their attempts to improve their wages are well-documented, and William Cobbett, in his text *Rural Rides***,** identifies the area as having some of the lowest wages in the south of England. Thomas and Hannah ran a shop next to the *Churchill Arms* from the 1840's until the 1860s, when Thomas Jnr and his wife, Anne, took over.[3]

Sheep shearing was a seasonal, young man's job, usually carried out by teams who would move around the area during late spring and early summer. Clearly, it was hard and sweaty work, using hand-shears, and one can understand that the men developed a prodigious thirst! It was usual for labourers to drink an average of a gallon of ale each day. The record for shearing sheep with electric clippers is 1075 ewes in 8 hours (two shearers), and using traditional shears a good man could shear 100 ewes in a day. One can only speculate that payment on a piecework basis may have encouraged compromises in quality, or animal welfare. As captain of the team Thomas would be answerable to employers for the quality of the work, and thus for the reputation of the team. For many centuries, and throughout much of the World, beer formed part of the contract between farmers and agricultural workers. There is a 5,000-year-old cuneiform tablet in the British Museum depicting workers being paid their daily beer-allowance. However, in mid-19th century Wiltshire, things were changing rapidly. Rural Wiltshire had been the scene of a very high level of disturbance during 1830, as labourers eagerly adopted the tactics of the Swing Riots. There were 339 prosecutions, with 52 sentenced to death (all but one commuted), and 150 men were transported to Australia.[4]

Traditional employment relations, based on customary obligations between workers and farmers, had been disrupted by enclosure and increasing mechanisation, leaving fewer workers tied to particular employers throughout the year, but requiring high labour input for short periods of time. This was combined with a growth in migration from the countryside to the growing urban areas, or to the colonies. Thomas Sawyer's two brothers, John and William, having undertaken apprenticeships as a bootmaker and a miller respectively, moved to London in the late1840s. Those who remained in year-round employment with particular farmers found that their wages and other benefits were under pressure. In 1850, there was a widely-supported strike in West Lavington, following attempts to force down the weekly wage to 7 shillings.[5] This wage was far below the minimum needed for subsistence; government data indicates that wages in the County were 9 shillings and 3 pence in 1852.[6]

Attempts by agricultural workers to unionise met stiff resistance by farmers, and little progress was made in increasing the weekly wage. The National Agricultural Workers Union was continually on the defensive, and many of the leading lights in the Union were non-

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[3] Thomas Snr. gave his occupation as, "castrator" in censuses, and as "sheep-dipper" on his son's marriage certificate. Thomas succeeded his father as "castrator". It is understood that the role was that of a poor man's vet.

[4] See Appendix 2, "Captain Swing", E.J.Hobsbawn and George Rude, 1969

[5] *The Salisbury and Winchester Journal*, 23 Sept, 1850

[6] British Labour Statistics: Historical Abstracts, Department of Employment and Productivity, 1971

conformist (particularly Primitive Methodist) preachers, who supported tee-totalism. It is in these circumstances and background that the case must be examined.

Legal analysis

The decision in this case raises important issues relating to employment law and contractual arrangements that extend well beyond the interests of the parties. As the reporting of the case states: the sum sought to be recovered was of no considerable amount, but the decision that the case produced from the judge was important inasmuch as it laid down the principle that:

> where an agreement forced upon a labourer by his workmen, or assented to by him involuntary in order to enable him to obtain employment, the law does not hold him bound by such agreement.

Unconscionable agreements

The basis of the decision appears to be that the agreement entered into between the plaintiff and the defendant and the men was void because it constituted an unconscionable bargain and was thus not enforceable. Instead, the plaintiff was entitled to the full payment in cash representing the extra work the men had performed. This sum - £10 and 10 pence (ten pounds and five pence in today's money) - appears to be the quantifiable sum that each men actually earned, and would have received had they not had an arrangement. If that had not been the case, the plaintiff would have been entitled to a *quantum meruit* for his services, representing a reasonable sum for the services he and the men provided.[7]

The principle of unconscionability in agreements is now largely reflected in the common law concept of economic duress and the equitable doctrine of undue influence, which will be examined below. [8] In addition, the principle of unconsciounability can be used as a source of legislation that seeks to regulate unfair contract terms.[9] There is also a possibility that a contract's validity might be affected by a general inequality of bargaining power, or, more specifically by a practice regarded as being in restraint of trade.[10]

Beyond the principles of duress and undue influence, above, there has been some recognition by the courts that an agreement may be struck down as being an unconscionable agreement,[11] and it appears that in our case that seems to be the basis of the judge's decision in finding for the plaintiff. The doctrine was used by the Supreme Court of Singapore in the recent case of *BOM v BOK*,[12] where a deed of transfer was set aside on grounds of, *inter alia,* unconscionability. In this case, the respondent was a man who had inherited considerable wealth from his parents, and a week after his mother was killed, and while in an acute state of grief, his wife (the first appellant), a former practising lawyer, drafted a deed of transfer providing that both of them would hold all of the respondent's assets on trust for their infant son. The respondent initially refused to sign the deed, but relented after his father-in-law, a senior legal practitioner, assisted the first appellant in persuading him to sign, and the first appellant untruthfully represented to him that the trust would take effect only upon his death;

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[7] See for example the decision in *Planche v Coburn* (1821) 8 Bing 14.
[8] See the recent case note on the Supreme Court of Singapore's decision in *BOM v BOK* [2018] SCCA 83: Vincent Ooi and Walter Young. 'A reformulated test for unconscionability' [2019] 135 LQR 400.
[9] The Unfair Contract Terms Act 1977 and the Consumer Rights Act 2015.
[10] *Nagle v Fielden* [1966] 2 QB 633, where Denning J stated that a rule could be challenged if it was arbitrary, unreasonable and capricious.
[11] See *Fry v Lane* (1880) 40 Ch. D 312, and *Cresswell v Potter* [1978] 1 WLR 255.
[12] [2018] SCCA 83

and, then threatening to kick him out of their house if he did not comply. The court found that there had been undue influence in this cases, because the first appellant had taken advantage of the respondent's acute sense of loneliness in a time of grief to pressure him into signing the deed, impairing his free will and constituting actual undue influence. However, the court also held, *obiter*, that the absence of independent advice and the fact that the transaction was at an undervalue weighed heavily in favour of a finding of unconscionability, leading the court to hold that the deed was by no means fair, just and reasonable, and therefore, unconscionable. This reasoning seems to be at the basis of the decision in our case, although we can see that in most cases the modern laws of duress and undue influence would offer a remedy, see below.

Duress and undue influence

One possible course of action open to the plaintiff in our case would be to plead that the agreement between himself and the defendants was tainted by economic duress. Duress, a common law concept, was initially confined to cases where there had been a threat to the person or goods of a person, which had then induced that person to enter into the contract.[13] This does not appear to have happened in our case – unless we could say that the plaintiff's goods (his wages entitlement) were being threatened by the defendants unless he agreed to payment by beer in lieu.

However, the common law concept of duress was subsequently expanded and the principle of *economic* duress accepted as a vitiating factor. Under this principle, a contract might be declared void/voidable where there has been a coercion of the will, [14]most commonly where one party threatens to break a contract unless the other accedes to their request. Cases of economic duress usually arise where the parties are already in a contractual relationship and one of them wishes to renegotiate the terms and seeks to impose economic pressure on the other to accept those terms: for example, 'if you do not accept an increase in the price or modification of my duties, I will break the contract.' Such agreements were originally void for want of consideration,[15] but as the courts accepted the validity of such consideration it then became important to distinguish between valid contractual bargaining and illegitimate economic duress and pressure. For example, in *D and C Builders v Rees,*[16] it was held that an agreement to take a lesser sum in full and final payment for building work was void because the customer had placed undue pressure on the builders, intimating that the builders could either accept what was on offer, or receive nothing.

Unlike common law duress, above, equity has provided redress to individuals who have been induced into a contract because of some undue influence or pressure exerted on them by another person.[17] Here the influence is regarded as vitiating the party's free will in entering into the contract, and extended beyond physical threats.[18] It is now accepted that the principle can apply in two situations: one, where *the relationship* between the parties gives rise to a presumption of undue influence,[19] and secondly, where there is evidence of *actual* undue influence.[20]

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[13] *Cumming v Ince* (1847) 11 QB 112; *Barton v Armstrong* [1976] 1 AC 104.
[14] See *Pao On v Lau Yiu Long* [1980] AC 614.
[15] *Stilk v Myrick* (1809) 2 Camp. 317.
[16] [1966] 2 QB 617.
[17] See Edwin Peel, *Treitel's Law of Contract*, 15th edn. Sweet and Maxwell 2020, chapter 10
[18] *Royal Bank of Scotland v Ettridge (No 2)* [20001] UKHL 24.
[19] See now, *Barclay's Bank v O'Brien* [1994] 1 AC 180
[20] *Turnbull v Duvall* [1902] AC429; *Barclays Bank v O'Brien* [1994] 1 AC 180.

It is suggested that in our case that neither duress nor undue influence (in either of its guises) was present, and that the court was more concerned with the general unfairness or unconscionability of the arrangement between the parties.

Custom and practice

In our case, it was argued that the payment (by beer) for work done over and above the contractual quantity was covered by a clear and consistent trade practice for sheep shearers, and thus was part of the contractual arrangements between the plaintiff and the defendants. Trade and custom is still a potential source for modern contracts of employment,[21] and in 'modern' employment law, the custom has to be certain, general and reasonable;[22] although it is unclear whether the worker has to be aware of the custom, or whether they can attempt to prove that they would not have agreed to it had they been aware of it.[23]

At the time of our dispute, it would have been common for workers' contracts to be regulated by relevant custom and practice, and thus one would have expected the court to accept the custom in our case. However, the doctrine of custom and practice is dependent on all the circumstances of the case, including whether it would have been conscionable for the rule to be applied on a particular individual, which the court felt was clearly not the case for our worker. Thus, the judgment with respect to coercion of the plaintiff by the defendants is interesting, in particular that the plaintiff was left with an unacceptable and stark choice, between accepting the method of payment and not being accepted as a worker by the defendants. Employees are, of course, often left with that stark choice, but the court was concerned in our case that the rule imposed by the men was inequitable and improper. In that sense the decision reflects the distrust of judges towards trade union and other collectives' rules, rules which might well be accepted if they are practiced by (regulated) employers.

Conclusions

The case of *Shore v Sawyer* offers an interesting insight into worker practice in the middle of the 19th century, and is perhaps an early example of the courts intervening to strike down unconscionable bargains. Given the limited documentation of the judgment is difficult to see the true legal reasoning of the decision, but it certainly has overtones of undue influence, duress and, more so, the wider concept of unconscionability. It is unlikely that the court in this case intended to lay down any firm precedent in this area, or in contract law generally, and the decision might well be explained in the context of the courts animosity to rules laid down by unregulated collectives.

[21] See *Sagar v Ridehalgh and Son Ltd* [1931] 1 Ch 310; Ian Smith, Aaron Baker and Owen Warnock*, Smith and Wood's Employment Law*, 13th edn. Oxford 2019, 159-160.
[22] *Marshall v English Electric Company Ltd* [1945] 1 All ER 633.
[23] *Ibid*.

RECENT DEVELOPMENTS

HUMAN RIGHTS

Allocation of housing and anti-discrimination law: the decision in *R (Z and another)*

R (Z and another) v Hackney London Borough Council and another (Respondents) [2020] UKSC 40.

Rona Epstein*

Introduction and the social context: social housing

This case concerns the allocation of social housing. Adequate housing is a basic human right and the United Nations Committee on Economic, Social and Cultural Rights has stressed that the right to adequate housing should not be interpreted narrowly. Rather, it should be seen as the right to live somewhere in security, peace and dignity. It includes the right to choose one's residence, to determine where to live. It includes equal and non-discriminatory access to affordable adequate housing – housing is not adequate if its cost threatens or compromises the occupants' enjoyment of other human rights. Adequate housing requires access to employment opportunities, health-care services, schools, childcare services and other social facilities, and it must not be located in polluted or dangerous areas.[1] Thus we all have a right to somewhere decent and safe to live.

However, for decades, house building in the UK has not kept up with the growth in population. The National Housing Federation has recently reported that the real social housing waiting list in England is 500,000 households more than official figures suggest. Its research indicates that the true number of people needing social housing in England is now 3.8 million. This equates to 1.6 million households – 500,000 more than the 1.16 million households recorded on official waiting lists. Because of the severe shortage of social homes, some of these people have been on a council waiting list for almost two decades and may never be housed. The number of people in need of social housing is set to rise rapidly as a result of the Covid-19 pandemic, with low-income earners twice as likely to lose their jobs.[2]

In September 2019 *The Guardian* reported that thousands of homeless children are growing up in cheaply converted shipping containers and cramped rooms in former office blocks. 130,000 families in England are being crammed into one-bedroom flats and social housing residents of a block of flats in east London that had been engulfed in flames report that they are being forced to move back despite safety fears. 'These are just a few recent examples of how the UK housing crisis is affecting the country's poorest and most vulnerable' citizens'.[3]

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* Honorary Research Fellow, Coventry Law School, R.Epstein@coventry.ac.uk

[1] The Right to Adequate Housing, Factsheet No. 21, Office of the United Nations Rights Commissioner for Human Rights.

