Coventry Law Journal

Editor-in-chief: Dr Steve Foster

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Editorial

We are very pleased to publish the first issue of the twenty-eight volume of the *Coventry Law Journal*. This issue contains many pieces that reflect what has occurred since the last issue – in December 2022. In the leading article, Steve Foster, from Manchester Grammar School, writes on the progress and reaction to the Illegal Migrants Bill 2023, which raises a number of issues with respect to the rule of law and the United Kingdom's international human rights' obligations: at the time of writing the piece the Bill of Rights Bill was dropped by the government, and the IMA was passed after some amends in the House of Lords. There are also articles by various Nigerian academics - on consumer protection, intellectual property rights and global health security. Legal professional, Dr Konstantina Michopoulou, makes a return to the journal, contributing an article on educational rights for children, and Alex Simmonds, now at Dundee University, has produced another journal on his specialist topic, Space Law, and the right to be heard.

There are also a number of case notes and recent developments on recurring matters such as free speech and whistle-blowing, free speech and privacy, prisoners' rights, and patient autonomy and human rights. We are especially pleased to publish a case note on police liability and negligence by Conor Monighan, a barrister at 5 Essex Court Chambers, and would like to thank him for his time and expertise. We are also grateful to other staff at the Law School, who contributed case notes and book reviews on various aspects of law: one from our research fellow, Dr Rona Epstein, and the other from our Assistant Professor in Law, Dr Tony Meacham. Dr Meacham also provides our very first formal obituary in the 28 years of the journal – on Ben Ferencz, former prosecutor of the Nuremberg Trials.

The Journal also welcome various contributions from our students. We have published four of our undergraduate students' dissertations (reintroduced on to our LLB programme this year), as well as case notes, blogs and short stories written by students as part of their course assessments. We wish them all every success in the future.

On a sad note, we bid farewell to Dr Evgenia Ralli (EU and company and finance law), who leaves us to take up an exciting new position at Edinburgh University; and Dr Lorraine Baron (SWUPL), who is off to Bangor University in North Wales: we wish them both the best in the future. We also say a huge thank you and goodbye to Professor Robert Upex, who has taught property and trusts at the School over the last 5 years, and who has been an academic and a barrister for a great number of years; happy retirement, Robert! Our thanks go to all of them for all their hard work at Coventry Law School.

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 December 2023, and contributions need to be forwarded to us by early November.

The editors: Dr Steve Foster and Dr Stuart MacLennan

ARTICLES

HUMAN RIGHTS

Hubris and calculation: some thoughts on the Illegal Migration Bill

Steve Foster*

Introduction

Beginning on its opening page, the Illegal Migration Bill (IMB) exudes controversy.[1] In keeping with the statement previously made by the Home Secretary, Mrs. Braverman, Lord Murray of Blidworth writes:

> I am unable to make a statement that, in my view, the provisions of the Illegal Migration Bill are compatible with the Convention rights, but the Government nevertheless wishes the House to proceed with the Bill.

A statement under s.19(1)(b) of the Human Rights Act 1998 – a rarity in any event - is unprecedented in immigration law.[2] All the same and as reactions to the IMB show, it is likely to prove well-judged. For example, in her letter to both Parliamentary Speakers,[3] Dunja Mijatovic, the Council of Europe's Commissioner for Human Rights, warned that the IMB's '…provisions create clear and direct tension with well-established and fundamental human rights standards, including under the European Convention.'[4] The United Nations High Commissioner for Refugees (UNHCR) drew a similar conclusion.

> The Bill, if enacted, would breach the United Kingdom's obligations under the Refugee Convention, the 1954 Convention relating to the Status of Stateless Persons, the 1961 Convention for the Reduction of Statelessness and international human rights law and would significantly undermine the international refugee protection system.[5]

Domestically, the Equality and Human Rights Commission (EHRC) endorsed these criticisms:

> The EHRC remains seriously concerned that the Bill risks placing the UK in breach of its international legal obligations to protect human rights, and exposing people to serious harm. Provisions providing for the detention of children and pregnant women, and removing protections for victims of trafficking and modern slavery are particularly worrying.[6]

The Commission identified six particular problems: undermining the principle of universality, removing existing protections to victims of trafficking, punishing refugees, breaching the principle of *non-refoulement*, creating very broad powers of detention, and the giving of insufficient consideration to the

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* Assistant Head, Manchester Grammar School

[1] All references are to the Bill as it entered the House of Lords. The Bill is now an Act of Parliament.

[2] The IMB was published alongside the Home Office's *Illegal Migration Bill – European Convention of Human Rights Memorandum* https://assets:publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1140977/echr_memo_illegal_migration_bill_final.pdf in which, among other things, the Home Secretary explained why she believed that the Bill would survive legal challenges on human rights grounds.

[3] Respectively, Sir Lindsay Hoyle MP and Lord McFall.

[4] Dunja Mijatovic, *Letter to the Speakers of the UK Parliament*, 24 March 2023 https//rm.coe.int/commhr-2023-8-letter-to-united-kingdom-speaker-of-the-houses-of-parlia/1680aaad61

[5] UNHCR, *Legal Observations on the Illegal Migration Bill*, 2 May 2023 https://www.unhcr.org/uk/media/unhcr-legal-observations-illegal-migration-bill-02-may-2023

[6] Equality and Human Rights Commission, *Statement on Illegal Migration Bill ahead of House of Commons Report Stage*, 24 April 2023

impact on equality. Later, the House of Lords Select Committee on the Constitution,[7] and the Joint Committee on Human Rights,[8] published their own analyses. Both concluded that on multiple counts the IMB would breach constitutional principle and human rights law.

Political realities, however, ensured that the IMB comfortably received its Second Reading in the Commons on 13 March 2023 by 312 votes to 250. No Conservative MPs voted against, though a number joined former Prime Minister, Mrs. Theresa May, in declining to register a vote. Subsequent fears that wrecking amendments might force the Bill's withdrawal also failed to materialise, the IMB going on to receive its Third Reading on 26 April: 289 votes to 230.[9] It came before the House of Lords the following day and is now proceeding through committee. Peers' reactions have been overwhelmingly critical. Yet, while those opposed to the IMB certainly have the 'numbers' to introduce significant amendments, it remains to be seen whether they have the will to insist on them. Equally, if peers do decline to back down, Parliament-watchers might yet enjoy one of the most compelling games of legislative 'ping-pong' in living memory.

Politics and the Bill

The IMB is a response to the Prime Minister's 'five pledges' speech,[10] boldly promising to end, once and for all, small boat crossings. If Mr. Sunak and his colleagues are to be believed, this is vital not only for protecting the UK's borders but also its social stability and indeed its very 'way of life'.[11] Yet, the IMB is also an unusual admission of failure. Mrs. Braverman, in particular, has consistently highlighted the ineffectiveness of the IMB's immediate predecessor - the Nationality Asylum and Borders Act 2022 ('NABA') - despite its very recent vintage and the fact that it has yet to be fully implemented.[12] In her view only the boldest measures, those that deliberately push against the boundaries of the law,[13] can 'stop the boats'. In the process, of course, she is flagging both her personal human rights agenda - she supported the ill-starred British Bill of Rights ('BBORB') and wishes to withdraw the UK from the ECHR – and her status as *the* premier Conservative right-winger.[14]

Differences between the IMB and NABA, however, should not be overstated. Both share the same strategic thinking: exploiting the UK's 'end-of-the-line' geographical location, shifting responsibility for migration to neighbouring countries, and downplaying the lack of safe and legal routes for refugees to enter the UK. They are also constructed upon the same electoral calculations. Asylum is seen in Government circles as a 'wedge' issue, capable of undermining Labour's efforts to reconstruct its famed 'Red Wall'. Elsewhere, legal challenges to the IMB in the European Court of Human Right (ECtHR) raise the possibility of repackaging and reviving the 'Brexit' agenda.

Time and chance will determine whether the IMB will pay the Government and Mrs. Braverman the political dividend they seek. By then, however, the Bill could have impacted profoundly on the lives of

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https://www.equalityhumanrights.com/en/our-work/news/statement-illegal-migration-bill-ahead-house-Commons-report-stage

[7] House of Lords Select Committee on the Constitution, *Illegal Migration Bill,* 16th Report of Session 2022-23 (HL Paper 200)

[8] Joint Committee of Human Rights, *Legislative Scrutiny: illegal Migration Bill*, 12th Report of Session 2022-23 (HC 1241, HL Paper 208)

[9] Once again very senior Conservatives – Mrs. May, Sir Iain Duncan Smith and Sir Geoffrey Cox among them – voiced doubts over the Bill's fairness and legality.

[10] Delivered on 4 January 2023

[11] See Mr. Robert Jenrick's speech to Policy Exchange on 25 April 2023 - 'Sovereign Borders in an Age of Mass Migration' - which led to further accusations that the Government was drawing directly on the Far Right 'playbook'. See: Rajeev Syal, ''Values and lifestyles' of small boat refugees threaten social cohesion, says Jenrick', *Guardian*, 25 April 2023.

[12] The Prime Minister, Mr. Sunak, has agreed to pay the French government £500 million over three years to help finance more patrols and construct a new detention centre. A new Small Boats Command Centre has been created to manage small boat crossings though the absence of a 'push back' policy naturally limits what this can achieve.

[13] Short of withdrawing from the Refugee Convention and the ECHR.

[14] The possibility that yet another Conservative leadership contest might be less than sixteen months away is unlikely to have been lost on her.

some of the world's most vulnerable people, to say nothing of the UK's international reputation and its system of rights protection. It is to these, infinitely more important, possibilities we now turn.

Duties under the Bill

Let us consider the IMB from the perspective of the thousands of migrants who enter the UK each year seeking the protection of its government and its laws. What might they learn about the Bill and its implications for their future well-being?

The removal and other duties

The IMB's most distinctive feature lies in its preferred method for preventing the overwhelming majority of migrants from obtaining the protection they seek and which, under current rules, would be granted in the majority of cases.[15] The Government acknowledges this.

> The Illegal Migration Bill goes considerably further than any previous immigration Bill. For the first time, it will prevent those who travel via safe countries and enter the UK illegally from having their asylum claim considered by the UK and stops illegal migrants from being able to access our modern slavery system. It goes further than NABA by placing a duty on the Home Secretary to remove illegal migrants, rather than the previous discretionary duty *that can be interpreted more liberally by the courts* (emphasis added).[16]

Quite simply, the Home Secretary is creating and then placing herself under a statutory duty to remove from the UK any person ('P') who meets the four conditions set out in Clauses 2((2)-(4) and (6).[17] These are that: on or after 7 March 2023 P entered the United Kingdom without leave to enter or other permissions; did not enter directly from a country in which their life and liberty were threatened because of their social characteristics or political opinions;[18] and, though they required leave to enter or remain, did not have it. The Joint Committee on Human Rights (JCHR) is deeply critical.

> The scope of… (the removal duty) is extremely broad and would deny the right to asylum to the vast majority of refugees, including children and victims of modern slavery.[19]

The removal duty sits alongside the duty in Clause 4. This applies where, on arrival or entry, P makes a protection or a certain type of human rights claim.[20] The mere fact that P meets the four conditions then obliges the Secretary of State to declare that claim permanently inadmissible.[21] No assessment of its merits can or will take place.[22] The Lords' Constitution Committee points out that the effect is akin to an ouster clause, subsequently reinforced by Clauses 52-53 (analysed in more detail below).[23] Further controversy surrounds additional provisions denying P access to protections available to victims of

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[15] The Refugee Council's data suggests that roughly 90 per cent of those who safely cross the Channel on small boats claim asylum. Of these, approximately two-thirds are likely to be successful. See: Rhys Clyne and Sachin Savur, *The Illegal Migration Bill: seven questions for the government to answer*, Institute for Government, 10 March 2023 https://www.instituteforgovernment.org.uk/publication/illegal-migration-bill

[16] Home Office Policy Paper *Nationality and Borders Act compared to the Illegal Migration Bill: factsheet* Updated 23 May 2023 https://www.gov.uk/government/publications/illegal-migration-bill-factsheets/nationality-and-borders-act-compared-to-illegal-migration-bill-factsheet

[17] Clause 2(1)

[18] See Clause 2(4). The concept is amplified at Clause 2(5), which states that P '… is not to be taken to have come directly to the United Kingdom from a country in which their life and liberty are threatened…if, in coming from such a country, they passed through or stopped in another country outside the United Kingdom where their life and liberty were not so threatened'.

[19] Joint Committee on Human Rights, *Legislative Scrutiny: Illegal Migration Bill,* p. 7

[20] Defined at Clause 4(5) as a claim that P's removal from the UK either to a country of which she is a national or citizen, or a country or territory in which she has obtained a passport or other document of identity, would be unlawful under s.6 HRA. Provision for other types of human rights claims is made at Clause 40(4).

[21] See: Clause 4(3).

[22] A final sting: since the inadmissibility declaration is not a refusal to admit the claim, P is denied the right to appeal it to the First-tier Tribunal under s. 82(1)(a)-(b) of the Nationality, Immigration and Asylum Act 2002.

[23] House of Lords Select Committee on the Constitution, *Illegal Migration Bill,* paras. 5 and 7

slavery or human trafficking under ss. 61-62 and 65 NABA. These are disapplied at Clauses 21(1)-(2), which in turn require several amendments to existing statutes, notably the Modern Slavery Act 2015 and NABA itself. Of these, the amendment to s.63 NABA is especially important, since it extends the existing public order disqualification,[24] to all those who meet the four conditions, as well as foreign nationals convicted of any criminal offence regardless of sentence length.[25] These are major departures from existing policy and, per the UNHCR's intervention, have been widely condemned for breaching both the spirit and the letter of several treaties.

Clause 4 is also complemented, if that indeed is the correct word, by Clause 29.[26] Once P's claim has been declared inadmissible, the Secretary of State is placed under yet another duty: to refuse to grant them leave to enter or remain in the UK at any future point. In the interests of consistency, however, she can make an exception for unaccompanied children or those assisting criminal investigations into modern slavery. Similar prohibitions apply to grants of entry clearance or electronic travel authorisation (ETA), settlement and citizenship. This duty is, however, subject to Clauses 29(3)-(5), which give the Secretary of State limited discretion to set it aside where it would breach the ECHR, or where other exceptional circumstances apply.[27]

Removal options: Clauses 5-6

The Home Secretary's message to P is: Parliament requires me to remove you from the United Kingdom regardless of your personal circumstances or any claims you intend to make.[28] Three options then present themselves. One: where P is a national or has a relevant passport or other documentation, they can be removed to a country designated safe under s.80AA(1) Nationality, Immigration and Asylum Act 2002 ('NIAA').[29] A protection or human rights claim can be used to block removal *to that particular country* but only if the Secretary of State believes exceptional circumstances apply.[30] Two, alternatively P may be removed to the country from where they embarked for the UK.[31] Three, if neither are possible,[32] the Secretary of State can instead remove P to any country listed in Schedule 1, providing she believes P will be admitted.[33]

Thanks to Clause 6, the Secretary of State possesses the power to add new countries to that Schedule, a power that could prove invaluable should the Government conclude additional third country 'outsourcing' agreements. Certain constraints are placed on her discretion. In adding a country she must satisfy herself that *in general* there is no serious risk of persecution and that removal will not *in general* contravene the UK's obligations under the ECHR (emphasis added).[34] She must also have regard to all the circumstances of that country and information from an appropriate source.[35] These requirements

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[24] Section 63(1)(a) NABA.

[25] There is a very limited exception to the disapplication of protections, which arises where P might be of use to the UK authorities in the course of an attempt to prosecute people traffickers. However, it is hedged with multiple qualifications. Most importantly, the exception will not override the removal duty, no matter how helpful P has been. See Clause 21(3) read alongside Clauses 21(4)-(7).

[26] This adds a new s.8AA to the Immigration Act 1971.

[27] Clauses 30-34 contain several provisions making P ineligible for being granted or registered for British citizenship, though the Secretary of State can opt to set aside the duty in individual cases where she considers that the UK's ECHR obligations would be contravened.

[28] Exceptions are provided at Clause 2(11), the main one being that officials accept that P is an unaccompanied child. In this case, the duty is (temporarily) transformed into a power, only to be restored as a duty on P's eighteenth birthday The others are that; P's circumstances fall under exceptional categories created by regulations made by the Secretary of State, a Minister of the Crown has made a personal determination that an interim measure made by the ECtHR prevents removal or P is a victim of slavery who the Secretary of State wishes to remain in the UK to co-operate with criminal proceedings.

[29] See Clauses 5(3)(a)-(b). This list contains thirty-three European countries, including Albania.

[30] See Clause 5(5). They include: a case where the country is derogating from its obligations under the ECHR in accordance with Article 15 of the Convention and a case where the Member State is the subject of a proposal initiated in accordance with Article 7(1) TEU.

[31] Clause 5(3)(c)

[32] For example, there is no 'returns' agreement in place, or that country is not listed in Schedule 1

[33] See Clause 5(3)(d). Fifty-three countries are listed, including the Republic of Rwanda.

[34] Clause 6(1)

[35] Clause 6(4). International organisations constitute such a source.

should make legal challenges easier to mount. Yet the reference to generalities seems designed to give the Secretary of State considerable 'wriggle room'. So too does the reference to a 'serious risk of persecution', which implies that a lesser risk of persecution is legally acceptable, providing there is no general (that word again) contravention of the UK's obligations under the ECHR.

Removal of unaccompanied children

This is the most significant exception to the removal duty. Whilst the Secretary of State can remove unaccompanied children before their eighteenth birthday, she can do so only in four circumstances: reunion with a parent; removal to a country listed in s. 80AA(1) NIAA; removal to any other country (a) of which P is a national, or has obtained a passport, etc., or (b) from where P embarked for the UK *providing they have not made a protection or human rights claim*;[36] or (c) in such other circumstances as may be specified in regulations. Once P reaches the age of eighteen, however, the removal duty immediately applies.

These limited protections, however, are contingent on the successful outcome of an age assessment. Challenging adverse assessments will not be easy. Under Clause 55, a partial ouster clause, these may not be appealed to the First-tier Tribunal.[37] P will be able to apply for judicial review yet their application has no suspensive effect, forcing them to continue their application from abroad. Further, the court may only quash the assessment on the narrow basis that it was wrong in law, rather than in fact. Clause 56 further disadvantages P's legal position. It empowers the Secretary of State to make regulations about the effect of P's decision to deny consent to the use of a specified scientific method for determining age where, in the view of the Secretary of State, there are no reasonable grounds for that decision. The regulations may disapply s.52(7) NABA,[38] such that P is then treated as an adult. For the record, the JCHR[39] and professional opinion,[40] are both highly critical of these provisions.

Powers and the Bill

The legal duties in Clauses 2 and 4 show that, *when it comes to removing P,* the Secretary of State has little appetite for discretionary powers, preferring instead the better protection afforded by the common law doctrine of parliamentary sovereignty and the rules of statutory interpretation. However, this still begs the question of what happens to P before they are forced to leave? This is anything but a trite question. Aside from the notorious inefficiency of the Home Office, under the IMB P cannot be removed until they have received a written removal notice, stating their country of destination.[41] This can be challenged and if P is successful, an alternative destination will have to found. It is also possible that the Government's removal options will not range quite as widely as Ministers might have us believe. Consequently, at this juncture the broad thrust of the Bill changes, the previous onus on constraints (duties) shifting to a new emphasis on discretion (powers). This movement will be examined in two contexts: detention and the welfare of unaccompanied children.

The power to detain

[36] It is thus axiomatic that P's ability to thwart removal will depend upon access to legal advice.

[37] This places P under significant disadvantages. An appeal under s. 54(2) NABA obliges the First-tier Tribunal to determine P's age on the balance of probabilities and assign them a date of birth. The Tribunal may consider any matter it thinks relevant, including any matter of which the assessor was unaware and any matter arising after the date of the initial decision. Most importantly, its determination is binding on the executive.

[38] A provision which means that a refusal to consent can damage P's credibility.

[39] See: JCHR, *Legislative Scrutiny: Illegal Migration Bill*, pp. 7-8

[40] See, for example, Shona York*, Amendments to the Illegal Migration Bill attack basic legal rights and processes*, Free Movement, 25 April 2023 https://freemovement.org.uk/amendments-to-the-illegal-migration-bill-attack-basic-legal-rights-and-processes/

[41] Clause 7(2)

The Bill's provisions on detention are extensive. Essentially, Clauses 10(2) and (6) empower immigration officials and the Secretary of State to detain P, where they meet *or are suspected of meeting* the four conditions. This power extends to P's family members including accompanying children. Unaccompanied children can be also detained, though only under regulations. It will be, however, for the Secretary of State to determine whether these specify time limits. Finally, P can be detained at a location the Secretary of State considers appropriate,[42] paving the way for new and controversial detention facilities in ex-military bases and converted barges and ferries.

Clause 11 concerns the length of detention. Again, two sets of provisions operate in parallel; one concerned with detention on entry under the Immigration Act 1971, the other with continued detention on the authority of the Secretary of State.[43] The Lords' Constitution Committee describes Clause 11 as a partial codification of the common law principles originating in *Hardial Singh v Governor of Durham Prison*:[44] partial because Clause 11 significantly departs from them. This is so because the Secretary of State is empowered to extend P's detention for removal purposes beyond a reasonable time. The initial question she has to answer is: *in her opinion*, how long is it reasonably necessary to detain P pending arrangements for their removal? However, in forming her opinion she is fettered neither by the existence of factors delaying removal, nor any subsequent acceptance that removal simply cannot be made within a reasonable period, if at all.[45] A second question then arises. If there is no reasonable prospect of P being removed, for how long should they continue to be detained? The answer, once again, is for as long as, in the opinion of the Secretary of State, it is reasonably necessary for appropriate arrangements to be made for their *release*. This contrasts with the common law. It also has major implications for civil liberties in the UK, in particular the prospect that P's detention can continue indefinitely.[46]

Clauses 10-11 should be read alongside Clause 12. This prohibits the First-tier Tribunal granting P immigration bail for the first 28 days of detention. Neither, during this period, can P seek judicial review, other than in respect of decisions made in bad faith or involving severe procedural breaches.[47] An application can be made for a writ of habeas corpus.[48] However, given that detention powers are so widely drawn, the likelihood of such an application succeeding seems remote. The absence of a legal remedy is particularly important once it is remembered that the Clause 10 power to detain applies to those who are merely suspected of meeting the four conditions, or where it is suspected but not established that the Secretary of State has a duty to remove them. It might prove to be the case that P does not meet these criteria, in which case under the *Hardial Singh* principles they would have been ineligible for detention. Under the IMB by contrast, they may be detained for up to twenty-eight days without a realistic possibility of legal challenge.

Whilst the decision to detain can be challenged after twenty-eight days, the nature of the Secretary of State's powers limits judicial oversight and guards against legal defeat. When forming her opinion on the duration of detention, the IMB is silent on the factors that the Secretary of State must take into account. As a result, the question of what constitutes a reasonable period of detention is taken from the courts and placed in the hands of the executive.[49] This is another matter of great constitutional concern, one with '…serious implications for the liberty of the individual'.[50] The JCHR makes the additional point that in seemingly every aspect of detention, the IMB does not require the Secretary of State to

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[42] This is so whether or not the detention is ordered under the Immigration Rules or s. 62 NIAA.
[43] In addition, Clause 11(5) inserts new provisions into s. 36 Borders Act 2007 (detention relating to deportation) to bring these into line with the amendments to s. 62 NIAA.
[44] [1983] EWHC 1 QB. The 'Hardial Singh principles' were subsequently outlined by the Supreme Court in *Lumba (WL) v Secretary of State for the Home Department* [2011] UKSC 12.
[45] As per detention under the Immigration Act 1971, existing limitations on the detention of unaccompanied children and pregnant woman will apply.
[46] This is the fear of the Lords' Select Committee on the Constitution. See its report on the Illegal Migration Bill at para. 13.
[47] As a result, according to the Lords' Constitution Committee this makes Clause 12 another of the Bill's partial ouster clauses.
[48] In Scotland, suspension and liberation.
[49] House of Lords Constitution Committee, *Illegal Migration Bill*, para. 13
[50] Ibid. para. 15

distinguish the position of children and adults. Consequently, it predicts that these clauses will clash with the UK's obligations under the United Nations Convention on the Rights of the Child (UNCRC).[51]

A final fetter on the Secretary of State's discretion is removed by Clause 13, which disapplies her duty under s.57 Borders, Citizenship and Immigration Act 2009 to consult the Independent Family Returns Board.[52] Given the widespread opposition to the principle of child detention, it is possible that the Board would have advised against extensive use of Clause 10, especially in the absence of time limits under Clause 11. The Government, it would seem, is unwilling to take the chance that the Board might have taken a more deferential approach.

The welfare of unaccompanied children

The breadth of the Secretary of State's discretion is also apparent in the provision of accommodation and support for unaccompanied children. The IMB's implications for child welfare are discussed at length in the report of the JCHR, which notes that children are affected by every aspect of the Bill.[53] Under Clause 15(1) the Secretary of State may provide or arrange accommodation in England, and for as long as P resides in Home Office accommodation, the Secretary of State has the discretion to provide other support.[54] Further, under Clause 16 she can decide if and when a child is to cease residing in Home Office accommodation, subject to the duty to direct an English local authority to provide accommodation under s.20 Children Act 1989. Similarly, the Secretary of State may direct that an unaccompanied child in local authority care cease to be provided with that accommodation, once again subject to a duty to arrange for an alternative.

The JCHR is deeply unhappy with these provisions. Its main concern is that the IMB is silent on the form Home Office accommodation must take, a silence that also settles over the associated issues of standards and other requirements. In addition, and unlike local authority accommodation, Home Office accommodation is not subject to the requirements of the Children Act 1989, despite the latter being '…the main way children's welfare is safeguarded in England'. This makes Clauses 16(4)-(7) especially troubling, since their effect is to remove a child from that Act's protection. On this point, the JCHR notes the well-reported instances of children going missing from Home Office accommodation, together with continued fears over its adequacy and security.[55]

Courts and the Bill

By now, P will have become only too aware of their limited ability to seek redress in the domestic courts: the preceding commentary being a tale of '…ouster clauses, partial ouster clauses, time limits and restrictions placed on…claims that would have been available prior to the Bill coming into force'.[56] At the same time, P will be advised that, whilst it is still possible to challenge their removal notice, they can *suspend its effect* only through a suspensive claim. A protection or human rights claim, a claim as a victim of modern slavery or an application for judicial review cannot achieve this. This is implied at Clause 4(1) and reinforced at Clause 52. In any proceedings relating to a removal decision, the court cannot grant an interim remedy preventing or delaying that removal, or having that effect, it being immaterial whether Convention rights are under consideration.[57]

Suspensive claims can be made on the grounds that P will suffer serious harm as a consequence of removal or that the decision is factually incorrect. We shall focus on the former. A serious harm suspensive claim is made to the Secretary of State.[58] In making her decision, she must take account of several factors, including assurances given by the government of the receiving country and the failure

[51] Joint Committee on Human Rights, *Legislative Scrutiny: Illegal Migration Bill,* p. 7
[52] This body advises the Home Office on safeguarding children during their family's removal from the UK.
[53] Joint Committee on Human Rights, *Legislative Scrutiny: Illegal Migration Bill,* p. 7
[54] See Clause 15(3)
[55] Joint Committee on Human Rights, *Legislative Scrutiny: Illegal Migration Bill,* p. 7
[56] House of Lords Select Committee on the Constitution, *Illegal Migration Bill*, para. 3
[57] Clause 52(3)
[58] Clause 41

of P to provide 'certain evidence' when it was reasonable for her to have done so.[59] Time pressures on P are considerable. A suspensive claim must be made within eight days of receiving a written removal notice.[60] Further, where P has been removed following the expiry of the claim period, they are prohibited from making a suspensive claim out of country; a prohibition that also applies where P has given notification that they intend not to make a suspensive claim only to change their mind after removal. The Secretary of State can also prescribe information the claim must include and the form and manner in which it must be made.[61] Since the Secretary of State has a duty to reach her decision within four days, P might also wonder whether, once submitted, their claim can receive anything approximating proper consideration.

The evidential threshold for a successful claim is daunting.[62] To succeed, P's supporting evidence must be *compelling* and show that they '…would face a real, imminent and foreseeable risk of serious and irreversible harm if removed from the United Kingdom'. The IMB defines serious and irreversible harm as including death, persecution, torture, inhuman or degrading treatment or punishment and onward removal to another country where P would face a real risk, etc. of any harm mentioned above. [63] Accordingly, this definition does not cover all rights protected by the ECHR, for example, the right to private life. Similarly, forms of persecution not falling within s.31 NABA are excluded.[64] Neither, for that matter, does persecution meeting that definition, but where the Secretary of State judges that P can avail themselves of protection against it.[65] These provisions significantly ease the legal pressure on the Secretary of State when minded to reject a suspensive claim. She might also take advantage of Clause 39, which gives her the power to make additional regulations, one, amending the meaning of 'serious and irreversible harm' and, two, revising the associated list of examples. In this way, she can reassert control over the claims process should the Upper Tribunal or SIAC interpret serious harm in ways the Government finds unhelpful.[66]

If their claim is rejected, P has limited rights of appeal. Firstly, since the suspensive claim is expressly excluded as a protection or human rights claim, no right of appeal lies to the First-tier Tribunal under s.82(1)(a)-(b) NIAA.[67] This also applies to the Secretary of State's rejection of a human rights claim relating to P's removal to a third country.[68] Secondly, the Secretary of State can also certify a rejected claim as clearly unfounded.[69] Where this is the case, and P still wishes to appeal, they must first apply to the Upper Tribunal for permission. However, under Clause 44(3), this may be granted only if the Tribunal considers there is compelling evidence that the serious harm condition is met and the risk ('real, imminent and foreseeable') is obvious.[70]

Where a certification under Clause 41(3) is not made or permission is granted under Clause 44(3), an appeal lies to the Upper Tribunal.[71] It might be redirected, however, by the Secretary of State to the Special Immigration Appeals Commission (SIAC).[72] The appeal must be brought on the grounds that, contra the Secretary of State's decision, the serious harm condition is in fact met and, once again, the notice of appeal contains compelling evidence of this. When adjudicating, the Upper Tribunal must take

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[59] Clause 41(4)
[60] The Secretary of State may extend this where she considers it appropriate. See: Clause 41(6).
[61] Clause 41(5)(b)-(c)
[62] In this respect, there are powerful echoes of BBORB, especially Clauses 8 and 20.
[63] Clause 38
[64] Clause 38(5)(b)
[65] Clause 38(5)(c) read alongside Clause 38(8)
[66] Clause 38(6)
[67] See: Clause 40(2) – a provision that mirrors Clause 4(4)
[68] Clause 40(4)
[69] Clause 41(3)
[70] The Bill also specifically excludes harm resulting from a lower standard of healthcare in the receiving country as falling within the definition of 'serious and irreversible', even when that could be precisely its practical result. On a related point, pain or distress resulting from the realisation that medical treatment available in the United Kingdom will not be available to P in the receiving country is unlikely to meet the serious harm test. See Clause 38(3).
[71] Clause 43(7) provides that under s. 13 Tribunals, Courts and Enforcement Act 2007 an appeal can be made to the Court of Appeal on a point of law subject to any order made by the Lord Chancellor (Secretary of State for Justice).
[72] See Clause 51

into account the factors mentioned in Clause 41(4), i.e. precisely those factors the Secretary of State herself also had to take into consideration.[73] Clause 47 places a further constraint on the Tribunal by limiting its ability to consider new matters. Whilst the Tribunal can set aside ministerial objections and consider new evidence, it must first apply the 'compelling reasons' test.[74] The importance of Clause 47 cannot be under-estimated. Given the very limited time for P to challenge the removal notice, it is quite possible they will wish to raise new matters on appeal. Clause 47 is designed to 'choke off' that possibility.

Finally, P's ability to appeal the Upper Tribunal's decision to a senior court is heavily restricted. Under Clause 44(7) no right exists to appeal the Tribunal's ruling that a suspensive claim is indeed clearly unfounded. A limited right lies under Clause 49(4) to appeal the Tribunal's final decision. However, this is restricted to questions of whether: the Tribunal had a valid application before it,[75] was improperly constituted, or acted either in bad faith or using procedures so defective they amounted to a fundamental breach of natural justice. Exactly the same provisions apply to appeals against the Upper Tribunal's refusal of an out of time claim or to consider new matters.

Article 39 ECHR

The most eye-catching constraint on the courts is contained in Clause 53, added late following concessions extracted from the Prime Minister by right-wing Conservative MPs. To an extent, it complements Clause 52, which as we have seen denies domestic courts the power to grant interim relief delaying removal. Clause 53 is heavily influenced by Clause 24 BBORB, added late following the ECtHR's ruling to halt the deportation of an asylum seeker to Rwanda.[76] If Clause 24 was law at that stage, no account would have been taken of interim measures granted by the ECtHR, whilst the domestic courts would have been prevented from having regard to such measures when granting relief.

The political impact of Clause 53 is likely to be significant, since it calls into question the continued willingness of the UK Government to honour its obligations under the ECHR. Essentially, before immigration officers or the domestic courts can have regard to an interim order made under Article 39 ECHR, a Minister must personally disapply the removal duty under Clause 2(1). Their discretion is wide: the Minister being entitled to take into account any matter deemed relevant.[77] There is, however, an expectation that they will pay particular attention to the manner in which the ECtHR has responded or is likely to respond to the arguments of the UK government or any future representations it might make.[78] These touch upon longstanding complaints that Strasbourg fails to give proper consideration to the arguments of Ministers or provide adequate justifications for its rulings.[79]

Clause 53 aims to appease those sections of Conservative opinion who lobby for outright withdrawal from the Convention. Whilst Mr. Sunak opposes such a move, all the same his Government seems willing to risk confrontation with the Strasbourg authorities. In her letter of 24 March Dunja Mijatovic advises that the ECtHR is unlikely to accept that Clause 53 gives the Government legal authority to disregard its interim rulings.

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[73] The Tribunal must also take into account P's failure to provide evidence when it was reasonable for her to have done so: see Clause 41(5)

[74] Clause 47(5)(b)

[75] This allows an appeal on the grounds that P's initial claim was not clearly unfounded or where there were compelling reasons for them making the claim outside the permitted period.

[76] *NSK v United Kingdom* (application no. 28774/22), dated 14 June 2022.

[77] Clause 53(4)

[78] Clause 53(5)

[79] These were allegedly restated by Mr. Sunak in his meeting Siofra O'Leary, the President of the ECtHR in May 2023. This followed his address to the Council of Europe meeting in Reykjavik, when he sought to persuade European leaders that illegal migration is one of the three key issues facing the Continent in light of Russia's invasion of Ukraine. See Ben Quinn, 'Rishi Sunak to push for Europe-wide approach to illegal migration, *Guardian*, 16 May 2023

> …interim measures issued by the European Court of Human Rights, and their binding nature, are integral to ensuring that member states fully and effectively fulfil their human rights obligations.[80]

This raises the prospect that Clause 53 will acquire the characteristics of a 'stalking horse', pushing the Government into an adversarial, possibly hostile relationship with the ECtHR as a pretext for including a formal commitment to withdraw in a future Conservative manifesto: Mr. Sunak's reservations notwithstanding.

Statutory interpretation: the duties under Clause 1

As if all of this was not sufficiently disheartening for P, running in the background is Clause 1(3). This presses the domestic courts to defer to Minsters when interpreting the IMB. It does so by placing a statutory duty on any court or tribunal, *insofar as this is possible*, to read and give effect to the IMB to achieve its stated purpose. This is:

> …to prevent and deter unlawful migration, and in particular migration by unsafe and illegal routes, by requiring the removal from the United Kingdom of certain persons who enter or arrive in the United Kingdom in breach of immigration control.[81]

This is amplified by Clause 1(2), which lists eight specific provisions that 'advance that purpose'. These are: the removal duty, the inadmissibility of protection and certain human rights claims; the detention of persons subject to the removal duty; disapplication of protections, etc. available to victims of modern slavery; the prevention of those who meet the conditions for removal from being given leave to enter or remain in the UK, or settling or obtaining citizenship, the provision of the suspensive claim procedure; and, finally, a provision that all other legal challenges to removal are non-suspensive. Clause 1(4) lists six additional provisions, though these are not designated as necessary to advance the purpose of the Bill.[82]

The Government's hand is strengthened further by Clause 1(5). Uniquely (for the moment!), this disapplies s.3 HRA, effectively displacing it in favour of Clause 1(3). This decision is described by Professor Kavanagh as unprecedented and one that runs directly counter to the intention of Parliament when passing the Human Rights Act.[83] She points out that whilst the two clauses share the same language, the latter redirects the courts' '…interpretative focus away from achieving rights-compatibility towards fulfilling the legislative purpose directed by Parliament'.[84] This is, as she says, wholly consistent with previous Conservative attempts to reform human rights law. With BBORB now 'mothballed', the current impetus for reform would appear to be channelled through the IMB.

The Constitution Committee is critical of both measures, partly because of their novelty and the uncertainty they create. In noting that it is '…difficult to predict how they will be interpreted by the courts', the Committee argues that the latter will have to take a view on whether the language of Clause 1(5) expressly disapplies s.3 HRA. Whilst the Committee believes that to be so, it adds that it is still possible Clause 1(5) might be caught by the *Thoburn* principle on the implied repeal of constitutional

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[80] Dunja Mijatovic, *Letter to the Speakers of the UK Parliament*, 2

[81] Clause 1(1)

[82] These are: provision for periods of immigration detention, unless exceptional circumstances apply disapplication of protections of victims of modern slavery or human trafficking and for persons sentenced to any period of imprisonment and who are liable to deportation, inadmissibility of asylum and human rights claims made by nationals of certain safe States, provision for regulations to 'cap' the number of people able to lawfully enter the UK annually and, finally for certain kinds of behaviour by a person making an asylum or a human rights claim to be taken into account as damaging that person's credibility.

[83] A. Kavanagh, *Is the Illegal Migration Act itself illegal? The Meaning and Methods of Section 19 HRA*, U.K. Const. L. Blog (10th March 2023). She goes on to note that 'When section 3 HRA was enacted, it was intended to apply 'to all primary and secondary legislation whenever enacted'. It was not envisaged that subsequent governments could adopt a 'pick and choose' approach.'

[84] Ibid.

statutes.[85] The Committee goes on to note that the IMB does not seek to disapply s.4 HRA. Consequently, in the aftermath of a declaration of incompatibility a second question arises: can the court strike down subordinate legislation or is it prevented from doing so under s.6(2) HRA?[86] It might be added that judicial willingness to make declarations will be determined by the emphasis they choose to place on the doctrine of deference. On this point, human rights lawyers will be mindful of the well-publicised concerns over the shifting mind set of the Supreme Court under Lord Reed's presidency.[87]

Ultimately, however, a still greater problem looms. As Ms. Mijatovic (among others) has noted, the combined effect of Clauses 1(3) and 1(5) risks once again[88] '…creating divergence with the case law of the European Court of Human Rights'. Should that risk materialise, it would shift primary responsibility for rights-protection in the UK *back* to Strasbourg. This would weaken the domestic courts' working relationship with the ECtHR and defeat Parliament's intentions when passing the 1998 Act. The long-term damage – to the influence of the domestic courts and the principle subsidiarity- is likely to be considerable.[89]

Rights and the Bill

In its Memorandum of 7 March, the Home Office accepted that several of the IMB's clauses raised implications for a number of Convention rights, notably Articles 2-6, 8 and 13-14. In each case, however, it maintained that, even where there was *prima facie* evidence of interference, the Government would succeed in defending its position. This was so despite its admission that there was a better-than-evens-chance of a court ruling that Convention rights had indeed been breached.[90]

This invites further comparison with BBORB, built on Mr. Raab's critique of human rights law following publication of the report of the Independent Human Rights Act Review.[91] This critique was structured upon the following themes: the negative 'rights culture' encouraged by the Act, its adverse impact on service delivery, the restrictions it placed of the government's ability to protect the public,[92] and the barriers it placed on the ability of elected politicians to remedy the above. The principal source of these defects was the 'living instrument' doctrine developed by the ECtHR, subsequently imported into domestic law by the combined effect of ss.2(1) and 3 HRA. Accordingly, BBORB was presented as a much-needed constitutional 'reset'. It is worth dwelling for a moment on how this was to have been achieved.

- The influence of the ECtHR on domestic human rights would have been significantly curtailed and not simply in respect of Article 39 ECHR;
- The concept of 'fundamental rights' would have been modified by the filtering of what the Ministry of Justice argued were trivial and undeserving claims. Introducing exacting evidential thresholds were also part of this. So, too, was the rule that the ECHR could not be used by the domestic courts to create positive obligations;
- The incremental expansion of Convention rights would have been prevented by the refusal to include in BBORB an equivalent to s. 3 HRA. Consequently, the only means of challenging primary legislation would have been via the retention of s.4;
- Ministers would have been encouraged, at least in theory, to innovate by the absence of an equivalent to s. 19 HRA;

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[85] *Thorburn v Sunderland City Council* [2002] EWHC 195 (Admin).
[86] House of Lords Constitution Committee, *Illegal Migration Bill*, paras 39-41
[87] See for example Professor Conor Gearty, 'In the Shallow End', *London Review of Books*, volume 44, no. 2, 27 January 2022.
[88] Ms. Mijatovic has in mind the British Bill of Rights, the nature and likely consequences of which she had criticised in a previous report.
[89] Dunja Mijatovic, *Letter to the Speakers of the UK Parliament*, 24 March 2023, p. 2
[90] This was the reason why she declined to make a s.19(1)(a) HRA statement.
[91] Ministry of Justice *Human Rights Act Reform: A Modern Bill of* Rights, December 2021, CP 588.
[92] The exploitation of human rights rules by foreign national offenders (FNOs) was specifically mentioned in this respect.

- Most importantly, several provisions would have directed the courts *as to how they should interpret and apply BBORB*;[93] thereby reinforcing the principle of judicial deference to elected institutions. Elsewhere, other provisions aimed to 'anglicise' the concept of human rights.[94]

Comparison of the IMB and BBORB must not be stretched too far. The latter was a wide-ranging constitutional statute. The former, by contrast, focuses on a specific policy area and has to exist alongside the very thing the BBORB would have replaced: the Human Rights Act. Equally, some of the principles underpinning BBORB also shape the IMB. This is so, for example, in respect of Clauses 53, 38, 1(3) and 1(5); it is also evident in the s.19(1)(b) statement. Further, BBORB informs the IMB's fundamental distinction between migrants deserving of protection in the UK and those who are not. Most importantly, its influence can be seen in the effective disablement of the Human Rights Act as a means of protection. Assuming the Bill comes into effect, s. 6 HRA can be used neither to force the Home Office to consider an application for leave to enter, nor remain, nor suspend, leave alone or prevent, removal. The BBORB lies dormant:[95] its impact on Government policy-making anything but.

Conclusions

This article has focused on several aspects of the IMB that (hopefully) are of interest to those who study, teach and practice the law (not just human rights). However, the author is mindful that for reasons of space, there are others – new search powers, the annual 'cap', to name but two – that have not been considered. He is also mindful that the IMB has attracted much adverse comment for a different reason: the profound lack of evidence that it can ever hope to achieve the purposes set out in Clause 1(1). This point was made by Mrs. May, who, during the Second Reading debate, told MPs that "…whenever you close a route, the migrants and people smugglers will find another way, and anybody who thinks that this bill will deal with the issue of illegal migration once and for all is wrong".[96] This brings into sharper focus the question of whether Mrs. Braverman (or her successors) will manage to quickly remove large numbers of migrants arriving on or after 7 March 2023 to locations permitted under Clause 5. It is arguable that the listing of Albania as a safe State under s. 80AA NIAA will help,[97] particularly in light of the agreement signed by Mr. Sunak and his Albanian counter-part, Mr. Edi Rama, in December 2022.[98] At the same time, as so many have pointed out, similar agreements are not and currently cannot be in place for nationals from States such as Afghanistan, Eritrea, Iran, Sudan and Syria. In their cases, the Secretary of State's options will depend heavily upon third-country agreements such as the Migration and Economic Development Partnership signed with the Republic of Rwanda.

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[93] These are evident in Clause 1, reinforced by Clause 7, and Clause 3 when read in conjunction with Clauses 4-6 and 8.

[94] See Clauses 4 and 9

[95] At the time of writing, the Government suddenly announced that it had ditched the Bill of Rights Bill. The history of this decision is tortuous. In its first Cabinet meeting (7 October 2022), the Truss government had agreed to pause BBORB's progress: it had been due to return to the Commons the following week. However, the government's subsequent collapse and the appointment of Mr. Sunak as the new Prime Minister, with Mr. Raab as his Deputy, fed speculation that the Bill would be included in the new Government's legislative programme. That was certainly the impression created by a bullish Mr. Raab when speaking to the JCHR on 14 December 2022. As it transpired, Mr. Raab's optimism over the Bill's prospects was misplaced, his forced resignation on 21 April 2023 seemingly killing off its chances of resuming its parliamentary progress this side of the next general election. This has since been confirmed by his successor as Justice Secretary, Alex Chalk MP, in an answer to a parliamentary question. See Martin Bet 'Bill of Rights will be ditched, says Justice Secretary' *The Independent*, 27 June 2023.

[96] Becky Morton, 'Theresa May says asylum plan won't solve illegal migration issue', *BBC News website*, 13 March 2023

[97] The fairness of this is questionable. In 2022, no fewer than forty-eight per cent of initial decisions on asylum claims brought by Albanians were positive. Further, of the 166 refusals appealed, fifty-seven per cent were successful. See Peter William Walsh and Kotaro Oriishi, 'Albanian asylum-seekers in the UK and EU: a look at recent data', *The Migration Observatory,* 27 April 2023 https://migrationobservatory.ox.ac.uk/resources/commentaries/albanian-asylum-seekers-in-the-uk-and-eu-a-look-at-recent-data/

[98] Equally, a degree of caution is called for. It is undoubtedly the case that, in 2022, Albanians constituted the largest group of asylum claimants from any one country (15,925 of all applicants). However, the number of new arrivals from Albania tailed off markedly from last October, a trend that has continued into 2023. This suggests that the number of those removed under the Bill might be not as high as might once have been the case.

With this last point in mind, the Refugee Council has published a valuable impact assessment of the Bill.[99] This is based on three assumptions: that the legal and practical obstacles to the Rwandan scheme are overcome,[100] that the scheme will indeed enable the Government to remove 30,000 souls from the UK, but that no other comparable scheme will be negotiated. Accordingly, the Council estimates that three years after the IMB comes into force, 225,000 - 257,000 people will have had their claims deemed inadmissible.[101] Of this number 161,000 - 193,000 will remain in 'legal limbo': unable to make an admissible claim (and hence unable to work) yet incapable of being removed. On the further assumptions that between 50-100 per cent of asylum seekers leave detention after an average of twenty-eight days and the Government does not need more hotels to accommodate them, the cumulative costs will still total £8.7-9.7 billion.[102] In an implicit recognition that accommodation will remain an issue, in the same month as the Bill was published the Government announced that it intended to use three ex-military bases (in Lincolnshire, Essex and East Sussex) with the capacity to house several thousand people. However, even then Mr. Jenrick has conceded that this will be insufficient to bring about an immediate end to the use of hotels.[103]

Herein might lie the ultimate fate of a Bill conceived in hubris and shaped by crude political calculation: large-scale suffering for political gain, leaving the real causes of a complex problem unaddressed and a viable solution a long way out of sight.

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[99] The assessment can be found at https://www.refugeecouncil.org.uk/wp-content/uploads/2023/03Refugee-Council-Asylum-Bill-impact-assessment.pdf. See also the excellent analysis of Clyne and Savur, ibid.

[100] This might be easier said than done. On 29 June 2023, some weeks after the Refugee Council published its assessment, the Court of Appeal ruled that, until deficiencies in the Rwandan asylum system are corrected, removing asylum seekers to that country would be unlawful. This not only called into question the viability of the Rwandan policy, it is likely to have significant implications for other third-country schemes the Government wishes to negotiate: *AAA (Syria) & Ors, R (on the application of) v Secretary of State for the Home Department* [2023] EWCA Civ 745. The judgment was not unanimous. Sir Geoffrey Vos, MR and Lord Justice Underhill agreed with the appellants; Lord Burnett LCJ took a different view. Significantly perhaps, Lord Burnett, who read the judgement, also took the opportunity to affirm that the court's decision did not imply any view whatsoever on the political merits of the Rwandan scheme. Its concern lay solely with whether the scheme complied with the law as laid down by Parliament.

[101] This number will include between 39,500 and 45,006 children, approximately one-third of whom will be unaccompanied.

[102] The costs of supporting asylum seekers hinge on the number of those who, after being informed their claims are inadmissible, are eligible to claim accommodation and support under s. 4 Immigration Act 1999, amended by Clause 8 IMB for this purpose. The Refugee Council is clearly concerned that applying for s. 4 support, difficult under normal circumstances, will be beyond the vast majority of those caught by Clause 4 IMB. Those who do not qualify risk being left permanently destitute: denied support yet still unable to work.

[103] 'How is the UK stopping Channel crossings and what are the legal routes to the UK?', BBC News website, 10 May 2023 https://www.bbc.co.uk/news/explainers-53734793

HUMAN RIGHTS

The right of children for human rights education and education for democratic citizenship as a state obligation for sustainable democracy

Dr Konstantina Michopoulou*

Introduction

We are all part of a world plagued by armed conflict often caused by ostensibly democratic states with ethnic and cultural heterogeneity, and a global community with individual societies that are afflicted by phenomena of racism, xenophobia, intolerance, and discrimination. Social scientists often argue that such ill behaviour is cultivated from the early stages of human existence and the way our own personality is shaped. To that end, safeguarding democracy and the rule of law through the development of a democratic citizenship consciousness at early years of a human being is more necessary than ever. This article explores, first, the relationship between the concepts of human rights education (HRE) and democratic citizenship (DCE) with the fundamental right to education, as enshrined in international conventions, and, at a next level, their interconnection with the Target 4.7 of the 2030 UN Sustainable Development Goals (SDGs). Thus, the analysis highlights States' responsibility for the direct application of such concepts (HRE & EDC) in school education as part of a wider democratic governance agenda. We argue that developing global democratic citizenship plays a catalytic role in safeguarding wider democracy in the global community in line with the SDGs, and fulfils States' obligations as partners of this community.

Human rights education (HRE) and education for democratic citizenship (EDC), either as an integral part of the right to education of children, or as autonomous rights, has acquired a particular significance for the development of children's personality and their preparation for an accountable and active role in a free society, by instilling the identity of democratic citizen which promotes and protects democracy. To this end, the article investigates the interconnection between: (i) the right of education with its special expression in the right of children to education for human rights and democratic citizenship; (ii) the concepts of HRE and EDC, arguing that in fact EDC constitutes the ultimate goal of HRE; (iii) the state responsibility to provide such type of education, within the scope of international legal instruments as well as of UN's 2030 Agenda for Sustainable Development; and (iv) democracy and its sustainable development, highlighting that the aims of education can only be realized by States' incorporating democratic citizenship and promotion of human rights into school education, building on a learning ethic of global citizenship for the new generation.

The legal basis of children's right to education for human rights and democratic citizenship in international legal documents as states' obligation

Most international legal instruments provide for a two-fold recognition of the right to education. On the one hand, it is recognized that the right to *access* to education, and, on the other hand, that the right for a *substantial* education, with clear *objectives*, that is directed towards the full development of human personality in a climate of respect for human rights and fundamental freedoms, that enables the active participation of all persons in a free society where diverse groups are able to coexist peacefully. From 1948 the Universal Declaration of Human Rights proclaimed a catalogue of human rights that apply to "all human beings",[1] including children. The position in literature the that Declaration echoes *jus cogens* status,[2] regardless of a state being party or not, has gained ground after over 70 years since its adoption.

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[1] Proclaimed by the United Nations General Assembly in Paris on 10 December 1948 (General Assembly resolution 217 A), available at: https://www.un.org/sites/un2.un.org/files/2021/03/udhr.pdf

[2] For further analysis see, Van Beuren, G. (1998), The International Law on the Rights of the Child, Kluwer Law International, The Hague, The Netherlands, p. 18.

Regarding education, Article 26 recognises first the right to education for everyone (para. 1) and, second, the right to an education directed to "the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace" (para. 2). Similarly, the International Covenant on Economic, Social and Cultural Rights (1966),[3] in Article 13 (1), provides that:

> The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

ICESCR incorporates in a binding form the four objectives of UNDHR, enriching them by adding the effective participation of people in a free society.

As it is provided in article 2, States Parties undertake to take steps by all appropriate means, including the adoption of legislative measures, with a view to achieving the full realization of these rights. Specifically, as far as the international recognition of children's rights in a legally binding text is concerned, the UN Convention on the Rights of the Child (UNCRC)[4] provides for the right of the child to education based on equal opportunities and set conditions for the States Parties on making it accessible to every child (article 28). In addition, the objectives of education are provided in article 29 (1) whose additional value consists of seeking to evaluate the aims of education from child's perspective.[5] In the sense of this article, States Parties undertake to provide to children an education that is directed to:

> (a) The development of the child's personality, talents and mental and physical abilities to their fullest potential; (b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations; (c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own; (d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin; (e) The development of respect for the natural environment.

Also, in Article 4, the State Parties undertake the obligation to adopt all the appropriate legislative, administrative, and other necessary measures for the implementation of the Conventions' rights, including the right to education and its objectives. Furthermore, Article 11 of the African Charter on The Rights and Welfare Of The Child (1990) includes similar provisions for its states-parties that safeguard the right to access to an education that promotes the development of children's personality, fosters the respect for human rights and fundamental freedoms, prepare the child for a responsible life

[3] Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976, in accordance with article 27, available at: https://www.ohchr.org/sites/default/files/cescr.pdf

[4] Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 entry into force 2 September 1990, in accordance with article 49, available at: https://www.ohchr.org/sites/default/files/crc.pdf

[5] Van Bueren, G. (1998), The International Law on the Rights of the Child, Kluwer Law International, note 2, p. 254.

in a free society in a spirit of understanding, tolerance, dialogue, mutual respect and friendship among all peoples, ethnic, tribal and religious groups.[6]

As it is provided in these legal documents, States have undertaken the responsibility to set a minimum standard of educational aims when designing their educational programmes for children. These programmes should develop the full potential of a child's personality, talents and abilities, inculcate the respect for human rights and fundamental freedoms, and prepare the child for being a responsible citizen in a free society. Thus, it can be inferred that the other side of the right to education *consists of* the right to a full development of the child's personality and the right for human rights and democratic citizenship education. In this framework, "human rights education" is an integral part of the right to education,[7] but also obtains an *autonomous* status of a human right itself,[8] having as a result the adoption of the UN Declaration on Human Rights Education and Training (UNDHRET).[9] Article 2 (2) of UNDHRET entails the three substantial elements of education: "about" "through" and "for" human rights which States, under Article 7, have the responsibility to promote and ensure.

This "tripartite formulation" is interlinked and represents a holistic approach to human rights education.[10] The first element is based on the learning *about* human rights as a pre-condition for their exercise; the element of education "through" human rights refers to the full development of human personality through developing or reinforcing attitudes, values and beliefs in an environment of respect of human rights, which is also included as education's objectives in article 29 (1) (a) and (b) of UNCRC; and the element of education "for" human rights includes empowering to enjoy and exercise taking action to defend and promote human rights.[11] With this "pro-active" sense, the third element ("for") is in line with Article 29(1)(d) of UNCRC, which gives particular emphasis on the role of education for an active participation of the child in a free society.

To this direction, it is also developed by the UN and, Especially, the Office of the UNHCHR, the Office of the Secretary-General's Envoy on Youth (OSGEY), and the UN Educational, Scientific and Cultural Organization (UNESCO), the World Programme for Human Rights Education. Its fourth phase (2020-2024) focuses on youth empowerment through human rights education, and aims at the adoption and adaption to national contexts of a comprehensive human rights education strategy for youth, using components, actions, and practical steps for the implementation by Ministries of Education and by educational leaders. On 26 September 2019, the Human Rights Council issued the Resolution 42/7 which adopted the "Plan of action for the fourth phase of the World Programme for Human Rights Education",[12] and which calls the States for developing initiatives and implementing the plan of action of the fourth phase, submitting their national evaluation reports on the implementation of the programme on their part. In this framework, it can be concluded that the international standards included in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, in the Convention on the Rights of the Child, and in other international human rights instruments, affirm that States are duty-bound to ensure that they should provide an education which

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[6] Adopted by the 26th Ordinary Session of the Assembly of Heads of State and Government of the OAU Addis Ababa, Ethiopia on 1 July 1990 and entered into force on 29 November 1999. Available at: https://au.int/sites/default/files/treaties/36804-treaty-0014_-_african_charter_on_the_rights_and_welfare_of_the_child_e.pdf

[7] World Programme for Human Rights Education. Fourth Phase Plan of Action, United Nations (on behalf of the Office of the United Nations High Commissioner for Human Rights-OHCHR), Office of the United Nations Secretary-General's Envoy on Youth (OSGEY), United Nations Educational, Scientific and Cultural Organization (UNESCO), New York – Geneva, 2022, par. 18, available at: https://www.ohchr.org/sites/default/files/2022-10/OHCHR-OSGEY-UNESCO-World_Programme-for-Human-Rights-Education_Fourth-Phase.pdf

[8] Similarly, Struthers, A. (2015) Human rights education: education about, through and for human rights, *The International Journal of Human Rights*, 19:1, 53-73 (56), DOI: 10.1080/13642987.2014.986652.

[9] Adopted by the General Assembly's Resolution 66/137, A/RES/66/137, on 19 December 2011, available at: https://www.ohchr.org/en/resources/educators/human-rights-education-training/11-united-nations-declaration-human-rights-education-and-training-2011

[10] Struthers, A. (2015) Human rights education: education about, through and for human rights, *The International Journal of Human Rights*, 19:1, 53-73 (56), DOI: 10.1080/13642987.2014.986652.

[11] For further analysis see, UN World Programme for Human Rights Education. Fourth Phase Plan of Action, idem, par. 5.

[12] Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/295/66/PDF/G1929566.pdf?OpenElement

strengthens the respect for human rights and fundamental freedoms, in an environment of diversity, pluralism, tolerance, respect and equity, and empowers their active exercise and defence within a democratic society.

These States' obligations should also be interpreted in the light of the principle of rule of law. This principle is featured as a fundamental interpretive principle in many Constitutions, which defines and regulates the positive side of each fundamental right and serves the principle of effective protection of human rights.[13] According to the doctrine of positive obligations that has very much developed in the case law of European Court of Human Rights,[14] state organs have a "tripartite typology"[15] of obligations: the "obligation to respect" which requires the state actors not to harm the human rights by committing violations themselves; the "obligation to protect" which requires the state to protect the owners of rights against interference by third parties and to punish the perpetrators; and, the "obligation to implement" in order to give full effect to the right's content by adopting suitable measures. Consequently, the international recognition of the children's rights for human rights and democratic citizenship education, as verified in the international legal documents, produce two-fold obligations for the State parties, i.e. negative ones, in the sense that States should respect and refrain from actions and educational practices which prohibit the realization of the objectives of the right to education, and positive obligations, in the sense that States should take measures to protect and ensure the exercise of these rights. In this framework, States can only fully realize the content of these rights according to the rule of law upon which is based a democratic governance.

Sustainable democracy and education for democratic citizenship

The United Nations' General Assembly Resolution 70/1 of 25 September 2015 adopts the outcome document of the United Nations summit for the adoption of the post-2015 development agenda: "Transforming our world: the 2030 Agenda for Sustainable Development".[16] This agenda includes 17 Sustainable Development Goals and 169 targets, which seek to realize human rights to all, balancing the three dimensions of sustainable development, i.e. the economic, social and environment, and is expected to be achieved by 31 December 2030. It is grounded in the Universal Declaration of Human Rights, international human right treaties, the Millennium Declaration,[17] and the 2005 Word Summit Outcome.[18] Other instruments refer to it also as the "Declaration on the Right to Development".[19] As GA's Resolution is underlined, the 2030 Agenda recognizes the need to build peaceful, just and inclusive societies in which democracy, good governance and effective rule of law are essential for sustainable development in its three dimensions, including economic growth, social development and environmental protection.[20] This is interlinked with an ethic of global citizenship and shared responsibility, acknowledging the natural and cultural diversity of the world in a climate of mutual respect, tolerance and understanding. Education can play a catalytic role towards the cultivation of this "global citizenship" which should offer a fertile ground for democracy, just governance and respect for

[13] Greer, S. *The European Convention on Human Rights, Achievements, Problems and Prospects*, Cambridge University Press, Cambridge, 2006, p. 197, 215

[14] ECtHR, *Matheus v France*, 31.3.2005, *Guiliani & Gaggio v Italy*, 24.3.2011, *Arutyunyan v Russia*, 10.1.2012, *Boultif v Switzerland*, 2.8.2001, *Chowdury et al. v Greece*, 30.3.2017, *Christine Goodwin v UK*, 11.9.2007, *Lautsi et al. v Italy*, 18.3.2011, *Leyla Sahin vs Turkey*, 10.11.2005, *Marckx v Belgium*, 13.6.1979, *MSS v Belgium and Greece*, 21.1.2011 etc., see also J.-F. Akandji-Kombe (2007), *Positive Obligations under the European Convention on Human Rights*, Human Rights Handbooks, No. 7, Directorate General of Human Rights, Council of Europe. Michopoulou, K. (2017), *Positive Obligations of State Institutions. The case law of the European Court of Human Rights and the Greek Constitution*, Doctoral Thesis, Panteion University of Social and Political Sciences, Athens, 95-103, available at: https://www.didaktorika.gr/eadd/handle/10442/40614?locale=en

[15] Harris, D., O'Boyle, M., Bates, E., Buckley *Law of the European Convention on Human Rights*, Oxford University Press (2014), 22.

[16] UN Document A/RES/70/01, available at: www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=Eaccessed August 2017

[17] Resolution 55/2

[18] Resolution 60/1.

[19] Resolution 41/128.

[20] Resolution 70/1, par. 9 & 35. Resolution 70/1, par. 36.

rule of law. Inclusive and quality education for all (Goal 4), including children and youth, especially those in vulnerable situations, that helps them to "acquire the knowledge and skills needed to exploit opportunities and to participate fully in society"[21] constitutes both means and goal for sustainable development where democracy can flourish. As it is recognized in the 2030 Education Agenda (Target 4.7), education for human rights and education for promotion of a culture of global citizenship, are vital to promote sustainable development.

This ethic of "global citizenship" is void of any assimilation or ethnic nationalism, but it is rather based on a sense of common understanding of human rights, respect of cultural diversity, and recognition that all civilizations are crucial contributors to sustainable development. It presupposes a "civic nationalism" which is democratic in character and is based on the perception that the nation is a "community of equal, right-baring citizens, patriotically attached to a shared set of political practices and values,"[22] and that national identity is based not on ethnicity, but on citizenship and rule of law. In other words, it can be supported that "global citizenship" is founded upon a concept of democratic citizenship and, vice-versa, serves democracy itself as an essential element of sustainability.

Education that aims for children to acquire the necessary knowledge and skills to develop their personality through exploiting opportunities that favour their talents and mental and physical abilities to their "fullest potential", and prepares them to participate as responsible citizens in a free society founded on democracy and rule of law, is an education that invest in the new generation, serving the UN's goals, as it is building up the culture of global democratic citizenship. The Council of Europe as UN's regional partner in Europe for the World Programme for Human Rights Education contributing to the achievement of the aims of both UN's World Programme and the 2030 Education Agenda (Target 4.7), incarnates them in the adoption of a "Charter on Education for Democratic Citizenship and Human Rights Education" (the Charter),[23] where education is emerged as a core factor for the promotion of democracy, human rights and rule of law, against phenomena of socio-political instability, such as discrimination, racism, violence, intolerance and xenophobia, that dynamize the development of democratic citizenship. The Charter, provides a definition of "Education for Democratic Citizenship" (EDC) as the: "education, training, awareness-raising, information, practices and activities which aim, by equipping learners with knowledge, skills and understanding and developing their attitudes and behaviour, to empower them to exercise and defend their democratic rights and responsibilities in society, to value diversity and to play an active part in democratic life, with a view to the promotion and protection of democracy and the rule of law", while for "Human Rights Education" (HRE) are used the same means ("education, training, awareness-raising, information, practices and activities by equipping learners with knowledge, skills and understanding and developing their attitudes and behaviour"), but to pursue the aim of building and defencing a universal culture of human rights in society.[24]

Consequently, the elements of "knowledge, skills and understanding" (about) and "developing their attitudes and behaviour" (through) are common denominators in both terms, i.e. education for democratic citizenship and human rights education, and in this sense, both terms overlap. What distinguishes EDC from HRE is the focus and scope rather that the goals and practices.[25] Thus, it seems in fact that the former constitutes the ultimate goal of the latter, as it seeks to empower learners through educational tools and methods to become responsible citizens that exercise and defend their democratic rights, playing an active role in a democratic society for the promotion and protection of democracy.

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[21] Resolution 70/1, par. 25.

[22] McLaughlin, T. & Juceviciene, P. (1997), "Education, Democracy and the formation of national identity" in *Education, Autonomy and Democratic Citizenship. Philosophy in a changing world*, edited by David Bridges, Routledge, London and New York, p.27.

[23] Adopted in the framework of Committee of Ministers Recommendation CM/Rec(2010)7, available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805cf01f

[24] Section I, par. 2 of Recommendation CM/Rec(2010)7

[25] See, Explanatory memorandum of Recommendation CM/Rec(2010)7, par. 37, available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805cf5f0

This perception is also aligned with the aims of the human rights treaties and, as far as the Convention on the Rights of the Child is concerned, with the fourth aim of education which concerns "*the preparation of the child for responsible life in a free society.*"

Democratic governance in children's' education

Education for democratic citizenship and human rights cannot be realised if democratic governance at schools and educational institutions is absent. This goes beyond the application of educational management and ethical leadership in decision-making processes. Above all, democratic governance at schools and educational institutions needs effective methods of empowerment for children to develop their democratic consciousness, and exercise their democratic rights putting democracy and promotion of human rights into practice. This begins from the central governance (where the competence of the structure of educational system lies in the Ministries of Education) or decentralized governance (where local authorities have the responsibility of education), asking for reforms to be made and measures to be taken, and reaches down in every single classroom creating an environment of respect to diversity and to each other's rights, of participation in democratic atmosphere and respect to the rule of law.

To do so, educational reforms with the perspective to cultivate a democratic citizenship, starting from issuing circulars, appropriate training policies for educators, review existing syllabus and ensuring materials building on human rights and democratic principles, introducing structures that enable sustainable student participation in decision making in all classes etc.,[26] should be of priority when re-designing current educational systems. Within school governance, proper space should be given in the school's curriculum for relevant measures, practices and activities, such as the promotion of dialogue, organisation of regular class assemblies, familiarization with children's rights through practical examples and role playing, participation of students in resolving conflicts without violence, successful integration of vulnerable groups, promotion of school activities on contemporary issues that preoccupy the youths, environmental awareness, cultural expression,[27] as well as participation of students in debates about barriers to their rights' exercise. Moreover, there is a need for practicing appropriate methodologies to combat hate and discrimination online and offline, developing media literacy and training on how to handle risks on social media such as violent or insulting content, hate speech, potential sexual predators, while training on how to use with safety new information technologies for education and networking, etc.[28] Of course, these measures can only be realized and achieve the ultimate goal of empowering democratic citizenship, if educational materials (e.g., curricula, textbooks) and teaching practices converge.

Democratic governance needs school principals capable of balancing the conflicting demands of various stakeholders, seeking at the same time for children's best interests, including the development of their personality, through the instillation of a culture of human rights and fundamental freedoms, which prepare them for an active democratic role in a free society. To this aim, educational leaders should employ various perspectives when, for example, dealing with an ethical dilemma of conflicting rights and adopt different ethical perspectives in their decision making. This includes a combination of an 'ethic of justice', 'ethic of critique', 'ethic of care', and 'ethic of profession.'[29] In this framework, schools should not only be just in the sense of providing equality of opportunity and allowing freedom of thought, but should also aim to educate everyone with principles of justice, equity and liberty "so that free and just people emerge from schools."[30] Consequently, adopting (in principle) and employing (in practice) an ethic of justice, school principals should recognize, respect and protect children's rights,

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[26] See, Explanatory Memorandum, note 26, par. 46

[27] See, Council of Europe, *Learning to Live Together. Council of Europe Report on the state of citizenship and human rights education in Europe*, 2017, p. 18, 37, available at: https://rm.coe.int/the-state-of-citizenship-in-europe-e-publication/168072b3cd

[28] See, World Programme for Human Rights, note 7, par. 27-28.

[29] See, Eyal, O; Berkovich, I; Schwartz, T. "*Making the right choices: ethical judgments among educational leaders*", *Journal of Educational Administration*; Armidale Vol. 49, Issue. 4, (2011): 396-413

[30] Kohlberg, L. (1981), The Philosophy of Moral Development: Moral Stages and the Idea of Justice, Vol. 1, Harper & Row, San Francisco, CA, p. 74

guaranteeing fair treatment for everyone, individually, based on uniform, universal standards; while, at the same time, focusing on the best interests of the students collectively. In parallel, with an ethic of critique, school principals are obliged to re-examine and challenge social norms, practices, curricula, and infrastructure that disturbs the pluralistic and democratic profile in school society to the detriment of more vulnerable members, and, at the same time, to be responsible for the well-being of every student, trying to empower the weaker ones. Indeed, through incorporating of human rights and democratic citizenship education in school programmes and adopting educational reforms that will focus on the better understanding of human rights and the importance of ethical exercise of power for resolving of human rights' problems in a spirit of esteem and respect, will create responsible, free thinking and active citizens and, finally, sustainable democratic systems.

