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CONTENTS

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CONTENTS

ARTICLES

RECENT DEVELOPMENTS

CASE NOTES

BOOK REVIEWS

Editorial

We are very pleased to publish the second issue of the twenty-seventh volume of the *Coventry Law Journal*. This issue contains many pieces that reflect what has occurred in this turbulent year. In the leading article, Andrew Jones writes on the application of international criminal law with respect to Russia's invasion of Ukraine. There are also a number of case notes and recent developments on recurring matters such as assisted dying, free speech and public morality, and patient autonomy and human rights. We are also pleased to include an update on discrimination and hairstyles, where ex-student Demi Clarke-Jeffers re-visits her piece in the last issue of the Journal to incorporate recent observations in this area.

We are especially pleased to include a reflective article by Rhonda Hammond-Sharlot, the School's Curriculum Lead for Professional Studies, who uses her professional and academic experience to explore the potential impact of the new Solicitors' Qualification Examination (SQE) on legal education and the expectations of students and the various professions. Coventry University, as with many other institutions, will become involved in the new Qualification, and Rhonda offers a valuable insight into legal education and how the new scheme will impact on students, staff and the legal profession.

The Journal is also delighted to include articles from academics overseas. Dr Isau Olatunji Ahmed and Khafayat Yetunde Olatinwo, both from Kwara State University in Nigeria, write, respectively, on tax avoidance in Nigeria, and space law; this time considering the potential application of the law of mortgages in outer space. Our thanks also go to John Sawyer, for researching and writing, with Steve Foster, on another piece of legal history relating to his family. We are also grateful to other staff at the Law School, who contributed case notes and book reviews on crime, criminal justice and human rights.

On a sad note, we bid farewell to Dr Romit Bhandari, Dr Monica Ingber and Sandrea Maynard, who leave us to take up exciting new positions at other universities. Our thanks go to them for all their hard work at Coventry Law School; we wish all of them every success in the future.

We hope you enjoy reading this issue and find something that will interest you: either as a student to inform your law study, or as a scholar to inspire your future research and interest in law. We also look forward to receiving your contributions for future issues. We encourage contributions from students, academic staff and practitioners, and if you wish to contribute to the Journal and want any advice or assistance in being published then please contact the editors. The next publication date is July 2022, and contributions need to be forwarded to us by early June.

The editors: Dr Steve Foster and Dr Stuart MacLennan

ARTICLES

INTERNATIONAL CRIMINAL LAW

Atrocities in Ukraine: crimes, accountability and the way forward

Dr Andrew G Jones*

Introduction

The international community looked on in shock as Russian forces invaded Ukraine, resulting in a bloody ongoing conflict. Despite nations coming together to announce in a clear and almost unanimous voice that this was entirely unacceptable under the law of nations, little progress has been made in either ending the violence or bringing those responsible to justice. The conflict has since raged on, with widespread and well-documented instances of ongoing international crimes committed by both sides. While there has been clear and consistent messaging from Ukraine, its allies and the UN that something needs to be done to ensure accountability, the avenues for achieving it are not clear. As a Permanent Member of the UN Security Council, the Russian Federation sits in a rare position of power within international law; one that allows it to remain isolated from existing systems of international criminal accountability. To overcome this, a change is required in the approach to international criminal prosecution, certainly in relation to the specific situation in Ukraine, but also more generally to ensure a future in which the international community is governed equitably under the rule of law.

Following the highly contested annexation of Crimea in 2014, the Russian Federation has continued to demonstrate its contempt for the principles of international law, via its determination to prevent former Soviet nations forging closer ties with Western States, and ongoing aggression against its neighbours.[1] In early 2022, these policies became more pronounced, with Russia commencing a full-scale invasion of Ukraine, sending forces across their shared borders and through the state of Belarus, in what it called a 'special military operation' intended to 'demilitarize and de-Nazify' the country.[2] While Russia may initially have expected a swift victory over its smaller neighbour, this was not to be, with fighting across the country continuing throughout the year, and likely to continue into 2023 and beyond. While finding a peaceful resolution to the conflict itself, together with restoring and maintaining Ukraine's territorial integrity, are all of vital importance, so too is seeking accountability for those criminal acts that have been committed in Ukraine, as a demonstration of the international community's commitment to justice. Seeking such accountability will be the focus of this brief article. As such, this article will leave aside any legal assessment of the military campaign as a whole, instead focussing on the potential for

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[1] Russia's military action against both Ukraine in 2014 and 2022 and Georgia in 2008 have demonstrated its willingness to breach the fundamental principles of the UN Charter on the use of force to prevent neighbouring states joining organisations like NATO.

[2] Report of the Independent International Commission of Inquiry on Ukraine, A/77/533 (18 October 2022), para. 24.

prosecution for the core international crimes of aggression, war crimes, crimes against humanity and genocide.

Although from the very first Russian operations in Ukraine in 2014 the 2022 invasion gained significant international attention, the Prosecutor of the International Criminal Court (ICC) has been conducting preliminary examinations of the situation, initially focussing on the Crimean Crisis and the period that followed within the annexed region.[3] Based on this, the Prosecutor has concluded that there is both jurisdiction for the ICC to investigate and potentially prosecute, and that crimes within the Court's remit had been committed.[4] Following this, and coming just days after Russia's 2022 invasion began, the Prosecutor announced their intention to seek authorisation to open a full ICC investigation into the situation, proceeding to do so after an unprecedented number of States Parties to the ICC referred the situation to the Court.[5] With that investigation now underway, there appears to be real prospects for individual criminal accountability brought against those most responsible for the atrocities that have seemingly been committed in Ukraine since 2014. However, as will be demonstrated in this article, genuine accountability could yet prove to be beyond the reach of an ICC, which remains heavily restricted by the provisions of its founding document. In fact, the Statute of the International Criminal Court (Rome Statute) is so restrictive that the leaders of well-placed nations like Russia - those most to blame for waging this war and thus for enabling the commission of atrocities within that context - are placed beyond its reach. Instead, the only individuals that will realistically face the prospect of ICC justice will be those much further down the chain of command. While those individuals would still be directly or otherwise responsible for the crimes committed, and certainly deserving of facing accountability, they would be far from the only, or indeed the most significant, targets for international justice.

This article will consider the extent of international criminality in Ukraine, using key UN reports to outline the crimes that have been committed during the ongoing conflict. It will then analyse the jurisdiction of the ICC, assessing the legal capacity of the Court to seek prosecutions for the reported atrocities. Based on these findings, and the determination that the ICC's jurisdiction places those most responsible for the crimes committed against Ukraine beyond its reach, the final section will discuss potential avenues for securing much needed accountability. This could include through changes in leadership at the state or UN level, through established powers of the UN General Assembly (UNGA), or through the establishment of a new internationalised aggression tribunal capable of bringing the Russian leadership to justice for the conflict that has unleashed untold misery upon the people of Ukraine.

Crimes in Ukraine

Russia's invasion of Ukraine in February 2022 set off a flurry of discussion and concern over what can be done, both to end the conflict and to bring those responsible to justice. There is little doubt that the invasion itself constitutes an act of aggression, confirmed in

[3] Fatou Bensouda, Statement of the Prosecutor on the conclusion of the preliminary examination in the situation in Ukraine (11 December 2020) available at <https://www.icc-cpi.int/news/statement-prosecutor-fatou-bensouda-conclusion-preliminary-examination-situation-ukraine> accessed 21/11/2022.
[4] *Ibid*.
[5] Karim A.A. Khan, Statement of ICC Prosecutor on the Situation in Ukraine: Receipt of Referrals from 39 States Parties and the Opening of an Investigation (2 March 2022) <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-receipt-referrals-39-states> accessed 21/11/2022.

numerous UNGA Resolutions on the issue.[6] As is often the case, however, aggression does not come alone and instead gives rise to the commission of various other international crimes. Since the beginning of the invasion, numerous reports have emerged that indicate widespread commission of the world's most serious international crimes. Most recently, in October 2022, a report of the Independent International Commission of Inquiry on Ukraine was transmitted to the UNGA, detailed its findings in relation to events in the country during the first month of the conflict, including indications of numerous war crimes, crimes against humanity and other abuses in the country.[7] Under its Human Rights Council mandate, the Commission's investigation focussed on the Ukrainian regions of Kyiv, Chernihiv, Kharkiv, and Sumy, describing the human rights situation stemming from the Russian aggression. The 17-page report delivered details a wide range of violations of both human rights and humanitarian law, primarily by Russian forces; although some elements highlighted that Ukrainian forces had also committed acts amounting to war crimes, including the torture and execution of persons *hors de combat* and prisoners of war.[8] Of significant concern are the various instances of indiscriminate attack, including the use of cluster munitions, the intentional killing and endangering of civilians, as well as widespread executions, arbitrary detention, torture and sexual violence against the civilian population generally, and children specifically. This report highlights not only the extent of the violations being committed in the country from the very outset of the conflict, but also the absolute need for accountability. As noted in the concluding paragraphs, 'the impact of these violations on the people of Ukraine is immense', and those that have suffered want and expect accountability for the atrocities committed.[9]

Similar findings were reported from other UN sources, with the Office of the High Commissioner for Human Rights (OHCHR) detailing serious ongoing human rights and humanitarian law violations in the wider period February to July.[10] As with the Commission's report, the OHCHR details various abuses committed by both Russian and Ukrainian forces, including the intentional targeting of civilians, torture, rape and other forms of sexual violence, extrajudicial executions and unlawful detention.[11] The report also describes cases involving the mistreatment and killing of prisoners of war and those rendered *hors de combat*.[12] Many of these incidents could amount to war crimes committed by both parties in the conflict. Other acts, such as the forced recruitment of Ukrainians into Russian-affiliated armed forces, could add to the growing list of international crimes perpetrated in the country.[13] More than simply confirming and expanding on the findings of the Commission's report, however, the OHCHR report also documents troubling shortcomings and abuses in Ukraine's approach to prosecution of Russian forces. These include denial of several basic fair trial guarantees, including methods of inducing confessions, as well as violations of the presumption of innocence and the principle of equality of arms between the prosecution and defence.[14] There are also suggestions that Russian forces have been prosecuted for their participation in the conflict, breaching their

[6] G.A. Res. ES11/1 (18 March 2022); G.A. Res. ES11/4 (13 October 2022); G.A. Res. ES11/5 (15 November 2022).
[7] Report of the Independent International Commission of Inquiry on Ukraine (n.1).
[8] Ibid, 11, para. 61 and 14, paras. 86-87.
[9] Ibid, 17, para. 110.
[10] Office of the High Commissioner for Human Rights, 'Report on the Human Rights Situation in Ukraine: 1 February to 31 July 2022' (27 September 2022).
[11] Ibid, 15-22.
[12] Ibid, 22-25.
[13] Ibid, 25-26, paras. 75-76.
[14] Ibid, 32-33, paras. 98-100.

combatant privilege.[15] Certainly, denying prisoners of war a fair trial is considered a war crime under the Rome Statute.[16] However, in addition, the inability or unwillingness of a state to carry out genuine domestic prosecutions is also a requirement for the ICC to exercise jurisdiction over the case.[17] As will be discussed in the next section, this rule of complementary jurisdiction ensures that domestic states have primary responsibility for prosecutions while enabling the Court to step in where necessary to ensure that justice is delivered.[18] As a general rule, domestic prosecutions of at least low-level offenders should be the go-to method of securing accountability, with the ICC acting only in a complementary capacity.[19] However, there are serious questions over whether Ukraine's institutions are in fact capable of carrying out that role. The OHCHR calls upon the international community to support international and national efforts to ensure accountability for all violations committed in Ukraine.[20] This relates not only to the willingness and ability of international institutions like the ICC to carry out prosecutions where necessary, but also to require international assistance in monitoring the situation and ensuring evidence is secured, as well as ensuring that the vital interests of justice are maintained.

In addition to potential war crimes and crimes against humanity, others have suggested that what is being carried out in Ukraine goes beyond the bounds of a mere armed conflict, being instead a far more sinister operation intended to destroy the very idea and existence of Ukraine and its people. In the International Court of Justice challenge of Russia's claims that its invasion was justified as a means to stop a genocide in the country, Ukraine's agent has suggested that Russia has used the Genocide Convention to justify 'abusing and violating that Convention in order to kill Ukrainians and destroy Ukraine.'[21] While not explicit, the clear indication is that, contrary to Russia's claim that Ukraine was committing genocide in its eastern regions, it is in fact Russia that is responsible for genocide against the Ukrainian people. Others have been more explicit on this point, including US President Joe Biden, suggesting that President Putin was committing genocide and was 'trying to wipe out the idea of even being Ukrainian.'[22] This is far from the only accusation, with others pointing towards the same or similar conclusions as the conflict draws on, recognising that Russia's actions could amount to both incitement to commit genocide and to acts intended to destroy the Ukrainian people.[23] These claims have drawn their conclusions from a report published in May 2022, which makes the case for Russia's culpability for genocide, referencing the legal duty of all states under the Genocide Convention to act to prevent it.[24]

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[15] Ibid, 33, para. 101.
[16] Rome Statute of the International Criminal Court (Rome, 17 July 1998) UN Doc. A/CONF.183/9 of 17 July 1998, entered into force 1 July 2002, Art. 8(2)(a)(vi).
[17] Rome Statute, Art. 17.
[18] Douglas Guilfoyle, *International Criminal Law* (OUP, 2016), 109-110.
[19] Antonio Cassesse *et al*, *Cassesse's International Criminal Law*, 3rd ed. (OUP, 2013), 296-298
[20] Report on the Human Rights Situation in Ukraine (n.10), 48, para. 158
[21] Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), Public Sitting, ICJ Rep. 2022 (March 7), 15, para. 16.
[22] Julian Borger, 'Joe Biden Accuses Vladimir Putin of Committing Genocide in Ukraine' *The Guardian* (Washington, 13 April 2022) <https://www.theguardian.com/world/2022/apr/13/joe-biden-accuses-vladimir-putin-of-committing-genocide-in-ukraine> accessed 20/11/2022.
[23] Vittorio Bufacchi, 'War crimes in Ukraine: Is Putin responsible?' (Published online 2022) Journal of Political Power, 1.
[24] Yonah Diamond, 'An Independent Legal Analysis of the Russian Federation's Breaches of the Genocide Convention in Ukraine and the Duty to Prevent' (New Lines Institute for Strategy and Policy/Raoul Wallenberg Centre for Human Rights, 2022) <https://newlinesinstitute.org/wp-content/uploads/English-Report-1.pdf> accessed 21/11/2022.

While the commission of atrocities in any form are of course to be prevented, condemned, and punished, the crimes discussed above are of particular note given that they are the focus of international criminal law, and more importantly, are capable of be the subject of prosecutions before the ICC.[25] This means that individuals guilty of perpetrating these horrific acts could face international criminal justice, being prosecuted for their actions and sentenced to prison terms in accordance with the Rome Statute. Moreover, international criminal law recognises that crimes of the nature and scale of those committed in situations such as this are not committed in isolation, with various other actors playing a significant role in the commission of the crime itself or in producing the situation that allows for it. It is here that we find the opportunity to seek prosecution of those at the highest levels of a state's command structures, something sought by Ukraine and its allies. As will be explored in the next section, however, the regime created by the Rome Statute places the ICC in a difficult position: being the supposed champion of accountability for these types of international crimes, yet not truly equipped with the authority and jurisdictional reach to be capable of delivering on that promise.

Prosecution at the ICC

The Rome Statute establishes a clear jurisdictional regime for the Court to adhere to, setting out the circumstances and crimes over which it is able to preside, as well as the three 'trigger mechanisms' through which cases can be brought before it.[26] Like many international institutions, the drafting of the Statute involved significant compromise, leaving the Court's jurisdiction necessarily narrow so as to better encourage its widest possible acceptance by states.[27] However, this compromise has also left the Court with a much more limited reach than would likely be expected from an institution charged with ending impunity for the commission of international crimes. These problems are well illustrated in the case of Ukraine, where the Court is being looked to by the world to respond to the atrocities taking place. The reality, however, is that the Court will in all likelihood struggle to live up to the expectations of the international community. Several aspects of the jurisdictional regime in particular can be highlighted in this situation as essentially nullifying the Court's ability to offer any real accountability for those most responsible for the conflict and resulting crimes.

Before considering the matter of wider prosecutions, it seems sensible to first deal with the matter of aggression as the initial crime and as one with its own system within the Rome Statute (as amended by the 2010 Kampala Amendments).[28] Under those amendments, the Court gained jurisdiction over the crime of aggression, a jurisdiction that was activated on 17 July 2018.[29] However, even more so than for other crimes, the ICC's jurisdiction over aggression is severely restricted, with Article 15 *bis* (5) clearly indicating that aggression committed by nationals of or on the territory of non-state parties is not covered. Thus, even if Ukraine were to become a member of the ICC and accept its jurisdiction over aggression, Russia and its nationals would still not be subject to prosecution for the crime since the amendments do not allow for the nationals of non-state parties to be prosecuted. As Akande and Tzanakopoulos explain, Article 15 *bis* (5) excludes aggression committed by a national

[25] Rome Statute, Art. 5.
[26] Rome Statute, Art. 13.
[27] Antonio Cassesse *et al* (n.19), 263.
[28] Amendments on the crime of aggression to the Rome Statute of the International Criminal Court, Doc. RC/Res.6, 11 June 2010 (adopted by consensus at the Review Conference of the Rome Statute, held in Kampala, Uganda).
[29] Resolution on the Activation of the Jurisdiction of the Court over the Crime of Aggression, Doc. ICC-ASP/16/Res.5, 14 December 2017 (adopted by consensus at the ICC Assembly of States Parties).

of a non-party on the territory of a state party, meaning that 'States parties cannot do anything that would allow the ICC to exercise jurisdiction over a crime of aggression allegedly committed by nationals of non-parties on the territory of states parties.'[30] As a result, Russia's blatant crime of aggression would be left out of any future ICC prosecutions.

Beyond aggression, however, there remain prospects for the Court to seek prosecutions for instances of the three other core crimes. To begin establishing whether such prosecutions would be possible, the preconditions of ICC jurisdiction establish that the crimes in question must be committed by a national of a Member State, or on their territory.[31] As noted, neither Ukraine nor the Russian Federation are Member States of the ICC, so there is an immediate impediment to the exercise of jurisdiction. However, the Statute does allow for states to provide *ad hoc* jurisdiction to the Court in specific circumstances.[32] This is the case in Ukraine, with the country lodging two such declarations: the first providing jurisdiction over crimes committed in Ukraine between 21 November 2013 and 22 February 2014;[33] the second extending this time limit, with an open-ended allowance from 20 February 2014 onwards.[34] This *ad hoc* authorisation for the Court to act was taken up by the Prosecutor, exercising their *proprio motu* power to investigate.[35] As noted above, this in turn led to the determination that crimes appeared to have been committed, and that a full investigation was warranted. Generally, the Prosecutor would then have been required to gain authorisation to proceed from the Pre-Trial Chamber, but this was avoided through the referral of the situation to the Court by some 43 States Parties.[36] As such, the door is certainly open for prosecutions to take place, with significant international support for the Court to act.

Nonetheless, an obvious flaw remains in that the Russian Federation has not provided any such authority, nor, as things currently stand, is it likely to do so. This means that the Court's jurisdiction over Russian nationals will be a hotly contested issue. As some have argued, the ICC cannot exercise its jurisdiction over the nationals of non-Parties, regardless of other considerations, relying on the customary principle that treaties cannot bind states that have not consented to them.[37] According to this line of thinking, a state's nationals are an extension of the state itself, and so a lack of consent from that state leads to a lack of jurisdiction over its nationals, wherever they may be located.[38] As such, in the case of Ukraine, Russia's nationals would be shielded from prosecution at the ICC, simply because Russia does not accept the Court's jurisdiction. There are those, of course, that disagree with this reading of Article 12 of the Rome Statute. Instead, they assert that 'non-party nationals are subject to ICC jurisdiction when they have committed a crime on the territory of a state

[30] Dapo Akande and Antonios Tzanakopoulos, 'Treaty Law and ICC Jurisdiction over the Crime of Aggression' (2018) 29(3) EJIL, 939-959, 954-955
[31] Rome Statute, Art. 12(2)
[32] Rome Statute, Art. 12(3)
[33] Declaration by the Government of Ukraine submitted to the Registrar of the ICC (9 April 2014) <https://www.icc-cpi.int/sites/default/files/itemsDocuments/997/declarationRecognitionJuristiction09-04-2014.pdf> accessed 23/11/2022
[34] Second Declaration by the Government of Ukraine submitted to the Registrar of the ICC (8 September 2025) < https://www.icc-cpi.int/sites/default/files/iccdocs/other/Ukraine_Art_12-3_declaration_08092015.pdf#search=ukraine> accessed 23/11/2022
[35] Rome Statute, Art. 13(3) and Art. 15
[36] 'ICC Investigation: Ukraine' <https://www.icc-cpi.int/ukraine> accessed 20/11/2022
[37] Jay Alan Sekulow and Robert Weston Ash, 'The Issue of ICC Jurisdiction over Nationals of Non-Consenting, Non-Party States to the Rome Statute: Refuting Professor Dapo Akande's Arguments' (2020) 16(2) South Carolina Journal of International Law and Business, 1-65, 3
[38] Ibid, 28.

that is a party to the ICC Statute or has otherwise accepted the jurisdiction of the Court with respect to that crime.'[39] This view of the legal position better reflects the reality of criminal justice and the purposes of the ICC, removing the prospect of nationals of states like Russia carrying out criminal acts on the territory of another nation with no prospect of criminal repercussions. Further, in answer to the US' primary argument that a treaty cannot create obligations for the non-party state, Professor Akande notes that:

> …there is no provision in the ICC Statute that requires non-party states (as distinct from their nationals) to perform or to refrain from performing any actions. The Statute does not impose any obligations on or create any duties for non-party states. To be sure, the prosecution of non-party nationals might affect the interests of that non-party but this is not the same as saying that obligations are imposed on the non-party.[40]

The result of this is that the ICC can, and indeed should, seek to prosecute individuals that commit offences on the ground in Ukraine, whether Russian or Ukrainian. However, in all likelihood, it means that those most responsible for the situation, both military and civilian leaders, would be out of reach since they would not have committed their offences on the territory of the consenting state. That said, there does remain the potential for seeking prosecution of such individuals for linked offences in the realm of complicity, although bringing those persons before the Court would be a highly problematic prospect.[41]

Of course, the drafters of the Rome Statute did not leave matters purely in the hands of the states themselves to dictate the fate of international criminals. The Rome Statute does leave room for a more complete means of placing non-members before the Court via the UN Security Council. The Council's referral power is in fact vested in Chapter VII of the UN Charter, under which it can declare any situation a threat to that international order and determine what measures are to be taken to resolve it.[42] This power is effectively translated into the Rome Statute, confirming that the Court can exercise jurisdiction over a situation referred to it by the Council under its Chapter VII powers.[43] Were such a circumstance to arise, the country in question, member or not, would be bound to accept the Court's jurisdiction under international law, with the legal authority stemming from the UN Charter. This is effectively the only route through which wider accountability for non-States Parties is possible. Unfortunately, there is again the unsurmountable block to this avenue - the Russian Federation's Permanent Membership in the Security Council. Since the passing of any decision of the Council requires the absence of a negative vote from the five Permanent Members, Russia is able to block any such referral, nullifying the Security Council's capacity to refer the situation and preventing prosecutions.[44]

Finally, as mentioned previously, the ICC's role is complementary to national jurisdictions, meaning that the Court can only prosecute where a State is unwilling or unable to genuinely do so itself.[45] This principle ensures that states maintain primary responsibility for criminal prosecutions, maintaining their sovereignty while also increasing the efficiency and

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[39] Dapo Akande, 'The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits' (2003) 1(3) Journal of International Criminal Justice, 618-650, 619.
[40] Ibid, 620.
[41] 'Territorial Jurisdiction of the International Criminal Court over the Russian Leadership: Locus Delicti in Complicity Cases' (*EJIL: Talk!*, 24 March 2022) <https://www.ejiltalk.org/territorial-jurisdiction-of-the-international-criminal-court-over-the-russian-leadership-locus-delicti-in-complicity-cases/> accessed 23/11/2022.
[42] UN, *Charter of the United Nations* (24 October 1945) 1 UNTS XVI [UN Charter], arts. 39 & 41.
[43] Rome Statute, art. 13(b).
[44] UN Charter, Art. 27(3).
[45] Rome Statute, Art. 17(1)(a).

effectiveness of those proceedings that do come to the Court.[46] As such, for the Ukrainian situation to be within the remit of the ICC it would need to be assessed whether there are ongoing investigations or prosecutions of the crimes in Ukraine, and whether the state is genuinely unwilling or unable to carry those out.[47] Since prosecutions for war crimes have already begun in Ukraine, with thousands of investigations into allegations of atrocities being investigated, it seems on the surface that the domestic institutions are in fact available and capable of carrying out their role.[48] This effectively negates the need for the ICC to step in, and in accordance with the complementarity principle indeed prevents it from doing so. However, the question is really, whether those institutions are able to carry out that role *genuinely*.

As noted above, serious questions have already been raised in relation to the fairness and validity of prosecutions seen in Ukraine in the initial stages of the conflict. Further concerns have been raised, highlighting the growth in anti-Russian sentiment as a further impediment to fairness, as well as the understandable prioritisation of reconstruction after the war, leaving cases unheard.[49] Others highlight that it is unlikely that any prosecutions of Russian nationals, or even attempts of the same, would take place in Russia itself.[50] Meanwhile, the potential that captured Ukrainians will face show trials in Russia for their participation in the conflict is very real, with a number of individuals already charged.[51] This leads to the conclusion that the ICC does have reasonable grounds to exercise its jurisdiction over the situation, though there will no doubt be challenges to that standing. Regardless, even with the ICC taking the situation on, it will still fall to Ukrainian courts to consider the vast majority of the minor cases, with the international court prioritising only those considered most responsible for any atrocities committed.

While there are undoubtedly other obstacles here, these fundamental gaps in the reach of the ICC and the substantial obstacles and challenges it would need to overcome, already leave the prospect of international prosecutions at best tenuous. Certainly, there are strong arguments to suggest that, in principle at least, the Court can and should act to bring prosecutions. However, without drifting beyond its own boundaries and ultimately undermining the already shaky legitimacy the Court has in the eyes of some of the world's most powerful nations, any prosecutions brought would be limited to those on the ground in Ukraine, leaving the most responsible individuals in the political and military leadership of the Russian state unconcerned. Meanwhile, the crime of aggression from which all of the other crimes have stemmed is left entirely beyond the ICC's grasp. Therefore, it is suggested that alternative means for securing accountability are needed, with various forms of the same already being suggested.

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[46] Robert Cryer, Darryl Robinson, Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure* (CUP, 2019), 155.
[47] Ibid, 156-159.
[48] Gaiane Nuridzhanian, 'Prosecuting war crimes: are Ukrainian courts fit to do it?' (*EJIL:Talk!*, 11 August 2022) <https://www.ejiltalk.org/prosecuting-war-crimes-are-ukrainian-courts-fit-to-do-it/> accessed 25/11/2022.
[49] Giulia Lanza, 'The Fundamental Role of International (Criminal) Law in the War in Ukraine' (2022) 66(3) Orbis, 424-435, 434.
[50] Ibid, 434.
[51] 'Ukraine war: Russian investigator says 92 Ukrainians charged' *BBC News* (25 July 2022) <https://www.bbc.co.uk/news/world-europe-62287502> accessed 23/11/2022; Robert Goldman, 'War crimes trial of Russian soldier was perfectly legal – but that doesn't make it wise' (*The Conversation*, 23 May 2022) <https://theconversation.com/war-crimes-trial-of-russian-soldier-was-perfectly-legal-but-that-doesnt-make-it-wise-183586> accessed 23/11/2022.

The way forward

With widespread calls for international criminal prosecutions to take place over Ukraine, which could realistically go unanswered, there is a clear need for options. While it would be ideal for the existing international criminal institution to prove its value here, the accountability gap inherent in the ICC system is all too clear and difficult to navigate around. Of course, although seemingly unlikely at present, one resolution to this would be for a complete change of leadership in the Russian state. As Vasiliev points out, 'no regime, however autocratic and violent, is eternal or invulnerable.'[52] There is, therefore, some chance, though admittedly small, that the current Russian leadership could face justice with the blessing of a future one. This would also bring with it the possibility of UNSC referral of the situation to the ICC, including the crime of aggression. However, any potential for this is obviously far off and unlikely, an extreme case of wishful thinking, despite remaining one of the simpler solutions to this issue.

In a similar vein, a potential solution to the frozen UN systems would be to take the drastic but, in the author's opinion, much-needed step of reforming the structure and standing of States in the UNSC. There are several potential avenues for this, whether through the removal of Russia's Permanent Membership,[53] the limiting or removal of the veto power, or the vesting of powers in the UNGA to act in the face of a frozen Council. Again, on the face of things none of these options seem particularly realistic given Russia's current position within the organisation and the significant hurdles that would need to be overcome for real change to take place. Nonetheless, the final option is not only the most plausible, but is in fact one that already has already been addressed, with a procedure in place.

The initial step towards overcoming the hold of the Permanent Membership on the Security Council, and by extension the whole international community, was taken some time ago, with power shifting to the UNGA in the face of Council paralysis as the holder of the secondary responsibility for maintaining international peace and security. The 'Uniting for Peace' procedure was adopted in 1950 following the USSR's vetoing of draft resolutions concerning the Korean War.[54] Under UNGA Resolution 377 (V), where there is a lack of unanimity among the Permanent Members, leading to a failure of the Council 'to exercise its primary responsibility for the maintenance of international peace and security', the Assembly is empowered to 'consider the matter immediately with a view to making appropriate recommendations to members for collective measures…to maintain or restore international peace and security.'[55] While a significant power shift within the UN, offering both a way around a frozen UNSC and better recognition of the UNGA's responsibility over peace and security, the Uniting for Peace process has only been used a handful of times

[52] Sergey Vasiliev, 'Aggression against Ukraine: Avenues for Accountability for Core Crimes' (*EJIL: Talk!*, 3 March 2022) <https://www.ejiltalk.org/aggression-against-ukraine-avenues-for-accountability-for-core-crimes/> accessed 23/11/2022.
[53] An option being called for by Ukraine and by some within the US government; Jack Detsch and Amy Mackinnon, 'Congress Wants to Boot Russia From U.N. Security Council' *Foreign Policy* (14 December 2022) <https://foreignpolicy.com/2022/12/14/congress-russia-un-security-council-putin-ukraine-war-biden-helsinki-commission/> accessed 18/12/2022; As noted, however, under the UN Charter, there is no procedure for removing a Permanent Member other than to remove the state from the UN entirely, which would anyway require Russia's agreement as a Permanent Member of the UNSC; UN Charter, Art. 6
[54] Ved P. Nanda, 'The Security Council Veto in the Context of Atrocity Crimes, Uniting for Peace, and the Responsibility to Protect' (2020) 52(1) Case W Res J Int'l L, 119-141, 135.
[55] G.A. Res. 377(V) (3 November 1950), 10.

since its inception, otherwise existing in relative obscurity.[56] As Carswell suggests, this is likely due to the realisation of the Permanent Membership that the resolution's impact on their veto power would threaten their individual sovereign interests, despite it being a valuable 'safety valve' in maintaining international peace and security.[57] It is situations like Ukraine that clearly illustrate this, starkly demonstrating the dangers of a system predicated on the willingness of a few powerful nations to take the necessary steps to ensure the safety and security of all.

The conflict in Ukraine has reignited debates on what can be done where the Security Council is frozen in the face of the actions of one of its own Permanent Members. It is therefore unsurprising that Uniting for Peace was almost immediately activated, leading to the adoption of several UNGA Resolutions with different effects. The first of note is Resolution ES-11/1, adopted 18 March 2022, which condemned the Russian invasion of Ukraine as a clear violation of Article 2(4) of the UN Charter and called for immediate cessation and withdrawal. The Resolution also reaffirmed the inviolability of Ukraine's territory and the illegality of the acquisition of territory through force, rejecting Russia's declarations in relation to the status of Ukraine's eastern regions and demanding they be reversed.[58]

This strong rejection of both Russia's policies and its stranglehold over the UNSC demonstrated in no uncertain terms that the international community was not willing to allow a Permanent Member to be shielded by their veto power, something that has since been reasserted in Resolution ES-11/4.[59] Nonetheless, while these documents both provided strong condemnations neither went further to actually taking direct action to hold Russia accountable for its actions. That came in the final Resolution of the 11th Emergency Session, Resolution ES-11/5, under which the UNGA declared that Russia 'must be held to account for any violations of international law in or against Ukraine. This includes its aggression in violation of the Charter of the United Nations as well as any violations of international humanitarian law and international human rights law'.[60] The Resolution called for the establishment of an international mechanism for reparation, as well as an international register of damage to record evidence and claims' information on damage, loss or injury caused by Russia's wrongful actions.[61] This has been welcomed as a positive step towards accountability for the Russian state, though is still far away from individual accountability for those responsible for the conflict and resulting atrocities.

In terms of more wide-reaching impacts, Russia's vetoing of UNSC draft resolutions has also led to a slight shift in the balance of power at the UN in the form of Resolution 76/262. A direct result of efforts by Lichtenstein, the Resolution recalls the Assembly's and the Council's roles in the maintenance of international peace and security, establishing a new system whereby a meeting of the General Assembly is to be called within 10 working days of the casting of a veto by one or more permanent members of the Security Council.[62] This means that whenever a veto is cast, the UNGA will automatically meet to debate the issue and decide on necessary action, preventing the Permanent Member's from effectively

[56] Andrew J. Carswell, 'Unblocking the UN Security Council: The Uniting for Peace Resolution' (2013) 18(3) Journal of Conflict and Security Law, 453-480, 458-459.
[57] Ibid, 456.
[58] G.A. Res. ES11/1 (18 March 2022), 3.
[59] G.A. Res. ES11/4 (13 October 2022).
[60] G.A. Res. ES11/5 (15 November 2022), 2.
[61] Ibid, 2.
[62] G.A. Res. 76/262 (28 April 2022), 1.

ending conversations on serious international issues. While hardly a dramatic restructuring of the system, this new procedure is a step in the right direction, again demonstrating the need for reform that better enables the international community to respond to challenges such as that in Ukraine. Complete overhaul, however, is a much more remote possibility, meaning that true accountability over Ukraine will need to come from elsewhere.