[2] (The Planner https://www.theplanner.co.uk/news/half-a-million-more-people-on-social-housing-waiting-lists 21.9.2020)

[3] https://www.theguardian.com/society/2019/sep/25/social-housing-crisis-builds-government-passes-buck

The social context: Hackney's Haredi community

The Haredi (also spelled Charedi) are a community of Orthodox Jews who live in a number of countries, chiefly in Israel, Canada, the United States and the UK. Reporting on a fund-raising campaign taking place in London for legal costs to oppose divorcing parents who wish to remove their children from the Haredi community, the *Independent* reported: 'The Charedi community is notoriously insular and practices a 19th-century interpretation of the faith. Engagement with the secular world is deeply taboo, Yiddish is spoken as the primary language and arranged marriages are standard practice. Men wear 19th-century Eastern European dress including long black coats and black hats, while women must dress modestly and married women must also cover their hair.'[4]

The charitable objective of Agudas Israel Housing Association Ltd (the Housing Charity) is to make social housing available primarily for members of the Orthodox Jewish community, in particular the Haredi community. It makes properties available via an online portal operated by Hackney London Borough Council (the Council), which is open to applicants for social housing whom the Council has identified as having a priority need. The Council cannot compel the Housing Charity to take tenants who do not fall within the scope of its charitable objective and its selection criteria. This, combined with a great need for social housing on the part of the Orthodox Jewish community, means that in practice the Council only nominates and the Housing Charity only accepts members of the Haredi community for the Housing Charity's properties. The social housing provided by the Housing Charity makes up less than 1% of the social housing available in Hackney. The appeal to the Supreme Court concerns the application of anti-discrimination law to charities, where they are established to provide benefits (in this case, social housing) for particular groups that are the subject of their charitable aims. The relevant anti-discrimination laws are contained in the Equality Act 2010 and Council Directive 2000/43/EC of 29 June 2000.

The facts in and background to *Z*

There is a great shortage of social housing in Hackney '[T]here is an acute imbalance between supply and demand for social housing in Hackney generally. About 13,000 households are currently registered under the Council's scheme for the allocation of social housing. In 2016, the Council allocated only 1,229 properties for social housing'.[5] Z, the principal appellant, is a single mother with four small children, two of whom have autism. She suffers from anxiety and depression. The Council identified Z as having a priority need for social housing in a larger property, and she was later housed by the council in such a property. However, she had to wait longer to be allocated suitable housing as she is not a member of the Orthodox Jewish community which meant that larger properties owned by the Housing Charity that became vacant were not available to her. She issued proceedings against the Council and the Housing Charity, alleging that she had suffered unlawful direct discrimination on grounds of race or religion contrary to the Equality Act 2010. There is a distinction between 'positive action which is lawful, and 'positive discrimination' which is not. It is lawful under s.158 of the Equality Act 2010 for an employer or provider of services to take action to compensate for disadvantages that it reasonably believes are faced by people who share a particular protected characteristic (i.e. age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex or sexual orientation). Separate provisions allowing positive action in relation to recruitment

[4] https://www.independent.co.uk/news/uk/home-news/ultra-orthodox-jews-launch-million-pound-fundraising-campaign-fight-converts-child-custody-cases-a7190281.html
[5] At Para 42.

and promotion in limited circumstances are contained in s.159 of the Act. Positive discrimination, however, is unlawful. In the employment unlawful positive discrimination would be where an employer recruits a person because they have a relevant protected characteristic rather than because they are the best candidate.

Counsel for Z argued that the Charity's allocation policy constituted unlawful 'positive discrimination' rather than legitimate 'positive action' falling within s.158. In making the distinction counsel for Z referred to paragraph 10.7 of the EHRC code of practice. The Divisional Court rejected that argument, pointing out that the EHRC code of practice stated that positive action in favour of a preferred group might well cause disadvantage to persons outside that group, but that the advantages to the preferred group might well outweigh the disadvantages, and thus be proportionate. 'In this case it is self-evident that the allocation of particular accommodation to a member of the Orthodox Jewish community may well disadvantage an individual non-member who may have a priority need for such accommodation. However, the relevant question … is whether the arrangements, viewed as a whole and in the light of relevant market circumstances, address the disadvantages and needs of the Orthodox Jewish community in a manner that outweighs the disadvantage to non-members of that community.'

The decisions of the Divisional Court and the Court of Appeal[6]

The Divisional Court dismissed Z's claim and the Court of Appeal dismissed her appeal. She then appealed to the Supreme Court and was given permission to add to her claim based on the Equality Act 2010 a new claim, namely that the allocation policy of the Housing Charity contravened the Race Directive by unlawfully discriminating against her on the grounds of race or ethnic origin. The question is whether the Housing Charity acted unlawfully or not in restricting access to its stock of social housing to members of the Haredi community.

The Courts found that the Housing Charity's allocation policy is proportionate and lawful under ss.158 and 193 (2) (a) of the Equality Act 2010, which permit actions which would contravene the Equality Act, provided that the actions in questions are proportionate and lawful measures undertaken to for a legitimate aim. The legitimate aim was held here to include the minimisation of disadvantages that are connected to the Haredi community's religious identity and countering the discrimination which they suffer, including in the private housing market, and the fulfilment of relevant needs which are particular to that community.

The decision of the Supreme Court

The Supreme Court agreed with the two lower courts, and unanimously dismissed the appeal. Lord Sales gave the main judgment, Lady Arden gave a concurring judgment. The Equality Act 2010 makes it unlawful to discriminate directly against any person on the basis on certain characteristics, known as protected characteristics. These include 'race', 'religion or belief'.[7] * However, the Act sets out exemptions where certain actions will not be considered unlawful direct discrimination. Section 158 provides an exemption where positive action addresses in a proportionate manner needs or disadvantages connected to a protected characteristic.[8] Section 193 sets out two further exemptions. Section 193 (2) (a) permits charities to restrict benefits to those within a protected characteristic if that restriction is a

[6] [2019] EWHC 139 (Admin); [2019] EWCA Civ 1099.
[7] At paras 17-18.
[8] At para 19.

proportionate means of achieving a legitimate aim. Section 193 (2) (b) permits charities to restrict benefits to those who share a protected characteristic if the restriction seeks to prevent or compensate for a disadvantage linked to the characteristic.[9]

The Housing Charity was entitled to adopt a clear and strict rule about who could and could not apply for its social housing, which means that it was made available only for members of the Orthodox Jewish community. This was to ensure that its charitable activities were focused on that community, so that its activities did in fact fulfil its charitable objective to alleviate the problems experienced by that community.[10] The Divisional Court had correctly considered the Housing Charity's allocation policy in the light of the applicable legal framework, and, accordingly, was entitled to find it to be proportionate and lawful under these statutory exemptions. The Supreme Court made its own assessment of proportionality, which is in agreement with that of the Divisional Court.

The Race Directive provides that discrimination on grounds of race or ethnic origin must be unlawful, particularly in relation to housing.[11] The Court found that the Housing Charity was not in contravention of this directive because its allocation policy differentiates on the basis of religious observance and not race or ethnic origin.[12] In her concurring judgment Lady Arden emphasised that an appellate court should not generally make its own assessment of proportionality in cases such as the instant one.[13]

Comment and conclusions

While the legal arguments in the decisions of both the lower courts and the Supreme Court would appear to be clear, let us consider also this case from the point of view of the appellant, who lost her case. As noted above, Z is a single mother who suffers from anxiety and depression. She has four small children: twin daughters and two sons, both of whom have autism. She was on the Council's list for social housing and had been identified by the Council as having priority need to be housed in a larger property. The Council, properly and lawfully, allocated a certain number of larger sized properties to the Housing Charity for members of the Haredi community. Z was not part of that community. The decision of the Supreme Court is convincing – allocating a bigger home to the Charity for a member of the Haredi community was, and is, lawful. The law courts have settled the legal issues in this case, but not, of course, the social and ethical ones. This case brings into sharp focus the housing policy of this and previous governments for many years. I write this Case Note in the week that the government has announced its decision to allocate an additional sum of £16.5 billion for military spending.[14] Responding to this announcement, the barrister and TV personality Robert Rinder commented that the government could house 136,000 children who are without a permanent home with the extra money they are putting into defence. Rinder, a Shelter ambassador, pointed out that 150,000 homes could be built with £12bn to help the situation in the country – a situation worsened by Covid. 'We should ask ourselves what is our place in the world,' he added.[15]

Housing is a human right. It is a pre-requisite for the health and well-being of every citizen and particularly the healthy development and well-being of every child. In 2003 the

[9] At para 21.
[10] At paras 76-87.
[11] At para 89.
[12] At paras 89-90.
[13] At para 120.
[14] BBC News, 19 November 2020.
[15] (BBC News 21 November 2020 https://www.bbc.co.uk/news/av/uk-politics-55005144).

government then in power published a Green Paper advocating reform of the system for the safeguarding of children in state care with the title '*Every Child Matters*'. If it is indeed true that every child matters, then this includes those of Z and all those in families who are homeless or inadequately housed. I would argue that we can and should demand an investment in social housing which would make it impossible for cases like *R (Z) v Hackney Borough Council* to come before the courts. We should turn our attention from the legal to the social issues raised by this Supreme Court case.

HUMAN RIGHTS

Freedom of expression and the protection of gender critical speech

R (Harry Miller) v The College of Policing and Another [2020] EWHC 225 (Admin)

High Court of Justice (Queen's Bench Division)

Maureen O'Hara*

Introduction

In 2016 the House of Commons Women and Equalities Committee's Report on 'Transgender Equality' recommended that the Gender Recognition Act 2004 be amended to enable people to change their legal gender simply by a process of self-declaration. Following this report, there was a public consultation about its recommendations, which ended in October 2018. The public consultation has led to considerable debate about the proposals for self-declaration. People in favour of the proposals argue that an individual should be able to define their own 'gender identity' and have this recognised in law without any form of assessment. This view is often based on the idea that all individuals have an internal, and possibly innate, sense of 'gender' which may or may not correspond with their sex, which is viewed as 'assigned at birth'. Many of those who oppose the proposals believe that self-declaration of 'gender' undermines the sex-based rights of women and girls, including rights to single sex services and facilities, such as changing rooms in public venues, and support services for those who have experienced sexual violence and domestic abuse. They see sex as a biological reality which is immutable, and see gender as socially constructed. This perspective is often described as 'gender critical'.

During this debate, the expression of gender critical views has frequently been framed as 'hate speech'. Evidence presented in the *Miller* case described hostile responses to gender critical academics within UK universities; and an environment in which gender critical views are being silenced by police actions, which includes the recording of the expression of such views as 'non-crime hate incidents'. The Claimant in *Miller* challenged this practice and the police policy on which it was then based. While not accepting the Claimant's argument that the policy was unlawful, the court found that the police's conduct towards the Claimant was an unlawful interference with his right to freedom of expression. In doing so, the court emphasised the special protection which is afforded to political speech and debate on questions of public interest under Article 10 of the European Convention on Human Rights. The judgment in this case arguably calls into question the judgment in the earlier case of *Forstater v CGD Europe and Ors* (case no 2200909/2019) in which the Employment Tribunal found that the Claimant's gender critical beliefs were not protected as a philosophical belief under s. 10 Equality Act 2010 because were not worthy of protection in a democratic society.

The facts and decision in *Miller*

The Claimant, Harry Miller, brought an application for judicial review against the College of Policing and the Chief Constable of Humberside in relation to Humberside Police's responses to a number of tweets of his which a member of the public had reported to them as allegedly 'transphobic'. Under policy issued by the College of Policing which applied at the time of these proceedings, which was known as the 'Hate Crime Operational Guidance' (HCOG), Humberside police recorded the tweets as a 'non-crime hate incident'. This is an incident

* Senior Lecturer in Law, Coventry Law School

which is subjectively perceived by the victim, or any other person, as motivated wholly or partly by hostility or prejudice, but which does not amount to a criminal offence. Following the complaint about the Claimant's tweets, a police officer went to his place of work to speak to him about them. The Claimant was not present, and the officer subsequently spoke to him over the telephone. The details of the conversation were disputed by the parties. However, the parties agreed that the officer's visit to the Claimant's place of work, and a subsequent telephone conversation about the tweets, had taken place. It was also agreed that the officer had told the Claimant that his behaviour did not amount to a criminal offence but that if it 'escalated' it might become criminal and the police would need to deal with it appropriately.[1]

The application for judicial review challenged both the legality of the HCOG and the way in which Humberside police had dealt with the claimant under that guidance. The Claimant argued that the HCOG was unlawful on its face as being in violation of the common law and/or Article 10 of the European Convention on Human Rights, which protects the right to freedom of expression. He also argued that, in addition or in the alternative, his treatment by the police violated his rights under Article 10(1). His argument was that, even if the HCOG was lawful, his treatment by the police was unlawful.

The Claimant's tweets were made early in 2019 in the context of a public debate which was taking place about proposed reforms to the Gender Recognition Act 2004. This legislation enables people to be granted a Gender Recognition Certificate, by which their gender is changed in law. The Gender Recognition Act requires an applicant for a Gender Recognition Certificate to have a diagnosis of gender dysphoria which is supported by a report from a registered medical practitioner or psychologist practising in the field of gender dysphoria, and an additional report from a medical practitioner who may or may not practice in that field. The application must be accepted by a Gender Recognition Panel, which is made up of members who have legal and medical qualifications.