Conclusion

The previous analysis exhibits an adequate legal basis for states' obligation to provide for children's Human Rights and Democratic Citizenship Education, as these concepts have been enriched in more specific legal documents adopted by UN and Council of Europe, and to ensure these rights' realization. Such an inclusive and quality education is crucial for the cultivation of an ethic of "global citizenship", based upon the concept of "democratic citizenship" which, in its turn, can promote democracy and the rule of law as essential elements of sustainable development. Thus, the analysis leads to the conclusion that education for human rights and democratic citizenship that is directed to the development of children's personality and attitudes by equipping them with knowledge, skills and understanding aiming at the promotion and protection of democracy and the rule of law, lays concrete foundations for sustainable democratic societies. In fact, building up a culture of democratic citizenship at schools, which constitute a cell of the society, through democratic governance that develops children's personality by instilling a universal culture of human rights and democratic consciousness, constitutes the investment of the global society in the new generation for sustainable democracy. And this is precisely the supreme goal that all States should serve; not only for fulfilling the obligations that have undertaken as parties to international organisations, but mainly for securing the democratic future of States and, consequently, their very own viability.

SPACE LAW

In space, the other side should have the right to be heard

Alex Simmonds*

Introduction

Human settlements on Mars appear to be edging ever closer.[1] To get to destinations of such an order, extended periods of space travel will be required. Unlike the International Space Station, which operates in relatively close proximity to the Earth people involved in deep-space travel - or those stationed on Mars itself - will be far from their home-planet. With no immediate communication possible with Earth and a return journey being undesirable or impossible, how can questions of legal liability be resolved in a fair and practical way? Various solutions have been suggested, including that of complete immunity being granted,[2] through to absolute authority being vested in the commander of the mission. Whilst such solutions may appeal to a sense of convenience and tradition, it is submitted that another method of dispute resolution needs to be in place in anticipation of individual disputes that could arise – including those vis-à-vis Earth-based parties - with an inquisitorial investigatory style being adopted. Such a procedure must respect procedural fairness and situational expediency as far as possible whilst also maintaining the rule of law beyond the surly bonds of Earth. This article assesses the current legal framework and suggests improvements in respect of potential future problems.[3]

It has been noted that "Regulation of behaviour in a situation where a normal national, territorial law system is lacking, presents a challenge to jurists."[4] That criminal and civil legal jurisdiction extends to human activity space is not, for the purpose of this article, disputed, and nor are questions of whether legal liability can arise within such an environment. Much has been written to suggest that legal jurisdiction follows astronauts and other crew members, and there are legal instruments which directly regulate life aboard spacecraft.[5] This article is concerned with the means by which individual disputes of a legal, quasi-legal or disciplinary nature should be resolved in deep-space travel, and the initial settlements on a foreign celestial body other than the Moon. Travelling to Mars would take a number of years and, during this time, it is probable, if not extremely likely, that some form of individual dispute will arise either between crew members or crew member(s) and those in overall charge of the mission on Earth or Earth Orbit. At the lower end of the spectrum, the dispute that arises may be a relatively minor disciplinary infraction, at the higher end, it may involve serious criminal or civil allegations.

In all cases, it may not always be appropriate for the Commander of the vessel to be charged with resolving or mediating such disputes. There are presently a number of legal models and frameworks that provide for dispute resolution in this regard but, to date, all such legal instrumentation has been crafted with operations in Earth orbit or the Moon in mind. In all such operations to date, astronauts and other personnel have been in relatively close proximity to the base of operations with a practically non-existent time delay on communications and regular staffing changes. Deep-space ventures – including missions to Mars – will not be of the same character. Whilst a serious dispute aboard the ISS could be ultimately resolved within a reasonable timeframe by NASA, ESA or other relevant investigating

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[1] N. Drake, *'Elon Musk: A Million Humans Could Live on Mars by the 2060's'* https://www.nationalgeographic.com/science/article/elon-musk-spacex-exploring-mars-planets-space-science (accessed 8 June, 2022).

[2] U.S. Congress, Office of Technology Assessment, *'Space Stations and the Law: Selected Legal Issues-Background Paper'*, OTA-BP-ISC-41 (Washington, DC: U.S. Government Printing Office, August 1986).

[3] This article was presented at the National Space Society's International Space Development Conference in Frisco, Texas on May 27th, 2023. Special thanks go to Dr Pascal Lee, Chairman of the Mars Institute and Principal Investigator at the Haughton- Mars Project at NASA Ames Research Centre.

[4] T.A. de Roos, *'Disciplinary and Criminal Law in Space'* in 'The International Space Station', 115, Brill (2006).

[5] H. P. Sinha, *'Criminal Jurisdiction on the International Space Station'* (2004) 30 J Space L 85.

authorities as in the case of Astronaut Anne McClain,[6] a dispute in deep space would not have this luxury owing to the 'geographical dislocation'.

This is important for a number of reasons. First, circumstances may present themselves in respect of a dispute during which there is no possibility of a crew member availing themselves of the well-established right to be heard. Second - and relatedly- the well-established right to be heard by an unbiased decision-maker may not be possible where Command Authority is the established doctrine. A denial of procedural fairness in respect of either of these two matters could in the worst case, lead to crew disharmony which, in turn, could impact on morale and, consequently, sour relations and jeopardise mission objectives. Third, significant delays in investigation by appropriate authorities could lead to the value of evidence decreasing as the memories of witnesses wane with time. On one previous analysis, Astronauts have the legal rights to health, safety and to be compensated for damage along with the duty to submit to criminal jurisdiction, but, allegedly no right to a fair hearing[7].

This article will assess the relevant applicable law and posed solutions – or, as appears to be the case, the paucity thereof – and then put forward a solution of its own. The core message is that whilst the present legal framework may work in respect of some types of dispute, there will be other occasions whereby resolution will be best conducted by means of remote procedures. Moreover, having regard to the nature of long-distance tele-communications, such procedures should be inquisitorial rather than adversarial in form. As has been stated "…that is for a great part what law is about: presenting tools of conflict resolution also when nobody can imagine that conflicts ever may arise!"[8]

International space law

A number of international instruments and agreements extend to Outer Space. The UN General Assembly Resolution 1348 of 1958 on the 'Question of the Peaceful Use of Outer space' was the first 'small step' towards an international legal framework governing human activity in outer space.[9] Resolution 1472 - 'International co-operation in the Peaceful uses of Outer Space'- [10] came in December 1959 from whence came the 'Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space',[11] and, ultimately, the 1967 Outer Space Treaty,[12] which stands as the most prominent legal instrument in the field to date.

This was followed by the 'Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space',[13] (known as the "Rescue Agreement) to guarantee some assistance to space-faring individuals (and their respective crafts, along with other 'space objects') in the event of peril. The 1972 Liability Convention's prime focus was to ensure that "A launching State shall be absolutely liable to pay compensation for damage caused by its space object on the surface of the Earth or to aircraft in flight."[14]

The 1975 Convention on Registration of Objects Launched into Outer Space[15] mandated the establishment of national registries for all objects launched or procured for launch by states party to the agreement and the final Treaty (so far) came in 1979 in the form of the Agreement Governing the

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[6] R. McKie, *'Nasa astronaut 'accessed ex-partners bank account from space station'* https://www.theguardian.com/us-news/2019/aug/24/nasa-astronaut-allegedly-accessed-ex-partners-bank-account-while-living-on-iss (accessed 8 June, 2022).
[7] Gabriella Catalano Sgrosso, *'Legal Status, Rights and Obligations of the Crew in Space'* (1998) 26 J Space L 163, 182.
[8] N. 3 above at 116.
[9] UNGA Res 1348 (XIII) (13 December 1958).
[10] UNGA Res 1472 (XIV) (12 December 1959).
[11] UNGA Res 1962 (XVIII) (13 December 1963).
[12] Treaty on Principles Governing the Activities of States in Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (adopted 27 January 1967, entered into force 10 October 1967) 610 UNTS 205 (Outer Space Treaty).
[13] UNGA Res 2345 (XXII) (22 April 1968).
[14] Ibid article 2.
[15] UNGA Res 3235 (XXIX) (14 January 1975).

Activities of States on the Moon and Other Celestial Bodies.[16] There are also a plethora of other principles adopted by the UN General Assembly[17].

Most recently, as political and commercial interest in exploration further afield has taken grip, the Artemis Accords[18] have joined these instruments with 20 signatories following France's recent ascension,[19] with others surely to follow. Other instruments specifically concerned with regulating Crew behaviour will be discussed later in this article.

The problem

It has been noted that "wherever there is human activity, there is the potential for a crime to be committed, and space activities are no exception."[20] Recently, NASA investigated allegations that Astronaut Anne McClain had accessed her ex-partner's bank account from the International Space Station in what was called the first criminal investigation in space.[21] Relatedly, an Earthbound test conducted by Russian authorities between 1998 and 1999, involving a replica of the Mir space station demonstrated the potential for criminal wrongdoing in such environments. A mixed-sex group of Russian and Japanese astronauts as well as a Canadian, Judith Lapierre, took part in the study to assess, among other things, adaptability to a 'space like' environment. It was reported that crimes occurred during this time: "Two Russian astronauts reportedly committed battery, assault and attempted murder, and one of them – the Russian commander – sexually assaulted and harassed Judith Lapierre."[22]

It has also been speculated that behavioural and psychological problems leading to criminal and or civil transgressions could arise from allergic reactions arising from prolonged exposure to 'synthetically-derived electro-magnetic energy fields.'[23]

The position has also been powerfully articulated as thus:

> When great distances separate the spacecraft from its home port, it will not be as easy to offload the recalcitrant or disorderly crewman or specialist as it is for the aircraft to offload the offending air passenger by making an unscheduled landing. Spacecraft crews that live together over extended periods of time provide a greater potential for dissension and world disruption than do aircraft crews that have only transitory relations with their fellow crewmen on board. Just as a mariner finds limited diversion opportunities at sea to provide

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[16] Agreement governing the Activities of States on the Moon and Other Celestial Bodies, United Nations, <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXIV-2&chapter=24&clang=_en> (accessed 8 June, 2022).

[17] 'The Principles Relevant to the Use of Nuclear Power Sources in Outer Space', UNGA Res 47/68 (14 December 1992), 'The Principles Relating to Remote Sensing of the Earth from Outer Space', UNGA Res 41/65 (3 December 1986) and The Principles Governing the Use by States of Artificial Earth Satellites for International Direct Television Broadcasting', UNGA Res 37/92 (10 December 1982).

[18] The Artemis Accords: Principles for Cooperation in the Civil Exploration and Use of the Moon, Mars, Comets, and Asteroids for Peaceful Purposes, https://www.nasa.gov/specials/artemis-accords/img/Artemis-Accords-signed-13Oct2020.pdf (accessed 8 June, 2022).

[19] Le Monde, *'Moon Exploration: France Joins Nasa Program'* https://www.lemonde.fr/en/international/article/2022/06/08/moon-exploration-france-joins-nasa-program_5986050_4.html (accessed 8 June, 2022).

[20] M. Chatzipanagiotis, *'Criminal Issues in International Space Law'* (2016) 18 Eur JL Reform 105.

[21] *See supra* N. 5.

[22] N. 5, *'CRIMES IN SPACE, A Legal and Criminological Approach to Criminal Acts in Outer Space'* Ann. Air & Sp. L., McGill University, Volume XXXI, 2006, 4.

[23] G. S. Robinson, J.J. Hughes, *'Space Law: The Impact of Synthetic Environments, Malnutrition and Allergies On Civil and Criminal Behaviour of Astronauts'*, Jurimetrics Journal, (1978) Vol. 19, No. 1, 59-69, 65. It was further suggested that an evaluation of such phenomenon is necessarily so that an appropriate regime of civil and criminal liability could accommodate such behavioural norms at p66 and, further, that such findings could question traditional reliance on the *M'Naughten* rules in cases of mental impairment. Discussion of this is beyond the scope of this article.

> relief from the monotony of work, spacemen, without even limited opportunity for shore leave, may find time heavy on their hands.[24]

For the observer still unconvinced that criminal activity could arise amongst highly trained professionals, it should be much easier to envision situations arising involving negligence or other branches of the civil law. What if an astronaut negligently damages part of a spacecraft or raises a contractual dispute over matters of pay? Doctrinal matters of medical negligence could certainly be engaged should a crew member receive inadequate or otherwise faulty medical treatment from any such qualified individual.

Given the likely international nature of such a venture, the thorny question of what may happen in a complex choice of law scenarios such as the one outlined vividly by Helen Shin would be hideously complex to resolve on a long-haul flight:

> An American biologist is conducting an experiment aboard an orbiting multinational space station built by the United States, Canada, Japan, and the European Space Agency. The biologist is passing through the Canadian module, where a French astrophysicist is repairing an instrument panel. The astrophysicist carelessly pushes aside a wrench, which floats away and injures the biologist. Which state's choice of law rules – and institutions – determine which state's substantive laws will apply to the issues of the astrophysicist's liability and the American's ability to recover damages?[25]

Matters *vis-à-vis* the crew aside, there would also be the potential for an astronaut in deep space to become the subject of a legal action on Earth. Whilst potential legal issues in respect of family matters have been the subject of academic speculation before in the context of settlements on Mars,[26] such matters could equally arise *en-route*. What if the Earth-based wife, husband or civil partner wishes to apply for the divorce of a crew-member during the mission, or what if a boundary dispute arises in respect of a crew-member's vacant property or, should an astronaut be renting out their home for the duration of the mission, perhaps a landlord and tenant dispute could arise? Furthermore, questions of product liability could arise regarding a range of matters, perhaps even in the case of a correctly administered course of medicine proving injurious owing to a perceived fault of a specified manufacturer. Moreover, various issues could arise in respect of a crew-member's Earth-based contractual arrangements, which would be expected to subsist throughout the duration of any given long-range mission – contracts of insurance, for instance, including home and life insurance. In respect of tort law, an action for defamation either against an astronaut or from an astronaut to a party based on Earth could arise. In all such instances, personal involvement in legal proceedings could arise.

It has been stated that "As space missions take transport spacecraft farther from Earth and require larger on board maintenance and operational crews, the precedent of maritime law will become increasingly important."[27] It may well be that the common law maritime remedy of being able to sue the owner of the vessel if injury is caused through 'unseaworthiness' may need to be exercised.[28] Any such cause of action would potentially lie beyond the jurisdiction of the Commander, as would many of the other matters outlined.

Regardless of the form any dispute may take, it is clear from the above that it is likely, if not inevitable, that some form of legal dispute between either the crew themselves and the internal management

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[24] H. DeSaussure, *'Astronauts and Seamen – A Legal Comparison'* (1982) 10 J Space L 165, 179.
[25] H. Shin, *"Oh, I Have Slipped the Surly Bonds of Earth": Multinational Space Stations and Choice of Law"*, Helen Shin, (1990,) Vol. 78, No. 5 California Law Review, 1375, 1376.
[26] Ernst Fasan, *'Human Settlements on Planets: New Stations or New Nations'* (1994) 22 J Space L 47 at 51.
[27] N. 24, 179.
[28] N. 24, 173.

structure, individual crew members or even an individual crew member and other individual(s) based on Earth. As will be discussed later, the present position vests the Commander with absolute authority. This was first put into law in the United States in 1980 arising from a NASA regulation concerning the Commander of the Space Shuttle [29] and presently finds itself in the United States Code of Federal Regulations:

> This subpart establishes the authority of the NASA Commander of a NASA mission, excluding missions related to the ISS and activities licensed under Title 51 U.S.C. Chapter 509, to enforce order and discipline during a mission and to take whatever action in his/her judgment is reasonable and necessary for the protection, safety, and well-being of all personnel and on-board equipment, including the spacecraft and payloads. During the final launch countdown, following crew ingress, the NASA Commander has the authority to enforce order and discipline among all on-board personnel. During emergency situations prior to lift-off, the NASA Commander has the authority to take whatever action in his/her judgment is necessary for the protection or security, safety, and well-being of all personnel on board.[30]

In addition to the practical difficulties of such an approach as outlined, to grant the Commander a complete and unfettered discretion to make any decision in such matters would be unsatisfactory, especially where this will offend the rules of natural justice, in particular *Nemo judex in causa sua* – that he or she should not be judge in their own cause. To have things otherwise could foster feelings of resentment amongst crew members which could, in turn, have a detrimental impact on the success of the mission.

As has already been powerfully articulated:

> "Crew morale is an extremely important factor at sea and will be equally or more important in space. The need for the absolute, undivided disciplinary authority of the shipmaster, then, becomes a striking parallel to spell out in detail the full range of the disciplinary authority vested in the spacecraft commander by NASA regulation. There will have to be a statutory basis for command authority, authority which is not limited to NASA spacecraft commanders, but to all in charge of any object in space. The Tokyo Convention will have its application to spaceflight and so will the disciplinary laws and regulations pertaining to the Merchant Marine."[31]

Whilst the disciplinary jurisdiction of the shipmaster certainly has its place, it does not provide adequate coverage for a range of scenarios including some of those discussed previously and some which will be outlined later in this article.

The right to be heard

It has been noted that certain expressions within the space treaties, such as "in the interests of mankind", "for the benefit of all peoples", "envoys of mankind", underline the universal scope of its norms."[32] Two most fundamental norms within the legal heritage of mankind are *audi alteram partem* and *nemo judex in causa sua* – the right to be heard and the rule that nobody should be judge in their own cause.[33]

Lord Denning clarified these terms in the case of *R v Gaming Board for Great Britain ex parte Benaim,*[34] that:

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[29] N. 24,176-177.
[30] 14 C.F.R. § 1214.700 (1981).
[31] N. 24, 179.
[32] S. Williams, *'The Role of Equity in the Law of Outer Space'* 5 Int'l Rel. (Eng.) 776 (1975).
[33] M. Freeman, *'Truth Commissions and Procedural Fairness'*, (2006), Cambridge University Press, at 119.
[34] [1970] 2 QB 417 at 430.

> Those two rules are the essential characteristics of what is often called natural justice. They are the twin pillars supporting it. The Romans put them in the two maxims: *Nemo judex in causa sua* and *audi alteram partem*. They have recently been put in the two words, Impartiality and Fairness. But they are separate concepts and are governed by separate considerations.

The importance of these rules has been proclaimed as biblical, Justice Fortescue once stating that: "God himself would not condemn Adam for his transgression until he had called him to know what he could say in his defence … Such proceeding is agreeable to justice."[35] The right to be heard is also referenced in 'The Eumenides', from 450 BCE whereby a goddess, charged with deciding guilt or innocence, stated that: 'there are two sides to this dispute. I've heard only one half."[36] It has even been written that such ideals regarding due process can be traced back to the Magna Carta,[37] in particular, Clause 39:

> No freeman shall be taken and imprisoned or disseised of any tenement or of his liberties or free customs…except by the lawful judgment of his peers or by the law of the land.' The important part is the exception, especially the words 'by the law of the land' (*legem terrae*).[38]

Such ideals were cited throughout the following centuries, with arguments advanced to the effect that the right exists independently of any statutory basis.[39] It was also famously stated in *Bagg's case*[40] that: "The other side ought not to be deprived of the opportunity of confronting the witnesses, and examining them publicly, which has always been found the most effectual method for discovering the truth."[41]

These rights are recognized in a variety of international statutes including Article 10 of The Universal Declaration of Human Rights:[42]

> Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

And Article 6(1) of the European Convention on Human Rights:[43]

> …in the determination of his civil rights and obligations of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

Furthermore, the African Charter on Human and People's Rights[44] states that "every individual shall have the right to have his cause heard". Other instruments where such matters can be found are the International Covenant on Civil and Political Rights[45] and the Convention on the Rights of the Child.[46] The international context aside, procedural fairness has been found to be endemic across a range of the world's domestic legal systems.[47].

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[35] *The King v Chancellor of Cambridge* (1723) 1 Str 557, 2 Ld Raym 1334, 8 Mod 148, 164.
[36] The Chinese Journal of Comparative Law/2015 – Volume 3/Issue 1, 1 March/Articles '*Western Culture and the Open Fair Hearing Concept in the Common Law: How Safe Is Natural Justice in Twenty-First Century Britain and Australia*?'
[37] D. Galligan, *'Due Process and Fair Procedures: A Study of Administrative Procedures'* 1997 OUP.
[38] N. 24, 171.
[39] N. 36, 31.
[40] KBD 1572.
[41] *Ibid*.
[42] The Universal Declaration of Human Rights, The United Nations, https://www.un.org/sites/un2.un.org/files/udhr.pdf (accessed 8 June, 2022).
[43] The European Convention on Human Rights 1953, The Council of Europe, https://www.echr.coe.int/documents/convention_eng.pdf (accessed 8 June, 2022).
[44] The African Charter on Human and Peoples Rights, Article 7(1) https://au.int/sites/default/files/treaties/36390-treaty-0011_0-_african_charter_on_human_and_peoples_rights_e.pdf (accessed 8 June, 2022).
[45]N32 above at 94.
[46] Ibid at 94.
[47] Ibid at 118.

As has been noted, "Law must precede man into space."[48] So must these most fundamental of considerations also precede man into *deep* space, for moral, ethical and practical reasons? Regarding a failure to follow procedural fairness, in the case of *John v Rees*,[49] Megarry LJ stated that:

> …Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events

Further, Gonzalez has written that:

> Procedural fairness has long been recognized as a key determinant of people's thoughts, feelings, and behaviours. In social spheres as diverse as the family, the work organization, and the legal arena, people react to how fairly they are treated.[50]

Feelings of resentment or unfairness on a mission of long duration far from the Earth would not be ideal, adding to the already stressful mission parameters and possibly heightening any real sense of alienation.

Existing legal frameworks pertaining to astronauts and other personnel

Regarding astronauts in particular, it has been noted that legal responsibility for astronauts squarely belongs with their state of origin:

> The general principle governing jurisdiction, including criminal jurisdiction, in outer space provides that the State of registry exercises jurisdiction over the space objects recorded in its national space registry and the persons on board these objects, regardless of their nationality.[51]

And, further that:

> The Outer Space Treaty establishes that "a State on whose registry an object launched into outer space is carried shall retain jurisdiction and control over such object, and over any personnel thereof, while in outer space or on a celestial body.[52]

So far there have been no explicit legal rules promulgated on individual legal responsibilities or specific procedures for recourse for astronauts, save the MCOP Code of Conduct for the Crew of the International Space Station, which also has its own disciplinary procedure.[53]

According to part B of Title 14 of the United States Code of Federal Regulations on the ISS Code of Conduct,[54] the Code of Conduct was designed to:

> *Inter alia*, establish a clear chain of command on-orbit; clear relationship between ground and on-orbit management; and management hierarchy; set forth standards for work and activities in space, and, as appropriate, on the ground; establish responsibilities with respect to elements and equipment; set forth disciplinary regulations; establish physical and

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[48] A.G. Haley, *'Space Age Presents Immediate Legal Problems',* 1 PROC. COLLOQ. L. OUTER SPACE 5 (Andrew G. Haley & Welf Heinrich eds., Wein, Springer, Verlag 1959).
[49] [1970] Ch 345, at 402.
[50] C.M. Gonzalez, T.R. Tyler, '*Why Do People Care about Procedural Fairness? The Importance of Membership Monitoring'* New York University, USA, (2006), 91.
[51] N. 22, 6.
[52] Ibid.
[53] 14 CFR§ 1214.403 IV, 'Disciplinary Regulations' See further A. Farand, *The Code of Conduct for International Space Station Crews*, European Space Agency, Bulletin 105, February 2001, online <https://www.esa.int/esapub/bulletin/bullet105/bul105_6.pdf> (accessed 8 June, 2022).
[54] Ibid.

> information security guidelines; and provide the Space Station Commander appropriate authority and responsibility, on behalf of all the partners, to enforce safety procedures and physical and information security procedures and crew rescue procedures for the Space Station.

There are also rules governing the conduct of both crew and tourists to the international space station.[55] In the immediate term, the Crew Code of Conduct gives some idea of how this may be handled – the ISS Commander is presently vested with a great deal of authority. In addition to being responsible for the outcome of the mission and for the protection of the ISS in general, the Commander also has responsibility for maintaining order and enforcing procedures[56] As the US Code of Federal Regulations states: "during all phases of on-orbit activity, the ISS Commander, consistent with the authority of the Flight Director, shall have the authority to use any reasonable and necessary means to fulfil his or her responsibilities,"[57] As de Roos states, "it has to be assumed, although it is not formulated in the Code, that the commander has the authority to use force or restraint as long as it is proportionate (reasonable and necessary) and justified by the need to ensure the immediate safety of the crew members and the ISS itself."[58]

Command Authority has also been identified by Chatzipanagiotis as being a central pillar of governance on such endeavours,[59] as noted, regarding missions to the ISS. He further points out that this approach is mirrored by the Russian authorities in this area under Article 203(3) of the Russian Law on Space Activity.[60] The ultimate power of a 'commander' is nothing new. Chapter 3 of the 1963 Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft, ratified by 186 states, confers broad ranging powers upon the Aircraft Commander. Article 6 (1) provides that:

> The aircraft commander may, when he has reasonable grounds to believe that a person has committed, or is about to commit, on board the aircraft, an offence or act contemplated in Article 1, paragraph 1, impose upon such person reasonable measures including restraint which are necessary: (a) to protect the safety of the aircraft, or of persons or property therein; or (b) to maintain good order and discipline on board; or (c) to enable him to deliver such person to competent authorities or to disembark him in accordance with the provisions of this Chapter.

The next in the chain of command is the Flight Director - to whom the Commander is accountable,[61] and the Multilateral Crew Operations Panel is responsible for determining the order of succession. Although the rules as published are ultimately silent on the matter, it is to be assumed that any dispute involving the Commander directly would be addressed via the chain of command. For the sake of clarity this should be highlighted in respect of future deep-space ventures.

Such rules pertaining to the Commanders authority are nothing new in law. In the old era of sea-faring it was a well-established rule in the common law of England and Wales that the Captain of a ship had the right to discipline the crew and subject them to punishments.[62] This parallel has been noted elsewhere in the literature, most prominently by De Saussure:

> In many respects, the astronauts of today are the modern equivalent of the ancient mariners. Like the mariners of old, they live in a cooped-up environment for significant periods of time, isolated from land-based communities, totally dependent upon the cooperation and

[55] N.3, 117.
[56] N. 3 above, 119.
[57] N, 52 above.
[58] Ibid.
[59] N. 20, 105- 108.
[60] N, 20, 110.
[61] N. 20, 110.
[62] See, for example, *Lamb v Burnett* (1831) 148 ER.

> assistance of fellow crewmen, and constantly under the shadow of tragedy from an essentially hostile environment.[63]

As satisfying an analogy as this one is, it does not completely fit the template of the modern day astronaut. With no radio communications or satellites to assist them, ancient mariners would have been well and truly cut off from the world for days, if not months at a time. Save for missions well beyond Mars, this is not likely to be the case for any space sojourn within the next 50 or so years as astronauts and crew members will surely be in remote contact with Earth for the duration of the voyage.

The disciplinary policy for the ISS attached to the Crew Code of Conduct contains three possible sanctions – Verbal Warning, Written Reprimand, and Removal from the Crew.[64] Both da Roos and Farand think that financial penalties should be added to this list.[65] The logic behind adding financial penalties to any regime of punishment seems to make sense, particularly as the option of depriving a Mars-bound astronaut or crew member of their liberty would be highly impractical. However, the greater the potential punishment, the more important becomes the requirement for independent appeals and the procedural mechanisms to facilitate them.

It is also worth noting that, in addition to such immediate responses to issues of misconduct, there is a significant deterrent in place by virtue of the nature of such missions by professional Astronauts. It has been strongly argued that:

> Crewmembers and visitors on the International Space Station, as well as in any other space vehicle or platform in outer space, are continually monitored. Their actions are followed by NASA's headquarters in Houston, Texas. Non-American crewmembers are also continuously monitored by their own agencies. Astronauts' actions are covered by network and cable television and NASA TV provides live ISS mission coverage on a daily basis. So, the deterrent effect of all these actions is very high. In fact, it is higher than any criminal justice deterrent measure that has been implemented on Earth. Incarceration, which is one of the extreme measures of deterrence, does not generally imply a permanent monitoring of the inmates' actions. Other deterrence devices, such as the controversial closed circuit television cameras installed in public places only provide a limited control of the persons' actions, i.e., cameras are usually located only in strategic places and they do not generally monitor the totality of the space and all persons that enter this space on a permanent and continuing basis. Thus, at this time, deterrence in outer space is high and essentially permanent.[66]

Whilst this may be true for some types of conduct, it does not (as mentioned previously) cover civil disputes brought against crew members from Earth-based litigants and, as will be explored further, this type of monitoring will be subject to a lengthy delay as a spacecraft travels further away from Earth, so the 'deterrent' effect could lose some of its potency although the author is unaware of any psychological studies that may address this possibility. Furthermore, the presence of deterrent measures does not, in and of itself, lead to a complete absence of criminal activity as can be deduced from simple observances made on Earth.

The gulf between existing legal frameworks and the practical problems

The present law appears to confer ultimate authority on the Commander in respect of every aspect of the mission and, indeed, every area of the law associated with the mission. In respect of how the law presently stands, The Commander, therefore, can rightly be regarded as being judge, jury and executioner – in some cases in their own cause. It is accepted that this position is entirely appropriate as regards the day-to-day mission parameters and to ensure operational efficiency, but on a long-duration flight to Mars or any other comparable destination, this may not be appropriate for each and

[63] N. 2, 165.
[64] N.3 above, 120.
[65] N. 3 above, 120.
[66] N. 3 above, 11.

every potential circumstance. Chiefly there are two broad objections to the present regime subsisting in such circumstances.

First, it is not appropriate where a dispute involves the Commander or they are a party to a dispute. As well-qualified, highly-decorated, highly-trained and professional the Commander may be, to assume that they are beyond reproach and incapable of negligence or criminal or other nefarious activity, no matter how trivial, is, quite simply, a fantastical assertion. More so when one considers that, regardless of how extensively the effects of long-term space travel have been researched in Earth-based environments and settings or even aboard the International Space Station, there is no way of knowing how such an experience may impact an individual, particularly not during the first mission of its kind. As has been stated, the rules of natural justice are very clear in this respect, that one should not be judge in their own cause.

Second, legal disputes involving individual crew members could arise independently of the Commander. Examples are, as previously discussed, Earth-based disputes that may arise in the absence of the crew member. These could take the form of family matters – divorce or routine matters such as inheritance – to a range of other civil matters, as outlined previously. They could also potentially extend to matters of criminal investigation involving one of the crew. In all of these matters, the vesting of absolute authority in the Commander does not make any operational sense and, indeed, the Commander would surely be acting *ultra vires* in such matters.

We have had orbital space operations for over 50 years and, so far at least, the present legal regime appears to have worked effectively. So why is this a particular problem with long-distance space missions? The answer is that, whilst the substantive issues and potential problems remain largely the same, procedurally, careful thought is needed regarding the fair and just way of resolving such disputes. Taking an Earth-bound dispute involving an astronaut or other member of a space crew, for example. Due to the proximity of the Earth to the International Space Station, video and/or radio communications can, for all intents and purposes, be instantaneous. Owing to the laws of physics, the further away from Earth a space craft travels, the longer it will take for radio communications to reach parties on board and, in turn, those on Earth. From the orbit of Mars itself, it can take between 12 and 22.5 minutes for light- and hence radio waves – to reach Earth.[67] In respect of direct questioning from Earth-based authorities this may prove problematic as will be discussed later.

The solution

In the course of deep space travel, individual legal problems may and probably will arise. The Commander will not always be the best person to deal with such problems, particularly if they involve legal disputes with Earth-bound individuals or entities. Such matters will well and truly be beyond the jurisdictional authority of the Commander. Moreover, if the Commander himself is so embroiled in such a dispute, the picture becomes more acute. To cater for such instances, legal apparatus must be created in order to facilitate the resolution of disputes via Earth-based authorities with judicial staff in the appropriate jurisdictions. It is with respect to these jurisdictions that attention should be given to the precise means by which any such disputes arising should be dealt with.

Broadly speaking there can be said to be two forms of legal trial procedure – adversarial and inquisitorial. Adversarial procedures tend to arise in Common Law Jurisdictions such as the United Kingdom, the United States of America, Canada, Australia and New Zealand. This mode of procedure requires that the parties lead the proceedings as opposed to the judge.[68] A particular cornerstone of adversarial proceedings is cross-examination, whereby evidence is sought from witnesses via a series of leading questions with little intervention from the judge. It has been stated that "cross-examination is the greatest legal engine ever invented for the discovery of truth",[69] and, therefore, it can be assumed

[67] N. Tilman, D. Dobrijevic, *'How long does it take to get to Mars?'* https://www.space.com/24701-how-long-does-it-take-to-get-to-mars.html (accessed 8 June 2022).
[68] H. Patrick Glenn, *'Legal Traditions of the World'*, 2nd edition, Oxford 2004, 228.
[69] *John H. Wigmore, Lilly v. Virginia,* 527 U.S. 116 (1999).

that there may be a need for some form of cross-examination in determining the truth of a matter involving an astronaut or crew member. Should a crew member or the Commander find themselves party to ground-based proceedings requiring cross-examination, the trial process itself will be fatally undermined owing to the time-delay factor previously outlined. As Lord Denning stated in a case involving an appeal against the actions of a judge, whereby the judge was accused of having asked the witness too many questions:

> The very gist of cross-examination lies in the unbroken sequence of question and answer…excessive judicial interruption inevitably weakens the effectiveness of cross-examination in relation to both the aspects which we have mentioned, for at one and the same time it gives a witness valuable time for thought before answering a difficult question.[70]

Light, and hence a question from a lawyer or other judicial actor carried by radio waves, can take up to 22.5 minutes to get to Mars from Earth. Any such answer to the question would take the same amount of time to get to Earth. Any subsequent question would take the same amount of time again. Those under cross-examination from a representative based on Earth would have ample time- up to 45 minutes on the above estimation – to ponder upon, and anticipate the nature of the subsequent question. This undermines what Lord Denning heralded as 'the very gist' of cross-examination and could lead to decisions based on such evidence being overturned as was evident from the case of *Jones v National Coal Board*,[71] where excessive judicial interference rendered the trial unsafe for similar reasons.

Prior to departure on a long-range mission, therefore, the most sensible arrangements would be for an inquisitorial style of investigation to be adopted and agreed between all the states party to the mission and relevant space authority – most likely NASA – regarding situations whereby the Commander would not be the most suitable individual to make a decision, and a similar arrangement to be made vis-à-vis astronauts and other personnel and their state of origin regarding disputes arising on Earth. Witness depositions should be given in writing as opposed to verbal answers given to questions via radio and any questions regarding the depositions should be returned with a strict time-frame as regards the forthcoming answers. It would be wise for a system of case management to be devised which specifies the processes required and associated timeframes in a similar way to the Civil Procedure Rules 1997.[72] Part 7 on starting a claim and Part 9 on response both set out key timeframes.

As has been mentioned elsewhere in this article, there are some analogies to be drawn between seafaring and star voyaging. Before any deep-space venture involving human beings is launched it may be wise to establish procedures for individual dispute mechanism. This could be outlined above by Treaty in a similar way to which the UN Convention on the Law of the Sea provides for dispute mechanisms under Article 287,[73] so that a uniform approach is adopted. At the very least, the states of origin for all of the Astronauts and personnel ultimately involved in deep-space missions should be notified of these potential problems so that their respective legislators can arrange for effective procedures to be brought into law on a local basis to avoid potential problems.

Alternative propositions

Given the problems outlined, if any particular jurisdiction is adamant that deep-space faring personnel should be subjected to cross-examination, one alternative solution could be to simply grant an automatic stay of proceedings until the personnel involved return to Earth and, ultimately, to their jurisdictions of origin. Some national legislation already allows for flexibility in certain instances. In the United Kingdom, the Limitation Act 1980 provides for an extension of the limitation period for which to bring

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[70] *Jones v National Coal Board* [1957] 2 Q.B. 55 at p65.
[71] Ibid.
[72] As laid down under the Civil Procedure Act 1997 c. 12. https://www.justice.gov.uk/courts/procedure-rules/civil/rules (accessed 8 June, 2022).
[73] The United Nations Convention on the Law of the Sea https://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf (accessed 8 June, 2022).

claims for personal injuries in particular circumstances. Therefore, there is no reason why existing legislation could not allow for a range of domestic proceedings to be delayed pending return to Earth.

There are, however, two major problems with such an approach. First, as any trial lawyer knows, delays to any kind of legal proceedings inevitably leads to a degradation in the quality of any oral evidence as memories of certain events fade over time. In respect of a journey to Mars, a stay thereon and a journey back, such a delay in this case could mean a matter of years. Secondly, it does not seem wise to keep personnel in a state of suspense over such matters when they are already performing unprecedented, demanding and often dangerous tasks in what should be regarded as a high-pressure and high-stress environment. The stress could foreseeably affect the state of mind and concentration of any given crew member and, therefore, for a variety of reasons, jeopardise mission safety.

A parallel could be drawn at this stage with armed forces personnel facing legal disputes unrelated to their service in their home jurisdictions whilst serving overseas in the most trying conditions, In that case, they would at least have the luxury of periodic leave and it would be much more practical for Commanding Officers to authorise specific leave in respect of any hearings which may arise. This would not be practical on Mars or even *en-route* to or from.

Conclusions

Deep space travel by human beings at some stage is inevitable. Should the forthcoming Artemis missions to the Moon prove to be successful, this time may come sooner than we realise. Such missions will involve long and stressful periods of travel in environments more isolated and dislocated from planet earth than ever previously experienced by human beings. The potential for legal disputes to arise amongst any given group of individuals is ever-present, and such will be the case for those bound for Mars. As has been evidenced, regardless of the levels of professionalism of those chosen few, legal problems can still arise, be they between individual crew members or between crew members and parties based on earth. Moreover, absent the 'continuous monitoring' faculty discussed by de Roos,[74] there is arguably less deterrence in such scenarios, and, resultantly perhaps, more potential for misconduct should surveillance actually have such an important effect on crew behaviour.

The present legal framework - essentially that the Commander is vested with near absolute authority - may be sufficient for contemporary orbital operations where recourse to mission control is a more realistic option. However, as has been discussed, this is not fit for purpose when considering more complex individual legal problems which may arise during deep-space travel. Firstly, as has been outlined, to vest the Commander with absolute authority in these circumstances risks offending the *nemo judex in causa sua* limb of natural justice – that one should not be judge in one's own cause- should a dispute arise involving the Commander themselves. Second, vesting ultimate authority in the Commander could impact the other limb of natural justice, *audi alteram partem*, as there is the very real potential for legal problems to arise that would be beyond the levels of competence or knowledge of the Commander as previously detailed. This would be most acutely felt in cases involving disputes between crew members and parties based on earth which, unless - as would be a most unlikely instance - the Commander happens to be a qualified lawyer or judge in the precise legal field the dispute arises within, the individual crew member would certainly not have their case heard, at least not competently or effectively. Third, a crew member may wish to appeal a disciplinary decision made by the Commander or, indeed, the fairness of the process the Commander followed in reaching such a decision. In this case, an appeals process must be established and enshrined in law.

Such rules of natural justice and procedural fairness are part of the fabric of humankind's common legal heritage and the first envoys of humankind to journey into what can truly be described as 'deep space' should take them forward in much the same way that Buzz Aldrin carried a copy of the 1967 Outer

[74] N.3 above at 11

Space Treaty to the surface of the Moon in 1969.[75] Sentimentality aside, the very real human consequences of a failure to allow a right to be heard could severely undermine morale in such circumstances. Revisiting the words of Megarry LJ in the case of *John v Rees*:[76]

> …Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events.

Not only is a failure to follow rules of natural justice or procedural fairness likely to constitute a moral wrong, there is also the very real possibility of undermining crew performance as a result of a hit to morale should a crew member(s) feel aggrieved by any such failure as was within the contemplation of Megarry LJ. Such an undermining of performance could, in such pressurised conditions, prove dangerous and potentially terminal.

For these reasons, ahead of humankind's initial journeys into deep space, it is incumbent upon the contracting authorities to discuss and implement a robust mechanism for individual dispute resolution which, owing to the law of physics, must also take account of the time delay associated with long range space travel. Such dispute mechanisms must contemplate, as a minimum, situations where the Commander may be a party to a dispute, situations where a Crew member may wish to raise an appeal against a disciplinary decision of the Commander and situations where any Crew member may be involved in a dispute with a party based on planet earth.

The common denominator in these three scenarios is that an effective procedure for communicating with ground-based authorities and parties to a legal dispute must be established which respects the integrity of the legal process, particularly as regards the third scenario. In all cases, the contracting authorities must take into consideration the fact that, whilst it may well have been heralded as "…the greatest legal engine ever invented for the discovery of truth,"[77] cross-examination will lose much of its effectiveness with substantial time delay owing mainly to the fact that those subject to it will have much more time to contemplate the likely course of questioning and may be able to anticipate what will be asked next.

Ultimately, the state of origin of each astronaut may wish to determine their own procedural rules as regards dispute resolution when it comes to a dispute between a Crew member and a party based on earth. However, owing to complex choice of legal questions it may well be that the state of origin is not necessarily the best jurisdiction to hear the dispute. What if the Japanese husband of a German crew member wishes to obtain a divorce in the United States where both parties were married and presently 'reside'? Or if the same German crew member is sued by a Belgian party in the English Courts in a commercial dispute as a result of a clause in their contract? A choice of law hearing may well determine that Germany would not be the best jurisdiction to hear such a dispute, thus rendering any German procedural rules academic.

It is submitted that the optimum solution would be for all contracting parties to establish a multilateral framework for individual dispute resolution which would have the effect of binding all potential earth-bound parties. This could be done via a treaty or via a protocol to be adopted at the United Nations ahead of any such deep space journeys, whereby all states agree to follow the framework in the event of such a dispute arising.

Due to the fact that cross-examination has the potential to be significantly undermined by time delay, the multilateral framework should prescribe that dispute resolution involving earth-based authorities

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[75] Sothebys, *FLOWN to the Moon on Apollo 11 —Buzz Aldrin's United Nations "Outer Space Treaty* "https://www.sothebys.com/en/buy/auction/2022/buzz-aldrin-american-icon/flown-to-the-moon-on-apollo-11-buzz-aldrins-flown (accessed 15 August 2022)

[76] [1970] Ch 345, at 402.

[77] *John H. Wigmore, Lilly v. Virginia*, 527 U.S. 116 (1999).

and crew-members should be carried out via written deposition as previously proposed, with written questions and answers being tendered, in place of in-person questioning if done by way of cross-examination. As mentioned, the English Civil Procedure Rules could be influential in the development of such a protocol as regards time-limits for responses and other related matters. It is further submitted that such a system should also be implemented as regards appeals against disciplinary decisions and for disputes to which the Commander themselves are a party.

Implicit in the above is the fact that such measures would also apply to permanent or, as would be more likely in the first instance, semi-permanent settlements on Mars and not just the intervening period of time spent travelling there. Thinking even further into the future, it is perhaps inevitable that a system of 'private interplanetary law' will have to be devised in respect of relations between earth-based entities and those on Mars. Moreover, the peculiarities of space and time will no doubt have consequence as regards the precise timing of certain events. This could cause some not-insignificant problems in contractual matters. For example, when did the acceptance of a contract between a crew member and an earth based entity occur? At the moment the contracted crew member spoke the words into the microphone/sent the communication by other means or when the words themselves arrived on earth in whatever format 15 minutes later? The English authority of *Brinkibon Ltd v Stahag Stahl und Stahlwarenhandelsgellschaft mbH*,[78] would hold that formation of a contract will generally occur where acceptance is received. So what about the state of contractual limbo that exists for the 15 minutes in these such cases? Could the postal rule in *Adams v Lindsell*[79] end up making some sort of 'intergalactic revival' in such circumstances? Contracts where time is stipulated to be 'of the essence'[80] will surely have to be considered in a new light or be drafted in such a way as to factor in respect for the time factor issue. Expressions such as 'a response must be received by 1200 Earth Time' may become common-place in certain future agreements with space farers. Moreover, how, in theory, will rules evolve in respect of an offer in contract law being revoked through lapse of time? Take, for example, the purchasing of shares or stocks- 22.5 minutes can be a long time in such environments and the authority of Ramsgate Victoria Hotel v Montefiore[81] would say that revocation of an offer through lapse of time can arise dependant on the subject matter. Would an offer to buy 100 shares at $20 per share be valid if, five minutes later, the same share value had risen to $500 per share? What would be the implications of time delay in such transactions? Could the offer be said to be validly revoked through lapse of time in such circumstances? As things stand, revocation is only generally valid upon receipt by the would-be offeree but it be fair for such rules to operate in this fashion with the involved time delay? Perhaps it will be inevitable that business dealings of such a nature will only be conducted by earth-based representatives through devices such as power of attorney or a brokerage. At the very least, any transactions of such a nature involving a volatile subject matter between earth based-entities and crew members in situations involving time delay will probably have to carry a caveat acknowledging that all such transactions are subject to the implications of general relativity.

Returning to the immediate problem of legal procedure in a deep space setting, the alternative prospect - rather than penning any such regulatory framework - may be to set the course and blindly hope that the good sense of the Commander and the ancient provisions of maritime law are to keep the operation afloat. Given the overall importance of such a mission to the future of humanity and the range of problems which could arise – both legal and, more crucially perhaps, operational, contingent procedural rules must be drafted, agreed, and put in place before humankind sets sail for deep space. Perhaps just as seriously, if humanity wishes to make another giant leap, it is equally important that the next crucial small step gets off on the right foot.

[78] [1983] 2 AC 34
[79] (1818) 1 B & Ald 681
[80] See *Union Eagle Ltd v Golden Achievement Ltd* [1997] UKPC 5
[81] (1866) LR 1 Ex 109

Securing International intellectual property rights protection over Nigerian innovations

Yunus Adelodun[*] and O M Oyadambi[**]

Introduction

According to intellectual property, rights are limited to the territory of the country where they have been granted. Thus, where a creative produces a work, the principle anticipate that he only enjoys protection of his intellectual property rights within the country of creation.[1] Whereas, given the increasing emphasis on globalization, there are situations where the work protected under the IP laws of some countries, Nigeria for instance, may move beyond the shores of the country. Where this occurs, it would thus be worrisome to national creatives, whose work may travel beyond borders, about how protected their intellectual property (IP) rights are in the global IP context. However, the evolution of international intellectual property protection allows the safeguarding of intellectual property beyond an intellectual property holder's immediate jurisdiction. This global protection mechanism has allowed intellectual property rights holders the latitude to maximize their intellectual property, both locally and internationally.

This article also recognizes the present reoccurring trend of the extraterritoriality of Intellectual Property laws in the United States, and how Nigerian legislatures and judiciary can learn from the former's mistakes and draws inspiration on their areas of improvement. Against that backdrop, this article examines the intellectual property rights in Nigeria and enforcement for breach. Riding on the principle of territoriality side by side, the extraterritoriality of IP laws (using the United States as a case study) the article assesses various global mechanisms and multi-lateral agreements for the protection of intellectual property rights of Nigerian creatives and inventors. This article pays particular attention to how innovators in Nigeria can dispense with the worry over the territorial limitation of the right over their innovation, secure of their IP rights under international intellectual property rights protection. Given the robust nature of copyright protection in Nigeria, the work explains the vaguely stated provisions and puts them in perspective in light of court decisions.

Intellectual property rights

Intellectual property is intangible property. It is said to be owned as a result of the use of the human intellect and effort to create things.[2] IP pertains to any original creation of the human intellect such as artistic, literary, technical, or scientific creation.[3] This refers to the legal rights accorded to an inventor or creator over his work in order to protect his invention or creation, usually for a determined period of time.[4] These legal rights called IPR confers on the creator exclusivity in dealing with his intellectual property, such that only the creator/inventor or his assignees or franchisees can fully utilize such invention or creation. The reason for this 'right to exclusivity' has been linked to the role which IP plays in the modern economy. Since creative products are derived from intellectual labour, such

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[1] Trimble, Marketa, "The Territorial Discrepancy between Intellectual Property Rights Infringement Claims and Remedies" (2019). Scholarly Works. 1251.
[2] Chandra Nath Saha and Sanjib Bhattacharya, "Intellectual Property Rights: An Overview and Implications in Pharmaceutical Industry", Journal of advanced Pharmaceutical Technology and Research, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3217699/ accessed the 7th December, 2022.
[3] Ibid.
[4] Ibid.

intellectual labor associated with the innovation should be given due importance. This is because public good emanates from it.[5]

Evidence of intellectual labour that may warrant these exclusive rights can be found in what is considered to be a 'quantum jump' - the amount of money being spent on research and development (R&D) over the years or the associated costs in investments and efforts required for putting a new technology in the market.[6] Developers, investors, researchers and all stakeholders having invested money and effort towards an invention or creation thus must have their products protected from unlawful use. This allows stakeholders the time to recoup their capital and gain profit over some definite period. Thus, Intellectual Property Rights are very valuable business assets, as they not only contribute to the general profitability of a business, but also leads to the advancement of the innovative and technological sectors of every country.[7]

The World Intellectual Property Organization (WIPO) defines intellectual property as a category of property that includes the intangible creations of the human intellect.[8] The overarching principle is that intellectual property should not be used or taken without the consent or approval of the owner.[9] The legal phrase intellectual property encapsulates some specific intellectual rights that the law seeks to protect. In Nigeria, such rights include copyright, trademark, patents, and industrial designs, and the principal laws governing intellectual property rights include the Copyright Act, the Trademarks Act, and the Patent and Designs Act; discussions on these are presented below.

Copyright

Copyright is a form of intellectual property that covers all forms of literary, artistic and musical works created by an 'author'. Copyright is the rights or literary property as recognised and sanctioned by positive law. It is intangible, an incorporeal right granted by statute to the author or originator of certain literary or artistic productions, whereby he is invested for a limited period with the sole and exclusive privilege of the use of such product for commercial and other purposes.[10] The principal legislation that regulates copyright in Nigeria is the Copyright Act.[11] The Act provides for a specific category of works

[5] A.S. Gutterman, B.J. Anderson, *Intellectual Property in Global Markets: A Guide for Foreign Lawyers and Managers*. London: Kluwer Law International; 1997.
[6] Chandra Nath Saha and Sanjib Bhattacharya, *op cit.*, Footnote 5.
[7] F.K. Beier, G. Schricker, 'IIC Studies: Studies in Industrial Property and Copyright Law, From GATT to TRIPS – The Agreement on Trade Related Aspects of Intellectual Property Rights'. (1996) Max Planck Institute for Foreign and International Patent. Munich: Copyright and Competition Law.
[8] World Intellectual Property Organization, 'Understanding Intellectual Property' (2016) Available at https://www.wipo.int/publications/en/details.jsp?id=4080 Accessed on the 30th of September, 2021
[9] L. Liberti, 'Intellectual Property Rights in International Investment Agreements: An Overview', (2010) OECD Working Papers on International Investment, 2010/01, OECD Publishing
[10] Brian Garner, *Black's Law Dictionary*, (2014) (5th ed. Thomson Reuters, St. Paul, MN) 94.
[11] Copyright Act, CAP C28, Law of the Federation of Nigeria, 2004.

that are protected under copyright.[12] They are literary works,[13] artistic works,[14] musical works,[15] sound recordings,[16] cinematography, and broadcast.[17] Where any person, regardless of whether he is a Nigerian citizen, makes any of the above works, he immediately acquires the rights to use them exclusively without undue interference from a third party.

Any author arguably begins to enjoy his exclusive right the moment it is created in a fixed and definite medium.[18] Thus, there is no strict requirement as to registration of any work with a regulatory body, although it is recommended to register a piece of work. In the same vein, the mere fact that a person created work does not automatically qualify the work to benefit from the protection of the Act unless two conditions are met

First, the author must have expended sufficient effort on giving the work an original character; the work need not be unique or of literary quality; originality is more concerned with the manner in which the work was created and thus must not be a copy of another person's work. Thus, in *Offrey v Chief S. O. Ola & Ors,*[19] the plaintiff designed a new school record book consisting mainly of several vertical and horizontal lines which the defendant publishing company copied from pages 1 to 42, although added their own pages. The defendant publisher was found to have known about the plaintiff book but published nonetheless. It was held that copyright would have existed if such product is the result of some substantial or real intellectual effort or hard-work and the labour was not a common place one.[20] In Nigeria, an artistic work would also not be eligible for copyright if, at the time when the work is made, it is intended by the author to be used as a model or pattern to be multiplied by any industrial process.[21] Second, the work must also have been fixed in any definite medium of expression whether currently known or to be developed later. From this medium, it could be perceived or reproduced either directly or with the aid of any machine or device. The body saddled with the responsibility of the administration and management of all matters relating to copyright in Nigeria is the Nigerian Copyright Commission,[22] who maintains an effective data bank of authors and their work.[23] It is also pertinent to

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[12] A "work" is defined as any translations, adaptation, new versions or arrangements of pre-existing works and anthologies or collection of works which by reason of the selection and arrangement of their content, present an original character. See Section 51 of the Copyright Act Cap, C.28 Laws of the Federation 2004. The term is also defined under section 1(1) of the Copyright Act as including all forms of literary, musical and artistic works, cinematograph films, sound recordings and broadcasts. Section 1(1) (a-f) of the Copyright Act.

[13] Literary work whether or not considered within the literary community to be of literary quality includes, (a) Novels, stories and poetic works; (b) Plays, stage directions, film scenarios and broadcasting scripts; (c) Choreographic works; Computer programmes; (e) Textbooks, treatises, histories, biographies, essays and articles; (f) Encyclopedias, dictionaries, directories and anthologies; (g) Letters, reports and memoranda; (h) Lectures, addresses and sermons; (i) Law reports, excluding decisions of courts; (j) Written tables or compilation. Any of the literary work above or similar to the works above qualify as a literary work.

[14] Artistic work includes, irrespective of artistic quality, any of the following work or works similar thereto:- (a) Paintings, drawings, sketching, lithographs, woodcuts, engravings and prints; (b) Maps, plans and diagrams; (c) Works of sculpture (d) Photographs not comprised in a cinematograph film; (e) Works of architecture in the form of buildings models; and (f) Works of artistic craftsmanship and also (subject to subsection (3) of Section 1 of this Act) pictorial woven tissues and articles of applied handicraft and industrial art. Cinematograph film includes the first fixation of a sequence of visual images capable of being shown as a moving picture and of being the subject of reproduction, and includes the recording of a sound track associated with the cinematograph film.

[15] Musical work means any musical composition, irrespective of musical quality and includes works composed for musical accompaniment.

[16] Sound recording means the first fixation of a sequence of sound capable of being perceived aurally and of being reproduced, but does not include a sound track associated with a cinematograph film. Broadcast means sound or television broadcast by wireless telegraph or wire or both, or by satellite or cable programmes and includes rebroadcast.

[17] Broadcast means sound or television broadcast by wireless telegraph or wire or both, or by satellite or cable programmes and includes rebroadcast.

[18] Section 1(2) of the Copyright Act

[19] *Offrey v Chief S. O. Ola & Ors* Suit No. HOS/23/68 decided 27th June 1969

[20] C. Nwabachili, 'The Infringement of Copyright in Nigeria: An Overview', https://www.globalacademicgroup.com/journals/knowledge%20review/Nwabachili.pdf accessed 7th December, 2022.

[21] Ibid.

[22] Section 34 of the Copyright Act

[23] Section 34 (3)e of the Copyright Act

note that the court vested with the jurisdiction to hear copyrights infringement disputes is the Federal High Court of Nigeria.[24]

When a person uses the work of another that is protected by the copyright law, in a manner that is inconsistent with the right of the owner and without the authorization of the owner, such a person is said to have infringed on the owner's copyright and the law prescribes both civil and criminal sanctions to such a person. This includes an action for conversion,[25] damages, or monetary compensation,[26] injunctions,[27] and account for profits. Copyright infringement also carries criminal liability with penalties of fine and terms of imprisonment.[28] The NCC is the body with appropriate prosecutorial powers to institute such criminal proceedings. In Nigeria, where the relevant prosecutorial body has instituted a criminal action against an offender, there is no restriction on the copyright owner to institute a civil action. For criminal liability, the offender would not be liable where it can be established to the satisfaction of the court that he did not know or believe he was infringing on such copy at the time of committing the offence.[29] Lastly, it is essential to note that the duration of copyright for literary, artistic and musical works is throughout the owner's entire lifetime and 70 years after his death.[30]

Trademarks

A trademark is the most popular form of intellectual property in Nigeria.[31] This can be attributed to its constant usage in trade and commerce. It refers to a type of intellectual property that protects the distinctive mark of a business.[32] Distinctive mark refer to the words and devises that make up the name or logo of a business. The Trademark Act regulates the use of trademarks in Nigeria, and unlike copyright, a trademark is expected to be registered at the trademark registry.

The procedure for the registration of a trademark begins when the applicant carries out a search at the registry to find out whether the mark they are about to register is available for registration;[33] that is, whether or not there is an existing mark similar to the one they intend to register. Suppose the mark is available to be registered. In that case, the applicant goes on to file an application, and the registrar would thereafter publish his notice of application in the trademark journal. The publication of the application is to give room for anyone who wants to oppose the registration of the trademark to file a notice of opposition.[34] After the notice of opposition is filed, the applicant is allowed to file a counterstatement, and thereafter evidence shall be taken, and the registrar shall decide whether or not

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[24] Section 251(1) of the Constitution of the Federal Republic of Nigeria, 1999.

[25] By s.16 of the Copyright Act, all infringing copies of the works copyright subsists, or of any substantial part thereof, shall be deemed to be the property of the author or owner. Therefore, the owner may seek the order of the court for the conversion of the infringed copyright materials.

[26] This could either be Special or General Damages. The author need not prove actual damage as the damages is said to be at large meaning an award that has no exact measurement.

[27] Injunctions could be interim or interlocutory for the purpose of restraining the person from further infringing on the copyright. If it is an interim injunction, it lasts for a short time and is usually granted only in cases of urgency requiring immediate relief. It is made pending the happening of an event such as the hearing and determination of a motion on notice or until a named date. If it is an interlocutory injunction, it is to be granted pending the final determination of a case on the merits. It ensures that the parties to the case maintain the status quo pending the determination of the substantive suit. It could also be perpetual injunction otherwise called permanent injunction, a final relief which ensure that the infringer never infringes with the author's work again. There is also the Anton Piller injunction for inspection and seizure of the infringing materials.

[28] C C. Nwabachili, *op cit.* Footnote 23.

[29] Section 20 of the Copyright Act.

[30] Section 2 Copyright Act, 1st Schedule.

[31] Muhammad Murtala, 'Trademarks in Nigeria: An Overview', (2016) 4(4) International Journal of Innovative Legal & Political Studies, https://seahipaj.org/journals-ci/dec-2016/IJILPS/full/IJILPS-D-2-2016.pdf accessed December 2nd, 2022.

[32] Anne-Marie Mooney Cotter, *Intellectual Property Law: Professional Practice Guide*, (London: Cavendish Publication Ltd, 2003), p.7

[33] Section 17 of the Trademark Act

[34] Olusola John, 'Nigeria: Procedure for Trademark Search and Online Registration in Nigeria', https://www.mondaq.com/nigeria/trademark/976986/procedure-for-trademark-search-and-online-registration-in-nigeria accessed the 4th December, 2022.

the application is valid[35]. If the decision of the registrar favours the party filing the opposition, the application would be refused. However, if it favours the applicant, or there was no one who filed an opposition, the registrar shall register the trademark and issue a certificate of registration to the applicant.[36]

After the registration of a trademark, the owner gets a guaranteed protection of that trademark for seven years,[37] and thereafter the trademark is renewable for another period of 14 years.[38] This means that within those periods when the trademark enjoys protection, no individual or entity is allowed to register or use that same mark for any reason. However, the trademark owner can grant permission to a third party to use his trademark. This can be done through a franchise, an assignment, or a transfer.[39] Furthermore, when a person's trademark has been or is about to be infringed upon, they can enforce their right as a trademark owner in several ways. If they wish to do this before the registration of the offending trademark, they are expected to file a notice of opposition as well as a statutory declaration after the offending mark has been published in the trademark journal. If the mark is being used already by the infringer, they may apply to a court for an Anton-Piller Order, or they may write a cease-and-desist letter to the infringer.[40]

A notable point here is that the law requiring a trademark to be registered does not mean that an unregistered trademark cannot enjoy protection under the law. An unregistered trademark would enjoy protection under common law to such extent that the owner would be able to restrict another person from using it under the tort of 'passing off,' provided that the owner has been in continuous use of that unregistered trademark.[41] This is basically to protect consumers from confusion arising from the use of the same trademark by another person.

Patents and industrial designs

Patent as a type of intellectual property is quite different from industrial designs. However, the law protects and regulates both under a single legislation - the Patent and Designs Act. Patent is the type of intellectual property that protects inventions; for an invention to be patentable, it must be new, it must result from an inventive activity and it must be capable of industrial application: that the invention must be able to be manufactured and used in any kind of industry, including agriculture.[42]

A person desirous of getting a patent for their invention is expected to make an application to the Registrar, and the application must contain their name and the description of their invention among other things. If the registrar is satisfied that the application has complied with the provision of the law, the patent shall be granted to the applicant.[43] A patent confers upon the owner the right to use and preclude any other person from using, importing, or selling the invented product. The duration for a patent is twenty years, starting from the date when the application for the grant of patent is submitted to the registrar. For an industrial design to be protected by intellectual property laws, it must also be registered. However, it must be new and it must not be contrary to public order or morality[44].

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[35] Section 20 of the Trademark Act.
[36] Section 22 of the Trademark Act.
[37] Muhammad Murtala, *Op cit.* Fn. 13,15
[38] Section 23 of the Trademarks Act
[39] Banwo & Ighodalo, 'Trademark Licensing in Nigeria', https://www.banwo-ighodalo.com/assets/grey-matter/2b19b06b5a62ddb8f345122a028676b9.pdf accessed the 4th December, 2022.
[40] Fred Onuobia, Similoluwa Oyelude, "Nigeria", in Global Legal Group, *International Comparative Legal Guides: Trade Marks, 2021*, p.195 https://www.gelias.com/images/Newsletter/TM21_Chapter-21_Nigeria_compressed_opt.pdf accessed 4th December, 2022.
[41] Chukwunweike Anukenyi, Sylvester Ndubuisi, 'Jurisdiction in Actions for Infringement of Trade Marks and Passing-Off in Nigeria', [2013] Vol.11, The Nigeria Juridical Review, https://law.unn.edu.ng/wp-content/uploads/sites/12/2016/08/Article-5-Jurisdiction-in-Actions-for-Infringement-of-Trademarks-and-Passing-Off-in-Nigeria-Chukwunweike-A.-Ogbuabor1.pdf accessed the 5th December, 2022.
[42] Section 1 of the Patent and Designs Act.
[43] Section 3 of the Patent and Designs Act.
[44] Section 31 of the Patent and Designs Act.

The intellectual property rights regarding an industrial design are vested in the statutory creator,[45] a person who, whether or not they are the true creator, is the first to file an application for the registration of the design. An application for the registration of an industrial design shall contain a request for the registration of the design together with the name and address of the person who wants to register it and the specimen of the design. After submitting these things, the person intending to register the design would pay a prescribed fee. Thereafter, the registrar shall examine the application and after they are satisfied that the application has complied with the law, the registrar shall issue a registration certificate to the statutory creator which is a proof that the design has been registered.

Lastly, infringement of a patent or a design occurs when a person uses the patent or the design in a manner that is inconsistent with the right of the owner, without the authorization of the owner.[46] That is, if a third party makes, sells, import or stocks or use the patent or the design without the consent of the owner. Upon infringement, the owner has a right to seek redress in court against the infringer and the owner is entitled to relief such as damages, injunctions, account for profit and others.[47]

An analysis of the extraterritoriality of intellectual property rights and the application of international protection of such rights

Due to the complex nature of the protection of the numerous rights established under the various rules of intellectual property, law and the uniqueness of determining the extent of the level of ownership and control of the rights of producers, many have posited that the application of another country's law in matters that emanate from another country will birth complexities, and there is an increased possibility of conflict of laws. In order to perform an analysis, the rules and practices of the United States with respect to the intellectual property rights will be established.

The judicial arm of government of the United States have continuously attempted, to resolve these issues, including establishing the presumption against the extraterritorial application of US law.[48] The school of thought that is against the above rule rely on in further preaching and establishing the rule of extraterritoriality of IP rights, and is the incurring inconsistency of the courts in the United States to apply the presumption. The presumption stems from the Restatement (Fourth) of the Foreign Relations Law of the United States, with the overall interest of protecting the international community from potential clash and conflicts of law.[49] To provide further justification for the emphasis on the presumption,[50] the court has over time emphasized the doctrine of separation of power: the executive and legislature have the ability to work at the international community, and the judicial arm are restricted by the United States law extra-territorially.[51] The idea of extending diverse countries' IP rights to another is heavily criticized due to the possibility of questioning the sovereignty of the other country. Matters centred on the aforementioned issue are usually confronted with the provisions of conflicts of law to prevent unnecessary interference.

In order to ameliorate the issue of preventing the possibility of the US courts not performing its duty as 'the last hope of the common man' via the application of the presumption, the court will evaluate the circumstance of the case together with the applicable laws and determine whether the presumption has been negated by the congress via providing that the law should have an international reach; in other words, it must be applicable outside the United States. In the event that the presumption has not been negated by any law, the courts has overtime expanded the law of the United States to apply extraterritorially in the event that the conduct in which the matter stemmed from occurred domestically.[52] Irrespective of the United States inconsistent application of the presumption, the court

[45] Section 14 (1) of the Patent and Designs Act.
[46] Section 25 (1) of the Patent and Designs Act.
[47] Section 25 (2) of the Patent and Designs Act.
[48] *WesternGeco LLC v. ION Geophysical Corp*., 138 S. Ct. 2129, 2136 (2018)
[49] Restatement (Fourth) of the Foreign Relations Law of the United States § 404, Reporters' Notes 1 (Am. L. Inst. 2018).
[50] Restatement (Fourth) of the Foreign Relations Law of the United States § 405 (Am. L. Inst. 2018).
[51] Curtis A. Bradley, Territorial Intellectual Property Rights in an Age of Globalism, 37 VA. J. INT'L L. 505, 516 (1997).
[52] William S. Dodge, 'The New Presumption against Extraterritoriality' 133 Harv. L. Rev. 1582, 1595–97 (2020)

has also overtime assented to the ground of licensing the extraterritorial application of the United States law in matters that establish damages and liability.[53]

Microsoft Corp v. AT&T Corp.,[54] is a notable case on the evaluation of the extraterritoriality of IP rights. The defendant argued that since the various copies of the software created overseas emanated via express supply from the United States, that master software emanated from the United States. The Supreme Court reasoned that since the entire copies emanated outside the United States via supply from outside the country, the patented invention and liability must be controlled by the foreign law. It further held that if there is any doubt in the mind of the defendants with regards the conduct of Microsoft falling outside the dictates of s.271(f), such doubt was to be expunged by the presumption against extraterritoriality. The possibility of a loophole to be maximized by software makers to Crete copies in various foreign companies was tagged by the Court to be an issue for "congress to consider".

Subsequently, in 2012 the Federal Circuit observed the circumstances of a particular case which is centered round the liability of manufacturers of pest control supplements. They were held liable for inducement under the extant provision of s.271(b) for the sale and manufacturing of the Perot control supplements outside the United States i.e. in a foreign land. In *Merial Ltd. v Cipla Ltd.*,[55] the Court held that the defendant was liable for inducement on the ground that it had a fundamental role in the packaging, manufacturing and provision of aid in the creation and development of the product which was used as a tool by the direct infringer for sale in the United States. It further held that the provisions of s.2151(b) cannot be limited by territorial boundary, and that the defendant attracted the application of the doctrine of extraterritoriality in inducting the act of infringement which occurred with the four corners of the United States. Relevantly, the case of *Power Integrations, Inc. v. Fairchild Semiconductor Int'l, Inc*.,[56] the argument of Power Integration that due to the fact that it established an underneath act of domestic infringement, it had the legal right of full compensation for ever damage suffered as a result of the infringement, was clearly rejected by the Federal Circuit. The court further held that the foreseeability theory of damages set into motion by power integration kick-start the presumption against extraterritoriality.

In 2018, the Federal Circuit received an application to overturn the decision of the district court in granting a motion of summary judgment in the case of *Texas Advanced Optoelectronic Solutions, Inc. v. Renesas Electronics America, Inc*.[57] The patentee was held by the district court to lack the ability to claim damages for light sensors, which were packaged, manufactured and tested in a foreign land and subsequently shipped to distributors and sales persons abroad. The court held the patentee was not entitled to compensation irrespective of the evidence rendered to reveal that Apple made sales of iPhones in the United Sales (including the gadgets of the accused). The court's affirmation of the summary judgment was premised on the ground that there was insufficient evidence to attach the foreign sales to the products made, sold, used and offered for sale on the United States under s.271(a).