Perhaps a far more realistic option could still come at the international level, even without significant changes to the current status quo. In the face of an inaccessible ICC, many, including Ukraine, have been proposing an alternative criminal justice institution, one that is empowered to prosecute the crime of aggression, which falls outside of the limited remit of the ICC described above.[63] This concept has been compared to the tribunals set up after WWII, and in response to atrocities committed in the former Yugoslavia and Rwanda in the 1990s, although the more apt comparison for such a tribunal may be the internationalised tribunals that have been established by agreement between states and UN institutions.[64]

This proposed tribunal would be established for the sole purpose of investigating, prosecuting and punishing the international crime of aggression committed against Ukrainian, winding down and then closing once this role has been fulfilled. In their report prepared for the European Parliament, Corten and Koutroulis suggest that there are two possibilities for this: a tribunal established under the powers of the UN; or one established by agreement between Ukraine and either an international organisation or other states.[65] Both have their problems, with the primary lingering questions being how such institutions could be legally established, and how they would be granted jurisdiction over Russia. For the sake of this contribution, it is the former possibility that is considered as the most plausible and likely to succeed. While agreements with other institutions or states could foster the required result,[66] the need for a truly international approach lies not only in the practical matter that head of state immunity is avoided in international courts,[67] but also the symbolic need for justice to be done on behalf of an international community universally impacted by the invasion of Ukraine.[68] There is also the crucial advantage that a limited

[63] Patrick Wintour, 'Russian war crimes draft resolution being circulated at the UN' *The Guardian* (4 December 2022) <https://www.theguardian.com/law/2022/dec/04/russian-war-crimes-draft-resolution-circulated-un-ukraine-zelenskiy> accessed 18/12/2022.
[64] Particularly relevant examples being the Special Court for Sierra Leone; Extraordinary Chambers in the Courts of Cambodia; Special Tribunal for Lebanon, among others.
[65] Olivier Corten and Vaios Koutroulis, 'Tribunal for the crime of aggression against Ukraine - a legal assessment' (*European Parliament*, 2022), 14; a third conceivable option posed in the report is that a case could be referred to the ICC through the Uniting for Peace system discussed above, but such a thing would require significant flexibility in the interpretation of established international law, 20-21.
[66] Corten and Koutroulis discuss the possibility of agreements with the Council of Europe, EU and other states as potential avenues.
[67] Claus Kreß, *Preliminary Observations on the ICC Appeals Chamber's Judgment of 6 May 2019 in the Jordan Referral re Al-Bashir Appeal* (Torkel Opsahl Academic EPublisher, 2019). 13.
[68] Oona Hathaway, 'The Case for Creating an International Tribunal to Prosecute the Crime of Aggression Against Ukraine (Part I)' (*Just Security*, 20 September 2022) <https://www.justsecurity.org/83117/the-case-for-creating-an-international-tribunal-to-prosecute-the-crime-of-aggression-against-ukraine/#:%7E:text=The%20Case%20for%20Creating%20the%20Tribunal%20through%20an,Nations%2C%20on%20the%20recommendation%20of%20the%20General%20Assembly> accessed 15/12/2022; Astrid Reisinger Coracini and Jennifer Trahan, 'Special Tribunal to Prosecute the Crime of Aggression Committed Against Ukraine (Part VI): On the Non-Applicability of Personal Immunities' (*Just Security*, 8 November 2022) <https://www.justsecurity.org/84017/the-case-for-creating-a-special-tribunal-to-prosecute-the-crime-of-aggression-committed-against-ukraine-part-vi-on-the-non-applicability-of-personal-immunities/> accessed 15/12/2022.

institution of this kind might be more capable of gaining the support of vital states such as the USA, that are generally more hostile towards the role of the ICC.[69]

As such, the suggestions put forward and supported here are for the UNGA to authorise the UN Secretary General to begin negotiating an agreement with Ukraine for the establishment of a new tribunal, a concept not without precedent.[70] This tribunal would be entirely focussed on prosecuting those leaders in Russia most responsible for the crime of aggression that are currently beyond the reach of the ICC. Meanwhile, the agreement should also seek to underline the role of the ICC in prosecuting those within its jurisdictional scope and responsible for the other international crimes outlined above.[71] This would avoid an unnecessary jurisdictional crossover or reallocation of funds, and, crucially, preserve the validity of the ICC and the role of both the Court and states in the prosecution of war crimes, crimes against humanity and genocide. This would of course mean that many of those responsible for such crimes would remain effectively immune from prosecution, with the ICC and Ukrainian courts unable to exercise jurisdiction or secure their surrender from Russia. It is also questionable whether this proposed aggression court would fare any better on that front. Vasiliev points out that it is again inconceivable that Russia or indeed Belarus would surrender their leaders to such an institution, save for in the case of dramatic regime change. This is something that would in any case make the whole exercise unnecessary; given that a regime open to such a step would be more likely to cooperate with the ICC, potentially to the point of self-referral.[72] Nonetheless, an aggression tribunal would at least go some way towards plugging the accountability gap in the ICC, demonstrating the resolve of the international community in ensuring that the crime of aggression, which has given rise to all the other atrocities committed in Ukraine, does not go unpunished. It would then be for the international community, potentially through the UNGA's Uniting for Peace procedure discussed above, to secure the compliance of those nations in the interest of international peace and security.

Conclusions

What is abundantly clear when discussing Ukraine is that the international community is facing an accountability crisis for which there are no clear or simple solutions. Whether crimes have been committed in Ukraine, both in the form of aggression stemming from the invasion itself, and war crimes, crimes against humanity and genocide, is no longer the real question, with every observer offering clear evidence of the same. However, this blatant disregard for rules supposedly applicable to all nations has exposed the stark limitations of international institutions supposedly responsible for preventing and punishing breaches of

[69] Larry D. Johnson, 'United Nations Response Options to Russia's Aggression: Opportunities and Rabbit Holes' (*Just Security*, 1 March 2022) <https://www.justsecurity.org/80395/united-nations-response-options-to-russias-aggression-opportunities-and-rabbit-holes/> accessed 18/12/2022

[70] The Extraordinary Chambers in the Courts of Cambodia were established by such an agreement; Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, UN Doc No. 417234 (6 June 2003) <https://www.eccc.gov.kh/sites/default/files/legal-documents/Agreement_between_UN_and_RGC.pdf> accessed 18/12/2022; for discussion of this process, see Helen Jarvis, 'Trials and Tribulations: The Long Quest for Justice for the Cambodian Genocide' in Simon M. Meisenberg and Ignaz Stegmiller (Eds.), *The Extraordinary Chambers in the Courts of Cambodia: Assessing their Contribution to International Criminal Law* (Springer, 2016), 20-21.

[71] Astrid Reisinger Coracini, 'The Case for Creating a Special Tribunal to Prosecute the Crime of Aggression Against Ukraine (Part II)' (*Just Security*, 23 September 2022) <https://www.justsecurity.org/83201/tribunal-crime-of-aggression-part-two/> accessed 18/12/2022

[72] Sergey Vasiliev (n.52)

the law. The ICC, the creation of which was a huge leap forward for international criminal justice, remains a deeply flawed institution, overburdened with expectations that ignore its limitations. Though the Court does conceivably have jurisdiction over crimes committed on Ukrainian soil, the exercise of that jurisdiction will be complex and controversial, not to mention restricted to those lower-level criminals located and detained within Ukraine itself. Even then, there is a real danger of either selectivity which would undermine the ICC's legitimacy, were it to target only Russian perpetrators, or a negative response from the wider community were it to begin prosecutions of Ukrainian nationals seen only as the victims of unwarranted aggression.

Of course, the prosecution of these atrocity crimes is crucial. Nonetheless, Ukraine and its allies understandably have their sights set on accountability for aggression committed by the Russian leadership as a priority. Being entirely outside of the ICC's reach, making this a reality will require change. That change could come from within Russia or from within the UN, though neither option appears particularly likely, certainly not in the short term. Hope therefore lies with the proposals being put forward and discussed for a new and unique approach to the aggression question in the form of an *ad hoc*, internationalised tribunal formed by agreement between Ukraine and the UN. This would satisfy a number of needs, ensuring accountability, resolving jurisdictional limitations, maintaining Ukrainian involvement while upholding the position of the ICC and demonstrating that no state is immune to international justice.

However, these lofty ambitions will not be easily satisfied, with real hurdles to be overcome in the establishment of such an institution, as well as enabling it to do its work, particularly in terms of securing potential perpetrators. Even were these matters to be resolved, the establishment of such a tribunal would no doubt have a knock-on effect, with suggestions of selectivity likely to be voiced in relation to every future instance of potential or realised aggression that does not inspire the creation of a new tribunal. Ultimately then, what needs to be determined is not just how to respond to the invasion of Ukraine, but rather to address the ongoing state inequality that is ingrained in the international system, placing the most powerful nations in a position of perpetual immunity.

LEGAL EDUCATION

The end of the Joint Statement: freedom or further fettering? An examination of the potential impact of the new Solicitors Qualifying Examination on undergraduate legal education

Rhonda Hammond-Sharlot*

Introduction

November 2021 saw the first sitting of the new Solicitors Qualifying Examination (SQE) and heralded the start of a whole new system to qualify as a solicitor. This new centralised examination will be the only way to enter the legal profession as a solicitor. There will be no exemptions for foreign jurisdiction lawyers wishing to qualify to practice in England and Wales, or for members of other branches of the UK legal professions. In future, once some short-term transitional arrangements have expired, everyone will need to pass SQE in order to be admitted.

Prior to this, the typical route to qualifying as a Solicitor was described by Eraut as a dual qualification system.[1] The undergraduate law degree was approved by the professional bodies: the Solicitors Regulation Authority (SRA) and the Bar Standards Board (BSB) by way of a Joint Statement, discussed in more detail later in this article. Candidates then moved on to a professional practice level 7 course – the Legal Practice Course (LPC) - delivered and assessed by some Universities, mainly post 19992 former Polytechnics. Finally, the candidate had to undertake a period of in-work training (the Training Contract), which Eraut likens to a period of apprenticeship.

This article aims to chart how solicitors have been trained (or not) in the past. It will look at the tension between the regulators and Higher Education Institutions (HEIs) that has arisen due to their different views as to what a Law School actually is. Specifically, it asks the following research questions: how has training as a solicitor been undertaken in the past; what is actually shaping undergraduate legal education in the UK; and whether the shape of undergraduate legal education is likely to change in the future in light of the deregulation?

The methodology will be a classic literature review looking at what has been written on this matter before, but also examining websites – particularly the SRA website. The work will look at the development to date and potential future development of Undergraduate Legal Education through the lens of institutional theory. That theory, first articulated by Scott in the mid 1990's,[2] argues that organisations in a field all isomorph (change to be the same as each other) because of the institutions exerting influence on them. This theory was developed by DiMaggio and Powell,[3] who said the isomorph was caused by one of three processes:

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[1] Eraut M, Developing the Knowledge Base: a process perspective on Professional Education in Barnett R (ed), in *Leading to Effect,* Open University Press (1992).

[2] Scott, W. Richard 1995. Institutions and Organizations. Thousand Oaks, CA: Sage.

[3] Paul J. DiMaggio, Walter W. Powell, 'The iron cage revisited: Institutional isomorphism and collective rationality in organizational fields' (1983) 48:2 American Sociological Review 147.

- Coercive isomorphism – which essentially is some external influence that demands a particular type of structure or behaviour. e.g. a regulator;
- Mimetic isomorphism – which occurs when organisations model themselves on each other for credibility or legitimacy; and
- Normative isomorphism – which is pressure on an organisation from an institution to meet some sort of standard.

The article will look at the similarity of undergraduate law provision in HEIs in the UK and consider why this Isomorph has occurred.

Historical development of legal education

There is an argument that law schools are liberal arts education centres and should be divorced from professional training.[4] However, there is an opposite view that the Universities, right from Undergraduate level, should be preparing potential lawyers for their future roles and therefore engage in vocational training.[5] The latter approach has raised concern with many actors in the legal arena, including Professor Celia Wells who argues "students at UK law schools will, by the end of their first year, have been assimilated into a way of thinking about law which is rule-bound and rational, partial and positivistic."[6]

Surprisingly, the debate relating to the role of a law school – liberal arts education or vocational training - is not new; it has hung over Law Schools since legal education began. The argument for law to be treated as a liberal arts discipline gained traction with the introduction of *Commentaries on the Laws of England*, by Blackstone in 1765.[7] At that time lawyers trained in their Inns of Court with little or no academic study of law, and introducing that idea was actually quite controversial. Blackstone, in publishing his Commentaries, provided a robust text relating to legal education – a starting point for institutions to offer an academic study of law. Surprisingly there was strong resistance to the idea of studying law as an academic subject. The lawyer's role was seen as advocacy, arguing the case for a client, a craft he (for they were all male) had learned from more experienced advocates, and the need for an understanding of law was not only not understood, but viewed with suspicion. Oxford and Cambridge taught only Roman Law, and there were no courses studying English Law – only *ad hoc* lectures at the Inns of Court. By 1846, University College London had begun offering lectures in Equity, common law and criminal law – and thus this appeared to be an academic law degree. However, Professor Andrew Amon, who taught this course, admitted to a Select Committee on Legal Education in 1846 that his teaching was 'chiefly of technicalities.[8]' The debate gained traction over the next decade or so, fuelled by the views of Cardinal John Newman and his views on what a university is, together with his support of liberal education.[9]

[4] Mason L and Guth J, *Reclaiming our discipline* (2018) 52 *The Law Teacher* 379.
[5] Frank J, *A plea for lawyer-schools* (1947) 56(8) *Yale Law Journal* 1305.
[6] Susanna Menis, Non-traditional students and critical pedagogy: Transformative practice and the teaching of criminal law (2017) 22 *Teaching in Higher Education* 193.
[7] Blackstone W, *Commentaries on the Laws of England* (1768) Clarendon Press.
[8] Select Committee on Legal Education 1846.
[9] Newman, J. H., The Idea of a University. (1852). London: Aeterna Press

The eminent legal scholar Albert Venn Dicey, revered for crystallising the rule of law, gave his inaugural lecture at Oxford in 1883. His chosen subject - 'Can English Law be taught at the University?[10] - expressed concern about the way legal professionals qualified:

> The pupil does not undertake to learn, the tutor does not in any way undertake to teach.[11]

By 1910, seven Universities were awarded charters to teach English Law,[12] although this was still controversial, with opposing views on whether they existed to train future lawyers or to provide a liberal education. Entry into the legal professions was by centralised examination without any requirement to have a law degree, or indeed any degree. This system is very similar to the new training regime for lawyers, so the debate has clearly continued throughout the ages. The establishment of a Society of Public Law Teachers (SPLT) (now Society of Legal Scholars) in 1909 provided a vehicle for the debate.

Lord Atkin described vocational legal training in an interesting way:

> You must in fact be a neophyte and go into the wizard's room and there learn the black art which the public…seem to associate with the learning and practice of Law.[13]

Despite much acknowledgement about the chaotic way legal professionals were trained, nothing substantial was done until 1971. This is despite the existence of 3 regulators, who do not appear concerned about people literally floating into the profession knowing little or no law and learning from more experienced lawyers who probably also knew little law.

The debate about what a law school should be did not abate in the 20th Century, and in 1913 it was formally acknowledged by a Parliamentary Commission.[14] That Commission concluded that a law degree should cover both academic and professional skills, but did not have any new ideas on how this could be achieved, and thus did not really contribute to the debate. In 1922, the Law Society – who regulated the Solicitors profession at that time - introduced a compulsory 1 year of university tuition for any would be Solicitor who did not have any other degree. By the 1960's this was shining a light on the tension between the professional regulator and the University system. The Law Society complained that the Universities were more interested in preparing students for university examinations rather than the central Law Society Exam that was the gateway to the profession. The Universities were unmoved by this complaint, seeing themselves as academic institutions whereas the regulator saw them as training courses. When the 'approved law schools' failed to change their courses to tailor them to the Law Society Examinations, the Law Society responded by removing the requirement for one year of University Law studies as part of Solicitor training.[15]

The Robbins report in 1963 finally recognised the missing piece in the ongoing argument – not everyone who studies law wants to be a lawyer.[16] In September 2021, 31,585 students commenced study for a law degree. With only 6981 new admissions to the Solicitors roll

[10] Albert Venn Dicey, 'Can English Law be taught at the University? An Inaugural lecture' (1883) Macmillan.
[11] Ibid.
[12] Oxford, Cambridge, UCL, Manchester, Liverpool, Sheffield and Leeds.
[13] Lord Atkin's address to SPLT 1931.
[14] Haldene Commission on Legal Education (1913).
[15] Hall JC, *The training of a Solicitor* (1962) *Society of Public Law Teachers* 1.
[16] The Robbins report: Committee on Higher Education (1963) Higher Education.

(Qualified as Solicitor's),[17] 1409 people were called to the Bar (qualified as Barristers).[18] Whist this is a little like comparing apples and pears, it does serve to show that a very significant number of law students do not go into the legal professions. The report led to the conclusion that law schools should not be narrowly focused, but offer a much wider and more academic approach to the diet of learning offered to students. This report also recommended that students should be offered a wider range of optional modules, including ones from outside law. That has not really happened even to date, there is the odd nod to criminology perhaps, but generally law students study law and only law; other than in law and/with business, etc.

The next, and major landmark was the Ormrod Report,[19] which tacked head-on how lawyers should be trained. This suggested three stages: academic education, professional/vocational education, and work based. This was a real opportunity for universities to move back to a liberal arts discipline model, as the training would take place in the next two stages. Two of the regulators – the Law Society (later replaced by the SRA) and the Bar Council (now BSB) then collaborated to come up with the 'Joint Statement', requiring Law Schools to include six (EU law was added later making it seven) compulsory subjects that anyone wanting to enter the legal professions had to have studied. Students whose undergraduate law degrees complied with the statement were deemed to have a Qualifying Law Degree (QLD) – a prerequisite for entry to the legal professions. The Ormrod report stated that beyond those subjects, universities would have complete freedom to shape their courses. However, the need for a QLD for anyone wishing to enter the professions meant that all law schools crafted very similar undergraduate offers – with the seven foundations of knowledge subjects usually forming the first two years. This isomorph effect is a classic example of institutional theory, all law schools look similar, and the pillar or process driving it would appear to be a coercive isomorph as the institution influencing it appears to be the Joint statement – the regulation.

This system was then established – students undertook an academic undergraduate law degree, followed by the Law Society Finals – a one year course covering professional practice offered by the College of law (now the University of Law). The College of Law had been created in 1962 by the Law Society, the then regulator, when the Law Society School of Law (created in 1903) was combined with another provider and renamed the College of Law. The work-based stage was then called Articles – 2 years of 'apprenticeship' type work experience within a law firm. At that point they were admitted to the Roll – the point where they were qualified. In 1993, there was a change: universities were allowed to offer the course covering professional practice, and many, typically post-1992 institutions, took up this opportunity.

The College of Law continued to attract many more students than the Universities. In 1994 Nigel Savage – Dean of Law at Nottingham Trent – challenged the College of Law. They were seen as the official provider with close links to the Law Society; indeed eight members of the governing bodies were common to both. Students were choosing the College over the universities as they also saw it as the official provider. Savage called on them to either come clean and be transparent about the link with the Law Society or become truly independent.

[17] The Law Society, 'Entry Trends' <https://www.lawsociety.org.uk/career-advice/becoming-a-solicitor/entry-trends> accessed 23 January 2023.
[18] Ibid.
[19] Ormrod J, *Report of the Committee on legal Education* (1971) Cmnd 45958.

The College took the independent route, appointed Nigel Savage to lead them, and went on to be the first private provider to be granted degree awarding powers in 2002.[20]

The LPC stage of vocational legal training continued to be offered by universities and private providers but the introduction of SQE is causing many HEIs to rethink that offer.

The effect of deregulation on legal education

SQE – a central examination - has ended the SRA regulation of legal education. Therefore, law schools are now free to offer any sort of course they like. However, a review of various websites shows no rush for law schools to actually change the rather common first and second year offered around the UK. The debate regarding liberal arts education versus vocational training provider has raged for many years, but when law schools are free to decide what they want to be, it appears there is little change.

Several authors have views on why this is. Unger argues that 'both higher education and the legal profession are undergoing a shift away from traditional professional self-regulation towards regulation by market forces.'[21] Unger then contends that the massification of higher education, with 49.8 per cent of school leavers engaging in Higher Education,[22] has driven an employability agenda that is pushing law schools away from the liberal arts discipline model and back towards the vocational law school model. Menis states that 'academia had greater power and control over the nature and role of legal education than it ever really wanted: yet it ended up subscribing to what may be perceived as the whims of the profession.[23]" Universities had every opportunity to focus on academic study of law, but the pressure of the competition from the Inns of Court and Law Society in the early days, and each other more recently, who were offering practical training, seems to have continually bounced them back to trying to offer training for practice.

Although the introduction of the SQE, and the deregulation of legal education, *prima facie* appears to free law schools to become whatever they want to be, Unger has already pointed to the huge employability agenda, which he says is driven by massification. Although less than half of all law graduates actually progress into the profession, most of them enter their undergraduate studies thinking that is what they want to do. Bowyer asks the question of what law schools are in light of this deregulation.[24] He urges law schools to take control of it or external forces will continue to provide the answer, as has happened so often in the past. He warns that 'law schools in England sit between two regulators that are part of the same neoliberal apparatus that is reducing everyone to the status of consumer". He refers to the SRA and the Office for students. Leighton describes the influence of the profession driving the shape of Law degrees as 'the tail wagging the dog.'[25]

The deregulation of the professional courses is not really happening, the responsibility is simply being shifted. The SRA view is they have replaced the gateway to the profession with a centralised exam, so the law schools are free to design their courses as they see fit in

[20] 'Nigel Savage to retire in April, *Law Society Gazette* November 2016, 15.
[21] Unger A, *Key Directions in Legal Education* (2020) Routledge.
[22] Department of Education 2018 figure – this figure has been used as the date become skewed by Covid thereafter.
[23] Menis S, *The liberal, the vocational and legal education: a legal history review – from Blackstone to a law degree* (2020) 54 *The Law Teacher* 285.
[24] Bowyer R. 'Regulatory Threats to the Law Degree: The Solicitors Qualifying Examination and the purpose of Law Schools' (2019) 30 Law and Critique 117.
[25] Leignton P 'Legal education in England and Wales: What next?' (2021) 55:3 *The Law Teacher* 405.

future. Julie Brannan was very clear that, following the establishment of the Legal Service Board,[26] the SRA no longer see any need to regulate legal education.[27] However, whilst much has been said about less than half of law graduates seeking to enter the legal professions, if law schools abandon the foundation knowledge subjects in the Joint Statement, they will still prevent the half that do want to enter the legal profession from doing so, as they will not have the knowledge needed to pass the SQE. Further, the bar courses for barristers will continue to have an entry requirement that those foundation knowledge subjects have been studied. The SQE will also drive the need to retain them as the law content in the MCQ exam will be based on those foundation knowledge subjects – so even Oxford and Cambridge are unlikely to change. It is not impossible though, several post-1992 and private providers are developing post- graduate options that cover all legal knowledge and practice aimed at non-law graduates. If someone wanted to study law in a very theoretical and conceptual manner, and then wanted to enter the legal profession, they could progress onto one of those vocational courses. However, it is unlikely, and the indicative content of the SQE will simply replace the old formal regulation in driving the indicative content of law degrees across England and Wales. The regulation has shifted from direct to indirect, but it is unlikely to stop affecting law schools in the same way. Bowyer paraphrases Freud and warns that the SRA may be stronger in its absence.[28] Menis suggests that universities, whilst having complete freedom to design law degrees, are not doing so. She suggests this is because

> …practice suggests that the need or want to comply with professional regulation is far stronger. Compliance means having a course recognised by the profession, and along with the marketed fiction that a degree leads to employment in the legal profession for most, law schools must give in to a sustainable vocational type of law degree.[29]

An interesting point can be observed on the SRA Website. The SRA are claiming they have ceased to regulate legal training by replacing the gateway to the profession with a centralised exam and ceasing any interaction with the training providers. One quite startling fact though is that both the Joint Statement,[30] that was the guidance document when they did regulate undergraduate law degrees, and the information pack,[31] when they regulated the LPC, both run to approximately 15 pages. The SQE assessment specification document they have provided detailing what will be covered in this new exam runs to well over 100 pages in far greater detail.[32] Any training provider designing professional/vocational courses to prepare for SQE is treating this document as the guidance to indicative content, assessment style, etc.

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[26] Legal Services Act 2007.
[27] Brannan J 'The legal Education and Training Review 5 years on: the view from the *regulators'* (2018) 52:4 *The Law Teacher* 397.
[28] Bowyer R, 'Regulatory Threats to the Law Degree: The Solicitors Qualifying Examination and the purpose of Law Schools' (2019) 30 *Law and Critique* 117.
[29] Menis S, 'The liberal, the vocational and legal education: a legal history review – from Blackstone to a law degree (2020) 54 *The Law Teacher* 285.
[30] Solicitors Regulation Authority, 'Joint statement on the academic stage of training' (September 2021) <https://www.sra.org.uk/become-solicitor/legal-practice-course-route/qualifying-law-degree-common-professional-examination/academic-stage-joint-statement-bsb-law-society/> accessed 23 August 2022.
[31] Solicitors Regulation Authority, 'Joint statement on the academic stage of training' (September 2021) <https://www.sra.org.uk/become-solicitor/legal-practice-course-route/resources/legal-practice-course-information-pack/> accessed 23 August 2022.
[32] n.30.

Other effects of indirect regulation on HEIs

Universities themselves are experiencing this indirect regulation, shackling them to jumping over hoops of questionable value. The three big pressures on university management are TEF, NSS and the recently created Office for Students. There is also the employability agenda being driven by the government who constantly pressure universities to address the skills gap – showing that the government idea of what a university is for is vocational, and not the Newman concept that those in academia tend to see it as. Unger felt the employability agenda is driven by massification – the universities have benefitted from the huge increase in student numbers brought about by the widening participation agenda, and the government interpretation of their public good function is a direct contribution to the skills agenda with vocational training. Whilst none of these drivers claim to directly regulate universities, they are hugely influential and dominate the agenda at every university. The reason seems to be the fact they are becoming marketized, and students are increasingly pressured by agencies outside of their universities to see themselves as consumers. Fees were raised to £9,250 max in 2012/13 and that was very much the start of government policies, from both political parties, that started to view university education in consumer terms. Whilst many lecturers have experienced an occasional student with this view, the vast majority of students view their Higher Education journey as a learning journey, not a market transaction. However they are under increasing pressure from outside institutions, driven by government policy from both parties, to take the view that they are consumers. External forces do not really understand this, and policies relating to HEIs since fees were raised very much compounded this. In 2015, the government commissioned '*Which*' – a consumer magazine - to review HE and see if it was value for money for students. The organisation is a consumer one and carried out the research the only way it knew, looking through a consumer lens. The final report – *A degree of Value* – concluded that 'teaching in HE was poor, and students were dissatisfied.'[33] Canto-Lopez argues that was not accurate, the National Student Survey (NSS) was in existence at that time, and, she states, showing good levels of satisfaction. The following year, the Consumer Rights Act 2014 was enacted, and that made it very clear that students were consumers as far as the law was concerned. There have been a number of cases against HEIs, and the fear of these litigious few pushes university executives into producing policies, processes and other frameworks that ensure backs are covered, but do not contribute in any way to the quality of learning.

Universities have been through incredible change over the last quarter of a century. In the late 1980s academic staff saw themselves mainly as researchers, and teaching qualification were rare. Sessions with students were frequently cancelled if the academic had a conference or similar to attend, and the students were very much expected to read the topics for themselves with sometime limited input from staff, and post graduate students leading workshops (called seminars then). Widening participation brought a huge increase in student numbers, and many of those students had very different profiles to the elite 5 per cent who attended Universities in the 1970s and 1980s. Widening participation was a very successful policy, with 80.6 per cent of the population progressing into higher education in 2022. It is quite right that a much higher percentage of the population should be entitled to undertake a third stage of education – with all the evidence of higher salaries (currently £100,000 p.a.) earned by graduates throughout their lives.[34] However, as Universities changed, teaching methods also had to change if staff were going to be able to cater for the

[33] *Which,* A degree of value: value for money from the student experience (2014) *Which* November 2014.
[34] Department of Education *Graduate Labour Market Statistics* <https://explore-education-statistics.service.gov.uk/find-statistics/graduate-labour-markets/2021> accessed 17 January 2023.

needs of the much larger numbers in their sessions. Today all University teaching staff have teaching qualifications, and all new starters are required to undertake teacher training as soon as they begin their careers. That is a positive move and enables staff to meet the needs of their students more effectively. However, there was a period when Universities were adapting, and moving from the old model – where academics did not really see themselves at teachers – to the model today where they do. That transition did not happen overnight, and students in the early days of widening participation probably did struggle with poor teaching – as the staff at their institutions did not think they were teachers. The various checks and balances created by governments (the NSS, the TEF and Office for Students) could indicate that government policy is looking back and reacting to a landscape that has changed considerably.

The aforementioned NSS also drives policy and process in universities. It has given rise to league tables that affect student's decisions when choosing an institution. Whole departments exist to ensure student experience is up to the standards expected, with all manner of 'gimmicks' – at least when they get to Level 6 when they are eligible to complete the survey. Academics and particularly managers are distracted by these external measurements of HEIs, and forced to focus on the results of them, rather than what their own students may be saying. Again, it does not always lead to the best educational decisions. These external influences are a huge driver for universities' management, policies and processes, yet they have no say in its design and it is actually the students who engage with it.

Following the review by *Which,* the Teaching Excellence Framework (TEF) was introduced, grading institutions Bronze Silver or Gold. This became a huge marketing tool, claiming to 'provide clear information to students about where the best provision can be found'.[35] The ratings are reached using two types of data: a report by the Institutions themselves, and what Canto-Lopez calls common sector indicators, e.g. Destination of Leavers of Higher Education survey (DLHEA – now the Graduate Outcomes Survey), NSS and statistics from the HE statistics agency.[36] Although called Teaching Excellence, the TEF is driving other agendas – particularly the employability agenda, mentioned heavily in the Green and White papers that preceded the legislation establishing the TEF. Employability is in danger of driving all law schools away from liberal arts discipline to vocational education with absolutely no pedagogic proof that one is better than the other. It is also a formulaic mathematical system that is used to grade universities, and one that can be manipulated. One UK institution demonstrated this very robustly. A whole team was created and tasked with tracking the destination of graduates – every last one was tracked down and the data that was submitted at the end of the period was so robust the institution rose from about the middle of the then DLHE to third.[37] This impacted on their TEF massively, and also appeared to drive an amazing leap of about 50 places in one of the league tables. The institution was not actually achieving any better outcomes for their graduates, just recording them far better – and that completely changed how the TEF viewed them. It is hard to see how teaching is made excellent through the metrics used, the NSS is about student

[35] Office for Statistics Widening *Participation* (2022) <https://explore-education-statistics.service.gov.uk/find-statistics/widening-participation-in-higher-education/2020-21> accessed 17 January 2023.
[36] Canto-Lopez M, New challenges in the UK legal Education Landscape: TEF, SQE and the Law Teacher.
[37] Destination of Leavers of Higher Education Survey – now superseded by Graduate Outcomes Survey

satisfaction overall – not just the teaching, and the other metrics do not measure teaching quality.

Alongside these drivers indirectly regulating universities there is now the office for students which Bowyers feels is the main issue.[38] As with the new SRA model, this body does not directly regulate universities, but gives students a vehicle to act like consumers and enforce their 'rights.' Universities perceive the office for students as hostile, and encouraging a culture of litigation and complaints.

The different types of universities will be driven more or less harshly by these different indirect regulators. In some ways, the red brick/Russell group universities may be protected by their reputation, and a poor result in a league table etc. will not drastically reduce the flow of students. The post-1992 universities do not have that force field around them and will be forced to engage much more in protecting their position as measured by these indirect regulators. These institutions are the ones that suffer most from any poor results in these external drivers, as any adverse impact on their marketing affects them hugely, usually effecting student numbers. The private providers are driven by different matters, profit, and their interaction in the indirect regulators is simply to maximise marketing and maximise profit.

Conclusions

The tension between Law Schools and the regulator mirrors the tensions between universities generally and the various external powers (discussed in this paper as NSS, TEF and Office for Students), driving their policies and procedures. Both sets are now claiming no direct regulation, whilst actually wielding a huge amount of influence over institutions. Law schools do not seem to feel free to change the shape of their undergraduate provision, despite the deregulation, as the SQE has started to dictate what must be covered in the undergraduate law degrees instead of the previous joint statement, so all Law Schools offer a very similar curriculum with no sign of many changing that. Universities generally are driven to creating processes and policies that maximise their scores with NSS, TEF and appease the Office for Students, although none of those agencies actually have any regulatory powers over Universities and would point to the fact engagement is voluntary. The shift from direct to indirect regulation means the institutions are still being forced to act in certain ways, based on rankings in league tables etc., and not solid pedagogy. The external bodies have no accountability to the Universities despite the enormous impact they have on them.

All these arguments about why Law Schools are not really changing can be viewed through the institutional theory. In the past it was assumed the regulation by the SRA was the reason for the isomorph – a coercive process. However, take away the regulation and nothing changes, whilst the myriad of reasons that may be governing that has been discussed above. It would appear the institution driving the isomorph was not the regulation, but a less tangible one. The knowledge needed to gain entry to the legal profession seems to be the institution causing all Law Schools to continue to look the same – whether that be demonstrated by passing a centralised exam, or the previous HEI set exams for the LPC, the regulation was not causing the Isomorph, rather it was the need to open the gateway for students wishing to enter the legal profession – whatever that gateway is. To do that HEIs

[38] Bowyer R, 'Regulatory Threats to the Law Degree: The Solicitors Qualifying Examination and the purpose of Law Schools' (2019) 30 *Law and Critique* 117.

need to ensure students have the appropriate knowledge; the isomorph we thought was coercive is actually normative in nature. It is driven by the professional needs, not the regulation setting that out. The author intends to carry out some empirical research early in 2023 to survey Heads of UK law schools to see if this hypothesis can be proven.