In 2016 the House of Commons Women and Equalities Committee's Report on 'Transgender Equality'[2] recommended that the Gender Recognition Act be amended to remove all of the current assessment processes and enable people to change their legal gender by a process of self-declaration. This would involve completing a statutory declaration.

The Claimant opposed the proposal to introduce self-declaration of gender identity. In his witness statement he explained his beliefs as follows:

> I believe that trans women are men who have chosen to identify as women. I believe such persons have the right to present and perform in any way they choose, provided that such choices do not infringe upon the rights of women. I do not believe that presentation and performance equate to literally changing sex: I believe that conflating sex (a biological classification) with self-identified gender (a social construct) poses a risk to women's sex-based rights; I believe that such concerns warrant vigorous discussion which is why I actively engage in debate. The position I take is accurately described as gender critical.[3]

The complaint to Humberside police about the tweets was made by a person described in the proceedings as 'Mrs B'. The presiding judge, Justice Knowles, made an order under CPR r 39

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[1] *R (Harry Miller) v The College of Policing and Another* [2020] EWHC 225 (Admin), 84.
[2] House of Commons Women and Equalities Committee, 'Transgender Equality First Report of Session 2015–16', HC 390, 14 January 2016.
[3] *R (Harry Miller) v The College of Policing and Another* [2020] EWHC 225 (Admin), 19.

2 anonymising Mrs B's identity. Justice Knowles noted that Mrs B had made a voluntary choice to read the tweets, which had not been directed at Mrs B or at any particular person. He also noted that the tweets were not specifically targeted at the transgender community.

The court rejected the Claimant's arguments that the police policy on recording 'non-crime hate incidents' set out in HCOG was unlawful under the common law. The Claimant argued that it was unlawful because there is no statutory authorisation for the interference with the right to freedom of expression to which the claimant alleged the policy gave rise. The court also rejected the argument that the policy was contrary to the right to freedom of expression under Article 10 of the European Convention.

Citing *Rice v Conolly*,[4] *R (Wood) v Commissioner of the Metropolis*,[5] and *R (Catt) v Association of Chief Police Officers*,[6] the court found that the policy was lawful under the common law because the police have the power at common law to record and retain a wide variety of data, and no statutory authorisation is necessary in relation to non-intrusive methods of data collection, even where the gathering and retention of data interferes with Convention rights.

In relation to the lawfulness of the HCOG policy under Article 10, the court applied the four-part analysis required in respect of alleged violations of Article 10 set out in *Wingrove v United Kingdom*.[7] The four questions addressed in this analysis are firstly, whether there has been an interference with the right to freedom of expression; secondly, if there has been an interference whether it is 'prescribed by law'; thirdly, whether the interference pursues one or more of the aims set out in article 10(2); and fourthly, whether the interference is 'necessary in a democratic society'. The fourth question incorporates the issue of proportionality.

In relation to the first question, the court concluded that the mere recording of the Claimant's tweets as a 'non-crime hate incident' pursuant to HCOG did not interfere with his right to freedom of expression within the meaning of Article 10(1), as it did not amount to a formality, condition, restriction or penalty imposed in response to his speech.[8] The court stated that, while the recording may have a chilling effect on freedom of expression, without more it is too remote from any consequences to amount to a restriction.

Although the court's finding on interference was sufficient to dispose of the Claimant's Article 10 challenge to the HCOG policy, the court went on the address the other three questions. It found that HCOG was prescribed by law, as it meets the dual test of accessibility and foreseeability established in *Huvig v France*,[9] and *Kruslin v France*.[10] The court stated that the perception-based definition of a 'non-crime hate incident' does not contravene the foreseeability requirement, as the policy allows for police discretion about whether or not to record events as 'non-crime hate incidents'. The court noted that the specific aims of HCOG were preventing, or taking steps to counter, hate crime and hate incidents, and building confidence in policing in minority and marginalised communities. It found that the policy pursued the legitimate aims of preventing disorder and crime and protecting the rights and freedoms of others, and that it was both necessary in a democratic society and proportionate

[4] [1966] 2 QB 414
[5] [2010] 1 WLR 123
[6] [2015] AC 1065
[7] (1996) 24 EHRR 1
[8] *Handyside v UK* (1979) 1 EHRR 737
[9] (1990) 12 EHRR 528
[10] (1990) 12 EHRR 547

However, while the court held that the HCOG policy was lawful, it found that the way in which the police had applied it in relation to the Claimant was not. In relation to the police officer's visit to the Claimant's workplace, the officer's comments to the Claimant about a potential criminal prosecution, and subsequent dealings with the police in which the Claimant was again warned about criminal prosecution, the court ruled that the police had interfered with the Claimant's right to freedom of expression under Article 10 in a manner which was unlawful. The court stated that it was very important to note that the claimant was contributing to an ongoing debate that is complex and multi-faceted. Citing *Vajnai v Hungary*,[11] the court noted that special protection is afforded to political speech and debate on questions of public interest. Applying the four-part analysis, the court found that the undisputed facts plainly showed that the police had interfered with the claimant's right to freedom of expression.

Justice Knowles stated:

> 'The effect of the police turning up at his place of work because of his political opinions must not be underestimated. To do so would be to undervalue a cardinal democratic freedom. In this country we have never had a Cheka, a Gestapo or a Stasi.
>
> […]Warning the Claimant that in unspecified circumstances he might find himself being prosecuted for exercising his right to freedom of expression on Twitter had the capacity to impede and deter him from expressing himself on transgender issues. In other words, the police's actions, taken as a whole, had a chilling effect on his right to freedom of expression. [12]

In respect of whether the interference was prescribed by law, the court stated that it was prepared to assume that the police officer was acting within his common law powers to prevent crime in his dealings with the Claimant. However, the court found that there was no rational basis on which the police officer could have believed that there was any risk of the Claimant committing a criminal offence, and that it was not rational or necessary to warn the Claimant about criminal prosecution. The court found that less intrusive responses to Mrs B's complaint were open to the police, and that the police's actions were disproportionate in relation to any potential benefit to be gained.

The court stated that what the Claimant wrote in his tweets was lawful. It questioned whether his tweets were properly recordable under the HCOG at all, while noting that it was not necessary to decide this point.

Analysis

The court placed great emphasis on the fact that the Claimant's tweets were made in the context of a national political debate, and noted the often hostile responses faced by those who express gender critical views within this debate. The court's judgement referred to the evidence of Professor Kathleen Stock, who described a 'hostile climate' facing gender critical academics within some UK universities.[13] It also referred to the evidence of Jodie Ginsberg, who is the CEO of the organisation Index on Censorship, which monitors freedom of expression. Ms Ginsberg made a statement in evidence in which she said:

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[11] (2010) 50 EHRR 44
[12] *R (Harry Miller) v The College of Policing and Another* [2020] EWHC 225 (Admin), 259-261
[13] *R (Harry Miller) v The College of Policing and Another* [2020] EWHC 225 (Admin), 243

> Index is concerned by the apparent growing number of cases in which police are contacting people about online speech which is not illegal and sometimes asking for posts to be removed. This is creating confusion among the wider population about what is and is not legal speech, and – more significantly – further supressing debate on an issue of public interest, given that the government invited comment on this issue as part of its review of the Gender Recognition Act… Police actions against those espousing lawful, gender critical views – including the recording of such views where reported as 'hate incidents' – create a hostile environment in which gender critical views are silenced. This is at a time when the country is debating the limits and meaning of 'gender' as a legal category…It has been reported that the hostile environment in which this debate is being conducted is preventing even members of parliament from expressing their opinions openly […][14]

In response, Justice Knowles stated:

> I take the following points from this evidence. First, there is a vigorous ongoing debate about trans rights. Professor Stock's evidence shows that some involved in the debate are readily willing to label those with different viewpoints as 'transphobic' or as displaying 'hatred' when they are not. It is clear that there are those on one side of the debate who simply will not tolerate different views, even when they are expressed by legitimate scholars whose views are not grounded in hatred, bigotry, prejudice or hostility, but are based on legitimately different value judgements, reasoning and analysis, and form part of mainstream academic research… the Claimant expressed views which are congruent with the views of a number of respected academics who hold gender-critical views and do so for profound socio-philosophical reasons. This conclusion is reinformed by Ms Ginsberg's evidence, which shows that many other people hold concerns similar to those held by the Claimant.[15]

Justice Knowles' emphasis on the importance in a democratic society of protecting freedom of expression on matters of public interest contrasts sharply with the approach taken to gender critical speech by the Employment Tribunal in the case of *Forstater v CGD Europe and Ors*.[16] The Claimant in this case was Maya Forstater, whose employment as a senior researcher at the Centre for Global Development (CGD), a think tank based in London and Washington, was ended because she had shared gender critical opinions on Twitter. Forstater had shared campaign material about the potential impact on women and girls of the proposals for gender self-declaration, and had sent tweets which essentially stated that men could not actually become women.

In her claim against CGD Forstater argued that her gender critical beliefs are a philosophical belief and should be protected as such under s.10 of the Equality Act 2010. She also argued that her lack of belief in an inner 'gender' should be protected.

In order to be protected under the Equality Act, a belief must satisfy five criteria established in *Grainger plc v Nicholson,* which are known as the 'Grainger criteria'. One of these criteria is that the belief must be "worthy of respect in a democratic society and not be incompatible with

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[14] *R (Harry Miller) v The College of Policing and Another* [2020] EWHC 225 (Admin), 249
[15] *R (Harry Miller) v The College of Policing and Another* [2020] EWHC 225 (Admin), 250
[16] Case no 2200909/2019

human dignity and not conflict with the fundamental rights of others''[17]. The employment judge, Mr J Taylor, found that Maya Forstater's beliefs did not meet this criterion.

Summarising Ms Forstater's beliefs in terms which were very similar to the description of the Claimant's beliefs in *Miller*, Mr Taylor stated,

> The core of the Claimant's belief is that sex is biologically immutable. There are only two sexes, male and female. She considers this is a material reality. Men are adult males. Women are adult females. There is no possibility of any sex in between male and female; or that a person is neither male nor female. It is impossible to change sex…She will not accept in any circumstances that a trans woman is in reality a woman or that a trans man is a man. That is the belief that the Claimant holds… While the Claimant will as a matter of courtesy use preferred pronouns she will not as part of her belief ever accept that a trans woman is a woman or a trans man a man, however hurtful it is to others. [18]

Mr Taylor went on to say:

> I conclude…that the Claimant is absolutist in her view of sex and it is a core component of her belief that she will refer to a person by the sex she considered appropriate even if it violates their dignity and/or creates an intimidating, hostile, degrading, humiliating or offensive environment. The approach is not worthy of respect in a democratic society.[19]

It is difficult to see how the judge reached this conclusion, given that his own summary of Forstater's beliefs states that she will use preferred pronouns as a matter of courtesy.

In relation to the issue of compelled speech, Mr Taylor stated that his analysis was not undermined by the decision of the Supreme Court in *Lee v Ashers Baking Company*,[20] that people should not be compelled to express a belief with which they profoundly disagree unless justification is shown. He suggested that the Claimant could generally avoid causing offence as it is often not necessary to refer to a person's sex at all. However, he stated that where this is necessary, he considered that "…requiring the Claimant to refer to a trans woman as a woman is justified to avoid harassment of that person." [21]

Arguably, this comment went beyond the judge's role in the case. Determining whether Forstater's beliefs were protected by the Equality Act did not require him to make a judgment about what she should or should not be compelled to say in a hypothetical situation.

While the cases of *Miller* and *Forstater* relate to very different contexts, Karen Monaghan QC has argued that, following *Miller,* it seems unlikely that the *Forstater* decision will survive an appeal, especially in view of the requirement under section 3 of the Human Rights Act 1998 to construe the Equality Act 2010 in conformity with the Convention rights so far as is possible. Monaghan questions whether a belief can be said to be unworthy of respect in a democratic society and in conflict with the fundamental rights of others in circumstances where its

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[17] [2010] ICR 360, para 24
[18] *Forstater* (n 16), para 77
[19] Ibid, para 90
[20] *Lee (Respondent) v Ashers Baking Company Ltd and others (Appellants) (Northern Ireland)* [2018] UKSC 49
[21] *Forstater* (n 10), para 91

expression is protected under Article 10. Article 17 would prevent a belief being protected if its expression constituted 'hate speech'.[22]

Conclusion

The judgment in *Miller* concerning the police's application of the HCOG in relation to the Claimant is significant in that it is likely to discourage the kind of police over-reach which Jodie Ginsberg's evidence suggests is creating a hostile environment in which gender critical views are being silenced. The judgment also calls into question the decision in *Forstater* that gender critical beliefs are not worthy of respect in a democratic society, which has arguably contributed to the hostile environment Ginsberg describes.

The College of Policing carried out a consultation in relation to the HCOG during October and November 2019, and the policy was under revision during the proceedings in *Miller*. In October 2020 new guidance entitled *Authorised Professional Practice guidance on hate crime* was published. The judgment has clearly influenced the new guidance, which states:

> Police officers and staff responding to a non-crime hate incident must remember that they have limited enforcement powers in these circumstances. A disproportionate response may adversely impact on either an individual's human rights, e.g., by inhibiting free speech, or on levels of hostility and tension in society (see *Miller v College of Policing and Humberside Police* [2020] EWHC 225 (Admin)).[23]

However, at the time of writing *The Times* has recently reported that a 14 year-old girl, known as Miss B, has threatened a judicial review of the revised guidance, and argues that it creates a chilling effect on her ability to voice legitimate views relating to transgender issues during school discussions.[24] A significant aspect of the chilling effect of the recording of 'non-crime hate incidents' is that, although these records are based entirely on subjective perceptions, they are disclosable where current or prospective employers request an enhanced Disclosure and Barring Service from the police. The police have discretion in relation to such disclosure.