In 2018, the Supreme Court, in *WesternGeoco LLC v. ION Geophysical Corp*.,[58] scrutinized the issue of extraterritoriality in a wider context and categorized the divergent components of patented invention from the United States under s.271(f)(2). The decision of the Federal Circuit was reversed by the Supreme Court on the ground that ss.271(a) and 271(f) have a relationship due to the inability of patent owners to receive damages from the loss of foreign sales. The court further established the grounds for questioning the extraterritoriality of IP rights from the position of the court in *RJR Nabisco, Inc. v. European Community.*[59] It turned down the presumption against extraterritoriality due to the fact that its application will birth absurdity on the end of recant statutes, particularly the Patent Act. The Court

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[53] *WesternGeco LLC v. ION Geophysical Corp*., 138 S. Ct. 2129, 2134 (2018). See Thomas F. Cotter, Extraterritorial Damages in Patent Law, 39 CARDOZO ARTS & ENT. L.J. 1, 3 (2021).
[54] 550 U.S. 437 (2007).
[55] 681 F.3d 1283 (Fed. Cir. 2012)
[56] 711 F.3d 1348, 1370-1371 (Fed. Cir. 2013)
[57] F.3d 1304 (Fed. Cir. 2018).
[58] 138 S.Ct. 2129 (2018).
[59] 579 U.S. 325 (2016)

further established that the intent of Congress was to regulate matters on infringement. Further, infringement as contained in ss.284 and 271(f)(2) of patent law must extend to the domestic conducts of manufacturing and supplying diverse components of an invention within the United States with the intention of combining such process outside the United States "in a manner that would constitute an infringement of patent when such combination occurred within the United States."

Most recently, in 2022, the Federal Circuit in *California Institute of Tech. v. Broadcom Ltd*.,[60] supported the decision of the district court to ignore the argument on the presumption against extraterritoriality. The position of the federal circuit was premised around the truism that the issue was not centered on whether or not the infringement policy should have a domestic or extraterritorial effect, plus, counsel failed to establish whether or not the cited laws apply domestically. The crux of the argument on both sides was on whether or not the relevant transactions that led to the creation of the intellectual property right were extraterritorial or domestic in nature. The district court held that:

> …the moment an alleged infringer is held liable for infringement following a claim from a patent holder; such position can only come into existence once the patent holder proves on preponderance of evidence that the infringer imports, sells, offers to sell without the patent user's authorization within the United States.

The court gave a succinct instruction to the jury on the requisite grounds before determining whether or not a sale should be adjudicated on based on the United States law. The evidence of the accused being supplied to Apple following the Master Development and Supple Agreements executed in the United States is sufficient evidence of the extraterritorial application of the United States Patent law.

The extent of the applicability and enforceability of trademark extraterritoriality is gently emerging as a ground for conversation. A country such as the United States, while evaluating the extent of the applicability of the above area, have recognised the matter as a fast-growing legal issue. An example of the aforementioned is the position of the United State court in the case of *Abitron Austria GmbH v. Hetronic Int'l, Inc*.[61] In 2016, in *Trader Joe's Co. v. Hallatt,*[62] the Ninth Circuit, independently reversed the decision of a lower court via the dismissal of an action instituted by Trader Joe against a Canadian retailer; the Canadian retailer contacted and subsequently pitched ideas of brands produced from Trader Joe in the United States and went on to sell the product in Canada. In the course of giving judgment, the Ninth Circuit openly adopted the two-step framework.[63]

In evaluating the level of extraterritoriality of trademark laws, courts are legally obligated to examine the law to determine whether or not the drafters of such laws intend to make it apply outside the four corners of the originating country. This is done by examining whether there is a clear and affirmative instruction to give it such widespread application. The US Supreme Court gave an intelligent mode of identifying this intention by holding that the Lahman Act, for example, employed the use of the words "use in commerce" - the use of commerce reveals the intention of the congress to allow the act have extraterritorial effect.[64] In the absence of the above, the court must evaluate the law and investigate whether the draftspersons intend to ensure the law has a general and foreign application. In 2020 the circuit employed the test that requires the conduct of foreign producers to have a stronger commercial ground in the United States over the requirement of the forge in strangers having some effect in the United States.[65] The tests are: whether or not the defendant is a citizen of America must be determined: how much has the dependent affected the e-commerce of the United States by his conduct; and whether there would be the possibility of having conflicts between the applied law and the foreign law. The requirements as established above have over the years been applied by the Tenth Circuit, while rejecting

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[60] 25 F.4th 976, 992 (Fed. Cir. 2022)
[61] 143 S. Ct. 398 (2022).
[62] 835 F.3d 960; 9th Cir. 2016.
[63] The two-step framework of RJR Nabisco. Id. at 966 (citing *RJR Nabisco, Inc. v. European Cmty*., 579 U.S. 325 (2016)).
[64] *Steele v. Bulova Watch Co.,* 344 U.S. 280 (1952).
[65] *IMAPizza, LLC v. At Pizza Ltd.,* 965 F.3d 871, 880 (D.C. Cir. 2020) (citing *Trader Joe's*, 835 F.3d at 969; *McBee v. Delica Col, Ltd.,* 417 F.3d 107, 120 (1st Cir. 2005).

the *Timberlake* and *Vanity Fair* tests. In cases where the defendant is a foreigner, the onus is on the plaintiff to establish that the act of the defendant had a costly effect on the commerce of the United States.

While National or domestic intellectual property laws are limited to a country, innovators need to protect their intellectual property outside the country where they are domiciled, lest they be counterfeited and pirated. This protection is crucial because a third party can register in another jurisdiction fraudulently or innocently, thereby excluding the original owner or first inventor from maximizing their intellectual property in that jurisdiction. International legal instruments to protect IP are available through treaties, conventions, protocols, agreements, charters and declarations. Before examining the applicability of international laws in Nigeria, it is important to mention that the applicability of international laws in Nigeria is subject to ratification: therefore, the country must submit its instrument of ratification besides being a signatory to the international legal instrument.

The extraterritoriality of trademark laws and applicability of international trademark laws in Nigeria: UA as a cases study

To have an understanding of the extent of the extraterritorial application of trademarks laws, the rule of priority and the level of its expansion from the United States to other countries will be adopted as a case study. Upon careful scrutiny of the United States trademark law, it is clear a prior user has an advantage over a foreign user. Put differently, a foreign user cannot claim priority over a previous user in the United States. However, foreign users have over time seek solace in the mark doctrine. However, in practice, the mark doctrine has failed to receive judicial recognition, as the court and the Trademark Trail and Appeal Board (TTAB) have constantly rejected arguments centred on the mark doctrine.

An example of such case is the case of *Jung v. Magic Snow.*[66] In this case, Jung filed an application in court alleging the grave possibility of the presence of confusion with the use of his mark. In canvassing her argument, she attached the alleged fame of her mark in Asia and posited that this same mark has popularity in the United States, due to her overall effort in developing the mark in Korea. The Trademark Trial and Appeal Board expressly dismissed the argument of Jung on the ground that the entirety of her argument failed to establish the point of having prior use of the design, the action also failed as a result of the inability of the Trademark Trial and Appeal Board to recognize the well-known doctrine in establishing priority.

It is expedient to establish that when considering arguments that sway on the end of the extraterritoriality of trademark law, experts fail to recognize the peculiar importance of intellectual property rights established under foreign laws. In order to settle this, lower courts in the United States have delineated seven hyper intelligent conditions before a patent law or trademark law can become extraterritorial (it is important to note that these conditions are outside the provisions of intellectual property law). The conditions are: the extent at which the law conflicts with a foreign policy or law: the allegiance or nationality of the parties in dispute and the location where the parties agreed, and the principal location of business; the mode of enforcement coupled with the ease of enforcement by either state to achieve maximum compliance with the extent to which enforcement by either state can be expected to achieve compliance; the effect the enforcement of the law will have on the United States as compared to the originating nation; an evaluation on whether or not the enforcement of such law would harm or negatively affect the American commerce as a whole: the level and height of the foreseeability of the effect of applying such law extraterritorially would have on the foreign country and the United States as a whole; and the comparative and juristic relevance of the conduct abroad and the violation charged of the conduct within the United States.[67] It is clear that the above conditions are not centered on the principles of Intellectual Property law. Instead, they are wide spread conditions applicable across

[66] LLC, 124 U.S.P.Q.2d 104102 (T.T.A.B. 2017).
[67] *Decca Ltd. v. United States*, 544 F.2d 1070, 1074 (Ct. Cl. 1976).

diverse legal areas to understand and weigh the issue of extraterritoriality of Intellectual Property Rights.

In furtherance of the earlier established subdivision, it is pertinent to establish international laws applicable in Nigeria and the mode of entrenching these laws into Nigerian law. There are three basic international laws applicable in Nigeria: the Paris Convention for the Protection of Industrial Property,[68] TRIPS, and the Madrid Agreement Concerning the International Registration of Marks of 1891. The Paris Convention for the Protection of Industrial Property was signed in Paris on the 20 March, 1883, as one of the first Intellectual Property Treaties. It established a union for the protection of Industrial Property. As of January 2019, the convention has 178 contracting member countries, making it one of the most widely adopted treaties worldwide. The substantive provision of the Convention is divided into three: national treatment, right of priority, and the common rules. It takes a range of forms, including patents for inventions, industrial designs, trademarks, service marks, commercial names and designations amongst others. Nigeria has been a contracting party to this convention since the 2nd of September, 1963.[69]

The Trade Related Aspect of Intellectual Property Rights ("TRIPS") is an international legal agreement between all World Trade Organization member nations. The agreement was negotiated during the 1986-1994 Uruguay rounds.[70] It introduced intellectual property rules into the multi-lateral trading system for the first time. It came into effect on the 1 January 1995 and it is the most comprehensive multi-lateral agreement on intellectual property.[71]

The TRIPS agreement plays a critical role in facilitating trade in knowledge and creativity, resolving trade disputes over intellectual property, and assuring WTO members the latitude to achieve their domestic objectives. The agreement is a legal recognition of the significance of links between intellectual property and trade.[72] The TRIPS Agreement covers five broad areas namely: what general provisions and basic principles of the multi-lateral trading system apply to international intellectual property; what the minimum standards of protection are for intellectual property rights that members should provide; which procedures members should provide for the enforcement of those rights in their own territories; how to settle disputes on intellectual property between members of the WTO; special transitional arrangements for the implementation of TRIPS provisions. Nigeria is a signatory to the WTO agreement on Trade Related aspects of Intellectual Property rights.[73]

The extraterritoriality of trademark laws and applicability of international trademark laws in Nigeria: USA as a cases study

The extraterritorial application of patent law must be distinguished from that of trademark laws. The practice of the United States is noteworthy when it comes to distinguishing the two areas. As established earlier, in the United States a prior foreign user of a trademark lacks priority over a previous user in the United States. Patent users on the other hand are expected to understand that the patent law denies foreign users following prior patent foreign activity.[74] Unlike the United States trademark law, the United States patent rights and its extraterritoriality is not as straight forward, as is its trademark laws

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[68] The Paris Convention, adopted in 1883, applies to industrial property in the widest sense, including patents, trademarks, industrial designs, utility models, service marks, trade names, geographical indications and the repression of unfair competition. https://www.wipo.int/treaties/en/ip/paris/index.html

[69] World Intellectual property Organisation, 'Nigeria: Jurisdiction – General Information', https://inspire.wipo.int/system/files/ng.pdf accessed the 5th December, 2022.

[70] Mirësi Çela, *op cit.*, Fn 33, 279.

[71] Ibid.

[72] Ibid.

[73] International Trade Administration, 'Nigeria: Country Commercial Guide: Trade Agreements', https://www.trade.gov/country-commercial-guides/nigeria-tradeagreements#:~:text=Nigeria%20ratified%20the%20WTO%20Trade,are%20ongoing%20within%20these%20fora. Accessed 5th December, 2022.

[74] *ITC Ltd. v. Punchgini, Inc*.482 F.3d 135 (2d Cir. 2007); 35 U.S.C. § 102 (both pre- AIA and AIA).

and their enforcement outside the United States. One of the reasons for this complication is premised on the ground of the multitudinous definition of the word 'infringement'.

The judiciary have tried in multiple occasions to settle this difficulty. For example, in *NTP v. RIM*;[75] the Federal circuit distinguished between a system claim and method claim. A system claim has the ability of being infringed in the event that a significant amount of the system can be located outside the United States, whereas a method claim lacks the ability of being infringed in cases where a single step was carried outside the United States.[76] However, an analysis of the American Invents Act reveals that the level of the extraterritoriality of the patent law has been expanded. A good example can be revealed in the express denial of patent rights and protection on the end of public foreign users and calls for the sale of inventions outside the four corners of the United States.

Hence, upon careful examination of the above, it is clear that there is difficulty in establishing the extraterritoriality of the patent legislation, the language employed by the act and the words used by the drafters of the legislation, can be attached to this difficulty. There is evidently no clear cut rule and each extraterritorial patent case must be held based on circumstance of each case and carefully evaluated. In 2007, the Supreme Court expressed its knowledge and interpretation of the extraterritoriality of the patent law by holding that the respective copies of computer soft wares developed outside United States cannot be tagged the various components of an invention that should be protected by patent as established in s.271(f)(1).

The United States Supreme Court is not silent in this matter, as the court specifically held that "virtually every foreign conduct is generally streamlined around the circumference of foreign laws". Foreign laws were further held to include 'the diversity of every judgment and policies streamlined around the rights open to investors, the public and competitors in patented inventions'.[77] The same Supreme Court in a case centered around the ability of the plaintiff to recover damages in an extraterritorial matter ignored the earlier established possibility of conflict of law and further held that the laws of the Supreme Court had the ability to assume jurisdiction in the matter, irrespective of whether or not it was an extraterritorial matter. [78]

On the applicability of international patent laws in Nigeria, the most common international law on patents is the Patent Cooperation Treaty of 1970, as well as the Paris Convention for the protection of Industrial Property. The Treaty is administered by the World Intellectual Property Organization (WIPO) and it has more than 148 contracting states. It provides a system of filing a patent application, and allows a person to obtain patents in multiple countries around the world on the basis of a single patent application. It also simplifies the procedure for obtaining patent protection in many countries, making it more efficient and economical for both the users of the patent system as well as the national offices. A patent application under the Patent Corporation Treaty has the same legal effect as a national patent application in each of the contracting states. Therefore, it saves the applicant the time of going to file a separate patent application in each country independently. Nigeria is a signatory to the patent corporation treaty. It was signed in 2003 and the instrument deposited to the WIPO office in 2005. Therefore, a Nigerian innovator who wishes to have an international protection over his innovation only has to register and apply for protection under the Patent Cooperation Treaty.[79]

Summarily, the comparison of the position of the United States Supreme Court in matters centered on the extraterritoriality of patent and trademark law reveals that the court played a significant role in solving the conflicting disputes in the extraterritoriality of trademark laws. Even before the existence of the presumption, the Supreme Court had always held that trademark law had the flexible ability to

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[75] 418 F.3d 1282 (Fed. Cir. 2005)
[76] *U.S. NTP, Inc. v. Research in Motion, Ltd.,* 418 F. 3d 1282, 1317-1318 (Fed. Cir. 2005).
[77] *Microsoft Corp. v. AT & T Corp*., 550 U.S. 437, 455 (2007) (quoting Brief for United States as Amicus Curiae at 28).
[78] *WesternGeco,* 138 S. Ct. at 2129. The dissent in *WesternGeco*, however, did raise such concerns. See ibid, 2143 (Gorsuch, J., dissenting).
[79] WIPO, "Nigeria Accedes to WIPO's Patent Cooperation Treaty", https://www.wipo.int/pressroom/en/prdocs/2005/wipo_upd_2005_238.html accessed the 5th December, 2022.

be applied extraterritorially.[80] However, it is clear that recent decisions of the Federal Circuit Court and the Supreme Court sway on the end of the extraterritoriality of patent laws. Thus, Nigeria has a lot to learn when it comes to extending Nigeria Patent laws to apply outside her four corners. The decisions of the United States courts should be consulted and relevant deductions must be made.

Applicability of international copyright laws in Nigeria

The benefit of international copyright protection is that the owner of the work need not register their work in multiple jurisdictions to obtain protection, because the Berne Convention for the Protection of Literary and Artistic Works.[81] This provides that a country that is a member of the Berne Union must afford copyright protection to foreign nationals without a requirement of any formalities like use of a copyright notice or a registration requirement. The Berne Convention is the oldest international convention governing copyright. Copyright protection under the Berne convention is for a minimum of 50 years from the year of the author's death.[82] For photographic works and works of applied art, the minimum term of protection is 25 years after making the work.[83]

Also, the Trade Related Aspect of Intellectual Property Rights ("TRIPS") agreement provides that countries that have ratified the agreement comply with the provisions of the Berne Convention.[84] However, the agreement extends copyright protection to computer programmes and original databases, which are not clearly protected in the Berne Convention. The agreement generally seeks to provide for copyright for works relating to new technologies. It also provides for other concepts such rental rights.[85]Another important instrument is the WIPO copyright treaty. It stipulates that the provisions of the Berne Convention apply in the digital environment so that rights such as the right of reproduction apply to reproduction on internet platforms. On 4 October, 2017, the World Intellectual Property Organization's Director General received Nigeria's instruments of accession and ratification of the WIPO copyright Treaty, the WIPO performances and Phonograms Treaty,[86] the Marrakesh Treaty,[87] and the Beijing Treaty[88].

In determining the extraterritoriality of IP laws, the case of *Halo Elecs., Inc. v. Pulse Elecs*,[89] is important for a proper understanding of the possibility of the extraterritoriality of Nigerian Intellectual Property Laws. This is because the Federal Circuit upon evaluating the distinguished prohibition imposed on the defendant making the entire sale procedure a domestic sale held that there was no error, even with the existence of circumstances such as; halo admitting to the truism that the entire stage of contracting and pricing negotiations occurred within the United States, they further averted that it does not fall within the requirements for extraterritorial activities within the purpose of s.271(a). The Federal Circuit established that the plaintiff "must understand that the design is not a blanket holding that must

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[80] Timothy R. Holbrook, Is There a New Extraterritoriality in Intellectual Property?, 44 COLUM. J.L. & ARTS 457, 463 (2021).

[81] Berne Convention for the Protection of Literary and Artistic Works, September 9, 1886, completed at Paris on May 4, 1896, revised at Berlin on November 13, 1908, completed at Berne on March 20, 1914, revised at Rome on June 2, 1928, revised at Brussels on June 26, 1948, and revised at Stockholm on July 14, 1967 (with Protocol regarding developing countries).

[82] Article 7(1) of the Berne Convention.

[83] Article 7(4) of the Berne Convention.

[84] Mirësi Çela, 'Trade Related Aspects of Intellectual Property Rights and Developing Countries', [2014] Vol. 3 No. 2, Academic Journal of Interdisciplinary Studies, 281.

[85] Ibid.

[86] The WIPO Performances and Phonograms Treaty (WPPT) deals with the rights of two kinds of beneficiaries, namely (i) performers (actors, singers, musicians, etc.); and (ii) producers of phonograms (persons or legal entities that take the initiative and have the responsibility for the fixation of sounds) https://www.wipo.int/treaties/en/ip/wppt/ accessed the 5th December, 2022.

[87] The Marrakesh Treaty is an international legal instrument which makes it easier for blind, visually impaired and print disabled people to access works protected by copyright.

[88] It grants performers four kinds of economic rights for their performances fixed in audio-visual fixations, such as motion pictures: (i) the right of reproduction; (ii) the right of distribution; (iii) the right of rental; and (iv) the right of making available. https://www.wipo.int/treaties/en/ip/beijing/summary_beijing.html accessed the 5th December, 2022.

[89] Inc., 831 F.3d 1369, 1378 (Fed. Cir. 2016),

emanate from a sale cycle, as such cannot be regarded as a domestic transaction". The court further upheld the decision of the lower court in holding that the extraterritoriality of patent laws is a possibility under the United States of America legal circumference.

Concerns in cross-border enforcement of the IPR of Nigeria creatives

Several international treaties and multilateral agreements mandates each state party to accord protection to creatives or works of creatives who are nationals of or registered in the states of other State parties on the exact terms as they do to their nationals.[90] This underscores the legal principle popularly known as 'national treatment'.[91] As party to a number of treaties containing significant provisions for reciprocal protection of copyright, Nigeria has indubitably committed to extending copyright protection to works of nationals and works first published in countries that are State parties to these international agreements.[92] It is important however to note that being a country that subjects treaties to ratification and domestication before it can be enforced within the country. Thus, there is a situation where an obligation exists to give national treatment under international law while these treaties have no force of law in domestic courts except as enacted into law by the National Assembly.[93] Thus, no right of action against infringement will exist.

For instance, in *Island Records Ltd v Pandun Technical Sales and Services Ltd & Anor,*[94] the first to sixth plaintiffs were recording companies incorporated in the United States of America and the United Kingdom. Their joint claims against the defendants were, *inter alia*, for an injunction restraining the defendants from further infringing on the copyright of their sound recording. The seventh to ninth plaintiffs were recording companies incorporated in Nigeria. The Federal High Court held that under the Copyright Act of 1970, a work produced by a person who is not a citizen of or domiciled in or a body incorporated under Nigerian law is not protected under Nigerian laws. The court held further that pursuant to s.2(1)(b) and 3(1) of the 1970 Act, the first set of plaintiffs, being foreign companies when the work was first recorded, had no basis to institute the action and thus were outside the protection of Nigerian law.

Similarly, this happened in *Société Bic S. A. v Charzin Industries Limited & Anor*.[95] The plaintiff was a corporation registered under the law of France, and its claim was for, *inter alia*, infringement of intellectual property rights. The defendant raised a preliminary objection, asking the court for an order striking out the part of the plaintiff's claim dealing with copyright infringement on the ground that the plaintiff was not a qualified person within the meaning of s.2(1)(a) of the Copyright Act 1988, to be conferred with copyright in Nigeria. The Court accepted this argument and declared that by that provision only a Nigerian Citizen or Nigerian incorporated companies can sue in this court for infringement of copyright. This line of decision has been replicated in the following decisions: *Microsoft Corporation v Franike Associates Ltd,*[96] and much more recently in *Voice Web International Limited v Emerging Markets Telecommunication Services Ltd & Ors*.[97]

This line of decisions seems to emphasise that even in the broader context of global Intellectual property protection, the approach in Nigeria is not influenced by being a signatory to relevant treaties and multi-lateral agreements. The question therefore is whether Nigerian creatives will be afforded the protection where the country itself does not protect the intellectual property of foreigners. This, indubitably, will

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[90] Adebambo Adewopo, Nkem Itanyi, 'Protection of Copyright in Foreign Works in Nigeria: An Analysis of the Decision in *Voice Web International Limited v Emerging Markets Telecommunication Services Ltd & Ors'*, GRUR International, (2021), 70(12), 1174–1180.

[91] Robert Brauneis, 'National Treatment in Copyright and Related Rights: How Much Work Does It Do?' (2013) GW Law Faculty Publications & Other Works 810.

[92] Adebambo Adewopo, Nkem Itanyi, *op cit*., n 66.

[93] ibid.

[94] *Island Records Ltd v Pandun Technical Sales and Services Ltd & Anor* [1993] FHCLR 318.

[95] *Société Bic S. A. v Charzin Industries Limited & Anor* [1997] 1 FHCLR 727.

[96] *Microsoft Corporation v Franike Associates Ltd* [2011] LPELR8987 (CA) 17[G-18[A].

[97] *Voice Web International Limited v Emerging Markets Telecommunication Services Ltd & Ors*, Suit No FHC/L/CS/576/2017.

put the works of Nigerian creatives at further risk, as the principle of reciprocity, which is fundamental to global IPR protection, is not observed by Nigeria. Thus, even where Nigerian creatives are protected under global treaties and multilateral agreements, there is the likelihood of encountering enforcement problems, except where Nigerian creatives register their works in the states where they will mostly need such IP protection.

From the earlier established United States cases, it is clear that the principles of Nigerian intellectual property laws can be expanded to be applied on a foreigner, even in matters where the cases emanate from a foreign land. The duty is on Nigerian judges to expand these laws to have extraterritorial applicability. The Nigerian legislatures are also saddled with the responsibility of redrafting intellectual property legislation in a way that ensures that it has extraterritorial applicability. These are recommendations deciphered from the position of the Federal Circuit and the U.S Supreme Court in the earlier cases.

Conclusions

The article's focus was a comparative analysis between the practice of extraterritoriality of the United States intellectual property laws in order to decipher the possibility of expanding Nigerian intellectual property rights outside of Nigeria, and to examine how international intellectual property rights can be secured over Nigerian innovations. With regards to copyright, the Berne Convention for the Protection of Literary and Artistic Works 1886 mandates every country that is a member of the Berne Union to afford copyright protection to foreign nationals without the requirement of any formalities such as the use of a copyright notice or registration requirement. For trademarks, the Paris Convention for the protection of Industrial Property, as an international agreement, helps creators ensure that their trademarks are protected in other countries. For patents, the Patent Corporation Treaty allows an applicant to file a patent application, which then allows them to obtain patents in multiple countries around the world with a single patent application. Nigeria is a signatory to these treaties and conventions, and Nigerian creatives can protect their intellectual properties under them. It is important to note that the expansive application of Nigeria's Intellectual property laws lies on the acceptance of the doctrine by the Nigeria judiciary and the belief of the practicability of the extraterritoriality of Nigeria's intellectual property laws by the Nigerian legislature.

CONSUMER LAW

Consumer rights protection and its impact on service quality in the telecommunications sector

Dauda Ariyoosu[*] and Suzan Akangbe [**]

Introduction

In this digital era, telecommunications services have transformed from just being telephones that enable people to talk and text to now include video and data (internet) service. The ability of the single platform such as telecommunications industry to offer all these services makes mobile phone an important tool, not only in communicating, but also in accessing information and services that are crucial to commercial, legal and health issues of the consumers. Telecommunications services have thus become an indispensable part of livelihood. The aim of this article, therefore, is to examine the impact of consumer rights protection on the quality of service in the telecommunications sector. The specific objectives of the paper were to: examine the development of consumer rights protection in the telecommunications industry; provide an overview of the historical background of consumer rights; and explain the approaches to consumer rights protection in the telecommunications sector.

It has been found that consumer rights protection has had a substantial impact on the quality of telecommunications services. The article concludes that the current global interest in telecommunications consumers' right protection have impacted positively on the quality of service in the telecommunications industry. It recommends that regulatory agencies need to be more insightful and respond promptly to new developments in the telecommunications technology. The telecommunications operators and subscribers must also be alive to discharge their responsibilities if the objective of protecting telecommunications consumers is to be fulfilled.

Consumer rights protection has become the centrefold of all businesses, not only because a good business strategy revolves around good customer services, but also as a result of the vital roles played by consumers in the profitability and growth of any business. Accordingly, nations all over the world strive to boost the development of their telecommunications sectors through enhanced consumer welfare. Though not every country has been able to achieve the vision of these principles set out by the United Nations, Nigeria's performance, like other developing nations, is still at its lowest ebb.[1] The telecommunications sector is no exception. Although the issue of consumer protection has been accentuated by industry stakeholders in the Nigerian telecommunications landscape, this appears to have made little or no impact on the welfare of telecommunications subscribers in Nigeria. The general feelings among Nigerian telecommunications subscribers still remains that they have been terribly short-changed by the regulators, the operators, and the system in general. The subscribers appear to always be at the losing end, no matter the circumstance.[2]

Prevalent problems, such as: poor signals; call jamming; network congestion; call failure/dropping; speech breakages; echoing of speech; delay or non-delivery of text-messages; inability to load or defective recharge cards; high tariffs without commensurate quality services delivery; flawed operational practices; inefficient billing system/malfunctioning of billing equipment; and poor customer

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[1]Meyiwa Ayojimi, 'Is the Consumer King in Nigeria?' Business Day Newspaper Nigeria, 18 March, 2014) <http://businessdayonline.com/2014/03/is-the-consumer-king-in-nigeria/#.VCL1I6OLVbw> accessed on 11 September, 2022.
[2]Emmanuel Okwuke, 'Protecting Subscribers in Nigerian Telecoms Space' <http://dailyindependentnig.com/2014/03/protecting-subscribers-in-nigerian-telecoms-space/> accessed on 04 July, 2014

service have continued to persist.[3] Consequently, there have been renewed calls for more contemporary and subscriber-friendly laws by stakeholders in the telecommunications sector.[4]

Historical development of consumer rights protection

In English common law, the evolution process of consumer rights is traceable to the principles of *caveat emptor*, that is 'let the buyer beware' and laissez faire, that is 'let do or allowing events to their own course'.[5] The judicial decisions in *Gardiner v. Gray,*[6] and *Jones v. Bright*[7] not only emphasised contractual obligations of the parties; they also laid down principles to save the consumer from fraudulent practices of the seller. During the course of evolution of the common law, the duty of care which enhanced the protection of consumer of a product was subsequently developed. In 1932, the House of Lords in *Donoghue v. Stevenson,*[8] propounded that the manufacturer of goods owes to the ultimate consumer, with whom he is not in any contractual relationship, the duty of care. This is a kind of special duty imposed on the professional having expertise in their respective fields who offered their services to the public at large to show care, skill and honesty in their dealings with their consumers. It was in the latter part of the 1950s that legal product liability was established, in which an aggrieved party need only prove injury by use of a product, rather than bearing the burden of proof of corporate negligence. It is, therefore, correct to assert that before the mid-twentieth century, consumers had limited rights and protection against unfair business practice.

On March 15, 1962, President John F. Kennedy presented a speech to the United States Congress in which he extolled four basic consumer rights: (1) the right to safety; (2) the right to be informed; (3) the right to choose; and (4) the right to be heard.[9] Later, the Worldwide Consumer Movement led by the Consumers International (CI), a global federation of over 240 Member organisations in 120 countries, added four more rights: (5) the right to satisfaction of basic needs; (6) the right to redress; (7) the right to education; (8) the right to a healthy environment. Thereafter, CI adopted these rights as a charter and started recognising March 15, as World Consumer Rights Day.[10] Since 1983, March 15 has been observed as "World Consumer Rights Day". This originated from the declaration of US President John F Kennedy in 1962, that 'consumers by definition include us all. They are the largest economic group, affecting and affected by almost every public and private economic decision. Yet they are the only important group….whose views are often not heard'.[11] This day is observed with the aim of (a) promoting the basic rights of all consumers; (b) demanding that those rights are respected and protected; and (c) protesting the market abuses and social injustices which undermines them.[12]

The coordination of consumer rights at the international level began in 1960, when the International Organisation of Consumer Union was formed. The first ever international conference of leaders from consumer organisations took place in The Hague in March 1960. Five of the 17 organisations present signed papers to create the International Organisation of Consumers Unions (IOCU). Its major functions

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[3]Michael Mojekeh, 'Quality of GSM Service in Nigeria: Subscribers Perception and Expectations' <http://mojekeh.blogspot.com/p/quality-of-gsm-service-in-nigeria_02.html> accessed on 01 September, 2022.

[4] Okhakhue B., 'Nigeria, Consumer Protection & CPC', The Nation Newspaper (Nigeria, 18 March, 2012).

[5] Ahamuduzzaman Nuruzzaman, Rahman Lutfor and Zannat Nahida, 'A Contextual Analysis of the Consumer Rights Protection Laws with Practical Approach: Bangladesh Perspectives' ASA University Review, Vol 3 No. 2, 2009. www.semanticscholar.org Accessed on 19 December, 2022.

[6] (1821) 17 S. Ct. Mass 188.

[7] (1829) 130 ER 1167.

[8] (1932) A.C. 562.

[9] Ireneus Nwaizugbo and Chibueze Ogbunankwor, 'Measuring Consumer Satisfaction with Consumer Protection Agencies-Insights from Complainants to CPA Offices In Anambah State', (2013) 1(3) International Journal of Small Business and Entrepreneurship Research (European Centre for Research Training and Development UK, September 2013) 14 <http://www.eajournals.org/wp-content/uploads/Measuring-Consumer-Satisfaction-with-Consumer-Protection-Agencies-Insights-from-Complainants-To-Cpa-Offices-in.pdf> accessed on the 11 September, 2022.

[10] 'World Consumer Rights Day 2014: Fix Our Phone Rights'

[11] 'Telecoms Summit Harps on Subscribers Rights to Quality Services' Daily Independent Newspaper (Nigeria, January, 2013) p. 12.

[12] Ahamuduzzaman Nuruzzaman, Rahman Lutfor and Zannat Nahida, 'A Contextual Analysis of the Consumer Rights Protection Laws With Practical Approach: Bangladesh Perspectives'

include representation of interest of consumers within international agencies such as the Economic and Social Council of the United Nations and expanding the consumer movement and nurturing young consumer organizations.[13] The participation of International Organisation of Consumer Union in certain international campaign networks has been of immense value. It has recognised the following eight basic consumer rights and has expressed its concern for their promotion: he right to safety; the right to information, the right to choice; the right to basic needs; the right to consumer education, the right to representation,; the right to redress; and he right to healthy environment,

The United Nations (UN) have also been endeavouring to promote cooperation among the member nations on various issues. In the context of consumer protection in particular, the UN and its subsidiaries such as the General Agreement on Tariffs and Trade (GATT), the Organisation for Economic Cooperation and Development (OECD), the United Nations Conference on Trade and Development (UNCTAD), and the United Nations Commission on Transnational Corporations (UNCTC), have been actively involved over the years. More recently, the UN has shown a considerable concern for the problem of consumer exploitation especially in the third world and has made serious endeavours in the direction, which inter-alia includes adoption of a set of guidelines on consumer protection on 9 April 1985 by the General Assembly.[14] These guidelines are meant to provide a framework for countries, particularly for developing countries, to be used in elaborating and strengthening consumer protection policies and legislation to protect consumers and also promote international cooperation in this field. These guidelines have the following objectives: to assist countries in achieving or maintaining adequate protection for their population as consumers; to facilitate production and distribution patterns responsive to the needs and desires of consumers; to encourage high levels of ethical conduct of those engaged in the production and distribution of goods and services to consumers; to assist countries in curbing abusive business practices by all enterprises at the national and international levels which adversely affect consumers; to facilitate the development of independent consumers' groups; to further international co-operation in the field of Consumer Protection; and to encourage development of such market conditions as to provide consumers with a greater choice at lower prices.[15]

These guidelines reinforce the increasing present day recognition that consumer protection issues can no longer be seen as being of purely local concern, but must be seen in an international context. Their importance is certainly not limited to the developing countries. Consumer protection issues are as important to the developed countries as much as they are to those countries in transition from socialist to market economy.[16] The guidelines further provide that governments should maintain adequate infrastructure to develop, implement and monitor consumer protection policies. Special care should be taken to ensure that measures for consumer protection are implemented for the benefit of all sectors of the population, particularly the rural population. The government should make an effort to ensure the improvement of the condition under which essential goods are offered to consumers, giving due regard to both price and quality.[17]

Approaches to consumer rights protection in the telecommunications sector

Globally, different approaches have been adopted for consumer protection in the telecommunications sector. Prominent among the approaches are: government regulatory approach, self-regulation and co-regulatory approaches, and consumer organisations' participation and representation. These approaches are, among targeted toward protecting consumers against fraud, unfair or deceptive acts or practices,

[13] See, ''History of Consumer Movement' <http://www.consumersinternational.org/who-we-are/about-us/we-are-50/history-of-the-consumer-movement/> accessed on 11 September, 2022.
[14] Samuel Asante, 'United Nations International Regulation of Transnational Corporations' (1979) 13 (1) Journal of World Trade Law 55-56.
[15] See the United Nations Guidelines for Consumer Protection.
[16] Samuel Asante, 'United Nations International Regulation of Transnational Corporations'.
[17] Ibid.

protect consumer's data and privacy as well as ensure that consumers enjoy good quality of telecommunications services.[18]

Government regulatory approach

Government regulatory approach in consumer protection requires government's enactment of consumer protection regulation/legislation. These legislation could be general, such as consumer protection and competition laws[19] or sector specific laws such as telecommunications law[20]. In most cases, telecommunications law does not only contain provisions for consumer protection but also enables setting up of a separate regulatory authorities and self-regulatory framework within the telecommunications industry.[21] Likewise, competition law in the telecommunications industry also protects the consumer interests by promoting competition in the markets which directly and indirectly benefit consumers.[22] Mobile number portability which gives consumer choice to migrate to other network is one of the most effective outcome of the demand aspect of competition law in the telecommunications industry. Mobile number portability, no doubt, increases competition among the operators in respect of offering of good quality of service.[23] In many countries, where markets are open to some form of competition, governments have set up telecommunications regulators to carry out the responsibilities of government in overseeing the operation of the sector. These responsibilities usually include consumers' prospection.[24] A typical example of consumer protection responsibility programme of regulator is that of Consumer Affairs Bureau of the Nigerian Communications Commission established in September 2001.

The Consumer Affairs Bureau has been acknowledged as a unique approach in protecting the rights and interest of consumer, given the fact that it serves as a 'one-stop-shop' that stakeholders can rely upon for information on the telecommunications industry in Nigeria. It sought not just to be a passive recipient of complaints "after the fact", but to 'generate an unmatched awareness of consumer rights in Nigeria by establishing a strong bureau that would monitor and control telecommunications operators in Nigeria in order to protect consumers from unscrupulous practices in the industry*'*. It has also established a Consumer Parliament that tours the different regions of the country where regulators and operators can be questioned directly by members of the public.[25] Although different approaches have been adopted in various jurisdictions, the government regulatory goal should be to ensure: (i) the delivery of acceptable service for the telecommunications user; and (ii) that consumers are aware of the variations in performance from various service providers/operators thereby allowing them to make an educated choice regarding their preferred service provider.

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[18] Jorg Binding and Kai Purnhagen, 'Regulation on E-commerce Consumer Protection Rules in China and Europe Compared- Same but Different?' (JIPITEC 2011) p. 187 <https://www.jipitec.eu/issues/jipitec-2-3-2011/3173/binding_purnhagen.pdf> accessed on 13 September, 2022.

[19] For example, the Federal Competition and Consumer Protection Act (FCCPA) 2018 which established the Federal Competition and Consumer Protection Commission with the responsibility of initiating broad-based policies and reviewing economic activities in Nigeria with a view to identifying anti-competitive and anti-consumer protection and restrictive practices.

[20] For example, the Nigerian Communications Act, 2003 which established the Nigerian Communications Commission (NCC) and for other matters connected therewith.

[21]Russell Simmons, 'Consumer Protection in the Digital Age: Assessing Current and Future Activities' (International Telecommunication Union (ITU), September, 2006) <http://www.itu.int/ITU-D/treg/Events/Seminars/2006/QoS-consumer/documents/Cons_Bkgpaper.pdf> accessed on 20 September, 2022.

[22] Patrick Xavier, 'Enhancing Competition on Telecommunication: Protecting and Empowering Consumers' (OECD Ministerial Background Report, 2007) p. 6 <http://www.oecd.org/internet/consumer/40679279.pdf> accessed on 30 June, 2022.

[23] Singer H.J, 'The Consumer Benefits of Efficient Mobile Number Portability Administration' <http://www.navigant.com/~/media/WWW/Site/Insights/Economics/Consumer%20Benefits%20of%20Efficient%20MNP_Economics_030813.ashx> accessed on 13 September, 2022.

[24] Russell Simmons, 'Consumer Protection in the Digital Age: Assessing Current and Future Activities'

[25] Okechukwu Itanyi, 'Regulatory Trends, Challenges, Potentials for Growth in Telecommunication Industry' <http://www.nigeriancurrent.com/ck81-special-reports/regulatory-trends-challenges-potentials-for-growth-in-->telecom-industry accessed on 13 September, 2022.

Self-regulation and co-regulatory approach

The notion of self-regulation is neither new nor revolutionary. Throughout history, industries have developed their own standards, rules and practices through a variety of organisations to reduce costs, avoid and resolve conflicts, improve quality of services and ultimately to create consumer confidence. Traditionally, self-regulation has been described as an option whereby an industry voluntarily develops, administers and enforces its own solution to address a particular issue, and where no formal oversight by the regulator is mandated. Self-regulatory schemes are characterised by lack of legal backing to act as the guarantor of enforcement. For example, self-regulation may involve the development of voluntary codes of practice or standards by an industry, with the industry solely responsible for enforcement.[26]

The nature and rapid evolution of the telecommunications network has aggravated the need for an effective and flexible method of regulating the industry. It is obvious that regulators alone, however determined, lack the resources to ensure adequate regulation of the telecommunications industry with its rapid changing technology which always keep the regulator behind. Therefore, the telecommunications regulators in most countries usually make provision for Code of Conduct by the telecommunications industry as a condition of licence. The Regulators can also impose a code of conduct or suggest that operators abide by it on a voluntary basis. In addition, consumer protection provisions are often included in telecommunications licenses, alongside other terms and conditions related to the provision of services and facilities. These conditions may relate to matters such as price regulation, quality of service standards and mandatory services that must be offered to consumers.[27]

The regulators primarily provide for enabling environment to encourage the operator to develop self-regulatory practices in the industry. For instance, in February 2001, Malaysia's regulator, the Malaysian Communications and Multimedia Commission (MCMC) set up a consumer forum called the Communications and Multimedia Consumer Forum of Malaysia. The forum was set up to encourage the development of industry self-regulation by the operators in the country. It primarily develops and oversees Codes that 'serve the dual purpose of promoting high standards of service in the communications and multimedia industry while protecting the interest of the Malaysian consumer'.[28]

In practice, pure self-regulation without any form of government or statutory involvement is rare. Hence, the notion of co-regulation, which can be described as a combination of non-government (industry) regulation and government regulation. Observers have noted that self-regulation has become embedded in the regulatory state, reflected in the range of 'joint products' between the regulator and the regulated, and is now best reflected in the understanding of the term 'co-regulation'.[29] Co-regulation generally involves both industry and the regulator developing, administering and enforcing a solution, with arrangements accompanied by a legislative backup. Co-regulation can mean that an industry develops the regulatory arrangements, such as a code of practice or rating schemes, in consultation with government. While the industry may administer its own arrangements, the government provides legislative backing to enable the arrangements to be enforced.[30]

Under co-regulation, certain powers are delegated to the industry to develop, regulate and enforce codes. According to the Organisation for Economic Cooperation and Development (OECD), self- and co-regulation when used in the right circumstances, can offer a number of advantages over traditional command and control regulation. The advantages include: greater flexibility and adaptability, potentially lower administrative costs, an ability to harness industry knowledge and expertise to address

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[26] The Australian Communications and Media Authority, 'Optimal Conditions for Effective Self- and Co-regulatory Arrangements' (Project, 2010) p.8 <http://www.acma.gov.au/webwr/_assets/main/lib310665/optimal_conditions_for_self-_and_co-regulation.pdf> accessed on 13 September, 2022.

[27] Atip Latipulhayat, 'Telecommunications Licensing Regime: A New Method of State Control After Privatisation of Telecommunications' (2014) 9 (1) Journal of International Commercial Law and Technology .27

[28] Ibid

[29] The Australian Communications and Media Authority 'Optimal Conditions for Effective Self- And Co-Regulatory Arrangements' (Project, 2010) p. 8

[30] Ibid.

industry-specific and consumer issues directly, quick and low-cost complaints-handling and dispute resolution mechanisms.[31]

Consumer organisations' participation and representation

The lack of consumer representative in the regulatory process is considered as a missing link in achieving effective protection of the consumers' rights. There is ongoing support for the involvement and participation of the consumers in the regulatory process. In most cases, both at national and global level, the regulators/policy makers represent the consumers. These regulators rarely consult and get feedback from consumers and their representing bodies, the interest of whom they are representing. The argument here is that no matter how vigilant the regulators are, they cannot adequately represent consumers especially era where increasing rivalry telecommunications operators threaten consumer rights. A report submitted to ITU-T Study Groups stresses the need to involve consumer representative bodies in the regulation process. The report in its suggestions, opined that participation of consumer representative bodies in regulatory process may result in transparency, critical evaluation of regulations and ultimately improve quality of services.[32]

Another strong recommendation for involvement of consumers representative in the regulatory process concerning consumers is the OECD consumer protection guidelines which stresses the need to engage consumer representative bodies in all regulatory process, and consider it as a fundamental human rights[33] There are now consumer organisations which focus on the rights and protection of the telecommunication and Internet customer/users in the developed countries. Many of the African consumer organisations do not get involved in consumer issues relating to the telecommunication and Internet sector. Only four countries out of the 30 African countries surveyed had consumer organisations that were specifically focused on the telecommunication and Internet sector: Côte d'Ivoire, Nigeria, Senegal and South Africa.[34] However, this approach cannot be used in countries without these consumer organisations.

It is pertinent to point out at this juncture that in most countries more than one of these models are used at the same time, while all the approaches are often used simultaneously for more effective protection of consumer rights in the telecommunications sector.

The impact of consumer rights protection on the quality of service in the telecommunications sector

Understanding of the meaning of 'quality' for any particular product or service requires an unbundling of quality attributes and elucidation of their applicability. In The Service/Quality Solution, Collier, views the many dimensions of quality as part of a 'consumer benefits package.' According to him, the consumer benefits package is 'a clearly defined set of tangible (goods-content) and intangible (service-content) attributes (features) the customer recognises, pays for, uses or experiences.'[35] Provision of quality service by the telecommunications services providers are the greatest expectation of the consumers. Therefore, the determining factor of excellent service quality is consistently meeting or exceeding customer expectations. The question is, what precisely is the service quality as applied to telecommunications, and how is it measured?

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[31]Hepburn Glen, 'Alternatives to Traditional Regulation' <http://www.oecd.org/gov/regulatory-policy/42245468.pdf> accessed on 13 September, 2022.

[32] Farooq Ahmad, 'ITU Agenda: The Missing Link of Consumer Rights' <http://a2knetwork.org/itu-agenda-missing-link-consumer-rights> accessed on 13 September, 2022.

[33] Organisation for Economic Cooperation and Development (OECD), 'Guidelines for Consumer Protection in the Context of Electronic Commerce' (Recommendation of the OECD Council) <http://www.oecd.org/internet/consumer/34023235.pdf> accessed on 13 September, 2022

[34] Russell Simmons, 'Consumer Protection in the Digital Age: Assessing Current and Future Activities'

[35] Vivian Witkind, David Landsbergen and Raymond Lawton, 'Telecommunications Service Quality' (The Ohio State University 1080 Carmack Road Columbus, Ohio 43210, March 1 996) <www.ipu.msu.edu/.../Davis-Telecom-Service-Quality-96-11-Mar-96.pdf> accessed on 13 September, 2022.

According to a recommendation published by the International Telecommunications Union (ITU), quality of service in the telecommunications sector is defined as 'the collective effect of service performance, which determines the degree of satisfaction of a user of the service'.[36] While Richters and Dvorak developed service quality criteria that customers can use to measure the quality of communications service, they identified availability, reliability, flexibility, speed, security and simplicity as criteria in measuring the quality of service in the telecommunications industry.[37]

In 1992, the Staff Sub-committee on Service Quality published a Telephone Service Quality Handbook intended to assist regulatory agencies in developing and administering service quality programs. The Handbook identifies four tools a regulatory agency might use, depending on its resources in evaluating quality service. The tools are: customer complaint analysis, performance standards and analysis, field investigations and customer surveys.[38] However, there appears to be three dominant methods of measuring the quality of service in the telecommunications sector. These are: the key quality indicators, live testing and consumer survey.[39] These methods are now discussed.

Key Quality Indicators (KQIs)

These indicators are patterned after key performance indicators (KPIs). They measure quality of service and make the results comparable across time, periods and carriers. Many National Regulatory Authorities, usually after a series of public consultations, have introduced sets of indicators for different services, depending on the scope of regulation, definitions, measurement guidelines and expected levels of quality. The sets vary and can relate to both customer service and technological issues. Unsuccessful call ratios, supply times for initial connection, response times for operator services and bill accuracy are among the most popular indicators.[40]To make it less prone to measurement biases, the KQIs require data to be gathered during a specified, recurrent period, not just a one-time sample. The method has been adopted in many countries, and international bodies, including the European Communication Standardization Institute and the European Commission, have endorsed it.[41]

Live testing

This method is not often used by both regulators and operators because of its costs. Even when it is used, it covers only a representative sample of services and end-users. Some countries - like France, Turkey, the United Kingdom, Latvia and India - have used this method to measure the quality of mobile services or Internet connections.[42]

In measuring mobile telephony, the live tests may be performed with the help of a custom vehicle with dedicated equipment, antennas or other facilities capable of gathering quality of service data. In car testing, the vehicle must adhere to a specified route, usually covering the biggest cities and most crowded travel routes. For broadband connection tests, access to customers' lines is essential. For example, Ofcom performed such live testing in the United Kingdom in 2008 and 2009 to verify the quality of the broadband network.[43] Dedicated facilities with special software were placed on the access lines of around 1,600 consumers and data was collected for a three-month period. The goal of this method is to present data regarding the quality of a given service at a particular moment in time over a specified period.

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[36] 'Quality of Telecommunication Services: Concepts, Models, Objectives and Dependability Planning- Terms and Definitions Related to the Quality of Telecommunication Services' <http://www.itu.int/rec/dologin_pub.asp?lang=e&id=T-REC-E.800-200809-I!!PDF-E> accessed on 17 September, 2022.
[37] Vivian Witkind, David Landsbergen and Raymond Lawton, 'Telecommunications Service Quality'.
[38] Ibid.
[39]'Telecommunication: Measuring Quality of Service' <http://www.atkearney.com/paper/-/asset_publisher/dVxv4Hz2h8bS/content/telecommuincation-mearsuring-quality-of-service/10192> accessed on 20 August, 2022.
[40] Ibid.
[41] Ibid.
[42] Ibid
[43] Ibid

Conduct of consumer surveys

This method can effectively pinpoint the weakest elements of service quality, giving operators effective feedback, while allowing customers to compare opinions about various operators. It can also be a useful addition to the indicator-based method of measurement. Contrasting those two sets of data can determine whether a weakness identified by consumers also falls among the low- levels of relevant indicator data. If not, proper verification of both activities can be performed. For example, the Telecom Regulatory Agency of India performs this type of joint measurement for 23 regions to ensure the validity of quality of service data. Customer surveys are used also in Nigeria and Germany. A survey conducted by the major telecommunications regulator in Nigeria, the NCC, shows that 71.54% subscribers are not satisfied with the services rendered by their Service Provider.[44]

Furthermore, there are two means of enforcing compliance with the minimum standards of quality of service by the regulators of telecommunications operators. These are sanction and publication of telecommunications complaints. The sanction is usually in form of payment of compensation or fine for failures to meet quality of service standards by the regulators. The regulator may impose payment of compensation or fine, on the telecommunications operators, either to individual customers who suffer particular quality of service failures, or to the customer base as a whole, where quality of service failures affect its entire network and are not referable to individual customers. The major challenge is that the imposition of sanction, as a means of enforcing compliance mechanism, on the telecommunications operators, is believed to have little impact on the improvement of the quality of service to the consumers.[45]

Publication of the consumer complaints is another mean of sanctioning the telecommunications operators for failure to meet the minimum quality of service standard. In this case, the regulator requires the telecommunications operators to submit the full details of customer complaints. The regulators believe that publication of such information will help consumers make more informed decisions about which provider offers the best service in cases of migrating a new service provider. In addition, publication of provider-specific complaints data also may act as an incentive for providers to improve their performance. [46]

The impacts of the consumer rights protection on the quality of service are in two folds. Consumer rights protection policies and regulations have numerous impacts on the telecommunications operators and consumers in relation to quality of service. Setting minimum quality of service standard as a consumer rights protection policy by the regulator helps telecommunications operators focus on delivering high quality services to their customers. It equally provides guarantee to telecommunications customers that the service they receive is of a certain standard.[47]

Another impact is that consumer rights protection encourages healthy competition among the telecommunications operators which result into improvement in the quality of service. The consumers, on the other hand, have a choice to switch providers if they are not satisfied with the quality of service. For instance, the mobile number portability as a demand side to strengthen competition in the telecommunications market makes decision of switching service provider not only easy but also meet the consumers' expectation of excellent quality of service.[48]

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[44]NCC Current Survey/Poll Result <http://consumer.ncc.gov.ng/poll_result.asp?succ=1&sgid=1&ansid=57&queid=11> accessed on 04 September, 2022.

[45] Measures of Quality of Telecommunications Services in the Channel Islands (the Channel Island Competition and Regulatory Authorities Consultation paper, Document No: CICRA 13/14 March 2013) <http://www.cicra.gg/_.../Telecoms%20QualittyofService> accessed on 20 August, 2022.

[46] Ibid.

[47] Ibid.

[48] Ibid.

Conclusions

Consumer rights protection in the telecommunications industry is a very extensive area and is considered a global agenda. Apart from legislation on the protection of the consumer in the telecommunications industry, it also includes the regulation of telecommunications market structure and introduction of competition law to ensure that the consumer enjoys good quality of service. The increasing global interest in protection of telecommunications consumers' right has impacted positively on the quality of service in the telecommunications industry.

Across the globe, various means of ensuring consumer protection in the telecommunications sector have developed, both at the national and international levels. These include: the government regulatory approach, the self and co-regulatory approaches, as well as consumer organisations participation and representation. In most countries, more than one of these models are used at the same time, while all the approaches are often used simultaneously for more effective protection of consumer rights in the telecommunications sector.

At present, consumer rights protection is considered as an essential responsibility of the regulatory agencies, the telecommunications operators, as well as the consumers themselves, with the regulatory agencies playing a major and supervisory role. Hence, the regulatory agencies in many different jurisdictions have adopted various methods to regulate telecommunications industry and ensure adequate consumer protection. However, regulatory agencies have not fully captured the nature of the telecommunications market's ever-changing landscape due to incessant advancement in technology.

What seems to be a good regulatory tool may soon prove inadequate, given the speed with which technology advances and customer habits and expectations change. Therefore, the regulatory agencies need to be more insightful and respond promptly to new developments in the telecommunications technology. The telecommunications operators and subscribers must also be alive in fulfilling their responsibilities if the objective of protecting telecommunications consumers is to be fulfilled.

HUMAN RIGHTS

Incorporating human rights on global health security screening at the airport: an analysis of the International Health Regulations 2005

Dr Ismail Adua Mustapha*

Introduction

Adoption of Human rights as one of the significant innovations and changes affecting public health through international law, has greatly contributed to the growth and development of international human rights to public health. This is evident in the World Health Organization's Constitution (WHO) 1948, where it was enshrined that the attainment of health is one of the highest fundamental human rights.[1] In furtherance of the various human rights laws provisions, the World Health Assembly (WHA),[2] under the umbrella of the World Health Organization, adopted a new International Health Regulations (IHR) in May 2005, incorporating and adopting the various international human rights provisions.[3] This adoption therefore put an end to the various revision exercises on the IHR which commenced in 1995.[4] The adoption of the IHR 2005 was urgently needed to safeguard the international community against the potential outbreak of influenza, which started rampaging the Asia, and which could eventually became epidemics transmitted by human-to-human,[5] thereby affecting the global health security.

Consequently, the new IHR widen the scope of the IHR's obligations by incorporating human rights principles. Thus, the new IHR maintain that implementation of its provisions shall be in compliance ''with full respect for the dignity, human rights and fundamental freedoms of persons."[6] Neither the old International Sanitary Regulations 1951 nor the 1969 International Human Rights Regulations directed the Port Authority in civil aviation institution to act in strict compliance with the human rights provisions. However, an improved 2005 Regulations has filled the gap by directing the States parties' Public Health Authorities to implement IHR 2005 medical examination, vaccination or prophylaxis on civil aviation passengers and goods to do so with due regard to human rights to privacy, movement, and freedom from discrimination on one hand, and to be in compliance with the vision and preamble to the World Health Organization's Constitution 1948.

This article will therefore provide the reader with an analysis of IHR 2005 enhanced roles of civil aviation authority in maintaining global health security at airports. It will then examine the twin methods (Traditional and Modern) of conducting global health screening of passengers at the airport. This will be done to give insights to the various screening modes to be adopted under the IHR 2005. The article will finally discuss the issue of health security screening versus adherence to human rights, particularly with respect to right to human dignity, privacy and freedom of persons as provided under the IHR 2005. The importance of this is to discover whether or not the global health security is to support the various rights mentioned under the IHR 2005.

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[1] See David Fidler, From International Sanitary Convention to Global Health Security: 'The New International Health Regulations' (2005) 4 (2) *Chinese Journal of International Law* 326.

[2] World Health Assembly is the World Health Organization's highest policy-making organ of WHO with power to review or revise and adopt international health instruments. See David Fidler (n 2) 326.

[3] See World Health Assembly Revision of the International Health Regulations, WHA 58.3, 23 May 1995.

[4] See World Health Assembly Revision of the International Health Regulations, WHA 48.7, 21 May 1995.

[5] See Angus, N. et al, 'Proposed New International Health Regulations' [2005] *British Medical Journal*, 321.

[6] World Health Assembly, Revision of the International Health Regulations, WHA58.3, 23 May 2005 (hereinafter IHR 2005), Art. 3 (1).

Enhanced roles of the Civil Aviation Authority in sustaining global health security in the light of IHR 2005

Pursuant to the provisions of the IHR 2005, the Civil Aviation Port Authority (CAPA) of a State Party is burdened with the critical roles to maintain global health security through strict compliance with the provisions of the IHR on prevention and suppression of the spread of infectious diseases, without violating the provisions of human rights to privacy, freedom of movement and discrimination. These roles are discussed hereunder.

Civil Aviation Authority and Global Health Security under the IHR 2005

It is argued that one of the responsibilities of the aviation authority is to maintain safe and secure air through the prevention of terrorism, as well protecting the passenger against infectious diseases. That was why the Convention on International Civil Aviation 1944 (Chicago Convention)[7] obliges the State party not to use the civil aviation in a manner that will negatively affect world safety and security.[8] It is not only the use of aircraft as weapons of mass destructions that is contravening the intent and purpose of the 1994 Convention, the ability to use the aircraft as a means of spreading infectious disease(s) can also be regarded as an act of using the aircraft against the intent and purpose of the Chicago Convention 1944 and the IHR 2005 respectively. Against this back drop, the IHR 2005 directives to prevent, suppress, and control the international spread of disease in ways that commensurate with and restricted to public health risks subject to avoiding unnecessary interference with international traffic of passengers and trade must be complied with.[9] Therefore, the civil aviation authority, must, as a matter of compliance, dutifully perform the following functions under the Regulations:

Protection of goods from any source of infection or contamination

The authority shall properly monitor all goods including baggage, cargo, containers, conveyances, postal parcels and human remains departing or arriving from affected territories to ensuring that they are free from infection or contamination, "including vectors[10] and reservoirs.[11]" It is submitted that the authority can implement this provision by keeping the goods in a decontaminated or derrat areas otherwise it will be difficult to detect which goods is infectious or contaminated. Fundamental to the implementation of this provision is human factor; the monitor must be a person who has passion for carrying out this responsibility and he must be at all-time be provided with necessary supports so as to serve as motivational apparatus in carrying out his duty. The supports include enabling environment, prompt payment of salaries and allowances; and adequate facilities needed to perform this important duty.

Protection of facilities from sources of infection or contamination

The facilities been used by the passengers at the point of entering a particular State shall be free from any sources of infection or contamination.[12] Maintaining these facilities in a sanitary condition is a key factor to carry out this responsibility. Consequently, the sanitary methods such as de-ratting,[13]

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[7] Chicago Convention on International Civil Aviation 1944 adopted on 7 December 1944 and entered into force on 4 April 1947, ICAO Doc. 7300/9, Ninth Edition, 2006.

[8] Ibid, Art. 4.

[9] See International Health Regulations, 2005, Art. 2

[10] "Vector" means an insect or other animal which normally transports an infectious agent that constitutes a public health risk, See IHR 2005, Art. 1

[11] "Reservoir" means an animal, plant or substance in which an infectious agent normally lives and whose presence may constitute a public health risk. See IHR 2005, Art. 1. See IHR 2005, Art. 22 (1) (a).

[12] Ibid, Art. 22 (1) (b).

[13] "Deratting" means the procedure whereby health measures are taken to control or kill rodent vectors of human disease present in baggage, cargo, containers, conveyances, facilities, goods and postal parcels at the point of entry, See IHR 2005, Art. 1

disinfection,[14] disinsection,[15] or decontamination,[16] of all goods are the keys to maintain facilities protection against been infected or contaminated.

Supervisory role and notice of sanitary duty

Sanitary examination or vaccination or inspection of travellers/passengers is one of the fundamental duties of the civil aviation public health authority in controlling the spread of infectious diseases. Therefore, sanitary measures are required for passengers and the goods including human remains at the point of entering or departing which ought to be supervised by the civil aviation authority in-charge.[17] Further to this duty is an advance written notice of sanitary duty, and the method to be adopted in carrying out the conveyance operators' duty.[18]

It is submitted that lack of or inadequate supervision will certainly affect the effective measures to control the spread of infectious diseases in international airports. This might, probably contributed to the spread of diseases such as Ebola Virus, COVID-19 among others which has negatively affected the global socioeconomic being of human race across the world. Furthermore, the authority is obliged to supervise the removal and safe disposal of any contaminated goods,[19] or article including foods, human or animal "dejecta", wastewater and other contaminated goods from a conveyance.[20] Accordingly, the regulations defines contamination as " the presence of an infectious or toxic agent or matter on a human or animal body surface, in or on a product prepared for consumption or on other inanimate objects, including conveyances, that may constitute a public health risk".[21] The Regulations defines "conveyance" to mean an aircraft, ship, train, road vehicle or other means of transport on an international voyage.[22] Therefore, the Civil Aviation Authority is under the regulatory obligation to make sure that its public health officer removes any aircraft that is infected with any of the communicable disease or containing any of the toxic agent or dead body or any contaminated objects that may constitute a global health risk. It is further submitted that the authority has two duties in this respect: removal of any infectious objects or toxic agent among others; and safe disposal of what the authority is removed from the aircraft or goods. They therefore complement each other, as removal without safe disposal will amount to non-implementation of the regulations.

The Authority is further obliged to supervise the ways and manner the Service providers carry out inspection and examination of passengers and their goods including cargo, parcel, aircraft, human remains and all other objects at the point of entry a particular destination.[23] What therefore is the relationship between 'Inspection and examination'? The *Cambridge Dictionary* has interpreted the world "inspection" to mean "the act of looking at something carefully, or an official visit to a building or organization to check that everything is correct and legal"[24] the Black's law dictionary defines the term as "the examination or testing food, fluid or other articles made subject by law to such examination,

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[14] "Disinfection" means the procedure whereby health measures are taken to control or kill infectious agents on a human or animal body surface or in or on baggage, cargo, containers, conveyances, goods and postal parcels by direct exposure to chemical or physical agents. See IHR 2005, Art. 1

[15] "Disinsection" means the procedure whereby health measures are taken to control or kill the insect vectors of human diseases present in baggage, cargo, containers, conveyances, and goods and postal. See IHR 2005, Art. 1
parcels;

[16] "Decontamination" means a procedure whereby health measures are taken to eliminate an infectious or toxic agent or matter on a human or animal body surface, in or on a product prepared for consumption or on other inanimate objects, including conveyances, which may constitute a public health risk. See IHR 2005, Art. 1

[17] See IHR 2005, Art. 22 (1) (c).

[18] "Conveyance operator" means a natural or legal person in charge of a conveyance or their agent. See IHR 2005, Art. 1. Ibid, Art. 22(1) (d).

[19] "Contamination" means the presence of an infectious or toxic agent or matter on a human or animal body surface, in or on a product prepared for consumption or on other inanimate objects, including conveyances that may constitute a public health risk. See IHR 2005, Art. 1

[20] Ibid, Art. 22 (1) (e).

[21] Ibid, Art. 1

[22] Ibid.

[23] Ibid, Art. 22 (1) (g).

[24] See *Cambridge Dictionary* <https://dictionary.cambridge.org> assessed on 25/10/2022.

to ascertain their fitness for use or commerce".[25] The regulations define the term as "the examination, by the competent authority or under its supervision, of areas, baggage, containers, conveyances, facilities, goods or postal parcels, including relevant data and documentation, to determine if a public health risk exists"[26] It is submitted that the terms: "inspection and examination" connote the same meaning, and can be used interchangeably in aviation parlance.

However, a distinguishing factor that differentiates inspection and examination is the world "medical". Therefore, "medical examinations" means the preliminary assessment of a person by an authorized health worker or by a person under the direct supervision of the competent authority, to determine the person's health status and potential public health risk to others, and may include the scrutiny of health documents, and a physical examination when justified by the circumstances of the individual case"[27] By this definition, the Regulations has placed a duty on the authority to permit Airport public health officer to physically assessed passengers for the purpose of determining their health status with a view to knowing whether or not they constitute potential health risk to the public. It needs be stated that assessment is not only directed to passengers' person, the health documents may be screened by way of assessing the required document at the point of entry whenever the need arises.

Provision for contingency arrangement for unexpected public health risk

The authority is under an obligation to have plan and provide contingency arrangement to guide against unexpected public risk.[28] Although what amounts to contingency arrangement for the unexpected public health risk is not stated in the Regulations. However, submitted that arrangements such as sanitary measures, means of inspection and medical examination, means of communication and the equipment to be used in conducting and/or inspection of goods and medical examinations of passengers can be regarded as contingency plan. It is submitted that timely control of infectious diseases at the point of entry a State is crucial in the prevention of spread of communicable diseases. This is will be possible where the authority has proper planning including provision for contingency arrangement for expected or unexpected health risk. It is submitted that it was the failure of the Civil Aviation Authority in Nigeria to have a standby plan and contingent arrangement that caused the rapid spread of *ebola* virus and COVID 19 in Nigeria.

Reapplication of Health Measures on Arrival of passengers

The IHR 2005 provides that the civil aviation authority is responsible to reapply World Health Organization's health measures for travellers, baggage, cargo, containers, conveyances, goods, postal parcels and human remains disembarking from an affected area, if evidences are bound that the measures applied on departure from the affected area were not successful.[29] It is submitted that the condition precedent for the implementation of the above provision are: (a) the passengers or goods or human dead body must have departed from an affected area; (b) there must be verifiable indications and/or evidence of unsuccessful application of health measures on departure; and (c) the measure must have been the one prescribed by the World Health Organization.

It is also submitted that the word "may" as adopted in the provision ordinarily connotes "not compulsory." [30] It is however be noted that it is not in all situation that a "not compulsory" obligation meaning is given to it. In fact in some situations, the word "may" has been interpreted to be word of obligation or compulsion to perform an obligation.[31] Considering the importance of the WHO's health measures in controlling and preventing the spread of communicable diseases, the principle of reapplication of health measures should be made compulsory, more so where there is evidence of

[25] See *Black's Law Dictionary*, 2nd Edition, INSPECTION: Definition & Legal Meaning <thelawdictionary.org> assessed on 25/10/ 2022.
[26] IHR 2005, Art. 1.
[27] Ibid.
[28] Ibid, Art. 22 (1) (g).
[29] Ibid, Art. 22 (2).
[30] See *State of Kerala & Ors v Kandath Distilleries* (2013) 6 SCC 573
[31] See *Ramji Missar v State of Bihar* AR 1963 SC 1088.

unsuccessive application of health measure to passengers; goods including cargo, postal parcel and human remain in departing states.

However, such public health measures should be applied or reapplied so as to avoid injury, discomfort to persons, or "damage to the environment in a way which impacts on public health, or damage to baggage, cargo, containers, conveyances, goods and postal parcels".[32] In summary, it should be applied in such a way that will not contravene the human rights as enshrined in the human rights laws.

Global health security screening of airline passengers

Pursuant to the International Civil Aviation Organization (ICAO) Health-Related Document to effectively secure global health safety, the public health authority of the affected State in conjunction with the Airport Authority and the WHO should, as a matter of obligation, conduct a national exit screening for any of the passengers without any form of discrimination before boarding the aircraft.[33] The purpose of this guidelines on national exist screening are: (1) to reduce or erase the transport of infectious diseases through the air transport, (2) to ascertain the number of passengers who have been infected before boarding the aircraft and (3) to apply the required treatment to the affected passenger.

Conceivably, the guidelines further encouraged the State concerned to adopt screening methods such as Visual inspection, Questionnaire and temperature measurement by means of temperature measurement devices.[34] Visual observation and questionnaire can be described as traditional on one hand, adoption of Bodily Temperature Devices are referred to as Modern methods of global health safety screening. Traditionally, none-medical personnel at the airport may be engaged to carry out visual observation and identification of those passengers who are demonstrating symptom of infectious disease before boarding the aircraft.[35] This is tactically referred to as primary health screening. The advantage of this method is that it is free from contravening the fundamental human rights of passengers since no contact is involved. However, it involves the deployment of many none-medical personnel to carry out visual observation. Furthermore, its adoption is for mere suspicion of passengers who might been infected with disease.

In case of the questionnaire, the public health authority subject to the supervision of civil aviation authority shall distribute questionnaires to the passengers before, during or at the point of disembarkation at the point of arrival. The questionnaires are designed in such a way that each passenger is obliged to fill his/her information concerning the status of his/her health status. Such information shall be treated as correct and truth to the best of the informant's information. Therefore, the purpose of this strategy is (a) to ascertain whether the passenger is from the disease infected area; (b) to know whether a particular passenger has had contact with an infected person, (c) to ask the passenger to report his/her symptom; and (d) to obtain passenger's contact information at his/her destination.[36] The adoption of questionnaire facilitates contact tracing should in case it is discovered that the aircraft is infected with infectious disease. However, the challenges in the adoption of this method are that passengers may give fake information which will make it impossible to trace the suspicious passenger. In addition, illiterate syndrome is another challenge. Some may not be literate in the language of the questionnaire while others may be illiterate. For the administrator, the time to carry out analysis of questionnaire is a serious challenge. Before the analysis could be concluded, all the passengers would have dispersed from the screening area. These pose a serious challenge to the administration of questionnaire as one of the primary screening strategies at the airport.