Mortgagor or mortgagee? Liability for damage caused to space assets where a right of forfeiture goes wrong in outer space?

Khafayat Yetunde Olatinwo*

Introduction

Parties are involved in contractual relations on a daily basis. Whatever the nature of such contracts, or whatever form it takes, the fact is that it is not strange for parties, be it private individuals, corporations, government agencies, NGOs and international organisations, to enter into obligations in return for certain benefits. The obligation is extended with a series of covenants and conditions with respect to the fulfilment of the terms of the agreement, the breach of which entitles the injured party to seek a variety of remedies depending on the terms of the agreement and any *lex situs*. This concept is not strange in space-related activities in spite of its unique nature. As long as parties conform to the provisions of the regimes, outer space is free for exploration and exploitation, and therefore open to human quest. Because of the huge financial commitment and obligations involved in space exploration, it would not be far-fetched to see space actors seeking financial assistance from financial institutions of other states and entering into a mortgage agreement to borrow huge capital to finance a particular space activity. This can take the form of a finance lease or agreement to finance the launch, manufacture, maintenance or purchase of a satellite in orbit and, almost always, the space asset/object as the security/collateral.

In such cases a breach of the terms of the contract on the payment after several demands may entitle the mortgagee/creditor to exercise its right of forfeiture, in this case removal of the satellite from orbit. Because of the increase in satellite launch and the finite nature of the Geo- Stationary causing satellites to cluster and collide, there is the possibility that the removal of a satellite may cause damage to another space object. The question is what happens when another space object or satellite belonging to another state or entity is damaged in the process of removing a satellite, the subject matter of the forfeiture? Who is liable for such damage, the mortgagor or mortgagee? The intention of this article is not to discuss a contract of mortgage on space asset/object but rather to discuss the liability for damage that may be occasioned where the act of removal of a space asset/object for breach of contract caused damage to another satellite in orbit or even the forfeited satellite. The article examines the position of space regimes on who is liable between the mortgagee, who is only observing his right to forfeiture or the launching party, and who may not necessarily be the mortgagor, but who is legally liable for damage caused to other space object through it space activity.

Enshrined in space regimes is the freedom to explore and exploit the usefulness of outer space to its fullest, particularly for the benefit of mankind.[1] Accordingly, the exploration

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[1] Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (the "Outer Space Treaty", adopted by the General Assembly in its resolution 2222 (XXI)), opened for signature on 27 January 1967, entered into force on 10 October 1967, The Convention on International Liability For Damage Caused By Space Objects (the Liability Convention" adopted by the General Assembly In Its Resolution 2777 (XXVI)) opened for signature On 29 March 1972, entered into force On 1 September 1972, The Convention On Registration Of Objects Launched Into Outer Space ('The Registration Convention'' adopted by the General Assembly in its

and use of outer space, including the moon and other celestial bodies, shall be carried out for the benefit of and in the interests of all countries, irrespective of their degree of economic or scientific development, and shall be the province of all mankind.[2] Outer space shall be free for exploration and use by all States without discrimination of any kind, on a basis of equality and in accordance with international law, and there shall be free access to all areas of celestial bodies.[3] Hence space actors are given the freedom to explore and utilise space resources within the space regimes regulating human activities in outer space.

As it is the nature of man to be inquisitive with the quest as to the ultimate gain in life coupled with the freedom on space exploitation, outer space resources have been utilised in many ways. Since the beginning of the space race between the United States and Russia in 1957,[4] human beings have benefited from space-based program in telecommunication, which ensures the use of GSM, GPS in the car, internet services and the ability to watch programmes aired in another country on the television; and science and technology. For instance, Canada leveraged on the success on her series of Canadaarm (MSS),[5] which was to contribute to ISS[6] to invent KidsArm and Canadaarm2; arm looking robots[7] that could perform surgeries thought unachievable thereby advancing in medicine, science, technology, and particularly artificial intelligence[8]; military reconnaissance, weather forecasting, Ariel navigation, environmental disaster and mitigation programs. These programs were achieved with space technologies through the launch of satellites and other space objects for different and unique purposes.

Obviously, at the point of the draft of the five major space treaties, the world community thought that space activities would only be engaged in by States without opening its mind to what space would become - the final frontier. Private individual business owners and corporations are now interested in space programmes, particularly entities in countries with

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Resolution 3235 (Xxix)), opened for signature on 14 January 1975 and entered into force on 15 September 1976, the Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space (the "Rescue Agreement", adopted by the General Assembly in its Resolution 2345 (XXII)), opened for signature on 22 April 1968, entered into force on 3 December 1968 & the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (the Moon Treaty)," adopted by the General Assembly in its Resolution 34/68), opened for signature on 18 December 1979, entered into force on 11 July 1984.

[2] Outer Space Treaty 1967, Article 1.

[3] Ibid.

[4] Adam Mann, 'what was the space race? Origins, events and timeline' Space.com (Bath City, 08 July 2022) <https://www.space.com/space-race.html> accessed 31 October 2022.

[5] Mobile Servicing System is a sophisticated robotic suite that plays a critical role in the assembly, maintenance and resupply of the space station <htpps://www.nasa.gov/mission_pages/station/structure/elements/mobile-servicing-system.html> accessed 31 October 2022 <https://wwwasc-csa.gc.ca/eng/iss/canadarm2/canadarm-canadarm2-canadarm3-comparative-table.asp> accessed 31 October 2022.

[6] Elizabeth Howell, 'International Space Station: Facts about the orbital laboratory' Space.com (Bath City, 24 August 2022) <htpps://www.space.com/16748-international-space-station.html> accessed 31 October 2022.

[7] Hailed as the first robotic to perform the handshake in space can perform maintenance, move assets, help dock space craft and support astronauts spacewalks <https://www.asc-csa.gc.ca/eng/iss/canadarm2/about.asp> accessed 24 October 2022.

[8] 'Technology from Canada's most famous robot, Canadarm, to help Doctors care for Children' March 9, 2015, Toronto, Ontario, Canada News <https://www.canada.ca/en/news/archive/2015/03/technology-canada-most-famous-robot-canadarm-help-doctors-care-children-html> accessed 24 October 2022. Melissa Gaskill, 'From Orbit to Operating Rooms, Space Station Technology Translates to Tumor Treatment' NASA News (22 November 2013) <https://www.nasa.gov/mission_pages/station/research/news/neuro_canadarm> accessed 24 October 2022.

public-private support for space-programs.[9] With the likes of Jeff Bezos and Ellon Musk's investment plans,[10] lunar mining,[11] the vision space hotel,[12] and civilian space travel,[13] it is now suggested that these regimes should be reconsidered to expand space actors to the present realities.

As a result of the influx of private investors, the economic realities of space-based programs and the huge financial obligation involved in space activities, it is not out of the question to find parties entering into contracts for the sale, hire or loan for its space activities. Space related contract is not alien to space industries. The incidence of Westar-6 and PALAPA-B2 informed the concept of conveyance of space objects. These two insured space objects were launched into space by NASA space shuttle and destined for GSO, but failed to reach its destination as a result of mechanical failure. These two Satellites were left hanging in low-earth orbit by their respective owner, which made the insurance company deem the satellites as a complete loss. It paid the money accrued under the insurance policies and obtained title to the satellites as agreed between the parties. The insurance company then arranged for the satellite to be brought back to Earth, then fixed and sold them.[14] This article is interested in contract of loans (the purpose of such a loan could be finance lease, purchase, manufacture, launch and maintenance of space object). Here space assets are charged as security in the loan agreement or a separate mortgage agreement, especially where the mortgagor defaults in payment, the mortgagee in exercising his right of forfeiture in orbit damages either the charged asset or a neighbouring satellite.

Hypothetically:

> ScuriX, a space company based in the United Kingdom, who because of lack of fund to launch its new satellite, Scuri2, obtained financing from Asonbare Inc., a financial service company with Scuri2, which was eventually launched from US launch facility, charged as security for payment. Upon default of payment and with several notice of demands, Asonibare Inc., decided to exercise its right of forfeiture under the mortgage which has arisen upon default by removing Scuri2 from orbit and bringing it back to earth through UKarm, a space company satellite based in UK. As UKarm grabbed Scuri2 with its strong arm, Scuri2's fuel line ruptured, exploded and hit another satellite, Niger7, belonging to Nigeria, which also got damaged.

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[9] Michael Sheetz, 'The US government is helping get cash to private space companies, replacing frozen capital' CNBC (New Jersey, 24 April 2020) https://www.google.com/amp/s/www.cnbc.com/amp/2020/04/24/us-government-getting-cash-to-private-space-companies-replacing-venture-capital.html> accessed 31 October 2022. 'UK Space programmes and missions' GOV.UK (6 October 2022) <https://www.gov.uk/guidance/uk-space-programmes-and-missions> accessed 31 October 2022.

[10] Christian Davenport, 'Elon Musk is dominating the space race. Jeff Bezos is trying to fight back' *The Washington Post* (Washington, D.C, 10 September 2021) <https://www.washintonpost.com/technology/2021/09/musk-bezos-space-rivalry/ > accessed 31 October 2022.

[11] Lewis Pinault, 'Mining the moon to help save the Earth (op-ed), space.com (Bath City, 10 May 2022) <https://www.space.com/mining-moon-save-life-earth-op-ed> accessed 31 October 2022

[12] Joshua Chiedu, 'The World's First Space Hotel Is Opening Soon & Here's What To Know About It' THE TRAVEL (11 August 2022) <https://www.thetravel.com/what-to-know-about-the-first-space-hotel-in-the-world/> accessed 31 October 2022.

[13] Scott Dutfield and Vick Stein, 'Inspiration4: The first all civilian spaceflight on SpaceX Dragon' Space.com (Bath City, 05 January 2022) <https://www.space.com/inspiration4-spacex.html> accessed 31 October 2022

[14] *When a Satellite circles close to Earth, it means it's in low Orbit* (LEO). Satellites in LEO are just 200-500miles (320-800 kilometres) high. The Tech Museum <http://www.thetech.org/exhibits/online/satellite/4/4a/4a.1.thml> accessed 15 August 2022.

The article will now analyse the relevant international space treaties in order to determine who is liable for any damage caused.

Space object versus space asset

In order to understand the object and subject of damage to which its liability is the bane of this article, it is apposite to briefly clarify what a space object or space asset is under this heading. Most importantly, the major space regimes use the term 'space object' while the regimes which recognise the act of charging these objects as security use the term 'space asset'.[15] Simply put, be it space object or space asset, the intention, definition or description in the all regimes point to any man-made object that finds its way to outer space from the surface of the earth, but excludes any object, including space resources that finds its way to space by natural means. However, it includes an object manufactured or invented in space for the purpose of space activities. This description appears clearer than the definition given in the space regimes.

The Registration Convention[16] defines space object to "include component parts of a space object as well as its launch and parts thereof."[17] This same definition was repeated in the Liability Convention,[18] while space object was used interchangeably with "object launched into outer space" in the Rescue Agreement[19] According to Gorove,[20] a component part of space object would include all elements normally regarded as making up the space object, including fuel tanks and perhaps even the fuel itself.[21] It, therefore, means that all other objects in celestial bodies present by natural means are not space objects; surprisingly though, the Moon Treaty, which is also applicable to Outer Space, does not cover celestial objects that found its way to the surface of the Earth by natural means.[22]

Domestic legislations have tried to expand the list of what could be termed a space object. For example, the Australian Space Activities Act[23] defines space object to mean "a thing consisting of (a) a launch vehicle and (b) a payload (if any) that the launch vehicle is to carry into or back from an area beyond the distance of 100km above mean sea level; or any part of such a thing, even if: (c) the part is to go only some of the way towards or back from an area beyond the distance of 100km above mean sea level, or (d) the part results from the separation of a payload or payloads from a launch vehicle after launch."[24] China's Measures for the Administration of Registration of Objects Launched into Outer Space defines the term "space object' as an artificial satellite, crewed spacecraft, spacecraft, space probe,

[15] Convention on International Interest in Mobile Equipment 2001 otherwise known as the Cape Town Convention and the Protocol to the Convention on International Interest in Mobile Equipment on Matters Specific to Space Assets 2012 otherwise known as 'Protocol on Matters Specific to Space Assets.
[16] Registration Convention 1975, Article I.
[17] Article I.
[18] 1972, Art I.
[19] 1968, Art 5.
[20] Stephen Gorove was a space law writer. 'Resources: Stephen Gorove Collection' Center For Air & Space Law <https://airandspacelaw.olemiss.edu/team/resources/stephen-orove/> accessed 31 October 2022
[21] Stephen Gorove, "*Studies in Space Law: Its Challenges and Prospects*" (Leyden, Netherlands; Reading, Mass: A.W Sijthoff 1977), 105.
[22] Moon Treaty 1979, Art 3(3) "This Agreement does not apply to extra-terrestrial materials which reach the surface of the earth by natural means" See also the "Report of the 53rd Conference of the International Law Association, Buenos Aires, 1968." at 81-102 and 170-186.
[23] An Act about Space Activities and for Related Purposes. Act No. 123 of 1998 as (amended). Applicable to Australian nationals within and outside the territory.
[24] See Section 8.

space station, launch vehicle and parts of thereof, and other human-made object launched into outer space." It further provides that "the sounding rocket and ballistic missile that temporarily crosses outer space shall not be regarded as a space object."[25] Obviously, this provision does not consider any object as a space object that is not intended to be permanent in space. The United States, National Aeronautics and Space Act did not define Space object but states objects such as launch vehicles and Experimental Aerospace vehicles as space object.[26] It can be safely assumed that space objects and its component parts is an object designed or intended for the purpose of space related activities ,which would include a space station, launch vehicle, artificial satellite, crewed spacecraft, spacecraft, spaceship, space vehicle space probe, space station and payload.[27]

As mentioned earlier, the later regimes applicable to space object/asset both generally and specifically appreciates the involvement of other space actors other that states in space activities. The first of such regimes is the 2001 Cape Town Convention, which generally applies to any international interest in mobile equipment to which many space satellites and object fall within. Article 2(2) provides that '…an international interest in mobile equipment is an interest, constituted under Article 7, in a uniquely identifiable object listed in paragraph 3' and accordingly paragraph 3 listed the categories referred to in paragraph 2 to be '… (a) air frames, aircraft engines and helicopters; (b) railway rolling stock; and (a) space assets. Besides hinting that the Convention is also applicable to space asset, it did not define space asset. However, because of the unique nature of outer space to which all the provision of the Convention may not necessarily be applicable, a Protocol on Matters Specific to Space Assets was made to complement the provisions in the Cape Town Convention to suit outer space activities.

By the provision of the Protocol on Matters Specific to Space Assets, space asset means 'any man-made uniquely identifiable asset in space or designed to be launched into space, and comprising:[28]

> (i) a spacecraft, such a s satellite, space station, space module, space capsule, space vehicle, reusable launch vehicle, whether or not including space asset falling within (ii) or (iii) below; (ii) a payload (whether telecommunications, navigation, observation, scientific or otherwise) in respect of which a separate registration may be affected in accordance with the regulations; or (iii) a part of a spacecraft or payload such as a transponder, in respect in respect of which a separate registration may be effected in accordance with the regulations together with all the installed, incorporated or attached accessories, parts and equipment and all data, manuals and records relating thereto.[29]

The above definition of man-made objects in space makes up for the lack of the inexhaustive definition given in the Registration Convention, the Liability Convention and the Rescue Agreement, irrespective of the term used. To qualify as an asset such space object must be man-made, uniquely identifiable, designed and intended to be used in outer space and be individually registered whole or separately. This author opines that there is no difference between space object and space assets and, thus they can be used interchangeably depending

[25] See Article 2, Measures for the Administration of Registration of Objects Launched Into Space. Order No. 6 February 2001.
[26] Section 308 (f) (i) and 309.
[27] An object which a person undertakes to place in outer space by means of a launch vehicle and includes sub-component of the launch vehicle specifically designed or adapted for that object. Section 2465 of the National Aeronautics and Space Act pub. L. No. 111-314 124 Stat. 3328 (Dec 18, 2010).
[28] Article 1(2)(k).
[29] Article 1(2)(k)(i-iii).

on the context of discussion. Therefore, for the purpose of this article, the use of the term 'space asset' would be appropriate.

Contracts on space asset

As with any other asset or object capable of being conveyed or contracted over, a space asset can be a subject of insurance, lease, assignment, sale, or security for loans (a mortgage agreement). Accompanying the rule that ownership in a space object does not change merely because of being launched into space, presence in space or upon its return to the earth,[30] is the ability of the owner of the space object not only to use the object for its intended purpose and in any other manner consistent with the State of registry laws and international law on space, but also to insure, sell, lease, mortgage and assign the object. The protocol also makes provision to secure ownership, right or interest in the space asset notwithstanding that the asset is docked with another space asset in space, installed or removed from another space asset, or returned from space.[31] In essence, an owner of a space object retains the power to convey title in the space object irrespective of whether the object is on earth or in orbit.

The concept of conveyance of a space object was informed by the celebrated incident of Westar-6 AND PALAPA-B2,[32] launched into space by NASA space shuttle and destined for GSO,[33] but failing to reach its destination as a result of mechanical failure. These two satellites remained hanging in low-earth orbit by their respective owner. The insurance company deemed the satellites as complete loss, paid the money accrued under the insurance policies, and obtained title to the satellites as agreed between the parties. The company then arranged for the satellite to be brought back to the earth, fixed, and then sold them[34] The transfer of title in space object grew from 'just' insurance arrangement to normal conveyance between State Parties, state and private individuals, and the Intergovernmental Organisation or Governmental and Non-Governmental Organisations as the case maybe. Examples of such conveyance can be found in the Google and SkyBox Imaging Acquisition Agreement, where Google Inc. bought Sky box Imaging Satellites for the sum of $500 million in 2014;[35] the lease on an in-orbit Satellite between SES (Société Européénné des Satellites) of

[30] Outer space Treaty 1967, Article VIII; Registration Convention 1976, Article II & Space Station Agreement 1998, Article 5(2), Protocol on Matters Specific to Space Assets 2012, Article III.
[31] Protocol on Matters Specific to Space Assets 2012, Article III
[32] Richard Parker, 'On-orbit satellite servicing, insurance and lessons of Palaba B2 and Wester 6' (2015)1(3) Space Journal of Asgadia <https://room.eu.com/article/Onorbit_satellite_servicing_insurance_and_lessons_of_Palapa_B2_and_Wester_6> accessed 2 November 2022.
[33] Geostational Orbit. "Having an orbit at an altitude of approximately 22,240 miles above the equator (35,786 kilometres) such that the satellite will appear stationary from the ground" see Liana X.Y & Daniel V.O, *'A Guide to Space Law Terms'* (2012) Space Policy Institute (SPI), George Washington University & Secure World Foundation, 44. Online < htpp://swfound.org/a-guide-to-space-law-terms>accessed 02 November 2022. Geostationary-Satellite Orbit is "*the orbit of a geosynchronous satellite whose circular and direct orbit lies in the plane of the Earth's equator."* International Telecommunications Union (ITU) International Radio Regulation 2012 Edition, S.VIII(1.190); Kenneth Peterson, 'Satellite Communications' (2003)3 Encyclopaedia of Physical Science and Technology <https://www.sciencedirect.com/topics/engineering/geostationary-orbit> accessed 2 November 2022.
[34] *When a Satellite circles close to Earth, it means it's in low Orbit* (LEO). Satellites in LEO are just 200-500miles (320-800 kilometres) high. The Tech Museum <http://www.thetech.org/exhibits/online/satellite/4/4a/4a.1.thml> accessed 02 November 2022.
[35] Editorial, 'Google and Skybox Imaging Sign Acquisition Agreement' SATELLITE Market & Research (California, 13 June 2014) <http://www.satellitemarkets.com/news-analysis/google-and-skybox-imaging-sign-acquisition-agreement> accessed 07 November 2022.

Luxembourg and Thaicom of Thailand;[36] the lease agreement between Eutelsat of Paris (a Satellite Fleets operator) and China on an in-orbit Satellite (launched in 2007) in 201;[37] and the sale of Spot 7 medium resolution optical earth observation satellite between Luxembourg Airbus Defence and Space and Azerbaijan's Azercosmos Space Agency.[38]

Prior to the coming into force of the two regimes on space assets conveyances,[39] many conveyances were entered into under and regulated purely by the general law of contracts in the relevant jurisdiction. Laws regulating cross border agreements were left to the determination of both parties and at times *lex situs*. This is because of the lacuna in the earlier major space treaties, which did not anticipate commercialisation of outer space. With these two regimes in existence there is now a legal order to which transactions within the provisions of the Cape Town Convention and Protocol on Matters specific to space asset are applicable. The Protocol establishes an overall regulatory framework that recognises and protects the security interests of a mortgagee/creditor in a space asset. Both treaties take into account the reality that state governments cannot continue to effectively fund space activities, especially with the boom in economic reality of outer space. Space asset financing is very important, especially taking into account the needs of the developing and less developed countries with insufficient or inadequate finance from the government. Hence, the introduction of the practice of asset-based financing through an international framework of secured transaction law into the space industry. It should be stressed that a secured transaction in respect of financing space activities is not new as space companies have resorted to security loans to finance space project from finance companies as a result of governments' low or inadequate finance, particularly in developing countries, and even before the Cape Town Convention came into force. What the Cape Town Convention and the Protocol offered is the recognition and protection of creditor's interest, reducing the creditor's risk, and a legal framework for such space-asset secured transaction.

Article 1 of the Cape Town Convention recognises a mortgage agreement and describes a security agreement as an 'agreement by which a charger grants or agrees to grant to a charge an interest (including an ownership interest) in or over an object to secure the performance of any existing or future obligation,[40] of the charger or a third party'.[41] Performance here means the repayment of the loan as and when due. Loosely put, a mortgage is 'a legal agreement by which a bank, building society etc. lends money at an interest in exchange for taking title of the debtor's property, with the condition that the conveyance of title becomes void upon the payment of the debt' that is, the conveyance of a property to a creditor as security for a loan. Illustrating the hypothesis here, ScuriX (mortgagor) borrowed money for the launch of Scuri2 (secured asset) from Asonibare Inc. (mortgagee) under a security agreement recognised by the Cape Town Convention. The Convention is applicable to international interest in mobile equipment and in this instance (article), the space asset,[42]

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[36] Peter de Selding, 'Thaicom Leases SES Sat to Keep Orbital Slot' SPACENEWS (Virginia, 26 September 2012) <https://spacenews.com/thaicom-leases-ses-sat-keep-orbital0slot/> accessed 07 November 2022.
[37] Peter de Selding, *Eutelsat Leases Chinese Satellite at 11th Hour to protect Orbital Slots.* SPACENEWS (Virginia, 13 May 2011) <http://spacenews/eutelsat-leases-chinese-satellite-11th-hour-protect-orbital-slot/> accessed 07 November 2022.
[38] Peter de Selding, '*Airbus Sells in-orbit spot 7 Imaging Satellite to Azerbaijan'* SPACENEWS (Virginia, 4 December 2014) http://spacenews.com/42840airbus-sells-in-orbit-spot-7-imaging-satellite-to-azerbaijan/ accessed 07 November 2022.
[39] Cape Town Convention and Protocol on matters specific to space asset.
[40] 'Secured obligation means an obligation secured by a security interest.' Cape Town Convention 2001, Article 1(hh).
[41] Oxford Languages and Google https://languages.oup.com/google-dictionary-en.
[42] Cape Town Convention 2001, Article 2(3)(c).

granted by the chargor (the focus of this article), vested in a conditional seller under a title reservation agreement or vested in a lessor under a lease agreement.[43]As pointed out earlier, the Protocol on Matters Specific to Space Assets 2012 is necessary to adapt the Cape Town Convention to space related matter,[44] because of the peculiarities of the environment and activities carried on.[45]

The mortgagee's/chargee's right to possess space assets

Even though the right to peaceful and quite possession and enjoyment of the use of the space asset by the mortgagor/debtor is sacrosanct in any mortgage agreement, this will not preclude the mortgagee from being entitled to possession in the event of default of payment at the agreed time and at the end of the waiting period. The regimes have identified ways and options to possess a mortgaged space asset. The provisions on secured financing of space assets and reliefs in the event of default of payment existing in the two regimes are commendable, especially the first option. According to Article 8 of the Cape Town Convention, amongst the remedies opened to a mortgagee (chargee) in the event of default, as provided in Article 11, is to: i) take possession or control of any object charged to it; ii) sell or grant a lease of any such object; and iii) collect or receive any income or profit arising from the management or use of any such object. The remedies can also be sought by the mortgagee through a court order.[46] These remedies are expected to be exercised in a commercially reasonable manner.[47]

These remedies were also reiterated and reaffirmed specifically in the Protocol on Matters specific to space assets. However, this article is concerned with the remedy on possession of the space asset, which the Protocol, to some extent, seems to shy away from. While article XVII restricts the applicability of the provision on the condition of it being exercised in commercially reasonable manner (Article 8 (3) of the Cape Town Convention), it accommodates the assignment of the debtor's rights[48] to the creditor in the event of default of payment under the secured agreement. Hence, 'a rights assignment made in conformity with Article IX of this Protocol transfers to the creditor the debtor's rights the subject of the rights assignment to the extent permitted by the applicable law.' The right transferred to the creditor under a right assigned agreement can be further reassigned to a third party and such reassignment will operate as assignment.

Article XXI[49] provides an insight on the right of a mortgagee to take possession of a space asset used as security in a secured finance agreement. This is in the event of insolvency to

[43] Ibid, Article 2(2)(a-c).
[44] Other protocols made to complement the Cape Town Convention to suit peculiarities include Protocol on Matters Specific to Aircraft Equipment (2001), Luxembourg Protocol on Matters Specific to Railway Rolling Stock 2007 and Protocol on Matters Specific to Mining, Agriculture and Construction Equipment 2019.
[45] See Preamble, Conscious of the need to adapt the convention to meet the particular demand for and the utility of space assets and the need to finance their acquisition and use.
[46] Article 8(2).
[47] Article 8(3).
[48] This means 'an agreement wherein the debtor i.e. the mortgagor in this instance confers on the creditor i.e. the mortgagee, an interest (including an ownership interest) in or over the whole or part of existing or future debtor's rights to secure the performance of debt or in reduction or discharge of, any existing or future obligation of the debtor to the creditor which under the agreement creating or providing for the international interest is secured by or associated with the space asset to which the agreement relates.' See Protocol Specific to Space Asset, Article 1(2)(h).
[49] Protocol on Matters Specific to Space Assets. Two alternatives to possession of space assets were laid down.

which the state concerned has made a declaration to that effect in pursuant to article XLI (4) of the same Protocol. The debtor or insolvency administrator is mandated to give possession or control over the secured space asset to the creditor not later than the earlier of the end of the waiting period upon default, and the date the mortgagee is to take possession or control over such space asset or transfer the debtor's right under a right assignment.[50] Up until such time where possession or control is handed over to the mortgagee, the insolvency administrator is to preserve, maintain and value the space asset in accordance with the agreement. This does not prevent the mortgagee from applying for any other form of reliefs in the interim under the relevant law. However, 'the insolvency administrator or the debtor, as applicable, may retain possession of and control over the space asset and the debtor's rights covered by a rights assignment where by the time specified in paragraph 2 or paragraph 3 it has cured all defaults other than a default constituted by the opening of insolvency proceedings, and has agreed to perform all future obligations under the agreement. A second waiting period shall not apply in respect of a default in the performance of such future obligations.'[51]

The second alternative to the mortgagee's right upon default of payment on the part of the mortgagor is still related to insolvency. Hence, upon the request of the mortgagee, the mortgagor is to notify the mortgagee whether it will cure the default and fulfil all obligations under the agreement, or allow the mortgagee take possessions of or control and operation over the space asset.[52] Failure means the mortgagee is permitted to approach the court for the purpose of taking possession of or control and operation over the space asset provided that the mortgagee can show that such international interest has been registered as provided by the two regimes.[53] Pending the determination of the issue by the court, it is expected that the space asset will not to be sold or dealt with in a manner that will affect the parties to the agreement.[54]

The provision of article XIX bring succour to the fact that a private individual or entity may also benefit in claims for possession under the regimes, as the provision accommodates the choice of the parties to agree to place command codes and related and materials with another person in order to afford the creditor an opportunity to take possession of establish control over or operate the space asset.[55] The fear however, is that the Protocol's idea of possession is more related to tracking, telemetry and control, but not physical possession. It is time for laws to be more proactive to fit in to realities, even where there are space objects that can very well refuel, service, readjust location, replace and remove other satellites/space objects for a certain reason.[56]

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[50] *Ibid*, Article XXI (2&3).
[51] *Ibid*, Article XXI (8).
[52] *Ibid*, Article XXI, alternative B (2).
[53] *Ibid*, Article XXI, alternative B (3 & 4).
[54] *Ibid*, Article XXI, alternative B (6).
[55] Article XIX.
[56] 'Smart Satellites to Repair and Refuel stranded satellites in space' Space Foundation https://scitechdaily.com/smart-satellites-to-repair-and-refuel-stranded-satellites-in-space/amp/> accessed 15 November 2022; Jonathan O'Callaghan, 'UK wants to send a spacecraft to grab two dead satellites from space' *New Scientist* (UK,US & Australia, 23 June 2022) <https://www.newscientist.com/article/2325889-uk-wants-send-a-spacecraft-to-grab-two-dead-satellites-from-space/> accessed 15 November 2022; Loren Grush, 'Satellite uses giant net to practice capturing space junk' The Verge (19 September 2018) <https://www.theverge.com/2018/9/19/17878218/space-junk-remove-debris-net-harpoon-collisions> accessed 15 November 2022.

The reality of physical possession is slightly visible, as much as the regime tries to conceal it. In article XVII (3) it is stated that 'unless otherwise agreed, a creditor may not enforce an international interest in a space asset that is physically linked with another space asset so as to impair or interfere with the operation of the other space asset where an international interest or sale has been registered with respect to the other space asset prior to the registration of the international interest being enforced.' It is enough that this protocol is long over-due, shying away from realities is however baffling. This provision can also be viewed as embodying relevant international laws on the peaceful use of outer space, so that the space activities of a state (and here, a mortgagee) does not interfere with the operation of another state's space activities.[57]

The question now is what happens where a space asset/object physically linked to the charged space asset is damaged? Is it the mortgagee, who is merely exercising his possessory right as provided in the Protocol, or the mortgagor who defaulted in payment? And using the article's hypothesi*s,* are Asonibare Inc. and/or UKarm liable for the damage cause to Niger7 and Scuri2?

Liability for damaged caused during the execution of forfeiture in outer space

Interestingly, neither the Cape Town Convention nor the Protocol on Matters Specific to Space Assets makes provision relating to this, probably because this discussion seems new or unrealistic to the world community until the day when it becomes glaring and real. This buttresses the point that it is not likely that the Protocol especially envisages actual physical possession; otherwise there would have been a follow up provisions on how such possession should be carried out and the consequences of causing damage to both forfeited space asset and any other space asset/object damaged in the process. The effect of this lacuna is to fall back to the Liability Convention of 1972 in the event of any damage caused during physical possession of a space asset.

The Liability Convention describes 'damage' as regards outer space activities to mean 'loss of life, personal injury or other impairment of health; or loss of or damage to property of states or of persons, natural or juridical, or property of international intergovernmental organisations'[58] It establishes regimes to cover damage in outer space, on flight and on earth and well as to create two heading of liability to which a launching state would be accounted to: i.e. absolute and fault liability. A launching state would be liable absolutely for damage cause by its space object on the surface of the earth or to aircraft in flight.[59] However, article III provides that where the damage is caused elsewhere than on the surface of the earth to a space object of one launching state or to persons or property on board such a space object by a space object of another launching state, the latter shall be liable only if the damage is due to its fault or the fault of persons for whom it is responsible. Since the discussion is about damage caused in outer space, then the provision of article III seem appropriate to work with. Hence, for a state to be held liable for damage in outer space, the launching state must show that it was not its fault, as it took all necessary steps in its activities and that such damage was a result of the complainant state's negligence.

As the Registration Convention and Liability Convention's provisions suggest that a launching state includes not only the state that carries out the launch or facilitates the launching of a space object, but also a State whose territory or facility is used to launch a

[57] Outer Space Treaty, articles IV, VI, VII & IX.
[58] Article I, Liability Convention.
[59] Liability Convention 1972, Article II.

space object,[60] it is feasible to have not a single but many states as launching states for the purpose of liability in the Outer Space Treaty. The operating words are, therefore: 'launch', 'procures', 'territory,' and 'facility', and as far as this article is concerned, 'registry' (for the purpose of liability). Hence, a space object owned (whether by a state, individual, international intergovernmental organisation or corporations) and to be operated by Nigeria intended to be launched by South Africa launch operators from a United States facility in Canada, and registered on Russia's registry, may result in Nigeria, South Africa, the United States, Russia and Canada all being regarded as a launching state for the purpose of liability. Bringing the hypothesis back here, the launching states for the space object that caused damage i.e. UKarm, would be UK. This arrangement illustrates that there has to be a different liability regime when it comes to secured finance on space assets. The only way the UK can remove itself from liability is to show that the damage is not its fault, but rather the negligence of the launching state of Niger7, and if possible Scuri2 by showing evidence of negligence. The question then is, upon forfeiture, scuri2 now belongs to Asonibare Inc. who contracted UKarm to remove the scuri2 from outer space back to earth?