Current police practice in this area grew out of the recommendation in the Macpherson Inquiry's report[25] that the police and other criminal justice agencies should define an incident as racist if it was perceived as racist by the victim or any other person. This perception-based approach is now applied to the five 'strands' which are monitored in relation to hate crime, which are race, religion, sexual orientation, disability, and being transgender. The Macpherson Inquiry's main purpose in recommending police recording based on subjective perception was to ensure that the police took racially motived crime seriously, and correspondingly, that victims of such crimes could be confident that they would be taken seriously when they reported them. Its aim was to remove police discretion in relation to recording the possible racist motivations involved in some offences. It seems unlikely that the Inquiry envisaged a

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[22] Karen Monaghan, 'The Forstater Employment Tribunal judgment: a critical appraisal in light of Miller', *UK Labour Law Blog,* 19 February 2020 <https://uklabourlawblog.com/2020/02/19/the-forstater-employment-tribunal-judgment-a-critical-appraisal-in-light-of-miller-by-karon-monaghan/> accessed 10 May 2020

[23] <https://www.app.college.police.uk/app-content/major-investigation-and-public-protection/hate-crime/responding-to-non-crime-hate-incidents/>acessed 4 December 2020

[24] Fiona Hamilton, 'Girl, 14, takes on police over pupils' right to free speech' *The Times* (04 December 2020) <https://www.thetimes.co.uk/edition/news/girl-14-takes-on-police-over-pupils-right-to-free-speech-v9ht8pwck >accessed 5 December 2020

[25] Sir William Macpherson of Cluny, *The Stephen Lawrence Inquiry Report of an Inquiry by Sir William Macpherson of Cluny* (Cm 4262, 1999)

situation in which people who have committed no criminal offence can be reported to prospective employers as having been involved in a ‘hate incident’.

Accommodating intolerant speech: the decision in *Ngole v Sheffield University*

R (Ngole) v University of Sheffield [2019] EWCA Civ 1127.

Dr Steve Foster*

Introduction

An inevitable dilemma arises when Parliament creates statutory and other schemes to protect both free speech and religious freedom,[1] but at the same time passes legislation to protect certain groups from discrimination in order to facilitate the right to equality.[2] Until recently, when that conflict has arisen, the courts gave preference to its equality policies at the expense of individual speech and beliefs, largely ignoring free (religious) speech rights.[3] The decision of the High Court in *R (Ngole) v University of Sheffield*[4] continued the previous trend in deciding that a university had acted lawfully in deciding to expel a devout Christian student from a post-graduate course after he posted comments on social media expressing his orthodox religious views about same-sex marriage and homosexuality. However, the Court of Appeal then decided that the University's decision was both procedurally incorrect and disproportionate to the student's Convention rights of free speech and religion.[5]

This decision has reopened the debate concerning the extent to which religious and personal views that challenge equality and diversity can be voiced by individuals; particularly those who might owe some form of duty to promote equality and diversity. This piece examines the decision in the light of the conflict between free speech and the promotion of equality.

The facts and decision *Ngole*

Ngole is a devout Christian and has orthodox religious views on the morality of homosexuality. He had enrolled as a mature student with the university on a two-year post-graduate course in social work. The social work profession was regulated by the Health and Care Professions Council (HCPC), and the university's postgraduate social work programme was the Council's approved course leading to a qualification approved for the purpose of professional registration.

The claimant had been expelled by the university after he engaged in a lengthy debate on social media about a state official in the US who had refused to issue licences for same-sex marriages. In those posts he stated that same-sex marriage was a 'sin and an abomination' and cited various Biblical passages in support of his views. The university initiated an investigation and found that there were areas of concern relating to his fitness to practice and referred the matter to a faculty 'fitness to practise' committee panel. The panel took issue with the posts, not on the

* Associate Professor of Law, Coventry University Law School, United Kingdom.

[1] The UK Parliament has done this by enacting both ss. 12 and 13 of the Human Rights Act 1998, which requires the courts to have 'special regard' to, respectively, article 10 and article 9 of the European Convention;

[2] The Equality Act 2010.

[3] McClintock v Department of Constitutional Affairs [2008] IRLR 29; London Borough of Ealing v Ladele [2010] 1 WLR 995; and McFarlane v Relate Avon Ltd [2010] IRLR 872. For the European Court's stance in this area, see the decision of the European Court of Human Rights in McFarlane v United Kingdom, Application No. 36516/10) (2013) 57 EHRR 8 and Ladele v United Kingdom, Application No.51671/10 (2013) 57 EHRR 8, considered later in the article.

[4] *R (Ngole) v University of Sheffield* [2017] EWHC 2669 (Admin).

[5] *R (Ngole) v University of Sheffield* [219] EWCA Civ 1127.

grounds of his views, but because he had posted them publicly in a way which it believed would affect his ability to do the job of a social worker. The panel expressed serious concerns about the postings and concluded that there had been a serious breach of two professional requirements: to keep high standards of personal conduct; and to make sure that his behaviour did not damage public confidence in the profession. The panel noted that the claimant had given no evidence that he would refrain from presenting his views in the same way in future and concluded that the student should be excluded from further study on the programme and that he would be permitted to enrol on an alternative programme that did not lead to a professional qualification. The university's appeal committee rejected his appeal and his complaint to the Independent Adjudicator for Higher Education was also rejected.

Ngole submitted that the decision was in breach of his rights under Articles 9 and 10 of the Convention, protecting, respectively, freedom of religion and the right to freedom of expression, and that removal from the course was disproportionate. The university argued that the claimant had showed "no insight" with respect to the postings and that the decision to remove him from the course was fair and proportionate. Refusing the application, the High Court noted that the university had defended its actions by reference to the regulatory framework of the Council and had an obligation to not only teach and examine the course, but also to act as a gatekeeper for the social work profession.[6] The university's decision to remove the student was in terms that he was not fit to continue preparing for registration as a social worker and that the student's general fitness to practise was impaired; there being no evidence that the impairment could be remedied.[7]

Considering the claimant's Convention rights, the Court noted that freedom of expression was an important right, and that exercising that right to express the content of deeply held religious views deserved respect in a democratic and plural society; nowhere, in the Court's view, more so than in a university.[8] However, the university's issue was not the religious motivation or the religious content of the postings, but how they could be accessed and read by people, service users included, who would perceive them as judgemental, incompatible with service ethos, or suggestive of discriminatory intent.[9] Whatever the student's actual intention, it was the perception of the postings that would cause damage, and it was reasonable for the university to be concerned about that perception. The more the student insisted on the paramount importance of his faith and his freedoms, the more concerned the university became that he was simply unwilling or unable to see and deal with their concerns.[10] Therefore, the balance between the public interest in the guaranteed professionalism of social workers and the free exercise of important convention rights by the student had been carried out fairly and proportionately.[11]

The decision of the Court of Appeal in Ngole

On appeal, it was held firstly that the HCPC regulations and guidance were sufficiently clear and precise to be prescribed by law in order to comply with the qualifying provisions of Articles 9 and 10 of the Convention. The Court stressed that absolute certainty was not achievable, but that it had to have been clear to the student that offensive language and the expression of discriminatory views would be unacceptable.[12] The Court also found that the

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[6] *R (Ngole) v University of Sheffield* [2017] EWHC 2669 (Admin) at para 17.
[7] Ibid. para 151
[8] Ibid. para 166.
[9] Ibid. para 169.
[10] Ibid. para 170
[11] Ibid. para 181.
[12] *R (Ngole) v University of Sheffield* [219] EWCA Civ 1127, at para.103.

maintenance of confidence in a profession fell within the legitimate aim of professional regulation, although it added that it could not extend to prohibiting any statement that could be thought controversial or to have political or moral overtones.[13] Even a broad legitimate aim had to have limits, and could not extend to preclude legitimate expression of views simply because many might disagree with those views.[14] Conversely, the legitimate aim of such regulation had to ensure that reasonable service users perceived they would be treated with dignity and without discrimination, and in the Court's view, the use of aggressive or offensive language in condemnation of homosexuality would be capable of undermining confidence and bringing the social work profession into disrepute.[15] As the guidance made clear, the appellant had an obligation not to allow his views about a person's lifestyle to prejudice his interactions with service users by creating the impression that he would discriminate against them.[16]

Moving to proportionality, the Court of Appeal held that the both the objective of regulation and the extent of interference had to be proportionate. Thus, the real questions for the Court concerned the degree of intrusion into those rights, and whether a less intrusive alternative to expulsion and a bar from professional life would have sufficed.[17] In the Court's view, although his reaction and his perceived lack of insight, had caused concern, the university had failed to appreciate that the appellant's apparent intransigence was an understandable reaction to being told that he could never publicly express his religious views on topics such as sexual morals; in other words that there was a blanket ban.[18] Further, the university had also failed to appreciate that its stance did not accord with the HCPC guidance, or with common sense. The guidance did not prohibit the use of social media; it made clear that use of social media to share personal views and opinions was permitted, but that the university might have to take action if offensive comments were posted.[19] At no stage did those in charge of the disciplinary process make it clear that it was in fact the manner and language in which the appellant had expressed his views that was the problem. Neither did they offer him guidance as to how he might more appropriately and moderately express his views in a public forum and in a way in which it would be clear that he would never discriminate on such grounds or allow his views to interfere with his work as a professional social worker.[20]

Finally, the Court concluded that the university's approach to the sanction was disproportionate. The views expressed were the appellant's religious and moral views, based on the Bible. Further, he had not been shown to have acted in a discriminatory fashion, and had stated that he would never do so; and that had been accepted by the university.[21] There was no evidence that any service user had read the postings, or of any damage to the reputation of the profession. The swift conclusion that the appellant needed to be removed from the course had not been demonstrated to be the least intrusive approach

[13] Ibid. para 104.
[14] Ibid. para 105.
[15] Ibid. para 106.
[16] Ibid. para 106.
[17] Ibid. para 107.
[18] Ibid. paras 109-110.
[19] Ibid. para 111.
[20] Ibid. para 113.
[21] Ibid. para 135.

that could have been taken.[22] The Court of Appeal thus remitted the case for a new hearing before a differently constituted fitness to practice committee.[23]

The decision in *Ngole* and its impact on the free speech v diversity debate

This case was decided in the context of the responsibilities owed by employees or representatives (or in this case potential employees of those bodies) towards upholding principles of equality and diversity. Thus, unlike purely private citizens who wish to express their views on matters such as homosexuality or transsexuality,[24] these cases are viewed differently by the courts as the individual has both a contractual and/or public duty to support the state and their employers in promoting equality and diversity.[25] Notwithstanding this, these cases do affect free speech and the right to hold and express religious and other views, and the law and judges must seek some compromise in order to accommodate the (religious) free speech rights of the speaker. Although the decision in *Ngole* is not direct authority on the extent to which the law allows such views to be expressed, some of the points made by the Court of Appeal on proportionality (of both the language used to express the view and the penalty imposed by the university) may have significance to a wider debate on free speech.

Secondly, the decision does not disturb previous rulings that establish that religious views cannot be used to excuse discriminatory practices, or to justify the refusal to extend public or other services to individuals.[26] *Ngole,* therefore, was about whether budding social workers can express anti-gay views, and if so how. The issue for the Court of Appeal was free religious speech, not whether religious views can excuse discrimination, or excuse a person from facilitating an equality or diversity policy. Finally, although the Court of Appeal makes it clear that it is not permissible to penalise a person for *any* anti-gay comment, the Court does not give clear guidance on what would be an acceptable interference with free speech in such circumstances.

The decision in Ngole and the distinction between discrimination and compelled speech

As stated above, the decision in *Ngole* does not leave room for the speaker to discriminate against others on grounds of – in this case – sexual orientation. The case law in that area is clear and there is no room to allow for exemptions to equality and diversity policies because of individual religious beliefs.[27] However, the case does add to the free speech debate raised in the case of Lee *v Ashers Baking Ltd,* [28] where the Supreme Court held that it was not unlawful for a shop to refuse to make a cake that had a pro-gay message on it. In that case the Court held that the bakery owners had not been guilty of associative direct discrimination on the ground

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[22] Ibid. para 137.
[23] Ibid. para 146.
[24] See *R (Harry Miller) v The College of Policing and Another* [2020] EWHC 225 (Admin), noted by Maureen O'Hara, 'Freedom of expression and the protection of gender critical speech' (2020) 25(2) *Coventry Law Journal* **.
[25] See the recent Employment Tribunal case of *Higgs v Farmor's School*, unreported, Bristol Employment Tribunal, ET/1401264/19). In that case it was hled that a Christian school assistant was not unlawfully sacked after being dismissed from her job for sharing Facebook posts which criticised the introduction of teaching about LGBTQ+ relationships in primary schools.
[26] Ibid.
[27] See the cases referred to in note 3, above and the decision of the Supreme Court in *Hall v Bull* [2013] UKSC 73.
[28] [2018] UKSC 49. See Steve Foster, 'Let them eat cake; but don't expect me to make it; sexual orientation discrimination, religious objections and the Supreme Court' (2019) 24(1) *Coventry Law J*ournal 100; Michael Connolly, 'Lee v Ashers Baking and its ramifications for employment law' [2019] 48(2) *Industrial Law Journal* 240, and K Norrie 'Lee v Ashers Baking Co Ltd (Case Comment) (2019) 1 *Juridicial Review* 88, at 95.

of sexual orientation as their objection was to the message on the cake, because of their religious views concerning gay marriage, and not to any particular person or persons. In her Ladyship's opinion, the reason for the refusal to supply the cake was their religious objection to gay marriage, and the objection was to the message on the cake and not to any particular person or persons.[29] Further, her Ladyship held that obliging a person to manifest a belief that he did not hold was a limitation on his Article 9(1) rights to freedom of thought, conscience and religion.[30] The right to freedom of expression included the right not to express an opinion.[31] Thus, although the bakery could not refuse to provide a cake to Lee because he was gay or because he supported gay marriage that did not amount to a justification for something completely different, namely obliging them to supply a cake iced with a message with which they profoundly disagreed.[32] In her Ladyship's view, anti-discrimination legislation should not be read in such a way as to compel providers of goods, facilities and services to express a message with which they disagreed, unless justification was shown, and it had not been shown in the instant case.[33] Thus, as it was the message, and its association with the message, that they objected to, the shop owners' (religious) free speech rights had to be balanced with the customer's political opinions. In that respect, to force such a person to support, or assist in the supporting, of that view, was considered by the Supreme Court to a step too far in upholding equality on grounds of sexual orientation.