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[32] IHR 2005, art. 22 (3).
[33] See ICAO Health-Related Documents: Airport Preparedness, p. 23 <
[34] Ibid.
[35] See Lukas Gold, Ismaeil Balal, and Okan G, 'Health Screening Strategies for International air travellers during an epidemic or pandemic' [2019] 75 *Journal of Transport Management* 27.
[36] Gostic Katelyn *et al*, 'Effectiveness of Traveller Screening for Emerging Pathogens is Shaped by Epidemiology and Natural History of Infection' (2015) *Elife,* 4 <elifesciences.org> accessed 27/10/22. See also Shu P.Y et al, 'Fever Screening at Airport and Imported Dengue' (2005) 11(3) *Emerg. Infect. Dis.* 460.

The adoption of visual look and infrared thermometer, no doubt cannot give desire results in combating the spread of infectious disease. The need to deploy technological health screening devices known as Body Temperature Measurement Devices is inevitable. The device is more advance and is deployable to screen passengers before boarding the aircraft. The device is of three type: Non-contact Infrared Thermometer, Non-contact Infrared Thermometer Camera, and Ear Infrared Thermometer.

Non-contact Infrared Thermometer (NCIT) is a temperature measuring device to screen and ascertain the temperature of passengers before boarding the aircraft. Practically, it is held by a screening officer who is expected to give distance between 1.2 and 6 inches (3-15cm) from the passenger's forehead.[37] The accuracy of its ability to detect fever is between 80%-99%, its error therefore, could be +- 1.0 zero degree Celsius. However, the device is known for it is ability to adapt to different weather, therefore it does not need frequent calibration. This makes it to be less expensive and easy to maintain.[38] On the other hand, None-Contact Infrared Thermometer Camera (NCITC) otherwise known as Thermal Imaging Camera or Thermographic Camera is used to ascertain the temperature of passengers as they pass through the field for view. Its effectiveness and efficiency in determining the accuracy temperature of passengers depend on how effectively used with the Thermometer.[39] Fundamental advantage of NCITC is its higher screening capacity than NCIT. However, unlike NCIT, it does need constant calibration to meet the weather condition otherwise it will lose its efficiency and efficacy. Also, it is not easy to maintain as an instrument of screening at the airport because of its high cost of maintenance.[40] The Ear Infrared Thermometer, a contact temperature screening device to ascertain and confirm the temperature of a passenger. It is usually adopted as a supplementary to other temperature screening devices because of its accuracy.[41]

It is submitted that all these devices constitute means of conducting primary screening of passengers' temperature at the airport. They do not ascertain the nature of infectious disease affecting the suspected passenger(s). It can be safely concluded that they can only be used as suspicion devices. Therefore, what then required to ascertaining the real health status of the passengers especially when temperatures rose beyond the normal measurement? It is argued that the secondary method of screening passenger should be deployed. It is an outright medical examination of those who have been suspected to have contacted the infectious disease having undergone the processes of primary screening. The necessity to conduct secondary screening is not farfetched from the fact that primary screening devices cannot ascertain the nature of infectious disease contacted by a particular passenger. While the adoption of medical examination as a secondary measure is pointing to the accuracy of the nature of infectious disease. Its time consuming and delay of passengers constitute source of worry to aviation stakeholders.[42] Fundamentally, the aim and objective of the secondary screening through medical examination is to ascertain the nature of sickness with a view to prevent its spread to the international community or within the community of nations.

It needs be noted that whichever method is adopted, the provisions of fundamental human rights must be strictly adhered to. The ICAO Health-Related Document and the IHR 2005 obliged member States to consider the instrumentality of human rights provisions whenever the devices on the suppression and prevention of spread of diseases are been deployed. The ICAO Health Related Document provides that 'States are obliged to respect a traveller's fundamental human rights…'[43] This provision did place a blanket obligation on the State party concerned. Because, the nature of human rights the airport public health screener is to respect are not specifically mentioned. However, the gap was filled by giving

[37] Fluke, *Fluke Corp.; Everest, W A: 2017. Infrared Thermometers*. < http://en-us.fluke.com/products/thermometers/fluke-62-max-plus-thermometer.html > accessed 27/10/22.
[38] See CDC (Center for Disease Control) Non-contact temperature measurement devices: consideration for use in port of entry screening activities. 2014 < https://wwwnc.cdc.gov/travel/files/ebola-non-contact-temperature-measurement-guidance.pdf > accessed 27/10/22.
[39] Ibid.
[40] Ibid.
[41] Ibid.
[42] Cho Kyung *et al*, 'Fever Screening and detection of Fabrile arrivals at an international airport in Korea: association among self-reported fever, infrared thermal camera scanning, and tympanic temperature' (2014) *Epidemio, Health* 36.
[43] ICAO Health Related Document, Note 1, 22-23.

directive to implement health related screening subject to the provisions of the IHR 2005.[44] Consequently, the IHR 2005 provides that 'the implementation of these Regulations shall be with full respect for the dignity, human rights and fundamental freedoms of persons.[45] These rights are now analysed.

Global health security screening and the IHR 2005 fundamental human rights provisions

Human rights provisions enshrined in the IHR 2005 supports the notion that the port health security screening at the airport shall conduct health-related screening with due regards for fundamental right to freedom of movement, freedom from inhuman treatment, freedom from discrimination and delay, and right to confidentiality of data information. Filder opined that "the human rights obligations in the new IHR mean that the objective of minimum interference with international traffic includes protecting not only trade flows, but also human rights."[46] Therefore, the importance of human rights to the public health screening of passengers at the airport is acknowledged in the IHR 2005.

Global public health screening at the airport and right to human dignity

The term "dignity" has no precise meaning or definition as neither the IHR 2005 nor any of the International or national human rights laws is helpful in giving a precise or specific meaning or definition. This has created serious *lacuna* in determining the scope and limitation of the term in the field of international human rights law. Thus, different meaning has been ascribed to the term, depending on those who invoked it.[47] This is evident in the statement of Conor that the term 'dignity' as used by the States is creating confusion on the ground of its adoption base on different philosophical and cultural thinking of the respective State. He goes on to state that:

> A person's inherent dignity demands the protection of human right on the basis of equal treatment and respect and while the unjustified deprivation of human right may constitute an attack on human dignity, it can never be deemed to derive a person of his or her inherent dignity.[48]

Accordingly, Conor is trying to justify the notion that 'Human right is the foundation for dignity but not dignity as foundation for human rights'[49]. That was why he further stated that "cruel, inhuman or degrading treatment is one of the most widely recognized ways of infringing on person's human dignity"[50] It is submitted that Conor has failed to give a specific meaning of 'human dignity' rather he merely stated the foundational basis and the scope of the term. A further argument on the nature of 'dignity' as opposed to human right has also been canvassed by Feldman to the effect that:

> The notion that dignity on itself be a fundamental right is superficially appealing but ultimately unconvincing. We are conceived and born, and most of us live and die, in circumstances of significant indignity. It seems…that human dignity is a desirable state, an aspiration, which some people manage to achieve some of the time, rather than a right. Nevertheless, human rights when adequately protected, can improve chances of realizing the aspiration'[51]

Shultizner's comment on the nature and scope of human dignity is not different from the earlier writers. He states 'that…human dignity is regarded as a supreme value that not only stands separated from

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[44] See ICAO Health Related Document, Annex 9: Facilitation, paragraph 8.12, 6.
[45] See IHR 2005, Art. 3 (1).
[46] David Fidler, 'From International Sanitary Conventions to Global Health Security: The New International Regulations [2005] 4(2) *Chinese Journal of International Law,* 367.
[47] See Doron Shultziner, 'Human Dignity-Functions and Meanings' (2003) 3 (3) *Global Jurist Topics* 1; Henk Botha, 'Human Dignity in Comparative Perspective' (2009) 2 *Stell LR* 171-172; Conor O'Mahony, 'There is no such thing as a right to dignity, I. (2012) 10 (2) *CON* 554-557.
[48] Conor O'Mahony (n 50) 563.
[49] Ibid.
[50] Ibid, 569.
[51] David Feldman, 'Human Dignity as a Legal Value: Part 1' (1999) *Public Law* 682; Conor O'Mahony (n 50) 561.

human rights but also supersedes them. Human rights derived from human dignity while the latter encompasses the essential characteristics of human beings'[52] It is submitted that the nature of dignity is, however, not so clear, as it can be regarded as a tool for strict application of human right to global health security screening of passengers at the airport. Therefore, public health screeners at the airport are under international and national human rights laws obligation to apply equality and respect in the screening of passengers at the airport. This will serve as a foundational basis to the protection of passengers' fundamental human rights.

Global public health screening at the airport and fundamental human right to privacy

Despite the fact that there is no consensus definition of 'right to privacy', yet the IHR 2005 provides for health security screening at the airport with due respect for human right to privacy.[53] Although the importance of right to privacy is as old as the history of human existence.[54] However, the difficulty in comprehending the term makes difficult in defining what it is.[55] This led to the elusive characteristics in defining the right to privacy[56]as different scholars looked at it from different background and cultural usages. For example, some scholars looked at it from moral, sociological, religious and cultural perspectives. However, these perspectives are outside the scope of this paper. A 19th century scholar, Warren and Brandeis define it as a 'right to be let alone'[57] It has also been defined as:

> Our right to keep a domain around us, which includes all those things that are part of us, such as our body, home, property, thought feelings, secrets and identity. The right to privacy gives us the ability to choose which parts in this domain can be accessed by others, and to control the extent, manner and timing of the use of those parts we choose to disclose.[58]

Westin defines it as:

> The claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others.[59]

While Warren and Brandeis define the term 'right to privacy in the context of what is obtainable in common law jurisdiction, with the mind set of civil suits against gossip-mongers in the 19th century, Westin conceptualized it in term of individual approach to right to privacy. On the other hand, Westin extended it meaning to include societal right to secrete of information. It can be safely concluded that the concept of right to privacy is "elusive and ill defined".[60] Meriam Webster dictionary defines it as 'right of person to be free from intrusion into or publicity concerning matter of a personal nature'.[61]

The concept of right to privacy has been provided in the IHR 2005. The Regulations provides:

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[52] See Doron Shultziner, 'Human Dignity-Functions and Meanings' (2003) 3 (3) *Global Jurist Topic* 1; Botha H., 'Human Dignity in Comparative Perspective' (2009) 2 *Stell LR* 171-172. See also Paolo Carozza, 'Subsidiarity as a structure principle of international human rights law' (2003) *AJIL* 46; Lorraine Wereinb, 'Human Dignity as Rights Protecting Principle' (2004) 17 *National Journal of Constitutional Law (NJCL)* 132.

[53] IHR 2005, Art. 3 (1).

[54] Patricia Newell, 'Perspective on privacy' (1995) 15 (2) *Journal of Environmental Psychology,* 95; Alibeigi A, et al, 'Right to privacy, a complicated concept to review' (2019) *Library Philosophy and Practice (e-journal).*

[55] See Nick Taylor, 'State Surveillance and the Right to Privacy' (2022) 1 (1) *Surveillance and Society* 67; Samuel Warren and Louis Brandeis 'The Right to Privacy' in Schoeman, Ferdinand David, (ed.), *Philosophical Dimensions of Privacy: An Anthology*. (Cambridge, Massachusetts: Cambridge University Press, 1984) 75-103.; Jamal Green, 'The So called Right to Privacy' (2010) 715 *U.C Davis L. Rev* 720; Oliver Diggelmann and Marie Cleis, 'How the Right to Privacy Became a Human Right' (2014) 14 *Human Right Law Review* 442, 458.

[56] See Richard Posner 'The Right of privacy' (1978) 12 (3) *Georgia Law Review* 393.

[57] See Samuel Warren and Louis Brandeis, 'The Right to privacy' (1890) IV (5) *Harvard Law Review* 194.

[58] See Yael Onn, et al., 'Privacy in the Digital Environment' (2005) *Haifa Center of Law& Technology* 1.

[59] Alan Westin, 'Privacy and Freedom', 5th edn. New York, U.S.A., Atheneum 1968.

[60] See Jamal Greene (n 57).

[61] See Right to privacy, Merriam-Webster.com Legal Dictionary, Merriam-Webster < http://www.merriam-webster.com/legal/right%20of20privacy. > accessed 18/11/2022.

> Subject to applicable international agreements and relevant articles of these Regulations, a State Party may require for public health purposes, on arrival or departure:
>
> (a) With regard to travellers:
>
> (iii) a non-invasive medical examination which is the least intrusive examination that would achieve the public health objective.[62]

As earlier stated, public health security screening at the airport can be carried out by means of traditional or modern devices, the application of which is subject to fundamental human right to privacy as provided by the IHR 2005 and other international and national human rights laws. Therefore, the unambiguous provision of the regulations to the effect that a non-invasive medical examination which is least intrusive to detect the nature of infection and the status of passenger involved would be a balance in achieving the public health objective. An invasive, according to the IHR 2005 has been interpreted to mean 'means the puncture or incision of the skin or insertion of an instrument or foreign material into the body or the examination of a body cavity'.[63] The acts of non-invasive have been listed to include 'medical examination of the ear, nose and mouth, temperature assessment using an ear, oral or cutaneous thermometer, or thermal imaging; medical inspection; auscultation; external palpation; retinoscopy; external collection of urine, faeces or saliva samples; external measurement of blood pressure; and electrocardiography'[64] Consequently, any method or act adopted to examine a passenger aside those listed under the Regulation could be regarded as an invasive method or act, and therefore interfere with the fundamental human right to privacy of the passenger.

No doubt of the State party's obligation to maintain least intrusive medical examination is a way to strictly adhere to human right to privacy. Yet, the term "intrusive" has been interpreted to mean 'possibly provoking discomfort through close or intimate contact or questioning'[65]. A medical examination has been defined by the Regulations to mean 'the preliminary assessment of a person by an authorized health worker or by a person under the direct supervision of the competent authority, to determine the person's health status and potential public health risk[66] to others, and may include the scrutiny of health documents, and a physical examination when justified by the circumstances of the individual case'[67]

It is submitted therefore that a provoked discomfort could be sourced while conducting a preliminary assessment of a passenger, or health document to determine his health status and risk to the public, or by physical examination through: (1) close or intimate contact; or (2) questioning of a passenger by the airport medical personnel or an authorized health worker or any person under the supervision under the authority of Port health authority at the airport. Accordingly, going by the Regulations, an intrusive and invasive conduct of civil aviation public health screening would, certainly contravene the fundamental human right to privacy of passenger. Furthermore, while it is mandatory that a suspect passenger whose health constitutes potential health risk to other will have to undergo a medical assessment to determine his real health status, yet this is however subject to an express informed consent of such a passenger otherwise it will amount to a denial of right to privacy. The regulations provide:

> No medical examination, vaccination, prophylaxis or health measure under these Regulations shall be carried out on travellers without their prior express informed consent

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[62] IHR 2005, Art. 23 (1) (a) (iii).
[63] Ibid, Art. 1.
[64] Ibid.
[65] Ibid.
[66] Public health risk has been interpreted under the Regulations 2005 to mean a likelihood of an event that may affect adversely the health of human populations, with an emphasis on one which may spread internationally or may present a serious and direct danger. See IHR 2005, Art. 1.
[67] Ibid.

> or that of their parents or guardians, except as provided in paragraph 2 of Article 31, and in accordance with the law and international obligations of the State Party.[68]

Thus, where such passenger is an adult, the consent so required must be obtained from him otherwise it will amount to a flagrant disrespect for such a passenger's fundamental human right to privacy. Likewise, an informed consent of a minor must be obtained through his parent or guardian. It is submitted that the simple reason for a minor's consent to be obtained from his parent is that a minor lacks contractual capacity to enter into a contract of carriage by air. Therefore, parent or guardian shall be liable for any misdeed of the minor. However, an exception to the application of the doctrine of informed consent is where there is an evidence of imminent public risk.[69] The nature of evidence required and its weight are not stated in the Regulations. However, a documentary or oral evidence of imminent risk to the public at large would suffice. For example, it was evident that COVID-19 posed a serious health risk to the public at large. Its fast spreading through international and local airlines was an evidence and confirmation that the disease constitutes imminent danger to the public. In this circumstance, an informed consent of a passenger (minor or adult) is not required before the authorized personnel could conduct a medical examination. Fidler observed as follows:

> The revised Regulation's provisions on compulsory measures raise, however, two concerns from a human rights perspective. First, the new IHR only require States Parties to apply the least intrusive and invasive measure in connection with medical examinations but not to vaccination, prophylaxis, isolation or quarantine.[70] Secondly, the revised Regulations do not contain requirements that States Parties accord those subject to compulsory measures due process protections, such as the right to challenge such measures in court.[71]

Another privacy issue that is protected under the IHR 2005 is Right to privacy of personal data information. The regulations defines personal data as 'any information relating to an identified or identifiable natural person'[72]. Accordingly, a data that is not known to an identifiable natural person needs not be recognized as a personal data or worthy of being protected under the Regulations. The Regulations failed to mention what determines or means of identifying a natural person. However, recourse is made to The European Union (EU) Data Protection Directive where it defines Personal data as "any information relating to an identified or identifiable natural person ('data subject'); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity"[73]. Consequently, a natural person can be identified in person or through physical, physiological, mental, economic, cultural, or his social stability as the case may be.

In the 21st century where new technologies have been deployed to collect, use, and disseminate personal health information of passengers into databases by the Civil Aviation Public Authority. The way and manner to protect information so collected constitutes a source of concerned to human rights activities. This is due to the fact that the rate at which people share another persons' information through social networking sites is alarming. Furthermore, abuses of personal data information regarding passengers' health status during health security screening, including misuse of information for unlawful purposes, identity theft, eavesdropping and skimming are sources of worried in the field of personal data protection syndrome.

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[68] Ibid, art. 23 (4).

[69] Ibid, art. 32 (2). See David Fidler, 'From International Sanitary Convention to Global Health Sanitary: The New International Health Regulations' (2005) 4 (2) *Chinese Journal of International Law*, 367.

[70] Ibid, Arts 23.2 and 31.2.

[71] See David Fidler, (n 71) 367.

[72] Ibid, Art. 1

[73] See Directive 95/46/EC, sec. 2[a]; See also Article 29 Data Protection Working Party, Opinion 4/2007 on the concept of personal data, June 20, 2007, at http://www.gov.gg/ccm/cms-service/download/asset/? asset.id=12058063. Accessed 11 November 2022.

Interestingly, the IHR 2005 did offer data protection in term of collection, storage and usage.[74] The protection is similar to the principles of Fair Information Practices which has long been applied since 1960s.[75] Practically speaking, the United States,[76] Georgia,[77] Thailand,[78] and Nigeria[79] have adopted the principles with a view to protect personal data information so collected.

Global public health screening at the airport and Right to freedoms of persons

The phrase "fundamental freedoms of persons" as used in the Regulations is not defined. It is suggested herein that it could mean two of the freedoms envisaged in the Regulations: Right to freedom of movement and Right to freedom from discrimination. Even though right to freedom of movement is not directly mentioned in the Regulations. However, what appears to mean right to freedom of movement is rooted in article 2 of the Regulations when the purposes of the Regulations are stated to be among others to protect, prevent, control the international spread of disease in ways that would "avoid unnecessary interference with international traffic and trade".

Consequently, flight restrictions and/or ban from operating international routes on ground of public health issue(s) amount to movement restriction, therefore contravening the right to freedom of movement, thus a flagrant disobedience to art. 2 of the Regulations. For example, while in early February 2020, about 59 airlines companies had suspended or restricted flight operation en route china; and some other countries, United Kingdom, Australia, Russia and Italy placed travel restrictions on some other countries.[80] In another development, UK imposed travel restrictions on Nigeria on the ground that 21 detected cases of Omicron variant of Covid-19 in England were traceable to travellers from Nigeria. Consequently, Nigeria reacted by placing a reciprocal ban on travellers from UK, Saudi Arabia, Canada and Brazil over Covid-19 variant.[81]

It is submitted that the negative implications of flight and/or travel restrictions on global civil aviation business are :(1) it contravenes right to freedom of movement as envisaged under the IHR 2005 and various international human rights laws; (2) it distorts world economic order, thus causes economic instability; (3) it encourages discrimination among the nations. For example, the Nigeria Aviation Minister has described the travel restrictions/ban placed on Nigeria travellers by the UAE aviation authority as "discriminatory profiling of Nigerian."[82]

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[74] See IHR Art. 45 (1) and (2).

[75] OECD (Organisation for Economic Cooperation and Development). 1980. "OECD Guidelines on the Protection of Privacy and Trans border Flows of Personal Data." Paris, France. http://www.oecd.org/document/18/0,3343,en_2649_34255_1815186_1_1_1_1,00.html; U.S. Department of Health, Education, and Welfare. 1973. "Records, Computers and the Rights of Citizens: Report of the Secretary's Advisory Committee on Automated Personal Data Systems July, 1973."Washington, DC. http://aspe.hhs.gov/DATACNCL/1973privacy/tocpreface members.htm; CSA (Canadian Standards Association International). 1996. "Model Code for the Protection of Personal Information." Toronto, Ontario. For an extensive discussion on the principle of fair information practice, see David Amir Banisar, 'The Right to Information Privacy and Privacy: Balancing Rights and Managing Conflicts' (the international bank reconstruction and development/the world bank 1818 h street NW, Washington DC, 2011) 1-8

[76] See the Privacy Act of 1974, 5 USC 552(a). There is also a patchwork of sectoral legislation applying to heath, financial, and credit records; some telecommunications records; educational records; and other areas at both the national and state levels. For a comprehensive overview, see Solove and Schwartz (2008).

[77] General Administrative Code, sec. 27.

[78] Official Information Act, B.E. 2540 (1997).

[79] See National Health Act, 2014, Vol. 101 No. 145, sections 26, 27, 28 and 29.

[80] See Matteo Chinazz *et al*, 'The effect of travel restrictions on the spread of the 2019 novel corona virus (COVID-19) outbreak' (2020) *Science* 395.

[81] See Oluchi Okorafor, 'Covid-19 Ban now, Nigeria Places Travel Ban on UK, Canada, Saudi Arabia'(2021) *Science,* 13 <sciencenigeria.com> accessed 19/12/2022; Bunmi Adeloju, 'FG to restrict airlines from UK, Saudi Arabia in response to Omicron travel ban', *The Cable*, 12 Dec., 2021 <the cable.ng> accessed 19/12/ 2022; see also Jesupemi 'Are, Covid: UK bans foreign travellers from Nigeria over Omicron concerns' *The Cable*, 4/12/2022 <thecable.ng> accessed 19/12/2022.

[82] See Eze Chinadu and Sumaina Kasim, 'Emirate to resume Nigerian Routes as FG lifts Ban: UAE drops Rapid Antigen Test requirement' *This Day*, www.thisdaylive.com accessed 19/12/ 2022.

Another part of "fundamental freedoms of persons" is Right to freedom from discrimination. The purposive approach of the Regulations is to protect the international community against the spread of diseases by applying all the public health security measures in a non-discriminatory manner.[83] Neither what amounts to non-discriminatory or discriminatory manner nor their meaning was provided in the Regulations. However, article 3 (2) of the Regulations makes the application of its provisions subject to the Charter of the United Nations and the Constitution of the World Health Organization. Therefore, what amount to discriminatory or non-discriminatory of airlines passengers is subject to non-discriminatory provision under the United Nations Charter. Under the Charter, States are encouraged and enjoined to apply laws with due "respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion;" [84]

It is therefore submitted that what amounts to discrimination is where global aviation health screening is carried out with due regard to race, sex, language or religion. Thus, a non-discriminatory application of the Regulations is where the provisions of the Regulations are administered without considering race, sex, language or religion. The equal treatment of airline passengers on global health security screening without any distinction woman being can think of is referred to a non-discriminatory health security screening at the airport.

Conclusion

The WHO and ICAO had a symbiotic effort on the prevention and protection of international community against the spread of deadly diseases through a theoretical approach by adopting IHR 2005 and the ICAO Guidelines on the application of IHR 2005. While the WHO made general theoretical efforts toward maintaining international health peace by way of adoption of IHR 2005 to eradicate, prevent and suppress the spread of infectious disease, the ICAO singlehandedly made case for civil aviation on how, whom and when the IHR 2005 is to be applied through guidelines in preventing and suppressing the infectious diseases through air transport. This article has clearly analysed the statutory roles of civil aviation authority as directed by the IHR Regulations 2005 in order to sustain sound health of passengers worldwide. The article argues that the directions are the pre-screening roles which must be strictly complied with if the spread of disease is to be curtailed and sound world health is to be maintained. Therefore, strict adherence to pre-screening roles are one of the keys to achieving the aim and objectives of the Regulations 2005.

It is also argued that pre-screening roles of civil aviation authority is not a full proof in preventing and suppressing the spread of disease, further screening of passengers and goods must be conducted through traditional and modern methods. The essence is to ascertain the health status of passengers as well as that of goods, and to know whether or not they constitute public health risk of international concern. It is therefore submitted that the screening roles compliment pre-screening duties because they are two sides of the same coin that are made inseparable to eradicate the spread of infectious disease. However, the methods so adopted must be subject to fundamental human rights under the Regulations 2005.

While it is interesting to state that WHO's proposals for incorporating human rights in IHR 2005 was traceable to the January 2004 IHR Draft wherein stricter obligations is placed on States Parties regarding protection of rights of identified or identifiable persons than the existing international human rights laws. Very apt in the IHR 2005 as applicable to global security health screening of passengers' is the doctrine of non-invasive medical examination, vaccination or prophylaxis on travellers without the traveller's prior informed consent.[85] The provision was incorporated to protect the fundamental human right to privacy which includes data protection privacy. However, the public health officer at the airport may conduct any invasive screening of passengers' but subject to compliance with certain laid down

[83] IHR 2005, Art. 42.
[84] United Nations Charter https://www.un.org/en/about-us/un-charter/full-text assessed 20/12/2022; Art. 1 (3).
[85] See World Health Organization, International Health Regulations: Working Paper for Regional Consultations, IGWG/IHR/Working paper/12.2003, 12 January 2004 (hereinafter January 2004 IHR Draft), art. 36 (2).

procedures and protections under the IHR 2005.[86] Therefore, informed consent of passengers need not be undertaken while examining, vaccinating among other protection devices in order to protect the sanctity of public health.[87]

Furthermore, the concepts of freedom of equality and freedom from discrimination; and freedom of movement had had considerable effects on the passengers. The passengers were not treated equally when it comes to matter of testing or medical examination thereby contravening the doctrine of equality as envisaged in international human rights laws. The way and manner some passengers were being profiled with a view to discriminate was not in tandem with the spirit of IHR 2005. Travel restriction and /or ban placed on some countries clearly inhibits freedom of movement the implication of which the civil aviation business has been distorted.

[86] See Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, UN Doc. E/CN.4/1985/4 (1985) (hereinafter the Siracusa Principles).

[87] IHR Conflicts Analysis, 67–8 (''International law allows states to require medical examination, vaccination, or other prophylaxis as a condition of admission for travellers as long as there is compliance with international human rights law. . . . International human rights law recognizes the legitimacy of requiring compulsory medical examination, vaccination, or other prophylaxis in exceptional circumstances'').

RECENT DEVELOPMENTS

HUMAN RIGHTS

Whistle-blowing and free speech under the European Court of Human Rights and under Nigerian Law

Dr Ejemen Ojobo[*] and Dr Steve Foster[**]

Halet v Luxembourg, Application No. 21884/18, decision of the European Court of Human Right, February 14, 2023, European Court of Human Rights

Nigerian Bill 2019

Introduction

Whistle-blowing by employees raises a number of legal issues regarding the employee's duty of fidelity towards their employer and their duties under the general law of confidentiality. Such disclosures can result in a breach of contract and thus disciplinary action (including dismissal) against the employee. Further, employers may bring more general legal actions against the individual to safeguard their commercial or other rights, including damages if any loss has been sustained. As these cases raise issues of freedom of expression and freedom of information, the law may wish to provide some protection to the whistle-blower, either in providing some public interest defence,[1] or by passing legislation to protect informers from dismissal or other detriment.[2] Such laws must comply with basic tenets of fairness and principles of human rights, ensuring that they maintain an appropriate balance between free speech and freedom of information and the commercial interests of employers and others (which include the right to reputation and property rights).

This piece will first examine the recent ruling of the Grand Chamber of the European Court of Human Rights in *Halet v Luxembourg*.[3] The case concerned the disclosure by an employee of a private company of confidential documents comprising tax returns of multinational companies and other documents, obtained from his workplace. The employee now claims that a criminal fine against him was a breach of his free speech rights, guaranteed by Article 10 of the European Convention. The decision will be examined to identify where Western human rights law draws a balance between the respective rights and interests of the parties, and what impact it might have on state law in this area. The piece will then examine how this area is addressed and resolved in a different jurisdiction – Nigeria – and how proposed legislation will potentially affect the rights of both parties.

Facts and Decision in *Halet*

The applicant is a French national who at the relevant time worked for the firm PricewaterhouseCoopers (PwC), which provides auditing, tax advice and business management services. Its activities include preparing tax returns on behalf of its clients and requesting advance tax rulings ("ATAs") from the tax authorities. These rulings concern the application of tax legislation to future transactions and between

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[1] See for example, *Initial Services v Putterill* [1968] 1 QB 393, where an employee revealed that the employer was committing criminal offences under restrictive practices legislation, and *Lion Laboratories v Evans* [1985] 2 QB 526, where the employee revealed that there were defects in the claimant's breathalyser equipment.

[2] In the United Kingdom, this is in the form of the Public Interest Disclosure Act 1998: An Act to protect individuals who make certain disclosures of information in the public interest; and to allow such individuals to bring action in respect of victimisation.

[3] Application No. 21884/18, decision of the Grand Chamber of the European Court of Human Rights, February 14, 2023.

2012 and 2014 several hundred advance tax rulings and tax returns prepared by the company were published by various media outlets. The published documents drew attention to a practice, spanning a period from 2002 to 2012, of highly advantageous tax agreements between the company, acting on behalf of multinational companies, and the Luxembourg tax authorities. An in-house investigation by the company established that in 2010, just before he left the firm following his resignation, an auditor, AD, had copied 45,000 pages of confidential documents, including 20,000 pages of tax documents corresponding to 538 advance tax rulings and that in the summer of 2011 he passed them on to a journalist, EP, at the latter's request. A second in-house investigation by the company revealed that in May 2012, following media revelations about some of the advance tax rulings copied by AD, Mr Halet had contacted EP and offered to hand over further documents.

Some of the 16 documents (14 tax returns and 2 accompanying letters) were used by EP in a television programme that was broadcast in June 2013, and in November 2014 the documents were also posted online by an association of journalists known as the International Consortium of Investigative Journalists. Following a complaint by PwC, criminal proceedings were instituted, at the close of which Mr Halet was sentenced on appeal to a criminal fine of 1,000 euros and ordered to pay a symbolic sum of 1 euro in compensation for the non-pecuniary damage sustained by the company. In its judgment the Court of Appeal found that the disclosure of documents subject to professional secrecy had caused his employer harm that outweighed the general interest. Mr Halet lodged an appeal which was dismissed in January 2018.

Halet lodged an application with the European Court of Human Rights, alleging that his criminal conviction had amounted to a disproportionate interference with his right to freedom of expression under Article 10, and by a majority the Court held that there had been no violation of Article 10. The applicant requested that the case be referred to the Grand Chamber under Article 43, and on 6 September 2021 the panel of the Grand Chamber accepted that request.

Decision of the Grand Chamber of the European Court

The Grand Chamber began by reiterating that the protection enjoyed by whistle-blowers under Article 10 of the Convention was based on the need to take account of features that were specific to a work-based relationship: in other words, on the one hand, the duty of loyalty, reserve and discretion inherent in the subordinate relationship entailed by it, and, where appropriate, the obligation to comply with a statutory duty of secrecy; and on the other hand, the position of economic vulnerability vis-à-vis the person, public institution or enterprise on which they depended for employment and the risk of suffering retaliation from them.[4] The Court also pointed out that, to date, the concept of "whistle-blower" had not been given an unequivocal legal definition and that it had always refrained from providing an abstract and general definition. Thus, the question of whether an individual who claimed to be a whistle-blower benefited from the protection offered by Article 10 called for an assessment which took account of the circumstances of each case and the context in which it occurred.[5]

In this connection, the Court decided to apply the review criteria defined by it in *Guja v. Moldova*,[6] in order to assess whether and to what extent an individual who disclosed confidential information obtained in the context of an employment relationship could rely on the protection of Article 10.[7] In addition, conscious of the developments which had occurred since the *Guja* judgment - whether in terms of the place now occupied by whistle-blowers in democratic societies and the leading role they were liable to play - the Court considered it appropriate to confirm and consolidate the principles established in its case law with regard to the protection of whistle-blowers, by refining the criteria for their implementation in the light of the current European and international context.[8]Applying those principles to the present case, it noted, first, that with respect to the availability of alternative channels for making

[4] *Halet v. Luxembourg*, Application No. 21884/18), decision of the European Court of Human Right, February 14, 2023, [59]
[5] *Halet v. Luxembourg*, Application No. 21884/18), decision of the European Court of Human Right, February 14, 2023, [60]
[6] Application No. 14277/04.
[7] *Halet v. Luxembourg*, Application No. 21884/18), [61].
[8] *Halet v. Luxembourg*, Application No. 21884/18), [62].

the disclosure, that where conduct or practices relating to an employer's normal activities were involved and these were not, in themselves, illegal, effective respect for the right to impart information of public interest implied that direct use of an external reporting channel, including, where necessary, the media, was to be considered acceptable. This was also what the domestic Court of Appeal had accepted in the present case.[9]

Regarding the authenticity of the disclosed information, the Grand Chamber noted that Halet had handed over to the journalist documents whose accuracy and authenticity had been confirmed by the Court of Appeal, and were thus not called into question in any way. Accordingly, this criterion had been met.[10] Further, with respect to the applicant's good faith, it appeared from the Court of Appeal's judgment that the applicant had not acted for profit or in order to harm his employer. The criterion of good faith had thus been met at the time that the disclosures in question were made.[11]

Moving to the public interest in the disclosed information, the Grand Chamber pointed out that the impugned information was not only apt to be regarded as "alarming or scandalous", as the Court of Appeal had held, but had also provided fresh insight, the importance of which was not to be minimised in the context of a debate on "tax avoidance, tax exemption and tax evasion," by making available information about the amount of profits declared by the multinational companies in question, the political choices made in Luxembourg with regard to corporate taxation, and their implications in terms of tax fairness and justice, at European level and, in particular, in France.[12] In addition, the weight of the public interest attached to the impugned disclosure could not be assessed independently of the place that was now occupied by global multinational companies, in both economic and social terms.[13] The information relating to the tax practices of multinational companies, such as those whose tax returns were made public by the applicant, had undoubtedly contributed to the ongoing debate – triggered by AD's initial disclosures – on tax evasion, transparency, fairness and tax justice. There was no doubt that this was information for which disclosure was a matter of interest for public opinion in Luxembourg, whose tax policy was directly at issue, as well as in Europe and in other States whose tax revenues could be affected by the practices that had been disclosed.[14]

Turning to the detrimental effects of the disclosure, the Grand Chamber considered that the damage sustained by the employer could not be assessed only in respect of the possible financial impact of the impugned disclosure. Thus, it accepted that it had sustained some reputational damage.[15] However, it also noted that no longer-term damage appeared to have been established, making it necessary to examine whether other interests had been affected by the impugned disclosure.[16] In the present case it was not only the applicant's disclosure of information that was in issue, but also the fraudulent removal of the data carrier and that, in this connection, the public interest in preventing and punishing theft had also to be taken into consideration.[17] Further, the applicant had been bound not only by the duty of loyalty and discretion owed by any employee to his or her employer but also by the rule of professional secrecy which prevailed in the specific field of the activities carried out by the company, and to which he had been legally bound in the exercise of his professional activities.[18] In its view, the assessment criteria used by the Court of Appeal with regard to the damage suffered by the company (namely "damage to ... image" and "loss of confidence"), were undoubtedly relevant, but that Court had confined itself to formulating them in general terms, without providing any explanation as to why it had

[9] *Halet v. Luxembourg*, Application No. 21884/18), [190].
[10] *Halet v. Luxembourg*, Application No. 21884/18), [173-174].
[11] *Halet v. Luxembourg*, Application No. 21884/18), [185-189].
[12] *Halet v. Luxembourg*, Application No. 21884/18), [190].
[13] *Halet v. Luxembourg*, Application No. 21884/18), [191].
[14] *Halet v. Luxembourg*, Application No. 21884/18), [192].
[15] *Halet v. Luxembourg*, Application No. 21884/18), [190].
[16] *Halet v. Luxembourg*, Application No. 21884/18), [191].
[17] *Halet v. Luxembourg*, Application No. 21884/18), [193-195].
[18] *Halet v. Luxembourg*, Application No. 21884/18), [196].

ultimately held that such damage - the nature and scope of which had not, moreover, been determined in detail - had "outweighed the general interest" in disclosure of the impugned information.[19]

The Grand Chamber concluded that the Court of Appeal had not placed on the other side of the scales all of the detrimental effects that ought to have been taken into account. On the one hand, the Court of Appeal had given an overly restrictive interpretation of the public interest of the disclosed information, and at the same time failed to include the entirety of the detrimental effects arising from the disclosure in question on the other side of the scales, focusing solely on the harm sustained by the employer.[20] In consequence, the Grand Chamber decided to carry out its own balancing exercise of the interests involved, reiterating that the information disclosed by the applicant had undeniably been of public interest.[21] Although it could not overlook the fact that the impugned disclosure was carried out through the theft of data and a breach of the professional secrecy by which the applicant was bound, it noted the relative weight of the disclosed information, having regard to its nature and the extent of the risk attached to its disclosure. In view of its findings as to the importance, at both national and European level, of the public debate on the tax practices of multinational companies, to which the information disclosed by the applicant had made an essential contribution, it considered that the public interest in the disclosure of that information outweighed all of the detrimental effects.[22]

With respect to the severity of the sanction, the Grand Chamber noted that, after having been dismissed by his employer, the applicant had been prosecuted and sentenced, at the end of criminal proceedings which attracted considerable media attention, to a fine of 1,000 euros. Having regard to the nature of the penalties imposed and the seriousness of their cumulative effect, in particular the chilling effect on the freedom of expression of the applicant or any other whistle-blower, an aspect which had apparently not been taken into account in any way by the Court of Appeal, and especially bearing in mind the conclusion it had reached after weighing up the interests involved, the Court considered that the applicant's criminal conviction could not be regarded as proportionate in the light of the legitimate aim pursued.[23] It followed that there had been a violation of Article 10 of the Convention.[24]

Impact of *Halet* on whistle-blowing and free speech in Europe

There are a number of texts adopted by the Council of Europe with respect to the area of whistle-blowing, which the Grand Chamber had reference to. On 29 April 2010, the Parliamentary Assembly adopted Resolution 1729 (2010) on the protection of whistle-blowers, recognising their importance - concerned individuals who sound an alarm in order to stop wrongdoings that place fellow human beings at risk – as their actions provide an opportunity to strengthen accountability and bolster the fight against corruption and mismanagement. Under the terms of that Resolution, relevant legislation must provide a safe alternative to silence, protecting anyone who, in good faith, makes use of existing internal whistle-blowing channels from any form of retaliation (unfair dismissal, harassment or any other punitive or discriminatory treatment). On 1 October 2019, the Parliamentary Assembly also adopted Resolution 2300 (2019) on Improving the protection of whistle-blowers all over Europe, and under the terms of that Resolution noted that many Council of Europe member States have passed laws to protect whistle-blowers either generally or at least in certain fields.[25]

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[19] *Halet v. Luxembourg*, Application No. 21884/18), [200].
[20] *Halet v. Luxembourg*, Application No. 21884/18), [201].
[21] *Halet v. Luxembourg*, Application No. 21884/18), [201].
[22] *Halet v. Luxembourg*, Application No. 21884/18), [202].
[23] *Halet v. Luxembourg*, Application No. 21884/18), [204-205].
[24] *Halet v. Luxembourg*, Application No. 21884/18), [206].
[25] Albania, Croatia, the Czech Republic, Estonia, Finland, France, Georgia, Hungary, Italy, Latvia, Lithuania, the Republic of Moldova, Montenegro, North Macedonia, Poland, Romania, Serbia, the Slovak Republic, Spain, Sweden, Switzerland and the United Kingdom. On 16 April 2019 the European Parliament had approved a proposal for a directive aimed at improving the situation of whistle-blowers in all of its member States, the Resolution further emphasised that the Council of Europe member States which were not, or not yet, members of the European Union (hereafter "the EU") also have a strong interest in drawing on the draft directive with a view to adopting or updating legislation in accordance with these new standards.

In addition, on 30 April 2014, the Committee of Ministers adopted Recommendation CM/Rec (2014) 7 on the protection of whistle-blowers, which states that individuals who report or disclose information on threats or harm to the public interest ('whistle-blowers') can contribute to strengthening transparency and democratic accountability and that the personal scope of the national framework should cover all individuals working in either the public or private sectors, irrespective of the nature of their working relationship and whether they are paid or not, and should be protected against retaliation of any form. Forms of such retaliation might include dismissal, suspension, demotion, loss of promotion opportunities, punitive transfers and reductions in or deductions of wages, harassment or other punitive or discriminatory treatment.

Further, the European Directive on the protection of persons who report breaches of European Union law – Directive (EU) 2019/1937 of the European Parliament and of the Council on the protection of persons who report breaches of Union law – was adopted on 23 October 2019, and lays down common minimum standards for the protection of persons reporting breaches of European Union law in a range of areas, such as public procurement, financial services, prevention of money laundering and terrorist financing, product safety and compliance, transport safety, protection of the environment, radiation protection and nuclear safety, food and feed safety, animal health and welfare, public health, consumer protection, protection of privacy and personal data, and security of network and information systems.[26]

The Grand Chamber in this case noted that the Chamber, in its earlier judgment, regarded the applicant as a whistle-blower for the purposes of the Court's case-law, and sought to establish whether the national courts had complied with the various criteria developed by the Grand Chamber in *Guja v. Moldova*.[27] That included: the availability of alternative channels for making the disclosure; the public interest in the disclosed information, the applicant's good faith, the authenticity of the disclosed information, the damage caused to the employer and the severity of the penalty The Grand Chamber then concluded that only the criteria concerning, firstly, the balancing of the public interest in the information disclosed against the damage caused to the employer and, secondly, the severity of the penalty, were in issue in this case.[28]

With respect to the general principles concerning the right to freedom of expression within professional relationships, the Grand Chamber stated that the Court has found that the protection of Article 10 of the Convention extends to the workplace in general,[29] and that the Article is not only binding in the relations between an employer and an employee when those relations are governed by public law but may also apply when they are governed by private law.[30]

The Grand Chamber also noted that the protection regime for whistle-blowers is likely to be applied where the employee or civil servant concerned is the only person, or part of a small category of persons, aware of what is happening at work and is thus best placed to act in the public interest by alerting the employer or the public at large.[31] Nonetheless, employees owe to their employer a duty of loyalty, reserve and discretion, which means that regard must be had, in the search for a fair balance, to the limits on the right to freedom of expression and the reciprocal rights and obligations specific to

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[26] The relevant provisions of this Directive are as follows. Article 2 lays down common minimum standards for the protection of persons reporting the following breaches of Union law: (a) breaches falling within the scope of the Union acts set out in the Annex that concern the following areas: (i) public procurement; (ii) financial services, products and markets, and prevention of money laundering and terrorist financing; (iii) product safety and compliance; (iv) transport safety; (v) protection of the environment; (vi) radiation protection and nuclear safety; (vii) food and feed safety, animal health and welfare; (viii) public health; (ix) consumer protection; (x) protection of privacy and personal data, and security of network and information systems; (b) breaches affecting the financial interests of the Union as referred to in Article 325 TFEU and as further specified in relevant Union measures; (c) breaches relating to the internal market, as referred to in Article 26(2) TFEU, including breaches of Union competition and State aid rules, as well as breaches relating to the internal market in relation to acts which breach the rules of corporate tax or to arrangements the purpose of which is to obtain a tax advantage that defeats the object or purpose of the applicable corporate tax law.

[27] Application No. 14277/04 [77-95].

[28] *Halet v Luxembourg*, Application No. 21884/18, [60]

[29] *Kudeshkina v. Russia*, Application No. 29492/05 [85].

[30] *Palomo Sánchez and Others v. Spain* [GC], Application Nos. 28955/06 [59].

[31] *Guja*, [72].

employment contracts and the professional environment.[32] The Grand Chamber concluded, therefore, that the protection enjoyed by whistle-blowers under Article 10 is based on the need to take account of characteristics specific to the existence of a work-based relationship: on the one hand, the duty of loyalty, reserve and discretion inherent in the subordinate relationship entailed by it, and, where appropriate, the obligation to comply with a statutory duty of secrecy; on the other, the position of economic vulnerability *vis-à-vis* the person, public institution or enterprise on which they depend for employment and the risk of suffering retaliation from the latter. [33]

Applying those principles to the present case, to consider necessity and proportionality, the Grand Chamber confine itself to assessing the specific circumstances of each case submitted to it in the light of the general principles, applying the review criteria defined by it under Article 10 of the Convention, and the *Guja* criteria; with additional clarifications required in order to take into account the specific features of the present case. [34]

The Grand Chamber then examined the outcome of the balancing exercise, finding that the exercise undertaken by the domestic courts did not satisfy the requirements it had identified in the present case. On the one hand, the Court of Appeal gave an overly restrictive interpretation of the public interest of the disclosed information, and failed to include the entirety of the detrimental effects arising from the disclosure in question on the other side of the scales, focusing solely on the harm sustained by the company. In finding that this damage alone, the extent of which it did not assess in terms of that company's business or reputation, outweighed the public interest in the information disclosed, without having regard to the harm also caused to the private interests of PwC's customers and to the public interest in preventing and punishing theft and in respect for professional secrecy, that Court failed to take sufficient account, as it was required to do, of the specific features of the present case.[35] At the same time, it could not overlook the fact that the impugned disclosure was carried out through the theft of data and a breach of the professional secrecy by which the applicant was bound. Nevertheless, it also noted the relative weight of the disclosed information, having regard to its nature and the extent of the risk attached to its disclosure. Thus, in the light of its findings as to the importance, at both national and European level, of the public debate on the tax practices of multinational companies, to which the information disclosed by the applicant has made an essential contribution, it considered that the public interest in the disclosure of that information outweighs all of the detrimental effects.[36]

Turning to the severity of the sanction, the Grand Chamber stressed that in the context of proportionality, irrespective of whether or not the penalty imposed was a minor one, what matters is the very fact of judgment being given against the person concerned.[37] Having regard to the essential role of whistle-blowers, any undue restriction on freedom of expression effectively entails a risk of obstructing or paralysing any future revelation, by whistle-blowers, of information whose disclosure is in the public interest, by dissuading them from reporting unlawful or questionable conduct Thus, the public's right to receive information of public interest as guaranteed by Article 10 of the Convention may then be imperilled.[38] In the present case, therefore, after having been dismissed by his employer, admittedly after having been given notice, the applicant was also prosecuted and sentenced, at the end of criminal proceedings which attracted considerable media attention, to a fine of EUR 1,000. Having regard to the nature of the penalties imposed and the seriousness of the effects of accumulating them, in particular their chilling effect on the freedom of expression of the applicant or any other whistle-blower, an aspect which would not appear to have been taken into account in any way by the Court of Appeal, and especially bearing in mind the conclusion reached by it after weighing up the interests involved, the

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[32] *Palomo Sánchez and Others*, [74], and *Rubins v. Latvia*, Application No. 79040/12, [78].
[33] *Halet v Luxembourg*, Application No. 21884/18, [191].
[34] *Halet v Luxembourg*, Application No. 21884/18, [158].
[35] *Halet v Luxembourg*, Application No. 21884/18, [201].
[36] *Halet v Luxembourg*, Application No. 21884/18, [202].
[37] Citing *Couderc and Hachette Filipacchi Associés*. Application No, 40454/07, judgment of the Grand Chamber European Court of Human Rights 10 November 2015, [151].
[38] *Halet v Luxembourg*, Application No. 21884/18, [204].

Court considers that the applicant's criminal conviction cannot be regarded as proportionate in the light of the legitimate aim pursued.[39]

Accordingly, after weighing up all the interests concerned and taken account of the nature, severity and chilling effect of the applicant's criminal conviction, the Grand Chamber concluded that the interference with his right to freedom of expression, in particular his freedom to impart information, was not necessary in a democratic society.[40]

The judgment of the Grand Chamber could be said to be especially generous to whistle-blowers, following the Strasbourg Court's robust defence of free speech in areas of public interest discussion. Although the domestic courts took into account most of the countervailing interests raised in the dispute, the Grand Chamber's concern was not the procedural approach to the balancing exercise, but the substantive weight attached to the public interest factors evident in this case. Thus, too little weight attached to the public interest in receiving that information, together with the chilling effect of sanctions imposed on the whistle-blower in this case; and too much weight attached to the illegality of the speaker's actions and the detriment it might have on the company, and commercial relations generally.

In that sense, the judgment may be seen as encroaching on state sovereignty and the role of the domestic courts in enforcing state law in the context of both commercial and human rights factors.

Whistle-blowing in Nigeria

The assertion made above that the law may wish to provide some protection to the whistle-blower, either in providing a public interest defence, or by passing legislation to protect informers from dismissal or other detriment stands true even in Nigeria, in particular, the need to create actual legislation to protect the whistle-blower. Currently, there is no existing comprehensive legislation that protects whistle-blowers against the possible reprisals that could occur.[41] As noted above, this could come in the form of dismissal, or as in the *Halet* case, criminal sanctions.

In Nigeria, the current framework has been built up in a piecemeal fashion. In the private sector for example, banks, have often relied on internal whistleblowing polices or guidelines from the Central Bank of Nigeria (CBN) to provide protection for whistle-blowers, or to enable whistleblowing.[42] For most public sectors, reliance has been placed on the Independent Corrupt Practices and other Related Offences Act (ICPC) 2000, which provides for protection of whistle-blower identity when disclosing,[43] and also punishes upon conviction anyone who knowingly discloses false information.[44] Unlike the *Halet* case above, which demonstrates the complexities and overlap between rights that could arise from the act of whistleblowing, the Nigerian whistleblowing sector still fails to deal with such complexities in detail.[45] Thus, most of Nigeria's development around whistleblowing and whistle-blower protection is still in its infancy, especially as it is still without a comprehensive legislation.

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[39] *Halet v Luxembourg*, Application No. 21884/18, [205].
[40] *Halet v Luxembourg*, Application No. 21884/18, [206].
[41] E, Ojobo A Review of the Effectiveness of the Nigerian Whistleblowing Stopgap Policy of 2016 and the Whistle-blower Protection Bill of 2019 (2023) Journal of African Law 1 at 5
[42] CBN Guideline for whistle-blowing for banks and other financial institutions in Nigeria, Available at < https://www.cbn.gov.ng/out/2014/fprd/circular%20on%20code%20of%20circular%20on%20corporate%20governance%20and%20whistle%20blowing-may%202014%20(3).pdf > Accessed 29th May 2023.
[43] Section 64 (1) (2) The Corrupt Practices and other Related Offences Act 2000.
[44] Section 64(3) *Ibid* There are other legislations such as the Economic and Financial Crimes Commission Act. The 1999 Constitution of the Federal republic of Nigeria which provides for the freedom of information under section 39. As we shall also observe shortly there have been attempts to formalise whistleblowing support and protections through the stop gap policy of 2016 and a Whistleblowing protection Bill of 2019, but this has yet to be passed into law.
[45] Nigeria is also signatory to the UN Human Rights Convention.

It should be noted that without clear whistleblowing protections laws, the questions as to whether genuine whistle-blowers would be afforded protection remains largely unclear, and there are still some questions as to how whistleblowing is defined under Nigerian law. Without a legal framework, it remains unclear if information disclosed under the Nigerian Freedom of Information Act of 2011, which somewhat embodies the spirit of Art 10 of the Convention,[46] will be regarded as protected disclosures, and if such disclosures are likely to attract consequences.

An illustration of this can be seen under the administration of the former President of Nigeria, Goodluck Ebele Jonathan,[47] where disclosures were made to a senate committee on finance[48] by the then Governor of the Central Bank of Nigeria, Mr Sanusi Lamido Sanusi about mismanagement of funds by the Nigerian National Petroleum Company (NNPC).[49] This disclosure had the effect of damaging not only the reputation of the NNPC but that of the President and his administration. Shortly after the disclosures Mr Sanusi was accused of being financially reckless and engaging in misconduct as Governor of the CBN by the President, and was suspended from office. Public opinion considered Sanusi's suspension as governor to be a reprisal attack against someone who they viewed as a whistle-blower for the disclosures he made, especially given the suddenness with which he was suspended from office.[50]

However, it is suggested one way to interpret Mr Sanusi's incident is that his disclosures may not necessarily be construed as the act of a whistle-blower. This is because consideration must be given to the forum in which the information was revealed (a memo to the Senate committee on Finance), and the specific role which he occupied (Governor of the Central Bank). It is suggested that this disclosure can be viewed as that of a public officer responding to an inquiry,[51] and that the information exposed corrupt practices did not necessarily make him a whistle-blower. It is relevant to note here that s.27 of the Freedom of Information Act 2011 protects a public officer from civil or criminal proceedings arising from lawful disclosures given in good faith, but is seems these provisions fell short of protecting Mr Sanusi from suspension.[52] Thus, this incident raises the question of what protection the Nigerian legal framework can offer where there is a genuine case of whistleblowing, and whether it would even be effective.

While it does not seem to have been raised at the time, the Sanusi incident also points to the relevance of Article 10 of the Convention, discussed above in *Halet*, within the Nigerian framework. From the discussions above, it would seem that disclosures under Article 10 could be considered whistleblowing, and that the Article gives credence to the idea that there should be protection where disclosures are made while exercising the right to expression and disclosure of information. Of course, emphasis is also placed on professional secrecy which causes the employer harm, and how this weighs against the general interest. If we were to regard Mr Sanusi's disclosure as the act of a whistle-blower, we can see that there has been no breach of secrecy as it was an inquiry, even if reputational damage to the administration was suffered. Thus, Mr Sanusi may have been able to rely on this Article to protect his right of free speech.

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[46] As well as Section 39 of the 1999 Constitution of the Federal Republic of Nigeria which states that every person shall be entitled to freedom of expression, including freedom to hold opinions and to receive and impart ideas and information without interference.

[47] May 2010 – May 2015.

[48] The letter to the committee was later leaked to the public.

[49] T Ezukanma "Sanusi: Whistle-blower or hypocrite" (17 March 2014) *The Vanguard* Available at < http://www.vanguardngr.com/2014/03/sanusi-whistleblower-hypocrite/ > (last accessed on 29th May 2022).

[50] Following his suspension, his international passport was also seized. See The Premium Times "SSS detains, seizes Sanusi's passport" (20 March 2014) *The Premium Times Available* at < https://www.premiumtimesng.com/news/155484-breaking-sss-detains-seizes-sanusis-passport.html?tztc=1 > (last accessed on 29th May 2022).

[51] Ejemen Ojobo A Review of the Effectiveness of the Nigerian Whistleblowing Stopgap Policy of 2016 and the Whistle-blower Protection Bill of 2019 (2023) Journal of African Law 1 at 4.

[52] Note that it was claimed that the reasons for his suspension had nothing to do with the disclosure, although to an objective observer, the timing of it could be said to be suspicious.

The Nigerian Whistle-blowing Protection Bill

After the Sanusi incident, there have been three formal attempts to pass legislation offering protection to whistle-blowers in Nigeria.[53] Attempts were made in 2015, 2017,[54] and 2019,[55] with a stop-gap policy introduced in 2016.[56] Apart from the 2016 stop-gap policy, little has been achieved in the quest to create formal legislation to protect whistle-blowers. One thing the 2016 stop-gap policy did demonstrate was the need for protection. At its heart, the policy was designed to incentivise whistleblowing in Nigeria, and offer a means for reporting incidents of mismanagement and misappropriation of public funds and assets.[57]

Since the launch of the policy a total of (approximately) £300,000,000 has been recovered,[58] and a total of 13,002 tips were received.[59] Investigations and prosecution remain low, with only 918 being investigated as of the last update, with 623 completed. There have been about12 prosecutions and 4 convictions made.[60] Since reporting started under the policy, there have been instances of reprisal attacks against whistle-blowers.[61] Thus, the 2019 proposed Bill was seen as a necessary next step in offering protection to whistle-blowers.[62]

Section 2 of the Bill determines the scope of what would trigger the protections available. Under s.2, disclosures of improper conduct[63] made in the public interest, where there is reasonable cause to believe that the information disclosed is to the best of their knowledge true is regarded as sufficient to rely on the protections under this Bill. Further, under s.18, the Bill offers a wide range of protection, including protection from dismissals, victimization, redundancy, and suspension. Unfortunately, four years later, this Bill is still yet to be made law, and has only passed the first reading, with no indication of whether it will actually become law. Thus, it has been noted that the momentum created by the 2016 stop-gap policy has already being lost.[64]

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[53] Pre-Sanusi, there is the proposed Bill of 2008 and 2011 but they were never passed into law.

[54] This bill was a reiteration of the stopgap policy; the main aim was to provide for the rewarding of whistle-blowers, like the stopgap policy, but just like its predecessors and the trend of proposed legislation in Nigeria, this bill never made it into law.

[55] This being the most recent attempt.

[56] Federal Republic of Nigeria "Federal Ministry of Finance Whistleblowing Portal" Available at < http://whistle.finance.gov.ng/Pages/default.aspx > (last accessed 29th May 2023).

[57] *Ibid*. Also, the 2017 proposed Bill was proposed to give formal backing to the policy, but it was never passed into law.

[58] Figures is their respective currencies are ₦7.8 Billion; $378 Million and £27,800. See Corruption Anonymous: The Whistle-blower Platform 'Engaging Corruption in Nigeria - One Year of the Corruption Anonymous (CORA) Project' (2018) African Centre for Media & Information Literacy Available at < https://whistleblowingnetwork.org/WIN/media/pdfs/Fraud-corruption-ME-NA-Nigeria-Whistleblower-report-2018.pdf > at page 15 (last accessed 29th May 2023).

[59] *Ibid.*

[60] *Ibid.*

[61] Some examples include Aliyu Ibrahim and Ntia Thompson who after blowing the whistle in their respective organisations, were fired. While Thompson was reinstated, it has been reported that there have been instances of victimisation. Aliyu Ibrahim, as at the last update was still fighting for reinstatement. See Corruption Anonymous: The Whistle-blower Platform 'Engaging Corruption in Nigeria - One Year of the Corruption Anonymous (CORA) Project' (2018) African Centre for Media &
Information Literacy Available at < https://whistleblowingnetwork.org/WIN/media/pdfs/Fraud-corruption-ME-NA-Nigeria-Whistleblower-report-2018.pdf > at page 15 (last accessed 16th May 2023).

[62] Whistle-blower Protection Bill 2019, available at < https://placbillstrack.org/view.php?getid=6292 > (last accessed 16th May 2023).

[63] What constitutes improper conduct is quite extensive, under section 2 (1) it considers scenarios such as economic and financial crimes, terrorism, mismanagement or misappropriation of public resources, environmental degradation, health and safety issues, etc.

[64] African Centre for Media and Information Literacy "AFRICMIL Launches Survey on Five Years of Whistleblowing Policy in Nigeria" (2021) *AFRICMIL* Available at < https://www.africmil.org/africmil-launches-survey-on-five-years-of-whistleblowing-policy-in-nigeria-2/ > (last accessed 29th May 2023)

Conclusions and reflections

Before the passing of the UK Public Interest Disclosure Act 1998, whistle-blowers had limited protection against actions brought by employers and other claimants in confidentiality. The present law, bolstered by a robust approach taken by the Strasbourg Court and various European legislative measures, above, shows that cogent evidence of harm needs to be proven before whistle-blowers' free speech rights can be restrained or sanctioned. The decision in Halet is especially protective in this respect, overturning a judgment of the domestic courts which had specifically attempted to balance both sides.

The Nigerian situation demonstrates that there is a clear need for the law to provide for the protection of whistle-blowers, but there seems to be a lack of political motivation to see it through. This is evidenced by the fact that over the years there have been many attempts - from 2008 to 2019 - to enact a whistleblowing Bill, but none have successfully made it into law. The current Bill presents an opportunity to create this legislation, and with the case of *Halet* in mind, lessons can be learned to create stronger legal protection. It is doubtful, however, that any new Nigerian Law will achieve the same level of protection to whistle-blowers afforded by the European Convention on Human Rights and the Strasburg Court.

Balancing clinician's privacy rights with public disclosure; getting the balance right

Abbasi v Newcastle upon Tyne Hospitals NHS Foundation Trust; Haastrup v King's College Hospital NHS Foundation Trust [2023] EWCA Civ 331

Court of Appeal

Rebecca Gladwin-Geoghegan[*] and Dr Steve Foster[**]

Introduction

A recent decision of the Court of Appeal involved the continuing problem of balancing a person's right to freedom of expression (protected by Article 10 of the European Convention on Human Rights) with the right to private life (contained in Article 8) in the context of medical treatment. This balancing exercise must be carried out without providing 'trump' status to one particular right,[1] although information relating to medical privacy rights has been given special protection by the domestic courts.[2] In general, therefore, the courts must weigh the respective interests and claims in the specific case, applying the principles of necessity and proportionality to the facts and deciding whose rights are stronger in where the balance lie; including any balance of convenience when considering interim remedies.

In the context of medical law, this conflict is usually between patients' privacy rights and press freedom, although in the current case it was the privacy rights of medical clinicians treating patients that was at issue. In this case,[3] the Court discharged reporting restriction orders protecting the identities of clinicians and other treating staff involved in the care of two children, who were now deceased, and who had been the subject of end-of-life judicial proceedings. In doing so the Court had to consider the above principles in resolving the dispute, but in particular the wishes of the patients' parents who wished to sell the story to the press.

The facts and decision in *Abbasi* and *Haastrup*

Two sets of parents appealed against the refusal to discharge reporting restriction orders protecting the anonymity of clinicians and other treating staff involved in the care of their now deceased children. Each of the children had been the subject of end-of-life proceedings in the High Court, where the court had to decide whether life-support should be withdrawn. The children had subsequently died but in both cases restricting orders were made during the proceedings of unlimited, open-ended duration. In the first case the orders provided anonymity for four named clinicians and in the second case it provided anonymity for a wide range of health service staff who had played any part in the provision of care or treatment of the child. The parents, who had been critical of the care their children had received in hospital, sought to be released from the protection orders so that they could speak publicly about their experiences and be free to identify the NHS staff involved in the treatment. On the other hand, the relevant National Health Service Trusts maintained that the restriction orders should remain in force indefinitely so as to protect appropriate rights of confidentiality and privacy.

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[1] *Re S (Publicity)* [2004] UKHL 47.
[2] *Campbell v MGN* [2004] UKHL 22, re-iterated recently by the Supreme Court in *Bloomberg v ZXC* [2022] UKSC 5.
[3] *Abbasi v Newcastle upon Tyne Hospitals NHS Foundation Trust; Haastrup v King's College Hospital NHS Foundation Trust* [2023] EWCA Civ 331

At first instance, the President of the Family Division held that the court had jurisdiction to review the continuation of the orders, and conducting the balancing exercise between the two competing interests, found that the detailed and substantial case for protecting staff anonymity comfortably outweighed the parents' basic assertion of their right to freedom of expression.[4] Thus, he ordered the continuation of the orders, with some amendment to reflect the changed position following the death of the children.5 The parents then appealed against that decision, submitting that there was no jurisdiction to make the restriction orders in the first place, or to continue them in the absence of an identifiable cause of action, or to make orders preventing the naming of individuals who were neither parties nor witnesses.

Allowing the appeals, the Court of Appeal first considered the question of whether the court had the jurisdiction to make the orders. The Court of Appeal noted that the applications in the end-of-life proceedings were brought under the High Court's inherent jurisdiction in this area. Under this jurisdiction, a court enjoyed all the powers available to it under that inherent jurisdiction and by virtue of s.37 of the Senior Courts Act 1981, which confirmed that it might grant injunctions when seized of proceedings whenever it was 'just and convenient to do so'. In the Court of Appeal's view, those powers could be exercised to protect the integrity of the proceedings and those involved in, affected by or connected with them, and that that jurisdiction was now exercised, in so far as competing European Convention rights were concerned were concerned, by reference to those rights.[6] The Civil Procedure Rules did not expand or confine those powers, and it was no significance in this case that at the time the restriction orders were made and when the discharge applications were considered that the Civil Procedure spoke of protecting the identity of *parties* and *witnesses* and only later of any *person*. The High Court had always been able to make orders to protect people who were neither parties nor witnesses, and there was no need for distinct causes of action to be identified to enable a court to make appropriate orders, including restrictive reporting orders. Further, the Convention rights of those affected by the proceedings must be considered, so, if seized of the proceedings, the court might make such orders as were just and convenient.[7]

Moving to the balancing exercise involving Articles 8 and 10 of the Convention, the Court of Appeal noted that case law demonstrated that an intense fact-sensitive evaluation and balancing exercise must take place when the court was asked to curtail freedom of speech to safeguard rights contained in Article 8. Those authorities demonstrated the high value attached to freedom of speech and the practical reality would be that compelling evidence was needed to curtail the legitimate exercise of free speech.[8] In this case, the rights of the staff concerned the risk, through social media, of harassment and potentially violence if they were identified. These risks resulted not directly from what was planned by the parents or the mainstream media, but the uncertain behaviour of others, and careful analysis of the realities of that future risk was needed.[9] It was noted that when the Trust's identity was disclosed in the first case, there was no evidence of any adverse consequences for clinicians, whether protected by the orders or not; and in the second case, there was no evidence of harassment of staff at the time of the end-of-life proceedings, despite the name of the hospital being in the public domain.[10] Thus, the absence of continuing serious problems despite the identification of the hospitals was a striking feature, and

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[4] *Abbasi v Newcastle upon Tyne Hospitals NHS Foundation Trust* [2021] EWHC 1699 (Fam) [114].
[5] Ibid, [116].
[6] *Abbasi v Newcastle upon Tyne Hospitals NHS Foundation Trust; Haastrup v King's College Hospital NHS Foundation Trust* [2023] EWCA Civ 331, [45-62] *Applying S (A Child)*, n 1.
[7] *Abbasi v Newcastle upon Tyne Hospitals NHS Foundation Trust; Haastrup v King's College Hospital NHS Foundation Trust* [2023] EWCA Civ 331 [63-68], applying *Attorney-General's Reference (No 3 of 199)* [2010] UKHL 34, and *Guardian News and Media Ltd, Re* [2010] UKSC 1.
[8] *Abbasi v Newcastle upon Tyne Hospitals NHS Foundation Trust; Haastrup v King's College Hospital NHS Foundation Trust* [2023] EWCA Civ 331 [104-111].
[9] *Abbasi v Newcastle upon Tyne Hospitals NHS Foundation Trust; Haastrup v King's College Hospital NHS Foundation Trust* [2023] EWCA Civ 331 [104].
[10] *Abbasi v Newcastle upon Tyne Hospitals NHS Foundation Trust; Haastrup v King's College Hospital NHS Foundation Trust* [2023] EWCA Civ 331 [105].

whatever might have been the position at the time of the original proceedings and the restrictive orders, the risk to the clinicians and staff by being identified by the parents and press was low.[11]

The Court of Appeal then noted that by contrast to the findings on private life rights, the parents' rights to freedom of expression would be seriously compromised by the continuation of the orders. In particular, the Court disagreed with the President of the High Court at first instance that there was a lack of specificity regarding the substance of the allegations the parents wished to make or the identity of those they wished to name when doing so.[12] The Court then noted that the wider systemic concerns affecting the operation of the NHS laid before the court could not justify the creation of a practice, not anchored to the specific circumstances of a case, of granting indefinite anonymity to those involved in end-of-life proceedings. Such generic restrictions on free speech were highly controversial and should be considered in the political context by Parliament, rather than the courts.[13]

The Court of Appeal thus concluded that the rights of the parents in wishing to tell their story outweighed any Article 8 rights of clinicians and staff as were still be in play, long after the orders were made in the end-of-life proceedings. Accordingly. The orders would be discharged, and the order stayed pending any application for permission to appeal.[14]

Balancing free speech with confidentiality

Under the Human Rights Act 1998, the courts, as public bodies under s.6, will need to strike an appropriate balance between the protection of privacy/confidentiality interests and press freedom. More specifically, s.12 of the Human Rights Act requires the courts to have particular regard to freedom of expression where freedom of expression is threatened in legal proceedings. With respect to that balancing exercise, in *Douglas v Hello! Magazine,*[15] the Court of Appeal stated that s.12 requires the court to consider Article 10 of the Convention in its entirety, including the exceptions permitted within Article 10(2). Thus, it was not appropriate for the court to give freedom of speech additional weight over and above any competing right, such as the right to private life. Thus, in *Re S (Publicity)*[16] the House of Lords confirmed that freedom of expression under Article 10 does not have an automatic 'trump' status under the Act. In this case an order had been sought restraining the identification of a murderer (who was the child's mother) and her victim (the child's brother) in order to protect the welfare of a child who was in care. It was held that the court should conduct a balancing exercise between the child's right to private life and the right of freedom of expression. Their Lordships stressed that s.12 did not require the court to give pre-eminence to either article and the judge had to consider the magnitude of the interference proposed and then what steps were necessary to prevent or minimise that interference.[17]

Although the courts may start from the position that any interference with freedom of expression needs to be justified on strong grounds, they are prepared to compromise it in favour of a stronger countervailing claim. This is especially the case where an individual's right to life or physical safety

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[11] *Abbasi v Newcastle upon Tyne Hospitals NHS Foundation Trust; Haastrup v King's College Hospital NHS Foundation Trust* [2023] EWCA Civ 331 [90-103).]