Generally, activities in outer space are not left to the whims and caprice of states. The UNCOPUOS[61] has reiterated the need for mutual cooperation and non-interference of states to other state's activities. Article IX of the Outer Space Treaty provides that

> […] in the exploration and use of outer space, including the Moon and other celestial bodies, States Parties to the Treaty shall be guided by the principle of cooperation and mutual assistance and shall conduct all their activities in outer space, including the Moon and other celestial bodies, with due regard to the corresponding interests of all other States Parties to the Treaty. […] If a State Party to the Treaty has reason to believe that an activity or experiment planned by it or its nationals in outer space […] would cause potential harmful interference with activities of other States Parties in the peaceful exploration and use of outer space, […] it shall undertake appropriate international consultations before proceeding with any such activity or experiment.

A state party is also expected to request for consultation concerning the activity of a state which it fears such activity may interfere and cause harmful interference to its own activities.[62] This onus could be discharged where Nigeria is able to adduce evidence to show that it is not aware of the act of removal by UKarm, and that UK ought to have made consultation knowing that its act of removal can potentially harm other objects belonging to other states. It must also be pointed out that a State of Registration is expected to supervise the activities of any space object registered in its registry. This is simply for the purpose of compliance, and not liability for damage caused by such space object. This is to buttress the fact that the UK is merely responsible for the activities of scury2 and nothing more, but will be liable for being the launching state for UKarm. It will be safe to presume that the private

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[60] See Article 1 (c) Liability Convention and Article 1 (a) Registration Convention.

[61] United National Committee on the Peaceful Uses of Outer Space, set up in 1959 is the UN subcommittee with the task of reviewing and fostering international cooperation in the peaceful uses of outer space as well as to consider legal issues arising from the exploration of outer space. <http://www.unoosa.org/oosa/en/ourwork/copuos/index.html> accessed 16 November 2022.

[62] Outer Space Treaty, Article IX. 'A State Party to the Treaty which has reason to believe that an activity or experiment planned by another State Party in outer space, including the Moon and other celestial bodies, would cause potentially harmful interference with activities in the peaceful exploration and use of outer space, including the Moon and other celestial bodies, may request consultation concerning the activity or experiment' See also article I and IV, Responsibility of States for International wrongful Act 2001, *Trial Smelter Arbitration Case (*1938/1941) RIAA 1905.

entity involved would be vicariously liable to the launching state, who is in turn international liable for the damaged caused.

Conclusions

The Protocol on Matters Specific to Space Asset 2012 has contributed immensely to the growth of secured financing on space assets by creating a regime to which such contract is defined. Law should evolve, hence the need to call for provisions in the areas which the law has overlooked. Although such issues will never arise, the Cape Town Convention 2001 is an eye opener and hopefully other related and relevant issues addressed in this article will be given consideration.

While it is easy to determine the liability of UKarm and the ability to shift fault to Niger7 where it is found to be negligent in its space activities, deciphering the status of the damage to Scuri2 and liability of UK to ScuriX, is quite unclear. Should it be concluded that the mortgagee/creditor lost both money and security for payment (the space asset)? Note also that UKarm may also be liable to ScuriX, its client, for damaging Scuri2, which it is supposed to bring back to earth. It is high time for space laws to be proactive and not wait for another general law like the Cape Town Convention to prompt another special Protocol to this effect. As seen, the provisions of the Liability Convention cannot adequately cater for some issues that may arise in the event of damage during the act of physical possession of a charged space asset upon the default of the mortgagor/debtor to repay. It is important to have provisions that will answer questions such as: who is liable where the space asset itself is damaged during physical possession; what is the role of the mortgagor/debtor for safe possession; and who is liable where other space assets/objects are damaged in the course of possession.

The issue of the mortgagor/debtor's right over the forfeited assets has to be defined. It will not be too apt to conclude that their right extinguishes upon default of payment and expiration of the waiting period. What if the space asset is valued to be worth more than the borrowed money, so that the mortgagor is entitled to a fraction of the value after the mortgagee must have realised the principal capital loan plus interest? Can the mortgagor maintain claims against both mortgagee and the company contracted to carry out the removal of the space asset from space? Also, what is the identifiable right of persons who may also have interest over the damaged asset? Until law answers these questions, it would seem to be matters for contract *simplicita,* and not public international law.

TAX LAW

Tax Avoidance: the fiscal termite eating away the revenue base of Nigeria

Dr Isau Olatunji Ahmed*

Introduction

The need for the Nigerian government to provide social amenities and embark on developmental projects to improve the living standards of its citizens and to meet its overhead or recurrent expenditures, necessitate the need for the government to intensify its revenue generation efforts. Taxation is now generally regarded as an important source of revenue generation for the Nigerian government, which involve levying taxes on individuals, corporate entities, and goods and services.[1] This is due to the fact that, through taxation, the government is able to raise a significant amount of revenue to meet its needs and provide basic amenities for its citizens. The Nigerian government through its revenue agency, Federal Inland Revenue Service (FIRS), stated that it generated about 1.97 trillion Naira (5 billion US dollars) through taxation in the first half of 2015, which represented 98 per cent of the targeted revenue of 2.28 trillion Naira (7 billion US dollars) for January and June 2015.[2] Likewise, in 2018, the government disclosed that it generated 5.320 trillion Naira (13 billion US dollars) from taxation.[3] This was said to be the highest revenue generated from taxation in the history of Nigeria as at 2018.[4]

However, in recent times, the government's revenue generation efforts from taxation have been impeded by certain fiscal resistant tactics such as tax avoidance, which has resulted in huge revenue loss to the government. According to the Global Financial Integrity,[5] close to 100 billion US dollars per year is lost in revenue to tax avoidance in developing countries.[6] Another report compiled by Christian Aid estimates that revenue lost to tax avoidance each year in developing countries could rise to 160 billion US dollars.

Tax avoidance, alongside other concepts such as tax evasion and tax planning, has been described as fiscal termites eating away the potential tax revenue of the government. Unlike tax evasion and tax planning, which are generally considered as legal and illegal

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[1] Oladele Rotimi, Asu Udu and Aderemi Adetunji Abdul-Azeez, 'Revenue Generation and Engagement of Tax Consultants in Lagos State, Nigeria: Continuous Tax Evasion and Irregularities' (2013) 1(10) European Journal of Business and Social Sciences 26.

[2] Premium Times, 'FIRS realises N1.97trillion revenue', *Premium Times Newspaper* (Lagos 10 August 2015) <http://www.premiumtimesng.com/business/banking-and-finance/188103-firs-realises-n1-97trillion-revenue.html> accessed on 15 April 2022.

[3] Oladeinde Olawoyin, 'FIRS generates N5.3 trillion in 2018, highest in Nigeria's history-Official' (Lagos 8 January 2019) <https://www.premiumtimesng.com/news/headlines/304675-firs-generates-n5-3-trillion-in-2018-highest-in-nigerias-history-official.html> accessed on 15 May 2022.

[4] Ibid.

[5] Global Financial Integrity (GFI) is a non-profit, Washington, DC-based research and advisory organization, which produces high-calibre analyses of illicit financial flows, advises developing country governments on effective policy solutions, and promotes pragmatic transparency measures in the international financial system as a means to global development and security <http://www.gfintegrity.org/about/> accessed on 15 April 2022

[6] World Finance Magazine, 'The true costs of tax avoidance' <http://www.worldfinance.com/strategy/the-true-costs-of-tax-avoidance> accessed on 15 April 2022

respectively, there is no such clear cut classification for tax avoidance, thereby posing a serious threat to the government's revenue generation efforts.

The magnitude of potential revenue lost to tax avoidance is having a significant negative impact on the government, which requires revenue to improve essential services to its citizens.[7] This has made the government pay closer attention to the issue of tax avoidance, which has the potential of the depriving the government of the revenue needed to cater for the citizens.[8] This necessitated the need for the government to put in place mechanisms to prevent tax avoidance. The objective of this article is to examine the concept of tax avoidance and its underlying incentives. The article also examines the impact of tax avoidance and the mechanisms to prevent or counter it.

The concept of tax avoidance

There is no fixed legal, legislative or statutory definition/meaning of tax avoidance owing to the difficulty of framing an exhaustive definition to cover the concept.[9] In order to provide an understanding of the concept of tax avoidance, this article will consider definitions provided by various scholars and tax commissions, as well as the definitions contained in various judicial pronouncements on the concept.

Tax avoidance is defined under the Black's Law Dictionary as the 'act of taking advantage of legally available tax planning opportunities in order to minimize one's tax liability'.[10] This definition suggests that tax avoidance occurs when a person arranges his or her affairs in such a way as to take advantage and/or exploit the tax law to minimize tax liability. This definition implies that tax avoidance could be legal in nature. The 'Radcliffe Commission' defined tax avoidance as 'some acts by which a person so arranges his affairs that he is liable to pay less tax than he would have paid but for the arrangement'.[11] A similar definition is given by the Carter Commission, which defined tax avoidance as every attempt by legal means to reduce tax liability that would otherwise be incurred by taking advantage of some provisions or lack of provision in the law.[12]

The Organization for Economic Co-operation and Development (OECD) defined tax avoidance as one that is generally used to describe the arrangement of a taxpayer's affairs that is intended to reduce tax liability, noting that although the arrangement could be strictly legal it is usually in contradiction with the intent of the law it purports to follow.[13] The Review of Business Taxation defined tax avoidance as a misuse or abuse of the law that is often driven by the exploitation of structural loopholes in the law to achieve tax outcomes that were not intended by Parliament, but also includes the manipulation of the law and a focus on form and legal effect rather than substance.[14] Wheatcroft defines tax avoidance as

[7] Christian Aid, 'Death and taxes: The true toll of tax dodging' <http://www.christianaid.org.uk/images/deathandtaxes.pdf > accessed on 13 March 2022
[8] Vito Tanzi., 'Globalization, Technological Developments and the works of Fiscal Termites' International Monetary Fund Working Paper 2000, <http://ww.imf.org/external/.../wp00181.pdf> accessed on 13 May 2022.
[9] Mohammed T Abdulrazaq, *Principles and Practice of Nigerian Tax Planning & Management* (2nd ed. Stirling-Horden Pub. Ltd. Ibadan 2013), 86.
[10] Black's Law Dictionary (9th ed., St. Paul MN-West, 2009) 1599
[11] The Royal Commission on Taxation of Profits and Income, United Kingdom, 1955 para 1016
[12] Royal Commission on Taxation (The Carter Commission) 1966 Canada.
[13] The Organization for Economic Co-operation and Development (OECD) Glossary of Tax Terms <http://www.oecd.org/ctp/glossaryoftaxterms.html> accessed on 14 April 2022.
[14] Second Reading Speech, Income Tax Laws Amendment Bill (No. 2) 1981, Hansard, House of Representatives, 27 May 1981.

the art of dodging tax without actually breaking the law, or alternatively, the right of every citizen to structure one's affairs in a manner allowed by law, to pay no more than what is required.[15] Ulph also defined tax avoidance as the use of artificial or contrived methods of adjusting taxpayers' social, economic or organizational affairs to reduce their tax liability in accordance with the law while not affecting the economic substance of the transactions.[16]

The courts have also had opportunity to give succinct interpretation to the concept of 'tax avoidance'. This usually arises from cases coming before them on the grounds of contravention of sections in the tax law, which are usually referred to as an anti-avoidance provision.[17] However, courts in Nigeria and the United Kingdom have adopted different approaches to the interpretation of tax avoidance, resulting in different meaning and definitions of the term.[18] Different approaches by the courts in interpreting tax law have resulted in different classification of transaction. As such inter-country comparisons in this respect have proved fruitless in the search for common meaning of the concept of tax avoidance.[19]

One of the clearest definitions of tax avoidance was provided by Lord Nolan in his judgment in the *Willoughby case,*[20] which very succinctly seeks to draw a line of distinction between tax avoidance and tax planning where he stated as follows:

> The hall mark of tax avoidance is that the taxpayer reduces his liability to tax without incurring the economic consequences that Parliament intended to be suffered by any taxpayer qualifying for such reduction in his tax liability. The hall mark of tax mitigation, on the other hand, is that the taxpayer takes advantage of a fiscally attractive option afforded to him by the legislation, and genuinely suffers the economic consequences that Parliament intended to be suffered by those taking advantage of the option.

From the above definition it is clear that there is a difference between tax avoidance and tax planning. Furthermore, Lord Templeman in the *Challenge Corporation case*[21] noted that:

> Income tax is avoided and a tax advantage is derived from an arrangement when the taxpayer reduces his liability to tax without involving him in the loss or expenditure which entitles him to that reduction. The taxpayer engaged in tax avoidance does not reduce his income or suffer a loss or incur expenditure but nevertheless obtains a reduction in his liability to tax as if he had.

Tax Avoidance is further defined by the European Court of Justice as wholly artificial arrangements which are designed to obtain a tax advantage which are aimed at circumventing tax laws.[22] The Nigerian case of *Akinsete Syndicate v Senior Inspector of*

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[15] George Shorrock Ashcombe Wheatcroft, 'The attitude of the Legislature and the Courts to tax avoidance', (1955) 18 (3) Modern Law Review 209.
[16] David Ulph, Managing Tax Risks in Beyond Boundaries: Developing Approaches to Tax Avoidance and Tax Risk Management (Freedman J. eds) Oxford University Centre for Business Taxation 101-115.
[17] Mohammed Taofeeq Abdulrazaq, *Principles and Practice of Nigerian Tax Planning & Management*, (2nd ed. Stirling-Horden Pub. Ltd. Ibadan 2013), 109.
[18] *Ibid* 109.
[19] *Ibid* 109.
[20] *CIR v Willoughby* [1997] 4 All ER 65 at p.73, See also the case of *CIR v Challenge Corp Ltd* [1986] S.T.C. 548.
[21] *CIR (NZ) v Challenge Corporation Ltd,* [1987] AC 155.
[22] Imperial Chemical Industries Plc (ICI) v Kenneth Hall Colmer (Her Majesty's Inspector of Taxes) (1998) ECR I-4695.

Income Tax[23] provided an insight into the meaning of tax avoidance. The Court held that tax avoidance by lawful means is acceptable even though it did not state which category of tax avoidance by lawful means is not acceptable.[24]

The above definitions of the concept of tax avoidance are indicative of the fact that it is not entirely illegal as it involves the legal exploitation of the tax system to reduce tax liability. Even though this legal exploitation is not fraudulent in nature, the results of such legal exploitation are considered immoral, improper, abusive and against the spirit of the tax law. It can therefore be postulated that tax avoidance is an exploitation of the fiscal legislation in a manner not intended by the legislature. Accordingly, while a person has the right to arrange his affairs in order to reduce his tax liability, where such person embarks on an artificial arrangement for the purpose of escaping and reducing tax liability otherwise due, such an arrangement may not be socially acceptable.[25] Thus, a manipulative transaction which has the effect of artificially reducing tax liability would be disallowed as being a tax avoidance scheme.[26] It is important to note however that it is not all activities of taxpayers towards reducing or minimizing their tax liability that will amount to tax avoidance. While tax avoidance is an example of tax minimization, other examples of tax minimization are tax evasion and tax planning. Although, these labels (tax avoidance, tax planning and tax evasion) are not used universally, they have been accepted internationally by the International Academy of Comparative Law at its 18th congress in Washington in 2010.[27]

The distinction between tax avoidance, tax planning and tax evasion can be viewed as a partially overlapping legal spectrum of tax minimizing behaviour.[28] At one end is tax evasion, which is illegal and criminal in nature. Tax planning, at the other end of the spectrum, is tax minimization behaviour that the government is aware of and allows to continue.[29] In some instances the government may even encourage it.[30] Tax avoidance on the other hand lies between the two, exploiting the tax law while denying its substance.

Features of tax avoidance transactions

There is no consensus as to what makes a transaction constitute tax avoidance in nature. However, there are some established features that determine whether a transaction constitutes tax avoidance. These feature revolve around the notions of 'form', 'purpose' and 'policy', [31] and are briefly discussed here:

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[23] *Akinsete Syndicate V. Senior Inspector of Income Tax* F.S.C 164/66 (Unreported).
[24] Mohammed Taofeeq Abdulrazaq, *Principles and Practice of Nigerian Tax Planning & Management*, (2nd ed. Stirling-Horden Pub. Ltd. Ibadan 2013), 109.
[25] Ibid.
[26] Ibid.
[27] Karen Brown and David Snyder, 'General Report Regulation of Corporate Tax Avoidance' <http://www.link.springer.com/content/pdf/bfm%3A978-94-007-2354-2%2F1.pdf> accessed on 15 April 2022.
[28] Prebble B.C., 'Should Tax Avoidance be Criminalised? Tax Avoidance and Criminal Law Theory' (LL.B Dissertation, University of Otago 2011) 20.
[29] Ibid.
[30] Example are some of tax incentives such as Pioneer Status under the Industrial Development (Income Tax Relief) Cap I 7 LFN 2004, The Nigerian Liquefied Natural Gas (NLNG) (Fiscal Incentives, Guarantees and Assurances) Act Cap. N8 7 LFN 2004 and so on.
[31] Graeme Cooper, Tax Avoidance and the Rule of Law (IBFD Publications BV, Amsterdam 1997) 28.

Form

The first feature used to identify tax avoidance is the 'form' of the transaction. 'Form' generally refers to the legal relationships that gives legal structure to transactions and through which taxpayers achieve desired economic results which is the 'economic substance' of the transaction.[32] The form approach identifies the economic outcome of a transaction and concludes that tax avoidance occurs when the taxpayer secures an economic outcome that avoids the normative tax treatment intended by Parliament.[33] Thus, where a taxpayer sets up an artificial or contrived transaction or scheme merely for the purpose of minimizing its tax liability, such transaction or scheme will amount to tax avoidance.[34] In *Ramsay Ltd. v I.R.C.*,[35] the question before the court was whether the taxpayer was entitled to a deduction for an alleged capital 'loss' under the capital gains legislation and resulting from a series of self-cancelling transactions. On a literal interpretation of the relevant provisions, the taxpayer had suffered such loss, however the court held that the word had to be construed purposively and as such referred to 'economic losses rather than 'arithmetical differences'. Lord Wilberforce stated thus:

> It is the task of the court to ascertain the legal nature of any transaction to which it is sought to attach a tax or tax consequence and if that emerges from a series or a combination of transactions, intended to operate as such, it is that series which may be regarded.

However, it is to be noted that not all transactions or schemes aimed at minimizing tax liability constitute tax avoidance. A transaction or scheme, even if its legal form is artificial and contrived in nature, could be justified for business reasons.[36] In addition, there are situations where tax legislation often encourages taxpayers to use artificial and contrived legal forms as an incentive to achieve particular economic outcomes by suspending the normal tax consequences of those outcomes.[37] Accordingly, taxpayers taking advantage of such incentives cannot be viewed as engaging in tax avoidance merely because they have chosen contrived, tax-preferred legal forms for their economic activities.[38] It can only be said that they are merely engaging in permissible tax planning/mitigation.[39]

Purpose

The second feature of tax avoidance focuses on the underlying purpose of the transaction. This means that where a taxpayer engages in transactions for the sole purpose of reducing its tax liability, the transaction will be deemed to constitute tax avoidance.[40] This approach is premised on the view that the underlying purpose of a transaction must have a real economic substance and not a mere artificial transactions, whose only purpose is to

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[32] Taylor M. D., Tax Policy and Tax Avoidance: The General Anti-Avoidance Rule from a Tax Policy Perspective (LLM Dissertation, University of British Colombia 2006) 37.
[33] Ibid, 38.
[34] Ibid, 38.
[35] [1982] AC 300 at 326.
[36] Graeme Cooper, Tax Avoidance and the Rule of Law (Amsterdam: IBFD Publications BV, 1997) 30
[37] Brian Arnold & James Wilson, 'The General Anti-Avoidance Rule - Part II' (1986) 36(5) Canada Tax Journal 11.
[38] *Peterson v. Commissioners of Inland Revenue* (2005) U.K. P. C. (P.C.) (Peterson).
[39] *CIR v Willoughby* [1997] 4 All ER 65 at p.73, See also the case of *CIR v Challenge Corp Ltd* [1986] S.T.C. 548.
[40] Taylor M. D., Tax Policy and Tax Avoidance: The General Anti-Avoidance Rule from a Tax Policy Perspective (LLM Dissertation, University of British Colombia 2006), 39.

minimize tax liability without real economic substance.[41] A distinct advantage of a purpose-oriented approach is that the purpose of taxpayers' transactions are generally much easier to identify as they are based on an objective.[42] It is therefore not surprising that most countries have adopted purpose-oriented approach in determining whether or not a transaction constituted tax avoidance.

In *Furniss v Dawson*,[43] Lord Brightman formulated a business purpose approach of interpretation of taxation statutes based on the principle of interpretation already established in *Ramsay*.[44] For business purpose approach of interpretation to apply, Lord Brightman stated:

> First, there must be a pre-ordained series of transactions or, if one likes, one single composite transaction. This composite transaction may or may not include the achievement of a legitimate commercial (i.e. business) end ... Secondly, there must be steps inserted which have no commercial (business) purpose apart from the avoidance of liability to tax—not 'no business effect'. If those two ingredients exist, the inserted steps are to be disregarded for fiscal purposes. The court must then look at the end result. Precisely how the end result will be taxed will depend on the terms of the taxing statute sought to be applied.[45]

Taxpayers are allowed tax deductions in respect of expenditures incurred wholly and exclusively for the purposes of their trade. However, where an expenditure has more than one purpose, such an expenditure will not be deemed to have been incurred wholly and exclusively for the purposes of the trade and as such, no tax deduction will be allowed. This is known as the duality of purpose test, which was laid down by the House of Lords in the case of *Mallalieu v Drummond*.[46] In that case, a barrister claimed the cost of her court clothing as a business expense. The House of Lords said this was not incurred wholly and exclusively for the purposes of her profession because one of her objects was to serve her needs as a human being and the fact that the clothes were only for the purposes of wearing in court and would never have been used for any private purpose, was not enough to displace the duality of purpose. The House of Lords further stated that even though the clothing was required for her professional purpose because she would not have been allowed to appear in court in other clothing, the subconscious purpose of meeting her needs as a human being was enough to disallow the expenditure.

However, the purpose-oriented approach is not without its weaknesses. One is that, from a tax policy perspective, taxpayers' motives and purposes are sometimes not relevant to the taxation of their transactions.[47] This is because tax results from objective economic circumstances and not from taxpayers' purposes for their transactions. The exception to this is where legislation may make purposes relevant, such as when distinguishing between business and personal expenses.[48] A more significant problem with the purpose-oriented approach relates to the numerous tax expenditure provisions that encourage certain activities

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[41] Ibid, 39.
[42] Brian Arnold, 'In Praise of the Business Purpose Test', in Report of the Proceedings of the Thirty-Ninth Tax Conference, 1987 Conference Report (Toronto: Canadian Tax Foundation, 1988).
[43] [1984] A.C. 474.
[44] Judith Freedman, 'Interpreting Tax Statutes: Tax Avoidance and the intention of parliament' (2007) 123 Law Quarterly Review 60.
[45] Ibid.
[46] (1983) 57 TC 330.
[47] Brian Arnold, 'In Praise of the Business Purpose Test', in Report of the Proceedings of the Thirty-Ninth Tax Conference, 1987 Conference Report (Toronto: Canadian Tax Foundation, 1988).
[48] Ibid, 42.

by granting tax reductions and incentives at the expense of tax law's primary purpose of raising revenue.[49] This serves as an incentive to taxpayers to engage in certain transactions in order to obtain those tax incentives even without an underlying non-tax purpose.[50]

Policy

The third feature of tax avoidance is the policies underlying the tax legislation. Under this approach, tax avoidance occurs when taxpayers obtain tax results not intended by the tax legislation or when the transaction defeats the policy underlying the tax legislation.[51] This approach has been articulated in a number of different ways. For example, the UK Tax Law Review Committee (TLRC) described tax avoidance as any action taken to reduce or defer tax liabilities in a way that Parliament plainly did not intend or could not possibly have intended had the matter been put to it.[52] The policy-based approach is premised on the idea that the underlying policy of a tax legislation should not be defeated by the tax outcome of a transaction. Thus, from a tax policy perspective, the focus is to ensure that a transaction complies with the fiscal and economic policies underlying the tax legislation.[53] This approach also allows for tax mitigation/planning because it acknowledges that some tax-reduction transactions actually accord with the purpose of the legislation.[54]

The disadvantage of this approach is that it can sometimes be extremely difficult to clearly identify a policy underlying tax legislation. This is because determining the parliamentary intention can sometimes be problematic to the courts.[55] Requiring the courts to go behind a legislation to deal with questions of underlying policies of the legislation may sometimes be impractical.[56]

From the above, it is postulated that the features of a tax avoidance transaction are where: (a) the transactions result in a mismeasurement of taxpayers' economic income so that they pay less tax than they would have paid if they were taxed on their economic income; (b) the transactions are engaged in by taxpayers for the sole or primary purpose of obtaining such a tax benefit; and (c) the transactions result in an outcome not contemplated by policy underlying tax legislation.[57]

Thus, in identifying tax avoidance, attention should be on the means adopted to implement a particular arrangement, transaction or scheme. This means that the greater the degree of

[49] Example of these are the allowances provided under the Second Schedule to the Companies Income Tax Act CAP C.21 LFN 2004, Pioneer Status under the Industrial Development (Income Tax Relief) Cap I 7 LFN 2004, The Nigerian Liquefied Natural Gas (NLNG) (Fiscal Incentives, Guarantees and Assurances) Act Cap. N8 7 LFN 2004 and so on.
[50] See the Canadian case of *Stubart Investments Ltd. v. R.,* 84 D.T.C. 6305, at 6324.
[51] Taylor M. D., Tax Policy and Tax Avoidance: The General Anti-Avoidance Rule from a Tax Policy Perspective (LLM Dissertation, University of British Colombia 2006) 43.
[52] The Institute of Fiscal Studies Tax Law Review Committee <http://www.ifs.org.uk/comms/comm64.pdf> accessed on 15 April 2022.
[53] Taylor M. D., Tax Policy and Tax Avoidance: The General Anti-Avoidance Rule from a Tax Policy Perspective (LLM Dissertation, University of British Colombia 2006) 45.
[54] Graeme Cooper, Tax Avoidance and the Rule of Law (IBFD Publications BV, Amsterdam 1997) 31
[55] Ibid, 45.
[56] David Ward, 'The Business Purpose Test and Abuse of Rights' (1985) 1 British Tax Review 121.
[57] Neil Brooks, 'The Responsibility of Judges in Interpreting Tax Legislation' in Cooper G. S., Tax Avoidance and the Rule of Law (Amsterdam IBFD Publications BV, 1997) 96. See Rosenberg J. D., "Tax Avoidance and Income Measurement" (1988-1989) 87 Michigan Law Review 365.

artifice, the more likely it is that the arrangement, transaction or scheme is of a kind which was not intended by Parliament.[58]

The underlying incentive for tax avoidance

Various and diverge reasons have been attributed as serving as the incentives for taxpayers indulging in tax avoidance. These reasons can be classified into two categories.[59] The first category comprises of factors that negatively affect taxpayers' compliance with tax legislation. These consist of low willingness to pay taxes (low tax morale), high costs to comply with tax laws, low quality of the service in return for taxes paid, lack of fairness and equity in the tax system, low transparency and accountability of public institutions, high level of corruption and lack of rule of law and weak fiscal jurisdiction.[60] The second category comprises reasons for the low ability of tax administration and fiscal courts to enforce tax liabilities. These factors can be summarized as resulting from insufficiencies in the administration and collection of taxes as well as weak capacity in auditing and monitoring tax payments, which then limit the possibility to detect and prosecute violators.[61]

Apart from the above, several studies also indicate that taxpayers such as corporate entities make use of tax avoidance strategies as a way to increase their financial accounting earnings in order to boost their reputation and their share price.[62] This is why corporate leaders do not perceive tax avoidance as a problem, often resulting from the fact that tax avoidance is not illegal like tax evasion.[63] For example, in defending Google's tax arrangements, which reportedly involved the (legal) transfer of 9.8 billion US dollars of revenues from international subsidiaries into Bermuda in 2011, Google Chairman, Eric Schmidt, reportedly stated, 'I am very proud of the structure that we set up. We did it based on the incentives that the governments offered us to operate'.[64] Some corporate leaders have viewed tax avoidance as obligatory and as part of their fiduciary duties to shareholders.[65] For example, in response to criticism of General Electric (GE)'s tax practices, GE's 2010 Citizenship Report emphasized that the company fully complies with the law and there are no exceptions, but at the same time acknowledged that it has a responsibility to its shareholders to reduce its tax costs as the law allows.[66]

A study analysing why a corporate tax executive would refuse to engage in tax avoidance strategies revealed that a majority (69.5 per cent) of executives considered the potential harm to the company's reputation as an important or very important factor in determining whether or not to adopt a tax avoidance strategy.[67] This means that the risk of harm to a company's reputation is a more frequently cited consideration not to engage in tax avoidance

[58] Mohammed Taofeeq Abdulrazaq, *Principles and Practice of Nigerian Tax Planning & Management*, (2nd ed. Stirling-Horden Pub. Ltd. Ibadan 2013), 113.
[59] The International Tax Compact (ITC), 'Addressing tax evasion and tax avoidance in developing countries' <http://www.taxccompact.net/.../2011-09-09_GT > accessed on 24 April 2022.
[60] Ibid.
[61] Ibid.
[62] John Graham, 'Incentives for Tax Planning and Avoidance: Evidence from the Field 26' (MIT Sloan Research Paper No. 4990-12, 2013) http://www.ssrn.com/abstract= 2148407 m accessed on 22 March 2022
[63] Jasmine Fisher, 'Fairer Shores: Tax Havens, Tax Avoidance and Corporate Social Responsibility' (2014) 94 Boston University Law Review 348.
[64] Ibid, 349.
[65] Ibid, 349.
[66] General Electric Corporation, GE 2010 Citizenship Report 17 (2010) http://www.ge.com/lu/en/docs/1315417188571_ge_2010_citizenship_report.pdf accessed on 22 April 2022.
[67] Jasmine Fisher, 'Fairer Shores: Tax Havens, Tax Avoidance and Corporate Social Responsibility' (2014) 94 Boston University Law Review 349.

than the risk of detection and challenge by the tax authority.[68] Overall, many factors influence the decisions whether or not to engage in tax avoidance practices. On the whole, tax avoidance involves no more than the selection of a method of transaction which is least costly in tax as it conveniently involves the techniques by which the lawyers and the accountants can so arrange a client's affairs so as to achieve a reduction in the amount of tax he would otherwise have to pay.[69]

The impact of tax avoidance in Nigeria

Tax avoidance has a damaging effect on the economy as there is always the prospect of losing much needed revenue through it. For example, investigative reports indicated that Nigeria has been losing several billions of dollars in revenue every year due to tax avoidance activities by local and multinational corporations.[70] According to an investigative report by Premium Times, the Nigerian government lost about 23.187 billion Naira (700 million US dollars) to the tax avoidance activities of certain telecommunication operators in the country.[71] Furthermore, the recent announcement by the FIRS that Nigeria lost about 178 billion US dollars to tax avoidance between 2007 and 2017 is confirmation that tax avoidance is on a continuous rise and it is gradually obliterating the revenue base of the country.[72]

Further, it has been suggested that the adverse effect of tax avoidance on developing countries such as Nigeria is more damaging than that of developed countries.[73] According to research, the effects of tax avoidance on developed economies is minimal because these countries have strong regulatory frameworks to check and prevent the menace of tax avoidance.[74] On the other hand, developing countries are more susceptible to tax avoidance.[75] This is due to the lack of a strong regulatory framework and administrative resources to tackle the issue of tax avoidance head on.[76]

The lack of a strong regulatory framework therefore makes the impact of tax avoidance more acute in developing countries. This causes tax avoidance to have a direct life or death impact in developing countries, bearing in mind that the tax revenue needed by the government to invest in essential services such as healthcare, education, and infrastructure

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[68] Ibid, 349.
[69] Mohammed Taofeeq Abdulrazaq, 'Judicial and Legislative Approaches to Tax Evasion and Avoidance in Nigeria' (1985) 29(1), Journal of African Law 65.
[70] Bakre Owolabi, 'Tax Avoidance, Capital Flight and Poverty in Nigeria: The Unpatriotic Collaboration of the Elite, the Multinational Corporations and the Accountants: Some Evidence' (Paper presented at the Tax Workshop, University of Essex, United Kingdom, July 2006).
[71] Emmanuel Mayah 'How MTN ships billions abroad, paying less tax in Nigeria' Premium Times Newspaper (Nigeria 26 October 2015) <http://www.premiumtimesng.com/investigationspecial-reports/192159-investigation-how-mtn-ships-billions-abroad-paying-less-tax-in-nigeria.html> accessed on 29 April 2022.
[72] James Emejo, 'FIRS: Nigeria lost =N=5.4tr to tax evasion by Multinationals' This day Newspaper (Nigeria 12 January 2021) <https://www.thisdaylive.com/index.php/2021/01/12/firs-nigeria-lost-n5-4tn-to-tax-evasion-by-multinationals/> accessed on 29 April 2022.
[73] Rushanara Ali, 'Tax avoidance hurts both Britain and developing countries', Labour List Magazine (United Kingdom, 9 February 2013) <http://labourlist.org/2013/02/tax-avoidance-hurts-both-britain-and-developing-countries/> accessed on 14 April 2022.
[74] Ibid.
[75] World Finance Magazine, 'The true costs of tax avoidance' <http://www.worldfinance.com/strategy/the-true-costs-of-tax-avoidance> accessed on 15 April 2022
[76] Ibid.

is severely and negatively affected.[77] For some Non-Governmental Organizations like Save the Children,[78] the impact and effect of tax avoidance also constitute a political problem.[79] It is argued that the impact of revenue lost to tax avoidance has a direct impact not only on the quality of development, but also on people's lives such as high mortality rate and health risks.[80]

It can therefore be posited that the negative effect of tax avoidance in developing countries is much more than revenue loss. The impact and effect of tax avoidance on the economies of developing countries such as Nigeria is well encapsulated by Baker,[81] who describes tax avoidance as the ugliest chapter in global economic affairs since slavery and is still one of the worst problems affecting developing economies.[82]

Legal mechanisms to counter tax avoidance in Nigeria

Generally, the traditional approach to counter tax avoidance has been for countries to include anti-tax avoidance provisions in their domestic income tax legislations to prevent taxpayers from exploiting the loopholes in the tax law to reduce or minimize their tax liability.[83] This can be in the form of a Specific Anti-Avoidance Rule (SAAR) or a General Anti-Avoidance Rule (GAAR).[84] Both SAAR and the GAAR provisions are regarded as the most common domestic legislative measures that are used and relied upon by countries to counter act of tax avoidance schemes.[85] Specific Anti-Avoidance Rule (SAAR) provisions are enacted for the sole purpose of preventing a specific known tax avoidance scheme.[86] This type of anti-tax avoidance provision is normally targeted at a specific avoidance scheme and provides for many consequential adjustments.[87] Example of SAAR in Nigeria is the Income Tax (Transfer Pricing) Regulations 2018 introduced by the FIRS pursuant to its powers under s.61 of the Federal Inland Revenue Service (Establishment) Act No. 13 2007. The Regulation was meant to provide specific transfer pricing regulation in Nigeria.[88]

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[77] Mohammed Taofeeq Abdulrazaq, *Principles and Practice of Nigerian Tax Planning & Management* (2nd ed., Stirling-Horden Pub. Ltd. Ibadan 2013), 133.