Although the context of the above case differs from *Ngole* – Ngole was not in any way *compelled* to share the views of others - the Supreme Court's rejection of the discrimination claim in *Ashers* allowed it to consider the reasonableness of forcing a person to abide with ideas of equality and diversity, when to do so clashes with their religious beliefs. In *Ngole*, therefore, the Court of Appeal, being convinced that the student had no intention to discriminate against potential clients were insistent that the university draw a clear line between what he could and could not post on social media. On the other hand, there are similarities with the previous discrimination cases, as we cannot ignore Ngole's duties towards the social work profession and the university and his indirect duty to uphold any relevant policies of diversity and equality. We cannot therefore, treat him as a private citizen in assessing the acceptability of his views in establishing criminal liability.[34] Equally, a court would surely have to take into account that the owners' views were based not simply on their opinion, but there religious sensibilities, thus augmenting their free speech rights. Consequently, the context of equality, and the extent to which it can be balanced against religious free speech, does not disappear simply by calling the issue one of freedom of speech, or the right to be free from compelled speech. Those issues have to be addressed, as the Court of Appeal in *Ngole* makes clear.

In *Ngole* the real issue was whether his views on homosexuality, and his failure to retract them, were consistent with his intended career as a social worker' despite his rights of free speech and religion. Whereas the High Court assumed such views and his stance to be inconsistent with his position, the Court of Appeal insisted on a further enquiry into those views, and of the necessity and proportionality of punishing them. Although the Court of Appeal provides little

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[29] Ibid. Lady Hale, at para 28.
[30] Ibid. Lady Hale, at para 50, citing *Buscarini v San Marino* (2000) 30 EHRR 208 and *Commodore of the Royal Bahamas Defence Force v Laramore* [2017] UKPC 13.
[31] *R (Zimbabwe) v Secretary of State for the Home Department* [2013] UKSC 38.
[32] *Masterpiece Cakeshop Ltd v Colorado Civil Rights Commission* 44 BHRC
[33] *Lee v Ashers Baking Ltd.* [2018] UKSC 49, Lady Hale, at para 56.
[34] See for example, the decision in *Hammond v DPP* [2004] EWHC 69 (Admin) on whether anti-homosexuality protest breached s.5 of the Public Order Act 1986. See Steve Foster 'Are we Afraid of Free Speech' (2019) 24(2) *Coventry Law Journal* 70, and Steve Foster 'Accommodating intolerant speech: religious free speech versus equality and diversity' [2019] *European Human Rights Law Review* 609, 618-20.

guidance as to where that balance may lie in particular cases, after Ngole, certain bodies, and the law generally, should not restrict (religious) free speech that questions those policies and related views beyond that which is necessary and proportionate. Thus, to prohibit *any* view that questions those policies and views is contrary to the principles of necessity and proportionality that temper unreasonable restrictions on free (religious) speech. Further, in deciding the proportionality of any interference, bodies and the law should pay due regard to the fact that the speech in question is based on the speaker's religious views. This should augment the free speech rights and should be considered by the court in the balancing exercise.[35] Despite that, it should be permissible to consider a wider meaning of harm in deciding the existence of that aim, and the extent to which it is permissible to protect it. For example, in cases such as *Ngole*, it is surely permissible to consider the speaker's responsibilities (as a budding social worker) to embrace equality and diversity, and not to say anything which suggests that he was not prepared to carry out those policies in the future. The Court of Appeal (and indeed the university) were not convinced that *Ngole* wished to discriminate against clients, but that surely cannot be the dividing line between acceptable and unacceptable speech on this topic.

Conclusions

The High Court decision in *Ngole* was less to do with the scope of free speech and the right to hold and manifest unpopular views, than whether those views can be consistent with modern policies on equality and diversity in the social work profession. As a result, free speech values, and religion freedom were given little weight and the court refused to involve itself in a balancing exercise between religion (and religious views) and upholding equality and diversity. On the other hand, the decision of the Court of Appeal gave greater weight to the Convention rights of the speaker to express their religious views against homosexuality. This allowed the court to balance those views with the maintenance of equality and diversity in the social work profession and provided an opportunity to lay down guidelines on what constitutes acceptable and unacceptable free speech in the context of anti-gay messages.

The decision in *Ngole,* and the Supreme Court's decision in *Ashers* should not be understood as justifying what would otherwise be unlawful discrimination when a person has religious or other deeply held convictions that oppose equality and diversity in sexual orientation. However, the decisions in *Ngole* sand *Ashers,* based as they are on free speech, and freedom from compelled speech, open up the debate as to the extent to which anti-gay views can be consistent with duties owed by an employees or providers of public services. The holders of those respective views are in a state of attrition and non-compromise, but the law has a duty to provide a logical basis for accommodating both views in this debate. The Court of Appeal was not prepared to identify the parameters of what views (and the method by which they are expressed) are acceptable, and left that to the university, but the law in general would benefit from some clearer rules in this area.

[35] *Redmond-Bate v DPP, The Times* 23 July 1999.

HUMAN RIGHTS

Travellers' rights, local authority duties and human rights

Bromley LBC v Persons Unknown [2020] EWCA Civ 12 Court of Appeal (Civil Division)

Dr Steve Foster

Introduction

The civil and human rights of travellers in the United Kingdom give rise to legal, social and cultural debate regarding the enjoyment of those rights and the appropriate integration of this group into society, including the extension to them of basic social amenities and the accommodation of their rights to private and family life. These rights, and their restriction, are regulated by a number of statutory and common law powers, but such law is also informed by the rights contained in both the Human Rights Act 1998 and the Equality Act 2010.[1]

This piece will examine a recent Court of Appeal decision that gives guidance as to the approach that needs to be taken by local authorities seeking to obtain borough-wide injunctions prohibiting encampment by persons unknown on public spaces. In that sense the decision is important in providing guidance on the balance between the rights of travellers and the social and other issues that local authorities must take into account in allowing travellers to use public land. The piece will also make brief reference to the latest Council of Europe's plan for inclusion of those groups in member states,[2] but that document and the wider issues will be explored in a future issue of the journal.

The facts and decision in *Bromley*

In this case, a local authority appealed against a judge's refusal to grant a five-year injunction prohibiting encampment in certain public spaces.[3] Specifically, the local authority had obtained a without-notice interim injunction preventing encampment on all the public spaces in the borough, save for highways and cemeteries. Although its stated target was "persons unknown", the injunction was aimed at the Gypsy and Traveller communities and anticipated an increase in their encampments in the borough. It was accepted by the Court of Appeal that Romany Gypsies and Irish Travellers were protected as minorities under the Equality Act 2010, and that a nomadic lifestyle was integral to their culture. However, it was also conceded that there was a shortage of designated sites in the UK, and that in the area administered by the local authority there was a shortage of permanent pitches and no transit sites.

At first instance, the judge granted a final injunction in relation to fly tipping and waste, but refused to grant one in respect of entry and encampment. Applying the test in *Boyd v Ineos Upstream*,[4] the judge found that all the ingredients required for a *quia timet* injunction were in place and that, without relief, there was a strong probability of irreparable harm to the land caused by the travellers. However, on the facts she found that it would not be proportionate to grant the proposed injunction. In reaching that conclusion, the judge took into account the following factors:

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[1] Principally, the right to respect for private and family life, and home, under Article 8
[2] Council of Europe, *Strategic Action Plan for Roma and Traveller Inclusion (2020-2025)*, available at www.echr.int/roma
[3] [2019] EWHC 1675
[4] [2019] EWCA Civ. 515

- the proposed injunction's width, the geographical compass and duration;
- the fact that it sought to prohibit entry and occupation rather than anti-social or criminal behaviour;
- the lack of alternative sites in the borough;
- the cumulative effect of similar injunctions obtained by neighbouring local authorities; and
- the local authority's failure to carry out a proper environmental impact assessment (EIA) or welfare assessment or to properly address the issue of permitted development rights under Schedule 1 the Caravan Sites and Control of Development Act 1960.

Dismissing the appeal, the Court of Appeal first dealt with the issue of proportionality, noting that the judge at first instance had held that the proposed injunction amounted to a *de facto* borough-wide prohibition of encampment and entry and occupation for residential purposes. That, in the Court's view, was an accurate description, and she was right to be concerned, and there was no merit in the local authority's argument that her concern was misplaced because the proposed injunction excluded cemeteries, highways, and privately owned green space. Highways were not appropriate places for encampments; the evidence was that Gypsies and Travellers did not camp in cemeteries, and that transferring the problem to private landowners was not the solution. Moreover, the judge had been entitled to find that the proposed five-year term was disproportionate, and she could not be criticised for failing to explore the possibility of a shorter timescale given that the local authority never suggested one.[5]

The Court of Appeal noted that the judge had also been entitled to be concerned by the fact that the injunction was aimed at entry/occupation, rather than anti-social or criminal behaviour. Thus, although the absence of substantial evidence of past criminality was not determinative of the issue of proportionality, it was nevertheless a relevant factor whose weight was a matter for the judge.[6] At this point, the Court considered the local authority's argument that the judge's concern about the lack of alternative sites meant that she failed to consider whether there should be an injunction in "lesser" terms. However, in its view, although judges should consider ordering less draconian relief where appropriate, there had to be realistic limits to that exercise, and the width of the proposed injunction and the absence of any existing or proposed transit sites were relevant to the court's decision.[7] Moreover, it was for the local authority to propose the temporal and geographic scope of the relief it sought, and in the present case it had not proposed any lesser form of relief for the judge's consideration.[8] The judge had been entitled to take into account the cumulative effect of similar injunctions obtained by neighbouring local authorities, and the decision in *Secretary of State for the Environment, Food and Rural Affairs v Meier*,[9] was not authority for the wide proposition that it was appropriate to use a *quia timet* injunction to deal with an anticipated problem. While each local authority's situation had to be looked at on its own merits, it would be wrong to ignore the fact that injunctions obtained by neighbouring authorities would narrow the options for Gypsy and Traveller communities.

[5] *Bromley LBC v Persons Unknown* [2020] EWCA Civ 12, 66-67.
[6] *Bromley LBC v Persons Unknown* [2020] EWCA Civ 12. 66-67.
[7] Applying the High Court's decision in *Wolverhampton CC v Persons Unknown* [2018] EWHC 3777 (QB).
[8] *Bromley LBC v Persons Unknown* [2020] EWCA Civ 12, 68-74.
[9] [2009] UKSC 11.

Accordingly, the cumulative effect of other injunctions was a material consideration whose weight was a matter for the judge.[10]

Additionally, in the Court's view, the judge had also been entitled to find that the local authority had failed to carry out an Equality Impact Assessment (EIA), and failed to comply with its public sector equality duty. Although that duty did not require local authorities to conduct EIAs, doing so would evidence good practice and a proportionate approach. Moreover, the local authority had failed to engage properly with the Gypsy and Traveller communities and had not undertaken the necessary welfare assessments.[11] The judge had also been entitled to find that the local authority had not satisfactorily dealt with the argument that the proposed injunction would potentially cut across permitted development rights.[12] Finally, she had been right to apply the "irreparable" harm test. The application of that test was supported by case law and was not contrary to the Supreme Court's decision in *Meier*, above.[13]

The Court of Appeal also gave wider guidance as to how the balancing of rights and interests might be better attained in practice. In the Courts view, the obvious solution to the tension between the Article 8 rights of the Gypsy and Traveller communities and the law of trespass was the provision of transit sites, as without such sites attempts to prevent unauthorised encampments might well put local authorities in breach of its obligations under the European Convention. Further, although the Court accepted that exceptional, wide injunctions might be granted, where appropriate, it suggested that where such an injunction was sought, the following was a useful guide:[14]

- the evidence before the court should indicate what alternative housing or transit sites were reasonably available;
- the lack of any alternative site might weigh significantly against the proportionality of any injunction;
- the submission that the Gypsy and Traveller communities could go elsewhere or occupy private land was not a sufficient response, particularly when neighbouring local authorities were obtaining similar injunctions;
- the local authority had to engage with the Gypsy and Traveller communities and assess the likely impact of an injunction, taking into account their specific needs, vulnerabilities and lifestyle; t was in such cases good practice to carry out an EIA and welfare assessments of the individual members of the community;
- special consideration had to be given to the timing and manner of approaches to dealing with any unlawful settlement, and as regards the arrangements for alternative sites;
- the Gypsy and Traveller communities had an enshrined freedom to move from one place to another. An injunction which prevented them from stopping at all in a defined part of the UK was a potential breach of both the ECHR and the 2010 Act, and should only be sought when, despite the foregoing steps having been taken, there was no other solution.