[12] *Abbasi v Newcastle upon Tyne Hospitals NHS Foundation Trust; Haastrup v King's College Hospital NHS Foundation Trust* [2023] EWCA Civ 331 [104-111].

[13] *Abbasi v Newcastle upon Tyne Hospitals NHS Foundation Trust; Haastrup v King's College Hospital NHS Foundation Trust* [2023] EWCA Civ 3311 [116-129).

[14] *Abbasi v Newcastle upon Tyne Hospitals NHS Foundation Trust; Haastrup v King's College Hospital NHS Foundation Trust* [2023] EWCA Civ 331 [130, 131].

[15] [2001] 2 WLR 992.

[16] [2005] 1 AC 593.

[17] Similarly, in *Re LM*, *The Times*, 20 November 2007, it was held that a restriction on the reporting of an inquest into a child's suspicious death should not be granted as there was insufficient evidence of any lasting harm to the child's siblings so as to override freedom of expression. On the other hand, the court held that it was necessary to place a restriction on the press identifying the siblings as such a measure constituted a proportionate response to their privacy interests under Article 8

would be at risk. Thus, in *Venables and Thompson* v *Newsgroup Newspapers*,[18] granting indefinite orders to restrain publicity of the claimants' identities, the High Court held that although it recognised the enormous importance of upholding freedom of expression, in the instant case it was necessary to grant such injunctions. In the instant case, the claimants (who, when young, had been found guilty of murdering a very young boy) were at serious risk of attack and the court had to have particular regard to Article 2 of the Convention, and the right of confidentiality should be placed above the right of the media to publish freely information about the claimants. This principle has been upheld in subsequent cases,[19] including a further claim for anonymity by one of the claimants above. Thus, in *Venables v News Group Papers Ltd,*[20] refusing an application to lift the anonymity orders, the High Court held that although the first claimant's rights under Articles 2 and 3 of the European Convention was not a trump card, the test was whether there was a real risk of harm of the degree described in Articles 2 and 3 being occasioned to the claimants by the release of information. In common with every other citizen, the man had a right to be protected from serious threats to his life that might arise from individuals seeking to take the law into their own hands.[21] Noting that it was extremely rare for criminals to be protected in such a manner, the court noted that the circumstances had not changed sufficiently since 2001 to justify varying the injunction and reducing the level of confidentiality.

In other cases the court must balance the respective strengths of each claim, giving due weight to any competing interests or rights, and having regard to any public interest served by disclosure. For example, in *Tiller Valley Foods* v *Channel Four Television*,[22] an interim injunction was refused preventing the defendants from broadcasting a programme made with the help of a journalist who had posed as an employee and who had reported on allegations of bad and unhygienic practices at the claimant's factory. In the judge's view the information was not confidential simply because images of the factory had been taken without the claimant's consent, and in any case its disclosure was justified in the public interest. However, in these cases the court might impose conditions on the dissemination of that public interest information. Thus, in *BKM v BBC*,[23] a court refused an injunction to restrain the broadcast of a film exposing failings in the care provided at care homes, because the use of clandestine filming in this case was necessary in the public interest in investigating standards in care homes. However, it placed a condition that the broadcast should not interfere with the privacy of the residents more than was necessary (in this case by obscuring the identities of the residents). There may also be a more general public interest in compromising privacy, beyond balancing free speech with individual privacy interests. For example, in *Brent LBC* v *K* [24] it was held that there was a clear public interest in permitting a local authority to disclose to another authority the fact that a person working in a care home had been found guilty of assaulting her child. Thus, despite the potential disadvantages to the mother's enjoyment of her private and family life, the need for public safety and the interests of the woman's patient outweighed any Article 8 rights and justified disclosure.

In cases such as the present one, the courts must assess the interference with privacy interests, including the risk of any harm or distress to any of the parties. For example, in *T* v *British Broadcasting Corporation*,[25] the High Court granted an injunction to prevent the identification of a vulnerable mother in a broadcast about adoption. The programme reported on the practice of 'current planning' where a child who was taken from his natural parents would be fostered pending a decision whether to adopt or not. The programme showed details of the process as it has been applied to T, who was suffering from a mental disorder, and her daughter, showing footage of the last contact between the two and indicating that T had problems with anger management. In granting the injunction the court held that it was not

[18] [2001] 1 All ER 908. In December 2001 a newspaper was found guilty of contempt when it broke the terms of the court order – *Attorney-General* v *Greater Manchester Newspapers Ltd*, *The Times*, 7 December 2001.
[19] See *X (Mary Bell) and another* v *News Group News-papers and another* [2003] EMLR 37.
[20] [2019] EWHC 494 (Fam).
[21] Both Articles 2 and 3 of the European Convention impose a positive obligation on the state to protect an individual's life from threats posed by other individuals: *Osman v United Kingdom* (2000) 30 EHRR 245
[22] *The Times*, 23 May 2004.
[23] [2009] EWHC 3151 (Ch).
[24] [2007] EWHC 1250 (Fam).
[25] [2007] EWHC 1683 (QB).

necessary to ask whether the programme was not in the best interests of T before conducting that exercise. In this case, there was medical opinion to the effect that the programme would cause greater distress than any benefit to T and such evidence was relevant. T was vulnerable and unable to truly consent to or appreciate the programme, and there was a real risk that she would be greeted with a hostile and abusive reaction from viewers (although that need not be proved for the injunction to be granted). In the court's view the broadcast constituted a massive intrusion into her privacy and autonomy, undermining her dignity as a human being and the broadcaster's Article 10 rights would not be proportionate to the exposure of T's raw feelings and her relationship with her daughter. Further, the public interest could be served without identification.

On the other hand, the claim in favour of publication might be particularly strong where the information in question promotes not only freedom of expression but also some other Convention rights. For example, in *Torbay BC* v *News Group Newspapers*,[26] the High Court discontinued an injunction and allowed the publication of a girl's story concerning her pregnancy at the age of 12. The court recognised that the right to communicate one's story was protected not only by Article 10 of the ECHR, but also by Article 8, which protected an individual's physical and social identity. Although the father's rights justified maintaining the injunction as far as he was concerned, it did not prevent the girl or the press from telling his story anonymously, and an injunction wide enough to do that would infringe the girl's and the newspaper's rights. Again, in *BKM v BBC,*[27] it was held that although clandestine recording in a care home for the elderly engaged and interfered with the residents' right to private life, there was not a sufficiently serious infringement to outweigh the right to freedom of expression as the public interest in such a film justified the recording. The use of clandestine filming in this case was necessary in the public interest in investigating standards in care homes and the care home was unlikely to succeed at full trial in proving that the broadcast should not be shown. However, in refusing the injunction the court placed a condition to the effect that the identity of the residents be obscured so that the broadcast should not interfere with the privacy of the residents more than was necessary.

The outcome of such conflicts are, thus, often difficult to predict, depending as they do on the particular facts, with the courts attempting to reach a proportionate outcome. For example, in *H* v *Associated Newspapers*; *H* v *N*,[28] the Court of Appeal made an order that a newspaper should not identify either a former health worker who had retired from the health service because he had been diagnosed HIV positive, or the health authority for which he had worked. Nevertheless, the court held that the risk that those who knew the details of the claimant's retirement would suspect that that he was the healthcare worker in this particular action did not justify the restraint imposed on the newspaper not to disclose his specialty. That restraint, in the court's opinion, would inhibit debate on a matter of public interest and was not justified. Similarly, an order restraining the newspaper from soliciting information that might directly or indirectly lead to the disclosure of the identity or whereabouts of the claimant and his patients was, in the court's opinion, a particularly draconian fetter on freedom of expression and, therefore, too wide to be justified.[29] Further, in *Re Attorney General's Reference No 3 of* 1999[30] the House of Lords discharged an anonymity order relating to a defendant acquitted of rape, finding that the defendant's right to privacy was outweighed by the broadcaster's right to freedom of expression. The House of Lords held that although the defendant had an expectation of privacy – because such information suggested he may have been guilty - there was a legitimate reason for interference. This was because it was in the public interest to make a programme about his acquittal and the fact that it was related to the

[26] [2004] EMLR 8.
[27] [2009] EWHC 3151 (Ch)
[28] [2002] EMLR 425. See also *A Health Authority* v *X* [2002] 2 All ER 780, where the Court of Appeal stressed it was for a court of law and not the area health authority to resolve the conflict between the private/public interests in the confidentiality of medical records and some other public interest.
[29] See also *Green Corns Ltd* v *Claverley Group Ltd* [2005] EMLR 31. Here, it was held that where a newspaper had published the addresses of homes for troubled children, which had resulted in a campaign by local residents to have the homes abandoned, it was necessary to place a restraint on the publication of addresses in subsequent newspaper articles. The public interest did not justify the publication and republication of such sensitive information as the addresses of the children and their past mental and social problems.
[30] [2010] 1 AC 145.

removal of the double jeopardy rule; it was equally in the public interest to name him in order to give credibility to the programme. Their Lordships also noted that the defendant's acquittal had already been in the public domain and that he could not complain that that as a result of the programme an application was made to retry him for that offence. Although there was a danger of trial by media, his right to privacy did not outweigh the public interest in freedom of expression.[31] This case should not be read as giving press freedom a trump status and it is clear that factors such as prior publication were relevant in the case.[32]

The balancing exercise is, therefore, particularly difficult where freedom of expression conflicts with another fundamental right. For example, in *X* v *Y*[33] the court was faced with a conflict between the public's right to know and the confidentiality of hospital patients' medical files. In that case an injunction had been sought by the area health authority to stop newspapers from disclosing the names of two doctors who had contracted AIDS. This information had been given to the press by an employee who had disclosed hospital records. The defendants relied on the public interest defence but it was held that the public interest in disclosure was substantially outweighed when measured against the public interest in maintaining loyalty and confidentiality. In the court's view, the record of hospital patients, particularly those suffering from this appalling condition, should be kept as confidential as the courts can properly keep them. The deprivation to the public of the information sought to be published will be minimal, given the wide-ranging public debate concerning AIDS and doctors, which was then going on in the press.

Similar issues were discussed by the High Court in *A (A Protected Party) v Persons Unknown*,[34] where the Court granted a permanent injunction restraining the press and all other persons from publishing the names or identities of two individuals who, as children, had pleaded guilty to very serious offences committed against two young victims. The Court noted that the case had caused almost unparalleled public outrage directed at the individuals, and the real risk to their Convention rights under Articles 2, 3 and 8 made the interference with any Article 10 rights an absolute necessity. The Court stressed that neither Article 8 nor Article 10 had precedence over the other, and that an intense focus on the comparative importance of the rights being claimed was necessary. Following *Venables and Thompson*, it held that the court had jurisdiction in exceptional cases to extend confidentiality protection and impose press restrictions where there was convincing evidence that not doing so was likely to lead to serious physical injury or death for the person seeking confidentiality, and where there was no other way to protect them. These exceptional circumstances could include the young age at which offences had been committed, the need to support the offender's redemption and rehabilitation into society, the serious risk of potential harassment, vilification and ostracism, and the possibility of physical harm or harm to the offender's mental state. The Court noted that witness evidence, press coverage and internet posts all pointed to the conclusion that if the claimants' identities were revealed they would be at extremely serious risk of physical harm, as well as undoubted fear and psychological harm. Even releasing only their former identities would seriously destabilise the situation and allow revenge-seekers to engage in a hunt for the new identities. There were serious and real risks to their Article 2 and 3 rights, and the withdrawal of anonymity would have a potentially very serious effect on their rehabilitation, continuing education, mental health and well-being. Although those factors had to be balanced against the public interest in the perpetrators of very serious crimes being identified, the court's clear conclusion was that the instant case was one of absolute necessity due to the extreme likelihood of physical and mental

[31] Further, their Lordships took into account the fact that the rape victim had waived anonymity and that his name had been published since his acquittal.

[32] In contrast, in *A v Norway*, decision of the European Court 9 April 2009, there was a violation of Article 8 when a recently released prisoner had been identified by newspapers as a suspect in a rape and murder investigation and who had brought an unsuccessful defamation action against the media. The domestic courts had dismissed his action by finding that the press had acted in the public interest in publishing photographs and the allegations of guilt. The European Court held that the applicant had been persecuted at time of his potential rehabilitation and such stories had caused psychological and moral harm to his integrity.

[33] [1998] 2 All ER 648.

[34] [2016] EWHC 3295 (Ch).

damage being caused to the claimants. There was therefore no choice but to grant anonymity on the grounds of the inevitable violation of the claimants' Convention rights

This begs the question whether information should continue to be treated as confidential and protectable where the information has already entered the public domain, thus destroying the essence of confidentiality on which the claimant's action is based. Thus, in *Attorney General v Guardian Newspapers Ltd*,[35] the House of Lords held that a public body could only maintain an injunction so as to protect confidential information if they could prove that there was an overriding public interest justifying an interference with freedom of expression. Further, if information had entered the public domain it could no longer be the basis of an injunction to preserve confidentiality.

The balance and medical law

Although the *Abbasi* and *Haastrup* cases relate to end of life care decisions relating to children, the approach taken by the court in respect of the RROs is of wider significance. It is anticipated that the approach adopted by the court will also extend to Court of Protection decision making where an adult lacks capacity to make a treatment decision, or other situations where anonymity is in issue in health or social care cases. Cases of this nature often attract significant media attention. Potentially of greater concern to clinical teams, is the threat of harassment and unscrupulous behaviour from the wider public through social media and groups who utilise the unfortunate circumstances of a particular patient to push their own agenda. Such behaviour was evident in the coverage and social media responses to Charlie Gard's[36] and Alfie Evans'[37] cases, which occurred in the years immediately prior to best interests proceedings being initiated in respect of Zainab Abbasi and Isaiah Haastrup.

Counsel for the Trusts utilised arguments relating to the risk of such behaviour and its profoundly negative impact on clinical teams to support the continuation of the Abbasi and Haastrup RROs. Sir Andrew MacFarlane, in the High Court,[38] was so persuaded as to the gravity of what he described as the *'highly negative impact of unfettered social media targeting'*[39] that he departed from the decision of Sir James Munby in *A v Ward.*[40] This case concerned the question of whether professionals, namely the medical team, social workers and expert witnesses, in care proceedings under Part IV of the Children Act 1989 should have their anonymity protected by *contra mundam* injunctions. It was held that in the absence of compelling reasons in support of anonymity, the fear or risk that if identified the clinical and care team would be subject to targeting, harassment and vilification would be insufficient to counterbalance the arguments for denying expert witness anonymity in the public interest. Indeed, the need for there to be 'compelling reasons' for anonymity can also be found in the 2014 Practice Guidance on Transparency in the Courts, Publication of Judgments.[41] Dispensing with the necessity to demonstrate 'compelling reasons' Sir Andrew MacFarlane asked

> why should the law tolerate and support a situation in which conscientious and caring professionals, who have not been found to be at fault in any manner, are at risk of harassment and vilification simply for doing their job? In my view the law should not do so.[42]

Of concern was not only the immediate risk to the clinical teams involved in the patients care, but also the wider profession. In addition to the potential for there to be a decline in the number of healthcare professionals willing to engage in work that exposes them to targeting, is the concern that best interests referrals may not be made when they should be, as they would have the effect of immediately exposing

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[35] [1990] 1 AC 109.
[36] *Great Ormond Street Hospital for Children NHS Foundation Trust v Yates (No 2)* [2017] EWHC 1909 (Fam).
[37] *Evans v Alder Hey Children's NHS Foundation Trust* [2018] EWCA Civ 805.
[38] [2021] EWHC 1699 (Fam).
[39] Ibid, [92].
[40] [2010] EWHC 16 (Fam).
[41] Sir James Munby, Practice Guidance: Transparency in the Family Courts, 16th January 2014,accessible at < www.judiciary.uk/wp-content/uploads/2014/01/transparency-in-the-family-courts-jan-2014-1.pdf> [accessed 30th June 2023]
[42] Supra n.38 [96]

clinical teams to such a risk. Weight was attached to the 'exponential' development in social media since the decision in *Ward* to justify departure from that case.

Had the disapproval of *Ward* been upheld by the Court of Appeal then *Abbasi* would have tipped the balance in favour of anonymity in a wide range of cases. However, the effect of the Court of Appeal decision is to revert back to the *Ward* position. What is important to note is that in the absence of best interests proceedings,[43] the clinical teams have no independent right to seek anonymity, save in circumstances where an individual may be able to pursue their own cause of action. Indeed, Lord Burnett went so far as to suggest that it would be 'impossible *to imagine a free-standing application (unconnected with an individual case) on behalf of hospitals, learned societies etc. to accord anonymity to swathes of professionals engaged in work such as this.* '[44] This is because there would be no *'legal peg'*[45] upon which to hang the application. Consequently, the RRO needs to be viewed through the lens of the best interest's proceedings.

When granting an RRO the starting point is always to consider the interests of the patient that is the subject of the proceedings. Usually, any RRO would encompass the patient and their family so that they are not identified. The relevant public body, i.e. the Trust, would usually be disclosed, except in situations where the identification of the Trust would lead to the identification of the patient. Named individuals, i.e. members of the clinical team, may also be anonymised for the same reason. The RRO in Isaiah Haastrup's case went significantly further than this, including all of the clinical team involved in his and his mother's treatment. The rationale for anonymisation is to ensure the continuity of care and protect the patient and their families' privacy interests. The personal protection the anonymity order brings to the clinician is ancillary to main purpose of facilitating adequate and appropriate care for the patient. As such, it is arguably appropriate for RROs to come to an end upon the conclusion of the proceedings or the death of the child concerned, or very soon after, as the purpose of the RRO has at that stage been fulfilled.

However, by taking a rights based approach to the remit of an RRO, the courts have a careful balancing exercise to undertake and one which shifts beyond the immediate concern for the patient. Whilst initially an RRO would seem to invoke a consideration of the balance between the patient's Article 8 rights and wider freedom of expression under Article 10, *Abbasi* exposes the necessity to consider the Article 8 rights of the clinical team. Lord Bennett acknowledges that the RROs concerned the *'wider immediate impact on the staff concerned in the cases and on the operation of the hospitals in circumstances where tensions were high'.*[46] The protection afforded under the RRO is no longer merely facilitative of the care of the subject of the best interest's proceedings; it also encompasses a recognition that failure to make an RRO that extends to member of a clinical team, may involve in an infringement of their personal rights. When weighing up potential competing interests there needs to be intense scrutiny and in whose favour the balance tips will be dependent upon the individual circumstances of the case.

Taking the clinical teams rights in isolation, any interference with their Article 8 right, is based upon a future risk of harm and the potential for exposure to professional scrutiny. The threshold for professional scrutiny to amount to an infringement of a person's Article 8 right, is a very high threshold to overcome[47] and is unlikely to be satisfied in the circumstances of this type of case. Indeed there may be a significant public interest in facilitating professional scrutiny of the conduct of clinical teams.

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[43] Or other care proceedings where anonymity is considered

[44] *Abbasi v Newcastle upon Tyne Hospitals NHS Foundation Trust; Haastrup v King's College Hospital NHS Foundation Trust* [2023] EWCA Civ 331 [122].

[45] Ibid.

[46] *Abbasi v Newcastle upon Tyne Hospitals NHS Foundation Trust; Haastrup v King's College Hospital NHS Foundation Trust* [2023] EWCA Civ 331 [83]

[47] *Re Guardian News and Media and others* [2010] UKSC 1 at [60]: Lord Rodger summarises the Strasbourg jurisprudence, explaining that the publication in question must constitute such a serious interference with his private life as to undermine his personal integrity.

Consequently the focus of the arguments relating to the individual rights of the clinical teams in *Abbasi*, relates to the future *risk* of harm from the wider public. Unlike cases such as *Re S,*[48] *Guardian,*[49] and *BBC,*[50] this risk of harm is speculative in nature. The Court of Appeal in *Abbasi* were directed to no Strasbourg jurisprudence in this area and consequently, there is no specific guidance on how a speculative risk of harm and therefore a potential incursion on a person's Article 8 rights, should be balanced against a concrete incursion on another's freedom of speech under Article 10. What the Court of Appeal did conclude was that a balance will need to be struck. A court will be required to very carefully consider the realities of the risk and it will be incumbent upon those asserting their rights,[51] to adduce evidence as to these realities.

It seems likely that in most cases where an end of life decision in respect of a child is being made that a real risk will be established at least during the currency of the best interest's proceedings and up to the death of the child. The prospect of future harm by improper secondary activity is a factor that should properly be weighed in the balance in determining the extent of anonymity. This is due to the propensity for such cases to attract significant public attention. However as time progresses, the reality of such a risk materialising diminishes, along with the weight that should be attached to it in determining how the balance of competing rights should be struck. This is particularly the case when compared to the Article 10 rights of the parents and wider public. Therefore in the absence of compelling reasons, i.e. evidence of particular factual circumstances which suggest that more weight should be afforded to the clinical teams' interests in the overarching balancing exercise, the balance is likely to tip against the continuation of anonymity.

Conclusions

So what weight should be attached to the wider systemic problems that fall outside the remit of an individual clinician's Article 8 right, but which were highly influential in the High Court? Seemingly very little if any at all, according to the Court of Appeal. Lord Burnett identifies that systemic problems, [52] by their very nature would arise any time the courts were to consider a question of this nature, and by extension other cases involving clinical or care related decision making. To recognise that there was some countervailing interest due to a generic concern, would in effect establish that indefinite anonymity should be afforded to clinical and care teams in all cases which expose systemic problems. Such a broad acceptance of anonymisation would amount to a significant incursion on freedom of expression, proper public debate and principles of open justice. Any such general anonymisation in cases such as this would need to *'be considered in the political context of Parliament'*[53] following the approach that was adopted in *Re S.* Although arguments were made that anonymity due to these systemic problems could be construed as a matter of public safety or the protection of health and morals under Article 10.2, so as to justify derogation from the parent's and wider public's right to freedom of expression under article 10, the Court of Appeal strongly disagreed, suggesting that the circumstances fell significantly short of any interpretation of Article 10.2 by Strasbourg. As such, these wider concerns felt within the relevant professions will not feature in the balancing exercise courts will be required to undertake in the grant of an RRO.

Those persons working in a clinical or care context may perceive the decision of the Court of Appeal to be a clear message from the judiciary that they should 'put up and shut up.' However, it is important to remember that individual interests of clinical teams are being recognised in the manner outlined above and that other remedies in both criminal and civil law do exist which are both preventative and remedial in nature. Moving forward, it is likely that orders recognising the need for clinician anonymity

[48] n. 1.
[49] n. 47.
[50] n. 23.
[51] The Trusts in this case, on behalf of the clinical teams.
[52] *Abbasi v Newcastle upon Tyne Hospitals NHS Foundation Trust; Haastrup v King's College Hospital NHS Foundation Trust* [2023] EWCA Civ 331 [117].
[53] *Abbasi v Newcastle upon Tyne Hospitals NHS Foundation Trust; Haastrup v King's College Hospital NHS Foundation Trust* [2023] EWCA Civ 331 [119].

during the currency of the proceedings will be more common place. However, the orders will be more limited in nature than the Abbasi and particularly the Haastrup RROs. From Lord Burnett's approval of Lieven J's approach in Abbasi, it would appear that RROs relating to this type of case will follow these guiding principles. First, that RROs should be as refined as possible and anonymity afforded only to those individuals that have been identified as requiring protection. Second that the continuation and terms of the RRO need to be reviewed as a particular case progresses and refined or amended when appropriate to do so. Third, that indefinite anonymity at least so far as clinicians and other professionals concerned would be extraordinary. It will be obligatory for those seeking to assert the continuation of anonymity on the basis of some risk, to adduce evidence of that risk in support of anonymity. Last, it also appears as though as a matter of best practice,[54] RROs at least in respect of clinical teams and other professionals, should automatically come to an end after a defined period of time, subject to any application for an extension. In the event that such an application is made, the judge will be required to evaluate the competing interests of all the relevant parties and make a determination in respect of in whose favour the balance tips.

The case raises important general issues regarding the balance between two conflicting ECHR rights, but as pointed out in the second section of this piece, is more important in the content of physicians' privacy and its conflict with free speech and open justice. In that sense, a further appeal or subsequent dispute in the Supreme Court, could provide clarity with respect to the breadth of RROs, and their compatibility with ECHR jurisprudence.

[54] Following the approach in *Re M (Declaration of Death of Child)* [2020] EWCA Civ 164.

Prisoner voting rights and the European Court of Human Rights: time for a definitive ruling from the Grand Chamber?

Kalda v Estonia (No. 2), Application No. 14581/20, decision of the European Court of Human Rights 6 December 2022

Dr Steve Foster*

Introduction

The question whether prisoners should have the right to vote during their sentence, and indeed after their sentence is complete, has engaged both national and international law, with the European Court of Human Rights making a number of important rulings with respect to the compatibility of national law with Article 3 of the First Protocol to the European Convention, which provides for an indirect and limited right to vote in elections.[1]

The European Court has rejected the notion of automatic forfeiture of prisoners' rights,[2] but has allowed each state to impose ordinary and reasonable restrictions on the enjoyment of prisoners' rights, consistent with the management of prison life.[3] Further, with respect to prisoner enfranchisement, the case law of the Strasbourg Court suggests that states may impose restrictions on grounds that would not be acceptable if imposed outside the prison environment, allowing states a good deal of discretion in deciding not only whether they wish to impose restrictions on prisoner voting rights, but the extent to which they do, including the grounds on which those restrictions are based. Accordingly, the European Court has decided to interfere only when the state has exceeded its broad and flexible discretion granted via the margin of appreciation.[4]

Despite this broad discretion, the Strasbourg Court has ruled that national law and practice should not impose an arbitrary and blanket ban on prisoner voting,[5] insisting that the national authorities formulate disenfranchisement rules based on all relevant circumstances, including the offence for which the individual was incarcerated and the length and type of the sentence. In that respect, the recent decision of the European Court in *Kalda v Estonia (No. 2),* where the Court upheld a lifelong ban on a prisoner sentenced for murder, raises a number of interesting issues concerning national disenfranchisement law and its compatibility with the Court's jurisprudence. On the one hand, the ban appeared, in law at least, to be a blanket ban of the type previously ruled incompatible with the Convention, but on the other hand, the rule was applied to a particularly dangerous prisoner, and where the national Supreme Court had considered the constitutionality of the application of the legal rule to the particular individual.

The case has been appealed to the Grand Chamber of the Court, and if the Grand Chamber accepts jurisdiction of the case it will be interesting to see whether the Court's ruling in this case is upheld, or whether the Grand Chamber insists that national rules, as opposed to judicial discretion, have to embody the necessary discretion.

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[1] Article 3 of Protocol No 1 is detailed below, as are leading judgments of the Grand Chamber of the European Court in this area, including *Hirst v United Kingdom* (No. 2) (2004) 38 EHRR 40 and (2006) 42 EHRR 41 (Grand Chamber), and, in particular *Scoppola v Italy* [2012] ECHR 868, discussed in detail below.

[2] *Golder v United Kingdom* (1975) 1 EHRR 524.

[3] See the European Court of Human Rights decision in *Boyle and Rice v United Kingdom* (1983) 10 EHRR 425.

[4] For example in, n 1.

[5] See *Hirst v United Kingdom,* n 1, and *MT and Greens v United Kingdom*, Application Nos. 60041/08 and 60054/08, decision of the European Court of Human Rights, 23 November 2010.

Facts and domestic proceedings in *Kalda v Estonia (No. 2)*

The applicant is detained in Viru Prison, Estonia, having been convicted of numerous criminal offences, including twice for murder (one of them being the murder of a police officer), twice for illegal possession, use, storage or transfer of a firearm or ammunition, twice for escaping from custody or from the place of serving a sentence, and twice for robbery. He was sentenced to life imprisonment and has been serving his sentence since 1996, during which time he was convicted of inciting the murder of another prisoner in a 'tortuous or cruel manner'. The applicant was generally considered highly dangerous and the domestic courts, although noting a certain improvement in his behaviour, dismissed his request for parole in 2020.

Article 58 of the Estonian Constitution provides that participation in voting may be restricted by law for Estonian citizens who have been convicted by a court and are serving a sentence in a penal institution, and s.4(3)(2) of the European Parliament Election Act provides that a person who has been convicted of a criminal offence by a court and is serving a prison sentence does not have the right to vote.[6] Despite those provisions, in April 2019 he applied to the Rural Municipal Government requesting to be allowed to vote in the European Parliament Elections, but that request was dismissed and his subsequent appeals to the Administrative Court was dismissed. On appeal to the Court of Appeal, the Court refused to depart from the Supreme Court's previous ruling in 2015 on whether he should vote in national and European elections, the Supreme Court finding, that although domestic law imposed a blanket ban on prisoners' voting rights, such a prohibition had been proportionate in the applicant's specific case, given his criminal record and sentence. The Supreme Court explained that the prisoners' voting ban served the purpose of temporarily preventing persons who had seriously undermined the fundamental values of society (including those protected by the Penal Code) from exercising State power through participating in the elections of the legislature. In addition, this restriction protected the rights of those who had not demonstrated such disrespect towards the values underlying collective life, and promoted the rule of law. Although the Supreme Court emphasised that the right to vote could not be restricted lightly, and that mere technical difficulties could not be sufficient to justify voting restrictions in prison, it found against the prisoner in this case.

In a similar judgment with respect to the applicant's right to vote in parliamentary elections (governed by an identical provision in the Riigikogu Election Act, the Supreme Court overruled the Court of Appeal's declaration that the ban was unconstitutional. In that case, the Supreme Court stressed that it interpreted Article 57 of the Constitution in a manner similar to how the Strasbourg Court interpreted Article 3 of Protocol No. 1 to the Convention, agreeing that the ban, according to which no one who was serving a prison sentence could vote at the parliamentary elections, was, in principle, unconstitutional. However, the Supreme Court explained that it could only assess the constitutionality of a certain legal norm within the framework of a specific procedure and in accordance with the request made to it, and that in the proceedings under consideration it had to assess whether the legislature had used its discretion to restrict voting rights in a proportionate manner *in the specific circumstances of the applicant's case*. It then explained that an absolute voting ban which applied to a certain defined group of individuals and did not allow any balancing of interests to take place could nonetheless prove to be proportionate with respect to certain persons belonging to that group. Listing all the offences of which the applicant had been convicted, and noting that the Constitution permitted restricting the voting rights of at least some prisoners and taking into account the number, nature and gravity of the offences committed by the applicant, as well as the fact that he had been sentenced to life imprisonment and had

[6] Section 20(3)(1) of the same Act provides that a person who, according to information in the criminal records database, has been convicted of a criminal offence by a court and whose prison sentence will last until election day (as assessed on the thirtieth day before the elections) will not be entered in the list of voters.

continued committing offences while in prison, the Supreme Court concluded that the voting ban was proportionate in his case.[7]

In another previous ruling, made in 2015, concerning the applicant's right to vote in the 2014 European Parliament elections, the Supreme Court overruled the decision of the Court of Appeal who considered the ban to be in violation of European Union law and had refused to apply it. In that case the Supreme Court reiterated that in the proceedings at hand the proportionality of the prisoners' voting ban had to be assessed from the perspective of the specific applicant, and found that banning the applicant from exercising his voting rights at the European Parliament elections did not restrict the right under Article 3 of Protocol No. 1 to the Convention to the extent that it undermined free elections in a manner that thwarted the free expression of the people in the choice of the legislature. Thus, although the ban clearly violated the rights of many prisoners, the applicant could not rely on the violation of the rights of others in demanding to be granted the right to vote.[8]

The Supreme Court refused to hear the appeal in the present case and the applicant brought a case under the Convention, claiming a breach of Article 3 of the First Protocol, which provides:

> The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature

The decision of the European Court of Human Rights in *Kalda v Estonia (No. 2)*

The Court first considered the application admissible, rejecting the Government's argument that the previous claims made in the domestic courts pertaining to different elections made his claim out of time and otherwise inadmissible as manifestly ill founded.[9]

Dealing with the merits of the application, the Court noted that the applicant's claim, that as the criminal offences had been committed some ten to twenty years earlier the ban was disproportionate; and that the absolute ban on voting rights also violated EU law.[10] It then reiterated that the rights guaranteed by Article 3 were crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law, and that in the twenty-first century, the presumption in a democratic state in favour of inclusion and universal suffrage has become the basic principle.[11] Affirming that the margin of appreciation for each state was wide in this area, it stated that there were numerous ways of organising and running electoral systems and a wealth of differences in historical development, cultural diversity and political thought within Europe, which it is for each Contracting State to mould into its own democratic vision.[12] Nevertheless it was for the Court to determine in the last resort whether the requirements of Article 3 of Protocol No. 1 have been complied with; satisfying itself that the conditions do not curtail the rights in question to such an extent as to impair their very

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[7] The Supreme Court added that the Chancellor of Justice could initiate constitutional review proceedings that would enable it to assess the constitutionality of the provisions in question in an abstract manner, and that Parliament also had the power to amend the unconstitutional provisions of its own motion.

[8] In addition, the European Court of Justice has held, in *Delvigne v Commune de Lesparre-Medoc* (C-650/13, EU: C: 2015: 648, judgment of 6 October 2015, that French domestic law was compatible with Article 39 (2) of the Charter of Fundamental Rights of the European Union by excluding persons convicted of a serious crime from those entitled to vote in elections to the European Parliament. The Court of Justice held that the French limitation of prisoners' voting rights did not call into question the essence of those rights since it had the effect of excluding certain persons, under specific conditions and on account of their conduct, from those entitled to vote in elections to the Parliament, as long as those conditions are fulfilled. In addition the French limitation was proportionate in so far as it took into account the nature and the gravity of the criminal offence committed and the duration of the penalty (at [48-49]).

[9] *Kalda v Estonia (No. 2)*, Application No. 14581/20, decision of the European Court of Human Rights 6 December 2022, at [30-32].

[10] *Kalda v Estonia (No. 2)*, at [35].

[11] *Kalda v Estonia (No. 2)*, at [38], citing *Hirst (No 2*) and *Scoppola*, n 1.

[12] *Kalda v Estonia (No. 2)*, at [39].

essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate.[13]

In particular, any conditions imposed must reflect, or not run counter to, the concern to maintain the integrity and effectiveness of an electoral procedure aimed at identifying the will of the people through universal suffrage. Any departure from the principle of universal suffrage risks undermining the democratic validity of the elected legislature and the laws it promulgates, and exclusion of any groups or categories of the general population must accordingly be reconcilable with the underlying purposes of the Article.[14] Reiterating that removal of the right to vote without any *ad hoc* judicial decision does not, in itself, give rise to a violation of Article 3, it stressed that the Contracting States may decide either to leave it to the courts to determine the proportionality of a measure restricting convicted prisoners' voting rights, or to incorporate provisions into their laws defining the circumstances in which such a measure should be applied. Accordingly, in the latter case, it will be for the legislature itself to balance the competing interests in order to avoid any general, automatic and indiscriminate restriction).[15]

Applying those principles to the facts, the Court stressed that under the terms of Articles 19 and 32 (1) of the Convention it was not competent to apply or examine alleged violations of EU rules unless and in so far as they may have infringed rights and freedoms protected by the Convention. More generally, it is primarily for the national authorities, notably the courts, to interpret and apply domestic law, if necessary in conformity with EU law, the Court's role being confined to ascertaining whether the effects of such adjudication are compatible with the Convention.[16]

Finding that there was no dispute that there had been an interference with Article 3 and that it pursued a legitimate aim,[17] the Court noted that the domestic law restricting convicted prisoners' right to vote in the European Parliament elections was indiscriminate in its application in that it did not take into account the nature or gravity of the offence, the length of the prison sentence or the individual circumstances of convicts. Nor had Government put forward any evidence that the Estonian legislature had ever sought to balance the competing interests or assess the proportionality of a blanket ban on the right of convicted prisoners to vote.[18] Further, while the Court accepted that when sentencing someone to prison, the domestic courts would have to have regard to all the various circumstances before choosing a sanction, there was no evidence whether those courts, in the instant case, took into account – at the time of deciding on a sentence – the fact that a prison sentence would involve the disenfranchisement of the applicant.[19] Thus, the circumstances of the present case appear to the Court, on the face of it, similar to those examined in earlier cases where a blanket ban on prisoners' voting rights was in question.[20] However, unlike the previous cases where the Court found a violation of Article 3, it noted that in the present case the domestic courts assessed the proportionality of the application of the voting ban in the specific circumstances pertaining to the applicant and concluded that it had indeed been proportionate.[21] Therefore, it was important to reiterate that in cases arising from individual

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[13] *Kalda v Estonia (No. 2)*, ibid.
[14] *Kalda v Estonia (No. 2)*, at [40].
[15] *Kalda v Estonia (No. 2)*, at [41], citing *Anchugov and Gladkov v. Russia*, Application Nos. 11157/04 and 15162/05, decision of the European Court, 4 July 2013, and *Kulinski and Sabev v. Bulgaria*, Application No. 63849/09, decision of the European Court, 21 July 2016.
[16] *Kalda v Estonia (No. 2)*, at [43].
[17] *Kalda v Estonia (No. 2)*, at [44].
[18] *Kalda v Estonia (No. 2)*, Application No. 14581/20, decision of the European Court of Human Rights 6 December 2022, at [45].
[19] *Kalda v Estonia (No. 2)*, Application No. 14581/20, decision of the European Court of Human Rights 6 December 2022, at [46].
[20] *Kalda v Estonia (No. 2)*, at [47], citing *Hirst,* n1; *Anchugov and Gladkov;* and *Kulinski and Sabev,* n15. See also *Söyler v. Turkey*, Application No. 29411/07, decision of the European Court, 17 September 2013, considered below.
[21] *Kalda v Estonia (No. 2)*, at [48], comparing and contrasting, respectively, *Strøbye and Rosenlind v. Denmark*, Application Nos. 25802/18 and 27338/18, decision of the European Court, 2 February 2021, where the domestic court had thoroughly examined the justification and proportionality of the limitation of the applicants' voting rights; in contrast to *Hirst (No. 2)*, where the Court and Grand Chamber had noted that the domestic courts, when addressing the question of the voting ban, had themselves not undertaken any assessment of proportionality of the ban.

applications the Court's task was not to review the relevant legislation in the abstract, but to confine itself, as far as possible, to examining the issues raised by the case before it.[22]

Stating that it would require strong reasons to substitute its own view for that of the domestic courts, particularly when the latter have carried out their review in a manner consistent with the criteria established by the Court's case-law,[23] it noted that the domestic courts reasoned that the voting ban had been proportionate in respect of the applicant, given the number, nature and gravity of the offences he had committed, his continued criminal behaviour while in prison, as well as the fact that as a result he had been sentenced to life imprisonment. In that connection, the Court observed that the seriousness of the offences committed was also one of the factors taken into account by the Grand Chamber in the case of *Scoppola* in reaching its conclusion that the Convention had not been violated.[24] Further, the Estonian Supreme Court – despite deeming the voting ban to be constitutional with respect to the applicant – took an overall critical stance against the blanket ban on prisoners' voting rights, referring extensively to the Convention and the Court's case-law, and ruling that the ban clearly violated the rights of many prisoners.[25]

Accordingly, the Court found that, in the circumstances of the present case, there was no basis for finding that the domestic courts, when assessing the proportionality of the voting ban with respect to the applicant, overstepped the margin of appreciation afforded to them. It followed, therefore, that there has been no violation of Article 3 of Protocol No. 1.[26]

Prisoner voting rights in Europe and the decision in Kalda v Estonia (No. 2)

Nearly forty years ago, in *Mathieu-Mohin and Clerfayt,*[27] the European Court of Human Rights confirmed that Article 3 included an implied right for individuals to vote, but also stressed that the right was subject to implied limitations, as long as any conditions do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness.[28] Thus, neither the Convention nor the Court expect a common European standard in this area, provided the restriction corresponds to a legitimate aim (however flexible and fluid that aim is), and is proportionate to such aim.

In *Hirst v United Kingdom (No 2)*, the European Court accepted that this was an area in which a wide margin of appreciation should be granted to the national legislature both in determining whether restrictions on prisoners' right to vote can still be justified in modern times and if so how a fair balance is to be struck. However, it observed that that there was no evidence that the United Kingdom Parliament had ever sough to weigh the competing interests or to assess the proportionality of the ban as it affected convicted prisoners. Thus, the Court could not accept that an absolute bar on voting by any serving prisoner in any circumstances fell within an acceptable margin of appreciation.[29] On appeal to the Grand

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[22] *Kalda v Estonia (No. 2)*, at [49].
[23] *Kalda v Estonia (No. 2)*, at [50].
[24] *Kalda v Estonia (No. 2)*, at [51], comparing and contrasting *Scoppola*, with *Söyler*, n 20, where the Court referred to the relatively minor nature of the offence.
[25] *Kalda v Estonia (No. 2)*, Application No. 14581/20, decision of the European Court of Human Rights 6 December 2022, at [52].
[26] *Kalda v Estonia (No. 2)*, Application No. 14581/20, decision of the European Court of Human Rights 6 December 2022, at [53-54].
[27] (1987) 10 EHRR 1.
[28] *Mathieu-Mohin and Clerfayt,* at [52].
[29] See also the subsequent judgment in *Anchugov and Gladkov v Russia,* decision of the European Court, 4 July 2013, concerning the blanket ban on prisoner voting in Russia, as set out in Article 32(3) of the 1993 Constitution The Russian government argued that the case was distinguishable from *Hirst,* because its ban was enshrined in a Constitutional provision which had been adopted only after a nationwide vote, and after its terms had been subject to extensive public debate at various levels of Russian society. However, the Court observed that no attempt had been made to weigh the competing interests or to assess the proportionality of a blanket ban on convicted prisoner's voting rights (at para 109)). See also *Kulinski and Sabev v Bulgaria*, decision of the European Court 21 July 2016, which found a violation on similar grounds (in other words, a blanket ban).

Chamber,[30] it was stressed that the principle of proportionality required a discernible and sufficient link between the sanction and the conduct and the circumstances of the individual concerned.[31] However, the Grand Chamber in *Hirst (No 2)* accepted that the domestic provision might be regarded as pursuing the aims pleaded by the government, in so far as it was aimed at preventing crime, enhancing civic responsibility and respect for the rule of law, and of conferring a punishment in addition to the sentence.[32] Despite that, it noted that the domestic provisions affected approximately 48,000 prisoners and that it applied in a blanket fashion to the full range of offences which warranted imprisonment.

Although the decisions of the European Court of Human Rights and the Grand Chamber in *Hirst (No 2)* failed to establish strict and exact criteria for satisfying the element of legitimacy in prisoner disenfranchisement cases, they did at least stress the need for the proportionality, dismissing measures which arbitrarily disenfranchise prisoners without reference to the gravity or nature of the offence and any legitimate aims of disenfranchisement. Thus, in *Söyler v. Turkey*,[33] the European Court held that there had been a violation of Article 3 when it found that the ban on convicted prisoners' voting rights in Turkey was automatic and indiscriminate and did not take into account the nature or gravity of the offence, the length of the prison sentence or the prisoner's individual conduct or circumstances. In the Court's view, the application of such a harsh measure on a vitally important Convention right had to be seen as falling outside of any acceptable room for manoeuvre of a State to decide on such matters as the electoral rights of convicted prisoners.[34]

However, the subsequent decision of the Grand Chamber in *Scoppola v Italy (No 3)*,[35] indicated that an extended discretion would be given to member states in this area. A chamber of the European Court had decided that Italian law that provided for lifetime disenfranchisement of those sentenced to more than five years imprisonment was contrary to Article 3.[36] However, although the Grand Chamber held that the decisions in the UK cases were still good law and must be complied with, it pronounced that member states have a wider margin of appreciation in this area than had been ruled in previous cases. Accepting that there was no dispute as to whether there had been an interference with the applicant's rights in this case, but, significantly, or that the interference pursued the legitimate aims of preventing crime and enhancing civic responsibility and respect for the rule of law, the Grand Chamber consider the proportionality of that interference.[37] Upholding the Grand Chamber's ruling in *Hirst* with respect to automatic and indiscriminate bans, the Grand Chamber then went on to rule that the decision in *Frodl v Austria*,[38] which required judicial involvement in the decision to disenfranchise a prisoner was not good law.[39] Thus, the wide variety of approaches taken by the different legal systems in this area meant that States could decide either to leave it to the courts to determine the proportionality of any measure restricting prisoners' voting rights, or to incorporate provisions into their laws defining the circumstances in which such a measure should be applied.[40]

The Grand Chamber then considered the compatibility of the relevant Italian Law as it affected the applicant's case. In this respect, it noted that in contrast to the position of the United Kingdom as examined in *Hirst (No 2)*, that the provisions showed the national legislature's concern to adjust the application of the measure to the particular circumstances of the case in hand, taking into account factors such as the gravity of the offence which had been committed and the conduct of the offender. Further, the measures were only applied in connection with certain offences against the State or the judicial

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[30] (2006) 42 EHRR 41.
[31] *Hirst v United Kingdom No 2*, Grand Chamber at [71].
[32] *Hirst v United Kingdom No 2*, Grand Chamber at [74].
[33] Decision of the European Court of Human Rights, 17 September, 2013.
[34] *Söyler v. Turkey*, at [25].
[35] Application no. 126/05, *decision of the Grand Chamber of the European Court 22 May 2012.*
[36] *Scoppola v Italy,* Application No. 126/05, decision of the European Court of Human Rights 18 January 2011 (the Chamber noted that the applicant was deprived of the right to vote because of the length of his custodial sentence, irrespective of the offence committed or of any examination by the trial court of the nature and gravity of the offence (at para 49).
[37] *Scoppola v Italy* (Grand Chamber), at [92].
[38] (2011) 52 EHRR 5
[39] *Scoppola v Italy* (Grand Chamber), at [100].
[40] *Scoppola v Italy* (Grand Chamber), at [102].

system, or to offences which the courts considered to warrant a sentence of at least three years' imprisonment.[41] On the facts, the Grand Chamber noted that the applicant had been found guilty of serious offences and sentenced to life imprisonment,[42] and that in those circumstances it could not conclude that the disenfranchisement provided by Italian law had the general, automatic and indiscriminate character that had led it in *Hirst (No 2)* to find a violation of Article 3.[43] Thus, unlike the position highlighted in *Hirst (No 2*), a large number of convicted prisoners in Italy were not deprived of the right to vote in parliamentary elections.[44] Further, under Italian law a prisoner could, three years after finishing their sentence and displaying good conduct, apply for rehabilitation so as to recover the right to vote.[45] Accordingly, the Grand Chamber found that the government's margin of appreciation in this sphere had not been overstepped and that therefore there had been no violation of Article 3.[46]

The effect of the decision in *Scoppola (No 3)* was that each state is provided with a wider margin of appreciation with respect to choosing which prisoners they are going to disenfranchise. This wider margin is apparent in the *Scopolla* case itself, as the Grand Chamber have overruled the Chamber's decision to the effect that a life time ban was arbitrary and thus in violation of Article 3 of the First Protocol.

In assessing the impact of the decision in the present case on prisoner disenfranchisement and the jurisprudence of the European Court of Human Rights, a number of points need to me made. First, despite the flexibility provided by the Court and Grand Chamber in this area, the case law continues to be clear in its rejection of indiscriminate and arbitrary blanket bans on prisoner voting. Thus the jurisprudence insists that restrictions on all prisoners voting in national and European elections, irrespective of the seriousness and type of the prisoner's crime and the (related) length of sentence. In this respect, it is astounding that the Council of Europe accepted the United Kingdom's paltry reform of its disenfranchisement laws, whereby only those already released on temporary license were allowed to vote.[47]

Despite this executive acceptance, UK domestic law is clearly inconsistent with *Hirst (No 2)* and even *Scoppola*, however one views the discretion granted by the Strasbourg Court to each Member State in this area. However, given the Committee of Ministers' approval, future challenges to UK law would face the difficulty of ignoring such approval, despite the law still being in conflict with the continuing letter and spirit of the Court's past and subsequent rulings. Surely it cannot be conducive to the role of the Court (and the aims of the Convention) that one state is allowed to continue with rules that are out of line with Strasbourg jurisprudence, and where that case law is being applied other states whose laws are being challenged under the Convention's judicial mechanism. In this respect, a further challenge to UK law before the Court would be welcome, as would a Grand Chamber ruling in the case of *Kalda*.

Second, both the Strasbourg Court and the UK domestic courts have insisted that they will not deal with a challenge to specific national law *in abstracto*. Therefore, in *Kalda*, both the national courts and then the European Court refused to look at the national law's general compatibility with Article 3, choosing

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[41] *Hirst (No 2)*, at [106].
[42] *Hirst (No 2)*, at para.107.
[43] *Hirst (No 2)*, at para. 108.
[44] *Hirst (No 2)*, at para 108.
[45] *Hirst (No 2)*, at para. 109.
[46] *Hirst (No 2)*, at para. 110. The European Court of Justice has also offered a similar margin of appreciation with respect to the right to vote under EU Law: *Delvigne v Commune de Lesparre-Medoc* (C-650/13) EU:C:2015:648
[47] Following calls from the Council of Europe's Committee of Ministers to resolve the impasse created by the Government's refusal to change the law following the decision in *Hirst*, the government published proposals in November 2017, allowing prisoners on Temporary Licence to vote. These are now contained in a Ministry of Justice policy framework: Restrictions on Prisoner Voting Policy Framework. 11 August 2020, allowing prisoners already in the community on home detention curfew or released on temporary licence to vote. In December 2017, the Council of Europe agreed to these changes as an acceptable compromise that would address the criticisms raised by *Hirst (No 2)*: 1302nd meeting (December 2017) (DH); Action plan (02/11/2017) Communication from the United Kingdom concerning the case of HIRST (No. 2) v. the United Kingdom (Application No. 74025/01) https://dm.coe.int/dg1/execution/documents_execution/UK Hirst Action Plan November 2017.docx f.

instead to examine whether its application to the applicant was consistent with the constitution, Article 3 of the First Protocol, and the accompanying case law of the European Court of Human Rights. This accords with the role of the European Court, to rule on specific challenges and claims made by specific victims; although both the national and European Court were of the strong opinion that the law, at least on the face of it, was inconsistent with the Convention. This is useful if, of course, the national judiciary has the power to receive constitutional challenges, particularly if they can use the Convention and its case law to make its decision, as they did in *Kalda*. The position is more complex where the member state's judiciary do not have such powers, in which case we would have to wait for an individual to make a challenge under the Convention. Thus, in *Chester v Ministry of Justice,*[48] the UK Supreme Court refused to make a declaration of incompatibility of the 1983 Representation of the People Act 1983 in terms of its application to life sentence prisoners, as it was for Parliament to make an appropriate response to the judgments of the European Court of Human Rights.[49] In that case, therefore, the domestic courts were powerless to rule on whether the exclusion from the vote of life sentence prisoners who had served their minimum terms, as the European Court had made no ruling on that specific issue. This serves as a stark warning of the consequences of repealing the Human Rights Act 1998, or indeed of withdrawing from the Convention itself.[50]

Third, the approach adopted in *Kalda* – to examine the strict legal provision in the light of the wider constitutional rules and ideals and in their application to a specific applicant – begs the question whether the European Court should tolerate ostensibly blanket bans in this area, or whether they should rule them incompatible with Article 3 in that they send a clear message that Parliament's intention is to deny prisoners the right to vote in a discriminatory manner. In *Kalda*, the European Court noted that the (arbitrary) domestic provision had been interpreted and applied in a manner that was consistent with the domestic constitution and the jurisprudence of the European Court, so in this case there was little to concern it. However, it could be argued that domestic legislatures should be encouraged to construct and maintain clear and Convention compliant rules in this area, subject of course, to the margin of appreciation allowed by the Strasbourg Court.

Conclusions

The decision in *Kadla* joins a number of other rulings from the European Court and Grand Chamber on the issue of prisoner enfranchisement and the compatibility of various practices of individual member states of the Council of Europe. These practices range from blanket bans (with individual exceptions) both during and after the sentence, to complete prisoner enfranchisement. The Court has accepted that each state can choose their own laws, adopting any relevant penological, criminal justice and public policy theory within that state's legal and political system. However, despite providing increasing flexibility in terms of the aims and proportionality of such measures, the case law appears to insist on provisions that take into account the individual circumstances of the prisoner, including their crime and length of sentence. In that sense, UK law stands out as incompatible with Article 3 despite the Council of Europe's executive acceptance of its modest reforms of its primary legislation.

Whilst the European Court's approval in *Kadla* of the judicial oversight of what is on the face of it a blanket ban was acceptable given the national court's approach to the case, it is uncertain whether such clear and arbitrary provisions, subject to constitutional and human rights interpretation by the national judiciary, should be encouraged by the European Court. Such an approach leaves prisoners in certain states vulnerable, forcing them to take expensive and lengthy proceedings in Strasbourg. Further, the dependence on judicial supervision does not sit well with the Grand Chamber's ruling in *Scopolla,* that judicial involvement in the decision to disenfranchise a prisoner is not a condition of the national law's compatibility with Article 3.

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[48] [2012] UKSC 63.

[49] See Elizabeth Adams, 'Judicial discretion and the declaration of incompatibility: constitutional considerations in controversial cases' [2021] *Public Law* 311

[50] See Steve Foster and Steve Foster, 'Reforming the Human Rights Act 1998 and the Bill of Rights Bill 2022' (2022) 27 (1) *Coventry Law Journal* 1.

These concerns could best be dealt with by another ruling from the Grand Chamber in this case, as well as by a more robust approach to enforceability of Court judgments by the Council of Europe,

HUMAN RIGHTS

Jet-skis, holidays and high-profile businesspersons: photographs and privacy protection in domestic law

Stoute v News Group Newspapers [2023] EWHC 232 (KB); [2023] EWCA Civ. 523

Dr Steve Foster*

Introduction

When the media take and publish photographs of individuals, together with related stories, the right to do this through freedom of expression and press freedom needs to be balanced against the individual's right to privacy. This is particularly so when the photographs intrude on the rights of the victim's family members, thus strengthening the privacy claim of the claimant.[1] Both domestic law and Article 8 of the European Convention on Human Rights (given effect to by the Human Rights Act 1998) provide remedies in appropriate cases; whether in the form of injunctions or damages,[2] but such rights are restrained by defences based on the right to free speech (and the public interest), which are accommodated by Article 10 of the Convention and s.12 of the Human Rights Act.[3]

However, not every unauthorised photograph will constitute a breach of the domestic law or of Article 8.[4] First, the claimant will need to show that they had an actionable and reasonable expectation of privacy in that image; and the press will then be allowed to claim that there was a public interest in taking and publishing the photograph (and any accompanying story), which then overrode that privacy right. Domestic law has to get that balance right if it is to be consistent with both Articles 8 (private life) and 10 (freedom of expression) of the ECHR, and the jurisprudence of the European Court of Human Rights in this area.[5] The balancing act is carried out through the principles of proportionality, and no right has 'trump' status as such,[6] although the taking of unwarranted photographs is regarded as a particularly intrusive form of privacy breach, and can often swing the case in favour of the claimant.[7]

Despite the above rules, all cases are fact-sensitive and the outcome of any litigation can be difficult to predict. A recent case from the UK High Court,[8] now upheld by the Court of Appeal,[9] involving an application for an interim injunction against the defendant press pending full trial provides an insight into the jurisprudence in this area, illustrating the complex application of what are, at first sight, straightforward guiding principles. The High Court had to consider, at proceedings pending a full trial, whether the photographing of the claimants (reasonably high profile businesspeople), and his friends and family, constituted the tort of misuse of private information and a breach of Article 8. The case raise various legal and practical difficulties in establishing liability in privacy cases, as well as the

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[1] See, in particular, *Weller v Associated Newspapers* [2014] EWHC 1163 (QB), and, in the European Court of Human Rights*, Von Hannover v Germany* (2004) EMLR 2.

[2] This can be in the form of a direct action under the Act, against a public authority, or under the torts of confidentiality, misuse of private information, or for breach of copyright. In addition, in some cases it is possible to take action against the press for harassment, either, under the Protection from Harassment Act 1997.

[3] Section 12 of the Human Rights 1998 provides that courts should pay particular regard to the right of freedom of expression contained in Article 10 when deciding cases where freedom expression is under threat in any legal proceedings.

[4] *Sir Elton John v Associated Newspapers,* unreported, decision of the High Court 23 June 2006*,* and *Murray v Express Newspapers Ltd; also known as Murray v Big Pictures (UK) Ltd* [2007] EMLR 22 (High Court); *Murray v Express Newspapers Ltd* [2009] Ch 481 (Court of Appeal).

[5] Most notably, *Van Hannover v Germany,* n 1.

[6] *Re S (Publicity)* [2005] 1 AC 593.

[7] See the early cases of *Theakston v MGN Ltd* [2002] EMLR 22, and *Jagger v Darling* [2005] EWHC 683*,* and subsequently *Murray*, n 4.

[8] *Stoute v News Group Newspapers* [2023] EWHC 232 (KB); [2023] EWCA Civ. 523

[9] *Stoute and Stoute v News Group Newspapers* [2023] EWCA Civ. 523

application of any press freedom or public interest defences, which will be examined through the established case law.

The decision in *Stoute v News Group Newspapers*

The claimants are a married couple who ran a company which famously sold personal protective equipment to the National Health Service and private hospitals, and who had secured government contracts worth £2 billion during the COVID-19 pandemic. They bought a holiday home beside a public beach in Barbados and, while there with friends and family, were photographed by paparazzi while travelling by jet-ski from a yacht to a beach club for a meal for their daughter's birthday. The defendant newspaper informed the claimants that it intended to publish shots taken on the public beach outside the restaurant and sent them photographs of the holiday home, the boat, and each claimant; the implication being that those were the photographs that were going to be to be published. The claimants then made an urgent application for an injunction at short notice, which was granted in respect of the photographs of the house and the boat, but refused in respect of the photographs of the claimants.[10] The newspaper then published articles without using the injuncted photographs, but using instead the pictures of the claimants. The claimants now claim that the published photographs were cropped differently to those which had been submitted to the court and brought a claim for damages for misuse of private information, infringement of copyright, and for permanent injunctions.

The claimants accepted that the instant application was being made on the return date for the existing injunction in respect of the photographs of the house and boat, and that they were seeking to re-litigate issues that had already been before the court. However, they submitted that the previous hearing had proceeded on an erroneous basis in respect of what photographs the defendant had threatened to publish, that the photographs had been taken while they were engaged in a private activity, and that they had had a reasonable expectation of privacy even though they were in a public place.

Refusing the application, the High Court held that it covered the subject matter that previously had been before the court, that there was a public interest in finality in litigation, and that it was contrary to that public interest to permit the same issues to be re-litigated. If a claimant failed to secure an injunction, then the remedy was an appeal, there being no general right to make a repeat application for the same relief.[11] There was, however, no absolute rule prohibiting a repeat application and the court had a discretion to entertain or grant it where there was good reason to do so.[12] The previous application had been made at very short notice, and the photographs had been disclosed in a way that had led the claimants to believe that they were what would be published and that had informed their application. Whether the publication of a photograph amounted to misuse of private information was highly fact-sensitive and depended on precisely what was depicted in the photograph, and there were significant differences between the photographs disclosed and the photographs published. There was, therefore, a good reason to permit a repeat application and the court would consider it afresh.[13]

The Court then considered the question of whether the photographs could be considered private information, thus forming the basis of a reasonable expectation of privacy in the misuse of private information and related actions. In that respect, the Court noted that the claimants had been in a public place, had been targeted by photographers, and had not consented to the pictures being taken or published.[14] It then noted that although they were in a public place, they were engaging in a private birthday celebration, and had not sought publicity about it.[15] Further they had not been aware that the

[10] Unreported, injunction granted by Heather Williams J on 31 December 2022.
[11] *Stoute v News Group Newspapers*, at [27-28].
[12] *Stoute v News Group Newspapers*, [28], citing *Laemthong International Lines Co Ltd v Artis* [2004] EWHC 2226 (Comm)
[13] *Stoute v News Group Newspapers*, [30-31].
[14] *Stoute v News Group Newspapers*, [32].
[15] *Stoute v News Group Newspapers*, [32].

photographs were being taken, but had known that they had become the target of photographers, and had made the trip to the restaurant and chosen what to wear in that knowledge.[16]

In the Court's view, the information captured in the photographs was capable of amounting to private information because everyone had a right to exercise personal autonomy over the extent to which they revealed aspects of their physical appearance.[17] On the other hand, photographs of the claimants were already in the public domain, and their company had made a considerable amount of money from public funds.[18] Although being in a public location when the information was obtained did not, of itself, mean there was no reasonable expectation of privacy, there was no general reasonable expectation of privacy in respect of information that was obvious to anyone who happened to be in the same place at the same time.[19] The claimants had arrived on a public beach by Jet Ski, and there was a demonstrative and performative element to their arrival. Thus, the information captured in the photographs corresponded to how they had chosen to appear in public.[20] Further, there was no additional element of inherently private information, and the fact that more parts of their bodies were visible in the published photographs than had been shown in those previously before the court did not make a material difference in that respect.[21] Although the absence of consent, the distance from which the photographs had been taken, and the targeting of the claimants were all relevant to whether there was a reasonable expectation of privacy, those factors were not present to a degree which made success at trial likely, as required by s. 12(3) of the Human Rights Act 1998[22] Thus, the claimants were not 'more likely than not' to establish at trial that the photographs amounted to private information and not sufficiently likely to do so to an extent which would justify injunctive relief.[23]

On the question of balance of convenience, and balancing the defendant's Article 10 rights, the Court noted that public expenditure on personal protective equipment remained a newsworthy issue and there was a real prospect that if not restrained the defendant would publish the material that the claimants sought to restrain. If the court was wrong and the claimants were likely to succeed at trial, the losses they would sustain could not be directly remedied by monetary compensation so that damages were not an adequate remedy.[24] However, the photographs *had* been published and damage had been sustained; whether the publication was unlawful would be determined at trial, and even if the claimants could show that they had a reasonable expectation of privacy, the balance fell against the grant of injunctive relief.[25]

The Court of Appeal decision in *Stoute*

On appeal to the Court of Appeal,[26] the appeal was dismissed and the decision at first instance upheld. The grounds of appeal were as follows: first, that the judge had wrongly presumed that events taking place in public were not private unless some additional element was present; secondly that the judge had wrongly held that because the appellants did not have a reasonable expectation of privacy in relation to others present at the beach, they did not have such an expectation in relation to the publication of the photographs in the respondent's newspaper; third, that the judge had erred in the balancing exercise with respect to how other factors had been considered and balanced.

The Court of Appeal firstly reviewed the current applicable law, including the requirement that the claimant show a reasonable expectation of privacy in the relevant information, and that such an

[16] *Stoute v News Group Newspapers*, [32].
[17] *Stoute v News Group Newspapers*, [32].
[18] *Stoute v News Group Newspapers*, [32].
[19] *Stoute v News Group Newspapers*, [33].
[20] *Stoute v News Group Newspapers*, [34].
[21] *Stoute v News Group Newspapers,* [34].
[22] *Stoute v News Group Newspapers,* [34-35], citing *Von Hannover v Germany,* n. 1, and *John v Associated Newspapers*, n. 4.
[23] *Stoute v News Group Newspapers,* [35].
[24] *Stoute v News Group Newspapers*, [39].
[25] *Stoute v News Group Newspapers,* [40].
[26] *Stoute v News Group Newspapers* [2023] EWCA Civ 523.

expectation overrode any freedom of expression claim of the defendants.[27] Noting that various factors needed to be taken into account, the Court then stressed that a person was less likely to have a reasonable expectation of privacy with respect to a photograph taken in a public place, although that was not an absolute rule.[28] The Court then found that the judge had not applied any presumption that events taking place in public were not private unless some additional element was present. The judge had begun by accepting that the fact that the appellants were in public did not mean they did not have a reasonable expectation of privacy, and his reference to an additional element, in context, showed that he was referring to the fact that information revealed in public was less likely to be recognised as private absent some additional element. The judge had also taken into account additional factors including that the appellants had been hounded by paparazzi. There had, therefore, been no error in this respect.[29]

The Court of Appeal then considered the judge's treatment of the case with respect to the public location of the photographs. In the Court's view, the judge had indeed considered what would have been visible to others present at the beach and restaurant, but the authorities showed that that was a relevant factor, and he had not, thus, erred by doing so. The judge had not failed to differentiate between visibility to those present and publication of photographs in a national newspaper, and was fully aware that the context was one of newspaper publication, and had accordingly plainly considered the impact of that fact. Thus, the judge had correctly reasoned that what was visible to members of the public at the time was a relevant, though not determinative, factor in coming to his decision.[30]

Finally, the Court of Appeal held that the challenge to the weight given to other factors in the balancing exercise would only be a viable ground of appeal if it compelled the conclusion that the judge's decision had not been open to him, and that was not the case here.[31] In any event, the judge had been entitled to take into account and assign weight to the factors including the "performative" element of the appellants' arrival on the beach by jet-ski, their targeting by paparazzi, the presence of children, and the effects of the intrusion on the appellants.[32] Further, he had not made any error in concluding that it was unlikely that the appellants would establish a reasonable expectation of privacy in respect of the publication of the photographs, or that the balance of risk favoured refusing an injunction.[33]

Photographs, privacy and domestic law

Before examining the impact of the decision in *Stoute* on existing principles in this area, it is worth examining the legal framework and previous case law on photograph, privacy and press freedom.

Domestic law does not provide the individual with an absolute right over their photographic image, although the laws of confidentiality and misuse of private information (and copyright), can be employed, in combination with Article 8, to protect individuals from the unlawful and unreasonable taking and publication of their image. In the post-Human Rights Act era, the claimant is able to rely, indirectly in private cases, on Article 8 together with relevant case law from the European Court in this area, and the question is whether the circumstances surrounding the taking and publication of the photograph gives rise to a reasonable expectation of privacy and, if so, whether any breach could be justified on grounds of the public interest in publication.

Although early decisions made under the 1998 Act were favourable to publication of personal details of the individual's private life,[34] the courts were still willing to grant injunction to prohibit the publication of intimate photographs. Thus, in *Theakston* v *MGN Ltd*,[35] the claimant, a well-known television presenter, obtained an injunction to stop the publication of photographs taken of him whilst

[27] *Stoute v News Group Newspapers* [2023] EWCA Civ 523, [31], citing *Bloomberg LP v ZXC* [2022] UKSC 5.
[28] *Stoute v News Group Newspapers* [2023] EWCA Civ 523. [37], citing *Campbell v MGN Ltd* [2004] UKHL 22
[29] *Stoute v News Group Newspapers* [2023] EWCA Civ 523, [57].
[30] *Stoute v News Group Newspapers* [2023] EWCA Civ 523, [58].
[31] *Stoute v News Group Newspapers* [2023] EWCA Civ 523, [59].
[32] *Stoute v News Group Newspapers* [2023] EWCA Civ 523, [60].
[33] *Stoute v News Group Newspapers* [2023] EWCA Civ 523, [64-65].
[34] *A v B plc* [2003] QB 195.
[35] [2002] EMLR 22

visiting a brothel. Although the court found that a brothel was not a private place for the purpose of clause 3 of the Press Commission's Code of Practice; it found that the claimant had a reasonable expectation that photographs taken in a brothel without consent would remain private. Mr. Justice Ousley noted that photographs can be particularly intrusive, and subsequently the courts have shown a willingness to prevent the publication of photographs, taken without consent and another sought to exploit and publish.[36]

For example, in *Douglas v Hello! (No 3)*[37] it was accepted that special considerations apply to photographs in the field of privacy, because as a means of invading privacy a photograph is particularly intrusive.[38] Further, in *Campbell v MGN Ltd*,[39] the House of Lords held that there had been a breach of the claimant's privacy when the *Daily Mirror* had published articles revealing that the claimant was a drug addict and was attending Narcotics Anonymous and providing details of those meetings, along with photographs of her leaving a clinic. Importantly, the majority found that had it not been for the publication of the photographs they would have been inclined to regard the balance between the rights as about even. Specifically, Baroness Hale stated that a picture is "worth a thousand words" because it adds to the impact of what the words convey: it tells the reader what everyone looked like; in this case it also told the reader what the place looked like. In context, it also added to the potential harm, by making her think that she was being followed or betrayed, and deterring her from going back to the same place again.[40]

The taking of photographs in breach of Article might also affect the level of damages awarded in such cases. Thus, in *Mosley v News Group Newspapers Ltd*,[41] where the press published photographs and graphic details of the sexual antics of the claimant, the court found an unjustified breach of his rights in confidentiality and privacy,[42] and, in granting damages, it took into account that photographs were published in deciding that a proper award would be £60,000.[43] This, and the fact that publication of private information and images can be damaging to family members, is illustrated in *Edward Rocknroll v MGN Ltd*.[44] where the claimant, a minor celebrity but well known as the husband of the famous actor Kate Winslet, brought a successful action against the defendant newspaper to stop the publication of partially naked photographs of him that that had been taken at a party. Granting the injunction , the court noted that publication would not only cause embarrassment to him, but that there was also a grave risk that that Winslet's children would be subject to teasing at school about the behaviour of their new stepfather and that such teasing could be seriously damaging to the relationship he sought to establish with them.[45]

On the other hand, it is clear that the taking of an individual's photograph without their consent will not give rise to a breach of Article 8 or other rights in every case. Thus, in *Sir Elton John* v *Associated Newspapers,*[46] the court refused to grant an injunction to restrain the publication of photographs taken by the press of the claimant: the photographs and story would have been unflattering and offensive,

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[36] [2002] EMLR 22, at para 78. See also *Jagger v Darling* [2005] EWHC 683, where an injunction was granted to Elizabeth Jagger (the daughter of Sir Mick Jagger) to stop further publication of CCTV footage taken in the defendant's nightclub, showing the claimant engaged in sexual activities with another celebrity (the late George Best's son). Granting the injunction it was held that repeated publication of the images would only serve to humiliate the claimant.