[78] Save the Children also known as the Save the Children Fund International is an international non-governmental organization that promotes children's rights provides relief and support children in developing countries. It was established in the United Kingdom in 1919 in order to improve the lives of children through better education, health care, and economic opportunities, as well as providing emergency aid in natural disasters, war, and other conflicts, <http://www.savethechildren.net/>, accessed on 12 March 2022

[79] World Finance Magazine, 'The true costs of tax avoidance' <http://www.worldfinance.com/strategy/the-true-costs-of-tax-avoidance> accessed on 15 April 2022.

[80] Ibid.

[81] The founder and President of the Global Financial Integrity, <http://www.gfintegrity.org/about/> accessed on 15 April 2022.

[82] Raymond Baker, 'The Ugliest Chapter in Global Economic Affairs Since Slavery' <http://www.taxjustice.net/cms/upload/pdf/Baker_070628_Conference_speech.pdf> accessed on 15 April 2022.

[83] Mohammed Taofeeq Abdulrazaq, *Principles and Practice of Nigerian Tax Planning & Management* (2nd ed., Stirling-Horden Pub. Ltd. Ibadan 2013) 135.

[84] Ibid.

[85] Shaa'bani Tavakol, 'Anti-tax avoidance measures in OPEC-member countries' (2011) 7(11) Journal of American Science 106.

[86] Ibid, 126.

[87] Ibid, 129.

[88] Ahmed Olatunji Isau, 'Transfer Pricing: The Nigerian Perspective' (2014) 2 (2) International Journal of Accounting and Taxation 26 <http://aripd.org/journal/index/ijat/vol-2-no-2-june-2014-current-issue-ijat> accessed on 9 July 2022.

General Anti-Avoidance Rule (GAAR) provisions are usually a set of rules within a country's income tax legislation designed to prevent or counteract an avoidance of tax.[89] GAAR provisions are normally of general application, vesting the tax authority with broad, all-embracing rules and wide-ranging powers to deny the taxpayers of any tax benefits of any transaction or arrangement that is believed not to have any economic or commercial substance or any purpose other than to avoid payment of tax. The primary policy objective of the GAAR is to deter taxpayers from entering into any arrangements that would lead to avoidance of tax and where taxpayers proceed with such an arrangement, the GAAR operates as a mechanism to deny any tax benefit which the taxpayer is trying to achieve.[90] In essence, the ultimate purpose of a GAAR provision is to stamp out tax avoidance.

In Nigeria, there are GAAR provisions in various tax legislations in the country to safeguard the tax base of the country from being eroded through various forms/schemes of tax avoidance. Section 22 of Companies Income Tax Act (CITA)[91] is widely considered as a GAAR provision in this regard. There are corresponding provisions in other tax laws such as the Personal Income Tax Act (PITA),[92] the Capital Gains Tax Act (CGTA)[93] and the Petroleum Profits Tax Act (PPTA).[94] Section 22 of CITA, which is similar in content with the provisions of s.17 of PITA, s.20 of CGTA and s.15 of PPTA is reproduced hereunder:

> 'Where the Board is of opinion that any disposition is not in fact given effect to or that any transaction which reduces or would reduce the amount of any tax payable is artificial or fictitious, it may disregard any such disposition or direct that such adjustments shall be made as respects liability to tax as it considers appropriate so as to counteract the reduction of liability to tax affected, or reduction which would otherwise be affected, by the transaction and any company concerned shall be assessable accordingly.'

The above provision qualifies as a GAAR provision as it satisfies all the possible features of a GAAR. First, the provision identified a scheme to include any disposition which in the opinion of the FIRS is not given effect to or any transaction, which then reduces or would reduce the amount of any tax payable. Second, the provision identified tax reduction as the sole and dominant tax benefit of such transaction. The provision is therefore an omnibus anti-avoidance provision that empowers and invests the FIRS with the powers to disregard any artificial or fictitious dispositions and transaction meant to reduce tax payable and direct any adjustment in that regard. GAAR provision in s.22 of CITA specifically empowers the FIRS with powers to: 1) disregard any disposition which in its opinion is not given effect to; 2) disregard any artificial or fictitious transaction which reduces tax; and 3) direct adjustment in respect of the tax liability of such disposition and transaction as it considers appropriate to counter act the tax reduction.[95]

Due to its broad and general nature, the provision of s.22 of CITA occupies a critical position in the country's anti- tax avoidance armoury as it represents an attempt to make provisions to prevent future manifestations of unacceptable tax avoidance schemes in a situation where

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[89] Ernst and Young, 'GAAR rising mapping tax enforcement's evolution' <http://www.ey.com/publication/.../GAAR.pdf> p. 2 accessed on 20 July 2022.
[90] HMRC, 'HM Revenue and Customs (HMRC) General Anti Abuse Rule (GAAR) guidance' <https://www.gov.uk/.../2_HMRC_GAAR> accessed on 14 July 2022.
[91] Companies Income Tax Act CAP. C21 LFN 2004 (as amended).
[92] Section 17 Personal Income Tax Act CAP P8 LFN 2004.
[93] Section 20 Capital Gains Tax Act CAP. PC1 LFN 2004.
[94] Section 15 Petroleum Profits Tax Act CAP. P13 LFN 2004.
[95] Mohammed Taofeeq Abdulrazaq, *Principles and Practice of Nigerian Tax Planning & Management* (2nd ed., Stirling-Horden Pub. Ltd. Ibadan 2013), 135.

the tax avoidance scheme is not covered under any enactment.[96] It can therefore be seen that the powers conferred on the FIRS in s.22 of CITA is very wide and it is applicable to all possible tax avoidance schemes that may be conceived.[97] However, using the GAAR provision in s.22 to deter tax avoidance is not without its own challenges. It has been argued in this regard that the language of the GAAR provision is too vague and imprecise in nature. For example, according to Ayua,[98] the language of the GAAR provision places an enormous burden on the interpretative skills of tax officials requiring them to examine every transaction, which can sometimes be a very difficult task. The author contends that due to the level of training of the FIRS officials, the tax officials are usually reluctant to apply the GAAR provision to strike down tax avoidance in the country. This has affected the significance and the usefulness of the GAAR provision and explains why the FIRS is yet to test the GAAR provision in court.[99]

The situation is further compounded with the history of Nigerian courts, which have consistently and religiously resolved any ambiguity in the tax legislations in favour of the taxpayer.[100] The effect of this is that due to the ambiguous nature of its language, if tested in court the GAAR provision is most likely to be resolved against the FIRS and in favour of the taxpayer. Courts in Nigeria usually confine themselves to the strict letter of taxation statute and consider tax as an imposition depriving citizens of their financial liberty. They are therefore traditionally hostile to statutes seen as encroaching on a citizen's property or liberty and any ambiguity in the tax law is usually resolved against the government and in favour of taxpayers.[101] It can therefore be posited that the GAAR provision in s.22(2) (b) of CITA cannot effectively on its own prevent tax avoidance in the country. That is why despite its presence in the CITA, the country continue to lose huge amounts of tax revenue to various tax avoidance schemes, which necessitated the need to introduce a regulation on transfer pricing.[102] However, notwithstanding its defects, in theory the GAAR provision in s.22 provides the country with an extensive means of preventing tax avoidance in the country due to the fact that it can be extended to disallow all forms of conceivable tax avoidance scheme.[103]

Conclusion

The article has provided an understanding of the concept of tax avoidance. The article revealed that tax avoidance involves the legal utilization of the tax regime to reduce the amount of tax that is payable by means that are within the law. The article further revealed that while tax avoidance is not entirely illegal, it is considered to be immoral, improper, abusive and against the spirit of the law.

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[96] Derek Obadina, 'Fighting Aggressive Tax Avoidance in Nigeria: An Agenda for Reform'<https://www.academia.edu/10805766/Tackling_Aggressive_Tax_Avoidance_in_Nigeria_an_agenda_for_reform> accessed on 22 July 2022

[97] Ibid

[98] Ignatius Ayua, *The Nigerian Tax Law* (Spectrum Law Publishers, Lagos 1996) 261.

[99] Mohammed Taofeeq Abdulrazaq, *Principles and Practice of Nigerian Tax Planning & Management* (2nd ed., Stirling-Horden Pub. Ltd. Ibadan 2013) 143.

[100] *Federal Board of Inland Revenue v. Integrated Data Services Limited* (2009) 8 NWLR (PT.1144) 615, at 637 para H, 638 paras C-E; *Mobil Oil Nigeria Limited v Federal Board of Inland Revenue* (1977) 3 S.C 53.

[101] *F.B.I.R v. American International Insurance Company (Nig.) PLC* (1999) 1 N.R.L.R. 50, at 56.

[102] Mohammed Taofeeq Abdulrazaq , *Principles and Practice of Nigerian Tax Planning & Management* (2nd ed., Stirling-Horden Pub. Ltd. Ibadan 2013) 144.

[103] Ibid, 123.

The article examined the feature of tax avoidance transaction from the notions of 'form', 'purpose' and 'policy' and found that any transaction or scheme whose sole purpose to minimize tax liability and defeat the intention of parliament will be regarded to constitute tax avoidance. The article also found that apart from revenue loss, tax avoidance has a direct negative impact on the lives of the people living in developing countries such as Nigeria. The finding of the article revealed that tax avoidance is countered through both Specific Anti-Avoidance Rules (SAAR) or General Anti-Avoidance Rules (GAAR). It is the recommendation of this author that the Nigerian government and its policy makers should endeavour to strengthen the GAAR provision in the various tax legislations in the country to overcome its defects in order to be more effective in preventing all forms and schemes of tax avoidance in the country.

LEGAL HISTORY

The dodgy billet: "The past is a foreign country; they do things differently there."

Re Billeting of Soldiers, *Devizes and Wiltshire Gazette*, 28 November 1847

Devizes District Petty Sessions, before Admiral Bouverie and Mr Nisbet

John Sawyer* and Dr Steve Foster**

Introduction

In a previous issue of the Journal, the authors considered a case that involved relatives of John Sawyer in a dispute about payment of agricultural workers.[1] In that article, the authors related the case of a worker who objected to being paid for his work in beer, with Steve Foster imaging the legal outcome in today's legal system. In the present issue, we examine a case that again involved one of John's relatives, but which had a more serious impact on individual rights and liberty and the general notion of the rule of law.

John has transcribed the case in which Thomas Sawyer is, by John's admission, made to look a little foolish, and which raises questions about the degree to which petty officialdom should be allowed to exercise its responsibilities without following the rules and the rule of law. Once the case has been explained, the authors will attempt to place the salient legal issues in a modern context, also noting the present government's predilection for ignoring the basic principles of procedural justice, and its reluctance to follow the law and the rule of law.

The facts and claims

The case concerned a recruiting corporal who was seeking accommodation for himself and a recruit. He was entitled under the provisions of the Mutiny Act to do this, provided he obtained a "billet" (French for note) from the parish constable, and served this on the accommodation provider. The army and navy recruiters then often offered food and drink to recruits as an inducement to sign up for long terms of service. The dispute related to the fact that the recruiting officer provided a billet with an incorrect signature and the landlord refused to offer accommodation.

John Hazell, the landlord of the *Wheatsheaf Inn*, West Lavington, was summoned by a Sergeant belonging to the Coldstream Guards under section 67 of the Mutiny Act, for having refused to receive a billet brought to him on the evening of November 8 by the Corporal of a recruiting company for that regiment. The Corporal, whose name was George Grant, briefly stated that he applied for a billet at the Constable's House, which he duly obtained. At approximately 8:50 in the evening he took it to the Wheatsheaf Inn, where it was refused by the landlord and landlady, both of whom said. That "they would have no soldiers in their house that night". As a consequence, the corporal was obliged to obtain and pay for a bed elsewhere for the recruit he had with him.

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[1] John Sawyer and Steve Foster, 'Ale not be accepting that as payment, thank you. Payment in beer and the decision in *Shore v Sawyer'* (2020) (25) 2 Coventry Law Journal 89.

The two magistrates who heard the case against the landlord found that he should have provided accommodation, irrespective of the incorrect signature on the billet, and duly fined him 40/-.

In the recorded court proceedings, Mr Whittey [who appeared for the defendant] said he was instructed that no billet had been made on this occasion, and if there had been he should like to see it. The corporal then produced the piece of paper he had received, stating that when he took it to the public house, neither the landlord nor landlady would look at it. Mr Whittey then submitted that before a victualler is compelled to receive a soldier into his house, the billet brought to him must be legally drawn by the constable of the parish. But, in this case the billet was neither drawn in the proper form nor had it the signature of the Constable attached to it. The constable's name was Sawyer, and the name appended to the paper was “Thomas Junior”.[2]

The sergeant replied that it was not to be expected that a soldier should know the name of the constable of every parish into which he marched, and that had the landlord looked at the billet, as he ought to, and pointed out that the signature was a wrong one, then it might have been changed; but, he positively refused to have any soldiers to his house that night.

It was argued, therefore, that the signature on the billet was accounted for by the corporal. On his arrival in West Lavington about 7 o'clock in the evening, he applied at the Constable's (Sawyer’s) House for billets for himself and the recruit he had brought with him, but found the constable from home. Sometime afterwards he made a second application and a person who represented himself to be the Constable's father said, if his son did not come home shortly, he would make out the billets himself, which he subsequently did at the *Churchill Arms*, signing them “Thomas Junior”. The son (who had returned in the interval) was present just as he was handing them to the corporal, and upon being told by his father that he had billeted two men, inquired where he had put them? “One to the *Wheatsheaf* and one to the *Churchill Arms*”, replied the old man. “I don't believe” rejoined the son “I have any business to billet at the *Wheatsheaf* as that is in Littleton” (actually, the constable was mistaken in this, as although Littleton has a separate constable, as a matter of convenience, it forms part of the West Lavington Parish).

Mr Whittey then argued that surely private individuals have no right to grant billets in this way:

> I would submit that it is the duty of a soldier applying for a billet to ascertain the name of the constable of the Parish into which he marches: and that the victualler upon whom the onerous duty of receiving soldiers falls has a right to expect to be satisfied of the legality of the claim that he made upon him.

Mr Nisbet, one of the Magistrates, stated that in this instance the objection of the landlord does not seem to have been grounded upon the supposed illegality of the billet which he refused to look at. His reply to the application appears to have been that he would have no soldiers in his house that night. Every facility ought to be afforded to Her Majesty's service, and had Mr Hazel done what he ought he would have taken the billet, and if he thought the

[2] "Thomas Junior", the parish constable, lived next door to the *Churchill Arms* on one side, and next-door to his father (also Thomas Sawyer), on the other. Note that the parish constable was an unpaid role appointed by the local parish vestry. Wiltshire was the earliest developer of a County Constabulary, under the provisions of the County Police Act 1839, but it appears that there must have been a considerable period over which the parish constable roles in relation to local administration continued.

signature was an improper one, would have directed the corporal how to get it rectified. The constable, however, here appears to have virtually acknowledged the billet as his own by allowing his father, with his sanction, to act as his deputy. Were such quibbles and excuses to be allowed an immense deal of disturbance would be created throughout the country.

In response, Mr Whittey pointed out that Mr. Hazell has never, on any occasion, refused the billet of a soldier when brought to him at reasonable hour; but in this instance the house was quite full, in consequence of its being feast time, and his previous arrangements put it out of his power to afford the required accommodation. The Sergeant replied that no time was specified for the reception of billets for soldiers on recruiting service. After some further discussion upon the matter, Admiral Bouverie, the other magistrate said:

> We think the paper the corporal received appeared to him to the right and proper thing, and that it should not have been objected to by Mr. Hazell. We consider therefore the charge proved, and fine him 40s.—that being the lowest sum we think it a sufficient penalty, but it is the smallest we can impose.

Following procedures and procedural justice

The Magistrate's decision provides a fascinating insight into judicial (or quasi-judicial) reasoning at that time, the Magistrates rejecting the defence lawyer's arguments that the serving of the billet was illegal and of no effect because of the procedural flaw accepted by all parties. Rather, the landlord and landlady are portrayed as the villains of the peace, obstructing the performance of a public servant's duties by, perhaps as a second thought, unreasonably relying on the technical illegality of the billet. In the court's view, the essential thing was that the law was executed and obeyed, and any technical procedural breach needed to be overlooked, particular as the defendants had the opportunity to notify the authorities of the irregularity and get it rectified. In other words, defendants should not be able to avoid their legal responsibilities by relying on technical irregularities.

In modern administrative law, whether the breach of a statutory procedure voids a legal power is primarily determined by asking whether the procedure was mandatory or directory: a mandatory (compulsory and essential) procedure will mean the power is declared unlawful if the procedure is not followed; whereas a directory (a minor, technical and less important) procedure will not affect the legality of the action. This classification is also used in contract law to distinguish between important breaches (conditions) and less important ones (warranties) in deciding whether a breach entitles the innocent party to terminate the contract for that breach.[3]

But, as with any strict classification, the courts are wary to apply such distinctions without flexibility and the context of the case.[4] Thus whether the procedure is mandatory, thus making any action automatically unlawful, will depend on factors such as the wording of the statute – did it say the procedure must be followed, or simply that it *may* or *should*? More importantly, the court will inquire into the purpose of the procedure and what the consequences might be to persons affected by that power if the procedure was not followed.[5]

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[3] See Mark Ryan and Steve Foster, *Unlocking Constitutional and Administrative Law*, 4th edition, Routledge 2018, 609-610. A new edition of the text is published in January 2023.

[4] See Lord Hailsham in London and *Clydeside Estates Ltd v Aberdeen DC* [1980] 1WLR 182.

[5] Thus, in cases where the Act requires consultation, the courts are likely to regard the statutory duty to consult as mandatory. *Agricultural, Horticultural and Forestry Industry Training Board v* A*yelsbury Mushrooms Ltd* [1972].

Thus, in cases where the power affects the liberty or rights of the individual a procedure is likely to be regarded as mandatory, the power falling for breach of that procedure.[6]

In our case, the requirement to provide a billet from the local constable, not his father, should have been regarded as mandatory and the resultant power unlawful and of no effect. Although many might see it as a technical departure from the legal power – the son would surely have authorised the billet had he been there – it is fundamental to any legal system and the control of public power that legal officers follow procedures, and that only those provided with legal powers are allowed to exercise them.

Conclusion

Again, we thank John for sharing his research of his family history with us, and providing another example of legal enforcement and reasoning from another era. The Magistrate's attitude and decision in this case should serve as a warning to those who fail to follow the rules and seek to justify their actions by receiving public and political approval in order to escape the consequences of their illegal actions. Fortunately, there now exists a more robust system of judicial review to counter such abuses, thus upholding the rule of law, accountability of public officers, and the benefits of procedural justice.[7]

[6] *E 1/(OS Russia) v Home Secretary* [2012] EWCA Civ 357.
[7] See Steve Foster, The rule of law in modern times: not a pretty sight' (2021) 27 (1) Coventry Law Journal 1.

RECENT DEVELOPMENTS

DISCRIMINATION LAW

Another look at harassment in the workplace: is there hope for change?

Demi Clarke-Jeffers*

Introduction

Recent 2022 guidance surrounding the issue of hair discrimination has been published by the Equality and Human Rights Commission: Preventing Hair Discrimination in Schools.[1] The premise of this guidance is to adopt an inclusive environment and help school practitioners improve, develop and review policies to ensure that they are not unlawfully discriminatory. The development and recognition of this issue emerged because of research and court actions, which prove that this issue disproportionately affects pupils with Afro-textured hair or hairstyles experience. The guidance identifies that some of the policies that are currently in place can be negative and encourages schools to ensure that the policies remain in conformity with the Equality Act 2010. In addition, the guidance provides insightful examples of race, disability, religion, and gender-based discriminatory issues that interlink with hair discrimination.

Background

The pivotal issue related to the reluctance to expand section 14 of the Equality Act because it was deemed by the government as 'too complicated and 'burdensome'[2] to apply three or more protected characteristics - age, disability, gender reassignment, race, religion or belief, sex, and, sexual orientation.[3] Consequently, this failed to acknowledge issues of harassment:

> A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

In addition, it causes further problems when an individual in the workplace must choose whether they are being harassed with respect to their race, sex, culture, or religion. The importance towards Article 9 ECHR, right to manifest religion and belief, and Article 10 ECHR, right to freedom of expression, were emphasised as the law needs to ensure that it is not only aligned with the Equality Act 2010 but also with the human rights of the individual.

The author's previous article - 'Harassment at work: is the law failing?'[4] - drew upon the successes and failures of the United Kingdom (UK) law in relation to hair harassment in the

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[1] Equity and Human Rights Commission, 'Preventing hair discrimination in schools' (2022) <https://www.equalityhumanrights.com/en/advice-and-guidance/preventing-hair-discrimination-schools> accessed 16 December 2022.

[2] Government Equalities Office, 'Equality Bill: Assessing the impact of a multiple discrimination provision' (April 2009) <https://data.parliament.uk/DepositedPapers/Files/DEP2009-1229/DEP2009-1229.pdf> accessed 18 April 2022.

[3] The Equality Act 2010, s. 26.

[4] Demi Clarke-Jeffers, 'Harassment at work: is the law failing?' (2022) 27(1) Coventry Law Journal 167. <https://publications.coventry.ac.uk/index.php/clj/article/view/884/936> accessed 27 December 2022.

workplace. More specifically the article related to Black and Muslim women and the experiences they faced and continue to experience at work. The experiences varied from stereotypical perceptions of naturally textured hair deemed as "dirty" or "unprofessional",[5] along with inappropriate comparisons towards objects and animalistic scrutiny, which is dehumanising, humiliating and offensive.[6] Moreover, it covered the exposure of the 'Neutrality Policy' 2017,[7] and experiences of physical harassment noted in the case of *McGonigle*;[8] although, in the latter case Judge Hallen identified a breach of policy in connection to harassment and bullying. Thus, judge Hallen expressed the need for employees to be treated with dignity in the workplace. This was significant towards the identification of dual harassment claims in the law.

From a young age, black women are placed in an intimidating, hostile, degrading, humiliating and offensive environment that continues to cause discrimination due to the inadequate protection provided by the law. Beforehand it was considered that the law was failing to regulate harassment within education settings due to polices that penalised afro-textured hair.[9] In addition, an overwhelming 82.9 per cent of young people experienced harassment within the educational institution.[10] The weight of the law was revealed to be ineffective, the implementation of the polices being restrictive, fostering the notion that wearing your natural hair is an issue. New policy would dispute the notion that the policy remains restrictive.

The previous article provided recommendations to implement the Halo Code to be adopted into UK legislation. The initiative pledges for "freedom and security to wear all afro-hairstyles without restriction or judgement". [11] Incorporation of the Halo Code will ensure that everyone is included within the law and highlight that any form of harassment or discrimination will not be tolerated. The Halo code promotes inclusivity, which is important because the prerogative of the law is to serve, protect and defend people and thus it is necessary to acknowledge every aspect of an individual's identity.

In accordance with literature and legislation from the United States (US) it was argued that the UK is behind the US and lacks the strength and development of the US because the US have the CROWN Act (Creating a Respectful and Open World for Natural hair), which prohibits "discrimination based on an individual's texture or style of hair." [12] Thus, it is evident that the UK lacks the independent framework and effective legislation to negate any issues surrounding the issues of hair discrimination and harassment in the workplace and in educational institutions.

In summary, the prior article recommended adopting the Halo Code to benefit employers and employees whilst also mandating continuous cultural competency training in the workplace. The prior article urged for the importance of change to the UK legislation and

[5] D Wendy Greene, 'Splitting Hairs: The Eleventh Circuit's Take on Workplace Bans Against Black Women's Natural Hair in EEOC v Catastrophe Management Solutions' (2017) 71 U Miami L Rev 987.
[6] Jessica Morgan, 'These Black Women's stories Prove Hair Discrimination Happens Here Daily' Refinery 29 (UK, 11 February 2020).
[7] *Achbita v G4S Secure Solutions* [2017] EU: C: 2017: 203.
[8] *McGonigle v WM Morrison's Supermarket plc* [2021] UKET 3202627/2021.
[9] Michelle De Leon and Denese Chikwendu, 'Hair Equality Report 2019: "More than just Hair"' (2019) <https://www.worldafroday.com/hair-equality-report> accessed 19 April 2022.
[10] Ibid.
[11] Jane Edwinal, 'Halo Code' (October 2020) <htttps://halocollective.co.uk> accessed 27 December 2022.
[12] Janelle Griffith, 'House passes the Crown Act banning discrimination against Black hairstyles' NBC News (America, 18 March 2022).

remained discouraged to what was currently in place as lacking, and held the view that it was not a priority towards legislators "current agenda." [13]

Towards the beginning of 2022, it was deemed that the law was failing to support this demographic when cases of harassment occurred, due to the lack of legislation that could directly support Black and Muslim Women in relation to harassment claims. However, there seems to be a potential shift towards more proactive change, support and improvement by the Equality and Human Rights Commission (EHRC), below.

The new EHRC Guidance

The recommendation provided within the policy is useful as it suggests that schools should provide training for teaching staff in order to cultivate virtuous relationships and to absolve unlawful discrimination and harassment relating to hair, thus resulting in understanding, and further to support members of staff. Another recommendation is to foster equality throughout the year by organising a host of activities such as the celebration of afro-textured hair and including Black role models. Another resource the Commission provided is a decision-making tool that can be used to aid the elimination of any potential discrimination related to hair. These are in addition to several other external resources, such as World Afro Day,[14] including resources from a variety of different platforms which advocate for equity.

Recent developments would dispute the prior standpoint that the law is failing to regulate harassment in the education setting as 'ineffective', as the guidance provides sound guidance on the vast amount and variety of hairstyles that can be adopted whilst understanding that it is not only limited to what they listed. Moreover, it also provides advice and support in terms of the negative language and connotations of the words individuals use, which can impact on young people's self and identities. This brings awareness of the type of language one should avoid. This is paramount because as mentioned previously the implications of harassment in educational settings can be carried on into the workplace. In addition, the report is also aware of the mental health impact that can be caused because of harassment within the education setting, thus raising awareness of ongoing and contemporary issues. Moreover, the guidance provides anecdotes of real-lived experiences that perpetuate the impact of disproportionate unlawful discrimination on young people. Although the educational institution is very much the foundation level to combat hair discrimination, the issue is bigger than education itself, although it is a good starting point, and it must be expanded out into other institutions to allow it to have a clear and direct benefit for those who are affected by the issue.

Furthermore, linking to the point that the guidance provided is isolated in relation to preventing hair discrimination in educational institutions, the focal point is not spread into other industries such as in the workplace, where it is evident that hair-related issues arise in these settings (including the negative issues and experiences that individuals with afro-hair textured or hair-styles experience). Consequently, if other industries are not encouraged to adopt changes in their policies a cyclical nature will continue to persist. Thus, this guidance can be replicated in the workplace as it provides sufficient recommendations on how to create a policy to eliminate unlawful hair discrimination. Ultimately, this is merely a policy that suggests and prompts policy changes for the benefit of institutions to avoid them from

[13] Demi Clarke-Jeffers, 'Harassment at work: is the law failing?' [2022] 27(1) CLJ <https://publications.coventry.ac.uk/index.php/clj/article/view/884/936> accessed 27 December 2022.
[14] Michelle De Leon and Denese Chikwendu, 'Hair Equality Report 2019: "More than just Hair"' (2019) <https://www.worldafroday.com/hair-equality-report> accessed 18 December 2022.

unlawfully discriminating. Furthermore, it is reiterated throughout the guidance that it is simply a tool. This indicates that there is a choice whether to incorporate it into school policy, but with the potential of court action if not followed. Further, this policy becoming statutory is salient in creating awareness and knowledge for staff and those impacted, who will feel comfortable enough to raise these issues.

Presented within the guidance is an extensive and advantageous list and/or requirements that can be considered when developing policies. However, can this remedy the present problem of harassment in the workplace? It is a useful tool to use when considering improvements in developing policies if used appropriately and purposefully, and thus can be extremely advantageous for current employees in the workplace to feel more comfortable and at ease to know that they have a policy that is conscious of the characteristics that they possess. Thus, there will be less confusion or dispute about how they decide to wear their hair as a specific style, or have it covered. However, currently it remains as a policy that has not been embedded within legislation, and this could cause hesitation to rely on or to make their employees aware of such policy.

The EHRC provides several examples which intersect each other and which seemingly disputes the ideology that the protected characteristics in actuality are not 'too complicated' or 'burdensome'.[15] The EHRC provide simple case law examples that reveal that there can be overlaps, including acknowledgement and awareness of this. An example which the EHRC provides is the intersection between disability, race and gender: the EHRC provided rationales, which is beneficial as it provides a comprehensible visual framework towards the intersectional characteristics.

Throughout 2022, it has been observed that an increasing amount of employers have made the decision to be actively involved in the Halo Code Initiative. This is commendable and highlights the importance of employees within the workplace and encourages celebration towards inclusivity and begins to build safe environments for individuals to express their self through their 'crowning glory.' [16]

Conclusions

As suggested previously, the inclusion of the Halo Code as law would be beneficial for employees and employers, not only to acknowledge that there is a mandated law to protect against harassment, but also to require cultural competency training within the workplace. Cultural competency training would be advantageous for everyone within the workforce as well as educational institutes, allowing them to be aware, understand and learn about the cultural values and beliefs of the issues that Black and Muslim women experience.

The positive recommendations from the EHRC radiate significant positive steps in the right direction. Proposing for Black educators and role models to play an impactful role within education opens the doors to support and understanding, not only for educators, but also for the young people in the environment, who then become part of the workforce leading to a positive working environment.

[15] Government Equalities Office, 'Equality Bill: Assessing the impact of a multiple discrimination provision' (April 2009) <https://data.parliament.uk/DepositedPapers/Files/DEP2009-1229/DEP2009-1229.pdf> accessed 28 December 2022.
[16] Crystal Powell, 'Bias, Employment Discrimination, and Black Women's Hair: Another Way Forward' (2018) 2018 BYU L Rev 933.

The above has demonstrated both law's success and deficiencies. The law has been successful in regulating harassment at work in terms of the definition provided by the Equality Act 2010, as well as dealing with general harassment claims. To reiterate, the duty of the law is to ensure that everyone is protected and can call on the law to assist them. By providing the platform for Black and Muslim women to feel protected is essential in order to deter the normalisation of harassment within education and the workplace.

Prior developments would suggest that the law is failing to regulate harassment in the workplace specifically in relation to Black women and their hair. Recent developments would indicate that there is steady progression being made, which begins at the formative educational institutions. This is positive and is surely leading in the right direction in supporting individuals' characteristics. This allows individuals the choice to wear their afro-textured hair or hairstyles accompanied by religious, cultural, or other protected characteristics in order to create policies that foster collectiveness and inclusivity. On the other hand, the law remains behind the US as the law has yet the suggested statutory guidance as the US has with the CROWN Act. Arguably, this issue does not position itself at the bottom of the agenda as previously argued, but rather it is on legislators' radars to be an important issue ripe for amendment. Support for this issue is paramount, and UK law needs to urgently work on this reform to help individuals, especially those that hold more than one protected characteristic, so that any claims of harassment can be dealt with effectively and appropriately.

PRISONERS' RIGHTS

Prisoners, free speech, privacy and access to pornography

Chocholac v Slovakia (App. No. 81292/17), decision of the European Court of Human Rights 7 July 2022

Dr Steve Foster*

Introduction

In *Golder v United Kingdom*,[1] the European Court of Human Rights rejected the claim that a prisoner's right of access to the courts and legal advice was impliedly restricted under the Convention, insisting instead that any restriction had to meet the requirements of legality and necessity in the qualifying provisions of the relevant article. Equally, in *Raymond v Honey*,[2] the UK House of Lords stressed that prisoners retain all civil rights that are not taken away either expressly or by necessary implication. The phrase 'necessary implication' of course opens up the possibility of imposing restrictions on prisoners' rights because they are prisoners. There is a strong public perception that prisoners forego their rights on incarceration and that the taking away of such rights is a necessary and justified punishment for their crimes. In *Boyle and Rice v United Kingdom*,[3] the Court stated that:

> When assessing the obligations imposed on the Contracting States by Art 8 in relation to prison visits, regard must be had to the ordinary and reasonable requirements of imprisonment and to the resultant degree of discretion which the national authorities must be allowed in regulating a prisoners' contact with his family. (At para 74).

Further, in *Dickson v United Kingdom,*[4] the European Court accepted that it was permissible for the prison authorities to take notice of public confidence in the penal system and to interfere with the prisoner's rights as part of the sentence:

> …whilst reiterating that there is no place under the Convention system… for automatic forfeiture of prisoners' rights based purely on what might offend public opinion, the Court nevertheless accepts that the maintaining of public confidence in the penal system has a legitimate role to play in the development of penal policy within prisons (at para 33).