[10] *Bromley LBC v Persons Unknown* [2020] EWCA Civ 12, 75-79, applying the High Court decision in *Harlow DC v McGinley* [2017] 1851 (QB).
[11] *Bromley LBC v Persons Unknown* [2020] EWCA Civ 12, 52, and 80-87.
[12] *Bromley LBC v Persons Unknown* [2020] EWCA Civ 12, 90-93.
[13] *Bromley LBC v Persons Unknown* [2020] EWCA Civ 12, 94-96.
[14] *Bromley LBC v Persons Unknown* [2020] EWCA Civ 12, 100-109.

Travellers' rights and the European Convention on Human Rights

It is clear from the Court of Appeal's reasoning, and the initial decision of the High Court, that the key to the legality of these injunctions is a sufficient accommodation and balancing of the rights of travellers and the local authorities' application of the laws of trespass and nuisance. In these cases, courts are obliged by domestic law and the case law of the European Court of Human Rights to give the right weight to those rights, and failure to consider such rights and their appropriate weight will lead to (successful) judicial challenge.[15] Thus, if the courts simply apply traditional principles of judicial review to such cases – whether the decision was strictly lawful, carried out for a proper purpose and was rational, then they are likely to fall foul of European Court jurisprudence.[16]

The European Court of Human Rights has indeed considered the compatibility of domestic planning and related laws with the right to respect for the home and of family life in this context. Thus, an awareness and appreciation of its reasoning and approach is informative to shaping domestic law and its interpretation. Although it is clear it is prepared to offer a reasonably wide margin of appreciation to both the law and decision-makers in this area, the Court has accepted that Convention rights extend to non-traditional homemakers. Thus, in *Buckley* v *United Kingdom*,[17] where the applicant was refused planning permission to place three caravans for her and her family to live in on her land, the European Court held that the right to a home under Article 8 was not restricted to a lawful home. On the facts, the applicant had intended to make the land and her caravans her home, and thus her right under Article 8 was engaged. However, on the facts, those measures were clearly prescribed by law and pursued the legitimate aims of highway safety and environmental and public health – as covered in Article 8(2) by the legitimate aims of public safety, economic well-being and the protection of health and morals and the rights of others. Importantly, the Court stated that although the decision-making process needs to be fair and take due account of any Convention rights, in this case the decision of the planning authorities had not exceeded the margin of appreciation and the means employed to enforce the law were not disproportionate.[18]

The broad approach used in *Connors* suggests a cautious, hands-off approach by the European Court, which does not of course have to be adopted by the domestic courts in the interpretation and application of domestic law.[19] However, the Court will insist that the domestic laws and procedures are fair and non-discriminatory. For example, in *Connors* v *United Kingdom*,[20] it found a violation of Article 8 when the applicant and his family, who were gypsies, were evicted from council-owned property which had been their base for the previous 15 years. In the Court's opinion the eviction was not attended by sufficient procedural safeguards, namely the requirement to establish proper justification for the serious interference with their Convention rights and to provide necessary and detailed reasons. The Court noted that the law and the state had placed considerable obstacles in the way of gypsies pursuing an actively

[15] Section 2 HRA requires courts to take relevant European Court decisions into account, but not necessarily to follow them.
[16] See *Price v Leeds City Council*, below, on the consequences of not following such decisions.
[17] (1996) 23 EHRR 101.
[18] See also *Coster, Beard and Chapman* v *United Kingdom* (2001) 33 EHRR 20.
[19] This is because under s.2 of the Human Rights Act 1998 decisions of the European Court of Human Rights do not have to be followed, but taken into account. See *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38, where the Supreme Court stressed that the ECHR rights given effect to under the Human Rights Act 1998 were now domestic rights.
[20] (2005) 40 EHRR 9.

nomadic lifestyle while at the same time excluding from procedural protection those who decided to take up a more settled lifestyle.[21]

The failure to follow the principles and case law of the European Court in these cases is clearly illustrated by the decision of the House of Lords in *Price* v *Leeds City County*,[22] which led to further challenge before the European Court. In this case, it was held by the domestic courts that a possession order from a local authority ordering a family of gypsies to leave its land was not, in the absence of exceptional circumstances, contrary to Article 8, or the jurisprudence of the European Court of Human Rights.[23] In *Price*, the House of Lords decided that the rule that the enforcement of a right to possession in accordance with the domestic law of property could never be incompatible with the Human Rights Act 1998,[24] should be modified in the light of the case law of the European Court.[25] However, it held that although it was open to an occupier to raise an Article 8 defence to possession proceedings in the county court rather than by way of judicial review, the public authority did not from the outset have to plead and prove that the order sought was justified. Thus, once the court accepted that the property in question was the occupier's home for the purposes of Article 8, it was to proceed on the assumption that the requirements of the domestic law regarding possession struck a fair balance and would provide the justification for interference required by the qualifying paragraph in Article 8(2). In their Lordship's view, further consideration of the interests protected by Article 8 would be unnecessary and there was no requirement that the Article 8 issue had to be considered by the court in every case by taking into account the occupier's personal circumstances. In their Lordship's view, if the requirements of the law had been established and the right to recover possession was unqualified, the only situations in which it would be open to the court to refrain from making the possession order were if a seriously arguable point was raised that *the law* was incompatible with Article 8.[26]

This approach is, of course, inspired by the court's recognition that the applicant has no *legal* right or claim in or on the land in question, and that their Convention claims need to recognise such. Statutory authorities are, therefore, simply ensuring that unauthorised possession of property is being punished and dealt with accordingly, and the legislation and its application pays little heed to the fact that the individual's basic human rights are being affected. Such an approach then deprives the court of an opportunity, or desire, to examine the particular hardship experienced by particular individuals (or groups of individuals) and reasoning and decision in *Price* led to an application to the European Court of Human Rights. In *Kay v United Kingdom*,[27] the Court held that Article 8 required an occupier of public authority property to challenge the authority's decision to seek possession against him on the basis that, *having regard to his personal circumstances*, the decision was a disproportionate interference with his right to respect for his home under Article 8 of the Convention. In this case the applicant's challenge to the decision to strike out their Article 8 defences failed because it was not possible at the time to challenge a local authority's decision to seek a possession order on the basis that that

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[21] The decision in *Connors* was not followed domestically. In *Price* v *Leeds City County* [2006] 2 AC 465, it was held that a possession order from a local authority ordering a family of gypsies to leave its land was not, in the absence of exceptional circumstances, contrary to Article 8 and the decision in *Connors*.
[22] [2006] 2 AC 465,
[23] In *Connors v United Kingdom* (2005) 40 EHRR 9,
[24] Established in *Harrow LBC v Qazi* [2003] UKHL 43, [2004] 1 A.C
[25] *Connors,* note 23, above.
[26] Alternatively, if the occupier wished to challenge the public authority's decision to seek possession as an improper exercise of its powers on the ground that no reasonable person would consider the decision justifiable
[27] (2012) 54EHRR 30. The case that reached the European Court was not a case involving the rights of Gypsies and travellers, but the principles applied by the Court would apply equally to those claims.

decision was disproportionate having regard to personal circumstances. Accordingly, the striking out of those defences meant that the procedural safeguards required by Article 8 for the assessment of the proportionality of the interference with their rights had not been observed, and the applicants had been dispossessed of their homes without the opportunity of having the proportionality of that measure determined by an independent tribunal.

This decision, albeit in a different context of deprivation of family and home rights established the need to apply strict principles of proportionality and fairness to decisions affecting the rights of gypsies and travellers. Thus, returning to the decision in the present case, the Court of Appeal's robust insistence that all personal and other circumstances have to be considered in testing proportionality, and that alternative arguments presented by the authorities must be strictly examined in the light of the need for proportionality, is to be welcomed.

Conclusions

As we saw above, the Court of Appeal's decision in the present case contained comments and guidance on the wider issues involved in balancing the respective interests of travellers and the authorities. Some of this is not strictly binding, representing no more than a wish for a more appropriate approach in this area, but many of the observations can be used to guide the courts in subsequent judicial review cases. It may also be interesting to note extra judicial views in this area, and whether the recent *Council of Europe's Strategic Plan for Roma and Traveller Inclusion* offers a useful into the challenges facing the recognition and enforcement of such rights. This Strategic Action Plan translates the strategic objectives of the Council of Europe regarding the protection and promotion of human rights, democracy and the rule of law into a policy framework for the social and intercultural inclusion of Roma and Travellers in Europe. Its objectives are to promote and protect the human rights of Roma and Travellers, to combat anti-Gypsyism and discrimination, and to foster inclusion in society, and is structured around combating anti-Gypsyism and discrimination; supporting democratic participation and promoting public trust and accountability; and supporting access to inclusive quality education and training.

These initiatives are again welcome, and in combination with a more robust judicial review of measures and actions adopted by local authorities that interfere with such rights, we may see a greater recognition and accommodation of travellers' rights in our legal system.

HUMAN RIGHTS

Sleep-walking into an Orwellian police state? Advancing surveillance technology, privacy and democratic rights

R (on the application of Bridges) v South Wales Police [2020] EWCA Civ 1058.

Anna O'Shea* and Dr Steve Foster**

Introduction

Live facial recognition (LFR) is advanced surveillance technology that has been trialled at major public events by police forces throughout the UK. It captures images and video footage of individual facial features in real time and compares the images against a national data base for the purpose of biometric surveillance. The footage is checked against a 'person of interest watch list,'[1] tracing missing or vulnerable persons and individuals wanted in connection to crime. Approximately 12 million images of individuals are stored in Police National Databases,[2] including ordinary members of the public.[3] The use of this technology has become a reality in the UK despite lacking any legal framework.[4] The following piece will highlight and discuss the human rights implications relating to the use of artificial facial recognition (AFR), specifically in light of the recent decision of the Court of Appeal in *R (on the application of Bridges) v South Wales Police*.[5]

The decision of the Court of Appeal in *Bridges*

The legality of facial recognition technology and its application by the South Wales Police has been challenged in both the High Court and now the Court of Appeal, and in *R (on the application of Bridges) v South Wales Police*,[6] the Court of Appeal held that the use of such technology in a pilot project by the South Wales Police Force was not "in accordance with the law" for the purposes of Article 8(2) of the European Convention on Human Rights 1950, because there was no clear guidance on where the technology could be used and who could be put on a watch list. The Court of Appeal also held a data protection impact assessment was inadequate and not compliant with s.64(3) of the Data Protection Act 2018, and that the police force had not taken reasonable steps to investigate whether the technology had a racial or gender bias, as required by the public sector equality duty under s.149(1) of the Equality Act 2010.

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* LLB, year 3, Coventry University.
** Associate Professor in Law, Coventry Law School

[1] The Metropolitan Police, South Wales Police Constabulary; South Yorkshire Police; Leicestershire Police Constabulary; and Greater Manchester Police have piloted the use of LFR technology.

[2] Paul Wiles, Annual Report 2017: Commissioner of the Retention and Use of Biometric Material (Office of the Biometrics Commissioner 2018), p.88.

[3] The Law Society: Algorithmic Use in the Criminal Justice System Report 14th June 2019 Accessed on the 25th August 2020.

[4] Jennifer Lynch**,** Electronic Frontier Foundation: Face Off – Law Enforcement Use of Face Recognition Technology, 2 February 2018. https://www.eff.org/files/2018/0215/face-off-report-1b.pdf. Accessed on the 15th November 2019.

[5] [2020] EWCA Civ 1058.

[6] Note 5, above.

The case had been brought by a civil liberties campaigner, whose image had twice been captured on camera, and in *R (Bridges) v Chief Constable of Sout*h Wales,[7] the High Court held that the current legal regime in the UK was adequate to ensure the appropriate and non-arbitrary use of automated facial recognition technology. On the facts, it held that the police force's use of such technology in a pilot scheme was consistent with the requirements of human rights and data protection legislation and the public-sector equality duty. In the High Court it was found that the interference his right to private life under Article 8(1) was justified because the technology was used within a legal framework that was sufficient to satisfy the requirement in Article 8(2), that any interference be in accordance with law. The court accepted that the legal framework was contained in both primary legislation (the Data Protection Act 2018) and secondary legislation (the Surveillance Camera Code of Practice made pursuant to s.29 of the Protection of Freedoms Act 2012) and in the force's local policies. However, it commented that the future development of such technology was likely to require periodic re-evaluation of the sufficiency of the legal regime.[8]

Bridges then appealed against the dismissal of his claim for judicial review Allowing the appeal in part, the Court of Appeal first held that the High Court's references to the possibility of future reconsideration of the sufficiency of the legal regime was curious, and the fact that new technology was being trialled did not alter the need for any interference with art.8 rights to be "in accordance with the law". That, in the Court's view, was a binary question, because interference was either in accordance with the law or it was not.[9] This appeal was concerned with the deployment of the scheme within the force's area and whether the particular interference which had arisen was lawful; it was not concerned with future use of the technology nationally.