[37] [2005] 3 WLR 881

[38] [2005] 3 WLR 881, [44].

[39] [2004] 2 AC 457

[40] [2004] 2 AC 457, [155].

[41] [2008] EMLR 20

[42] See Steve Foster, 'Balancing privacy with freedom of speech: press censorship, the European Court of Human Rights and the decision in *Mosley v United Kingdom* (2011) 16 (3) *Communications Law* 100, at 101-2.

[43] [2008] EMLR 20, at paras 235-236. See also, *AAA v Associated Newspapers* [2012] EWHC 2103 (QB), where it was held that although there existed an exceptional public interest in the professional and private life of an elected politician so as to justify the publication of a newspaper article claiming that a child had been born as a result of an extra martial affair that he had had, there was no justification for publishing a photograph of the child, taken covertly when she was less than a year old. The decision was upheld by the Court of Appeal: [2013] EWCA Civ 554

[44] [2013] EWHC 24 (Ch)

[45] [2013] EWHC 24 (Ch), at para 36

[46] Unreported, decision of the High Court 23 June 2006.

because they caught the celebrity rock star in a casual and scruffy state, but that was insufficient to ground an action in confidentiality. Further, the fact that the photographs were taken without his consent did not *per se* give rise to an action, the court stressing that there had to be some form of harassment to engage the protection offered by Article 8. Subsequently, the domestic courts have rejected the requirement of harassment to maintain an action, although the above case has established the principle that the individual is not protected from every unwelcome photograph.

The leading authority in the area of photographs and privacy is now the Court of Appeal decision in *Murray v Express Newspapers*,[47] the Court stressing the need to consider all aspects of the privacy claim and the circumstances pertaining to the taking of the photograph. In *Murray*, the author JK Rowling and her husband and son had sought an injunction and damages against the *Express Newspapers* to stop the further publication of a photograph taken of the boy when he was under two years of age. The photograph had been taken by use of a long-range lens when he was walking in the street with his parents. The parents had not given their consent to the photograph and subsequently it appeared in a newspaper, along with a quotation, attributed to JK Rowling, setting out her thoughts on motherhood and family life. An action was brought in the law of confidentiality and under the Data Protection Act 1998.

Giving judgment at first instance, Patten J held that the starting point was whether the child had a reasonable expectation of privacy according to the test laid down in *Campbell v MGN*.[48] That question had to be determined by taking an objective view of the circumstances, including the reasonable expectations of his parents in those same circumstances as to whether their children's lives in a public place should remain private.[49] Rejecting the idea that the taking of the photograph without consent was unlawful *per se*,[50] and that the law did not allow celebrities to carve out a press-free zone for their children in respect of absolutely everything they choose to do,[51] his Lordship noted that there was no evidence that the boy's parents were either aware of the photograph being taken or were in any way distressed by it being taken. Further, there was no evidence that the boy had been exposed to physical danger or any other harm.[52]

His Lordship then stated that there was a distinction that could be drawn between a person engaged in family and sporting activities and something as simple as a walk down a street or a visit to the grocers to buy milk. The former was part of a person's private recreation time intended to be enjoyed in the company of family and friends and publicity was intrusive and could adversely affect the exercise of such activities. On the other hand, if a simple walk down the street qualified for protection, it was difficult to see what would not; there was an area of routine activity which, when conducted in a public place, carried no guarantee of privacy. The instant case fell into that category, and although anodyne and trivial events might be of considerable importance and sensitivity to a particular person, the facts in the present case were not sufficient to engage article 8.[53]

On appeal it was held that whether there was a reasonable expectation of privacy depended on all the circumstances of the specific case, including the attributes of the claimant and the activity in which they were engaged, the place at which it happened, the nature and purpose of the intrusion, the absence of consent, the effect on the claimant and the circumstances in which, and the purposes for which the information reached the hands of the publisher.[54] The Court of Appeal then held that once the reasonable expectation test was satisfied, the court would then have to consider how the balance should be struck, the question whether the publication of those facts would be highly objectionable to a reasonable person

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[47] *Murray v Express Newspapers Ltd* [2009] Ch 481 (Court of Appeal), overruling *Murray v Express Newspapers Ltd; also known as Murray v Big Pictures (UK) Ltd* [2007] EMLR 22 (High Court).
[48] *Murray v Express Newspapers Ltd* [2007] EMLR 22, [22], applying *Campbell v MGN* [2004] 2 AC 457.
[49] *Murray v Express Newspapers Ltd* [2007] EMLR 22, [23].
[50] *Murray v Express Newspapers Ltd* [2007] EMLR 22, [33], noting the New Zealand case of *Hosking v Runting* (2005] 1 NZLR 1.
[51] *Murray v Express Newspapers Ltd* [2007] EMLR 22, [66].
[52] *Murray v Express Newspapers Ltd* [2007] EMLR 22, [66]
[53] *Murray v Express Newspapers Ltd* [2007] EMLR 22, [65].
[54] *Murray v Express Newspapers Ltd* [2009] Ch 481, [36].

being relevant.[55] Applying those tests, the Court of Appeal stated that it was at least arguable that the appellants had a reasonable expectation of privacy; and in particular the fact that the photographed appellant was a child was relevant and of greater significance than the judge at first instance recognised.[56]

The factors identified in *Murray* were employed in *Weller v Associated Newspapers Ltd,*[57] where Paul Weller, a well-known musician, brought an action on behalf of his children for damages under the law of misuse of private information and the Data Protection Act 1998 with respect to a number of photographs that had been taken of Weller and his children whilst shopping and relaxing in a California restaurant and which had been published on line in the UK by the defendant newspaper. The photographs had been removed one day later.

Giving judgment for the claimants, the High Court held that the question test whether there was a reasonable expectation of privacy was a broad one, taking into account all the circumstances,[58] including whether there was an absence of consent, together with the circumstances in which and the purpose for which the information had come into the hands of the publisher.[59] The court noted that although it was appropriate to take into account the fact that it was lawful under California law to take and publish the photographs, the relevant act complained of was the publication of un-pixelated photographs of the children in England and Wales, and whether that was lawful had to be determined by a fair application of the tests laid down in English law.[60] Applying that test, the court concluded that the photographs had been published in circumstances where the claimants had a reasonable expectation of privacy, as they showed the children's faces – a chief attribute of their respective personalities – they were on a family trip with their father, and were identified by their surname. The photographs were different in nature from crowd shots of the street showing unknown children; rather they showed how the claimant's looked as Paul Weller's children and how they looked on a family day out with him.[61] The court then held that the balance came down in favour of upholding the claimant's article 8 rights over and above the defendant's rights under Article 10. There had been an important engagement of privacy rights because the photographs showed expressions on the faces of children on a family afternoon out with their father, showing a range of emotions and then identifying them by surname. In contrast, there was no relevant debate of public interest to which the publication of the photographs contributed.[62]

The above principles have been informed by the case law of the Strasbourg Court**,** which has accepted the potential for greater intrusion into privacy caused by photographs. Thus, in *Reklos v Greece*,[63] it was noted that a person's image constitutes one of the chief images of a person's personality, as it reveals the person's unique characteristics and distinguishes the person from his or her own peers.[64] Further, the Court has been instrumental in protecting the privacy rights of celebrities, particularly from intrusive photographing. Thus, in *Von Hannover v Germany*,[65] the European Court held that the publication of photographs taken of the former Princess Caroline of Monaco and her family in her daily life clearly fell within Article 8. In stressing the significance of photographs as means of invading privacy, the Court held that the photographs in question – of her shopping and relating with close friends and her children in a public place - contained very personal or very intimate 'information' about an individual, where the protection of the rights and reputation of others took on particular importance.[66] Further, it noted that photographs appearing in the tabloid press were often taken in a climate of

[55] *Murray v Express Newspapers Ltd* [2009] Ch 481, [39].
[56] *Murray v Express Newspapers Ltd* [2009] Ch 481, [52].
[57] [2014] EWHC 1163 (QB)
[58] [2014] EWHC 1163 (QB), [16]. It was accepted that the claim under the Data Protection Act 1998 would stand and fall with the claim for misuse of private information.
[59] [2014] EWHC 1163 (QB), at para 28, citing *Murray v Express Newspapers plc*, [38].
[60] [2014] EWHC 1163 (QB), [44].
[61] [2014] EWHC 1163 (QB), [45].
[62] [2014] EWHC 1163 (QB), [47].
[63] [2009] EMLR 16
[64] *Recklos v Greece,* [40].
[65] *Von Hannover v Germany* (2004) EMLR 2
[66] *Von Hannover v Germany*, [59].

continual harassment, inducing in the person concerned a very strong sense of intrusion into their private life or even of persecution.[67]

Significantly, the Court noted that everyone, including people known to the public, had a legitimate expectation that his or her private life would be protected.[68] The Court noted that the photographs showed the applicant in scenes from her daily life, and thus engaged in activities of a purely private nature, taken secretly and without her consent and making no contribution to a debate of public interest. Relevant to the instant case, it also noted that the general public did not have a legitimate interest in knowing the applicant's whereabouts or how she behaved generally in her private life, even if she appeared in places that could not always be described as secluded and was well known to the public.[69]

On the other hand, there is some case law suggesting that it will take into account the well-known status of that individual in determining whether there has been a violation of Article 8. Thus, in *Van Hannover v Germany (No 2*),[70] it was held by the Grand Chamber of the European Court that there had been no violation when photographs had been taken of Princess Caroline of Monaco and her husband on a skiing holiday. In the Grand Chamber's view, because the photographs accompanied a story which questioned whether the couple should have been holidaying at a time when her father – Prince Rainier - was critically ill, they related to a matter of genuine public interest and were thus justified on grounds of freedom of expression.[71] The Court also stated that irrespective of the question to what extent the she assumed public functions on behalf of the Principality of Monaco, it could not be claimed that the applicants, whom were undeniably well known, were ordinary private individuals; they had to be regarded as public figures.[72] Similarly, in *Von Hannover v Germany (No 3),*[73] it was held that there was no breach when the domestic courts refused to grant an injunction prohibiting the further publication of a photograph of the applicant and her husband taken while they were on holiday; the photograph being accompanied by an article about the trend among the very wealthy towards letting out holiday homes and including information about the home. The European Court accepted that although the photograph of the couple did not concern a matter of public interest, the article did, and that the article did not provide private information relating to the couple and was not simply a pretext for taking a photograph.[74]

These principles have also been applied where the individual is simply well known, rather than a public figure or state representative. Thus, in *Springer v Germany*,[75] it was held by the Grand Chamber that there had been a violation of article 10 when an injunction had been granted to a well-known television actor prohibiting the applicants from publishing photographs of him being arrested for cocaine possession, together with articles about his previous drug use and convictions. In the Court's view, the facts as disclosed were not intimate private details but concerned public judicial facts. Further, the actor was sufficiently well known to qualify as a public figure, which reinforced the public's interest in being informed of his arrest and the proceedings against him.[76] Whether the taking and publication of photographs constitutes a breach of article 8 depends, therefore, on a number of factors relating both to the expectation of the individual's privacy and the public interest in publication; and the public status of the individual is apparently vitally important in respect of both questions. Thus, as with the domestic law of misuse of private information, the previous conduct of the applicant, including whether they

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[67] Ibid
[68] *Von Hannover v Germany*, [69], italics added.
[69] *Von Hannover v Germany*, [74]. See the recent decision of the European Court in *Tuzunatac v Turkey,* Application No 14852/18, decision of the European Court of Human Rights March 7, 2023, where the Strasbourg Court decided that the taking and publishing of a photograph showing two high profile actors in an intimate embrace was in breach of Article 8.
[70] (2012) 55 EHRR 15
[71] *Von Hannover v Germany (No 2),* at [56].
[72] (2012) 55 EHRR 15, [120]
[73] Decision of the European Court of Human Rights, 19 September 2013
[74] *Von Hanover v Germany (No. 3),* at [59].
[75] (2012) 55 EHRR 6
[76] *Springer v Germany*, [99].

have courted and consented to publicity in the past, can be considered alongside other factors such as the level of intrusion, and the age and lack of public status of the victims.

This flexible and fact sensitive approach is also employed in cases where the applicant is not a public figure, but has attracted media attention because of their conduct. For example, in *Egeland and Hanseid v Norway*,[77] it was held that there had been no violation of Article 10 when two journalists had been prosecuted and fined for taking photographs of accused persons outside a court hearing without their consent, contrary to national law. The European Court noted that the photographs had been taken without her consent and directly after she had been informed of her conviction for a triple murder; she was in tears and in great distress and thus at her most vulnerable psychologically. The public interest in the photographs and the trial did not outweigh the woman's right to privacy and the interest in the fair administration of justice and the relatively modest fine was not disproportionate. Similarly, in *Recklos v Greece*,[78] it was held that the taking of a baby's photograph in a hospital without the parent's consent constituted a violation of article 8. In the Court's view there was no public interest in taking the photograph and the retention of the photographs contrary to the parents' wishes was an aggravating factor contributing to the finding of a breach.

The impact of *Stoute* on domestic and European case law

It needs to be remembered that the present case was concerned with an application for an interim injunction, pending a full trial on the merits. Thus the decision has not decided once and for all whether or not the claimants had an expectation of privacy, or that such an expectation was overridden by Article 10 of the Convention and the public interest in publication. Those questions can be tested at full trial, in an action for damages, should the claimants wish to pursue the action.[79]

The question for the courts in this case, therefore, was whether the claimants had satisfied the court that the test in s.12(3) of the Human Rights Act 1998 had been satisfied, and that the balance of convenience in granting the injunction lay in their favour. Section 12(3) provides that where a claimant seeks a temporary order to restrain publication pending a full trial no such order shall be made unless the court is satisfied that the applicant *is likely to establish* that publication should not be allowed. The law on this matter was formerly regulated by the rules in *American Cyanamid* v *Ethicon Ltd*,[80] which require the court to consider the strength of both parties' arguments, and whether the claimant had a real prospect of success at full trial. The question will then be where the balance of convenience lies before granting the order, still the applicable test but augmented by the new likelihood test. In *Cream Holdings* v *Banjaree and Another,*[81] the House of Lords confirmed that s.12 did not require the courts to give freedom of expression a higher order than other convention rights, and that the test under s.12(3) was whether the applicant's prospects of success at trial were sufficiently favourable to justify the making of such an order in the particular circumstances of the case. The purpose of s.12(3) was to emphasise the importance of freedom of expression at the interim stage and that it set a higher threshold for granting interim orders against the press than in *American Cynamid*. However, their Lordships also held that the word 'likely' in the section does not mean 'more likely than not' and that there was no single inflexible test. As a general approach the courts should be very slow to make such orders where the applicant had not demonstrated that he would probably succeed at trial, although in some cases a lesser degree of likelihood would suffice.[82]

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[77] (2010) 50 EHRR 2

[78] [2009] EMLR 16

[79] Often claimants will abandon the action once they fail at the interim stage, feeling that the substantial damage has already been inflicted by the dissemination, or further dissemination, of the information. Equally, the defendant press might abandon any defence at full trial if injuncted at the interim stage; feeling that publication in the future, even if they were successful at the full trial, would be fruitless and the information and photographic images have lost their value.

[80] [1975] AC 396.

[81] [2005] 1 AC 253.

[82] On the facts, the House of Lords held that as the allegations of the claimant's corrupt business practices constituted information of strong public interest, the claimant was likely to fail at full trial. The case will be considered in more detail in the next chapter.

In the present case, in balancing the claimants' arguments with those of free speech, the court considered the merits of the parties' claims – the fact that the claimants' expectation of privacy had been reduced by their entrance on to the beach (a public place); and that there was some public interest in their activities, because of their high public commercial profile. Conversely, it considered that a remedy of damages at full trial would not be an adequate remedy for the claimants; the main interest that the claimants were seeking to protect was the non- or further publication of the photographs with the accompanying distress and humiliation. In this respect, the decision can be contrasted with the decision in *Douglas and others v Hello! and others,*[83] where it was held at the interim stage that the claimant's privacy interests were fairly weak (they had already sold their image to another magazine) and in the court's view they could be adequately compensated by an award of damages if they were to succeed at full trial, which they did.[84] The difference in the decisions could be attributed to a growing protection of privacy rights following the decisions in *Campbell* and *Von Hannover,* but in any case the claimants were denied interim relief despite the inadequacy of compensation at full trial, should they win.

The main reason for denying the interim relief in this case appeared to be that the courts, given the public behaviour of the claimants' and the public location in which the images were taken, had serious reservations of the legitimacy of their expectation of privacy. In addition, s.12(4) of the 1998 Act states that where the proceedings relate to material which appears to the court, to be journalistic, literary or artistic material, it must have particular regard to the extent to which the material has, or is about to, become available to the public; the extent to which it is, or would be, in the public interest for the material to be published; and any relevant privacy code. Thus, in addition to the weakness of the claimant's expectation of privacy, the court was convinced that there was a genuine public interest in the claimant's activities, and noted that in any case the images had already been released to the public.

One or two aspects of the decision are, therefore, worthy of discussion in the wider context of privacy and free speech disputes; matters that may well resurface in this case if it goes to full trial. First, was the court right in coming to the conclusion that the public element surrounding the taking of the photographs, substantially reduced to strength of the privacy expectation, despite the appellants' assertion that it was the publication of the images in national newspapers that caused the real damage to their privacy, not the taking of the images in a public place? The Court of Appeal was satisfied that the trial judge had appreciated the significance of public dissemination, but nevertheless upheld the judge's decision on the images and whether, given the public location, the claimants could be said to enjoy an expectation of privacy in such circumstances. The courts must consider the effect of public dissemination in judging an expectation of privacy, and the added humiliation and distress it will cause.[85] The question in this case is whether both courts gave sufficient weight to the fact that the images were exposed, and subject to further exposure, in national newspapers, in addition to interfering with the claimants' privacy rights at that specific time and location. This question requires further investigation by the domestic courts as in raises fundamental questions regarding the reach of privacy rights (not just, but specifically in the context of photographs), and the position of the press in their reporting techniques.

Second, although this may have had little impact on the ultimate decision in this case, the courts' acceptance that there may have been a public interest in reporting the claimants' activities, and taking photographs of them, is debatable. There is no doubt that the claimants' commercial success, built principally on the profits they earned from the pandemic by providing of protective equipment, would engage public discussion, and that there was a public interest in knowing their whereabouts and activities, including, to a degree how they spent their money. The claimants has gained a high public and commercial profile as a result of the award of public contracts, and they would have to expect some interest in their business and general activities, including where they chose to holiday and the way that they chose to spend their wealth. However, whether that transfers to a public interest in seeing

[83] [2001] 2 WLR 992.
[84] [2005] 3 WLR 881: the claimants were awarded £14,600, including £3,750 each for distress.
[85] *PJS v News Group Newspapers Ltd* [2016] UKSC 26. Injunction granted despite the fact that the private information had leaked quite significantly on social media

photographs of them taken whilst on holiday is another matter. The existence of such a public interest is, of course, not necessary if there was no legitimate expectation of privacy in the first place; as in such a case there is nothing to balance, and free speech cannot be interfered with without the claimant enjoying a prima facie legal right. The courts' ruling on public interest in this case might, therefore have been purely in passing, and the appellants did not raise it specifically on appeal. Nevertheless, the courts may have to prove a more measured ruling on this point in the future; either at full trial in the present case, or in similar cases where the press allege that the public interest in the claimants justify an intrusion into their private activates, including the taking of photograph of the nature taken and disseminated in this case.

Conclusions

It has already been confirmed that the taking, and subsequent publication, of an individual's photograph without their consent will not automatically constitute a breach of Article 8 or the civil law. On the other hand, it is now clear that an action may succeed in domestic law despite the absence of clear harassment, and that whether there is a breach of the law will depend on all the circumstances of the case; proportionality and reasonableness being at the heart of any decision.

The law in this area must take into account both the nature of photographic images and reality that photographs of famous individuals will, inevitably, be taken and published, and that a certain level of press intrusion has to be accepted; as part of that reality and to accommodate the fact that the 'victims' will be public figures. First, photographs are a more intrusive form of privacy violation; causing more harm and distress to the claimant and their family, irrespective of the questions of whether the victim is a public figure or whether the photograph is accompanied by a public interest story. Thus, in cases such as *Theakston, Murray* and *Weller*, the newspapers may be entitled to publish the story, but might be stopped from publishing private or intimate images of the victim. The law should also to some extent accept the reality of certain individuals having their photographs taken and published in the media. Taking these factors into account allows the courts to protect the claimant's privacy even where that individual has courted publicity and the publication of the story is otherwise justified, because of its nature or because of the claimant's status and behaviour. It also can work against the claimant in that it accepts that the taking of photographs do not constitute an a violation of article 8 or the civil law, because of the inevitability of such images being taken and the fact that well known individuals should accept a certain, reasonable level of intrusion in this area, and that the law must draw practical boundaries.

The law has a responsibility to safeguard individual privacy from unreasonable intrusions by the press, but at the same time it must establish a realistic and workable threshold to establish an action in such cases. The decision in *Stoute* was, of course, made an the interim stage, but still raises some interesting issues regarding the scope of the claimant's expectation of privacy, especially when it is captured in a public place, and whether the press can justify any intrusion – particularly in the form of public dissemination of photographs – on the basis of public interest.

Photographs and privacy protection and the European Court of Human Rights

Tuzunatac v Turkey, Application No 14852/18, decision of the European Court of Human Rights March 7, 2023.

Dr Steve Foster*

Introduction

Taking and publishing photographs of individuals without their consent raises issues of private and life and individual privacy, protected under Article 8 of the European Convention. However, not every unauthorised photograph will constitute a breach of Article 8. First, the claimant will need to show that they had an actionable and reasonable expectation of privacy in that image; and the press will be allowed to claim that there was a public interest in taking and publishing the photograph (and any accompanying story), which then overrode that privacy right. The balance has to be consistent with both Articles 8 (private life) and 10 (freedom of expression) of the ECHR, and the jurisprudence of the European Court of Human Rights in this area,[1]

All cases are fact-sensitive, but a recent decision of the European Court provides some insight into the factors that must be taken into account. In this case,[2] the Strasbourg Court had to decide whether the taking and publishing of a photograph showing two high profile actors in an intimate embrace was in breach of Article 8; the applicants having failed to get a remedy before the national courts. The cases illustrates the principles that the Strasbourg Court applies in such cases, as well as the consequences of national law not following the Court's jurisprudence.

The facts and decision in *Tüzünataç v Turkey*

The case concerned an application by a famous Turkish actor with respect to the broadcasting by a television channel of a video recording where she appeared to be kissing another famous actor on a terrace. She claimed that the dissemination of this recording constituted an infringement of her right to respect for private life under Article 8 ECHR.

The applicant is a famous Turkish actor who has appeared in several films and television series. The television show broadcast a video recording showing the applicant in the company of ŞG, an actor and humourist also known to the public, on the terrace of the applicant's apartment, located on the sixth and last floor of a building. In the film, the audience saw both actors getting closer to each other before kissing several times. The show's presenter called the video "the love bomb of the year" and "the revelation of Berrak Tüzünataç's very secret relationship with Ş.G." adding

> You will be amazed when you see the [joy] (*sefa*) strange of the couple. At the first light of the morning, when the watches indicated 5 o'clock and the sun was rising, they kissed each other several times on the terrace overlooking the sea. They had amazing gestures.

The video was accompanied by background commentary and a number of captions, including:

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[1] Most notably, *Van Hannover v Germany(No. 1),* Application Nos. 40660/08 and 60641/08, decision of the Grand Chamber 7 February 2012

[2] *Tuzunatac v Turkey,* Application No 14852/18, decision of the European Court of Human Rights March 7, 2023.

> This lady sitting on the balustrade of her terrace is the famous actress Berrak Tüzünataç. Besides, she has a glass of wine in her hand. She's probably drunk, she could fall over. As she takes a sip of wine, a large man appears behind her. [That] person hugging Berrak Tüzünataç [while standing behind her] and bringing her down [from the railing] is none other than Ş.G.
>
> Then the kisses go to the cheeks. Another [kiss on the] cheek. Now Ş.G. draws Berrak Tüzünataç to him with a [sudden] gesture.
>
> The attempt of Ş.G. to [the] kiss succeeds. Again she leans back [on the balustrade]. She looks at the sea panorama upside down. She straightens up again. S.G. whispers something in her ear and then they go back into the apartment.

A district judge accepted the applicant's request for an order pending trial, prohibiting the publication by the press of the images as well as of any article on the subject, as in his opinion both were likely to injure their personality rights. The applicant then brought a civil action against the parent company of the television channel and the person responsible for the programme arguing that the dissemination of these images, filmed without her knowledge and without her consent in close-up using a telephoto lens, had infringed the confidentiality of her private life and her personality rights. She requested damages and a ban on the rebroadcasting of the images together with their destruction. However, although the court extended the interim measure until the end of the civil proceedings, the Istanbul High Court dismissed the applicant's claims, noting that the journalists had filmed the images from a public thoroughfare and not by secretly entering the applicant's home. Further, they had come by the scene by chance, in the context of a pursuit of ŞG, and had only continued to film her when they realised that the individuals on the terrace were the applicant and SG. It concluded, therefore, that the broadcast was not unlawful, since the applicant was a public figure whose lifestyle and celebrity attracted the attention of the "people" and press, and that the publication had presented a logical link between the style of expression and the subject of the programme. Further, the programme was of a critical nature, reflecting reality and did not contain any expression likely to infringe the rights of personality, honour and reputation of the claimant.

Subsequently the Court of Cassation dismissed the appeal, finding that the decision was in accordance with procedure and law. The applicant then lodged an individual complaint with the Constitutional Court complaining of a violation of her right to the protection of her reputation and the length of the proceedings before the civil courts. The Constitutional Court held that there had been no violation of the applicant's right to respect for her private life, and that the complaint relating to the length of the proceedings was inadmissible for manifest lack of foundation. It considered that the images of the applicant should be examined in the context of freedom of the press given the status of the applicant, an artist with a public of admirers, and where they had been filmed not from inside her apartment but from a public road while she herself was in a place exposed to everyone's view. Further, the images where the applicant and ŞG approach each other did not contain any elements likely to cause unacceptable discomfort to those concerned, noting that she had chosen to approach her companion of her own free will.[3]

Before the European Court, the applicant relied on, firstly, Article 8 of the Convention, arguing that the video showed intimate moments shared with her companion, filmed while they were on the terrace of her apartment, and thus constituted an interference with her right to respect for her private life. She also complained of the absence of an adequate judicial response to this interference. The Court declared the application admissible and then ruled on its merits.

The European Court first confirmed that the concept of private life covered elements relating to the identity of a person, such as his name, his photograph and his physical and moral integrity, and also

[3] With respect to the complaint relating to the length of the proceedings, it found that the period of four years over which they had taken place was reasonable.

implies the right to live in private, away from unwanted attention.[4] That guarantee is primarily intended to ensure the development, without external interference, of the personality of each individual in his relations with his fellow human beings; consequently, there is an area of interaction between the individual and third parties which, even in a public context, may fall within the realm of private life.[5] Further, while a private person unknown to the public may claim special protection of his right to private life, the same does not apply to public persons,[6] although in certain circumstances a person, even known to the public, can rely on a "legitimate expectation" of protection and respect for his private life. Accordingly, the publication of a photograph interferes with the private life of an individual even if it is a public person; a photograph containing very personal, even intimate, "information" about an individual or his family.[7]

The Court also recognised the right of every person to their image, emphasising that this is one of the main attributes of his personality, expressing his originality and allowing him to differentiate themselves from their peers. That right presupposes the control by the individual of his image, which notably includes the possibility of refusing its dissemination, and the right for him to oppose the capture, conservation and reproduction of it by another.[8] In determining whether a publication violates the individual's right to privacy, the Court must take into account how the information or photograph was obtained and must consider the fact that the consent of the persons concerned has been obtained or that a photograph arouses a more or less strong feeling of intrusion.[9] In cases such as this, the photographs appearing in the so-called "sensational" press, or "press of the heart", which usually aims to satisfy the curiosity of the public for the details of the strictly private life of others, are often carried out in a climate of continuous harassment, which may cause the person concerned to have a very strong feeling of intrusion into his or her private life, or even of persecution. Also relevant in the Court's assessment is the purpose for which a photograph was used and may be used in the future.[10] The Court also noted that other criteria may be taken into account depending on the particular circumstances, such as the seriousness of the intrusion into private life and the repercussions of the publication for the affected person, as well as the fact that the audio visual media often have a much more immediate and powerful effect than the written press.[11]

On the other hand, in the Court's view, although the disclosure of information about the private lives of public figures generally pursues a goal of entertainment and not of education, it can contribute to the variety of information made available to the public and undoubtedly benefits from the protection of the Article 10 of the Convention. Nonetheless, this protection may give way to the requirements of Article 8 where the information in question is of a private and intimate nature and there is no public interest in its dissemination.[12] Thus, when the situation is not subject to any political or public debate and the photographs and the comments relate exclusively to details of the person's private life with the sole aim of satisfying the curiosity of a certain public, freedom of expression calls for a more restrictive interpretation.[13]

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[4] *Tüzünataç v Turkey*, at [28], citing *Smirnova v. Russia*, Application Nos 46133/99 and 48183/99, at [95].
[5] *Tüzünataç v Turkey*, at [30], citing *Couderc and Hachette Filipacchi Partners c. France* [GC], Application No. 40454/07, at [83].
[6] Citing *Minelli v. Switzerland*, Application no. 14991/02, decision of the European Court June 14, 2005.
[7] *Tüzünataç v Turkey*, at [31], citing *Von Hannover v. Germany (No 2)* [GC], Application Nos. 40660/08 and 60641/08, decision of the Grand Chamber 7 February 2012, at [97].
[8] *Tüzünataç v Turkey*, at [32], citing *López Ribalda and others v. Spain* [GC], Application Nos. 1874/13 and 8567/13, decision of the Grand Chamber, October 17, 2019), at [89].
[9] Citing *Von Hannover v. Germany*, note 28, and *Hachette Filipacchi Associés v France*, Application No. 71111/01, decision of the European Court, June 14, 200, at [48].
[10] *Tüzünataç v Turkey*, at [33], citing *Reklos and Davourlis v Greece*, Application No. 1234/05, decision of the European Court, 15 January 2009, at [42], and *Hachette Filipacchi Associés v France,* Application No 12268/03, decision of the European Court of Human Rights 23 July 2009, at [52]).
[11] *Tüzünataç v Turkey* at [34], citing *Pedersen and Baadsgaard v. Denmark* [GC], Application No. 49017/99, at [79].
[12] *Tüzünataç v Turkey*, at [36], citing *Mosley v. United Kingdom*, Application No. 48009/08, decision of the European Court of Human Rights May 10, 2011, at [131],
[13] Ibid, citing *Hájovský v. Slovakia*, Application No 7796/16, decision of the European Court 1 July 2021, at [31].

Applying the above principles to the present application, the question was whether the national courts failed to protect the applicant against the claimed interference, and whether in the circumstances a fair balance was struck between the individual's right to respect for private life, on the one hand, and freedom of the press on the other.[14] It then observed that the video recording related exclusively to the applicant's strictly private life in the context of a relationship which she allegedly had at the material time with an actor known to the public, containing images of her spending time with her partner on the terrace of her home. The audience saw the couple chatting, getting closer to each other and kissing and the broadcast was announced by the presenter of the programme with expressions likely to arouse the interest and attention of the public: such as "the love bomb of the year", "the revelation of the very secret relationship "of the interested party and" the abnormal joy of the couple.''[15] In that context, even if it is accepted that elements of the private life could be revealed because of the interest which the public could have in knowing certain traits of the personality of a public person, a person's love and sentimental life is in principle of a strictly private nature, and details relating to a couple's sex life or intimate moments should only be made known to the public without prior consent to do so in exceptional circumstances.[16] The Court also noted that the dissemination of those details seems to have had the sole purpose of satisfying the curiosity of a certain audience for the details of the applicant's private life and cannot as such, whatever the notoriety of the person concerned, be taken to contribute to any debate of general interest for society.[17] The general interest cannot be reduced to the expectations of a public fond of details about the private life of others, nor to the taste of readers for the sensational or even, sometimes, for voyeurism.[18]

With respect to the circumstances in which the images were obtained by the journalists, the Court reiterated that the fairness of the means used to obtain information and return it to the public, as well as respect for the person, are essential criteria to be taken into account by the Court.[19] Thus, when information involving the privacy of others is in question, it is up to journalists to take into account, as far as possible, the impact of this information and the images concerned before their dissemination. In particular, certain events in private and family life are the subject of reinforced protection under Article 8 of the Convention and must therefore lead journalists to exercise prudence and precaution when covering them.[20] In the particular circumstances of this case, in judging her reasonable expectation of privacy, the applicant could not have expected to be filmed or to be the subject of a public report, and did not co-operate with the media. Even if the terrace of the applicant's apartment was visible from the public thoroughfare where the journalists were, the comments that they exchanged in the video suggest that they had made the recording secretly and sought to hide so as not to be seen by the applicant and her partner when they were filming. Further, the video was made at 5 a.m., and not at a time of day when the public flocks to the streets and when the applicant could have anticipated the presence of journalists outside. In any event, it is indisputable that the images were taken without the applicant's knowledge and that they were disseminated without her consent.[21] The Court thus reaffirmed that the notoriety or the functions of a person cannot in any case justify media harassment or the publication of photographs obtained by fraudulent or clandestine manoeuvres, or revealing details of the private life of persons and constituting an intrusion in their privacy.[22]

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[14] *Tüzünataç v Turkey*, at [39-40].
[15] *Tüzünataç v Turkey* at [42].
[16] *Tüzünataç v Turkey*, at [43], citing *Ojala and Etukeno Oy v. Finland*, Application No. 69939/10, decision of the European Court, 14 January 2014, at [54-55], *Ruusunen v. Finland*, Application No. 73579/10, decision of the European Court of Human Rights, 14 January 2014, at [49-50], and *Couderc and Hachette Filipacchi v France,* Application No. 40454/07, decision of the European Court of Human Rights 10 November 2015.
[17] Citing *Von Hannover*, note 28 above, at [65], and *MGN Limited v. United Kingdom*, Application No. 39401/04, decision of the European Court, 18 January 2011, at [143].
[18] *Tüzünataç v Turkey*, at [44],
[19] Citing *Egeland and Hanseid v. Application No. 34438/04*, decision of the European Court 16 April 2009, at [61].
[20] *Tüzünataç v Turkey*, at [45], citing *Éditions Plon v. France*, Application No. 58148/00, §§ 47 and 53, and *Hachette Filipacchi Associés*, note 37, at [46-49).
[21] *Tüzünataç v Turi*ey at [46].
[22] *Tüzünataç v Turkey*, at [47].

In addition, the Court found that by relying on the applicant's public profile and that the filming took place in a public place, the national courts could not be said to have properly balanced the applicant's right to respect for her private life and freedom of the press. The domestic courts should have shown greater rigor when weighing the various interests involved, in particular to the content of the broadcast video, which related to details of the applicant's love and intimate life (which in no way related to a subject of general interest) and to the circumstances (not in accordance with the standards of responsible journalism), in which these images were obtained and disseminated by the journalists, without the consent of the person concerned. In particular, the argument that the applicant had not been sufficiently attentive to the protection of her privacy by approaching her companion at a point on the terrace of her apartment visible from the outside was rejected. Acceptance of this criterion of a "spatial isolation" defence would be tantamount to saying that, unless she is in an isolated place sheltered from the public, the applicant must agree to be filmed almost at all times, and that these images are then to be very widely disseminated, even if such images relate exclusively to details of a person's private life.[23]

Accordingly, the Court concluded that the national courts failed in their obligation to protect the applicant's right to respect for her private life against the infringement which had been caused by the dissemination of those images, and there had been a violation of Article 8.[24] With respect to the claim under Article 6, the Court considered that the length of the proceedings before the civil courts, namely approximately four years and three months, could not be considered as disregarding the principle of a 'reasonable time', taking into account the nature of the case - which required careful balancing of the different interests at stake - the examination of the case at two levels of jurisdiction, and the introduction of two appeals before the Court of Cassation. Thus, on the facts there was no breach of Article 6.[25]

Photographs, privacy and the European Court of Human Rights

The decision in *Tüzünataç v Turkey* excites little debate, unless one believes that well-known public celebrities enjoy little or no privacy and thus have sold any expectation of privacy by the fact of them being famous and being the subject of interest from the public.[26] Thus, the decision of the domestic courts in this case, having failed to grasp the essential jurisprudence of the European Court in this area, was ripe for challenge by the European Court for failing to consider and apply the Court's fundamental principles in the necessary balancing act between privacy and freedom of expression.

To succeed in a case under Article 8, the applicant must first show that they have a reasonable expectation of privacy, and as there is no absolute right not to have one's photograph taken without one's consent, all the circumstances of the case must be considered in determining whether there is a violation of Article 8. Nonetheless, despite the fact that there is no absolute right not to have one's image photographed and published, the European Court has accepted the potential for greater intrusion into privacy caused by photographs. Thus, in *Reklos v Greece*,[27] it was noted that a person's image constitutes one of the chief images of a person's personality, as it reveals the person's unique characteristics and distinguishes the person from his or her own peers.[28] In these cases, therefore, photographing and distributing photographic images will strengthen the privacy claim.

The application of the principles becomes more complicated when the claimant is a celebrity. In *Von Hannover v Germany*,[29] the European Court held that the publication of photographs taken of the former Princess Caroline of Monaco and her family in her daily life clearly fell within Article 8. In stressing

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[23] *Tüzünataç v Turkey* at [48-49]. The Court also noted that the national authorities had failed to take sufficient account of the emotional distress and the consequences for the applicant's private and professional life which the dissemination of the images may have caused her.
[24] *Tüzünataç v Turkey*, at [50-51].
[25] *Tüzünataç v Turkey*, at [52-54]. As the applicant did not submit a claim for just satisfaction within the time allowed to her in accordance with the Court's procedure, the Court considered that there was no reason to award him any sum under this head (at [56]).
[26] See Lord Woolf in *A v B plc* [2002] 3 WLR 542, at [43], a view now discredited after *Von Hannover*.
[27] [2009] EMLR 16
[28] *Recklos v Greece,* at para [40].
[29] *Von Hannover v Germany* (2004) EMLR 2

the significance of photographs as means of invading privacy, the Court held that the photographs in question – of her shopping and relating with close friends and her children in a public place - contained *very personal or very intimate 'information'* about an individual. Thus, although freedom of expression extended to the publication of photographs, this was an area in which the protection of the rights and reputation of others took on particular importance.[30] Further, photographs appearing in the tabloid press were often taken in a climate of continual harassment, inducing in the person concerned a very strong sense of intrusion into their private life or even of persecution.[31]

Significantly, the Court noted that *everyone, including people known to the public*, had a legitimate expectation that his or her private life would be protected,[32] and this will impact on whether the publication can be justified by the public interest in freedom of expression. In the case the Court noted that the photographs showed the applicant in scenes from her daily life, and thus engaged in activities of a purely private nature, taken secretly and without her consent and making no contribution to a debate of public interest. Relevant to the instant case, it also noted that the general public did not have a legitimate interest in knowing the applicant's whereabouts or how she behaved generally in her private life, even if she appeared in places that could not always be described as secluded and was well known to the public.[33] These rules applied to the instant case, as the apartment and the applicant could, with some effort, be viewed by the public from a public location.

With respect to the public profile of the applicant, some case law suggests that the Court will take into account the status of that individual in determining whether there has been a violation of Article 8. Thus, in *Van Hannover v Germany (No 2*),[34] it was held by the Grand Chamber that there had been no violation when photographs had been taken of Princess Caroline of Monaco and her husband on a skiing holiday. Because the photographs accompanied a story which questioned whether the couple should have been holidaying at a time when her father – Prince Rainier - was critically ill, they related to a matter of genuine public interest and were thus justified on grounds of freedom of expression.[35] The Court also stated that irrespective of the question to what extent the she assumed public functions on behalf of the Principality of Monaco, it could not be claimed that the applicants, whom were undeniably well known, were ordinary private individuals; they had to be regarded as public figures.[36] Similarly, in *Von Hannover v Germany (No 3),*[37] there was no breach when the domestic courts refused to grant an injunction prohibiting the further publication of a photograph of the applicant and her husband taken while they were on holiday; the photograph being accompanied by an article about the trend among the very wealthy towards letting out holiday homes and including information about the home. Although the photograph of the couple did not concern a matter of public interest, the article did, and the article did not provide private information relating to the couple and was not simply a pretext for taking a photograph.[38]

Similarly, in *Springer v Germany*,[39] it was held that there had been a violation of Article 10 when an injunction had been granted to a well-known television actor prohibiting the applicants from publishing photographs of him being arrested for cocaine possession, together with articles about his previous drug use and convictions. In this case, of course, the facts as disclosed were not intimate private details but concerned public judicial facts, but the Court noted that the actor was sufficiently well known to qualify as a public figure, thus reinforcing the public's interest in being informed of his arrest and the proceedings against him.[40] Whether the taking and publication of photographs constitutes a breach of article 8 depends, therefore, on a number of factors relating both to the expectation of the individual's

[30] *Von Hannover v Germany*, at [59].
[31] Ibid
[32] *Von Hannover v Germany*, at [69], italics added.
[33] *Von Hannover v Germany*, at [74].
[34] (2012) 55 EHRR 15
[35] *Von Hannover v Germany (No 2),* at [118].
[36] (2012) 55 EHRR 15, at [120]
[37] Decision of the European Court of Human Rights, 19 September 2013
[38] *Von Hanover v Germany (No. 3),* at [76].
[39] (2012) 55 EHRR 6
[40] *Springer v Germany*, at [99].

privacy and the public interest in publication; and the public status of the individual is apparently vitally important in respect of both questions.[41]

In the present case, however, there was no public interest or contextual debate about celebrity life, beyond the capture and revelation of the applicant's private life and image, thus the applicant's status was irrelevant. This is the case even though the Court, in cases such as *Springer*, has drawn a distinction between wholly private individuals and persons well-known to the public, giving added protection to the former. For example, in *Egeland and Hanseid v Norway*,[42] it was held that there had been no violation of Article 10 when two journalists had been prosecuted and fined for taking photographs of accused persons outside a court hearing without their consent, contrary to national law. The Court noted that the photographs had been taken without her consent and directly after she had been informed of her conviction for a triple murder; she was in tears and in great distress and thus at her most vulnerable psychologically. The public interest in the photographs and the trial did not outweigh the woman's right to privacy and the interest in the fair administration of justice. Similarly, in *Recklos v Greece*,[43] it was held that the taking of a baby's photograph in a hospital without the parent's consent constituted a clear violation of Article 8. In the Court's view there was no public interest in taking the photograph and the retention of the photographs contrary to the parents' wishes was an aggravating factor contributing to the finding of a breach.

Conclusions

Despite some flexibility in public celebrity cases, the outcome in *Tüzünataç* was very predictable. Irrespective of natural public curiosity in two very well-known celebrity figures, the video and its public broadcasting clearly caught the applicant and her partner in a private, intimate moment that gave rise to a clear and legitimate expectation of privacy. Claims that the images were not captured in the apartment itself, and that the scene was visible from a public place, is both disingenuous and ignores the reality of reality of long lens photo-journalism, which allows events taking place on private premises to be captured from public highways or other buildings that the public have access to. It is surprising, therefore, that the Turkish domestic courts, being bound to follow at least the basic tenets of privacy law and the jurisprudence of the Strasbourg Court, should accept such a claim.

Equally baffling is the domestic courts' ruling that the broadcast was not unlawful because the applicant was a public figure whose lifestyle and celebrity attracted the attention of the "people" and press, and that the publication had presented a logical link between the style of expression and the subject of the programme. This ruling flies in the face of the seminal ruling in *Von Hannover that* celebrities should not be treated as public figures *par excellance*, thus further reducing their expectation of privacy, and that unless justified by the public interest intrusions into their private lives are in violation of Article 8. Further, the ruling that the programme was of a critical nature, reflecting reality and did not contain any expression likely to infringe the claimant's rights of personality, honour and reputation as public figures who would or should expect such intrusions, is wholly inconsistent with the jurisprudence in this area, which draws a clear distinction between the public interest and public curiosity.

The decision in the recent case sends a clear warning to the press and the domestic authorities concerning the necessary balance between celebrity privacy and press freedom. The well-known status of the individual is, in most cases, the driving force in capturing and disseminating photographic images, and other details. This will serve the public's curiosity and sell newspapers, but when this impinges on sufficiently intimate and serious aspects of that person's private life (such as the details of an intimate relationship), then privacy rights come into play in disturbing that public curiosity and the commercial gain of publishers. The European Court has accepted that this natural curiosity can reduce the

[41] See also *Hachette Filipacchi Associés v France,* Application No 12268/03, decision of the European Court of Human Rights 23 July 2009, where the Court attached particular importance to the public notoriety of the applicant and the fact that the published photographs had been derived from advertising material as opposed to being obtained through contentious or undercover methods.

[42] (2010) 50 EHRR 2.

[43] [2009] EMLR 16.

expectation of privacy of such individuals, but the guidance provided in *Von Hannover* is sufficiently clear to have allowed the Turkish courts to provide the actor with a suitable remedy, and to have avoided the Strasbourg application altogether.

CASE NOTES

Duty of care – police liability – public policy - exceptional cases

Woodcock v Chief Constable of Northamptonshire [2023] EWHC 1062 (KB)

High Court

Facts in *Woodcock*

The claimant had been in an abusive and coercive relationship with RG [at 61]. The trial judge found that, due to an increase in the number and seriousness of threats, the Chief Constable agreed officers would stay in a police car outside the claimant's home during the night of 19 March 2015 (albeit for an indefinite period depending on other policing needs) [at 79]. Officers also agreed a safety plan with the claimant which included advice that the claimant should call the police if RG attended her property and that she should make neighbours aware of the issue [at 80]. The defendant also unsuccessfully 'deployed a substantial group of officers to locate and arrest RG' [at 82].

At 7:32am on 19 March 2015 a neighbour called 999 and said RG was outside the claimant's property, the claimant would be leaving in a few minutes and RG was probably planning an attack [at 84]. Officers were dispatched to the claimant's address. However, neither the neighbour nor the call handler rang the claimant to warn her of the danger.

The claimant subsequently left her house. RG stabbed her with a large knife 7 times and was subsequently convicted of attempted murder [at 89; 5].

The decision at first instance

Following a 5-day trial the claim was dismissed. The trial judge concluded that: first, the police did not owe a duty of care to the claimant; second, in the alternative, there had been no breach of duty; third, that the causation test was not met. The judge noted that the amended Particulars of Claim did not plead that the claimant would have remained inside the property had she been warned about RG's presence by the police [at 117]. Nor was there any evidence on causation, despite the claimant's representatives having been given an opportunity to recall the claimant to give evidence on the point [at 117].

The decision of the High Court

The claimant appealed to the High Court. On the question whether the police owed a duty of care, the High Court concluded the police did owe the claimant a duty to pass on information that the alleged abuser was loitering outside her property. It stated:

> The exceptions to the general rule that the police are not liable and owe no duty of care for failing to act or failing to prevent harm caused by criminals are limited to cases where: (1) the police have *assumed a specific responsibility* to protect a specific member of the public from attack by a specific persons or persons; (2) *exceptional or special circumstances* exist which create a duty to act to protect the victim *and/or it would be an affront to justice* if they were not held to account to the victim. To engage a duty of care on the police to act to protect a member of the public the Courts will carry out a close analysis of the evidence relating to:
>
> (a) the foreseeability of harm and the seriousness of the foreseeable harm to the specific member of the public (the suggested victim); and (b) the reported or known actions and words of the specific alleged protagonist in relation to the feared or threatened harm;

> and (c) the course of dealing between the potential victim, the police and the alleged protagonist focussing on proximity; and (d) the express or implied words or actions of the police in relation to protecting the victim from attack by the protagonist and the reliance of the victim (if any) on the police for protection as a result; and (e) whether the public policy reasons for refusing to impose a duty of care outweigh the public policy in providing compensation for tortiously caused damage or injury (emphasis added)

In his judgment, only if factors (a) to (c) and (e) [and in some cases also (d)] are proven, on the balance of probabilities by the claimant, with sufficient weight and severity and immediacy, will the common law combined with public policy exceptionally permit the courts to rule that a civil law duty of care was owed by the police to the specific potential victim to protect him or her from the actions of the specific third party criminal in the circumstances or to warn him or her of danger. [49- 50].

The court then considered each of the factors outlined in (a)-(e) above and felt they were fulfilled. Harm was reasonably foreseeable and the 'detailed safety plan' agreed by officers created:

> A very close tripartite nexus in which the Claimant was relying on the Defendant officers' advice and the safety plan. In my judgment there would be little point in advising the Claimant to ask neighbours to keep watch for RG and to tell the Claimant or the police, if the police were then going to keep any such report secret from the Claimant [at 108].

The judge decided that public policy meant abused women should be protected and that the effort involved in passing on the vital information would have been 'infinitesimal' [109]. Public confidence in reporting matters to the police would be undermined if courts supported the police's omission in this case [at 109].

In light of the foregoing, the court concluded that there were 'exceptional or special circumstances' which created a duty to warn and that police had assumed responsibility. On the question of whether that duty had been broken, and the question of causation, the High Court concluded that the police had breached the duty to warn [at 115], and although it could not describe the trial judge's decision on causation as 'wrong', it found that that decision was 'unjust' within the meaning of CPR 52.21(2)(b) and thus the case should be remitted.

Analysis

In *Brooks v The Commissioner of Police* [2005] UKHL 24, Lord Nicholls noted that 'there may be exceptional cases where the circumstances compel the conclusion that the absence of a remedy sounding in damages would be an affront to the principles which underlie the common law. Then the decision in *Hill's* case should not stand in the way of granting an appropriate remedy.' What such an exceptional case might look like has remained a matter of speculation, until Ritchie J handed down judgment in *Woodcock*, which, if it remains good law, is likely to have a significant impact upon the law concerning the liability of the police in the tort of negligence.

In *Woodcock*, the High Court found that the police were under a positive common law duty to warn the claimant of a potential danger. It found the police had assumed responsibility towards the claimant by advising her to set up a 'protective ring' around her property and, in the alternative that this was a rare 'special / exceptional' case in which there was a positive duty to warn. The court also overturned the trial judge's decision on causation, saying that although the learned judge's findings on this point were not 'wrong' they were 'unjust'.

On any view, this case is extremely interesting and will attract a good deal academic and judicial attention. This is (probably) the first time that a higher court has found that 'exceptional/ special circumstances' justified the imposition of a positive, common law, duty on the police to warn. If the decision is left unchallenged, it may open the door for future claims and lead to a gradual widening of the 'exceptional circumstances' in which public authorities can be liable in negligence.

The decision arguably runs contrary to Supreme Court authority that negligence by public authorities should be treated in the same way as negligence committed by private parties (see *Robinson v Chief Constable of West Yorkshire* [2018] UKSC 4, *Poole Borough Council v GN* [2019] UKSC 25 etc.). In *Woodcock* the High Court concluded that an assumption of responsibility was created by the police's provision of a safety plan and the Claimant's reliance on the unstated implications of that plan. It is questionable whether the High Court would have come to an identical conclusion had similar advice been given by a friendly neighbour, for example.

The decision comes close to developing a common law duty akin to that imposed by Article 2/ 3 ECHR (as explained in *Osman v UK* and other case law). Indeed, the High Court even referred to an 'operational duty' at [at 101]. It is arguably difficult to reconcile this approach with Lord Toulson's comment in *Michael v Chief Constable of South Wales* [2015] UKSC 2 that the common law should not develop in conjunction with the HRA. Perhaps the decision reflects a desire to strengthen the common law given the possibility that the UK may leave the ECHR.

The High Court's criticism of the defendant's operational decision-making is, with respect, open to question. The High Court questioned why officers would ask neighbours to call 999 if any information provided would be kept 'secret' from the claimant [at 108]. There are numerous possible responses to this. One reason for the police wanting to know about any sightings of a wanted suspect was, presumably, so that officers could be dispatched to arrest RG – as occurred in this case. Although it would have been much better to pass on the information to the claimant, there might have been reasons for not doing so. There was disputed evidence that the claimant herself had been aggressive and a concern that she/her estranged husband might attack RG [at 91]. Courts have traditionally been reluctant to intervene in such issues. It is surprising that the claimant was found to have relied on an assurance which was not explicitly provided and when the trial judge found the plan was flexible depending on other policing needs.

Finally, the judgment arguably risks defensive policing. Officers may be concerned that agreeing even a broad safety plan, which does not contain a promise to call the victim with information, may imply greater assurances than had been intended and create a duty of care

Given the nature of the court's conclusions, it is likely the case will be appealed to the Court of Appeal.

Conor Monighan, barrister at 5 Essex Court Chambers. This article was originally published via 5 Essex Court's website and the UK Human Rights Blog

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Pre-charge disclosure - expectations of privacy – media freedom – public interest – sexual exploitation - compatibility of domestic law

RTBF v Belgium, Application No 417/15 decision of the European Court of Human Rights, 13 December 2022.

The facts and decision in *RTBF v Belgium*

RTBF, a Belgian public-service corporation, broadcast a report on the role of a couple (Mr and Ms V) in organising private wrestling matches with the participation of girls who were partially undressed, which had occurred in the sports hall of a school. RTBF television news included previews of the report, including some footage, and it was also broadcast on other stations. At the time programme was

broadcast a judicial investigation into the events in question was pending, although no charges had yet been brought.

The report had been prepared by a journalist, D, after he had learnt about a complaint by a girl (VB), who was a pupil in the school in question. VB had gone to a family planning centre to complain about the actions of Mr and Ms V and was received by the centre's doctor, who happened to be the partner of the journalist D. According to RTBF, the girl, on the doctor's advice, contacted D, who decided to carry out a journalistic investigation. He interviewed the applicant and three other girls who wished to remain anonymous. In the course of his investigation, he discovered the existence of the female wrestling matches, including, among other aspects, the recording of sex videotapes and their commercialisation, and the suspected involvement of Mr and Ms V. After VB had lodged a formal complaint with the police, D was informed by a judicial source about a search that was due to be carried out at the home of Mr and Ms V and the journalist and his team were waiting for the police officers as they arrived to conduct the search and filmed Mr V at the door of his home as the police officers entered. The journalist asked the neighbours what they knew about the couple and the alleged female wrestling matches in which they were involved.

Sometime after the search, in possession of the information given by the girls, D asked Mr and Ms V for an interview, which they accepted. The interview revealed that the couple arranged gatherings which they described as "female wrestling matches" in their home; these involved young women who were often naked, and some young women agreed to participate, for remuneration, in "mixed matches" with men known as "sponsors", and to be filmed during those matches. In the interview Mr V acknowledged a certain form of libertine conduct between consenting adults. He denied that he had forced the girls to participate in the matches or to be filmed.

Mr and Ms V considered that they had been insulted by the filmed sequences and the report, and applied to the Belgian courts seeking compensation for the damage they had allegedly sustained as a result of what they described as "a trial by media". The Namur Court of First Instance granted their claim in part and ordered RTBF to pay them compensation of 2,500 euros (EUR) each and EUR 1,000 in court fees. RTBF appealed against that decision and the Liège Court of Appeal upheld the judgment against RTBF and ordered it to pay each of the spouses one euro in respect of non-pecuniary damage; The Court of Cassation dismissed an appeal by RTBF. In the same year, Mr V was sentenced to 18 months' imprisonment, suspended, for several offences, including some related to the activities denounced by D. A mere finding of guilt was pronounced against Ms V in respect of some of the alleged offences.

RTBF lodged an application under the European Convention, claiming that the civil judgment against it had represented an unjustified interference with its right to freedom of expression under Article 10. The Court considered that the civil judgment constituted an interference with its right to freedom of expression, that the interference had a legal basis - namely Article 1382 of the Civil Code - and had pursued the aim of "protection of reputation". Then, in deciding the necessity of the interference in a democratic society, it began by noting that the programme undoubtedly concerned matters of public interest, its purpose being to inform the public about the suspicious conduct of Mr and Ms V and the investigation carried out by the judicial authorities. Thus, the programme had concerned not only "child protection" in the general sense, but also addressed a particularly serious form of violence against children, namely sexual exploitation and abuse. The programme referred to the existence of a particular aspect of the sex industry, specifically so-called "female wrestling" shows with a sexual connotation, and the involvement in that activity of several young girls, at least one of whom had been a minor at the relevant time, and at the behest of a person belonging to their social environment. The programme also reported on the authorities' lack of trust in the girls' statements and the difficulties encountered by these girls in seeking protection and asserting their rights, evidenced by the footage in the report concerning the police's reluctance to act on the first complaint lodged by one of the girls testifying anonymously, and by the school head teacher's refusal to believe VB's account.

The Court also noted that the report had been broadcast three months after the investigation had begun, and by that date, the judicial authorities had made no statement about the conduct of the investigation. Given the importance of the issues raised in the report and the lack of an official statement by the

investigating authorities, the public thus had an interest in being informed of the pending proceedings, including in order to be able to exercise its right of scrutiny over the functioning of the criminal justice system and, where necessary, to be alerted to the potential danger for girls who were likely to associate with Mr and Ms V. Lastly, at the end of the report broadcast. D. had stated that the judicial authorities" were expecting further witnesses to come forward.

Given that the exercise of freedom of expression in the context of a television programme on a subject of major public interest was at stake, the Belgian authorities had had only a limited margin of appreciation in determining whether there was a pressing social need to take the measure that they did in this case. Further, although Mr V's status as a former head teacher did not confer on him the status of a public figure, Mr and Ms V had agreed to be interviewed by the journalist – for RTBF, which is a national and international television company – thus agreeing to be placed in the spotlight, so that their "legitimate expectation" that their private life would be effectively protected had been limited.

Further, the manner in which D had obtained the information could not be regarded as unfair, and the veracity of the events described in the report had not been disputed by the parties to the domestic proceedings, nor by the parties to the proceedings before the Court. Neither had D's good faith been in issue as he had a sufficient "factual basis" for his value judgment and the style and means of expression used by the journalist corresponded to the nature of the issues raised in the report.

The European Court stressed that the Court of Appeal had not established that the report had had an impact on the direction of the investigation or the decisions taken by the investigating courts, and that at no point had D asserted that the charges on which the search of Mr and Ms V's home was based had been proven, or that the couple had committed the offences under investigation. During the television news and at the end of the broadcasted report, viewers had been reminded that the investigation was ongoing and that the couple were presumed innocent. Viewers had been put in a position to understand that the case had not yet come to trial, accordingly, the Court held that taken as a whole, the report had merely described a state of suspicion against Mr and Ms V, without exceeding the threshold of that suspicion. The Court concluded that the reasons put forward by the domestic courts had not been sufficient to establish that the interference complained of had been "necessary in a democratic society", and that although the penalty imposed on RTBF had been lenient, it could have had a chilling effect and that in in any event it had been unjustified. In view of the importance of the media and of the reduced margin of appreciation enjoyed by the domestic authorities in respect of a television programme on a subject of considerable public interest, the Court considered that the need for restrictions on freedom of expression had to be convincingly established, and that there had been a violation of Article 10.

Analysis

In *Bloomberg LP v ZXC* [2022] UKSC 5, the UK Supreme Court confirmed that, in general, a person under criminal investigation has, prior to being charged, a reasonable expectation of privacy in respect of information relating to that investigation. Consequently, as a starting point at least, the revelation of those details will amount to a breach of an individual's expectation of privacy, unless justified by any public interest defence, or other circumstances which refute or outweigh that initial expectation of privacy. The question now is whether such a rule is compatible with principles of free speech and press freedom, and the case law of the European Court of Human Rights in this area, in particular following the ruling in *RTB*, above.

The decision in *Bloomberg*, and the High Court ruling in *Cliff Richard v BBC* ([2018] EWHC 1837 (Ch)), gave rise to several areas of concern with respect to media freedom and the public interest defence. First, there were concerns that the starting point might make it more difficult to justify any interference via the defence of public interest once the expectation of privacy has been established as that starting point. Second, in *Bloomberg*, the Supreme Court insisted that the possible criminal nature of investigations into the claimant's activities was irrelevant, possibly, conflicting with the principle that individuals should not be allowed to suppress evidence of their own (admittedly in these case suspected) wrongdoing. Accordingly, the Supreme Court's decision might be regarded as unduly

restrictive of press freedom and investigative journalism, thus clashing with many of the principles that the Court has established in the area of public interest free speech (*Sunday Times v United Kingdom* (1979) 2 EHRR 245*, Lingens v Austria* (1986) 8 EHRR 407, *Oberschlick v Austria* (1995) 19 EHRR 389, *Observer and Guardian v United Kingdom* (1991)14 EHRR 153, and *Axel Springer v Austria* (2012) 55 EHRR 6), including the decision in *RTB*.

Specifically, the decision in *Bloomberg* might be difficult to reconcile with the principle that Article 8 should not be relied on in order to complain of a loss of reputation that resulted from the claimant's own actions (*Gillberg v Sweden* (2012) 34 BHRC 247), although the Supreme Court held that this only applied where a person is actually convicted of a criminal offence or investigated and found to have committed the alleged misconduct. Thus, in *Axel Springer v Germany* (2012) 55 EHRR 6), in the Grand Chamber held that in principle the public did have an interest in being informed—and in being able to inform themselves—about criminal proceedings, whilst strictly observing the presumption of innocence. That interest, in its view, will vary in degree, as it may evolve during the course of the proceedings—*from the time of the arrest*—according to a number of different factors, such as the degree to which the person concerned is known, the circumstances of the case and any further developments arising during the proceedings (at [99]). At first glance, the Grand Chamber's judgment in Axel Springer is clearly confined to reporting of public events and judicial proceedings post arrest and charge; very different from the facts *in Bloomberg*, where the individual has not yet been charged. Clearly, therefore, an individual would have a greater expectation of privacy pre-charge, or arrest, although the ruling in RTB casts doubts on the starting point established in *Bloomberg*.

The European Court has certainly imposed limitations on the press when reporting on criminal investigations, both as a means of upholding due process and individual privacy, including the right to be forgotten and to facilitate the process of rehabilitation *(Egeland v Norway* (2010) 50 E.H.R.R. 2 and *Mediengruppe Österreich GmbH v Austria* (Application No. 37713/18, decision of the European Court of Human Rights 26 April 2022). The Court has also approved of restrictions that uphold the administration of justice, and where the media have misused confidential information in the reporting on the case, as the appellants had of course been guilty of in *Bloomberg* (*Bedat v Switzerland* (2016) 63 EHRR 15).

The question, therefore, is whether the decision in *RTB* shows that the decision, or rule, in *Bloomberg* is inconsistent with European jurisprudence, or whether RTB can be seen as an exception to the starting point of privacy expectation lawfully established in *Bloomberg*. The facts and context of both cases are certainly very different; most notably, in *RTB* the applicants had openly debated the investigations with the media and could, therefore have forsaken their legitimate expectation of privacy under Article 8. Further, the public interest in those proceedings could be regarded as higher than in *Bloomberg*: not only did it raise issues of sexual exploitation of young people, the programme was part of an ongoing public debate that the applicants had participated in. True, the applicants had not admitted guilt, but neither had the programme insinuated criminal liability or otherwise disturbed the presumption of innocence. In that respect the European Court's trust in the media to draw a clear line between discussing ongoing criminal proceedings and insinuating guilt contrasts with the approach taken in *Bloomberg*.

On the other hand, the difference in the facts between this cases and *Richard v BBC* are probably substantial enough to justify the ruling in *Richard*, where it was held that intensive coverage of a police operation at the claimant's property investigating possible sexual abuse offences was in breach of the claimant's Article 8 rights. Both cases involved a strong public interest, but the present applicant's involvement in the broadcast, as well as the media's careful reporting of the investigation, are sufficient to draw comparisons with the domestic decision.

Conclusion

It is still suggested that the starting point established by the UK Supreme Court in *Bloomberg* risks attaching undue weight to the fact that the media might breach the practice of confidentiality whilst reporting on ongoing criminal proceedings. Thus, in subsequent cases, the media might find that they

have damned themselves by their breach of confidentiality and the presumption of privacy in these cases. Further, the claimant's expectation of privacy in *Bloomberg* survived despite being an officer a large corporation who was being investigated for fraud and corruption; facts outweighed by the dominant element of harm to reputation and the presumption against pre-charge disclosure. On the other hand, it is more than acceptable to apply the starting point in appropriate cases. Thus, in *WFZ v BBC* [2023] EWCH 1618 KB, the court granted an interim injunction restraining the BBC from publishing the identity of a high-profile man, who had been arrested in connection with sexual offences but not charged, was granted. In the court's view, the press's freedom to publish and the public's "right to know" were outweighed by the powerful public interest in the criminal justice proceedings not being impeded or prejudiced. Specifically, a suspect's interests, was the public interest specifically protected by the Contempt of Court Act 1981, although in the alternative the court would have granted the action under misuse of private information.

It is far from clear whether the European Court would regard the starting point, or presumption, as an unnecessary or disproportionate impediment to free speech and the media's opportunity to defend itself from actions in misuse of private information. In any case, following *RTB*, the domestic courts should, at the very least, exercise great caution in applying the starting point too inflexibly to cases where there is a clear public interest in investigating and reporting on ongoing criminal investigations.

Dr Steve Foster, Coventry Law School

STUDENT WORK

DISSERTATION

To what extent is legal indemnity for healthcare professionals the most effective method of handling medical negligence cases from care given during the coronavirus pandemic?

Macey Payne*

Introduction

On 11 March 2020, the World Health Organisation (WHO) declared the global outbreak of the Coronavirus (COVID-19) Pandemic.[1] As of 29 March 2023, there have been over 274,000,000 confirmed cases, and more than 2,000,000 deaths worldwide caused by the Coronavirus, and this number continues to increase every day.[2] The aggressiveness of the Coronavirus and its worldwide spread necessitated those employed within healthcare settings to shoulder the weight of so many infections, working to stop the spread and save as many of those with severe symptoms as possible. As can be expected in such unprecedented times, mistakes will have undoubtedly been made, bringing with it legal consequences for those who make such mistakes. Presently, a healthcare professional working for the National Health Service is indemnified from any liability in negligence, including any negligence action taken while providing care during the Pandemic. However, considering the effects of litigation and the emotional value attached to such a large-scale public health emergency, whether using the system of state-backed legal indemnity as a way to respond to negligence cases relating to the Coronavirus Pandemic is debatable.

This dissertation seeks to argue the limited extent to which legal indemnity is the most effective way to handle COVID-19 related medical negligence cases and suggests ways in which this extent can be improved. As will be seen, state-backed legal indemnity is a well-established system, which is a very effective method of shielding healthcare professionals from liability, but the biggest issues arise from the cost of litigation itself, particularly in this context, and the additional cases that progress to the courts will have on the number of cases waiting to be heard. For the purpose of this dissertation, negligent care given during the pandemic means any care that was given to any patient during this period, be it intensive care treatment to alleviate serious symptoms, any care affected because of the redirection of resources, or any other ordinary NHS-related treatment administered at this time.[3]

Accordingly, this dissertation contains three sections. Section 1 will provide a brief overview of the law of medical negligence as it operates in our jurisdiction, including the requirements that must be established to form a successful claim, and the forms of compensation available to a successful claimant. Then, the reader will be introduced to the operation of state-backed legal indemnity, the NHS Resolution, and its variety of clinical negligence schemes, including those formed in response to the additional workforce involved in providing care throughout the Pandemic in accordance with Coronavirus legislation. Section 1 will also highlight the extent to which using the current system of state-backed legal indemnity will be beneficial for this purpose, including the clarity it brings for those working in healthcare settings over their legal position, and the ability for claimants to be compensated for negligence the same as they would be at a time not concerned with a public health emergency. However, we will see that utilising the current system will cause a huge amount of NHS financial

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[1] World Health Organisation, 'Coronavirus Disease (COVID-19) Pandemic' (29 March 2023) <Coronavirus disease (COVID-19) pandemic (who.int)> accessed 31 March 2023.

[2] World Health Organisation 'Coronavirus Disease (COVID-19)' <Coronavirus (who.int)> accessed 31 March 2023.

[3] Also, in this dissertation, the time period of the Coronavirus Pandemic concerned is primarily 2020-2021.

resources to be used up on coronavirus provisions, and substantially add to the current backlog of court hearings caused by the Pandemic.