A recent decision of the European Court of Human Rights explores these conflicting and complex theories in the context of the prisoner's right to private life and freedom of expression. In particular, it concerned the question whether prison authorities can restrict a prisoner's access to pornographic materials, and if so to what extent and for what purpose. Although the Court found that the prisoner's rights had been interfered with disproportionately on the facts, strong dissenting judgments evidence a difference of judicial opinion in this area.

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[1] (1975) 1 EHRR 524.
[2] [1980] AC 1.
[3] (1988) 10 EHRR 425.
[4] (2007) 44 EHRR 21.

Facts and decision in *Chocholac*

The applicant is serving a life sentence for murder. During a routine search of his maximum security cell, a magazine was found which had explicit pictures pasted on to its pages. The material was found to be pornographic in nature and a threat to morality within the meaning of s.40 (i) of the Execution of Prison Sentences Act (EPSA). The material was confiscated, and disciplinary proceedings were opened against him; a reprimand was then issued under s.52 (3) (a) of the Act. A case was subsequently brought before the Slovakian Constitutional Court by the applicant based on Articles 8 and 10 of the Convention: that the images formed part of his private life, and that they had a "soothing and positive impact on him, especially as he was excluded from social life". It was also argued that s.40(i) of the Act was wrongly applied in that it was only an offence to "produce or procure and then put into circulation pornography that involved disrespect towards human beings, violence, zoophilia or … other pathological sexual practices". The Constitutional Court dismissed the applicant's claim, finding that pornography only fell within the remit of private life if it depicted the person concerned or a scene from their intimate sphere. The applicant then brought an application under the Convention, complaining that the sanction he received for the possession of explicit photographs violated his Convention rights; the Court deciding to deal with the case under Article 8 only.

After finding the case admissible, the Court held (by a majority of 5 to 2) there had been a violation of Article 8. The Court reiterated that prisoners continue to enjoy all the fundamental rights and freedoms save for the right to liberty and that possession of pornographic material is not normally against the law in the respondent State.[5] Nevertheless, in this case possession was forbidden by a rule that had been enforced through confiscation and the imposition of a disciplinary sanction. Accordingly, the seizure constituted an interference with the right to respect for private life under Article 8 and it was thus necessary to examine whether the interference was in accordance with the law, pursued a legitimate aim, and was necessary in a democratic society.[6]

The Court noted that legal basis for interference was Section 40(i) of the Act and, thus, in accordance with the law.[7] It then noted that the legal provision in question only sought to protect morality, and not order or the rights or freedoms of others. Accordingly, the Constitutional Court's reliance on notions of order and the rights or freedoms of others had been purely abstract, and without any link to the facts of this case.[8] In any case, the Court held that it was not necessary to take a definitive stance as to whether the disputed measure pursued a legitimate aim because it considered that, in any event, it was not necessary in a democratic society. [9]

Examining that question, the Court observed that necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued, but that the facts of the case did not correspond to such a need.[10] This was because the relevant material was "kept in the applicant's private sphere and destined exclusively for his individual and private use".[11] Thus, the core of the problem

[5] *Chocholac v Slovakia,* at 52.
[6] *Chocholac v Slovakia,* at 55.
[7] *Chocholac v Slovakia,* at 58.
[8] *Chocholac v Slovakia,* at 60-61.
[9] *Chocholac v Slovakia,* at 63.
[10] *Chocholac v Slovakia,* at 64.
[11] *Chocholac v Slovakia,* at 68.

was the underlying ban and not the sanction. While there is a wide margin of appreciation afforded to states in determining social needs, a restriction on Convention rights of prisoners cannot be justified solely on what would offend public opinion.[12] The contested ban therefore amounted to a general and indiscriminate restriction and, as a result, a fair balance had not been struck between the competing public and private interests involved, which led to a violation of Article 8.[13]

Dissenting, judges Wojtyczek and Derencinovic opined that the claimed interference with the prisoner's Article 8 rights failed to meet a sufficient threshold of severity or seriousness to constitute a violation.[14] On the question of whether there was a legitimate aim for the restriction, Judge Wojtyczek felt that a general ban on pornographic materials in prisons pursued several legitimate interests. First, Slovakia is a State Party to the International Convention for the Suppression of the Circulation of and Traffic in Obscene Publications, which requires contracting parties to take measures aimed at suppressing the circulation of such material.[15] The judge also cited several materials that argue that pornography is widely considered a significant cause of violence against women.[16] He also disagreed with the majority's decision that each ban should be reviewed on a case-by-case basis to ensure the balancing of competing interests. In his view, a case-by-case review would go against the preservation of order in prisons, which requires the enactment of general rules regulating the possession of objects by prisoners in their cells.[17] Disagreeing with the majority, in his view general measure may be a more feasible means of achieving the legitimate aim than a provision that allows a case-by-case examination.[18]

In finding that the inconvenience suffered by the applicant did not give rise to an issue of a violation of his privacy rights under Article 8, Judge Derenčinović stressed that the majority failed to consider two elements: the purpose for which the seized material was used, and the consequence of the seizure for the applicant.[19] Thus, he felt that the use of materials should not be seen as "compensation" for a ban on intimate visits.[20]

The decision in *Chocholac* and prisoners' democratic rights

This decision raises a number of fundamental issues regarding the protection and limitation of prisoners' democratic rights. As we have seen above, in *Dickson* and in *Boyle and Rice*, the European Court has accepted that restrictions can be permissible even if they might not be regarded as valid outside the prison environment. This does not necessarily accept the principle of automatic forfeiture, but does allow the state a broader discretion in restricting such rights, and of putting forward legitimate reasons for such restriction. This is evident throughout most of the case law under Article 8, both from the European Court and the domestic courts in the United Kingdom.

[12] *Chocholac v Slovakia,* at 69.
[13] The Court awarded the applicant €2,600 in respect of non-pecuniary damage, plus any tax that may be chargeable (five votes to two). The Court (unanimously dismissed the remainder of the applicant's claim for just satisfaction.
[14] *Chocholac v Slovakia,* dissenting opinion, at 2.
[15] *Chocholac v Slovakia,* Ibid, at 3.
[16] *Chocholac v Slovakia,* Ibid, at 3
[17] *Chocholac v Slovakia,* Ibid, at 7.
[18] *Chocholac v Slovakia,* Ibid, at 8.
[19] *Chocholac v Slovakia,* dissenting opinion, at 4-5.
[20] *Chocholac v Slovakia,* Ibid, at 5

Prisoners and the right to private life

As noted in the introduction, the European Court has indicated that it will give member states a wide margin of appreciation in regulating the private and family life of prisoners, for example, in matters such as family visits. Thus, in *Boyle and Rice* v *United Kingdom*,[21] in rejecting claims made by prisoners against restrictions placed on their visiting rights, it stated that regard must be had to the ordinary and reasonable requirements of imprisonment and to the resultant degree of discretion that the national authorities must be allowed in regulating a prisoner's contact with his family.[22] In general, therefore, the Strasbourg Court and the domestic courts have taken a 'hands-off' approach with regard to prison regulations that interfere with the prisoner's private and family life, stating that the prison authorities are better placed to determine the type and level of restrictions in this area.[23]

Thus, notwithstanding restrictions on private and family life need to be justified as being for a legitimate purpose and be proportionate, the courts continued to provide the authorities with a relatively wide margin of appreciation in this area, upholding restrictions that are reasonably related to factors such as good order and discipline.[24]

Prisoners and the right to private sexual life

Although the European Court has confirmed that the right to private life includes the right to a private sexual life, there is little authority for the prisoner's general claim to a private sexual life. Thus, in *X* v *United Kingdom*[25] the European Commission held that there was no violation of the prisoner's convention rights when prisoners were not allowed conjugal visits and this stance has been maintained in subsequent cases.[26] Despite the above approach, in domestic law prisoners enjoy a limited right to sexual life. In *R* v *Secretary of State for the Home Department, ex parte Fielding*,[27] a policy whereby male prisoners were only provided with condoms if they could prove that they were at specific risk of contracting AIDS or HIV was declared unlawful.[28] The case was not decided on Convention principles, although it was held that Article 8 could inform the court on the question of the rationality of the policy; and the court held that prisoners did not have a general right to be supplied with condoms on demand.[29]

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[21] (1988) 10 EHRR 425.

[22] Thus, in that case the prisoners could not complain when their visiting and contact rights had been reduced because of their transfer to another prison with a less generous regime.

[23] This is particularly so where the prisoner poses a risk because of the nature of their offence or subsequent behaviour: see *R. (on the application of Syed) v Secretary of State for Justice* [2017] EWHC 727 (Admin); [2017] 4 W.L.R. 101 (QBD (Admin)); although a breach of common law procedure was found. See also *R (AB) v Secretary of State for Justice* [2017] EWHC 1694 (Admin), with respect to controls in youth offender institutions.

[24] In *R* v *Ashworth Hospital Authority, ex parte E*, *The Times*, 17 January 2002, it was held that the decision of a special hospital to refuse a male patient's request to dress as a woman was justified under the terms of Article 8(2) of the Convention on security and therapeutic grounds.

[25] (1979) 2 DR 105.

[26] See also *ELH and PBH* v *United Kingdom* [1998] EHRLR 231.

[27] Unreported, decision of the High Court, 5 July 1999.

[28] See Delphine Valette, 'AIDS Behind Bars: Prisoners' Rights Guaranteed' (2002) Howard Journal of Criminal Justice, 107.

[29] See also *R* v *A Hospital, ex parte RH*, decision of the Administrative Court, 30 November 2001, where the applicant, who was detained under the Mental Health Act 1983, unsuccessfully challenged the hospital's policy of not providing condoms to patients, claiming that it was irrational and contrary to his Convention right to private life.

However, in *R. (Hopkins) v Soxedo/HMP Brozenfield*,[30] the domestic courts displayed a great deal of deference with respect to allowing prisoners to have intimate relationships in prison. Indeed the decision appears to accept the automatic forfeiture of prisoners' Article 8 rights. In this case, a prisoner applied for judicial review of the decision to cease to allow her to share a cell with her civil partner. The prison had decided to remove her partner from the claimant's cell pursuant to the "intimate relationship restriction" in its Decency/Managing Relationships Policy, which provides that it not accepted that women in an intimate relationship are to share a cell. On the question of whether the prisoner's Article 8 rights had been violated, it was held that the prisoner's article 8 rights had not been engaged or infringed as any such claim by a prisoner had to include consideration of the necessary restrictions of prison life.[31] In the court's view, a serving prisoner's article 8 rights were different and much more limited than those of free persons: being a prisoner inevitably curtailed the claimant's right to choose when and how she could associate with others. Consequently, the decision did not of itself constitute an infringement of the claimant's article 8 rights, as it was inherent in the prison sentence and was not of such a degree that her art.8 rights had not been respected. She and the interested party could mix for as long as they liked during the periods when they, like all other prisoners, were not locked in their cells. The fact that they could not share a cell and that the claimant could not receive care and support from her partner when they were locked in their cells did not mean that her article 8 rights were engaged and infringed.[32]

The court then decided that even if article was engaged, the prison's decision had been justified under article 8(2), which allows for lawful and necessary restrictions. The decision had been taken in accordance with law because of the terms of the policy, in particular the intimate relationship restriction, and it had pursued the legitimate aim of promoting good order and discipline in the prison, which was necessary for the prevention of disorder that could arise if same-sex partners were allowed to share cells. Further, in the court's view, the policy was proportionate to its aim.

The right to marry and found a family

Article 12 of the Convention guarantees the right to marry in accordance with the law, and in *Hamer* v *United Kingdom*,[33] the European Commission of Human Rights held that the prohibition on prisoners marrying while in prison struck at the very essence of the right guaranteed by Article 12 of the Convention.[34] However, the right to found a family whilst in prison has been restricted not only by the absence of a universal right to conjugal visits, but by cases where the prisoner has been denied a request to begin a family via artificial insemination. In *R* v *Secretary of State for the Home Department, ex parte Mellor*,[35] a prisoner serving a life sentence for murder claimed that he had the right to artificially inseminate his wife. The Secretary of State had a policy allowing artificial insemination in exceptional cases, but refused the applicant permission because he and his wife could start a family on his release. The Secretary of State also took into account the fact that as the relationship had not been tested outside prison it would not be in the best interests of any

[30] [2016] EWHC 606 (Admin).
[31] Applying the decision of the European Court in *Nowicka v Poland* (30218/96) [2003] 1 F.L.R. 417.
[32] *Applying R (Bright) v Secretary of State for Justice* [2014] EWCA Civ 1628.
[33] (1982) 4 EHRR 139.
[34] In *R (Crown Prosecution Service)* v *Registrar-General of Births, Deaths and Marriages* [2003] 2 WLR 504, it was held that it was not lawful to prevent a prisoner from marrying even where the marriage would make the wife a non-compellable witness for the prosecution in his forthcoming trial.
[35] [2001] 1 WLR 533.

child for permission to be granted. The High Court held that those articles did not guarantee to a prisoner the right to found a family while in prison. The decision was upheld by the Court of Appeal, which found that the restriction was for a legitimate aim and was proportionate in the circumstances. Although the Court of Appeal held that the prisoner might, in exceptional circumstances, be able to claim the right to artificially inseminate his wife; it was satisfied that no such circumstances existed in the present case. This approach was also adopted by the Scottish courts in *Dickson* v *Premier Prison Service*,[36] where it was held that it was not irrational or unlawful to refuse a prisoner's request to allow him to artificially inseminate his wife, even though on his release his wife would be 51 years of age and unlikely to be able to conceive. The court held that the likelihood of procreation on his release was only the starting point for the Secretary of State to consider. He was entitled to take into account the fact that his wife was claiming benefits, the welfare of the child, the implications of creating single-parent families and public concern about deterrence and punishment.

An appeal under the European Convention was initially unsuccessful and in *Dickson* v *United Kingdom*,[37] the European Court held that the policy rightly took into account matters which reflected public concern and the Secretary's application of those factors to the particular case was both legitimate and proportionate.[38] However, on reference to the Grand Chamber it was held that there had been a violation of Article 8 on the facts.[39] The Grand Chamber accepted that the Secretary of State could legitimately take into account the welfare of the child in making his decision. However, it held that the policy, and its review by the courts, did not strike a proper balance between the competing interests on the one hand of the applicants and on the other of the public interest in regulating and refusing such facilities.

A more robust approach has been taken with respect to challenges to prison mother and baby policies. The right of mothers to keep their babies with them during their sentence was raised in *R* v *Secretary of State for the Home Department, ex parte P and Q*.[40] where the Court of Appeal held that a blanket policy subjecting every mother to its provisions irrespective of individual family circumstances was unlawful. The Prison Service was required to consider whether a proposed interference with the child's family life was justified by the legitimate aims recognised by Article 8(2) of the Convention and to strike a fair balance between those aims. Although the Prison Service was entitled to adopt a policy that attempted to balance the rights of family life with the best interests of the child, in the case of one prisoner the policy would have a disproportionately detrimental effect on the child and the mother. The case is important in recognising the principle that a prisoner does not forego their fundamental rights on incarceration, and is a good example of the courts insisting that fundamental rights should not be compromised by inflexible policies that bind the administration and which fail to take account of the particular circumstances of any particular case.[41]

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[36] [2004] EWCA Civ 1477. See Helen Codd, 'Regulating Reproduction: Prisoners' Families, Artificial Insemination and Human Rights' [2006] EHRLR 39. See also Jackson, Prisoners, Their Partners and the Right to Family Life [2007] 19 (2) CFLQ 239.
[37] (2007) 44 EHRR 21.
[38] See Helen Codd, 'The Slippery Slope to Sperm Smuggling: Prisoners, Artificial Insemination and Human Rights' (2007) 15 Med Law Rev 220.
[39] *The Times*, 21 December 2007.
[40] [2001] 3 WLR 2002.
[41] Contrast *B v S* [2009] EWCA Civ 548, where it was held that there was no violation of Article 8 when a woman had been committed to prison without being allowed initially to have her baby with her (because a

Prisoners and free speech

With respect to free speech, the majority of cases concerning prisoners' expression have been dealt with under Article 8 of the Convention,[42] and the Court dealt with the present case under this Article. The Court had previously accepted that Article 8 also protects the right to freedom of expression. Thus in *Silver v United Kingdom,*[43] both the European Commission and the European Court considered that in the context of correspondence, the right to freedom of expression was guaranteed by Article 8 of the Convention.[44]

That prisoners enjoy a general right to free speech was also endorsed in *Bamber v United Kingdom*,[45] where a prisoner had been disciplined for breaking prison rules on contacting the media. Although the application was declared inadmissible because the interference was seen as a reasonable and necessary method of exercising effective control over communications with the media by the telephone,[46] the Commission accepted that the applicant had the right of freedom of expression under Article 10 and that such a right had been interfered with. Accordingly, although the applicant had other methods of communication with the media open to him, the restriction on his right to communicate with the media by telephone amounted to an interference with his right of freedom of expression. The case thus appears to confirm that any restriction on a prisoner's freedom of expression must relate to real issues of good order and discipline in prisons, and not to mere concerns of public confidence and objection raised by the fact that the speaker is a prisoner.

Turning to the present case, it would appear to be valid to restrict C's access to pornography if the state could point to a specific harm caused to good order and discipline in the prison, or the prisoner's health and rehabilitation. Thus, the majority insist that each case is dealt with on its merits rather than by a general, blanket rule. The majority also question whether there was any legitimate aim in this case, as the legal provision was concerned with morality, and the state's arguments based on order and discipline. In that sense, it is interesting that the Court moved to the question of proportionality without laying down further guidance on the legitimate aims for restricting prisoners' speech and private life.

With respect to UK law, the domestic courts have not provided clear guidance in this area. In *R v Secretary of State for the Home Department, ex parte O'Brien and Simms*[47] the House of Lords declared the Home Secretary's policy restricting journalists' reporting when visiting prisoners as unlawful.[48] However, the case did not establish that a prisoner had a general right of free speech in domestic law, and left open the question whether prisoners lose their right of free speech as a necessary incident of imprisonment. Thus, Lord Steyn stressed that the prisoners' claims were not based on the right to free speech in general, but

written application had to be made). Although the Article 8 rights of the baby had been engaged, and the judge had not given sufficient weight to this when sentencing, this did not demand that her sentence be postponed for 6 months.

[42] Guaranteeing, *inter alia*, the right to correspondence. For example in *Golder v United Kingdom*, note 1, the Court was dealing with alleged violations of arts 6 and 8 only, and in *Boyle and Rice v United Kingdom*, note 3, the Court was dealing with alleged violations of arts 8 and 13.

[43] (1983) 4 EHRR 537.

[44] Ibid, at para 107. See also *McCallum v United Kingdom* (1991) 13 EHRR 597.

[45] Application No. 33742/96, admissibility decision of the European Commission 11 September 1997.

[46] The Commission found that the new rule was for the legitimate aims of preventing disorder and for the protection of morals and/or the rights of others.

[47] [1999] 3 All ER 400. See also Foster, 'Do Prisoners enjoy the right to free speech?' [2000] EHRLR 393.

[48] In *R (A) v Secretary of State for the Home Department* [2003] EWHC 2846 (Admin), it was held that article 10 of the European Convention was not broken by requirements for the monitoring of journalists' interviews with asylum seekers detained under s.21 of the Anti-Terrorism, Crime and Security Act 2001.

were limited to a very specific context: the right of the prisoners to seek justice via the oral interviews with the journalists. His Lordship then considered the value of free speech in particular contexts:

> Not all types of speech have an equal value. For example, no prisoner could ever be permitted to have interviews with a journalist to publish pornographic material or to give vent to so-called hate speech. Given the purpose of a sentence of imprisonment, a prisoner can also not claim to join in a debate on the economy or on political issues by way of interviews with journalists. In this respect the prisoner's right to free speech is outweighed by deprivation of liberty by the sentence of a court, and the need for discipline and control in prisons.''[49]

In addition, their Lordships stressed that any right to freedom of expression was subject to rigid control by the prison authorities. For example, Lord Hobhouse accepted that the right to communicate with professional journalists needed to be controlled and regulated as a necessary part of running a penal institution.[50] His Lordship then accepted that some measure of control was permissible, provided it did not go beyond what was reasonably necessary,[51] and that the need to control such visits ought to be vested in and exercised by the prison governor.[52]

The passing of the Human Rights Act 1998 allowed the domestic courts to apply principles of necessity and proportionality when questioning legislative and administrative acts that impinge on the human rights of prisoners.[53] However, the case law is inconsistent, particularly where the prisoner is not using their democratic rights to augment broader principles of justice and the public interest, as in *O'Brien and Simms.*

A more positive approach was taken in *R (Hirst) v Secretary of State for the Home Department*,[54] a case where a prisoner had conducted a number of interviews with radio stations over the telephone on matters concerning prison life, but contrary to Prison Service Order 4400.[55] He had applied for permission to contact the media by telephone on matters of legitimate public interest relating to prisons and prisoners, but the request was refused because the claimant could exercise his right of free speech by writing to the media, rather than speaking to them on the telephone. The judge stressed that any interference with the right to freedom of expression had to comply the doctrine of proportionality,[56] and that the

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[49] [1999] 3 All ER 400 at 408, g-h. In this respect, his Lordship's general views reflect those of Kennedy and Judge LJJ in the Court of Appeal.

[50] Ibid. at 418, f-g. In the High Court Latham J had concluded that Rule 33 of the Prison Rules 1964 was lawful in covering the effect of inmate's activities on the interests of other persons. Latham J relied on the decision in *R. v. Secretary of State for the Home Department, ex p Bamber* [1996] 2 WLUK 252, which upheld the legality of restrictions imposed on prisoners contacting the media by telephone.

[51] [1999] 3 All ER 400, at 420, c-e, referring in particular to *Campbell v United Kingdom* (1992) 15 EHRR 137. His Lordship also relied on *R. v. Secretary of State for the Home* Depar*tment, ex p Leech* [1993] 4 All ER 539, and the Canadian case of *Solosky v R* (1979) 105 DLR (3rd) 745, which advocated basically the same test.

[52] *Ibid* 423, g-j, citing Judge LJ in *R v Secretary of State for the Home Department, ex p O'Brien and Simms* [1998] 2 All E.R. 491, at 510.

[53] *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532.

[54] [2002] 1 WLR 2929.

[55] This provides that prisoners must not make calls to the media if it is intended, or likely, that the call will be used for publication or broadcast. The paragraph declares that a prisoner may make a written application to do so, but that permission will only be granted in exceptional circumstances and that prisoners should normally communicate with the media by written correspondence.

[56] *Ibid*, at 2939, F (para. 29), citing the House of Lords' decision in *R v Secretary of State for the Home Department, ex parte Daly*, n 53.

question of whether the restrictions were unjustified had to be established by applying the principle of proportionality, albeit against the backcloth of the prison environment.[57] The onus was on the party seeking to interfere with Article 10 to show that the interference is designed to meet a legitimate objective, that the means adopted are rationally connected to that objective, and that the Convention right is not impaired more than is necessary to achieve that objective.[58] The judge accepted that some restrictions had to be placed on the prisoner, for example, a prisoner could not attend any public meetings or debates outside prison. This was a necessary consequence of the prisoner being locked up and his or her loss of liberty would thus impact on the enjoyment of his Convention rights.[59] On the other hand, he referred to a number of cases where the courts had upheld the freedom of speech of prisoners where it was directed at securing another important right of the citizen, such as access to the courts.[60]

The decision in *Hirst* recognizes the increased importance of freedom of expression and freedom of the press, stressing the need to show an overriding justification for any interference with such a right. Most significantly the decision modifies the view that prisoners lose their general right of freedom of expression on incarceration, Elias J rejecting the notion that the restrictions placed on a prisoner's right to contact the media on matters relating to prisons and prisoners were part and parcel of the sentence itself. Instead, the prisoner, in this case at least, retains the fundamental right to freedom of expression, placing the onus on the Home Secretary and the prison authorities to justify any restrictions by reference to proportionate measures that pursue the legitimate aim of maintaining security and order in prisons.

However, the decision in *Hirst* does not question the validity of Lord Steyn's statement that in some respects a prisoner's right to free speech is affected by and outweighed by deprivation of liberty by the sentence of the court. Thus, the subsequent decision of the Court of Appeal in *R (Nilsen) v Secretary of State for the Home Department and another* [61] accepted that the prison governor and the Home Secretary can take into account the views and sensibilities of the public and the prisoner's victims in placing restrictions on freedom of expression. It also held that restrictions on prisoners' speech do not have to be related to matters of good order and discipline within the prison gates.

The case was brought by Nilsen, a whole life sentence prisoner, who argued that prison rules that prohibited publication by the prisoner of his criminal activities was *ultra vires* the Prison Act 1952 and contrary to Article 10. The High Court rejected the argument that the Home Secretary's powers did not extend beyond the prison walls and were confined to good order and discipline within the prison.[62] The Home Secretary could concern himself with consequential effects outside prison and it followed that he could restrict a prisoner's freedom of speech in pursuance of the legitimate aims of, *inter alia*, the prevention of disorder or crime, the protection of morals and the protection of the rights of others. On appeal, Lord Phillips MR opined that one legitimate aspect of a sentence of imprisonment was to subject the prisoner's freedom to express himself outside the prison to appropriate control. Thus, criminals who were deprived of their liberty by imprisonment were deprived

[57] Ibid, at 2940, B-E (para. 31).
[58] Ibid, at 2941, C (para. 33), citing d*e Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Land and Housing* [1999] 1 AC 69.
[59] Ibid, at 2943, H-2944A (para 42).
[60] Ibid, at 2944, B-F (paras 43 to 45), citing *Raymond v Honey*, note 1.
[61] [2004] EWCA Civ 1540; [2005] 1 WLR 1028.
[62] *The Times*, 2 January 2004.

of enjoyment of their communication with the outside world, save in so far as the prison authorities permitted such.[63] The wording of the regulation drew the line appropriately between what was and what was not acceptable conduct on behalf of a prisoner and fell within the Home Secretary's powers conferred by the Act.[64]

With respect to the prisoner's right to access pornography, in the UK the matter seems to be one for the discretion of the prison governor, each governor allowing access to soft porn pornography in certain prisons. However, with respect to legal challenge, the limited case law in this area suggests that the authorities are free to regulate the access of such materials to prisoners.

In *Morton v HMP Long Lartin,*[65] a prisoner applied for judicial review of a decision of the governor to refuse him permission to receive specific pornographic magazines, arguing that the decision breached his rights under Article 10 of the Convention, as given effect to by the Human Rights Act 1998. Specifically, it was argued that the refusal was disproportionate given that what the prisoner sought to do did not present any threat to morality or order within the prison. Refusing the application, the judge held that a prisoner was not in the best position to determine how his interests were to be balanced with the interests and safety of the rest of the prison population. Thus, the determination by the governor to withhold the magazines amounted to an exercise of his discretion based on circumstances peculiar to that establishment at that time, made within the remit of an adequately disclosed and obvious policy and was therefore not in breach of Article. The judge ruled as follows (at para 9):

> In my judgment, there could be no prospect of the court in this case, on the range of issues which Mr Morton has raised, concluding that the Governor's decision was not permissible having regard to the rights to which prisoners are guaranteed by the Convention. The Governor must be accorded a wide margin of judgment in this matter. The court would be bound to pay deference to his position as the Governor of a particular prison, where he has responsibility for all. In my judgment, the pointers are all one way, not because there is absolutely no argument for the point of view Mr Morton puts forward, but because, in my judgment, the court would see no basis for setting aside the exercise of judgment which has been made by others.

The majority decision in *Chocolate* presents a very different view on this matter, suggesting that the prisoner enjoys the prima facie right to such access and that any restriction has to be justified on a case-by-case basis, with the state required to offer sound evidence on legitimate grounds.

Conclusions

It is difficult gauge the importance of the majority decision in *Chocholac* on the enjoyment of prisoners' Article 8 (and 10) rights. Although the Strasbourg Court has insisted that restrictions on prisoners' democratic rights have to be justified under the established principles of legitimacy and proportionality, it has offered a great area of discretion to prison authorities in restricting both private and family life and prisoners' free speech. In doing so,

[63] His Lordship also distinguished the present case with the decision of the House of Lords in *O'Brien and Simms*. There court was concerned with a blanket ban, whereas the present case was concerned with a tightly drawn restriction on a prisoner writing about his crimes, which was subject to an exception covering serious representations about conviction or sentence or part of serious comment about crime or the criminal and penal system.
[64] Ibid, at 1038, F (para 29).
[65] [2002] EWHC 3082 (Admin).

it has also accepted that such restrictions can be greater than those tolerated outside the prison environment. Thus, although it has eschewed the principle of automatic forfeiture, it has accepted that good order and discipline in prison, together with the nebulous concept of public confidence in the state's criminal justice system, are capable of justifying most restrictions on the prisoners Article 8 and 10 rights.

It is suggested that the majority's decision on both legitimacy and proportionality is correct and in line with previous jurisprudence in this area. As the basis of the legal restriction was public morals, rather than good order and discipline or the rights of others, then a blanket ban on prisoners accessing such information should be considered disproportionate, particularly as the prisoner was to use the material for his own private purpose. If on the other hand the aim of the law, and its application in this case, was to uphold prison discipline, to prevent crime, or to affect the rehabilitation of the prisoner, then previous case law would suggest that such a restriction would be lawful under the Convention. The minority's view reflected those aims, but if the law was not passed, or applied, for those purposes, the restriction must be regarded as both illegitimate and disproportionate.

Despite the majority's decision in this case, it is still likely that most restrictions on the prisoner's right to enjoy their private sexual life, and freedom of expression, are capable of being justified under the qualifying provisions of Articles 8 and 10. What the case has illustrated is that some judges embrace the principle of automatic forfeiture more than others, and are thus prepared to validate restrictions without robust application of the principles of legitimacy and necessity. The majority decision is welcome for that reason, but the decision should not be seen as introducing a new era in the enjoyment of prisoners' democratic rights, or the reduction of the authorities' wide discretion in restricting those rights.

CASE NOTES

Criminal Law – Murder – domestic violence – self-defence – householder defence

R v Magson [2022] EWCA Crim 1064

Court of Appeal (Criminal Division)

Facts

The appellant and the victim had been in a volatile relationship. When the relationship began, the victim moved into the appellant's house where she lived with her daughter. On 26 March 2016, the appellant and victim went out separately with their own friends. They met up together later in the evening when the victim had been acting aggressively. They returned home and were heard to be arguing loudly.

The Crown's case is that when they reached the front door, the appellant entered the house alone. The victim remained outside, banging on the door and asking to be let in. The appellant then armed herself with a knife, opened the front door, and stabbed him. The appellant's case differed from this. She claimed that they had entered the house together. He had accused her of having an affair, grabbed her around the neck and pushed her against the kitchen sink. She grabbed an object from the sink which she used to hit him with. She claimed that when she did this, she did not intend to cause him serious harm and merely wanted to stop his attack on her. The object in question turned out to be a knife, and her attack on him resulted in a stab wound to his chest.

When the emergency services arrived, the appellant told the police that she did not know how his injuries had been caused. Shortly after, the victim died from his injuries. The appellant was arrested and the knife was found later the following day in a bin at a different address.

The appellant was convicted of murder following a jury trial and was sentenced to life imprisonment with a minimum term of 17 years, less 136 days served on remand. She appealed against her conviction for murder on the basis that she was entitled to rely on the householder defence enacted by s.76(5A) and (8A) of the Criminal Justice and Immigration Act 2008, and that the judge had erred by not including the householder defence in his summing up to the jury. At appeal, the appellant submitted that she was a householder and that if the jury concluded that the victim was a trespasser, the appellant was entitled to rely on the householder defence. The Crown, on the other hand, argued that the householder defence did not arise in this case because the deceased was not a trespasser, neither in law nor in fact.

Decision

Appeal dismissed. At trial, it had not been part of the appellant's case that she believed the deceased was a trespasser. There was no evidence or suggestion that the appellant had ever thought that the deceased was a trespasser at the time of the stabbing. As such, there was no evidential basis on which the householder defence could arise. Therefore, it would have

made no difference to the outcome had the trial judge refined his direction to the jury on self-defence to include the householder defence. Indeed, the appellant had claimed that she picked up and used the knife while the victim was throttling her in the kitchen. Had the jury believed her account, they would have acquitted her on the basis of common law self-defence, without the need to consider the statutory householder defence.

Commentary

The 'householder defence' is a statutory addition to the common law defence of self-defence. The purpose of the defence is to provide greater legal protection to householders who use force in order to defend themselves or their property against intruders. The common law test of self-defence has two elements, both of which must be proven for the defence to apply. The first part of the test is subjective: did the defendant believe that it was necessary to use force to defend herself from attack? The second part of the test is objective: was the force used by the defendant reasonable in all the circumstances as she believed them to be? The second part of the test was amended to accommodate a statutory 'householder defence' by sections 76(5A) and (8A) of the Criminal Justice and Immigration Act 2008. These sections provide:

> (5A) In a 'householder case', the degree of force used by D is not to be regarded as having been reasonable in the circumstances as D believed them to be if it was grossly disproportionate in those circumstances.
>
> (8A) for the purposes of this section, a 'householder case' is a case where –
>
> (a) The defence concerned is the common law defence of self-defence
> (b) The force concerned is force used by D while in or partly in a building, or part of a building, that is a dwelling…,
> (c) D is not a trespasser at the time that the force is used, and
> (d) At the time D believed V to be in, or entering, the building of part as a trespasser.'

Cases involving self-defence will often turn on whether the force used was reasonable (part two of the test). In householder cases, s.76(5A) provides that the use of force will not be regarded as reasonable if it was grossly disproportionate in the circumstances. This compares with non-householder cases where, if the force used is merely disproportionate (as opposed to *grossly* disproportionate), the force will not be regarded as reasonable, and the defence will fail. Therefore, in householder cases, the defendant *may* avail themselves of a complete defence if the force used is less than 'grossly disproportionate'. In non-householder cases, the defence will only be available if the force used is less than 'disproportionate'; a lower level altogether.