The Court accepted that the legal framework regulating the deployment of the technology contained safeguards enabling the proportionality of the interference with Article 8 rights to be adequately examined. It also accepted that much of the High Court's analysis regarding the sufficiency of the framework was correct, but it had erred in finding that the interference with the appellant's Convention rights was in accordance with law. There was no clear guidance on where it could be used and who could be put on a watch list. Accordingly, that was too broad a discretion to afford to police officers to meet the standard required by the second paragraph of the Article.[10] Although the 2018 Act formed an important part of the framework, it was not, in the Court's view, sufficient by itself.[11]

The Court of Appeal then held that had the interference with Article 8 rights caused by the use of the technology been in accordance with law under Article 8(2), it would have been a proportionate interference, as the High Court had properly performed the correct balancing exercise. This is not surprising, given the European Court's previous case law, which has

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[7] [2019] EWHC 2341 Admin

[8] The Court also rejected arguments concerning breach of data protection legislation and data processing requirements. It also rejected submissions that AFR created a greater risk of false identifications in the case of women and people from black, Asian and other minority ethnic backgrounds (BAME) and held that the force had complied with the public sector equality duty in s.149(1) of the Equality Act 2010.

[9] Following *Gallagher's Application for Judicial Review, Re* [2019] UKSC 3,

[10] Following the Supreme Court's decision in *R. (on the application of Catt) v Association of Chief Police Officers of England, Wales and Northern Ireland* [2015] UKSC 9.

[11] The Court of Appeal also made observations about the content of the Surveillance Camera Code of Practice and the force's policies, at paras 39, 58-61, 69, 71, 85, 90-96, 104, 109-130 of judgment.

focussed on the need for a clear and non-arbitrary legal framework, rather than concerning itself with the proportionality of those measures.[12] However, it is submitted that no real proportionality test can be carried out, or forecast, until the law has been modified in conformity with the Court of Appeal's insistence on such a clear legal framework.

Moving from the consideration of Article 8 rights, the Court of Appeal also held that the High Court had been wrong to find that the data protection impact assessment, required by s.64 of the 2018 Act, was adequate. In the Court's view, the impact assessment had been written on the basis that Article 8 was not infringed, when, in fact, it was infringed because the technology and the scheme involved impermissibly wide areas of discretion. Thus, the Court found that he impact assessment failed to properly assess the rights and freedoms of data subjects and failed to address the measures envisaged to mitigate the risks arising from the identified deficiencies, as required by s.64(3)(b) and s.64(3)(c) of the 2018 Act. It is submitted that the Court of Appeal should have taken a similar approach to the question of proportionality above; although legality and proportionality are separate questions for a reviewing court, it is not fully possible for a court to judge proportionality until the measure has been revised. In any case the breadth of the powers under the scheme is a factor that is relevant to the court's assessment on proportionality. Thus, it would have been more appropriate for the Court of Appeal to defer any consideration of or opinion on proportionality to another day.

With respect to the claim relating to data processing and the claim that the police force had not satisfied the requirements of the first data protection principle in s.35 of the 2018 Act, namely that data processing had to be lawful and fair, the Court of Appeal held that the High Court had been correct to find that the question whether an appropriate policy document was in place did not need to be determined because the two deployments of the technology in the instant case occurred before the Act came into force. However, the Court of Appeal held that the High Court had been wrong to find that the force had done all it reasonably could to fulfil its Public sector equality duty.[13] In the Court's view, public concern about the relationship between the police and BAME communities had not diminished, and the duty was important to ensure that a public authority did not inadvertently overlook the potential discriminatory impact of a new, seemingly neutral, policy. The police force had never investigated whether the technology had an unacceptable bias on grounds of race or gender, and the fact that the technology was being piloted made no difference to the duty.

Surveillance, facial technology and human rights

In *Big Brother Watch and others v United Kingdom*,[14] the European Court of Human Rights (ECtHR) set out a three-part test for judging the legality of any restriction on Article 8 rights: that the restriction is in accordance with law, serves a legitimate aim and is necessary and proportionate. Specifically, a risk assessment of new technology is essential before it is used

[12] *Malone v United Kingdom* (1984) 17 EHRR 4 and *Klass v Germany* (1978) 2 EHRR 14.
[13] Following its previous decision in *R. (on the application of Bracking) v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345.
[14] Judgement, ECtHR, App. No. 58170/13, 62322/14, 24960/15, 13 September 2018, para 304, *Times Newspaper Ltd (Nos.1 and 2) v the United Kingdom,* Judgement ECtHR, App. Nos. 3002/03, 2376/03, 10 March 2009, para. 37. To be "compatible with the rule of law," the surveillance must be "accessible to the person concerned, and "foreseeable as to its effects."

for policing purposes,[15] as outlined in the Information Commissioners Office report.[16] Biometric data falls under sensitive processing[17] which applies to the use of AFR where images are taken and retained for purposes of determining an individual's identity, which may constitute a separate interference under Article 8 of the ECHR.[18] In *Catt v the United Kingdom,*[19] the ECtHR noted that a considerable amount of personal and sensitive data was being stored,[20] and in *S and Marper v United Kingdom,*[21] that the retention of DNA fingerprints would excessively weaken the protection afforded under Article 8if the use of modern technology was permitted, without carefully balancing the benefits of its use against individual human rights.[22] Any state claiming a pioneer role in advanced technologies assumes the responsibility for striking the correct balance.[23] Independent research observed six trials conducted by the MET,[24] and found inadequate planning procedures and practices.[25] It is a requirement for all policing practices[26] to incorporate human rights into any risk assessment,[27] so an effective necessity and proportionality analyses can be conducted during the decision-making process.[28]

Although the use of overt surveillance technology may have advantages in crime prevention and in tracking missing and vulnerable people, others argue its intrusive nature may have a chilling effect on individuals who exercise their democratic rights, such as freedom of assembly, which may dissuade individuals or organisations from taking part in public demonstrations for fear of being tracked or monitored.[29] It is an essential foundation for

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[15] Surveillance Camera Commissioner, 'Police Use of Automated Facial Recognition Technology with Surveillance Camera Systems: Section 33 of the Protection of Freedoms Act 2012,' March 2019, 9.
[16] Part 3 of the Data Protection Act 2018 applies to competent authorities when processing personal data for law enforcement purpose. Competent authorities are linked under schedule 7 of the Data Protection Act 2018 and also extends to bodies with statutory functions including criminal law enforcement.
[17] Section 35(8) DPA2018
[18] The processing must be strictly necessary, which is a condition under sched 8 of the Data Protection Act 2018: An appropriate policy statement should be in place, detailing how the data is processed.
[19] See also *Catt v the United Kingdom,* Judgement ECtHR, App. No.43514/15, 24 January 2019.
[20] Data Protection Act 2018. See also *Catt v the United Kingdom,* Judgement ECtHR, App. No.43514/15, 24 January 2019.
[21] ECHR 1581; Application nos.30562/4 and 30566/04. 4th December 2008.
[22] Ibid.
[23] N 2O at para 112.
[24] The researchers accompanied the police trials at: Stratford (Westfield), London, 28 June 2018; Stratford (Westfield), London, 26 July 2018; Soho (Cambridge Circus and Leicester Square), 17th December 2018; Soho (Leicester Square0, 18th December 2018; Romford (Town Centre), 31 January 2019; Romford (Town Centre), 14 February 2019.
[25] Pete Fussey and Daragh Murray**,** Independent Report on the London Metropolitan Police Service's Trial of Live Facial Recognition Technology, July 2019.
[26] These provisions are binding on all UK Police forces under s.6 (1) HRA 1998, concerns public authorities. Further information is available at https://www.legislation.gov.uk/ukpga/1998/42/contexts see section 1 of the Act for the list of convention rights.
[27]Art 1 ECHR: The obligation to respect human rights requires, *inter alia*, that states or public authorities must not to take measures that directly violate human rights. In order to ensure respect for human rights, some form of impact assessment is legally required.
[28] Regarding the rights brought into play, see Surveillance Camera Commissioner, *Police Use of Automated Facial Recognition Technology with Surveillance Camera Systems: s.33 Protection of Freedoms Act 2012*, March 2019, 3.
[29] John Penney, 'Chilling effects: online surveillance and Wikipedia use, (2016) 31 Berkeley Technology Law Journal 117; Elizabeth Stoycheff 'Under Surveillance. Examining Facebook's Spiral of Silence Effects in the Wake of NSA Internet Monitoring' (2016) 99 (2) Journalism and Mass Communication 296.

democracy and a basic condition for the progress of individual self-fulfilment[30] to allow diverse political programmes to be organized and debated, provided they do not harm democracy itself.[31]

Any measure that interferes with human rights, requires transparency and must clearly indicate a legal basis and the amount of discretion conferred upon the police must be disclosed.[32] The ECtHR has stressed that if powers vested in the state are ambiguous it may lead to arbitrary interference, especially where surveillance is becoming more advanced.[33] Data protection is fundamental to individual privacy,[34] and domestic law must provide adequate safeguards during the processing stages: S *and Marper v the United Kingdom*.[35] It is generally accepted that policing activity pursues a legitimate aim.[36] However, a risk assessment is required to ensure the overall rights compliance and that the reasons justifying its use are satisfactory, and that the specific means are proportionate to the aim: *Catt v the United Kingdom.*[37] This can be compared to the retention of custody images in *S and Marper v the United Kingdom,* as it may be necessary to retain custody images of individuals wanted for crime, but not for those who have been questioned without any convictions.

Case law has highlighted that the specific legal basis identified for the purpose of AFR technology may be vague, and in *S and Marper* v *the United Kingdom* the ECtHR noted that the objective under paragraph two for prevention of crime is worded in general terms, [38] which may in turn give rise to extensive interpretation. In *Catt,* in the light of the general nature of police powers and the variety of definition in terms of 'domestic extremism', the Court ruled that there was significant ambiguity over the criteria being used by police to govern the collection of data and that with the information available, it was difficult to determine the exact scope and content being gathered. This is a cause for concern; the common law provides the police with powers to obtain and store information for policing purposes, but those powers do not authorise intrusive methods of obtaining information.

The requirement that a measure is in accordance with, or prescribed by law, not only requires that the impugned measure should have a legal basis in domestic law but that the quality of law in question and its effect should be accessible and foreseeable to the person concerned: *Catt.* The prevention of crime and disorder is the most commonly cited justifications and is narrowly interpreted by the Court when ruling on whether restrictions are compatible under the ECHR. The measure in question must answer to a pressing social need and be proportionate to the

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[30] *Mouvement Raelien Suisse v Switzerland*, Judgement ECHR, App. No. 16354/06, 13 July 2012, para 48.
[31] *Centro Europa 7 S.R.L and D Stefano v Italy,* Judgment ECtHR, App. No. 38433/09, 7 June 2012, para 129.
[32] *Shimovolos v Russia,* Judgment ECtHR, App. No. 30194/09, 21 June 2011, para 67.
[33] Ibid.
[34] Article 8 (2) Article 10(2) Article 11(2) of ECHR all hold the same principles. Legitimate aim : in the interest of national security , public safety or the economic wellbeing of the country , the prevention of crime and disorder , the protection of health or morals or the protection of rights and freedoms of others.
[35] Note 21 at para 103.
[36] Judgment ECtHR, App. No.43514/15, 24 January 2019. Para 108. For the protection of the public order and prevention of crime
[37] Ibid at para 9.
It is important to note that the necessary in a democratic society test does not straight forwardly equate to the proportionality test as understood by the convention. A conventional understanding of proportionality may be based on the understanding that a measure is permissible if the benefit is proportionate to the interference with individual rights.
[38] *S and Marper v UK*, ECHR 1581; Application nos.30562/4 and 30566/04. 4th December 2008. At para 99.

legitimate aim and reasons justified by the national authorities must be satisfactory. The proportionality principle demands that a balance must be struck between the purposes listed in Article 8(2) ECHR on the one hand and the rights afforded by Article 8, or other relevant Convention rights.

It is argued that the use of LFR in the UK has the potential to turn CCTV cameras into identity checkpoints where members of the public are intensively tracked and monitored.[39] The police have rolled out this technology at a pace unlike any other democratic nation in the world,[40] and some have noted that overt surveillance is becoming increasingly intrusive on the privacy of citizens, in some cases more so than any other aspect of covert surveillance because of advancing technology.[41] It is of fundamental importance that any experiment with modern technology carried out by the police receives public consent, and awareness of the process by those taking part in the experiment, giving them the choice to participate or opt out. During a trial in Essex, a man sought to remain anonymous by covering his head. He was stopped by officers and asked to identify himself and after refusing to submit his identity he was issued with a fixed penalty notice.[42] This type of occurrence could have a profound impact on public trust and confidence in the police. Further academic research highlighted flaws in the camera quality when searching for matches against individuals with darker skin tones,[43] which may give rise to issues of a discrimination,[44] particularly if AFR surveillance is used during major sporting events, concerts, or carnivals where there is likely to be multicultural diversity.[45]

Conclusions

As we have seen, police planning procedures and practices relating to the use of AFR may not always adhere to the principles of human rights and there will always be opposing arguments as to its fair and proportionate use. Human rights campaigners may express concerns over individual privacy, and other democratic rights,[46] whereas those representing the state may contend that surveillance is necessary for prevention and detection of crime. As always, a careful balance must be maintained between the competing interests of private individuals and the need for state surveillance. If AFR surveillance technology becomes the future for policing practice, it will require transparency, public consent and independent oversight with regular scrutiny and appropriate statutory framework; placing human rights at the forefront before law enforcement purposes. Additionally, close monitoring and adequate training for those who

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[39] Silkie Carlo, Human Rights and Civil Liberties Campaigner and Director of Big Brother Watch UK, available at https://www.nathalienahai.com/4-surveillance-and-the-state-silkie-carlo/

[40] The Lawless growth of facial recognition technology. https://www.bigbrotherwatch.co.uk. accessed on 10 August 2020.