Then, section 2 moves to consider the extent to which exchanging our present legal indemnity scheme for legal immunity for NHS staff against actions in negligence for Coronavirus related medical negligence claims could be a more appropriate way to handle cases in this context. To do this, the strengths and weaknesses of such a system will be examined, including the cost-effectiveness of complete immunity, the effect this will have on the current court case load and the positive psychological effect a lack of litigation will have on NHS professionals. Nevertheless, we will see that legal immunity is not a better alternative to state-backed legal indemnity, due to its effect on potential claimants and their right to compensation, and a system of immunity's incompatibility with the rights bestowed by the European Convention on Human Rights,[4] and the Human Rights Act 1998.

Lastly, considering the factors that limit the extent of legal indemnity's effectiveness, the third and final section of this dissertation will argue for the continuance of legal indemnity for medical negligence cases relating to COVID-19 care, albeit with amendments made to the litigation process involved in ordinary medical negligence claims to suit the context of the Pandemic. To do this, two different systems will be considered: no-fault compensation, and compulsory mediation for cases of this nature, with the aim of advocating for an alternative that is financially smart, does not require a long waiting time, has a reasonable balance between the rights of claimant patients and defendant healthcare workers (facilitated by NHS Resolution), and is as undisruptive to the ordinary workings of medical negligence as possible.

Medical negligence and legal indemnity in the United Kingdom

Medical negligence is an area of tort law that has been developed, primarily through the common law, for centuries. So, Chapter 1 will provide a brief overview of the three requirements necessary to bring a successful claim in negligence, followed by the methods in which a claimant will be compensated by the defendant when successful. After this, Chapter 1 will introduce NHS Resolution, who are responsible for providing healthcare professionals operating under the National Health Service with state-backed legal indemnity from claims in medical negligence. Furthermore, this section will discuss NHS Resolution's current indemnity schemes, including the additional schemes formed for the purpose of indemnifying any additional healthcare workers who were registered to provide care in response to the Coronavirus Pandemic. Moreover, it seeks to demonstrate that the extent to which legal indemnity is an effective method of handling medical negligence claims in relation to COVID-19 is limited by its expenses, and its effect on the already overwhelmed court system.

Medical negligence in the United Kingdom

Medical negligence cases form a large part of civil litigation every year. From 2021-2022, the NHS were involved in 15,078 negligence claims- a rise from 13, 351 the previous year.[5] However, not all claims that progress to litigation are successful. To be so, there are three requirements that must be proven: the first two are that the defendant owed the claimant a duty of care;[6] that the defendant breached this duty.[7] Ordinarily, this will be assessed using the 'reasonable man' test overlooking any individual characteristics,[8] thus, only how the objective reasonable person would have acted in the circumstances.[9] However, where the defendant possesses a particular skillset, the objective reasonable man will be a man who possesses the same skills.[10] Where the skillset in question is that of a medical

[4] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR).
[5] NHS Resolution, 'Annual Report and Accounts 2021/2022' (20 July 2022) <NHS Resolution - Annual report and accounts 2021/22> Accessed 3 April 2023.
[6] *Caparo Industries Plc v Dickman* [1990] 2 AC 605 (HL).
[7] *Bolam v Friern Hospital Management* Committee [1957] 1 WLR 582 (QB).
[8] *Hall v Brooklands Auto Racing Club* [1933] 1 KB 205, 244 (CA).
[9] *Nettleship v Weston* [1971] 2 QB 691 (CA).
[10] n 7.

nature, the courts will seek to confirm the occurrence of a breach of duty by questioning a professional of the same (or similar) skills if they would have acted in the same way - though their opinion must be able to withstand logical analysis in order to be valid.[11] After duty of care and breach of duty have been proven, the third and final element is causation. Causation is split into two components: factual causation (whether the defendant's breach actually caused the claimant's harm);[12] and legal causation (whether the harm incurred was reasonably foreseeable, or if any subsequent event supersedes the defendant's breach in causing the harm).[13] Once these requirements have been established, negligence will have been successfully proven and the claimant will be eligible to receive compensation from the defendant. Although, a claim is not free to be brought whenever the claimant sees fit; the Limitation Act 1980 sets out the time limit in which actions in negligence can be made.[14] Section 11 makes it so that a claim in medical negligence must be made within three years of the harm occurring, or three years after the realisation that harm caused by negligence has occurred.[15] Any time after this will prevent a claim from success.

Compensation for negligence

Due to the fact that negligence falls under the remit of tort law, compensation for negligence will adhere to the typical tort law aim, necessitating "those who have without justification harmed others by their conduct to put the matter right".[16] In other words, the purpose of compensation in this context, in the form of damages, is to put the claimant in the same position as they would have been had the negligence not occurred, or as close to this position as possible.[17]

Where appropriate, not in all cases, the claimant may also be awarded non-compensatory damages. Non-compensatory damages may come in a variety of forms, such as exemplary damages (a higher than usual monetary reward given with the aim of disciplining the claimant and discouraging similar wrongdoings).[18] Where the defendant is a public authority, as with our NHS, *Thompson v Commissioner of Police for the Metropolis* gives general guidelines on the awarding of exemplary damages, including the conduct being particularly deserving of condemnation, and the maximum award being £50,000.[19] Also, a claimant may be rewarded aggravated damages, given in acknowledgement of the mental harm caused by the defendant's negligence.[20] It has been said that aggravated damages does not belong in cases of medical negligence, thus ordinary compensatory damages in cases of this kind will take into account the distress felt by the claimant due to the negligent harm, instead of awarding aggravated damages in their own right.[21] Non-compensatory damages may also take the form of nominal damages, where it can be established that a legal wrong has occurred, but there is no identifiable harm, [22]or contemptuous damages- a less than normal amount awarded because although the legal wrong was established, the claim was small.[23] Thus, there are various methods of compensation available that take into consideration the variety of issues caused by the being a victim of medical negligence.

However, when quantifying the appropriate sum of compensation owed to a successful claimant, it can often be difficult to measure the amount that is proportionate in the circumstances. As already mentioned, the aim is to restore the claimant to the position they would be in had the negligence not

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[11] *Bolitho v City and Hackney Health Authority* [1998] AC 232 (HL), 243, (Lord Browne-Wilkinson).
[12] *Barnett v Chelsea and Kensington Hospital Management Committee* [1969] 1 QB 428 (QB).
[13] *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co (The Wagon Mound No 1)* [1961] AC 388 (PC).
[14] Limitation Act 1980.
[15] Section 11, Limitation Act 1980.
[16] Tony Honoré, 'The Morality of Tort Law', in Owen, D (ed), Philosophical Foundations of Tort Law (Clarendon Press, 1995), 79.
[17] *Livingstone v Rawyards Coal Co* (1880) 5 APP Cas 25, (HL Scot) 39.
[18] *Rookes v Barnard and others* [1964] AC 1129 (HL), 1227 (Lord Devlin).
[19] [1998] QB 498 (CA) 514-517.
[20] "Aggravated Damages", *Stroud's Judicial Dictionary of Words and Phrases (*10th edn, Sweet & Maxwell 2022).
[21] *Kralj v McGrath and St Theresa's Hospital* [1986] 1 All ER 54 (QB).
[22] "Damages", *Jowitt's Dictionary of English Law* (5th edn, Sweet & Maxwell 2019).
[23] Ibid.

occurred.[24] However, where the harm caused is severe enough that the claimant can no longer resume life as it was prior to the negligent act, the court must envision any future losses the claimant will face, by predicting how the claimant's life would have been in the absence of the defendant's negligence.[25] This is substantially hard to prove, given the hypothetical nature of the question, and it being hypothetical means that any number of circumstances could have changed in the future.[26] Once this has been established though, the court must also predict the actual course of the claimant's life as a consequence of the defendants negligence; where the case concerns medical nature, the questions asked will involve, where continuous medical intervention is necessary, how long for, whether it is likely the claimant may recover, and to what extent such recovery is possible.[27] The answer to these questions indicates the appropriate amount of damages, and will be tailored to each individual case.

State-backed legal indemnity for healthcare professionals

Now that the foundations on how to bring a successful claim in medical negligence and the methods of compensation have been laid, we turn to actions in medical negligence taken against the NHS. The purpose of this next part of section 1 is to provide an overview of the current system of state-backed legal indemnity for healthcare professionals, to be able to assess the extent to which it is a suitable method of managing medical negligence claims relating to care given during the Pandemic. To do so, it is important to understand how state-backed legal indemnity operates, and the effect this has on NHS resources and employees.

In 1995, the National Health Service Litigation Authority (Establishment and Constitution) Order 1995 created the National Health Service Litigation Authority,[28] an extension of the Department of Health and Social Care, set to deal with NHS-related litigation. In the present day, this organisation is known as NHS Resolution. As part of their duties, NHS Resolution has the power to establish schemes that provide state-backed legal indemnity from actions in medical negligence to healthcare professionals that are employed at member trusts.[29] The providing of legal indemnity to healthcare professionals means that where an action in medical negligence is brought against an NHS worker, any legal fees or compensation to be paid out to a successful claimant falls within the hands of NHS Resolution, as opposed to the individual healthcare worker themselves.[30] Funding for this body comes both directly from the Department of Health and Social Care, and income from its own members, based on calculations on what will be paid out for claims yearly.[31]

Currently, NHS Resolution operate eight clinical negligence indemnity schemes, and four non-clinical negligence schemes.[32] An example of which, its largest, is the Clinical Negligence Scheme for Trusts (CNST).[33] CNST handle all claims of clinical negligence brought against any NHS member trust where the negligent action occurred after 1 April 1995, and though the relevant trust remains the legal defendant in the case, the financial burden of litigation is handed by CNST.[34] In their 2021/2022 annual report, it was noted by NHS Resolution that there had been a reduction of CNST claims by 5 per cent compared to the previous year, which is expected to be because of the restrictions caused by the

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[24] n17.
[25] *Appleton v El Safety* [2007] EWHC 631 (QB).
[26] Peter Cane and James Goudkamp, *Atiyah's Accidents, Compensation and the Law* (9th edn, Cambridge University Press, 2018), Chapter 6.
[27] Ibid.
[28] National Health Service Litigation Authority (Establishment and Constitution) Order 1995, S.I. 1995/2800.
[29] NHS Resolution 'Claims Management' (12 October 2022) <Claims Management - NHS Resolution> Accessed 12 April 2023.
[30] Ibid.
[31] NHS Resolution 'NHS Resolution Continues to Drive Down Litigation' (20 July 2022) <NHS Resolution continues to drive down litigation - Annual report and accounts published for 2021/22 - NHS Resolution> Accessed 13 April 2023.
[32] N. 5.
[33] NHS Resolution, 'Clinical Negligence Scheme for Trusts' (3 April 2020) <Clinical Negligence Scheme for Trusts - NHS Resolution> Accessed 3 April 2023.
[34] Ibid.

Pandemic, thus a rise in claims is expected in the future.[35] Irrespective of the slight decrease in claims, in the 2021/2022 financial year, the total harm incurred as a result of provisions covered by CNST totalled £13.3 billion, illustrating the sheer volume of financial resources utilised by one scheme.[36] Another example of NHS Resolution's indemnity schemes is the Clinical Negligence Scheme for General Practice (CNSGP), in operation since 1 April 2019.[37] CNSGP covers a range of actions, including administrative tasks undertaken by GP reception staff, and NHS 111 services.[38] In 2021/2022, CNSGP received 1502 claims, increasing from 973 in the previous year, and this number is expected to continue rising.[39] Therefore, it is clear that schemes both new and old founded by NHS Resolution cover a vast number of claims every year, playing a fundamental role in providing state-backed legal indemnity to those accused of providing negligent care.

Some of the most important schemes created by NHS Resolution, and particularly relevant here, are those created in response to the COVID-19 Pandemic. The National Health Service are one of the largest employers in the United Kingdom, with 1.2 million full-time staff recorded in October 2022.[40]Although, it became clear in the early stages of the Pandemic that those operating within NHS settings would need more support, considering the volume of hospitalisations and deaths caused by the Coronavirus, as well as the risk of NHS staff themselves becoming infected, thus requiring time off or medical attention. Consequently, the House of Commons initiated the Coronavirus Act 2020, which received royal assent on 24th March the same year.[41] The Coronavirus Act 2020 includes many provisions set to ease the burden on healthcare professionals working through the Pandemic,[42] including Schedule 1, providing the power to emergency register nurses, midwives, and any other relevant healthcare worker necessary to provide care to patients for this time period.[43] While the Act was passing through the House of Commons, it was identified that the power of emergency registration could provide an additional 15,500 doctors, and 50,000 nurses, nursing associates and midwives.[44] With a potential additional 65,500 healthcare staff joining the workforce, additional indemnity provisions were also put into place to cover those not already covered by an NHS Resolution scheme. Section 11 (England and Wales), s.12 (Scotland), and s.13 (Northern Ireland) of the Act make it so that those concerned could be indemnified by the appropriate authority through arrangements made for this purpose. Such indemnity was introduced by NHS Resolution's Clinical Negligence Scheme for Coronavirus, implemented in April 2020,[45] and the later implemented Coronavirus Temporary Indemnity Scheme.[46]

Given the existence of multiple NHS Resolution schemes already in operation, adding extra protection to indemnify the additional workers, however necessary they were, will be detrimentally expensive. In their 2021/2022 financial report, NHS Resolution revealed their predicted £1 billion spent on claims arising from their Coronavirus provisions in the 2022/2023 year.[47] It is not yet clear the exact number of claims being made in relation to negligent care given during the Pandemic, thus the forecast statistics are the most viable authority. Considering the fact that such a large amount of money has been forecast for these provisions alone, without taking NHS Resolution's other obligations and schemes into

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[35] N. 5.
[36] N. 32.
[37] NHS Resolution 'Clinical Negligence Scheme for General Practice' (19 October 2022) <Clinical Negligence Scheme for General Practice (CNSGP) - NHS Resolution> Accessed 3 April 2023.
[38] NHS Resolution 'Am I Covered Under SNSGP?' (23 September 2022) <CNSGP-Scheme-scope-table-2.pdf (resolution.nhs.uk)> Accessed 3 April 2023.
[39] N. 5.32
[40] Department of Health and Social Care, NHS England, Steve Barclay, 'Record Numbers of Staff Working in the NHS' (27 October 2022)< Record numbers of staff working in the NHS - GOV.UK (www.gov.uk)> Accessed 3 April 2022.
[41] Coronavirus Act 2020.
[42] Ibid.
[43] Sched. 1 Coronavirus Act 2020.
[44] House of Commons (House of Commons Library, Briefing Paper CBP 8861) 'Coronavirus Bill: Health and Social Care Measures' (20 March 2020) <Coronavirus Bill: health and social care measures (parliament.uk)> Accessed 13 April 2023.
[45] NHS Resolution 'Clinical Negligence Scheme for Coronavirus' (8 April 2021) <Clinical Negligence Scheme for Coronavirus - NHS Resolution> accessed 09 March 2023.
[46] NHS Resolution 'Coronavirus Temporary Indemnity Scheme' (5 April 2022) <Coronavirus Temporary Indemnity Scheme - NHS Resolution> Accessed 10 April 2023.
[47] N. 5.

account, demonstrates that legal indemnity is significantly expensive area for the NHS, a publicly funded authority,[48] and will continue to be highly expensive. As a result, the extent to which legal indemnity is suitable to handle claims arising from the Coronavirus Pandemic is seriously affected by its costs. Though it provides support to numerous healthcare workers, the sacrifice of spending billions in finite financial resources on litigation where funds given to the NHS are spread between various departments, including actual healthcare, has concerning implications.

Additionally, in the present day, and as a consequence of the closure of services during the move to online court hearings, the courts in the United Kingdom are experiencing a significantly large backlog of cases, increasing waiting times for court hearings in all areas of law, with 63,000 cases waiting to be heard in December 2022.[49] Statistics released by the government revealed that in October to December 2022, the mean waiting time for small civil claims was 51.3 weeks, 14.2 weeks longer than the same time in 2019.[50] To this end, the continuance of the current system of legal indemnity which facilitates court-based litigation where cases cannot be settled outside of court will only add to this, meaning patients will have to wait approximately a year for compensation, or potentially longer if the expectation for claims to increase is correct.[51] This suggests that utilising the courts to handle the more serious medical negligence claims for this purpose could be an unsatisfactory and frustrating process for those involved due to current waiting times.

Despite the fact that state-backed legal indemnity is very costly and does not provide a fast remedy for an aggrieved claimant, legal indemnity for COVID-19 related claims has its positives. An example of which is the clarity that state-backed indemnity will bring to healthcare workers who were already indemnified for actions before the pandemic, since their legal position is unchanging, and those who returned from retirement,[52] given the pandemic caused much anxiety in such unprecedented times, affecting not only our work lives but also our personal lives. In addition to this, legal indemnity means that regardless of the chaos caused by the Coronavirus Pandemic, the standard of care provided by the NHS is still of vital importance. This sends clear message to professionals and patients alike that patients are healthcare professionals aim to provide the same level of care as they did pre-pandemic.[53] Moreover, regardless of the fact that the individual healthcare worker will not pay compensation from their own pocket, patients will still be compensated for occurrences of negligence where they are owed it, demonstrating that compensation to a deserving claimant is still a relevant concern and will not be forfeited despite the circumstances.

In summary, bringing a claim in medical negligence is a technical process, but a claim in negligence does not require the healthcare provider themselves to incur any liability. NHS Resolution is a well-established organisation that has been in operation in the United Kingdom for decades. It provides clarity to healthcare professionals over their legal position should litigation occur and encourages the best standard of care across the NHS. Nevertheless, NHS Resolution's schemes are costly, and considering the cost of litigation has seen a dramatic increase in recent years, opting to stick to using legal indemnity for claims arising from the Coronavirus Pandemic is predicted to cause a blow to NHS resourcing, which limits the extent to which it is the most suitable way to handle claims relating to the Coronavirus Pandemic. So, to maximise the extent to which legal indemnity is the most effective method, consideration must be given on how to reduce the cost of litigation, waiting time for patients to be compensated, and the burden on the courts.

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[48] The King's Fund 'The NHS Budget and how it has Changed' (8 December 2022) < The NHS budget and how it has changed | The King's Fund (kingsfund.org.uk)> Accessed 27 May 2023.

[49] The Law Society 'Five Steps to Help Fix Chaos in our Courts' (19 December 2022) <Five steps to help fix chaos in our courts | The Law Society> Accessed 12 April 2023.

[50] Ministry of Justice 'Civil Justice Statistics Quarterly: October to December 2022' (2 March 2023) <Civil Justice Statistics Quarterly: October to December 2022 - GOV.UK (www.gov.uk)> Accessed 7 April 2023.

[51] n5.

[52] n44.

[53] Kieran Duignan and Chloe Bradbury, "Covid-19 and Medical Negligence Litigation: Immunity for Healthcare Professionals?" (2020) 88 Medico-Legal Journal 31, 32.

The feasibility of legal immunity

In April 2020, the Medical Defence Union released a statement calling for the introduction of legal immunity against medical negligence claims for its member doctors involved in Coronavirus-related care, as opposed to the legal indemnity provided by NHS Resolution.[54] This chapter seeks to argue that although the extent to which legal indemnity is the most effective way to handle medical negligence claims arising from the pandemic is limited, legal immunity is no better alternative. There are numerous advantages and disadvantages to legal immunity, however section 2 will focus on cost-efficiency, the impact on the current case backlog, the impact for both professionals and patients, and a possible interference with human rights legislation.

What is legal immunity?

By exact definition, legal immunity means an exemption from legal proceedings.[55] In the matter of legal immunity from claims of medical negligence, this would mean that where a healthcare professional acts negligently, a claim cannot be brought against them because they are exempt. Where with legal indemnity legal action may be brought and liability falls into the hands of the relevant NHS trust, facilitated through NHS Resolution, legal immunity in this context means that actions in medical negligence relating to care given throughout the Pandemic cannot be brought at all, because no involved party can incur liability.

The request from the Medical Defence Union was not one made at random; legal immunity for healthcare workers during the Pandemic was adopted by various nations worldwide- a notable example being the United States of America. At federal level, the Public Readiness and Emergency Preparedness Act authorises the Secretary of the Department of Health and Human Services in the American Government to issue a declaration providing legal immunity from liability to certain people, for claims arising from actions taken in the process of providing countermeasures, like vaccines, during a public health emergency.[56] Additionally, individual states chose to implement their own immunity measures. For example, California's Governor Code 8659 provides legal immunity to healthcare providers giving services throughout a public health emergency, so long as any injury incurred is not the result of criminal conduct.[57] So, legal immunity from liability for actions taken whilst providing care during the COVID-19 pandemic is a measure that has been used by other nations, making it an option worth considering for our NHS also. We now turn to evaluate the extent to which immunity for healthcare professionals would be a feasible alternative to indemnity.

Cost and saving of court wait time

As we saw in the previous section, the current system of state-backed legal indemnity is a costly system to uphold, especially since COVID-19 provisions alone are predicted to cost extortionate amounts.[58] As a result, it is obvious that, to preserve NHS resources, there is a dire need for a cost-saving alternative to combat the oncoming rise in claims relating to the Pandemic.

Accordingly, one of the most significant benefits of legal immunity is its ability to reduce costs. Since immunity provides an exemption from legal proceedings, its implementation would mean a decrease in litigation. This means that any financial resources set toward medical negligence litigation and compensation concerned with cases relating to the Pandemic will be spared. Thus, this money may be redirected elsewhere within the NHS, such as toward patient treatment. For patients currently being treated by the NHS, whether or not care can be provided depends on financial resources,[59] and in 2023,

[54] The Guardian 'Union Seeks Legal Immunity for NHS Medics in Pandemic' (19th April 2020) <Union seeks legal immunity for NHS medics in pandemic | NHS | The Guardian> accessed 03 March 2023.
[55] "Immunity" *Osborn's Concise Law Dictionary* (12th edn. Sweet & Maxwell 2013).
[56] Public Readiness and Emergency Preparedness (PREP) Act.
[57] CA Govt Code § 8659.
[58] N. 5
[59] John Harris, 'The Injustice of Compensation for Victims of Medical Accidents' (1997) 314 British Medical Journal 1821, 1822.

7.21 million patients are awaiting elective care, therefore awaiting access to these resources.[60] So, it can be reasoned that if it is possible to deny patients care they need because it is too burdensome on funds, the same concept should be applied to claimants seeking compensation for medical negligence.[61] In practice, this means that where the cost of compensating patients for medical negligence totals an amount that would be sufficiently draining on NHS resourcing, priority should be given to treating current patients, and those still waiting to be treated, as opposed to compensating past patients. The current forecast of Coronavirus provisions does not include the other provisions operating at the same time, [62] meaning without a restriction on how much is spent on negligence cases, patient care will continue to receive less funding than needed in the aftermath of the Pandemic to combat the long list of waiting patients. It is fair to opine that the NHS should save money on legal action where possible and prioritise restoring itself to its pre-pandemic functioning. In other words, the need to protect the NHS and its staff will be even more vital in the aftermath of the Pandemic,[63] which legal immunity would allow to a better extent than indemnity.

However, legal immunity would only provide an exemption from legal action, not an exemption from dealing with any other financial consequences incurred because of negligent care. As pointed out by Kieran Duignan and Chloe Bradbury, even without spending resources on resolving negligence disputes, the NHS will still be obliged to provide any care a victim of medical negligence may need, for however long they may need it, where the harm is so great that further treatment is necessary.[64] Obviously, operating any machinery used for treatment or any substances used in the process of care incurs costs, and especially where the harm is so great that an individual requires a long course of treatment to rectify the harm suffered, a large amount of resources will be necessary. Thus, although we will see a preservation of expenses by reducing negligence claims, immunity cannot eradicate the consequences of acting negligently entirely, so cutting the costs in litigation may not be as frugal as assumed. Nevertheless, financing the care of those who fall victim to medical negligence during the pandemic would not be as financially burdensome as it would be if legal fees and compensation were also a part of the picture. Patient care will be carried out regardless, but saving on legal fees could make post-negligent care much more comfortable and efficient where resources a relocated where they are needed most.

In addition, abolishing court action for this purpose would eliminate any cases relating to negligence occurring during the Pandemic from adding to the current backlog of cases seen in the court system.[65] Any other claims in negligence brought in accordance with the time limit set in the Limitation Act that progresses to litigation that do not concern harm suffered during the Pandemic will still exist,[66] but, especially if the number of cases does rise as expected, immunity prevents further cases going to court.[67] Hopefully, this would have the effect of slowing down the stacking up of cases waiting to be heard, making it more manageable to deal with and easing the burden on the judiciary.

Psychological impact of legal immunity

Another perceived benefit of legal immunity as opposed to legal indemnity is the psychological impact that the lack of litigation will have on NHS employees. As mentioned, the continuance of legal indemnity through a period of such unfamiliarity brings a sense of certainty to healthcare workers over their legal position. Nonetheless, the Clinical Negligence Scheme for Coronavirus, and other schemes operating under NHS Resolution, cannot erase the stress and anxiety caused by being the subject of a case of this nature, especially in a time of such heightened emotions like a public health emergency,

[60] British Medical Association 'NHS Backlog Data Analysis' (March 2023) NHS backlog data analysis (bma.org.uk) Accessed 12 April 2023.
[61] n 60, page 1821.
[62] n 5.
[63] Christine Tomkins and Others, 'Should Doctors Tackling COVID-19 be Immune from Negligence Liability Claims?' (2020) British Medical Journal 1.
[64] n56, page 33.
[65] n52; 53.
[66] n15.
[67] n5.

even if the individual professional is not themselves liable. Legal immunity however would remove that burden, due to the inability for a claimant to bring a case in the first place. Thinking about Sch 1 of the Coronavirus Act 2020,[68] it is known that emergency workers were quickly registered for the purpose of boosting staff numbers, including recently retired doctors and nurses and final year medical students, and numerous existing staff were retrained and redeployed where help was needed the most.[69] The immense pressure caused by having to work in unfamiliar circumstances, or by going back to work after having already retired, in a time where not only our work lives, but also our personal and family lives were thrown off balance suggests that some consideration should be given to this fact when debating whether to create an exemption from liability for this time period.

In support of this, special notice should be afforded to Mr Justice Green's judgment in *Mulholland*, [70] when considering the occurrence of medical negligence, the context of the situation in which an alleged breach of duty arose must be taken into account. Applying this logic to the current discussion, and upon reflection of the time that was the Pandemic, the context in question involved a lot of uncertainty relating to the virus in light of continuously changing data and government guidance, social distancing, unfamiliar work environments for those registered in haste, and anxiety over the health of ourselves and our loved ones. So, continuing the current system of legal indemnity would, as argued by Christine Thomkins from the MDU, make it so that those working through this time would be held to standards that would not reflect the conditions of the time, including any new roles taken on.[71] Thus, it is not fair to expect legal indemnity to support our healthcare workers the same as it would ordinarily. Adding the possibility of legal action on top of the instability caused by the virus would be mentally draining. Hence, legal immunity would, to a greater extent than indemnity, be an effective method of protecting NHS staff who worked during such unprecedented times, and ease the burden of the possibility of legal action and the feelings that come with it.

Alternatively, the system of legal immunity is only a positive system for the NHS, with little consideration of the feelings of the patients and their families who will feel the repercussions of the exclusion of liability. In this instance, we are considering the possibility of abolishing liability from negligence occurring during the Pandemic only. With this in mind, it has been pointed out that anyone wishing to seek compensation for a wrongdoing occurring during this time would be extremely unlucky for their harm to have occurred during this period, even though harm suffered during the pandemic is no less important than harm suffered at a time not concerned with a public health emergency.[72]It would be unfair to impose such a limitation on those who were unfortunate enough to need professional healthcare during this time, and from the perspective of the patient, being refused compensation could be exceedingly frustrating and anger-inducing. Whether or not compensation is rewarded is not a case of luck, and to implement this would go against the aims of tort law generally.[73] The sentiment has been shared by a range of academics, including Duignan and Bradbury, who argue that imposing an exemption from liability would provide incorrect implications toward the standard of care that the NHS aims provide.[74] This is fair, because the concept of legal immunity is potentially suggestive that the rights of those who cause harm are more deserving of protection than anybody who suffers from the infliction of harm.

This, in turn, has the power to affect the confidence of the public toward the NHS- the opposite of the desired trust from the public they serve. To this end, the extent to which legal immunity is a better option than indemnity in the context of medical negligence cases arising from the Coronavirus Pandemic is very limited by the one-sided nature it possesses, heavily in favour of the healthcare professional. It is also important to acknowledge that implementing a system of this kind would leave a lot of questions to be answered, such as who exactly is to be granted immunity; the MDU only

[68] n 43.
[69] n 44.
[70] *Mulholland v Medway NHS Foundation* Trust [2015] EWHC 286 [2015] 2 WLUK. 377 [90] (Mr Justice Green).
[71] n 68.
[72] n 58, 33.
[73] n16.
[74] n 66.

concerned its member doctors,[75] but other NHS staff are no less valuable, as well as whether or not the relevant piece of legislation granting immunity could be retrospective, and from what exact date its effect will start and end.[76] Accordingly, having to form an entirely new system to accommodate immunity further limits the extent to which legal immunity is a feasible alternative.

Legal immunity and human rights legislation

Despite the advantages that would be felt by the NHS by adopting legal immunity, the implementation of any kind of system that grants an exclusion from liability for a wrongdoing has serious human rights implications that must be considered, which even further limits the extent to which legal immunity could be effective in the circumstances. In accordance with Article 6 of the European Convention on Human Rights, everyone is entitled to a fair and public hearing within a reasonable time, by an independent and impartial tribunal established by the law.[77] In *Golder v United Kingdom*, the European Court held that the right to a fair trial also includes the right to access to the courts.[78] This has been incorporated into domestic law through the Human Rights Act.[79] In practice, this means that the United Kingdom has the responsibility to ensure that, in the instance of harm, anybody that wishes to bring a claim forward must be given the opportunity to do so. This directly contrasts the whole purpose of legal immunity, since the exclusion from liability means that an aggrieved patient has no body to bring a claim against. Therefore, if the immunisation of healthcare professionals was to be conferred by an act of Parliament, the relevant piece of legislation runs the risk of a declaration of incompatibility being made against it by the courts in accordance with s. 4 Human Rights Act 1998.[80] If this were to be the case, a remedial order may be made with the effect of removing the part of the relevant legislation, therefore revoking legal immunity granted to healthcare professionals to rectify the incompatibility.[81] Thus, the extent to which legal immunity is a reasonable alternative to legal indemnity is once again seriously limited, this time by the fact that there is a genuine chance it may be incompatible with the right of claimants to bring an action against the NHS for negligence, even if it is just for a certain period.

To summarise, legal immunity in the place of legal indemnity for cases relating to care given during the Pandemic has significant cost-saving advantages and would be a great way to show support for those who provided care during the Pandemic. However, the taking away of the chance for a party who suffers the consequences of medical negligence to be compensated for the harm they have suffered alongside the human rights issues it presents means that it is not a more suitable solution to the limitations of the effectiveness of state-backed indemnity. Thus, for legal indemnity to be effective to the greatest possible extent for this purpose, the focus must be on the litigation process, not the legal position of healthcare professionals.

An alternative claims system

Following the preceding two sections the following conclusion can be made: legal indemnity is an effective method of handling COVID-19 related medical negligence claims to a certain extent. The full extent, however, is limited by the effect indemnifying so many professionals will have on NHS Resources against the volume of claims made, and the contribution it will have on the backlog of cases waiting to be heard, and even though legal immunity provides a solution to these two factors, it is no suitable alternative. Thus, the third and final section of this dissertation seeks to argue in favour of an alternative system, in line with the indemnification of healthcare professionals, but focusing on changing the process of litigation used for claims relating to COVID-19 related negligent care. To do

[75] n 57.
[76] n 56, 32.
[77] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR), Article 6.
[78] *Golder v United Kingdom* (A/18) (1979-1980)1 EHRR 524.
[79] Sched. 1 Human Rights Act 1998.
[80] Section 4 Human Rights Act 1998.
[81] Sched. 2(1) Human Rights Act 1998.

this, we will examine the implications of two possible systems - no-fault compensation, and mediation, to assess whether either could be introduced to balance the pitfalls of indemnity for in this context.

No-fault compensation

The first alternative to court-based litigation we will consider is the introduction of no-fault compensation for claims in medical negligence that are specifically brought in relation to care given in the course of the Pandemic. No-Fault Compensation is a strict liability system of redress that eliminates the need to find fault in order for compensation to be rewarded.[82] At present, the United Kingdom operates no-fault compensation in few areas of medical care, one of which being for harm caused by vaccination.[83] Under the Vaccine Damage Payments Act 1979, severe disability resulting from an adverse reaction to a vaccination allows those affected to claim a one-off payment up to £120,000, irrespective of blame.[84] As of June 2022, the first payments have been made under this piece of legislation to those affected by a severe reaction to a COVID-19 vaccine.[85] Thus, if a medical no-fault compensation scheme is already in operation, and has since been extended to apply to Coronavirus vaccines, it is not unreasonable to suggest that, though it affects a different area of medical law, a no-fault scheme could be introduced to cover Covid-19 related negligence.

As mentioned, no-fault compensation eliminates the necessity to establish a breach of duty on the behalf of the defendant- this would ease the weight of the current backlog of cases experienced by the courts in the UK, since litigation would be unnecessary.[86] Moreover, unlike legal immunity, access to compensation would still be available to claimants despite claims not proceeding to the courts. Reports on the process of compensation rewarded in accordance with the Vaccine Damage Payments Act for claims relating to Coronavirus vaccines have shown that the average time for to be processed is 12 weeks from the time medical records are requested.[87] In comparison to the wait of 51 weeks for small civil claims and 75 weeks for civil multi track claims to be heard in a court according to the latest data, having an option for no-fault compensation would make access to a remedy for a deserving claimant much faster, and could significantly decrease the caseload of medical negligence claims relating to this time.[88] This would significantly improve the effectiveness of legal immunity in the context of medical negligence relating to Coronavirus care.

Additionally, introducing a system of no-fault compensation for this purpose provides an opportunity for the relationship between the NHS and its patients to become more open. After measuring the effect of tort-based in comparison to fault-free systems, Sharad Paul argues that the latter increases disclosure of negligent care to the relevant body. [89] If this is true, this would provide a means for more victims of medical negligence to be the recipients of compensation. Though there is a possibility that this may also increase overall compensation expenditure because of the encouragement of open disclosure. This is a concern echoed by members of the judiciary when it comes to no-fault compensation generally, including Lord Sumption who suggests that having a system of fault-free compensation would be less wasteful, but due to the potential of increased claims, the cost would be more expensive than operating a tort-based system overall.[90] No-fault compensation being less wasteful is a great selling point in the context of Coronavirus related care, because the recovery of resources is a very poignant concern amongst society in the aftermath of the Pandemic, but only to the effect that giving out fault-free compensation doesn't become equally, or more, expensive than litigation. In consideration of the sheer

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[82] "Strict Liability" *Osborn's Concise Law Dictionary* (12th edn. Sweet & Maxwell 2013).
[83] Vaccine Damage Payments Act 1979.
[84] Gov.UK 'Vaccine Damage Payment' <Vaccine Damage Payment: Overview - GOV.UK (www.gov.uk)> Accessed 13 April 2023.
[85] The British Medical Journal 'COVID-19: UK Makes First Payments to Compensate Injury or Death from Vaccines' (24 June 2022) Covid-19: UK makes first payments to compensate injury or death from vaccines | The BMJ Accessed 9 April 2023.
[86] N. 85; N. 52.
[87] N. 88.
[88] N. 52.
[89] Sharad P Paul 'Whose Fault is it Anyway?' (2017) Medico-Legal Journal of Ireland, 32 (2), 52, 54.
[90] Lord Sumption, 'Abolishing Personal Injuries Law- A Project' (2018), 34(3), 113, 120.

number of patients requiring treatment for COVID-19 and anyone else affected by the pandemic when it comes to treatment, alongside factors already discussed including emergency registered workers and the risk this has for increased negligent harm, the potential eligibility pool is large.

However, Lord Sumption's reservations over implementing a fault-free compensation scheme due to its costs is not a universally shared concern. In response to his article, Jonathan Morgan argues that adopting a universal compensation scheme could lighten the load on administrative costs, and though the eligibility pool would be wider, lower compensation thresholds could be implemented, allowing more people to receive the compensation they deserve without forfeiting more resources.[91] Having a standard compensation system available to those who make a claim after negligent care given during the Pandemic, but lowering the payment threshold to accommodate the need to preserve financial resources could definitely serve as a feasible solution, however, at the time of writing, the number of claimants who will come forward to claim compensation for acts during the Pandemic is unknown, making the effect of this unknown also. As aforementioned in Chapter 1, the over-arching aim of tort law is to put the claimant back in the position they would have been had the negligence not occurred.[92] It can be questioned whether a lower than usual compensation payment threshold for cases of this kind would adequately uphold this aim, and whether the circumstances of a public health emergency are enough to warrant such diversion from the ordinary aim. In the instance that the circumstances are not enough to warrant such diversion, another solution must be considered to improve the extent to which legal indemnity can be the most effective in the aftermath of the pandemic.

In summary, no-fault compensation is a great alternative to court-based litigation in the way that it allows patients to be compensated, and its help in reducing the backlog of cases awaiting a court hearing. It also encourages a more open relationship between the NHS and its patients when it comes to harm, however encouraging better disclosure also encourages more claims to be made, and therefore possibly increasing expenditure on compensation, which has the chance of being an overall costly scheme. Additionally, potentially decreasing the amount of compensation available has the potential to not fulfil the aims of tort law generally. If this were to be the case, no-fault compensation does little to improve the extent to which legal indemnity is appropriate for handling COVID-19 related medical negligence claims.

Mediation

We now turn to consider utilising compulsory mediation, a form of alternative dispute resolution, for medical negligence cases of this nature. Mediation is described as a "flexible and confidential" method of alternative dispute resolution that involves appointing a mediator, an independent and impartial third party whose role is to aid the disputing parties in talking through their issues and coming to a mutually agreeable solution.[93] Mediation is a highly effective method of settling disputes, with data published by the Centre for Effective Dispute Resolution demonstrating a 92 per cent settlement success rate in 2022.[94] This begs the question of whether streamlining any COVID-19 related medical negligence cases to mediation could improve the effectiveness of indemnity.

By providing an alternative method of dispute resolution, the disadvantages of litigation through NHS Resolution can be tackled at a different angle. Fortunately, mediation is a process of alternative dispute resolution that NHS Resolution already facilitates; in May 2020, NHS Resolution enforced its contract with four mediation providers; The Centre for Effective Dispute Resolution (CEDR) and Trust Mediation Limited to deal with personal injury and clinical negligence costs, and Costs Alternative

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[91] Jonathan Morgan, 'Abolishing Personal Injuries Law? A Response to Lord Sumption' (2018), 34(3), 122, 126.
[92] n17.
[93] Ministry of Justice 'A Guide to Civil Mediation' (20 July 2021) <A guide to civil mediation - GOV.UK (www.gov.uk)> Accessed 12 April 2023.
[94] Centre for Effective Dispute Resolution 'The Tenth Mediation Audit' (1 February 2023) <Tenth-CEDR-Mediation-Audit-2023.pdf >Accessed 6 April 2023.

Dispute Resolution (CADR) and St John's Buildings Limited to deal with the recovery of legal fees.[95] Hence, there is no need to conceptualise a brand new system and build a mediation scheme from scratch since they are already provided. This means that the legal indemnity schemes will still be in operation as normal, and nothing has to change, aside from the dispute resolution provider tackling medical negligence cases of this kind, saving time, effort and resources. Moreover, mediation is, in general, less expensive to carry out than typical court-based litigation.[96] Hence, even though NHS Resolution will still be obligated to pay out any legal fees and compensation involved in dealing with medical negligence, the amount of money used for this purpose will reduce.

Another positive to using mediation here is the emotional impact it will have on claimants. In a lot of cases, the occurrence of medical negligence is a very painful experience for not only the patients, but also their families; especially where such negligence causes fatal injury or death, the long process of litigation often prolongs grief and pain, making it harder to be dealt with until the case is over.[97] Given the current wait time and the predicted further increase, an alternative option that could provide a quicker ending is enticing. In support of the positive emotional impact of mediation, Sheila Johnson, an experienced mediator who has worked in medical negligence mediation, recalls that it is often after court-based litigation that clients will feel disappointed due to the lack of chance to express the emotional anguish caused by the negligent care given to them or a loved one, as well as the lack of opportunity to have their own questions answered by the relevant authority.[98] Especially during a widespread public health emergency such as the Coronavirus Pandemic, the emotional outlet provided by mediation allows a claimant to access not just compensation, but the benefit of being able to express the anguish caused by the harm suffered, and allows the party in attendance on behalf of the NHS to assure such claimants of their condolences in light of the sacrifices NHS staff made. The more claimant-centred option of mediation has the power to increase the extent to which indemnity is effective to use for claims in medical negligence arising from the Pandemic, because it takes into account the emotional value attached to the Pandemic for NHS patients, not just its staff.

Regardless of its benefits though, using mediation as a substitute for any court litigation arising from the time period in question could not be made mandatory. Much like legal immunity, forcing parties to partake in mediation instead of court-based litigation risks an interference of Article 6 of the ECHR, and its right to access to the courts.[99] As per the judgement in *Halsey*, encouraging unwilling parties to mediate is one thing, but to force it upon them would be to impose unnecessary obstructions to this right.[100] Additionally, the European Court of Human Rights has said that the right to access to the courts can be waived through, for example, ADR agreements, but to do so would have to be so carefully done so to not place unnecessary restrictions upon the right to seek litigation.[101]As a result, it is clear that it would be in contradiction with human rights law to make it so that the only route to compensation, or whatever outcome is desired, is through mediation, even for a special cause such as the Coronavirus Pandemic. Mediation is non-binding by nature, and so changing the rules to suit the purpose of Coronavirus-related claims would not be an acceptable solution,[102] meaning court-based litigation must be available to those who do not choose to make their mediation agreement binding or cannot come to a satisfactory agreement at all. In a lot of cases, this would defeat the purpose of avoiding litigation in the first place, but for those who are able to settle in mediation, having the option would be beneficial, and would still ease the burden on the backlog of cases going through the courts. So, using mediation for this purpose could benefit the extent of legal indemnity's effectiveness, but only where parties

[95] NHS Resolution 'Alternative Dispute Resolution' (26 November 2020)< Alternative dispute resolution - NHS Resolution> Accessed 5 April 2023.
[96] Centre for Effective Dispute Resolution 'What is Mediation?' (2023) <What is Mediation? - CEDR> Accessed 12 April 2023.
[97] Sheila M. Johnson, 'The Case for Medical Malpractice Mediation' (2000) 5 Journal of Medicine and Law, 21, 25.
[98] Ibid, 27.
[99] n80; 81.
[100] *Halsey v Milton Keynes General NHS Trust* [2004] EWCA (Civ) 576, [2004] 1 WLR 3002 [9] (Lord Justice Dyson).
[101] *Deweer v Belgium* (A/35) (1984) 6 EHRR CD406.
[102] n 98.

choose to involve themselves in mediation in the first place; strongly encouraging mediation is a good place to start.

In conclusion, it is perfectly reasonable to suggest that there can be an alternative method of resolving disputes and providing claimants with compensation that is still facilitated by NHS Resolution. No-fault compensation saves money on legal fees and the number cases going through the court system, while providing patients with a remedy. Although, adopting a no-fault system runs the risk of encouraging an increase in claims which, ultimately, may have the opposite effect hoped for. On the other hand, mediation is both cost-efficient, and allows patients to have an emotional outlet as well as compensation. The issue lies however with the issues around making mediation compulsory- we cannot force an unwilling claimant to take up mediation as opposed to going to court. Nevertheless, strongly suggesting and starting off all COVID-19 related medical negligence cases in mediation facilitated through the NHS provides the best-rounded solution. It is acknowledged that neither alternative is a perfect solution to the system already in place, however, both (mainly mediation) could improve the extent to which legal indemnity is the most effective method for handling medical negligence cases arising from the Pandemic.

Conclusion

In this dissertation, we have examined the extent legal indemnity for healthcare professionals is the best way to handle cases of medical negligence relating to the Coronavirus Pandemic. To conclude, it is clear that legal indemnity is suitable to a certain extent; it ensures that claimants will receive compensation, no matter the circumstances surrounding individual liability, and brings familiarity at a time of a lot of uncertainty. Despite this, legal indemnity necessitating liability to be covered by NHS Resolution, including all coronavirus related litigation will be very expensive for the NHS, and further add to the backlog of cases experienced by the courts in the present day. In section 2, we examined the suitability of legal immunity as an alternative to legal indemnity, with the conclusion being it is no better alternative. Though it has the ability to preserve finite resources, reduce the current court caseload, and protect the psychological health of those working during the pandemic, it gives no consideration to the right of claimants to receive access the courts and compensation. Finally, in consideration of the fact that legal indemnity is suitable for this purpose except for the effect it has on litigation, we discussed the potential of no-fault compensation and mediation as an alternative. Realistically, neither option provides the perfect solution for dealing with the rise in litigation we are sure to see in response to care given to patients during the Coronavirus Pandemic. Out of the two, mediation seems to be the most effective in increasing the extent of indemnity's effectiveness due to its lower costs, reduction on the amount of civil litigation, and the ability for claimants to be heard, however mandatory mediation cannot be enforced due to its infringement on the right to access the courts.

Hence, legal indemnity is an effective method of handling COVID-19 related medical negligence cases to a reasonable extent, however, the full extent of its suitability is limited by the effect it will have on NHS Resolution's behalf of the litigation process. To improve this position, an alternative that is considerate of claimants, cost efficient, time efficient and will not increase the amount of cases waiting to be heard by the courts must be introduced, to save our NHS from a medical negligence nightmare in the aftermath of the Pandemic.

DISSERTATION

Is current copyright law suitable to protect AI creations?

Charlotte Coker*

Introduction

There is a rising issue relating to the effectiveness of current copyright law when regarding AI creations. This is because the protection afforded to them through copyright, or lack thereof, is seemingly insufficient to ensure the creations made by the rapid developments in technology are protected appropriately. The main purpose of this dissertation is to explore the extent to which copyright law, both nationally and internationally, protects AI creations. There are three further purposes of this dissertation. These are: to bring awareness to how the current law is unsuitable for protecting AI creations and the problems that this may cause; to compare the differences of different copyright protections nationally and internationally when regarding AI creations and; to critically analyse current developments surrounding copyright law and evaluate how, and if, the law should change in order to support AI creations. These issues will be addressed in later chapters.

These issues are important to address so that the effects of developing technology can be determined in regard to the future of intellectual property. By doing this, depending on the outcome, it may give incentive for the development of AI technology that can contribute to literary, dramatic, and musical works as well as potentially benefiting other forms of intellectual property such as patents. Furthermore, by ensuring that AI creations are protected by copyright law or IP law generally, the clear regulations set out through the law could relieve pressure on the courts regarding copyright infringement and AI because it will be straightforward and easily understandable.

Due to the content of this issue, this dissertation is likely necessary to people who develop AI technology; creators and users of copyrighted works; as well as legislators, lawyers, and academics. AI developers will need to be informed about their rights surrounding the creations their technology has developed- assuming there is any difference to them through changes in the law. As well as this, a change in copyright law would impact the creators and users of copyrighted works as they may have to obtain licences to use AI works. Finally, these issues would be important to legislators, lawyers, and academics because they need to be aware of the new law, especially when advising clients, informing others, or teaching students.

In this dissertation, the topic is clearly regarding the impact of AI on copyright law. The main discussion question being, “Is copyright law suitable to protect AI creations”. There are further sub-questions that this dissertation aims to address in order to ensure an appropriate and detailed response to the main dissertation question; these are listed below.

- Can AI creations be copyrighted?
- If AI creations can be copyrighted, how will copyrighting them impact national and international legislation and intellectual property law in general?
- Can future technological developments also be considered if AI creations are allowed to be protected by copyright law?
- How will allowing AI creations to be protected by copyright impact human authors of copyrighted works and human creativity?

In order to address these questions and the main topic, following this introductory section, Section two will introduce and define AI and give an overview of current national copyright law. Then, the effects of AI on current national copyright law will be identified, highlighting potential problems that may arise

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due to the development of AI. Next, Section three will consider international copyright law in regard to AI creations; this chapter will consider and compare copyright law under WIPO and the US. Section four of this dissertation will analyse the current changes proposed for copyright law, including issues regarding TDM and the 'copyright ability' of AI creations. This will allow for an evaluation of how legal systems are adapting to incorporate AI creations into their copyright law – if they are – and how effectively they are doing this. In addition, further potential reforms will be addressed to suggest how legal systems may effectively incorporate AI creations into their intellectual property law as copyright-protected works. Finally, a conclusion will be drawn to solidify an answer to the proposed dissertation question and sub-questions, based upon the analysis in previous sections.

An introduction to AI and an overview of national copyright law

Copyright law and AI have become an area of law that is arguably in need of reform and updating internationally. Complications surrounding the ability of AI technology to create work that can be copyrighted- usually due to an issue about authorship, need to be addressed and legislated upon in order to create a cohesive understanding and baseline regarding AI creations, whether this is done for or against the protection of AI creations under copyright law. Before understanding the issues surrounding copyright law regarding AI creations, both AI and copyright law in the UK need to be understood individually.

This section of the dissertation will give definitions of AI generally, looking at different perspectives and understandings of the technology currently. Having defined AI, an overview of the current national copyright law will be given to analyse the problems that may arise from it. This will highlight the areas that may need reforming, allowing for a discussion proposing the best way forward for intellectual property law. Furthermore, this section will examine the relevance of incorporating AI creations within national copyright law and explore the impacts that this would have. This will expand on arguments for and against changing copyright laws to support AI creations, ultimately deciding if the proposed changes would be proportional to the impacts this may have on the law, and human copyright-protected works.

What is AI?

AI is important to define as no universally recognised definition applies to all types of AI technology.[1] The dictionary definition of AI is "the theory and development of computer systems able to perform task normally requiring human intelligence".[2] Whilst this succinct definition states the general concept of what AI is, it does not fully explore the different types of AI technology that exist. Another definition of AI is given by Marvin Minskey, who said that "AI is the science of making machines do things that would require intelligence if done by men".[3] Similarly to the dictionary definition, although this definition of AI is generally correct, it does not allow for a deeper understanding of AI technology, and is potentially outdated, so cannot be put into context with current copyright law.

A better definition of AI can be found in *Artificial Intelligence in a Throughput Model: Some Major Algorithms*.[4] This is because the different types of AI are defined. It explains that:

> Narrow AI has only characteristics consistent with cognitive intelligence… it is not conscious, sentient, or driven by emotions the way that individuals are configured to make decisions. General AI represent machines that display human intelligence, that is, they are able to perform any intellectual task that a human being can in terms of decision-making.

[1] https://www.wipo.int/about-ip/en/frontier_technologies/ai_and_ip.html.
[2] 'Artificial Intelligence (AI): What is it and how does it work' https://www.lexology.com/library/detail.aspx?g=5424a424-c590-45f0-9e2a-ab05daff032d#.
[3] Ragnar Fjelland 'Why general artificial intelligence will not be realised' (2020) https://www.nature.com/articles/s41599-020-0494-4.
[4] Waymond Rodgers *Artificial Intelligence in a Throughput Model: some Major Algorithms* (Routledge, 2020).

> Super AI displays features of all kinds of competencies such as emotional and social intelligence… able to be self-conscious and self-aware in their interactions with others.

Currently, narrow AI is the type that has already been created and is already in use, such as facial recognition or virtual assistants like Siri or Alexa. General AI (hereon AGI) is still just a theoretical concept and the work of science fiction, as nobody has been able to create a machine that can fully replicate the individual decision-making and creative intelligence of a human brain.[5] Therefore, this dissertation will mainly focus on narrow AI when referring to how AI should be incorporated within current law but will also highlight the need for future incorporation of AI technology that may be developed.

The WIPO Conversation on Intellectual Property and Artificial Intelligence further considers important aspects of AI creations regarding possible protection through copyright law.[6] These are whether the creations are: AI-supported, such as AI systems which "have no learning capability, poor ability handling uncertainties and can only reason narrowly defined problems"; AI-assisted, where human intervention happens throughout every stage of the process of making the creation and any creativity by the AI technology is therefore limited by this, or; AI-generated which is "the generation of an output by AI without human intervention".[7] The level of dependency on AI technology is essential to consider because it may affect the protection afforded to a creation made by it- or the protection that should be given.

National Copyright Law

Now that an interpretation of AI has been defined, an understanding of the law must be established before assessing the impact of AI creations. This part of Section Two will give an overview of copyright law highlighting relevant and important sections of the law, therefore allowing for criticism of its current application and problems arising surrounding AI creations regarding copyright law. Copyright law in the UK is governed by the CDPA.[8] This Act protects works which fall within specific categories. These are original literary, dramatic, musical, or artistic works; sound recordings, films, or broadcasts, and the typographical arrangement of published editions.[9] Copyright protection is a type of property protection, therefore giving proprietary and economic rights allowing for the owner of a copyright-protected work to control copying.[10] Furthermore, this Act protects the moral rights of the owner of the copyright-protected work, allowing for some control over how the work is used or exploited. Both primary and secondary works are protected under the CDPA, though primary works receive stronger protection due to the fact that they require more significant amounts of creativity and originality.

The originality of work means that "work must not be copied from another work… it should originate from the author".[11] Furthermore, original work requires "labour, skill, and judgement" under the UK's definition.[12] Authorship is defined under s.9(1) of the CDPA, which says that an author of a primary work is the person who creates it. This contrasts with the fact that the author of a secondary work varies according to the type of work that it is. There can be more than one author of a work; however, it seems as though the author must be a natural person as in s.9(1) it says that "in this part "author", in relation to the work, means the person who created it…" This Act does account for computer created works saying that "computer generated, in relation to a work, means that the work is generated by a computer in circumstances such that there is no human author of the work", suggesting a possibility to account for and computer made works. This may be applicable for AI creations and will be discussed in more depth within this dissertation. Ownership is a separate issue from authorship and is defined in s.11(1).

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[5] ibid.
[6] WIPO Conversation on Intellectual Property (IP) and Artificial Intelligence (AI), Geneva, September 27, 2019.
[7] ibid.
[8] Copyright, Design and Patents Act 1998
[9] ibid, s.1(a)(b)(c).
[10] ibid, s.2.
[11] *University of London Press v University Tutorial Press* [1916] 2 Ch 601.
[12] *Walter v Lane* [1900] AC 539.

Usually, the author is the first owner of copyright under the national law. There are exclusions under s.11(2), which accounts for works created during employment. In addition to this, for secondary works, ownership may vary from how it is defined in the aforementioned sections.

The final element of national copyright law to consider is the duration for which copyright will protect the work. This varies under the national law depending on the type of work that is created. For literary, dramatic, musical, and artistic works, the duration of copyright protection is the life of the author and seventy years after the death of the author.[13] Films have a similar duration of protection, that being the duration of the longest life out of: the principal director; the author of the screenplay; the author of the dialogue and; the composer of music specifically created and used in the film, and an additional seventy years after their death.[14] This contrasts with sound recordings, which are protected under copyright law for fifty years from the recording, or the typographical arrangement of published editions, which are protected for only twenty-five years, as the protection of these works does not take into account the life of the author, but instead gives a fixed figure.[15] This is, therefore, affording these types of works a lesser level of protection under the national copyright law.

Can AI creations be copyrighted under national law?

Four main issues surface regarding whether AI creations can be protected under national copyright law. These concern whether AI creations can fulfil the requirements of originality, authorship, ownership, and duration of copyright as they are currently laid out under the law. Each of these will be addressed in this section of section two, assessing AI's adherence to current copyright law, and suggesting potential changes that may help to advance national copyright law in the future.

First, originality must be questioned. This is because, with the current advancement and use of AI, it seems as though the technology does not have the capability to produce something truly original. Arguably only super AI or perhaps AGI could create an original work, but not AI as we know it today.[16] However, this may not be entirely accurate as AI technology can produce unpredictable creations, such as within the music industry, showing creativity to some extent.[17] This, therefore, may allow for the originality of some AI creations to be recognised. In contrast, one argument against AI originality would be the idea that originality comes from the creator of the AI technology rather than the technology itself through the inputs or instructions given.[18] However, this would still suggest that there can be originality in AI creations regardless of whom the originality came from.

This would be furthered by the current law surrounding authorship under the CDPA for computer-generated works, in the fact that authorship is granted to the creators of the technology rather than the AI technology itself - if this would apply to AI creations.[19] However, dependency on and the use of AI should be considered when addressing the issue of authorship. This is because an author is in regard to the person who creates it, so if AI creates it, despite the fact that it is not a person by literal definition, it is undoubtedly the author of the creation. A change to the ability for AI to be the author of its creation would be likely to change the entire outlook on the 'copyright ability' of AI creations. This is because AI creations seemingly meet other requirements of copyright law, perhaps even originality. However, allowing for AI to be the author of its creations would call for a complete change in the law, changing the definition of an author from person to either person or AI or, more generally, just creator. This may also disrupt the protection afforded to computer-generated works and may change the protection

[13] Ibid, s.12.
[14] Ibid, 13(b).
[15] Ibid, s.15.
[16] Eban Escott 'What are the 3 types of AI? A guide to narrow, general, and super artificial intelligence' (2017) https://codebots.com/artificial-intelligence/the-3-types-of-ai-is-the-third-even-possible.
[17] Luo Li 'Artificial Intelligence: An Earthquake in Copyright Protection of the Digital Music' in Damien Bielicki *Regulating Artificial Intelligence in Industry* (Routledge 2020).
[18] David Cowen 'Robot art: The UK copyright implications of artificial intelligence generated art' (2019) https://roboticslawjournal.com/analysis/robot-art-the-uk-copyright-implications-of-artificial-intelligence-generated-art-75379638.
[19] Section 178.

afforded to current authors of computer-generated works, meaning they could lose their rights.[20] This may seem disproportional when considering the extent to which AI can produce creations currently; however, it may prove beneficial for future projected developments in AI technology and the capability it may have one day.

Relating to this is the issue of ownership. Usually, for primary works, the first owner is the author of the copyrighted work, allowing them exclusive rights regarding who uses the work - whether it is just them or if they grant licences to others.[21] However, if AI creations are deemed copyrightable, it is unclear who ownership rights would be granted to - the AI which created the work or the creator of the AI technology. These questions could be rectified by amendments to the national copyright law under the CDPA without affecting the rights of human owners of copyright-protected works as new sections could be specifically created for AI creations, similar to how there are specific sections for CGW.[22] Doing this would further question the proportionality in changing the law to protect AI creations due to the somewhat limited scope of the technology presently, though this may need adjusting for projected developments making it relevant to consider. Some argue that "copyright law needs to be changed or re-evaluated in order to determine how we should address these AI systems, the products they produce, and the challenges they propose for the existing copyright regime."

The final of the four problems relates to the duration of copyright protection afforded to the different types of copyright-protected works. Duration causes problems because some of them are based on the life of the author. If it is decided to protect AI creations and the author is the creator of the AI technology, there is no issue as it would likely follow a similar route to "computer-generated works" under the CDPA.[23] However, if the AI technology is the author, a fixed duration of copyright would be the best way to resolve this issue, similar to how particular works, such as the typographical arrangement of published editions, are protected for a certain period of time regardless of the life of this author due to the ability of AI technology to continue producing creations indefinitely.[24]

This section of Chapter Two demonstrates that although copyright law nationally does not yet protect AI creations, it is achievable for it to do so with little amounts of amendments to legislation and no real detriment to human owners and authors of copyright-protected works.

An Overview of international copyright law and problems regarding AI

Now that it has been established how national law in the UK protects copyrighted works and the problems relating to AI creations, an understanding of international copyright law must be developed. In this chapter of the dissertation, international copyright law will be explained to some extent, particularly focusing on copyright law under WIPO and in the US. Then, problems arising from these laws concerning AI will be highlighted and addressed, allowing for a critical analysis of the current law and comparisons between international and national copyright law. This will allow for the similarity of problems for copyright law and AI to be recognised, meaning that suggestions for how the law may need to potentially change will be emphasised.

Copyright law under the World Intellectual Property Organisation (WIPO)

Copyright law under WIPO is protected under the Berne Convention.[25] Under Article 2, it is stated what is included under copyright-protected works through the Berne Convention, it says that "the expression 'literary and artistic works' shall include every production in the literary, scientific, and artistic domain…".[26] This clearly shows works that are protected as it is continued with examples of what this

[20] Ibid.
[21] Section 11.
[22] Section.178.
[23] Section 178.
[24] Section 15.
[25] Berne Convention for the Protection of Literary and Artistic Works 1886.
[26] Ibid, Article 2.

means exactly, however, this Article of the Berne Convention is not an exhaustive list.[27] This is positive for this specific type of copyright protection when considering the time that the Berne Convention[28] came about and the significant developments in technology generally and its contributions to copyrighted works in today's society. Therefore, although not directly included, the protection in the Berne Convention under Article 2 can be expanded and interpreted to protect computer programs and the expressive selection of database data and material as they can be included under the requirements of "production in the literary, scientific and artistic domain…"[29] This is furthered that Article 2 of the Berne Convention is "not intended to limit the modes or terms of expression which are protected by copyright law."

This gives an overview of current copyright law under the WIPO but has yet to address whether AI creations are protected by copyright law here. Generally, they are not. The second session of the WIPO Conversation on Intellectual Property and Artificial Intelligence clarified that there was an issue regarding authorship and ownership when regarding AI creations.[30] It was emphasised from this issue that "there must necessarily be a human creator who will be at the origin of any literary and artistic creation, even if generated by AI" and that copyright protection "should be vested in the human creator of the work".[31] This aligns with the national copyright law, to some extent, as it is evident that a human creator is required to produce copyright-protected works, and creations by AI are not yet protected by international or national IP law.

In contrast with this is the fact that under WIPO, "in specific conditions an AI application may be granted legal personality, that is, be vested with copyright; an example would be an artificial music score…" - this show that AI creation can be protected under international copyright law.[32] However, these specific conditions have not yet been expanded to protect other types of AI creations, such as literary and artistic works that are not musical, further highlighting the lack of action in the law to account for AI creations in regard to copyright protection.[33] This may be because there is no urgent need for change when considering the current development and capability of AI technology, but more likely that international law does not want to detriment human creators of copyright-protected work since giving AI a similar amount of protection could lessen the incentive for human-created works if the change in the law seems to favour AI creations.

It has been suggested that a separate *sui generis* system should be considered in relation to the protection of AI creations.[34] This could be an effective mechanism to cope with the development of AI technology without negatively impacting human creators of copyrighted work. By implementing law surrounding this, links could be drawn to the current copyright law under WIPO, making it similar to an extent but not changing the protection afforded to human creators of works, which seems to be fairer for both creators of copyrighted works as they currently are and AI creators of potentially copyrightable works when considering changes to IP law. Furthermore, implementing a new law affording protection to AI-generated works may incentivise developers to invest in such systems, broadening the works available to the public and giving the time-consuming effort that is needed to make machines with this capability the recognition that it deserves.[35] An alternative solution to this would be to implement some form of protection similar to that afforded to CGW in the UK, as this may be substantial in protecting the extent

[27] Summary of Berne Convention for the Protection of Literary and Artistic Works 1886. https://www.wipo.int/treaties/en/ip/berne/summary_berne.html.
[28] Ibid.
[29] Ibid.
[30] WIPO Conversation on Intellectual Property (IP) and Artificial Intelligence (AI), Geneva, September 27, 2019.
[31] Ibid.
[32] Ibid.
[33] Ibid.
[34] Ibid.
[35] Andres Guadamuz 'WIPO magazine: Artificial intelligence and copyright' (2017) https://www.wipo.int/wipo_magazine/en/2017/05/article_0003.html.

of current AI creations, however doing this may not be adequate to protect future projections of the development of AI and its ability to create original works with little, or no, substantive human input.[36]

Copyright Law in the United States

In the US, copyright law is protected under Title 17 of the United States Code, which includes the amendments enacted by Congress on October 17th, 2022, the Copyright Act 1976, and all subsequent amendments to copyright law.[37] Title 17 draws many similarities to the copyright protection afforded to works through the national law under the CDPA.[38] The subject matter of copyright is defined under section 102 of Title 17.[39] This protects many of the same works as the CDPA and the copyright law under WIPO, considering that this title implements the Berne Convention. Under this section, literary works; musical works, including any accompanying words; dramatic works, including any accompanying music; pantomimes and choreographic works; pictorial, graphic, and sculptural works; motion pictures and other audio-visual works; sound recordings; and architectural works are protected.[40] On first glance, there seems to be no reason that AI creations cannot be protected under US copyright law.

Continuing from this, section 201 explains the ownership of copyright in the US.[41] Similarly to the CDPA, under section 201(a) it states that the initial owner of a copyright work protected by this title is the author or authors of the work – and joint authors are co-owners of copyright in the work.[42] The ownership of work is expanded under section 201(b) for works made for hire which explains that the author of the work is the employer or person for whom the work was made, unless the parties have expressly agreed otherwise in a written instrument signed by them.[43] Furthermore, 201(c) considers the owners of collective works, and 201(d) and (e) explains the transfer of ownership of works, whether voluntarily or involuntarily transferred.[44] Evidently, Title 17 of the US Code goes into depth to clearly explain the ownership rights of copyright-protected works.[45] When considering ownership rights, there is no reason that AI cannot be the owner of a copyright work under Title 17 of the US code thus far.

A final essential part of US copyright law to highlight is the duration for which copyright will last. The duration of copyright is important to consider because it is usually dependant on the life of the author. This is no different for copyright under Title 17, specifically section 302.[46] In general, "copyright in a work created on or after January 1, 1978, subsists from its creation… for a term consisting of the life of the author and 70 years after the authors death".[47] This section further explains that for joint works copyright lasts for the life of the last surviving author and 70 years after their death; and that for anonymous works, pseudonymous works and works made for hire, the duration of copyright protection is either 95 years from the first publication of the work, or 120 years from the creation of the work-whichever period expires first.[48] This is where a problem would arise when considering US copyright law, and other copyright laws, regarding the protection of AI creations as duration of copyright ability suggests a human author, although this could be rectified by a fixed period of copyright protection being applied to such a creation without a human author, as mentioned in Chapter Two of this dissertation.

To solidify that copyright law in the US is not viable to protect AI creations, "on March 15th, 2023, the US Copyright Office announced that works created with artificial intelligence (AI) may be

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[36] n, 3, 128.
[37] Copyright Law of the United States (Title 17); Copyright Act 1976.
[38] Copyright Law of the United States (Title 17);
[39] Copyright Law of the United States (Title 17), s.102.
[40] Section.102.
[41] Ibid, s.201.
[42] ibid, s.201(a).
[43] ibid, s.201(b).
[44] ibid, s.201(c)(d)(e).
[45] ibid.
[46] ibid, s.302.
[47] ibid.
[48] ibid.

copyrightable provided the work involves sufficient human authorship".[49] Although this statement seems to suggest protection for AI creations and is somewhat progressive comparatively to national and international copyright law, it is still dependant on human authorship. Furthering this, "according to policy statements, works created by AI without human intervention or involvement still cannot be copyrighted as they fail to fulfil the human authorship requirement".[50] This adjustment to the law, although more considerate of potential AI creations, still does not allow for the protection of creations made solely by AI. Similarly, to previous suggestions in this dissertation, this could be combatted either through amendments to current copyright law, or by creating new legislation altogether, if governments and legislators see fit.

Overall, it can be seen that issues arising from the 'copyright ability' of AI creations are similar nationally and internationally, suggesting that systems need to be amended to better protect AI creations overall, and not detriment human authors by doing so. Reforming the current law or creating a sui generis protection under IP law as a whole would be a step forward to clarify the protection afforded to such creations and keep the system more cohesive.

An Analysis of proposed changes to copyright law

In this dissertation thus far, the national and international copyright laws have been explained, and problems that may arise regarding the insufficiency of copyright protection for AI creations have been brought to attention, with some suggestions on how to rectify these issues being highlighted. In this penultimate chapter of the dissertation, proposed changes to the laws, both nationally and internationally, will be discussed, analysing their ability to address the seemingly increasing need for change surrounding the lack of protection afforded to AI creations through copyright law.

Proposed changes nationally

The most prevalent consideration for a change in the law regarding AI technology in the UK has been through the Government Consultation concerning Artificial Intelligence and Intellectual Property: Copyright and Patents, published in 2022.[51] This consultation attempts to address many issues, including the importance of AI, criticisms of CGW protections, and TDM.

To begin with, this consultation comments on how "AI can support innovation and creativity in a range of ways" and how "some believe that AI will soon be inventing and creating things in ways that make it impossible to identify the human intellectual input in the final…work. Some feel this is happening now."[52] This emphasises some of the aforementioned ideas in this dissertation, about how it is essential to assess the effectiveness of the current law surrounding the protection of AI creations due to the rapid technological development of AI currently as well as in future expected developments, and to assess the impact that this may have on IP law as a whole.

Next, criticisms of protection for CGW are addressed. One important issue, which is also applicable when considering AI creations, is that "the legal concept of originality is defined with reference to human authors and characteristics like personality, judgement and skill".[53] This explanation of originality seems contradictory considering it can be, and under the CDPA is, applied to CGW.[54] In alignment with this, is the suggestion in Chapter Two of this dissertation that the definition of authorship should be adapted to allow for not only human but also non-human authors of copyrightable works.

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[49] 'Can Works Created with AI Be Copyrighted? Copyright Office Issues Formal Guidance' (2023) https://www.ropesgray.com/en/newsroom/alerts/2023/03/can-works-created-with-ai-be-copyrighted-copyright-office-issues-formal-guidance.