Therefore, in householder cases where the level of force used is grossly disproportionate, the defendant's use of force will be regarded as unreasonable and so the defence will fail. Conversely, where the level of force used is less than grossly disproportionate, the court will still need to determine whether the use of force was reasonable, taking into consideration all of the circumstances as the defendant believed them to be. If the force was reasonable, the defence is available, and the defendant must be acquitted. If it was not reasonable, the defence will fail. This was the basis of the Court of Appeal decision in *R v Ray* [2017] EWCA Crim 1391, following the reasoning of the High Court in the earlier *R (on the application of Collins) v Secretary of State for Justice* [2016] EWHC 33 (Admin).

In *R v Cheeseman* [2019] EWCA Crim 149, the question arose whether the householder defence could apply where the victim had entered the appellant's room in an army barracks with the appellant's consent, but later became violent and refused to leave, thereby potentially becoming a trespasser. The Court emphasised that, as appears from the wording in s.76(8A)(d) itself, the question is not whether the victim was a trespasser as a matter of law, but whether the appellant believed him to be a trespasser. Turning back to the present case, this point alone was fatal to the appellant's claim that the householder defence should have been made available to her. It was not part of her case that she believed that the victim was a trespasser. In any event, there was no evidential basis on which the householder defence could arise. The victim had lived at the appellant's address for some time, he had a key to the house, and – most critically of all –there was no suggestion that it was any part of the appellant's thinking that the victim was a trespasser at the time of the stabbing.

Strictly speaking, the appellant's case was not that she was entitled to rely on the householder defence under s76(5A) of the 2008 Act, but rather that the trial judge erred in not including the defence in his direction to the jury which may have otherwise made a difference to the outcome of the case. The appellant's evidence was that she picked up a knife from the kitchen sink and used it to defend herself while the victim was strangling her. If the jury had believed her account, they would have been bound to acquit her by virtue of the common law defence of self-defence, the requirements of which would surely have been satisfied in such a violent attack which threatened her life. Had the jury believed her account, they could have acquitted her without the need to rely on the householder defence.

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Right to die – assisted suicide – Article 8 ECHR – family wishes

Mortier v. Belgium (application no. 78017/17), decision of the European Court of Human Rights, 4 October 2022

European Court of Human Rights

Facts and decision of domestic authorities

The applicant's mother had been suffering from chronic depression for about 40 years. In September 2011, she consulted Professor D. and informed him of her intention to have recourse to euthanasia. At the end of the interview, the doctor concluded that she was severely traumatised, that she had a serious personality and mood disorder, and that she no longer believed in recovery or treatment. He agreed to become her doctor under the Euthanasia Act. Between 2011 and 2012, Mr Mortier's mother continued to consult Professor D. and other doctors in connection with the euthanasia procedure. The doctors suggested that she contact her children to inform them of her request, but she refused. However, in January 2012 she sent them an email informing them of her wish to die by euthanasia. Her daughter replied that she respected her mother's wishes; according to the case file, her son did not reply. Subsequently, she continued to meet the doctors and to reiterate her wish not to call her children, explaining that she wanted to avoid any further difficulties in her life and feared that her euthanasia would be delayed. However, she wrote a farewell letter to her children on 3 April 2012 in the presence of a person of confidence. On 19 April 2012, the act of euthanasia was performed in a public hospital by Professor D., the mother dying in the presence of a few friends.

The following day, the applicant was informed by the hospital that his mother had died by euthanasia. He sent a letter to Professor D. stating that he had not had the opportunity to bid farewell to her and that he was in pathological mourning. He also said that he had appointed a doctor to examine his mother's medical records. The doctor later noted, among other things, that the declaration of euthanasia was not in the file. In June 2013, as part of its automatic review, the Federal Board for the Review and Assessment of Euthanasia – of which Professor D. was co-chair – concluded that the euthanasia of Mr Mortier's mother had been carried out in accordance with the conditions and procedure laid down in the Euthanasia Act. In October 2013, the applicant requested a copy of the document recording the euthanasia from the Board, which, in March 2014, it refused to provide on the ground that it was prohibited from disclosing it by law. In February 2014, the applicant lodged a complaint against Professor D. with the Medical Association, but owing to the confidentiality of the proceedings, he was not informed of the outcome of his complaint. In April 2014, he then lodged a criminal complaint against persons unknown concerning the euthanasia of his mother. The complaint was first discontinued in 2017 for insufficient evidence, then, in May 2019, the judicial authorities reopened a criminal investigation into the circumstances surrounding the euthanasia. The appointed expert noted, in particular, that neither the declaration of euthanasia submitted to the Board nor its assessment could be found in the file. The investigation was finally closed in December 2020, as the prosecutor's

office had found that the euthanasia of the applicant's mother had complied with the substantive conditions prescribed by law and had been carried out in accordance with the statutory requirements.

Decision of the European Court of Human Rights

Relying on Article 2 (right to life) of the European Convention on Human Rights, the applicant alleged that the State had failed to fulfil its obligations to protect his mother's life, since the statutory procedure for euthanasia had allegedly not been followed in her case. Relying on Article 13 ECHR (the right to an effective remedy in domestic law for breach of Convention rights), he complained about the lack of an in-depth and effective investigation into the matters raised by him. The European Court decided to examine the complaints under Article 2 alone. The applicant also alleged that in failing to effectively protect his mother's right to life the State had also breached the right to private and family life (Article 8). The application was lodged with the European Court of Human Rights on 6 November 2017 and a number of non-governmental organisations were given leave to intervene as third parties.

With respect to the claim under Article 2, the Court stressed that the present case did not concern the question whether there was a right to euthanasia (*Pretty v United Kingdom* (2000) 35 EHRR 1), but rather the compatibility with the Convention of the act of euthanasia performed in the case of the applicant's mother. It further stated that the applicant's complaints had been examined from the perspective of the State's positive obligations to protect the right to life (*Osman v United Kingdom* (1997) 29 EHRR 245). The Court observed that the decriminalisation of euthanasia in Belgium was subject to the conditions strictly regulated by the Euthanasia Act, which provided for a number of substantive and procedural safeguards. The legislative framework put in place by the Belgian legislature concerning pre-euthanasia measures ensured that an individual's decision to end his or her life had been taken freely and in full knowledge of the facts. In particular, the Court attached great importance to the existence of additional safeguards in cases such as that of the applicant's mother, which concerned mental distress, and to the requirement of independence of the various doctors consulted, with regard both to the patient and to the doctor treating him or her.

In particular, the Euthanasia Act had been the subject of several reviews by the higher authorities, both prior to enactment (by the *Conseil d'État*) and subsequently (by the Constitutional Court), and those bodies had found, following an in-depth analysis, that it remained within the limits imposed by Article 2. Consequently, as regards the acts and procedure prior to euthanasia, in the Court's view, the provisions of the Euthanasia Act constituted in principle a legislative framework capable of ensuring the protection of the right to life of the patients concerned, as required by Article 2. Accordingly, there had been no violation of Article 2 under this head.

Secondly, with respect to compliance with the legal framework in the present case, the Court observed that the applicant's mother had undergone euthanasia some two months after her formal request for euthanasia and after Professor D. had ascertained that her request had been made of her own free will. This had been carried out in a repeated and considered manner, and without external pressure, and where she was in a terminal medical situation, expressing her constant and intolerable mental distress, which could no longer be alleviated and which resulted from a serious and incurable illness. That conclusion had subsequently

been confirmed by the criminal investigation conducted by the judicial authorities, which had decided that the euthanasia had indeed complied with the substantive and procedural conditions prescribed by the Act. Consequently, the Court considered that it did not appear from the material before it that the act of euthanasia carried out on the applicant's mother, in accordance with the established legal framework, had been in breach of the requirements of Article 2 of the Convention.

Next, with respect to the post-euthanasia review, the Court noted that two reviews had been carried out to verify whether the euthanasia in question had been in accordance with the law. As regards the automatic review carried out by the Federal Board, the applicant had alleged that the Board could not give an independent opinion on the lawfulness of his mother's euthanasia in so far as the case involved its co-chair, Professor D., who had not withdrawn from examining the case. The Court noted that in the present case the Board had verified, solely on the basis of the second part of the document, that is to say the anonymous part, whether the euthanasia carried out on the applicant's mother had been in accordance with the law. The Board had concluded that the euthanasia had taken place in accordance with the statutory conditions and procedure. It therefore appeared that Professor D. had not withdrawn and there was no evidence to show that the practice described by the Government, the fact of a doctor involved in the euthanasia at issue remaining silent, had been followed in the present case. The Court reiterated that the machinery of review put in place at national level to determine the circumstances surrounding the death of individuals in the care of health professionals had to be independent. While it understood that the statutory withdrawal procedure sought to preserve the confidentiality of the personal data contained in the registration document, and the anonymity of those involved, it nevertheless considered that the system put in place by the Belgian legislature for the review of euthanasia, solely on the basis of the anonymous part of the registration document, did not satisfy the requirements under Article 2 of the Convention.

The Court also noted that the procedure under the Euthanasia Act did not prevent the doctor who performed the euthanasia from sitting on the Board and voting on whether his or her own acts were compatible with the substantive and procedural requirements of domestic law. It considered that the fact of leaving it to the sole discretion of the member concerned to remain silent when he or she had been involved in the euthanasia under review could not be regarded as sufficient to ensure the independence of the Board. While being aware of the autonomy enjoyed by States in this sphere, the Court found that this defect could have been avoided and confidentiality nevertheless safeguarded. This would ensure that a member of the Board who had performed the euthanasia in question could not participate in its examination. Consequently, and having regard to the crucial role played by the Board in the subsequent review of euthanasia, the Court considered that the machinery of review applied in the present case had not guaranteed its independence, irrespective of any actual influence Professor D. might have had on the Board's decision concerning the euthanasia in question.

As regards the investigation, the Court noted that the first criminal investigation, conducted by the public prosecutor's office following the applicant's complaint, had lasted approximately three years and one month, whereas no investigative act appeared to have been undertaken by that office. The second criminal investigation, conducted under the direction of an investigating judge after notice of the present application had been given to the Government, had lasted approximately one year and seven months. In the Court's view,

taken as a whole, and having regard to the lack of diligence during the first investigation, the criminal investigation had not met the requirement of promptness required by Article 2 of the Convention. However, as regards the thoroughness of the investigation, the Court considered that in the course of the second criminal investigation the authorities had taken all reasonable steps available to them to obtain the information needed to establish the facts of the case. For example, the investigating judge had accordingly appointed a medical expert, who had examined the mother's medical file and presented his findings in a detailed forensic report. The police had also heard evidence from Professor D. Thus, in the Court's view, these findings were sufficient to conclude that the second investigation had been sufficiently thorough. In so far as the State was bound by an obligation of means rather than one of result, the fact that the criminal investigation had ultimately been discontinued, without anyone being committed for trial, did not in itself warrant the conclusion that the criminal proceedings concerning the euthanasia of the applicant's mother had not satisfied the requirements of effectiveness of Article 2 of the Convention.

Consequently, the Court found that the State had failed to comply with its procedural positive obligation because of the lack of independence of the Federal Board, and the length of the criminal investigation, but not with respect to the other claims.

With respect to the claim under Article 8, the Court noted that the Euthanasia Act obliged doctors to discuss a patient's request for euthanasia with his or her relatives only where that was the patient's wish to do so. If that was not the case, doctors could not contact the patient's relatives, in accordance with their duty of confidentiality and medical secrecy. In the present case, and in accordance with the relevant law, the doctors had suggested to her on several occasions that she should resume contact with her children, but the applicant's mother had refused each time, stating that she no longer wanted to have contact with her children. Nevertheless, at the request of her doctors, she had at one point sent an e-mail to her children, the applicant and his sister, informing them of her wish to undergo euthanasia.

The Court noted that while the applicant's sister had replied to that e-mail stating that she respected her mother's wishes, the applicant did not appear to have responded. In these circumstances, stemming from the long-standing breakdown in the relationship between the applicant and his mother, the Court considered that the doctors assisting the applicant's mother had done everything reasonable, and in accordance with the law, their duty of confidentiality and medical secrecy, and ethical guidelines, to ensure that she contacted her children about her request for euthanasia. The legislature could not be criticised for obliging doctors to respect the applicant's wishes on this point or for imposing on them a duty of confidentiality and medical secrecy. On this point, the Court reiterated that respect for the confidential nature of medical information was an essential principle of the legal system of all the Contracting Parties to the Convention, it being essential not only to protect patients' privacy but also to maintain their confidence in the medical profession and health services in general. Consequently, the Court considered that the legislation, as applied in the present case, had struck a fair balance between the various interests at stake. There had therefore been no violation of Article 8 of the Convention.

However, it is worth noting the judgments of the two dissenting judges, both of whom felt that there had been a breach of the substantive aspect of Article 2 in this case, and one judge feeling that assisted dying conflicted with the positive duty to protect life contained in

Article 2. Thus, Judge Elosegui argued that the Court had missed an opportunity to acknowledge that the *a posteriori* control system for euthanasia, being *a posteriori*, cannot be considered to offer sufficient safeguards against abuse regardless of the actual influence a person might have on the decision.

Commentary

As the Court pointed out, this was not a case where it had to consider the question whether a state had to offer assisted dying to a patient in order to comply with the Convention. This question has occupied both the European Court and the domestic courts since the seminal case of *Pretty v United Kingdom*, above. In that case, and subsequent cases in the United Kingdom, the courts have held that there is no right to assisted dying under Article 2, although there is a conditional right to assisted dying under Article 8 as the method of ending one's own life engages the right to private life and self-determination. Nevertheless, both the European and domestic courts have refused to find legislation banning assisted suicide in breach of Article 8 (and Article 14, which provides that individuals are entitled to enjoy Convention rights free from discrimination). This is due to the judicial deference offered by domestic courts towards Parliament (*Niklinson v Ministry of Justice* [2013] UKSC 38), and the margin of appreciation given by Member States by the European Court (*Pretty*).

Both courts accept that the question of assisted dying raises moral, ethical and scientific issues that make it more appropriate for the UK Parliament, and Council of Europe states generally, to decide the question within their own legislative framework. Indeed, as evidenced in the present case, there are a number of substantive and procedural safeguards that the state must consider if they are to accommodate both the 'right to die' and the state's positive duty under Article 2 to protect and preserve life. These complexities make it inappropriate for judges to rule on the compatibility of particular laws than ban assisted suicide; and from considering the wisdom of any proposals for reform (*R (Conway) v Ministry of Justice* [2018] EWCA Civ 1431; and *R (Newby v Secretary of State for Justice* [2019] EWHC 3188).

Turning to the present case, it is clear that despite there being no right to die under the Convention, a state that allows assisted dying, or the withdrawal of life treatment, is not in breach of Article 2, provided it contains safeguards to avoid unnecessary and arbitrary deaths (*Lambert v France* (2015) ECHR 545; Hans v Switzerland, decision of the European Court 20 January 2011). In *Lambert*, the European Court ruled that close relatives of a tetraplegic man did not have standing to raise complaints under Articles 2, 3 and 8 of the Convention in his name or on his behalf in respect of a decision to withdraw his artificial nutrition and hydration. It also held that in any case, by upholding the decision to withdraw treatment, the domestic authorities had not failed to comply with their positive obligation to protect life under Article The court found that both the legislative framework laid down by domestic law and the decision-making process were compatible with the requirements of Article 2. This reasoning would also apply to cases where national law allows for euthanasia.

In the present case, however, the Court was faced with two fundamental questions. First, whether the substantive and procedural safeguards were followed in this case, and whether the relevant law was consistent with those safeguards. The second question was a more novel one: should domestic law accommodate the rights of relatives to be informed in the euthanasia process, and how should that law balance such a right with the right of the patient.

The answer to these questions will of course inform any legislative framework adopted by Member States; including the United Kingdom should it pass legislation in this area.

With respect to the claims under Article 2, it is worth noting that the Court only upheld two specific claims: that the State had failed to comply with its procedural positive obligation on account of the lack of independence of the Federal Board; and with respect to the length of the criminal investigation into the death. These procedural violations occurred on the particular facts of this case, and are easily remedied by ensuring that any appearance of conflict is dealt with immediately, and that investigations are dealt with as quickly, but thoroughly, as possible. The Court's findings are not therefore an indictment on Belgium's general legal framework (leaving aside the dissenting opinions on this issue), which appeared to accommodate all the necessary safeguards to ensure compliance with the Convention and its case law.

With respect to the claim under Article 8 – that the applicant had not been sufficiently consulted before his mother's death – it is difficult to gauge the impact of the Court's ruling on the extent to which the Convention accommodates family and other participation in the assisted dying process. On the one hand, the Court states that the legislature could not be criticised for obliging doctors to respect the applicant's wishes on this point or for imposing on them a duty of confidentiality and medical secrecy. That appears to settle the conflict between the patient's wishes and the interests of the family clearly in favour of the patient and patient confidentiality. Thus, without the patient's consent the law prohibited doctors from informing others, and the Court appears satisfied with that rule. On the other hand, it noted that in accordance with the relevant law, the doctors had suggested to her on several occasions that she should resume contact with her children, but the applicant's mother had refused each time. Further, at the request of her doctors, she had sent an e-mail to her children, the applicant and his sister, informing them of her wish to undergo euthanasia. The Court then held that in these circumstances, stemming from the long-standing breakdown in the relationship between the applicant and his mother, it considered that the doctors assisting the applicant's mother had done everything reasonable to ensure that she contacted her children about her request for euthanasia. There had, *therefore*, been no violation of Article 8.

Because the Court made a ruling on all the facts, it could be suggested that it will not accept the wishes of the patient unconditionally in every case, and that doctors might have a limited duty to persuade the patient to contact and inform relatives and those close to the victim. Thus, the decision in the present case might not have solved all issues about the rights of the patient's family to take part in the procedure; indeed, they have some rights with respect to investigations post-death. Those who are seeking a change in the law in the United Kingdom, and those who might be tasked with the passing and administration of any law, will need to examine this case and its impact very carefully.

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Private life and reputation – right to a fair trial – defamation – free speech – public domain – truth

McCann and Healey v Portugal (application no. 57195/17), decision of the European Court of Human Rights, 20 September 2022

European Court of Human Rights

Facts and domestic proceedings

The applicants, Gerald Patrick McCann and Kate Marie Healy, are British nationals. In May 2007, while the applicants were on holiday with their three children in southern Portugal, their daughter Madeleine McCann, then aged three, disappeared. On the following day an investigation was opened by the prosecutor's office, whose lines of enquiry focused on a probable abduction. The investigation was entrusted to Inspector G.A. from the criminal investigation department. Biological and blood samples were subsequently detected by British sniffer dogs inside the holiday apartment and in the trunk of a vehicle that the applicants had rented a few days after their daughter's disappearance. As a result, in September 2007 the parents were placed under investigation; they were suspected of having hidden their daughter's body following her death, possibly as a result of an accident inside the apartment, and of having staged an abduction. Those proceedings were discontinued in July 2008.

In the meantime, in October 2007, Inspector G.A. was removed from the investigation and retired in July 2008. In the same month, he published a book in which he alleged, among other claims, as follows:

> Madeleine McCann died inside the apartment; an abduction was staged; death could have occurred following a tragic accident; evidence proved negligence on the part of the parents with regard to the care and safety of the children.

G.A. also gave a newspaper interview in which he repeated his theory. The book was subsequently adapted as a documentary programme, which was made commercially available from April 2009.

In consequence, the applicants brought interlocutory civil proceedings in Portugal, seeking an injunction to have the book and documentary banned, in addition to the seizure of G.A.'s assets. They then lodged civil actions against G.A, the publisher, the production company that had made and marketed the documentary, and the television channel which had broadcast it. These were dismissed by the Portuguese courts. On 31 January and 21 March 2017 respectively, the Supreme Court delivered two judgments, in which it considered that there had been no unlawful interference with the applicants' right to their reputation and that the principle of the presumption of innocence was not relevant to the case. It also noted that the statements made by G.A. had not been new, since they were set out in a police report of 10 September 2007, itself contained in the investigation file, to which the press had been given access. It further held that these statements, which had thus already been widely commented and discussed, represented a subject of public interest, and that the applicants,

who had deliberately sought media coverage, had to be regarded as "public figures", who were as a result inevitably subjected to more attentive scrutiny of their every word and deed.

Decision of the European Court of Human Rights

The applicants applied to the European Court of Human Rights, relying on Article 6 (the right to a fair hearing), Article 8 (the right to respect for private and family life), and Article 10 (freedom of expression) of the European Convention. They alleged first that the statements made by G.A. had damaged their reputation, their good name and their right to be presumed innocent, and complained that they had been unsuccessful in the proceedings before the national civil courts in establishing those allegations. The European Court decided to examine this complaint under Article 8 of the Convention, and more specifically in terms of the positive obligation of the state to respect private and family life arising from that provision. Secondly, the applicants alleged that the reasoning contained in the Supreme Court's decisions of 31 January and 21 March 2017 at the close of their civil claims had breached their right to be presumed innocent. The Court thus decided to examine this complaint under Article 6(2) of the Convention - presumption of innocence. The application was lodged with the European Court of Human Rights on 28 July 2017. Judgment was given by a Chamber of seven judges

With respect to the claim under Article 8, the Court noted that the contested statements made by G.A. in the book, documentary programme and interview concerned the applicants' alleged involvement in hiding their daughter's body, based on an assumption that they had staged an abduction and on a presumption of negligence towards her. In the Court's view, these statements were sufficiently serious to render Article 8 of the Convention applicable. It further noted that the book, the documentary based on it and the interview given by G.A. to a daily newspaper concerned a debate of public interest. It considered that the contested statements constituted value judgments which had a sufficient "factual basis", and that the elements on which the scenario advanced by G.A. was based were those which had been gathered during the investigation and had been brought to the public's attention. Additionally, this theory had been entertained in the context of the criminal investigation and had even led to the applicants being placed under investigation in September 2007. Furthermore, the criminal case had attracted extensive public interest both nationally and internationally and had given rise to considerable discussion and controversy. As the Lisbon Court of Appeal and the Supreme Court had noted, the disputed statements had undeniably formed part of a debate of public interest, and G.A.'s theory had accordingly been one of several opinions on the events.

The Court also noted that the criminal case had been discontinued by the prosecutor's office on 21 July 2008, before the publication of the book. In this respect, the Court held that, had the book been published before the decision by the prosecutor's office to discontinue the proceedings, the statements in question could potentially have undermined the applicants' right to be presumed innocent, guaranteed by Article 6(2) of the Convention, by prejudging that entity's assessment of the facts. However, given that the statements were in fact made after the case had been discontinued, it had been the applicants' reputation, guaranteed by Article 8 of the Convention, and the public's perception of them, which had been at stake, rather than any presumption of innocence or damage to their right to a fair criminal trial.

In the present case, the Court held that, even supposing that the applicants' reputation had been damaged, this had not been on account of the hypothesis put forward by G.A., but as a result of the suspicions expressed against them, which had led to their being placed under

investigation in the course of the proceedings and had given rise to extensive media attention and much controversy. Thus, the information had been brought to the public's attention in some detail even before the investigation file had been made available to the media and the book in question had been published.

With regard to the applicant's allegations of bad faith on G.A.'s part, the Court noted that the book had been published three days after the proceedings had been discontinued, which implied that it had been written, then printed, while the investigation had still been underway. In this respect, the Court held that, in choosing to make the book available for sale three days after it had been decided to discontinue the case, G.A. could, *as a matter of prudence*, have added a note informing the reader about the outcome of the proceedings. However, the failure to insert any such note could not, in itself, prove bad faith on his part. The Court noted that the documentary referred to the fact that the case had been discontinued, and that the applicants had continued their media campaign after the book's publication. In particular, they had cooperated in a documentary programme about their daughter's disappearance and continued to give interviews to the international media.

While the Court understood that the book's publication had undeniably caused anger, anguish and distress to the applicants, it did not appear that the book, or the broadcasting of the documentary, had had a serious impact on the applicants' social relations or on their legitimate and ongoing attempts to find their daughter. The Court also specified that while, admittedly, the statements in question were based on G.A.'s in- depth knowledge of the case file as a result of his role, there was no doubt that their content had already been known to the public, given the extensive media coverage of the case and the fact that the investigation file had been subsequently made available to the media after the investigation had been closed. For that reason, it held that the contested statements were merely the expression of G.A.'s interpretation of a high-profile case which had already been widely discussed. In addition, it did not appear that G.A. had been motivated by personal animosity towards the applicants.

Finally, the Court shared the Government's opinion as to the chilling effect that a ruling against G.A. would have had, in the present case, for freedom of expression with regard to matters of public interest. It further noted that, although the Supreme Court had been assessing the case at final instance, it had carried out a detailed analysis of the balance to be struck between the applicants' right to respect for their private life and G.A.'s right to freedom of expression, assessing them in the light of the criteria identified in its case-law and referring at length to the Court's case-law. Thus, having regard to the discretion ("margin of appreciation") afforded to the national authorities in the present case, the Court saw no strong reason to substitute its own view for that of the Supreme Court. It could not therefore be stated that the national authorities had failed in their positive obligation to protect the applicants' right to respect for their private life within the meaning of Article 8 of the Convention. It followed that there had been no violation of Article 8 of the Convention.

With respect to the claim under Article 6(2), the Court noted that the civil proceedings in this case related to two claims lodged by the applicants: the first claim had sought compensation on account of the alleged damage to their reputation and their right to the presumption of innocence, resulting, in their view, from the statements made about them by G.A.: the second had sought an injunction banning the sale of the contested book and documentary. In the Court's view, the civil proceedings had not therefore related to a "criminal charge" against the applicants. Further, they had not been linked to the criminal

proceedings opened after the disappearance of their daughter in such a way as to fall within the scope of Article 6(2) of the Convention. However, even supposing that Article 6(2) was applicable to the civil proceedings in issue in this case, it did not appear that, in its judgments of 31 January 2017 and 27 March 2017, the Supreme Court had made comments implying any guilt on the part of the applicants, or even suggesting suspicions against them with regard to the circumstances in which their daughter had disappeared. In consequence, the Court concluded that the applicants' complaint under Article 6(2) on account of the reasoning in the Supreme Court's judgments was manifestly ill-founded within the meaning of Article 35(3)(a) of the Convention and, as such, inadmissible.

Commentary

The decision of the Court in this case was reasonably straightforward in terms of the law and any human rights principles, despite the high profile nature of the parties to the action and the sad background to the case. The applicants had based their action in the Portuguese courts in defamation: that the publication of the book had damaged their reputation, rather than in privacy, where they would have argued that the publication of the book encroached on their reasonable expectation of privacy. The latter action, it is suggested, would be difficult to prove given the applicants high public profile in publicising the campaign for their daughter's return.

As such, although reputation is part of a person's private life, thus engaging Article 8 of the Convention, a person suing in defamation cannot claim simply on the basis that the publication displays a lack of respect for their private and family life; or, as the European Court recognised the anger, anguish and distress caused by the book's publication and any further public discussion in the media. Instead, the person has to show that the publication was capable of damaging their reputation, and the court must be satisfied that the publication has caused that damage, or further damage to the person's reputation. In defamation law, the defendant can put forward the defence of truth, as if the statement or publication is true no action in defamation can lie; although the burden is on the defendant to prove the truth, or substantial truth of the statement (*McVicar v United Kingdom* (2002) 35 EHRR 22).

Thus, if this action had been brought in the UK courts, the defendant would have relied on s.2 of the Defamation Act 2013 to show that the book merely recorded the facts: that there was public and police suspicion surrounding the applicants' involvement in the case, and that the police had indeed investigated that possibility. The book, of course, went further than mere reportage, and ventured into allegations: that on the basis of such facts the author thought that: Madeleine died inside the apartment; an abduction *was* staged; death could have occurred following a tragic accident; evidence *proved* negligence on the part of the parents with regard to the care and safety of the children". In such a case, a defendant would rely on the defence of honest opinion, under s.3 of the Defamation Act 2013. This provides that it is a defence to an action for defamation for the defendant to show that the statement complained of was a statement of opinion; that the statement complained of indicated, whether in general or specific terms, the basis of the opinion; and that an honest person could have held the opinion on the basis of any fact which existed at the time the statement complained of was published.

In the present case the defendant would argue that the basis of their opinion (that the applicants were involved and negligent) was based on existing facts (that the applicants had been questioned) and existing public and police conjecture as to their involvement. Presumably, in the present case, the courts (domestic or European) did not regard the allegations to be an independent statement of the applicant's guilt so as to deny the defence

of honest opinion. Had the applicants still been under police suspicion, the decision may have been different, but not under Article 8, but under Article 6 with respect to the presumption of innocence; see below.

If the defences under both ss. 2 and 3 fail, a defendant may then rely on the defence of public interest under s.4 of the Act, which provides that it is a defence to an action for defamation for the defendant to show that (a) the statement complained of was, or formed part of, a statement on a matter of public interest; and (b) the defendant reasonably believed that publishing the statement complained of was in the public interest. The Supreme Court of Portugal considered the applicants as 'public figures' – because of their high profile campaigning on behalf of their daughter and thus the high level of public debate created by the event – and the European Court also considered this factor. Hence, the defence would be open to a defendant in these circumstances and the question would then be whether the defendant *reasonably believed* that publication was in the public interest. In this respect the domestic courts have given the publisher a relatively wide area of discretion (*Jameel v Times* [2007] 1 AC 359) and s.4 was intended to have a liberalising effect on free speech. Thus, in the absence of bad faith (private gain is not determinative of this) and clearly irresponsible journalism, the defence would have been likely to succeed in the UK, as it did before the Portuguese courts.

The applicants' claim under Article 6 was also dismissed by the European Court, as the Court found that at no stage was the applicants' presumption of innocence compromised by the domestic proceedings. First, the proceedings were civil in nature, rather than criminal, the rule against the presumption of innocence, under Article 6(2), applying only to criminal proceedings. Second, in the Court's view, at no stage of the civil proceedings was the issue of the applicants' criminal guilt at issue, or, during those proceedings, did the domestic courts imply that the applicants were culpable. Thus, the issue for the domestic courts had been whether the reportage of the story by the author was a true account of what was already conjecture in the public domain; and not whether there was any truth in the conjecture that the applicants had been involved in the disappearance of their daughter.

The decision provides no real surprises with respect to the relationship between the right to reputation and free speech. However, many might question whether individuals, and the press, should be allowed to publish allegations causing distress to individuals or families, particularly in such a sensitive case. The liberal interpretation of defamation laws by both the European Court of Human Rights (*Lingens v Austria* (1986 6 EHRR 407) and in (UK) domestic law will provide robust defence to free speech in most cases, but the growing trend to protect individual privacy from irresponsible journalism might provide stronger grounds for claimants in cases such as the present (*Bloomberg v* [2022] UKSC 5). However, under the facts of the present case, it is likely that at most the applicants suffered no more than the inevitable anger, anguish and distress of having such allegations made in the public domain. The author and other broadcasters might well indeed be guilty of base opportunism and imprudent journalism, but that alone is not the basis of liability in defamation or privacy laws.

Dr Steve Foster, Coventry Law School, Coventry University.

Free speech – restrictions – public morality – proportionality

Bourton v France

European Court of Human Rights

The facts and domestic proceedings in *Bouton v France*

The applicant, Eloise Bouton, is a French national and who at the time of the events in question was a member of the Femen movement, an international women's rights organisation set up in Ukraine in 2008 and known for its provocative actions. On 20 December 2013, she staged a protest in the church of La Madeleine in Paris (but not during mass), by standing in front of the high altar while exposing her breasts, revealing slogans daubed across her body, and pretending to carry out an abortion using raw beef liver as a prop. The performance was brief and she left the church when requested by the choirmaster. The protest received media coverage, and in an interview with the magazine *Le Nouvel Observateur* on 23 December 2013, she explained the meaning of her action: that she had held "two pieces of beef liver in her hands, symbolising the aborted baby Jesus", and painted on her torso and back were "the slogans '344th slut' ... referring to the manifesto of 343 initiated by pro-abortion feminists in 1971 and 'Christmas is cancelled.'"

The parish priest filed a criminal complaint and applied to join the proceedings as a civil party, and on 7 January 2014, while in police custody, she explained that she had been designated by the Femen movement to stage her protest in France at the same time as similar protests by other Femen activists in various countries, and that the church of La Madeleine was chosen in France for "its international symbolism". The investigators entered in evidence a publication from the Femen-France website containing photographs with the captions: "Christmas is cancelled from the Vatican to Paris; on the altar of the church of La Madeleine, Holy Mother Eloise has aborted Jesus".

After a hearing on 15 October 2014, the Paris Criminal Court refused to refer to the Court of Cassation a priority question of constitutionality raised by the applicant, and dismissed the applicant's pleas alleging a failure to define the offence of sexual exposure and a violation of Article 10 of the Convention. Article 222-32 provides that sexual exhibition imposed in the sight of others in a place accessible to the public gaze is punishable by one year's imprisonment and a fine of 15,000 euros. When the facts are committed to the detriment of a minor under the age of fifteen, the penalties are increased to two years' imprisonment and a fine of 30,000 euros. It also rejected the argument that her action had been exclusively political and fell within the scope of her freedom of expression. The Criminal Court sentenced the applicant, on the charge of sexual exposure, to a suspended term of one month's imprisonment and, on the civil interests, ordered her to pay the parish representative 2,000 euros in respect of non-pecuniary damage and to contribute 1,500 euros to the other party's costs. The Paris Court of Appeal upheld the judgment in all respects. The applicant appealed on points of law against that judgment, but the Court of Cassation dismissed her appeal.

The decision of the European Court of Human Rights

Relying on Article 10, the applicant complained of her criminal conviction and, relying on Article 7 (no punishment without law), she complained of the vagueness and expansive interpretation of the offence of "sexual exposure".

With respect to foreseeability, the Court concluded that the applicant could reasonably have expected her conduct to entail consequences under the criminal law. Accordingly, the interference with the applicant's right to freedom of expression could be regarded as sufficiently foreseeable and therefore "prescribed by law" within the meaning of Article 10(2) of the Convention. The question therefore was whether the interference with her Article 10 rights was necessary in a democratic society.