[41] Tony Porter, Surveillance Camera Commissioner, Annual Report 2017-2018, 35.

[42] Lizzie Dearden, *'Police Stop People for Covering Their Faces from Facial Recognition Camera Then Fine A Man £90.*00 *after he protested*, *The Independent,* 31 January 2019. https://www.independent.co.uk/news/uk/crime/facial-recognition-cameras-technology-london-trial-met-police-face-cover-man-fined-08756936.html. Last accessed on the 15th November 2019.

[43] Joy Boulamwini and Timnit Gebru, 'Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classifications' in *Conference and Fairness*, Accountability and Transparency (FAT 2018) (2019).

[44] Art. 14 ECHR when used in conjunction in s.149 of the Equality Act 2010 may be used to challenge the technology in relation to indirect discrimination.

[45] The prohibition of discrimination requires that police forces take active measures to ensure that neither AFR technology nor its means of deployment violate the prohibition of discrimination Pete Fussey and Daragh Murray, Independent Report on the London Metropolitan Police Service's Trial of Live Facial Recognition Technology, July 2019. 23.

[46] Article 10 and 11 of the ECHR.

operate AFR surveillance is paramount before it is permanently rolled out into society, but how such laws are applied in the foreseeable future remains uncertain.

In *R (on the application of Bridges) v South Wales Police* (SWP)[47] the Court of Appeal ruled that there were both deficiencies in a data impact assessment (DPIA)[48] and a failure to comply with the public sector equality duty (PSED),[49] which requires public authorities to consider whether a policy will have a discriminatory impact on the grounds of race or sex. SWP did not take reasonable measures to consider this during the use of AFR software, and the Court of Appeal noted that identifying huge amounts of people, and tracking their movements around the country, could radically change the nature of policing in the UK, providing almost complete surveillance of the UK population.[50] There were, in the Court's view, deficiencies in the legal framework currently in place, and the police were afforded too much discretion in relation to who could be placed on a watch list and where AFR was to be deployed. However, on the question of proportionality, the Court of Appeal in *Bridges* found in that the benefits of the police use of AFR were potentially greater in comparison with what was considered a minor impact on the surveillance of Mr Bridges.

The Court of Appeal did not, therefore, rule on a blanket ban on the use of AFR, and indeed ruled that had the scheme been clearer and less discretionary, it would have been appropriate. As argued above, that question should be considered once the legislative provisions and any scheme is couched in appropriately lawful and non-arbitrary language. What is clear, is that the police had given too little thought to its scheme and whether it complied with human rights and other statutory duties. Until that exercise is carried out, then it is likely that such schemes will face (successful) challenges in the courts.

[47] [2020] EWCA Civ 1058.
[48] As required under section 64 of the Data Protection Act 2018.
[49] Section 149 of the Equality Act 2010.
[50] [2020] EWCA Civ 1058.

CASE NOTES

Human Rights – Fair Trial – National Security – In Camera Proceedings – Open Justice

Yam v United Kingdom (31295/11) (2020) 71 EHRR 4

European Court of Human Rights

Facts

In January 2020 the European Court of Human Rights (ECtHR) passed judgment in *Yam v United Kingdom* (31295/11) (2020) 71 EHRR 4, finding that the UK had not violated Article 6 (right to a fair trial) of the European Convention on Human Rights (ECHR) by holding a criminal trial partly in secret. The case raises a familiar issue which the courts – both domestic and European – have had to grapple with for decades, namely, how to balance an individual's right to a fair trial and the principle of open justice with national security concerns.

The case has a somewhat complex history in the UK with a series of appeals, specific interlocutory appeals, referrals, and judicial review challenges. The origins of the case can be traced to 2006 when the applicant, Wang Yam, was charged with murder, burglary, theft, handling stolen goods and fraud following the death of the writer Allen Chappelow in London. When his trial began at the Central Criminal Court in January 2008, it was ordered that part of the defence evidence was to be heard *in camera* – meaning in closed session where the press and public would be excluded – in the interests of national security and to protect the identity of a witness or other person. Although the exact reason for this was not disclosed, it was known that Yam was a former Chinese dissident and informant for the UK's Secret Intelligence Service "MI6".

Yam sought leave to appeal against the order for this evidence to be heard *in camera*, but this was refused by the Court of Appeal ([2008] EWCA Crim 269). Yam was found guilty of fraud, but the jury were unable to reach a verdict on the charges of murder, burglary and theft (Central Criminal Court, unreported, 1 April 2008). At the retrial, Yam was found guilty of murder and burglary (Central Criminal Court, unreported, 16 January 2009). Yam then sought leave to appeal his conviction, which was granted in part, but the appeal was subsequently dismissed on its merits ([2010] EWCA Crim 2072).

In 2011, Yam lodged his application with the ECtHR claiming that the secrecy of his trial had breached Article 6 of the ECHR, following which a further specific ground of complaint emerged. Relying upon Article 34 of the ECHR, which guarantees the right of individual petition, Yam wished to refer to the evidence given *in camera* in his submissions to the ECtHR, which the Central Criminal Court had prohibited. On this somewhat specific point and the Court's subsequent refusal to allow the publication of the material, Yam sought judicial review but was unsuccessful ([2014] EWHC 3558 (Admin)), and was again unsuccessful when he appealed to the UK Supreme Court ([2015] UKSC 76).

Lastly, in 2016 the Criminal Case Review Commission referred Yam's case back to the Court of Appeal after new witnesses and evidence emerged of a similar incident of violent mail theft in a neighbouring area to Yam's victim which occurred when Yam was in detention. The appeal was dismissed, however, with the Court finding that Yam's conviction had not been rendered unsafe, as there was no basis to conclude that the new evidence would or might reasonably have affected the jury's decision in this case ([2017] EWCA Crim 1414).

The decision of the European Court of Human Rights

At the ECtHR, Yam argued that the closed sessions violated his right to a fair and public hearing under Article 6(1), but also that his right to obtain the attendance of and to examine witnesses under the same conditions as those for the prosecution pursuant to Article 6(3)(d) had been violated. This was because, Yam argued, a fully public trial could have encouraged additional defence witnesses to come forward and prosecution witnesses would have been subjected to public scrutiny, thus presenting the possibility that his defence could have been further supported. At the same time, Yam argued that the UK had failed in its obligations under Article 34 of the ECHR to allow him to exercise his right of individual petition by refusing to allow him to disclose evidence heard *in camera* to the ECtHR.

The ECtHR found no violation of Articles 6(1) or 6(3)(d) of the ECHR. This was because Yam had been "fully involved in the procedure which led to the making of the *in camera* order", that "all the evidence concerning the reasons for the request was disclosed to him and his legal team", and he had "participated fully in the hearing on this matter before the trial judge where his counsel was able to oppose the request and cross-examine prosecution witnesses". Moreover the Court found that the numerous stages of Yam's legal challenge ensured that there had been rigorous and independent scrutiny of the decision to hold the trial partly in secret and that the closed sessions were limited and only applied to a specific part of the defence. On the issue of whether the closed sessions had prevented more defence witnesses coming forward, the ECtHR found this to be mere speculation as the "majority of the trial took place in public and it received a great deal of publicity at the time". Ultimately the ECtHR determined that there had not been any unfairness in the trial. On the specific ground of complaint pursuant to Article 34 about him being unable to disclose the evidence heard *in camera*, the ECtHR rejected this complaint and found that there had been "meaningful independent scrutiny of the asserted basis for the continuing need for confidentiality".

Analysis

The challenge of ensuring fairness and open justice whilst grappling with national security concerns is certainly not a new phenomenon for the courts. These issues have been particularly prevalent in recent cases involving terrorism, such as *Guardian News and others v Incedal and Rarmoul-Bouhadjar* ([2014] EWCA Crim 1861), which may have been the first entirely secret criminal trial in the UK before the intervention of several media corporations led to some details of the trial being made public, and *R. v Naweed Ali et al* (Central Criminal Court, unreported, 2 August 2017), which concerned a foiled terrorist plot. Cases of this nature raise significant problems for the principles of open justice, and to some extent the principles of natural justice and the equality of arms, all of which are pivotal to the common law notion of procedural justice which has heavily influenced the development of the ECHR (Ben Stanford, 'The Complexities of Contemporary Terrorism Trials Laid Bare' (2017) 181(33) *Criminal Law and Justice Weekly* 594-596). One thing common to these cases, including *Wang Yam*, was the hearing of some parts of the trial in closed session owing to the necessary disclosure of sensitive information.

It is a basic principle of open justice, engrained within the common law for centuries, that trials should be transparent and that the media and general public should not be excluded except in exceptional situations. However, as a limited right, the right to a fair trial under Article 6 of the ECHR allows the press and public to be excluded in certain situations. For a case of this kind involving issues of national security it is easy to see why, from the perspective of the UK

Government, closed sessions may have been necessary. In terms of natural justice and the equality of arms, it is a tenet of both principles that either side to a dispute must be able to identify the witnesses of the other side to be able to cross-examine them effectively. Article 6 of the ECHR does, however, allow witnesses to remain anonymous if their safety is threatened or if there are national security concerns at stake that would be jeopardised if that part of the trial was completely transparent.

As is well known, the ECtHR has traditionally granted a wide margin of appreciation on matters of national security, and in that respect the Court in *Yam* confirmed that it was "not well-equipped to challenge the national authorities' judgment that national security considerations arise". This factor, when combined with the similarly deferential approach generally adopted by domestic courts when national security issues arise, has led many to voice concerns that the creeping "normalisation" of secretive proceedings may be leading to a gradual erosion of long-held principles of open justice and natural justice. As Lord Neuberger acknowledged in *Al Rawi v Security Service* ([2010] EWCA Civ 482), which concerned the power of a court to order a closed material procedure for part of a trial, "it is a melancholy truth that a procedure or approach which is sanctioned by a court expressly on the basis that it is applicable only in exceptional circumstances nonetheless often becomes common practice".

In that respect, the use of closed material procedures (CMP) in British civil trials involving national security issues has particularly exposed how exceptional measures restricting traditional fair trial guarantees can take root and spread to other areas of law. With CMP, the individual might not be fully informed of the accusations, evidence or complete judgment, is excluded from closed sessions, and is not permitted any contact with their security-cleared lawyer once that lawyer has been served with the closed evidence. In other words, these proceedings are uniquely both *in camera* and *ex parte*. As a result, CMP pose serious problems not only for the principle of open justice, but also the principles of natural justice and the equality of arms.

Since the introduction of the procedures in 1997 for certain proceedings before the Special Immigration Appeals Commission, CMP have been authorised for use in the Investigatory Powers Tribunal, Parole Board hearings, asset-freezing and financial restrictions proceedings, and even employment tribunals amongst many other settings. Although these developments are all significant in their own right, the possibility for a court to authorise the use of CMP in *any* civil trial pursuant to the Justice and Security Act 2013 is the most significant extension. Specifically, this Act extends the possibility of implementing CMPs in any civil case following an application to the High Court, Court of Appeal, Court of Session, or Supreme Court. As legal practitioners and the public become more accustomed to the use of CMP in civil proceedings, the risks of such practices becoming normalised and spreading to other areas of law remains a significant possibility.

Thus far such drastic measures have not been adopted in criminal trials, in part due to the additional and stricter guarantees imposed by Articles 6(2) and (3) of the ECHR which reinforce the importance of natural justice in criminal proceedings, but also more generally because of the recognition of the potentially severe consequences for a defendant in a criminal trial. As such, with *in camera* proceedings the main issue of concern has centred on the principle of open justice.

Nevertheless, a Jeremy Bentham passage frequently mentioned by judges, journalists and academics alike warns against the dangers of secretive proceedings. Quoted by Lord Shaw in

Scott v Scott ((1913) AC 417), which is still today one of the most commonly referenced cases when closed sessions take place, Bentham said that "[i]n the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice". Clearly since then, the influence and domination of national security interests in some proceedings has imposed significant caveats upon this maxim.

Conclusions

As national security challenges emerge or evolve, so too will the issues for the courts to consider when balancing the rights of defendants and the principle of open justice with national security concerns. Certain aspects of the right to a fair trial, not least of all the principle of open justice and its related guarantees, have undoubtedly been subject to increased pressure and restrictions in recent years due to such interests. With both domestic and European courts generally adopting a deferential approach to government when natural security concerns arise, and with measures restricting open justice and natural justice being slowly normalised in civil proceedings, it will be essential for interested parties and the public more broadly to remain vigilant of these developments to protect the criminal legal system.

Ben Stanford, Assistant Professor in Law, Coventry Law School (Senior Lecturer in Law, Liverpool John Moores University as of January 2021).