The Court stressed that the imposition of a prison sentence for an offence in the area of political speech would be compatible with freedom of expression as guaranteed by Article 10 only in exceptional circumstances, as, for example, in the case of hate speech or incitement to violence. It noted that the sole aim of the applicant, who had not been accused of any insulting or hateful conduct, had been to contribute to the public debate on women's rights. However, the criminal sanction imposed on her for the offence of sexual exposure had not sought to punish an attack on freedom of conscience or religion, but rather the fact that she had bared her breasts in a public place. It then noted that while the circumstances related to the place and the symbols she used had to be taken into account, in order to assess the diverging interests at stake the domestic courts had not been required to weigh in the balance the applicant's right to freedom of expression against the right to freedom of conscience and religion.

Lastly, while the domestic courts had not ignored the applicant's statements during the criminal investigation, they had confined themselves to examining the fact that she had bared her breasts in a place of worship, without considering the underlying message of her performance or the explanations given by Femen activists about the meaning of their topless protests. In those circumstances, the Court found that the grounds given by the domestic courts had not been sufficient for it to consider that the sentence imposed on the applicant, in view of its nature and the severity of its effects, was proportionate to the legitimate aims pursued. The Court thus concluded that the domestic courts had not struck a balance, in an appropriate manner, between the interests at stake and that the interference with the applicant's freedom of expression had not been "necessary in a democratic society". There had thus been a violation of Article 10 of the Convention.

On the issue of Article 7, having found a violation of Article 10, the Court took the view that it was not necessary to rule separately, in the circumstances of the present case, on that complaint. On the issue of just satisfaction (under Article 41), the Court held that France was to pay the applicant 2,000 euros (EUR) in respect of non-pecuniary damage and EUR 7,800 in costs and expenses.

Commentary

The case law of the European Court accepts that Article 10 is wide enough to cover morally offensive speech (*Handyside v United Kingdom* (1976 1 EHRR 737), broadmindedness, tolerance and pluralism being the hallmarks of a democratic society, and that Article 10 covers speech that shocks and offends. However, in that case the Court made it clear that such speech is more susceptible to interference than, for example, political expression, and that the domestic authorities would be given a wide margin of appreciation in regulating

speech that causes harm to the morals of a particular state or the interests of particular individuals.

Thus, not only has the Court accepted that the protection of public morality and the sensibilities of others are legitimate aims for the purpose of Article 10(2), it has also made it clear that each member state has a wide discretion in deciding what laws to adopt and how to apply them. This approach was evident in *Handyside,* and in *Müller* v *Switzerland* (1988) 13 EHRR 212). In that case, several paintings portraying various unnatural sexual acts, crudely depicted in large format, had been displayed in an art exhibition and were seized by the authorities. The applicants, the artists and promoters, were subsequently prosecuted and fined for displaying obscene materials and the paintings were held to be examined, the paintings being returned to the owners eight years later. The European Court held that offensive and indecent material could be regulated by domestic law, provided it caused more than mere shock to the public, and that in the present case, it was not unreasonable for the domestic courts to find that the paintings were likely to '*grossly offend* the sense of sexual propriety of persons of ordinary sensibility'. The proceedings therefore fell within the state's margin of appreciation as being necessary in a democratic society and accordingly there had been no violation of Article 10.

However, the Court has displayed less tolerance to the interference of indecent speech when such expression serves a political purpose and constitutes political satire. Thus, in *Kunstler* v *Austria* (Application No 68354/01)*,* it was held that there had been a violation of Article 10 when the applicants' painting – depicting several outrageous sexual acts being performed by political and religious figures – was the subject of an injunction and an action for damages brought by a politician who claimed to have been debased by the painting. The European Court held that although states were given a wide margin of appreciation with respect to obscene and blasphemous material, in this case the painting had depicted political satire and that the law and the victims should be more tolerant of such depictions. It should be noted, however, that the reasons for interference in *Kunstler* were not based on public morals, but on the desire to protect individuals from attacks on their reputation and honour.

A more liberal approach towards immoral speech and acts has been evident in recent years. Thus, in *Tatar v Hungary* (Application nos. 26005/08 and 26160/08), decision of the Court 12 June 2012, the Court upheld political expression that was allegedly immoral. Here the applicants were fined for illegal assembly after staging a performance that involved exposing items of dirty clothing on a fence surrounding the Parliament building in Budapest. The applicants stated that the event was a political performance symbolising "hanging out the nation's dirty laundry". The Court found a violation of Article 10, ruling that the applicant's performance amounted to a form of "political expression" and that the authorities had not given "relevant and sufficient" reasons for the interference. More recently, in *Peradze and Others v. Georgia* (application no. 5631/16), the European Court of Human Rights held that there had been: a violation of Article 11 (freedom of assembly and association) of the European Convention on Human Rights read in the light of Article 10 (freedom of expression) where the applicants had been arrested and convicted for brandishing a banner likening Panorama Tbilisi, an urban development project, to a human penis during a public demonstration. The Court noted that the applicants' conduct had been peaceful and passive, and the slogan had not been used to insult or to denigrate anyone in particular; rather it had been used as a stylistic tool to express the applicants' high degree of disapproval of the urban development project. Thus, its controversial form was in itself no justification for restricting speech in a public demonstration that had aimed to highlight a matter of considerable public interest.

The decision in the present case very much reflects this more liberal approach in this area; requiring the state to provide sufficiently clear legal regulation of indecent and obscene material, and to accommodate political and other public interest values when balancing the regulation of such acts and the exercise of free speech. Failure to consider the free speech aspects of actions regarded as indecent or immoral, as was clear in this case, will attract the Court's rigorous approach with respect to political and public interest speech. This will result in the state's wide margin of appreciation in these cases being lost. On the other hand, the Court noted that the protest took place in a church, and, had the domestic courts considered her free speech rights as well as the aims of the law, it might have provided the domestic courts with a wider margin of appreciation in balancing those values.

In other words, there is no evidence that the Court has decided not to protect religious or public morality *per se*, or that such aims are no longer legitimate in modern democratic societies. The surprising element in the case, therefore, is why the domestic courts, being informed by European Convention principles and case law, should not fully consider the free speech and public debate interests in a case such as this. Had they done so, rather than dogmatically applying the law and finding a breach simply on evidence of nudity in a religious setting, then they might have decided the case differently. Alternatively, they might still have decided that the law had been broken, but that such a breach was necessary and proportionate; inviting the European Court to offer them an appropriate level of discretion in balancing all rights and interests.

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Blasphemy – religious feelings – freedom of expression – proportionality – margin of appreciation

Rabczewska v Poland, Application No. 825713, decision of the European Court of Human Rights, 15 September 2022

European Court of Human Rights

The facts and domestic proceedings in *Rabczewska*

The applicant, a pop singer in Poland known as Doda, gave an interview for a news website, which was published in August 2009. Part of the interview was subsequently reprinted in a tabloid under the title "Doda: I don't believe in the Bible." During the interview, the interviewer said: "You say that the Pope is an authority figure for you, you are a religious person, so why you are seeing somebody who desecrates the Bible and conveys anti-Christian sentiment?" In reply, she described her relationship with her then partner, explaining that the biblical message did have some value; however, the facts depicted in it were not reflected in scientific discoveries. The applicant believed in a higher power (*siła wyższa*), she had had a religious upbringing, but had her own views on those matters. She stated that she was more convinced by scientific discoveries, and not by what she described as "the writings of someone wasted from drinking wine and smoking some weed" When asked who she meant, the applicant replied "all those guys who wrote those incredible [biblical] stories."

After publication of the interview, two individuals complained to a public prosecutor that the applicant had committed an offence proscribed by Article 196 of the Criminal Code, which provides: "Whoever offends the religious feelings of other persons by publicly insulting an object of religious worship, or a place designated for public religious ceremonies, is liable to pay a fine, have his or her liberty restricted, or be deprived of his or her liberty for a period of up to two years."

The Warsaw District Court convicted the applicant and fined her 5,000 Polish zlotys (approximately 1,160 euros). The court observed that the legislature had balanced the two conflicting freedoms in Article 196 and stated that it was impossible to accept that the applicant did not understand the meaning of the words she used and, accordingly her statements did not fall within the margins of freedom of expression. The court noted that the applicant's comments had been made public and they had reached a wide audience and that the question of whether her statements amounted to insult had to be examined taking into account the average person's sensibility in Poland; noting that the Bible, along with the Torah, was considered in the different Christian religions and in Judaism to be inspired by God and was an object of veneration. Dismissing the appeal, the Constitutional Court noted that the insulting of an object of religious worship deliberately offends the religious feelings of other people, and that public debate should take place in a civilised and cultural manner, without any detriment to human and civil rights and freedoms.

The decision of the European Court of Human Rights

The applicant complained that her criminal conviction for offending religious feelings had given rise to a violation of Article 10, in particular that the necessity to protect the religious feelings of others should not be safeguarded at all costs, that the criminal law should not

have been employed to protect subjective religious feelings, and that the penalty imposed on her was excessive and thus disproportionate.

The Court reiterated that Article 10 was applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb (para 46, citing *Handyside v United Kingdom* (1979) 1 EHRR 737). However, it carries with it duties and responsibilities, including, in the context of religious beliefs, the general requirement to ensure the peaceful enjoyment of the rights guaranteed under Article 9 to the holders of such beliefs. This includes a duty to avoid as far as possible an expression that is, in regard to objects of veneration, gratuitously offensive to others and profane The Court thus reiterated that there may also be a positive obligation requiring the adoption of measures to ensure respect for freedom of religion, even in the relations between individuals.

The Court stated that those who chose to manifest their religion cannot expect to be exempt from criticism; they must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith (citing *Otto-Preminger-Institut v. Austria* (1994). However, where such expressions go beyond the limits of a critical denial of other people's religious beliefs and are likely to incite religious intolerance, for example in the event of an improper or even abusive attack on an object of religious veneration, a State may legitimately consider them to be incompatible with respect for the freedom of thought, conscience and religion and take proportionate restrictive measures. Presenting objects of religious worship in a provocative way capable of hurting the feelings of the followers of that religion could be conceived as a malicious violation of the spirit of tolerance, which is one of the bases of a democratic society Thus, expressions that seek to spread, incite or justify hatred based on intolerance, including religious intolerance, do not enjoy the protection afforded by Article 10 of the Convention.

Further, the fact that there is no uniform European conception of the requirements of the protection of the rights of others in relation to attacks on their religious convictions means that States have a wider margin of appreciation when regulating freedom of expression in connection with matters liable to offend intimate personal convictions within the sphere of morals or religion. Thus, in cases involving the conflicting interests of the exercise of two fundamental freedoms, the assessment of the (potential) effects of the impugned statements depends, to a certain degree, on the situation in the country where the statements were made at the time and the context in which they were made.

Having established that the restriction was prescribed by law and pursued a legitimate aim, the Court reiterated that a religious group must tolerate the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith, as long as the statements at issue do not incite to hatred or religious intolerance. Looking at her statements as a whole, the Court observed that the applicant did not develop her arguments and did not base them on any serious sources or a specific doctrine. The applicant did not claim to be an expert on the matter, a journalist, or a historian. She had been answering the journalist's question about her private life, addressing her audience in a language consistent with her style of communication, deliberately frivolous and colourful, with the intention of sparking interest. The Court then moved on to attack the domestic courts' reasoning, noting that the domestic courts failed to assess properly whether the impugned statements constituted factual statements or value judgments. Further, it noted that the domestic courts failed to identify and carefully weigh the competing interests at stake, or discuss the permissible limits of criticism of religious doctrines under the Convention versus their disparagement.

In particular, the domestic courts did not assess whether applicant's statements had been capable of arousing justified indignation or whether they were of a nature to incite to hatred or otherwise disturb religious peace and tolerance in Poland. The Court also noted that it was not argued before the domestic courts, or before the Court, that the applicant's statements amounted to hate speech. Thus, the Court finds that the domestic courts had not established that the applicant's actions contained elements of violence, or elements susceptible of stirring up or justifying violence, hatred or intolerance of believers. Further, the domestic courts did not examine whether the actions in question could have led to any harmful consequences. There was thus nothing to suggest that Article 196 contains a criterion that the insult should threaten public order; rather, it appears that it incriminates all behaviour that is likely to hurt religious feelings.

Finally, the Court observed that the applicant was convicted in criminal proceedings originating from a bill of indictment lodged by a public prosecutor upon a complaint by two individuals, the proceedings continuing even after the applicant had reached a friendly settlement with one of the complainants. The applicant was sentenced to a fine equivalent to 1,160 euros, fifty times the minimum and thus the criminal sanction imposed on the applicant was not insignificant.

In conclusion, the domestic courts had failed to comprehensively assess the wider context of the applicant's statements and carefully balance her right to freedom of expression with the rights of others to have their religious feelings protected and religious peace preserved in the society. It has not been demonstrated that the interference in the instant case was required, in accordance with the State's positive obligations under Article 9 of the Convention, to ensure the peaceful coexistence of religious and non-religious groups and individuals under their jurisdiction by ensuring an atmosphere of mutual tolerance. Further, the expressions under examination did not amount to an improper or abusive attack on an object of religious veneration, likely to incite religious intolerance or violating the spirit of tolerance. Thus, despite the wide margin of appreciation, the domestic authorities failed to put forward sufficient reasons capable of justifying the interference with the applicant's freedom of speech.

Commentary

Although the UK law of blasphemy and blasphemous libel was abolished by s.79 of the Criminal Justice and Immigration Act 2008, many legal systems regulate speech or other actions in order to protect either the tenets of the country's religion, or the sensibilities of the followers of that religion. The European Convention permits such laws provided they are necessary and proportionate in relation to a legitimate aim *(Otto-Preminger Institute* v *Austria* (1994) 19 EHRR 34; *Wingrove* v *United Kingdom* (1996) 24 EHRR 1). The European Court has indicated that member states would be provided with a wide margin of appreciation in this area. For example, in *Otto-Preminger Institute,* the Court held that that speech causing gratuitous offence may be restricted, and that the concept of blasphemy could not be isolated from the society against which it is being judged, as well as the population where the showings were due to take place, which were strongly Catholic. In contrast, in *Tatlav* v *Turkey*, Decision of the European Court, 2 May 2006 (Application No 50692/99). there had been a violation of Article 10 when the applicant had been prosecuted after publishing a book entitled the *Reality of Islam*, which claimed that religion had the effect of legitimising social injustices in the name of 'God's will'. The Court held that although the book contained strong criticism of the religion, it did not employ an offensive tone aimed at believers or an abusive attack against sacred symbols.

It is clear, therefore, that states are still allowed to operate moderate blasphemy laws. Thus, in *IA* v *Turkey* (2007) 45 EHRR 30, there had been no violation of Article 10 when the applicant had been fined for publishing a novel which, *inter alia*, alleged that the prophet Mohammad did not prohibit sexual intercourse with a dead person or a living animal. The book was not merely provocative and shocking but constituted an abusive attack on the Prophet of Islam. Notwithstanding a degree of tolerance of criticism of religious doctrine within Turkish Society, believers could legitimately feel that certain passages of the book constituted an unwarranted and offensive attack on them. Further, in *Gay News* v *United Kingdom*, (1983) 5 EHRR 123, the European Commission decided that a prosecution of a poem which described, *inter alia*, acts of sodomy and fellatio with the body of Christ immediately after his crucifixion was necessary in a democratic society. The Commission held that it might be necessary in a democratic society to attach criminal sanctions to material that offends against religious feelings, provided the attack is serious enough and that the application of the law is proportionate to the appropriate aim. The Commission also held that the fact that the offence was one of strict liability and is, thus, committed irrespective of the publisher's intention and the intended audience did not make it disproportionate *per se*. This aspect of the Commission's judgment now appears to be in question, for in the present case the Court was clearly influenced by the singer's intention and all the other circumstances of the expression in reaching its conclusion on necessity and proportionality.

The decision in the present case suggests that states are still allowed to maintain proportionate blasphemy laws, although several extracts of the Court's judgment mean that the legitimate aims of such laws appear uncertain. In other words, is it sufficient that the words or actions cause gratuitous and gross offence to religious followers, or must those words evidence religious intolerance or hatred? This requires clarification from the European Court, but whatever the scope of that aim, each state must ensure that blasphemy laws accommodate free speech norms, and that the law and judicial decisions of each state consider the context in which the words were spoken.

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Prisons – self-determination – private life – provision of food – duty to protect life

R. (on the application of JJ) v Spectrum Community Health CIC [2022] EWCA 2440 (Admin)

Administrative Court

The facts and the decision of the High Court

The claimant, a prisoner, was quadriplegic and required 24-hour care, including the need to be fed by a team employed by the defendant. It was accepted that eating any food posed a risk of death or serious injury by choking or aspiration, but that some foods posed a more significant risk than others. On the advice of a doctor and speech language therapist, the defendant refused to feed the prisoner food deemed to pose a more elevated risk, and the prisoner, who was an adult with full capacity, went on hunger strike stating that he wished to eat the food of his choice. The court was required to determine whether the defendant's refusal to feed a prisoner the food he wished to eat was unlawful, in circumstances where certain foods posed a risk of death or serious injury.

Giving judgment for the defendant, the High Court held that it was not unlawful for the defendant to refuse a prisoner who required feeding certain foods which it believed were contra-indicated and adverse to his clinical needs because they posed an increased risk of death or serious injury by choking or aspiration. The High Court held that although the defendant was interfering with his right to private life under Article 8 of the European Convention, the interference was lawful, proportionate and justified under Article 8(2) for the protection of health and the rights and freedoms of others.

With respect to the prisoner's autonomy, the High Court held that it was not unlawful for the defendant to refuse the prisoner certain foods as it was not fanciful to postulate that the defendant might be subject to criminal and/or regulatory action if the prisoner were to suffer serious or fatal injury as a consequence of being fed foods that posed a higher risk; the prospect of a prosecution for manslaughter being not negligible. The question of whether the prisoner validly consented to eating such food was an evidential question that would have to be resolved by a jury, and the reviewing court would not declare that it was lawful for the defendant to comply with the prisoner's wishes regarding diet. Thus, it would be wrong to make a declaration which purported to decide an issue of criminal liability for future events, the circumstances of which could not be known. So too, the Court found that he defendant's assessment of the risk to the prisoner was not irrational; it could not rely on empirical evidence about the prisoner's current ability to take food because he had eaten almost nothing, having been on hunger strike, and it acted rationally in relying on the opinion of suitably qualified experts to assess the current risk (paras 58-61).

With respect to the claim under Article 8 of the Convention, the Court found that as the prisoner was so grievously disabled, his autonomy was extremely limited and that his autonomy about what to eat formed a significant proportion of his capability as a person. Although his right to choose from the food available at prison engaged his right to private life and self-determination, the defendant's interference with that right was lawful, proportionate and justified for the protection of health, and for the protection of the rights and freedoms of others, namely the defendant himself and the defendant’s staff. Finally, with respect to the prisoner’s claim under the Equality Act 2010, the court found that the

defendant's practice of providing the prisoner with a special diet put him at a substantial disadvantage in comparison with persons who were not disabled, thus engaging s.20(3) of the Act. However, the prisoner had not persuaded the court that the defendant had failed to make reasonable adjustments to avoid any such disadvantage.

In conclusion, therefore, the court found that the claimant's medical condition had rendered him reliant upon others to feed him. Consequently, even though the claimant has capacity to make choices – even unwise ones – about what he wishes to eat, the defendant is not required to execute those wishes. That is because it has reasonably formed the view that giving the claimant those foods is adverse to his clinical needs and because it is possible that, were the defendant to comply with the claimant's requests, the claimant might suffer serious or even fatal consequences and the defendant and its employees might be open to prosecution or regulatory action.

Commentary

This type of case poses a difficult dilemma for prison and other authorities, and indeed the courts: how can we balance the right of prisoners to exercise their right to self-determination (including their right to take or risk their own life) with the authority's duty to protect and preserve the lives of those in their charge. This latter duty is owed both under common law and authorities also owe a positive duty under Article 2 of the European Convention on Human Rights to ensure that they take reasonable measures to safeguard every inmate's right to life. In addition, the authorities may face criminal liability for endangering an inmate's life.

Certainly, liability can be engaged under Article 2 where the prisoner takes his own life (*Keenan* v *United Kingdom* (2001) 33 EHRR 38; *Orange v Chief Constable of West Yorkshire* [2001] 3 WLR 736.). That is because the authorities owe a duty of care to prevent a suicide that is foreseeable and where the prisoner is a clear suicide risk. The authorities are not liable for every suicide in their jurisdiction, as there has to be a breach of duty in cases where there is a clear and immediate risk of suicide. Thus, in *Trubnikov v Russia* (Judgment of the European Court 6 July 2005), there had been no violation of article 2 when a prisoner with a record of suicide attempts had committed suicide in his cell. The Court held that despite his history, and the fact that the authorities were partly responsible for the fact that he had access to alcohol and should have known that his state posed risks to him whilst he was serving a disciplinary punishment in segregation, he had not *at the time* posed an immediate risk of suicide so as to engage the liability of the state.

The question for the court in the present case, however, is of a different order: can and should the authorities respect the prisoner's right of self-determination when to do so would increase the likelihood of the prisoner's death, for which the authorities may then be liable under its duty to protect life? In other words, can the authorities refuse a prisoner's wishes on what treatment they want, or not want to receive, when that request conflicts with a possible duty to preserve the prisoner's life?

That question has been considered in the context of force-feeding of prisoners and whether that would be in breach of Articles 3 and 8 of the Convention, guaranteeing, respectively, freedom from inhuman and degrading treatment and the right to respect for private life. In *X* v *FRG* (1985) 7 EHRR 152 the European Commission of Human Rights held that force-feeding involves a degrading element which in certain circumstances is in violation of Article 3, and in *Herczegfalvy* v *Austria*, ((1992) 15 EHRR 437), the European Court held that the medical necessity for such treatment must be convincingly shown to exist. However,

the practice does not appear to be in breach of article 3 *per se*. For example, in *Naumenko v Ukraine*, (Decision of the European Court 10 February 2004), it was held that there had been no violation of article 3 when the applicant had been subjected to therapeutic therapy. On the facts there was insufficient evidence that the applicant had not consented to the treatment, but in any case, article 3 did not prohibit such treatment in appropriate cases and here the applicant was suffering from serious mental disorders.

The issue was considered by the UK domestic courts in *R* v *Collins, ex parte Brady,* [2000] Lloyd's Rep Med 355 a case decided before the Human Rights Act 1998 came into operation, and one concerned with persons detained under mental health legislation. The prisoner had decided to starve himself to death and had been force-fed by the authorities when his health deteriorated. It was held that force-feeding was 'medical treatment' given to him for the mental disorder from which he is suffering as prescribed by s.63 of the Mental Health Act 1983. It was, thus, lawful provided there was sufficient evidence that the applicant's desire to starve himself was connected with his mental illness. The court accepted expert medical opinion that although the applicant had made a conscious decision to starve himself, his decision was a symptom of his mental illness. Accordingly, the authorities were entitled to treat that illness and to force-feed the applicant.

Notwithstanding the decision in *Brady*, the force-feeding, of even a mental health prisoner without very strong medical or other reasons will be contrary to Article 3 of the Convention (*Nevmerzhitsky v Ukraine*, decision of the European Court 5 April 2005, where the European Court made a finding of torture). This matter was considered in the context of compulsory treatment of mental health detainees by the Court of Appeal in *R (Wilkinson)* v *Broadmoor Hospital and Others* [2001] 1 WLR 419. The applicant had sought to challenge his forcible subjection to anti-psychotic medication on the grounds that such treatment was contrary to Articles 2, 3, 8 and 14 of the European Convention. The Court of Appeal held that it was for the court to consider whether the applicant was capable of consenting to the treatment, and whether the treatment would constitute a violation of the applicant's right to life, private life, and the right not to be subjected to inhuman or degrading treatment. Thus, the courts would need to be satisfied that there were extreme and urgent reasons justifying any such compulsory treatment. The Court of Appeal also opined that if the applicant *did* have the capacity to consent, it would be difficult to suppose that he should be forced to accept it; the impact on his rights to autonomy and bodily inviolability were immense and the prospective benefits of the treatment appeared speculative.

Although the courts condoned such a practice in the old case of *Leigh* v *Gladstone*, ((1909) 26 TLR 139) concerning the force feeding of protesting suffragettes, modern authority suggests that force-feeding would be unlawful provided the prisoner remained in control of his mental faculties. Thus, in *Secretary of State for the Home Department* v *Robb (*[1995] 1 All ER 677), the Court of Appeal made a declaration that the prison authorities had no duty to interfere with a prisoner's decision to go on hunger strike and stated that despite incarceration prisoners retained the basic right of self-determination. This position was confirmed in *Re W (Adult: Refusal of Treatment) (The Independent* 17 June 2002), where it was held that a prisoner with mental capacity had the right to refuse treatment to a self-inflicted condition that was potentially life threatening.

The problem in the present case, of course, was not that the prisoner objected to feeding in itself, but rather that he wanted the authorities to feed him a particular diet, when to do so would, because of his medical condition, increase the likelihood of his dying. That action

would, therefore, engage their potential liability under Article 2 of the Convention, and, more specifically open them up to a charge of criminal manslaughter.

In this case, the judge noted that the effect of the declarations, if granted, would be to absolve the defendant's practitioners from exercising clinical judgment in relation to what the claimant eats; the intended effect being to relieve the defendant's staff from potential future criminal liability in connection with the feeding of the claimant. In his judgment, therefore, it would be quite improper of the court to seek to tie the hands of a future criminal court by making a declaration that purports to have effect notwithstanding what circumstances might surround the harm that comes to the claimant. The judge also stressed that in the particular circumstances of the case the defendant had an obligation at common law to nourish the claimant in any event, and to keep the claimant alive (para 67, citing *R (Burke) v General Medical Council* [2005] EWCA Civ 1003*,* at 35).

Whilst the defendant accepts an obligation to nourish and to take reasonable steps to keep the claimant alive, this does not confer upon the claimant the right to demand or insist upon the provision of certain types of treatment in fulfilment of the defendant's duty towards him. Autonomy and the right to self-determination do not entitle the defendant to insist on receiving a particular medical treatment regardless of the nature of the treatment (*R (Burke) v General Medical Council* [2005] EWCA Civ 1003*,* at 31). The source of the duty of care towards the claimant in this case does not exist simply on the basis that the claimant demands (a certain type of) nourishment, with fulfilment of such a duty only being satisfied through acquiescing to those demands. The common law duty described above arises from the circumstances of the claimant being in the defendant's care and is satisfied through taking reasonable steps to keep the patient alive and provide treatment so long as it prolongs the patient's life (*Burke,* at 40).

It is for the clinical team in charge of the claimant's care, in exercise of their judgement, to determine what treatment options are clinically indicated to discharge their duty towards him. Those options are then offered to the claimant along with an explanation of all risks that the patient, or a reasonable person in the patient's position is likely to attach significance to (*Montgomery v Lanarkshire Health Board* [2015] UKSC 11). In the case of a competent patient such as the claimant, they can express their wishes through a decision whether to accept any of the treatment options offered. The claimant is free to accept or refuse the treatment on whatever basis he sees fit. This right for a competent patient to refuse a treatment option, creates the illusion that the claimant and others who may find themselves in his position, have the positive option to seek an alternative treatment. However if the clinical team determine that a course of treatment proposed by the claimant is not clinically indicated, they are under no legal obligation to provide such treatment to him (*Re J (A Minor)* [1993] Fam 15, at 26H).

Lord Phillips MR in *Burke* indicates that in circumstances where there is disagreement between the clinical team and the patient as to appropriate treatment options, a second opinion should be sought. Furthermore, at paragraph 40, there was an indication that the doctor in charge of Burke's care '*must either comply with his wish to be given ANH* (artificial nutrition and hydration) *or arrange for another doctor to do so.* However, this does not equate to a duty to find another doctor who is willing to administer treatment according to the patient's wishes, where such a treatment is clinically contra-indicated. Such a duty may arise in the circumstances of *Burke* as the ANH was and would likely continue to be clinically indicated until Burke's death either from the disease he was suffering (spino-cerebellar ataxia) or some other circumstances. However, *Burke* is distinguishable in this

regard from the present case, as the diet that the claimant sought was never clinically indicated.

The practical effect of the defendant's refusal to either administer the claimant's chosen diet or find someone else willing to administer it, is that the claimant's death may be brought about more quickly due to malnourishment because of the hunger strike. However, this is as a consequence of the 'choice' that the claimant has made to refuse any food other his preferred diet, rather than as a consequence of any failure to fulfil their common law obligations on the part of the defendant.

On the question of whether his Article 8 rights had been violated, although the judge considered that the claimant's right to choose his diet was, by reason of the extraordinary circumstances of this case, sufficiently important to merit the protection of Article 8, the countervailing concerns of the defendant amply justified the defendant's interference with the claimant's right to choose. Given the claimant's current condition, the justification for interference with the claimant's rights is all the stronger. Thus, even where fundamental rights of private life and self-determination are engaged, those rights might have to take second place to more general public policy aspects; in this case that the defendants comply with their civil, criminal and human rights obligations to treat the individual and keep him alive.

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BOOK REVIEWS

Guilty until proven innocent: the crisis in our justice system, by Jon Robins, Biteback Publishing, 2018; *Fake law: the truth about justice in an age of lies*, by The Secret Barrister, Picador, 2020

The Chief Inspector of Prisons Charlie Taylor said recently that with many jails in England and Wales now running limited regimes, it is the 13,000 remand prisoners who are mostly likely to spend 22 hours a day in their cells. On Sunday 4 December 2022, the BBC Radio 4 programme 'The World This Weekend' broadcast an interview with Sonya. She's the wife of a man who's been held in prison on remand for more than four years. He's had no trial. He is innocent until proven guilty, and has been waiting for over four years to clear his name. She has brought up their child alone, their daughter has just turned four.[1] The report stated that are more than 4,000 people who have been charged, denied bail and have been awaiting trial in prison on remand for over six months, more than 1,500 for more than two years, and more than 500 people for over four years.[2] Victims lose hope of seeing their case heard in court. Innocent people cannot defend themselves because their case doesn't seem ever to come before a judge or magistrate. Lives disrupted or ruined, huge costs to the public purse: what is going wrong?

Jon Robins, who teaches criminology at the University of Brighton and is the editor of The Justice Gap,[3] has written a readable, interesting and illuminating book that helps us to answer that important question.

The book throws light on the following issues:

- The criminal justice system requires a safety net as procedures will inevitably go wrong. However, there is no adequate safety net. He argues that the Court of Appeal fails today, as it has done in the past, to get to grips with miscarriages of justice, giving detailed accounts of many troubling instances to back his argument.
- There is no effective watchdog. The Criminal Cases Review Commission is seriously underfunded and overwhelmed and cannot do the job it was set up to do.
- As a result of a two-decade pay freeze on legal aid, very few lawyers are willing to undertake appeal work.
- There remain huge problems with disclosure and access to evidence.
- Failures in policing persist. 'Tunnel vision' and police misconduct continue to be a feature in producing miscarriages of justice.
- There continues to be a problem of poor legal defence. The inevitable consequences of the crisis in legal aid is that many defendants receive incompetent and inadequate legal representation.[4]

In parts this book reads like a thriller, as we follow the cases of people wrongly convicted and then imprisoned and the long and twisty road of their making appeal after appeal –

[1] https://www.bbc.co.uk/sounds/play/m001fvp4 From 16:00 to 29:00
[2] See: https://www.thejusticegap.com/women-in-prison-remand-in-custody/
[3] https://www.thejusticegap.com/
[4] See: Desperate Measures: are asylum seekers getting good legal advice? Rona Epstein and Peter Walsh, *New Law Journal,* 21 July 2020.

eventually being declared innocent, after many years, and ruined and devastated lives. I recommend that you read this book. And do not despair. We can all use our voices to argue and campaign for a better criminal justice system.

Fake Law: the truth about justice in an age of lies is written by – no one knows! He or she publishes as 'the Secret Barrister' (SB for short) and this is SB's second book, the first, *Stories of the Law and How It's Broken* was very widely read and much discussed. The follow-up volume Fake Law is, like the first book, written with passion and conviction. It is highly readable and at the same time thought-provoking and informative, as well as troubling to those of us who would wish to see a justice system that is both efficient and fair.

Fake Law starts with the coverage in the British press of the cases of householders who have been prosecuted after attacking burglars – the court decisions frequently being presented as 'you can't defend your own property'. The author shows how far this is from the truth, and how much press reporting is deliberately inaccurate and misleading, and often downright wrong. It is a salutary lesson to see how some parts of the press distort the truth and how dangerous this can be.

Further chapters explain the truth behind calls to 'save Charlie's life' when courts rule that the doctors have the right to end artificial ventilation of terminally ill children when it is the best interests of children in these rare and tragic cases. The author carefully explains what the expression 'the best interests' of the child means and narrates the public misunderstanding of recent cases where the courts have decided that the best interests of very ill children has meant their life support systems must be withdrawn. It is a difficult subject, and this book gives a very clear account of the issues, the ethics and the law.

Other topics are personal injury claims; employment law (the author points out that the public is taught little about their rights at work – according to a survey done in 2019 four out of five Britons are unaware of their employment rights). The issues discussed include:

- Human rights and the protections afforded by the European Convention on Human Rights. Here the author starts with a dramatic example of its use: the case of over 100 victims of the rapist John Worboys and the long struggle of some of his victims, ultimately successful, to obtain compensation from the government for the police's failings over many years to investigate his crimes and to prosecute him. SB asks the questions: What is the truth about our human rights law?
- And why might the government be so eager to take the Human rights Act away from us?

The final chapters cover topics in equality and due process, democracy, the meaning and protection of liberty, and the book ends with an epilogue entitled 'Our Future'. In a lively and readable way, this book reveals how the protections which should be provided by our laws can be subtly undermined by untrue and malicious reporting. I strongly recommend this clear, well-written and indeed fascinating book which will both entertain and inform you. It is a passionate defence of all that is good in our law and a call to us all to defend the principles of law and legal justice that are currently under attack.

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