[50] Ibid.

[51] Consultation Response "Artificial Intelligence and Intellectual Property: Copyright and Patents" 2022 https://www.gov.uk/government/consultations/artificial-intelligence-and-ip-copyright-and-patents/artificial-intelligence-and-intellectual-property-copyright-and-patents.

[52] Ibid.

[53] Ibid.

[54] Section128.

There are mixed views surrounding this idea; some argue that the protection for CGW is already excessive because "computers do not need to be rewarded to produce new content, but IP rights have costs to third parties".[55] In contrast, others believe that increasing IP rights would "incentivise investment in AI technology".[56] Neither of these views is inherently wrong, but whilst computers and AI technology do not need rewards for creations, the human producer of this technology may not have the incentive to create it if its creations are not adequately protected by IP law as copyrighted works. Another viewpoint arising from this consultation regards the philosophical idea that copyright is based upon creative endeavour and human authorship and, therefore, it should only apply to human creations.[57] This belief relates to the concern that "protecting computer-generated works may promote these works at the expense of human creations and devalue human creativity."[58]

Despite the reluctance of protecting CGW, and in turn AI creations, expressed through this view, it may be an idea promoting the need for a sui generis form of protection under IP law specifically to protects works from non-human creators. By doing this rather than amending copyright law, less scepticism may be prevalent as there would seem to be less of a threat to the creativity of the human mind and the protection afforded to the expression of this creativity. In addition to this, creating new legislation altogether would allow for definitions specifically tailored to CGW and AI technology, such as when concerning the definition of authorship, meaning no change (excluding the potential removal of protection for CGW under the CDPA) within current copyright legislation meaning there would be no detriment or change for human authors of copyrighted works.[59] Creating new, specific protection may be the most straightforward route for the national law to protect AI creations and avoid confusion or conflicts of interest through implementing changes.

A further concern is highlighted in this consultation that "a person may falsely claim that a work generated by AI is actually generated by them. This would mean that they would benefit from longer copyright protection." Those who are concerned about this suggest that AI creations automatically get tagged so that they cannot be claimed as human works, or that there are sanctions made for this false attribution. However, it has been stated that "we do not think that false attribution is a substantial issue at this point", reasonably so, as before thinking about a problem surrounding protecting AI and CGW through copyright law, it must first be established if and how this could be done. In addition to this, there are also already measures to protect against this, to some extent, such as the Fraud Act or under s.84 of the CDPA.[60]

Thus far, the consultation seems to support further protection for CGW and AI creations. However, based on this discussion, three options were proposed. These were: to make no legal changes; to remove protection for CGW, or; to replace the current protection with a new right of reduced scope or duration. The reasons given for making no legal changes to the current law is because it is not clear the extent to which AI users and developers rely on copyright for CGW. "This option would be justified if the current approach to computer-generated works were shown to have an incentive effect in encouraging new AI-generated works and investment in AI technology. It would also be necessary for this to come without unreasonable costs to third parties, including users of the works and human creators." [61] The issue with this option is that not enough incentive is given, but offering more incentive may seem like a threat to human creativity and works, especially when considering the potential speed and volume of the production of AI creations comparatively with those of human authorship. The second option – removing protection for CGW – "would be justified if granting copyright for CGW is not necessary to incentivise their production or has unreasonable costs to third parties." [62] By completely removing protection for CGW and AI creations, although AI does not itself need rewards or incentive to create,

[55] Ibid.
[56] Ibid.
[57] Ibid.
[58] Ibid.
[59] Section 9(3).
[60] Fraud Act 2006, s.84.
[61] Ibid.
[62] Ibid.

it will remove the incentive for producers of the AI to make and develop the technology, therefore hindering the development of it. However, this may be seen as positive for protecting human creativity, suggesting that a new system under IP law to protect CGW and AI creations rather than amending copyright law may be the most beneficial.

The third option seems to be the most progressive of the options considered, as it suggests replacing the current protection with a new right of reduced scope or duration, yet is still proposing removing protection from CGW, and the potential for protection for AI creations, counteracting the ideas put forth in this dissertation.[63] This option suggests a new form of protection which is to have the same author, that being the "person by whom the arrangement for the creation of the work was undertaken".[64] This would be problematic when addressing AI creations and the idea that they should be able to be the author of their work. However, it could be more inclusive in the fact that AI could be protected in the same way as CGW, potentially under the same new right, with recognition and protection for their creations given to the producer or creator of the technology. If this option were to be implemented, to reduce the scope or duration and ensure the balance that this option aims for, a fixed period for 'copyright ability' would be necessary, similar to the fixed period of protection against works such as the typographical arrangement of published editions under the CDPA currently.[65] The purpose of this option is to reflect the capacity of computers to generate work more quickly.

This consultation addresses another issue which is TDM. TDM is relevant for research and development for training AI, so it is important to address this as it may affect the originality of CGW and AI creations and, if misused, could infringe the rights of other copyright owners. It is the use of "automated computational techniques to analyse large amounts of information to identify trends and other useful information." Some material that is analysed or used is already protected by copyright, meaning that licences need to be obtained to use it, or an exception may need to be relied on. The current exceptions for TDM were introduced in 2014, and they include having permits for making copies of copyrighted works for TDM for non-commercial research, assuming that researchers have lawful access to the material (such as subscriptions).[66] This also requires the acknowledgement of works unless it is impractical. Other exceptions making TDM possible are if the copyright on the work has expired, if there is a temporary copying exception, through licencing, or if copyright on the work used does not exist.

This consultation suggests four options to potentially expand TDM. These are important to consider because more TDM would allow for better training of AI technology, therefore expanding the creations of AI that can potentially be copyrighted if copyright protection is eventually allowed for AI creations. The four options proposed by this consultation regarding TDM are to make no legal change; to improve licensing environments for TDM; to extend existing TDM exceptions to cover commercial research and databases, and; to adopt a TDM exception for any use with a right holder opt-out. It is essential to consider that "the proposed exception was not extended to permit any copying of copyright works or databases; and it would have been limited to making a copy of the work for carrying out computational analysis of data recorded in the work."[67]

Following this Government Consultation on "Intellectual Property and Artificial Intelligence: Copyright and Patents", in 2023 the Government decided to withdraw plans for proposed changes TDM exceptions. "The UK Minister for Science, Research and Innovation has stated in Parliament that the UK Government will not be proceeding with an extension to the UK's text and data mining exception that would have allowed… much broader access to materials needed for machine learning and to train AI systems".[68] This essentially means that, for now, TDM will stay the same, and creators of AI

[63] Ibid.
[64] N 72.
[65] Section 15.
[66] Ibid.
[67] Herbert Smith Freehills LLP 'UK withdraws plans for broader Text and Data Mining (TDM) copyright and database right exception' https://www.lexology.com/library/detail.aspx?g=cb6087d4-ba48-474a-81c5-4f1f85eba01e.
[68] Ibid.

technology need to be more cautious about doing research and development when training AI than they might have been if the proposed broader exceptions had been applied.

It was suggested that the Intellectual Property Office's (IPO's) proposed changes "take insufficient account of the potential harm to the creative industries" and whilst developing AI is important, wider TDM exceptions "should not be pursued at all costs".[69] This viewpoint reemphasises concerns that were earlier made prominent by the Government Consultation, those being that changes to IP law may be at the detriment of human creativity. The decision not to implement the changes suggested does not seem to affect the advancement for the 'copyright ability' of CGW and the potential protection of AI creations through copyright law or similar means. It does, though, show the reluctance, regarding changes to the law, for the advancement and benefit of AI generally by giving IP rights for non-human creations.

Proposed changes internationally

Consideration by WIPO has also been given regarding IP law and AI. "The World Intellectual Property Organisation established the WIPO Conversation on Intellectual Property (IP) and Artificial Intelligence since 2019 to bring stakeholders from diversified sectors to discuss the implications and impact of AI on IP policies and legislation". This is because AI concerns IP policies in many ways due to the main purpose of IP being "being a mechanism to generate incentives for creativity".[70] This WIPO conversation discusses many important issues regarding IP generally, but more relevantly for the purpose of this dissertation is issue 7, regarding authorship and ownership under copyright law, and issue 8, regarding infringement and exceptions of copyright-protected works.[71]

Issue 7 in this conversation discusses the increasing capability of AI to produce literary and dramatic works, and the fact that the copyright system has "always been intimately associated with… the encouragement of the expression of human creativity.[72] A major problem is highlighted in regard the balance between the value of human creativity and machine creativity.[73] To resolve this, as suggested in Section three of this dissertation, "a special sui generis system could be designed" specifically to protect AI creations rather than changing current copyright law. Validating this recommendation is the underlying idea that it is somewhat unclear to determine the human input in an AI creation, if there are any, and to distinguish advanced AI creations from human works that can be protected by copyright law. Contrasting this suggestion of a unique system to protect AI creations, it was argued that "legislation takes a long time… the law changes could only come about through judicial pronouncement… until the international community agrees on a treaty". However, allowing for judicial pronouncement to guide changes could be detrimental due to the pressure on the courts and that cases would be decided subjectively with reference to both national and international copyright laws which may not necessarily ensure cohesion in the decisions made, especially on an international level. Whether a decision is made to legislate, or cases are used to give precedent over the protection of AI creations, leaving such creations in the public domain could threaten the advancement of human creativity. This is due to of the unfair competition that may arise because "when AI systems are so advanced that nobody can tell if the work is coming from human or machine, it is going to be in favour of the machine". Through issue 7 of this conversation it can be understood how crucial adopting the law, either way, to protect AI creations is.

Furthering previous ideas in this dissertation, issue 8 addresses TDM. A main issue arising from TDM regarding AI and copyright is the risk of infringement when training AI with data so that it can produce its own creations. To avoid this, many people who train AI use materials which are no longer under copyright protection (the duration of copyright has passed), however, for literary works this may mean using outdated material which could potentially lead to gender and racial biases in the creations made

[69] Ibid.
[70] Alexander Cuntz 'Copyright and the currency of creativity: beyond income' (2019) https://www.wipo.int/wipo_magazine/en/2019/03/article_0003.html .
[71] N 12.
[72] Ibid.
[73] Ibid.

by AI. Despite this, in the WIPO conversation it was stated that "data sharing has multiple dimensions and it is best not to rush legislation… compulsory sharing of data is an extreme option… it is best to foster voluntary sharing… and if needed to serve the public interest, legislative solutions can be found". It has been argued that "the topic on the use of data and rights in data should perhaps go beyond the copyright system and embrace other areas such as technology, competition, privacy and ethics…", reinforcing the idea that there is resistance regarding changes to copyright law for the protection of AI creations.[74]

Overall, the WIPO conversation on IP and AI highlighted many of the same issues as the UK Government Consultation, drawing similar conclusions such as the fact that TDM should not be forcibly expanded and that currently, AI creations will not be protected by copyright law. Both of these proposed reforms in the law, though, do show the awareness that legislative bodies have regarding the importance of developing IP law for the new age of technological developments.

Conclusions

This section will give an overview of these answers, solidifying an understanding of them and highlighting the main points from this dissertation.

Firstly, to answer the main dissertation question, current copyright law is not effective for protecting AI creations. This is because currently the national copyright law of the UK under the CDPA does not provide protection for AI creations. Furthering this, the Berne Convention, which provides the main copyright protection under WIPO, also does afford protection to AI creations. The last copyright law addressed in this dissertation is the copyright law of the US under Title 17 of the United States Code. This compiles the Copyright Act 1976 and all relevant amendments to it yet does not afford adequate protection to creations solely generated by AI technology. However, under US copyright law some AI creations may be protected assuming that there is adequate human contribution to the work, so that the human authorship requirement is met as explained in Section Three of this dissertation. Some international copyright laws may protect AI creations, but none that have been focused on in this dissertation do. This is mainly due to issues with originality of the creation produced, authorship, ownership, and the duration of copyright that could be afforded, considering that the duration of copyright is usually dependant on the life of the authors- especially when concerning literary and dramatic works. In addition to this, the idea that protecting AI creations will negatively impact human creations and creativity could be a reason why there is slow progression in adapting copyright law for the new age of technology, and hindering how effectively it may be protected in the future under both national and international law.

Despite this, it could be possible to protect AI creations under copyright law. Doing this would give AI legal personality, affording it moral and economic rights over the work, unless these rights are given to the creator of the technology rather than the AI itself, for example in a similar manner to CGW under the CDPA, in which case, AI will not be the sole author or owner of the work.[75] Additionally, this will result in AI creations being taken out of the public domain, meaning that if users of such works wanted to use them, they would need to obtain licenses to do so. This can be seen as advantageous, though, in that it will reduce the potential for unfair competition between machine creations and human works despite how cost effective and fast producing AI creations could be. These all seem like positive impacts on copyright law generally, but due to aforementioned potential problems, and lengthy legislative procedures to amend the current law, the most agreeable suggestion may be to create a sui generis system specifically for the protection of AI creations under IP law internationally, rather than amending current legislation and treaties.

Further technological developments may be better included if a new system and international treaty under WIPO is created and agreed upon due to the scope of protection that could be given by this,

[74] Dr Luo Li 'Response to WIPO Conversation on Intellectual Property and Frontier Technologies (Fourth Session)'.
[75] Section 128.

contrasting with if AI creations were to be implemented under current copyright law in a similar manner to CGW under the CDPA.[76] Because there is already awareness about the direction in which AI technology is developing, it is just a matter of legislative bodies deciding how current and future technology, such as AGI and super-AI, would be best protected. Whilst doing this, legislators must also consider ways to reduce the supposed threats to human creativity in order to ensure the effectiveness of any updates to the law.

Provided that any law updated or created regarding this subject is well thought out, it should not have a major impact on the human authors of copyrighted works or human creativity. This is because, as decided in the UK Government Consultation and the WIPO conversation, there will be no changes made to TDM. This means that current copyrighted works (which are predominantly human works) will not be used without licenses, or until the duration of copyright has ended, therefore having no effect on human copyright-protected works. Furthermore, if a new system for the protection of AI creations is made, or even if AI creations are protected under amendments to current copyright law, there should be no impact on the protection of human copyrighted works due to the legislation as they should be considered as separate issues. However, the decision to, or not to protect AI creations under some form of IP law has arguments regarding the impact this would have on human creativity on either side – positive and negative – suggesting that legislators need to find balance through the protection, and amount of protection, that they decide to give.

The next steps regarding the potential copyright protection of AI creations will be for legislative bodies to act based on the results of the aforementioned different consultations and specialists who are educated in areas necessary to this subject. This could require a new treaty under WIPO and more cohesive definitions regarding AI and authorship to be given in order to keep those who may be affected by changes to the law well informed.

[76] Section 128.

DISSERTATION

Employment status and the gig economy: can reform ensure 'limb b worker' rights?

Conor Sparkes*

Introduction

Currently there are two systems in place that govern employment status: A system relating to rights owed based on status, and another that determines the tax status of an individual. This dissertation will deal mostly with employment rights, but tax status will be discussed briefly in a later section. Currently status is determined by the definitions set out in s.230 of the Employment Rights Act 1996. This section provides that an employee is a an individual who has entered into or works under a contract of employment,[1] whilst a 'worker' means an individual who has entered into or works under, either a contract of employment,[2] or any other contract whereby the individuals undertakes to personally perform some service, and the other party is not by virtue of the contract a client or customer, or a business undertaking.[3] As can be seen from these definitions, 'employees' are a sub-category of 'worker'. Generally, employee status is found by the courts by applying the test provided in *Ready Mixed Concrete*.[4] Employees have significantly less control over the performance of their work, and as such, enjoy a larger quantity of available rights. Workers, however, remain constantly uncertain of their rights. The requirements for non-employee workers are generally based on facts, applying Aikens LJ in *Autoclenz*[5] (also discussed later) and because of this, there is a lack of certainty when ascertaining their available rights.

In the last decade, there has been a surge in attention being paid to the so-called 'gig economy'. This term has been defined as 'labour markets that are characterized by independent contracting that happens through, via, and on digital platforms.'[6] These workers rely on being offered individual jobs, e.g., providing passengers with transport or delivering food, as a means of earning work, hence the 'gig'. Such services are often provided by phone applications (henceforth called 'apps'). On these apps, a worker will receive a job, which certain businesses allow them to accept or decline.[7] The level of control that gig economy workers possess over the nature of their work provides them with flexibility, however, with greater control comes the drawback of not enjoying the same quantity of rights that employees do, despite potentially being subordinate to certain conditions provided in their contracts with these apps.

Recently, in the Supreme Court decision of *Uber BV v Aslam*[8], it was declared that drivers for the app Uber were to be classified as workers for the purposes of the s.230(3) of the Employment Rights Act, under s.230(3)(b), described generally as limb (b) workers. It was found on the facts that Uber placed its drivers under contractual provisions which required them to accept rides after a specific number of declined rides, among other controlling factors such as behavioural and termination policies. Whilst this decision was made specifically on the facts of this particular case, it sets a precedent for workers' rights that other Uber workers could also apply to the courts for similar declarations. However, it is contrasted with a Court of Appeal decision in the same year, in *Deliveroo*,[9] where their delivery workers were not held to fall within s.296(1)(b) of the Trade Union and Labour Relations (Consolidation) Act

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[1] ERA, s.230 (1).
[2] ERA, s.230 (3)(a).
[3] ERA, s.230 (3)(b).
[4] *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497
[5] *Autoclenz Ltd v Belcher* [2011] UKSC 41, [2009] EWCA Civ 1046.
[6] Jamie Woodcock and Mark Graham, *'The Gig Economy: A Critical Introduction'* (Polity Press, 2020)
[7] Subject to certain conditions dependent on the app, see the rulings of *Uber BV* and *Deliveroo*
[8] *Uber BV v Aslam* [2021] UKSC 5.
[9] *Independent Workers Union of Great Britain v Central Arbitration Committee and Roofoods Ltd t/a Deliveroo* [2021] EWCA Civ 952.

1992 as delivery drivers had an exercisable right to substitution, defeating the requirement of personal service set out within the worker definition. The courts are willing to set out a purposive approach to employment legislation in order to achieve an ideal of 'worker protection' but will not protect gig economy staff from being disqualified from rights if even the most limited exception from personal performance of the work is allowed.[10]

Furthermore, the government has recently sought guidance on how the law relating to status should be improved. The Taylor Review 2017was commissioned to look into the changes in the current market and how the law can align with market incentives, potential exploitation of status requirements (which was believed to be occurring within the 'gig economy' field of work), and what changes can be realistically implemented.[11] After the report was released, the government set out the 2018 Good Work Plan[12] which outlined the future development of employment status law. The government also held a consultation that allowed interested parties, such as businesses and legal experts, to express their views of the current state of the law.[13] The response, published in 2022,[14] concluded that whilst there was a majority response to the survey in favour of either reform or better clarity of the current law, there was no consensus on which direction reform should take.[15] Moreover, following the COVID-19 pandemic, and the subsequent lockdowns in 2020 and 2021, the government, reflecting on the current economic state of the UK argued that such reform was not current a major priority for the market, and also expressed concerns that reform would further unsettle businesses, facing rising business costs and a potential recession.[16]

Therefore, there are currently no plans to introduce reform through legislation. However, 'gig economy' workers shall also face economic difficulties, as well as having no legislative protection from unscrupulous employers attempting to 'game' the system in order to limit the costs they are required to encumber for the rights of their workers. Therein lie the current arguments presented by critics of the current status of the law: does the system require change in order to help limb (b) workers secure their rights?[17] Or would reform decrease the attractiveness of such roles, increasing the burden on business and potentially leaving those reliant on gig work without income? And ultimately, to what extent is reform a realistic possibility in both the short-term and long-term?[18]

The Employment Rights Act 1995, *Ready Mixed Concrete* and the establishment of the employment status test

This section will outline the key statutory provisions that have provide the current definition of 'worker', as well as review the judgments of *Ready Mixed Concrete*[19] and *Autoclenz*,[20] which established widely accepted tests for finding employment status. It will also review *Uber BV v Aslam*,[21]

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[10] Carolynne Lord and others, *'The sustainability of the gig economy food delivery system (Deliveroo, UberEATS and Just-Eat): Histories and futures of rebound, lock-in and path dependency*' [2022] 0 (Ahead-of-print) International Journal of Sustainable Transportation 1-14.

[11] Department for Business and Trade and Department for Business, Energy & Industrial Strategy, *Good work: the Taylor review of modern working practices* (Crown copyright 2017).

[12] Department for Business, Energy & Industrial Strategy, *Good Work Plan* (Cm 9755, 2018).

[13] Department for Business, Energy & Industrial Strategy, HM Revenue & Customs, and HM Treasury, *Employment Status Consultation* (Crown copyright, 2018).

[14] Department for Business, Energy & Industrial Strategy, HM Revenue & Customs, and HM Treasury, *Employment Status consultation: government response* (Crown copyright, 2022)

[15] Ibid. 28.

[16] Ibid.

[17] Trades Union Congress, *Taylor Review: Employment Status* (Trade Unions Congress, 27 June 2018) < https://www.tuc.org.uk/research-analysis/reports/taylor-review-enforcement-employment-rights> accessed 16 March 2023.

[18] Birmingham Law Society, 'Employment Status Consultation' (Birmingham Law Society, 31 May 2018) <https://birminghamlawsociety.co.uk/wp-content/uploads/2019/01/Employment_Status_Consultation_response_-_Final.v.2.pdf.> accessed 4 April 2023

[19] [1968] 2 QB 497.

[20] [2011] UKSC 41, [2009] EWCA Civ 1046.

[21] [2021] UKSC 5.

as well as *Deliveroo*,[22] which provide conflicting decisions in regard to gig economy workers and will briefly indicate the problems that these judgments may bring forth in the future. As stated above, the current statutory definition of a 'worker' is in s.230 of the ERA. This definition originates from s.8(2) of the Wages Act 1986, a provision now repealed by the ERA, which acted as a consolidation act for various statutes having effect on employment rights. This definition is also included within the Working Time Regulations 1998 and the National Minimum Wage Act 1998. It is worth noting that these particular statutory instruments incorporated European Union directives on employment rights, and therefore, EU law still retains a significant impact on current status law.[23]

'Limb b' provides requirements to find whether an individual can be classed as a worker, however, this lacks nuance at first glance.[24] Similarly, the requirements for an 'employee' simple state there needs to be a contract of employment. A 'contract of employment' is defined in s.230(2), rather simply, as a contract of service, whether express or implied, and whether express or in writing. The issue with these definitions is that they do little to substantively define what an employee or their contract is, as if there is an inference of some mutual understanding made by the legislator that all employers and employees have.[25] Therefore, it was left to the judgment of the courts to decide what exactly constituted a 'contract of employment', and therefore what was understood to be an employee. In the landmark case of *Ready Mixed Concrete*, the oft-cited judgment of MacKenna J was delivered, which firmly established what was required in a contract of employment.

The case of *Ready Mixed Concrete* concerned the matter of whether a lorry driver was working under a contract of service. Ready Mixed Concrete (RMC) was a company that produced and distributed concrete to customers. To deliver the product to customers, they originally had a contract with an independent haulage business, but dissatisfied with this agreement, entered into hire-purchase agreements with owner-drivers. They would purchase a lorry from Ready Mixed Concrete for the delivery of the company's goods. Mr Latimer was one such owner-driver, having entered into a hire-purchase agreement with RMC in 1963. In 1965, he entered into another hire-purchase agreement for a different vehicle with the company. The matter at hand concerned whether RMC ought to have been making national insurance contributions on his behalf under the National Insurance Act 1965. The Minister of Social Security at the time was therefore asked to determine the employment status of Mr Latimer.

The Minister, on examination of the contract and the facts, concluded that Mr Latimer was an employee under RMC. Upon examination of the agreement, it was found that Mr Latimer was required to drive the hired vehicle himself, had to follow any orders from any 'reasonable servant of the company',[26] had to wear the company uniform, maintain the lorry out of his own expenses, and required consent from the company if he were to send a substitute driver instead of himself, whom he was required to pay. It was also found on facts that there were nine other hire-purchase drivers used by the company, and that they did not work set hours nor had set food breaks, and that the workers would independently arrange holidays so that only one driver was unavailable at a time.[27] Having received the justification behind the Minister's conclusion, RMC appealed this decision to the High Court.

The appeal was allowed by the High Court, the main factors for this decision being outlined by MacKenna J. He considered the above facts, and before making his decision, provided the requirements for what constitutes a 'contract of service': First, the servant agrees to provide service for another party in exchange for a wage or other remuneration. Second, he agrees in the performance of this service he

[22] [2021] EWCA Civ 952.
[23] See Georges Cavalier and Robert Upex, 'The concept of employment contract in European Union private law' [2006] *ICLQ* 55(3), 587-608 for a further discussion on Community law.
[24] Jeremias Prassl, 'Who Is a Worker?' (2017) LQR 133, 366.
[25] Ian Smith, Aaron Baker and Owen Warnock, *Smith & Wood's Employment Law* (15th edn, OUP Oxford 2021).
[26] [1968] 2 QB 514.
[27] Ibid. at 515.

will be subject to the other's control, making the other 'master'. Finally, the other provisions of the contract are consistent with a contract of service.[28]

He further explained these requirements. Without the existence of (i), there is no consideration and thus no contract. (ii) Stresses the importance of the element of control, which future cases have also pointed to as evidence of whether a master-servant relationship is found.[29] (iii) required further guidance, as Mackenna pointed to the requirement of personal service within the contract, and the liability of equipment and materials as factors that will point towards a contract being 'of service', rather than 'for services'.[30] Mackenna J also considered international cases in his decision, such as *Queensland Stations*[31] and *Montreal v. Montreal*[32] which provided examples of where it was held that contracts also presented with the question of whether they were 'of service' were ultimately held to be 'for services', due to the level of control enjoyed by the contractor on the facts.

MacKenna J ultimately considered that the contract provisions required Mr Latimer to maintain the vehicle and to ensure its availability, not necessarily Latimer himself.[33] Therefore, it was determined that this was a contract for services, namely for the carriage of goods by the hire-purchase vehicle, not the service of the driver himself. An important factor also considered was the impact of profit loss and gain, which fell upon Latimer himself, not on RMC.[34] Moreover, the freedoms which Latimer was granted by the contract, i.e., the substitution clauses and the ability to control the performance of the work, were consistent with the manner in which an independent contractor would be allowed to work.[35]

This case was pivotal in defining how master-servant relationships would be found by the courts. MacKenna J provided the elements of mutuality of obligations, control, and personal service that would become essential factors in determining whether an individual was a 'worker'.[36] These three criteria have been seen to be critical points of evidence for the existence of a contract of employment, under s.230(b) of the ERA. Specifically, the importance of personal service has been stressed by the courts as being the key requirement for the existence of a 'worker' arrangement, for both limbs of s.230(3). This has been affirmed in the judgments of *Pimlico Plumbers*[37] and *Deliveroo*, which shall be discussed later. However, if a person were not to satisfy the requirements expressed in *Ready Mixed Concrete*, then the courts will seek to establish whether they constitute a worker under limb (b) of s.230(3). The case of *Autoclenz* allowed the Court of Appeal to provide guidance on how the definition of 'worker' was to be satisfied.[38]

In *Autoclenz Ltd v Belcher and others*,[39] a car valeting company hired 20 individuals to provide their services. In 2007, these individuals were presented with an agreement, which contained provisions declaring that they were sub-contractors, the company was not required to provide them with work, and that the workers were not required to accept work. The workers therefore made a claim under the definition of worker provided in the NMW Regs 1999[40] and the WTR 1998[41], and thus were entitled to be paid minimum wage and statutory leave.[42] The Employment Tribunal held that a key provision in the 2007 agreement, concerning the worker's right to substitute and refuse work, did not reflect the actual agreement made with the workers, and were therefore sham clauses. Considering this, it was

[28] Ibid.
[29] Ibid.
[30] Ibid. at 516.
[31] (1945) 70 C.L.R. 539.
[32] [1947] 1 D.L.R. 161, P.C.
[33] [1968] 2 QB 526.
[34] Ibid.
[35] Ibid.
[36] See n.27 above
[37] *Pimlico Plumbers Ltd and another v Smith* [2018] UKSC 29, [2018] ICR 1511
[38] [2011] UKSC 41, [2011] ICR 1157
[39] Ibid.
[40] National Minimum Wage Regulations 1999
[41] Working Time Regulations 1998
[42] Ibid.

found that the workers fell within limb (a) of the 'worker' definition of the Regs.[43] This was appealed by Autoclenz, which the EAT allowed, on the grounds that the ET did not apply the correct test for sham clauses. There was no evidence of a 'common intention to mislead' and the clauses could not be stricken off as shams. Therefore, the workers did not fall into limb (a) but rather limb (b). [44]This was also appealed, with a cross appeal by the claimants.

The Court of Appeal restored the decision of the Employment Tribunal. Autoclenz's appeal was based on two grounds: The ET was unjustified in finding evidence of a contractual requirement of personal service, and they had erred in their application of the tests for 'sham clauses'. Smith LJ dismissed these grounds, arguing that evidence provided by a manager of the appellant proved that the reality was workers were expected to perform the services personally and required to give notice for any absences.[45] The substitution and right to refuse work clauses were not known by the workers and thus not ever put into action.[46] The other judges, Aikens and Sedley LJ, agreed with this judgment.[47] This decision was then appealed to the Supreme Court. The Supreme Court ruled unanimously that Belcher and others were under a contract of employment, despite the sham clauses placed within the agreement, and such entitled to minimum wage and statutory paid leave under the Regulations.[48] In his ruling, Lord Clarke JSC found that Smith LJ had been correct in her application of the legal tests provided. He agreed with Smith LJ's reference to the *dicta* in *Szilagyi,*[49] where it was established that in the case that one party relies on a contractual provision to be genuine whilst the other believes it to be a sham, the courts must examine all relevant evidence, including the contract itself and the actual conduct of the parties to purposively conclude on the true contractual relationship.[50] Therefore, the tribunal had identified that the workers were obliged to accept the work offered by Autoclenz, who in turn offered the work regularly. They operated under the control of the company's managers, had to perform the work personally and were not, in reality, entitled to enact any of the clauses discussed in the tribunal.[51]

This case set an important precedent for identifying sham clauses and emphasising the importance of the reality of employment contracts, however an incredibly important aspect of this case was Aikens LJ's judgment in the Court of Appeal, where he discussed the requirements provided in limb (b) of the Regulations,[52] which are identical to those provided in ERA s.230(3)(b). In his discussion, he explained what constitutes a contract of employment under limb (a) and what would satisfy the 'worker' definition under limb (b). He set out three requirements: First, the worker must be an individual who has entered into a contract, oral or written, express or implied, with another party for work or services.[53] Secondly, the work they have been contracted to perform must be perform by themselves. The ability to allow another to perform the work or services will disqualify the individual for falling under this definition.[54] This was affirmed, albeit indirectly, by Lord Clarke JSC in *Pimlico*,[55] whom in his discussion of the ruling of *Hashwani,*[56] stated that personal performance was the 'sole test' for finding worker status, and any other claim on a 'sole test' would be an 'inappropriate usurpation'. The requirement of personal service is therefore essential to finding 'worker' status, without this the courts will find that there is no 'contract for service' in existence. Finally, the work or service provided must not be, by virtue of the contract, for a client, customer, or any other business undertaking.[57] This would imply the economic

[43] [2006] ICR 731 [3].
[44] Ibid.
[45] [2010] IRLR 70 [40]-[45].
[46] Ibid. [61].
[47] *Ibid*. [71], [102].
[48] [2011] UKSC 41, [2011] ICR 1157 [39].
[49] *Protectacoat Firthglow Ltd v Szilagyi* [2009] IRLR 365.
[50] [2011] ICR 1157 [30]-[32]
[51] Ibid, [37-38]
[52] See (n.40 and n.41) above.
[53] [2010] IRLR 70 [75].
[54] Ibid, [76].
[55] [2018] UKSC 29, [2018] ICR 1511.
[56] *Jivraj v Hashwani* [2011] UKSC 40
[57] [2010] IRLR 70 [77].

burden falls strictly upon the working individual and therefore would fit under the definition of 'independent worker'.

This particular aspect of Aikens LJ's judgment would be cited in future cases and was affirmed by Maurice Kay LJ in *Hospital Medical Group Ltd v Westwood*,[58] a case concerning the status of a doctor hired for a specific performance of a service. This case adopts Aikens LJ's requirements for finding whether a doctor falls within the limb (b) definition, and also concerns the performance of specific work for one corporation.[59] Factually, there is some similarity with gig economy workers. Both the doctor in HMG v Westwood and gig economy workers rely on specific 'gigs' being offered to them in order to work and gain income, however, gig economy work has become the main contextual factor in two rulings, *Uber BV v Aslam*,[60] and the '*Deliveroo* case'.[61] In order to understand why these cases carry so much significance, they will be examined and compared.

In Uber BV, the Supreme Court confirmed that a group of Uber drivers were 'workers' under s.230(3)(b) of the ERA and dismissed Uber's appeal. The Employment Tribunal had found, on the facts, that the drivers for the Uber app were required to maintain their own vehicle, were named as 'independent contractors' within the written agreements, and were allowed to refuse trips.[62] However, they were also taken through induction, had no right to substitution, were paid weekly rather than by trip, and were monitored by the company based on passenger ratings and comments, with a behavioural policy in place for unfavourable reviews.[63] They also found that whilst drivers could refuse trips, refusing three trips in a row would result in the driver being forcibly logged off the app. On these facts, the ET also found the drivers to be 'workers' under the definition.[64]

Uber's appeal, which eventually reached the Supreme Court, was on the grounds that the lower courts had misdirected themselves in their understanding of the contractual relationship. Uber argued that their app was contractually understood by drivers to be used as a way to find clients and perform the trips.[65] Uber argued that they had no contract of service with the drivers, and therefore, the drivers acted as independent contractors conducting their business through the application.[66] In his ruling, Lord Leggatt JSC dismissed this argument, citing the Supreme Court in *Autoclenz* in determining that in finding whether the 'worker definition' is relevant, the courts should not just consider the contractual provision but rather the manner by which the contracted service was performed in consideration of the contract.[67] Another important aspect of Lord Leggatt JSC's suggestion that employment legislation had a general purpose of protecting dependent workers from being unfairly controlled by their putative employers. He also opined that to solely consider the contract would allow companies to be in control of whether statutory rights were granted to their workers.[68] Furthermore, it was held that the ET was correct in considering that Uber drivers were working when they were logged into the app, within their authorised working area and ready to accept trips, contrary to Uber's application.[69] The case therefore returned to the ET to determine whether these drivers were entitled to minimum wage and annual under the 'worker' definition.

This is contrasted with *Deliveroo*,[70] where the Court of Appeal held that Deliveroo drivers were not to be interpreted to be under the definition of 'workers' for the purposes of Article 11 of the European Convention of Human Rights. This case concerned the Central Arbitration Committee (CAC) rejecting

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[58] *Hospital Medical Group Ltd v Westwood* [2012] EWCA Civ 1005 [2013] I.C.R. 415.
[59] Ibid.
[60] [2021] UKSC 5 [2021] ICR 657.
[61] [2021] EWCA Civ 952.
[62] [2021] ICR 657 [3]-[13].
[63] Ibid. [6].
[64] Ibid. at 118-120
[65] Ibid, [43].
[66] Ibid, [44].
[67] Ibid, [62].
[68] Ibid, [76].
[69] Ibid, [123-124].
[70] [2021] EWCA Civ 952.

an application of collective bargaining rights by the Independent Workers Union of Great Britain (IWGB) for Deliveroo drivers, on the grounds that the drivers did not fall within the definition of 'worker' provided in the Trade Union and Labour Relations (Consolidation) Act 1992, s.296. The CAC found that Deliveroo drivers had a contractual right to substitution, which was also found to have been acted upon.[71] The IWGB appealed on domestic grounds to the High Court, though these were rejected. The only ground that was accepted on appeal concerned the potential misinterpretation of Art. 11 of the ECHR, which was found to have not been dealt with correctly by the CAC.[72] Ultimately, the High Court dismissed IWGB's appeal.

The appeal eventually reached the Court of Appeal where IWGB argued that the substitution clause in effect had not been acted upon by the large majority of drivers, and therefore, should be a contributory factor in this instance. It was suggested that if Deliveroo truly allowed all drivers to substitute themselves, then the company would be allowing their riders a right to refuse all work and remain still under contract. Furthermore, they argued that 'everyone' enjoyed the rights presented under Art. 11 and thus would include Deliveroo drivers.[73] The Court of Appeal rejected both of these arguments, stating that personal performance was an 'indispensable feature' of a worker relationship within domestic law, and did not see reason to dismiss its importance when considering ECHR rights.[74] IWGB has since applied for appeal to the Supreme Court.[75] Whether the Supreme Court will hear this appeal, at the time of writing, has not yet been determined. The critical difference between the decisions made in these cases lies in their independent facts. In fact, in the Court of Appeal, the relevance of *Uber BV* was diminished in its judgment because the Supreme Court case did not consider the aspect of personal performance.[76] The courts are, therefore, unwilling to consider the matter of gig economy worker status as a collective group, relying on fact-based evidence to make their decision. Also, it is worth highlighting that in *Uber*, the importance on finding the true employment relationship outside the contract was stressed, but in *Deliveroo*, the courts were unwilling to do so because of the 'indispensability' of personal performance.[77]

Therefore, in order to determine worker status, the ruling judge must find a requirement of personal performance at a minimum. However, does this reflect the reality of Deliveroo drivers? It is unlikely that these drivers view their work as a 'business undertaking' or their delivery destinations as 'clients' simply because their contract stipulates they may substitute who performs the delivery.[78] Moreover, it has been opined that the purposive approach in this case was not applied in the way that *Uber BV,* in citing *Autoclenz,* had affirmed. The lack of consideration for the practical use of the substitution clause has been criticised as not considering the intention of employment legislation as protecting workers.[79] Thus, the supposed intention of the legislation is in conflict with the practical application of the tests at hand. The courts seem unwilling to widen the definition to include the full scope of gig economy workers into the 'worker' definition, but still attest to such an approach in their decision and in the defining statutes. Therefore, there has been a fair amount of criticism surrounding the current tests for status, which the next chapter will examine in depth.

The Taylor Report: a consultation on employment status and the call for reform

This section will discuss the key problems that others have identified with the current state of employment status, and the government's response to these problems. This will include a critical

[71] Ibid, [24].
[72] Ibid, [31-35].
[73] Ibid, [40].
[74] Ibid, [77].
[75] Cristina Criddle, 'Deliveroo faces fresh UK Supreme Court challenge over riders' rights' (Financial Times, 5 September 2022) < https://www.ft.com/content/1f9806f7-41dc-4898-a282-5251764ba7a5> accessed 28 March 2023.
[76] [2021] EWCA Civ 952 [23]-[24]
[77] Ibid, [25].
[78] Joe Atkinson and Hitesh Dhorajiwala, 'The Future of Employment: Purposive Interpretation and the Role of Contract after Uber' [2022] MLR 85(3) 787.
[79] Alan Bogg and Michael Ford QC, 'The death of contract in determining employment status' (2021) LQR 137, 395.

analysis of the responses provided by trade unions, businesses, and law societies to a government consultation on employment status, an examination of the Taylor Report 2017 and the Good Work Plan provided in 2018.

In recent years, many have criticised the system by which employment status is found, specifically in regard to the gig economy. One major problem with the current law is that it allows unscrupulous employers to 'contract out' of providing rights.[80] That is to say, employers who do not wish to be burden with the cost of granting the rights that limb (b) allows will place provisions within the contract in such a manner that appears to be a contract for services instead of a contract of service.[81] Whilst it has been established that the courts will look beyond the contractual provision to find the true nature of the working relationship, this would require individuals to make claims to the court, which can be costly and uncertain. Therefore, gig economy workers remain at a high risk of being exploited.[82] This was the problem which the Taylor Report wished to resolve. In this report, it was proposed that the distinction between employees and workers would remain, but limb (b) workers would instead be called 'dependent contractors'. This would reflect both the reality of their relationship with the contractor of work, as well as distinguishing them from employees as an intermediary status between employee and independent contractor.[83] Moreover, the legislation defining employees and workers should be amended so that the common law principles, affirmed in *Autoclenz*, are placed within the legislation. This would give statutory authority to these requirements as well as providing guidance on their application to putative employers.[84]

It was also suggested that employment status should be restructured to be more consistent with tax. [85]Dependant contractors would be classed under 'employee' for the purposes of tax. In order to understand completely how alignment between employment and tax would affect substantive change, it will be explained, briefly. As opposed to the three-pronged system of 'employee', 'worker', and 'independent contractor' used in employment status, the tax system uses a two-pronged system of 'employee' and 'non-employee'. Those who fall within limb (b) of the s.230(3) ERA definition will fall into either of the two classes based on the test outlined by s.4 of the Income Tax (Earnings & Pensions) Act 2003. This test requires the finding of a contract of service or apprenticeship, identical to s.230(b) of the ERA. Therefore, the principles set out by MacKenna J in *Ready Mixed Concrete*[86] could also be seen as applicable for the purposes of finding tax status. It can be said that the essential factor in finding the employment and tax status of an individual resides in whether there is a requirement of personal performance of the contract.[87]

The Government, in response to these proposals, implemented the Good Work Plan, where it set out its intentions to find a balance between the flexibility offered by gig economy work, and the limb (b) status, whilst also protecting workers from exploitation.[88] The 2018 plan set out the goals of the government to create a 'dependent contractor' class, retain the three-prong employment system whilst also aligning certain aspects with the tax status system, and would continue to use the Taylor Report for guidance on any future changes to employment status.[89]

Upon the publication of the Taylor Report and the Good Work Plan, criticism was launched at the government's proposed approach. The report was criticised for providing no clear guidance on how the

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[80] NASUWT, 'Department for Business, Energy and Industrial Strategy, Her Majesty's Treasury and Her Majesty's Revenue and Customs Employment Status Consultation' (*NASUWT The Teachers' Union*, 15 January 2019) <https://www.nasuwt.org.uk/static/uploaded/4625096f-2673-438f-827d6bb7b8f89b79.pdf> accessed 1 April 2023.
[81] Ibid.
[82] Katie Bales, Alan Bogg, and Tonia Novitz (2018). 'Voice' and 'Choice' in Modern Working Practices: Problems with the Taylor Review' Industrial Law Journal, 47(1) 46.
[83] Department for Business and Trade (n 11).
[84] Ibid, [36].
[85] Ibid, [38].
[86] [1968] 2 QB 497.
[87] Ibid.
[88] Department for Business (n 12).
[89] Ibid.

protection of gig economy workers could be assured, and instead focusing on the codification of the established employment tests and principles.[90] It was argued that this provided no true improvement to the current protections offered to workers. Moreover, critics opined that unscrupulous employers would continue to 'game the system' by continuing to draft worker contracts that purposefully excluded them from statutory benefits, and so court actions would be the only way to examine the reality of the working relationship.[91] In order to seek an understanding on the full spectrum of opinions, the government also sought responses from professional firms and corporations on the proposed changes to employment status, in a 2018 consultation. Both trade unions and businesses alike released their responses to this consultation, which offer guidance on some of the suggestions for how employment status should be reformed.

The Trades Union Congress (TUC) and NASUWT: The Teachers' Union responded very similarly to the consultation, and so will be considered together to express an overall trade unionist argument for reform. Both unions stressed the need for the implementation of a new single definition of 'worker', which would allow all those who fall into this definition to enjoy the full volume of employment rights currently set aside for 'employees.'[92] TUC argued that this might be established by a commission on employment lawyers and social partner representative, and that all 'workers' are entitled to the full scope of employment rights. [93]In their response, TUC disagreed with the codification of the principles of control and personal service. They argued that by implementing them into statutes, it would remove the courts' ability to adapt these tests for novel forms of work.[94] NASUWT also expressed that by codifying the specific requirements of mutuality of obligations, control, and personal service, it may create a boundary that does not cover all forms of employment relationship.[95]

From these proposals, it can be seen that trade unions want the law on employment status to focus mainly on providing protection to workers. Their focus is on the reality of the contractual relationship between workers and their putative employers, being one of subordination, reflected in the first aspect of the worker definition provided by limb (b).[96] Therefore, rights should not be removed from workers simply due to the manner in which their work is performed. If they remain under a sufficient amount of control, then rights should be conferred onto them due to a lack of bargaining power entering into a contract of service.[97] However, this approach lacks objectivity and practicality. The reasoning behind their approach is to cover all workers under rights, but this could potentially mean an incredibly wide scope for a potential 'worker' definition.[98] Businesses could potentially struggle with pay requirements and in the current economic state of the UK as of writing, this would place a vast burden on companies. If such a burden were realised, this could potentially dissuade businesses from providing flexible roles like gig work. Therefore, workers reliant on such work for its flexibility would either be forced to find work requiring a tighter work pattern or be without work if they are unable to commit to fixed hours.[99]

In their response, the Birmingham Law Society argued for the codification of common law principles. They argued that this would clarify how employment status is found, enshrining the key notions of mutuality of obligations, control, and personal performance, and promoting the flexibility that the limb (b) worker status offers to individuals involved in work within the gig economy.[100] Furthermore, they

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[90] Chartered Institute of Personnel and Development, 'Taylor Review has potential to change the future of work' (CIPD, 11 July 2017) <https://www.cipd.co.uk/about/media/press/110717-taylor-review#gref> accessed 1 April 2023.
[91] Katie Bales, Alan Bogg, and Tonia Novitz (n. 82)
[92] NASUWT (n. 80).
[93] TUC (n. 17).
[94] Ibid.
[95] NASUWT (n. 80).
[96] Ibid.
[97] TUC (n. 17).
[98] KPMG, 'KPMG response to the consultation on employment status' (KPMG, 1 June 2018) <https://assets.kpmg.com/content/dam/kpmg/uk/pdf/2018/06/employment-status-consultation.pdf> accessed 2 April 2023.
[99] Susannah Kintish, 'Worker status: still no certainty' (2018) PLC Mag, 29(6), 4-5
[100] Birmingham Law Society, 'Employment Status Consultation' (Birmingham Law Society, 31 May 2018) <https://birminghamlawsociety.co.uk/wp-content/uploads/2019/01/Employment_Status_Consultation_response_-_Final.v.2.pdf.> accessed 4 April 2023

argued for alignment of definitions across statutes, citing the TULRCA 1992,[101] and the Equality Act 2010,[102] as having slightly differing definitions that causes confusion in interpreting status. They stressed the importance of clarity and unity in the definitions across all the authorities on employment status, expressing that tax and employment should also be aligned with a single definition.[103] However, they also disagreed that the term 'dependent contractor' should be used, on the grounds that it does not express the nature of the current 'worker' definition; a worker is someone who is not employed, but relies on work from a definitive source, not a contracted individual with an economic burden to bear in relation to a business.[104]

This response presents a more market-friendly approach to employment status. Businesses see limb (b) status as a practical mid-ground because of the flexibility it presents for workers.[105] The argument for codification of common law principles is centred on the certainty it brings. By incorporating these principles into statutes, both businesses and their workers can easily access the available rights of a status class and follow the tests provided. [106]This prevents the need for legal claims and court actions, which can be costly to both businesses and employees. However, as argued earlier, trade unions believe that codification does not provide protection to workers that have been disqualified from their rights because their contracts are written to purposefully avoid the need to give such rights. Therefore, it could be argued that codification is superfluous to helping resolve the main issue, that being the lack of certainty in the rights of limb (b) workers.[107]

As can be ascertained, the reality of reform is that it is an impossible practice to perfect. The arguments for 'widening the net' for the applicability of employment rights are countered by the impracticality and burden of cost such enjoyments would place on businesses, which may deter them from being attracted to creating 'dependent contractor' roles within their companies, limiting the availability of work for gig economy workers. However, focusing on making flexibility the priority does not reflect the economic reality of these individuals that work in the gig economy, and puts them at a major disadvantage compared to those under the much-more flexible 'independent contractor' definition, as well as those considered 'employees', who enjoys the full set of employment rights. Therefore, the next chapter will critically evaluate the practicality of reform, whether such a process should be a priority in the current economic climate, and the movements made by lawmakers to push status change forward.

The future of the law on employment status and the problems with potential reform

This section will establish the current attitudes of the government and the opposition towards future reform and suggested changes to the legislation on employment status. This will include an examination of legal opinions, working bills and the 2022 consultation response in order to opine on a potential solution to reform, with a final analysis on the practicality and realism of reform in the near future.

The government released their official response to the 2018 consultation in 2022, wherein it was decided that from examining the many responses given, there was a clear desire for reform to the current system but no uniform approach that would be accepted by all parties.[108] As discussed above, there was demonstrable disagreement with regard to codification, the 'dependent worker' change and so forth.[109] Therefore, the government has elected to not proceed with legislative changes. In their response, the government attributed this decision not only to the responses given, but to the current economic situation facing the UK.[110] The Good Work Plan was presented prior to the COVID-19 pandemic, where the vast majority of the country's businesses were forced to make significant changes to how they

[101] Trade Union and Labour Relations (Consolidation) Act 1992.
[102] Equality Act 2010.
[103] Birmingham Law Society (n. 100).
[104] Ibid.
[105] Malcolm Sergeant, 'The gig economy and the future of work' (2017) EJCLS 6 (2) 1.
[106] Ibid.
[107] TUC (n. 17).
[108] Department for Business (n 14).
[109] TUC, Birmingham Law Society (n 17-18).
[110] Department for Business, (n 14).

conduct business, and others were forced to cease business entirely until the re-opening of public spaces.[111] The government therefore opined that bringing in legislative changes to status, whilst bringing long-term clarity, might further unsettle businesses by placing onto them more costs. Instead, the guidance relating to employment status and determining an individual's status was updated to provide more information on the tests and requirements of each status group, as well as guidance on minimum wage applicability.[112]

Despite this, it is worth noting that members of the opposition have continued to push for change to relevant legislation. On 26 May 2021, the House of Lords heard the first reading of the Status of Workers Bill,[113] a Private Member's Bill sponsored by Lord Hendy and Andy McDonald for Labour, which would amend the TULRCA 1992 and the ERA 1996 to instead provide a singular definition of the worker status by changing the definitions of 'worker', 'employee' and 'employer', amongst others. The bill would unify 'worker' and 'employee' under a similar need to engage another for worker, and to not do so in the operation of a business in that individual's own account. This bill presents changes similar to those suggested by the trade unions in the 2018 consultation, such as a single worker definition, as well as clarity on the definitions of 'employer' and 'contract of employment'. Currently, the bill has left the House of Lords and the second hearing in the House of Commons is to be held on 6 May 2023, therefore, it is unknown how it shall progress.[114] However, it should be noted that this contrasts directly with the government's current position that the three-tier system benefits an ever-changing UK market and that legislation does not provide a solid solution to the problems presented,[115] therefore, it may be seen that the government will not support the implementation of this bill.

Therefore, if the Status of Workers Bill is not implemented, the law on status remains unchanged, and has been demonstrated, flawed. The problems presented by the responses to the consultation have merely received guidance on how to accurately implement the current tests on status, but this does nothing to remedy the problems that these tests are presenting to individuals.[116] The goal of protecting gig economy workers from exploitation by putative employers seems to have not been given much consideration by the government in their 2022 response, and therefore gig economy workers remain in a position to be exploited by unscrupulous employers by 'contracting out' of the rights conferred to them by statute. When considering this with the conflicting rulings of *Uber BV v Aslam*[117] and *Deliveroo*[118] within the higher courts, it is clear to see why workers' rights have been described as uncertain, insufficiently protected, and constantly at the whim of statutory interpretation.

In their analysis of *Uber BV v Aslam,* Atkinson and Dhorajiwala praised the affirmation of the purposive interpretation of statutory provisions used by the Supreme Court in *Autoclenz* specifically pointing to Lord Leggatt JSC's statement that these provisions are in place to protect subordinate workers from unscrupulous employers.[119] The use of a purposive approach, they argued, allows for a fact-based approach which focuses on the reality in which rights had been actually granted to workers.[120] However, they also outlined a key area of uncertainty. Specifically, in opining that it was 'not in doubt' that the general approach of employment legislation was to protect such dependent workers, this may be interpreted as the court making a declaration about legislation that was not intended to be derived from

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[111] Paul Mizen, Philip Bunn, Lena Anayi, Nick Bloom, Gregory Thwaites, and Ivan Yotzov, 'Two years on, how has the pandemic affected businesses in the UK?' (Economics Observatory, 31 March 2022) <https://www.economicsobservatory.com/two-years-on-how-has-the-pandemic-affected-businesses-in-the-uk.> accessed 5 April 2023.
[112] Department for Business, (n 14).
[113] Status of Workers HL Bill (2021-22) 242.
[114] HL Deb 28 January 2022, Vol 818, col WA553.
[115] (n 14).
[116] Simmons and Simmons, 'UK government response to employment status consultation: tax aspects' (*Simmons and Simmons*, 29 July 2022) < https://www.simmons-simmons.com/en/publications/cl66j0lgs1lwi0b059lx49ahp/uk-government-response-to-employment-status-consultation-tax-aspects> accessed 5 April 2023.
[117] [2021] UKSC 5.
[118] [2021] EWCA Civ 952
[119] Joe Atkinson and Hitesh Dhorajiwala, (n 78).
[120] Ibid. at 792.

the relevant statutes.[121] They criticised this remark as not considering alternative intentions for employment legislation, such as clarity for employers, and ignores the often contextual aspect of employment law.[122] However, they opined that the development of the purposive approach may well lead to such an interpretation being adopted by the legislator.[123]

This article raised the question of whether the development of the purposive approach would cause the higher courts to focus more so on the aspect of subordination within the relationship, rather than personal performance as a requirement. This was a relevant topic of discussion within *Deliveroo*; however, the Court of Appeal disagreed with the notion that the subordinate relationship between Deliveroo and its drivers would take precedent over personal performance. As considered earlier, the Court of Appeal affirmed the Supreme Court's statement in *Pimlico* that personal performance was the sole test for finding worker status. Therefore, it could be seen that Atkinson and Dhorajiwala are over-exaggerating the impact of Leggatt JSC's comment, especially when reviewing the rulings of cases post-*Uber*.

On the other hand, Bogg and Ford QC considered whether the decision in *Uber* had worked to distinguished 'worker' from 'employee' or vice versa.[124] They argued that Leggatt JSC had further aligned 'worker' status within the other statutory definition in his emphasis on subordination. In doing so, it stressed the importance of employment legislation providing protection to those who are reliant on others for work.[125] However, this was contrasted with Lady Hale's decision in *Bates von Winkelhof*,[126] where an equity partner was held to fall under limb (b), where she argued that other factors can also be decisive in determining 'worker' status, such as integration into the business. In this ruling, Bogg and Ford argue that the integration aspect of *Bates* has been diminished in favour of solidifying the protective role of employment status.[127] It was also suggested in this article that there may be cause for concern if 'worker' becomes further aligned with 'employee', citing the similarity of their definitive aspects (also discussed in *Byrne Bros*[128]), as this may lead to exploitation of the limb (b) status to exclude employees from statutory rights.[129]

Moreover, Bogg and Ford criticised the decision of *Deliveroo*, which found that Deliveroo drivers were not 'workers' under either limb (a) or limb (b).[130] They remarked that in its application of the *Uber* approach, the Court of Appeal failed to consider that the substitution clauses were implemented by the company in a fixed agreement, and that the drivers were not, majorly, exercising their right to substitute.[131] The question arises, therefore, of whether the relationship was one where drivers had a right to always substitute their work (which the article labels as 'a right to never do work personally'), or whether such a rate of substitution was limited and controlled by the company and therefore an overwhelming relationship of subordination exists. If, as Lord Leggatt JSC states within *Uber*, the intention of employment legislation is to protect subordinate workers from exploitation, then Deliveroo drivers should have been held to fall within the protection of the statute.

Examining these articles, there is a demonstrable argument made by legal experts and scholars that subordination should become an important factor when considering if an individual falls within the 'worker' definition. Taking to the context of the exploitation of gig economy workers and the use of sham clauses, it can be ascertained that gig economy work remains in a vulnerable position, relying on fact-based approaches in order to assert their statutory rights. Personal performance has been used to both define individuals as limb (b) workers, as well as disqualify them, therefore, it may be concluded

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[121] Ibid, [793-794].
[122] Ibid, [794].
[123] Ibid.
[124] Alan Bogg and Michael Ford QC, (n. 79).
[125] Ibid, at 395-396.
[126] *Bates van Winkelhof v Clyde & Co* [2014] UKSC 32.
[127] See (n 125) above.
[128] *Byrne Bros v Baird* [2002] ICR 667.
[129] See (n 125) above.
[130] Alan Bogg and Michael Ford QC, (n. 79).
[131] ibid.

that the current system does not work to ensure rights for gig economy workers. However, by stressing importance onto subordination, the line between 'worker' and 'employee' begins to blur, and as argued by Bogg and Ford, this may lead to the exploitation of the 'worker' definition in order to prevent rightful 'employees' from claiming their rights.[132] So, therefore, could it argued that subordination may be more helpful in ensuring both 'worker' and 'employee' rights, but may create other problems when attempting to attach them to the current statutory definitions of employment status? If so, then Lord Leggatt JSC's statement that employment legislation is intended to protect dependent workers would not be as easy to accept as it was assumed to be by Lord Leggatt JSC himself.[133] However, if the legislation were altered to instead present a single 'worker' definition, then there would be no gap between 'worker' and 'employee' in terms of their statutory rights, as both would be entitled to the same brevity of rights. Thus, if one were to consider incorporating the definition presented in the Status of Workers (HL) Bill,[134] then the supposed intention of employment legislation could be achieved without fear of further exploitation of dependent workers by unscrupulous employers via sham clauses.

However, as argued above, this may detract businesses from creating flexible roles within their company, such as gig economy work, as the requirement to provide the full set of statutory rights would need to be counterbalanced with a set amount of work being performed specifically by an individual worker.[135] Therefore, personal performance remains important, as business require an incentive to actively engage with this style of work, and the need for personal service provides that incentive to some extent (that being, the ability to consistently call upon a worker to perform a service when the business should need them). Thus, whilst the suggested reform above may ensure rights from both workers and employees, it does not ensure that worker-related occupations would continue to exist due to the costs of creating flexible roles whilst also needing to satisfy statutory requirements.

Conclusion

Thus far, this examination has reviewed the current tests for employment status, evaluating the legislative and common law definitions, as well as scholarly and professional critique of the current legal problems that the current system provides to 'limb b workers', specifically in the context of the gig economy. It has been found that reform is sought after, but cannot be agreed upon, and it was seen that there was a variety of suggestions for what such a reform would look like. Therefore, in this final chapter, the main arguments of this dissertation shall be reviewed and summarised and will conclude with a suggestion of what a reform to employment status should look like if it is intended to secure the most rights for workers and employees as possible.

As has been established, the current statutory definitions outlined in s.230(3) for 'employee' and 'worker' are somewhat vague and lack significant differences.[136] 'Employee' is attached to an open-ended definition for 'contract of employment', and worker relies on satisfying three requirements, which required clarification in common law, including a negative assumption about business undertakings. However, these tests have been refined by the judgments of *Ready Mixed Concrete*[137] and *Autoclenz*,[138] which stressed the importance of mutuality of obligations, control, and, most significantly, personal performance. The requirement of an individual to perform a service personally was affirmed in *Pimlico* as the most crucial aspect of differentiating a 'worker' from an 'independent contractor', and thus became a major point of discussion in future cases.[139]

[132] Ibid.
[133] [2021] UKSC 5, [71].
[134] See (n 113) above.
[135] Malcolm Sergeant, (n. 105).
[136] See (n 2-3) above.
[137] [1968] 2 QB 497.
[138] [2011] UKSC 41.
[139] [2018] UKSC 29.

In *Uber*, the principles set out in *Autoclenz* were affirmed, alongside the use of a purposive approach in order to set aside sham clauses to ascertain the true contractual relationship.[140] Here, it was stated by the Supreme Court that the general purpose of employment legislation was to protect subordinate workers from being exploited in the performance of the contract.[141] However, *Deliveroo* saw the Court of Appeal refrain from interpreting statutes in a way that would incorporate drivers into the 'worker' definition on the grounds that they had an exercisable right to substitution, thus defeating the personal performance requirement.[142] Despite the fact that very few drivers had used this right, it was found to be exercisable and thus accepted as part of the contract.[143] This presented conflict in the approach of the higher courts, as the aim of protecting dependent or subordinate workers was not achieved due to the application of an existing objective criteria.

Examining the responses to the employment status consultation, it became clear that these two conflicting ideals were also present in suggestions for reform or changes to legislation. Trade unions, such as TUC, argued for a single 'worker' definition to be implemented into statute. [144]This would give both 'employees' and other workers the same employment rights and allow for courts to focus on ensuring workers' rights by applying a purposive approach in a way that protects workers.[145] On the other hand, Birmingham Law Society argued instead for the codification of the principles set out by the courts currently, such as control, personal performance, etc., into the 'worker' definition.[146] Present in their suggestions was the idea that worker must remain separate from 'employee', due to the benefits that the flexibility afforded to worker brings to both those in need of such work, and businesses who may create such roles in their company without being afforded the costs that full employment entails. Ultimately, the government elected not to change legislation in the conclusion of the consultation. They aligned their views with the latter argument, stating that the three tier system was an essential part of developing the law on employment status.[147]

Therefore, it can be concluded that major legislative reform, whilst demonstrably in demand, is not likely to happen in the near future. The current economic climate and the lack of a unanimous approach has dissuaded the government from pursuing any major changes, and whilst there are Private Member's Bill in process regarding status definition, it is unknown how far along it shall get.[148] However, despite major reform being unlikely, it is imperative that this dissertation does not conclude on this point. The question being considered is not necessarily if reform is likely to happen, but rather, the manner in which reform may ensure the rights of limb (b) workers. Thus, whilst the practicality of reform is influential in determining the current nature of workers' rights, this dissertation shall be concluded with a decision on a proposal for reform that would help to protect workers' rights.

A legislative change in the worker definition to one singular definition would close any potential gaps in between the rights of 'worker' and 'employee', allowing workers access to more rights, and preventing employees from being exploited by employers who may seek to decrease their rights for the purpose of saving costs.[149] This would then allow the courts to begin interpreting the tests for worker in a way that promotes the ideal of protecting workers. Such a test would still find its foundation in the judgments of *Ready Mixed Concrete* and *Autoclenz*, maintaining the requirements of mutuality of obligations, control, and personal performance, but the need to protect subordinate workers would allow the courts to consider an exception of these requirements in certain circumstances.[150] This does potentially lack absolute objectivity, however, such a step should only be taken in cases where individuals have been disallowed their rights due to an imbalance in contractual bargaining power, such

[140] [2021] UKSC 5.
[141] Ibid.
[142] [2021] EWCA Civ 952.
[143] Ibid.
[144] See (n 17) above.
[145] Ibid.
[146] See (n 18) above.
[147] See (n 14) above.
[148] Status of Workers HL Bill (2021-22) 242.
[149] See (n 17) above.
[150] [2021] UKSC 5.

as those in the gig economy working for major corporations offering fixed agreements with no allowance of a counteroffer.

Ultimately, it is almost impossible to see how a test might be developed which satisfies all parties concerned with employment status, and it is unlikely such a test will ever be presented. Nevertheless, perhaps the ruling of *Uber*, and the changes presented in the Status of Workers (HL) Bill provide some form of guidance for where employment status and workers' rights are headed in the future. It is inevitable that in a constantly shifting market, there will be a demand for action on the solidification of gig economy worker rights, and thus, it is the final conclusion of this answer that wider reform will eventually be achieved, and workers will gain full protection of their rights.

DISSERTATION

The purpose of prison: a critical evaluation of the UKs contemporary rehabilitative prison system

Maria Kisiel*

Introduction

Prisons have been a key part of criminal justice systems around the world for centuries, from ancient dungeons to modern day penitentiaries. The United Kingdom's contemporary prison system and its purpose has long been debated by the public and the government alike. The UK has one of the largest populations of prisoners in Europe, with over 80,000 people currently incarcerated in the 122 prisons across the country, and the average sentence being 18 months.[1] This raises the question of what the true purpose of prisons is and if this purpose IS being achieved. Prison in the UK is defined as 'a building in which people are legally held as a punishment for a crime they have committed or while awaiting trial'.[2] However, Walker and Padfield propose that punishment is not the only purpose of these buildings, but one of nine. These nine purposes include detainment before a trial or sentence, coercion of people into compliance with the orders of the court, for example if the offender does not comply with paying a fine, to protect the members of the public from the offenders and to hold offenders for a long enough time to make possible a prolonged course of therapeutic treatment. As well as to deter both the individual, in a hope of them not reoffending after being released, and the public to discourage others from breaking the law in similar ways. Finally, to express disapproval of the offence as a society, to inflict punishment on the offender and to potentially protect a very unpopular offender from the victim and the victim's supporters.[3]

In recent years (2018-2019), former Justice Secretary, David Gauke, concluded that the most important purposes of prison are to protect the public from dangerous and violent individuals, to punish the offenders by depriving them of their liberty and to rehabilitate them by giving them the opportunity to reflect on their actions, take responsibility for their crimes and prepare them for being released back into society.[4] This attitude was upheld by his successor Robert Buckland QC who released the Prison Reform White Paper in anticipation of cutting crime rates and reducing reoffending.[5] This White Paper shows the shift in focus towards rehabilitation in recent years. However, with perpetual issues such as budget cuts,[6] and lack of enforcement of new schemes and programs[7], statistics continue to show that the prison system remains mostly unsuccessful with rates of recidivism being high and prisons being overcrowded as will be demonstrated in this dissertation.

This dissertation will evaluate whether prisoners are being effectively rehabilitated in prisons in the UK by exploring what types of educational and vocational programs are available and how well they are executed. Services such as therapy and anger management classes will also be investigated to shed light on how supported prisoners are in prisons and how this effects their rehabilitation. The UK prison

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[1] "Prisons Data" (*Justice Data* August 2022) <https://data.justice.gov.uk/prisons> accessed March 15, 2023

[2] Oxford Languages Dictionary

[3] Nigel Walker, Nicola Padfield, *Sentencing Theory, Law, and Practise* (2nd edition, Butterworths 1996) chapter 10

[4] David Gauke, "Prisons Reform Speech" (*GOV.UK* March 6, 2018) <https://www.gov.uk/government/speeches/prisons-reform-speech> accessed March 17, 2023

[5] "Prisons Strategy White Paper - Gov.uk" (*Prison Strategy White Paper*) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1038765/prisons-strategy-white-paper.pdf> accessed April 11, 2023

[6] 'State of our prisons: figures revel damaging impact of drastic budget cuts' (Prison Reform Trust) https://prisonreformtrust.org.uk/state-of-our-prisons-figures-reveal-damaging-impact-of-drastic-budget-cuts/ accessed 25th May 2023

[7] Karen Bullock and Annie Bunce, '"The Prison Don't Talk to You about Getting out of Prison": On Why Prisons in England and Wales Fail to Rehabilitate Prisoners' (2018) 20 Criminology & Criminal Justice 111

system will be compared to Japan and to Scandinavian countries such as Norway, Sweden and Finland. These countries have been chosen due to their positions being at two opposite ends of the spectrum concerning their treatment of prisoners despite all advocating for rehabilitation as an end goal. Although they have varying crime rates and prison populations, they all have lower recidivism rates than the UK and less issues with overpopulation and prison violence meaning that the UK has much to learn from these nations in order to improve their own criminal justice system. This will lead to recommendations and academic opinions on what the UK should do to enhance the prison experience and focus on rehabilitation as a tactic to reduce recidivism rates and the prison population. By addressing the root causes of criminal behaviour we can learn about what variables make individuals more likely to offend and target them before any offences occur, this can be done through the proper support and education of young people, so they are more likely to become law abiding citizens in the future.[8] In chapter one we will explore the legal framework of prisons in the UK and consider if prisoners' human rights are being effectively protected.

The legal framework of UK prisons

The legal framework for prisons in the UK is primarily set out in legislation and regulations that govern the management and operation of prisons. The main legislation concerning English and Welsh prisons is the Prison Act 1952. This Act outlines the responsibilities of the Secretary of State Justice regarding management and operation of prisons (sections 4-6) as well as the prison officer's duties and powers (sections 7-9). The Prison Rules 1999 set out the standards of treatment for the prisoners including their rights to religion (section 12), physical welfare and work (sections 23-31) and education (sections 32-33). It also states the procedures for things such as discipline (sections 45-61) and visitation (sections 74-80). In addition, the Criminal Justice and Public Order Act 1994 introduced changes to sentencing and new types of custodial sentences (ss. 26-27) such as mandatory life sentences (section 30) or intensive supervision and surveillance programmes (sections 33-34) in aim to reduce crime in the UK. This is supported by the Criminal Justice Act 2003 which establishes sentencing guidelines (section 1) and a Sentencing Guidelines Council (section 282). Other regulations include the Prison Service Orders which set out guidance for the UK's National Offender Management Service who are responsible for the management of prisons and probation services.

Concerning younger offenders, the Prison and Young Offenders Institution (Amendment) Rules 2017 set out the minimum standards for these institutions and the treatment of young offenders in custody in Young Offenders Institutions. This encompasses rules similar to that of the Prison Rules 1999 including rights to religion (section 12) and education (sections 32-22). Lastly the Care Act 2014 highlights the duty of care of the local authorities have towards vulnerable adults i.e. adults with disabilities or those in sensitive situations such as those in prisons (section 42) and requires that the prisoners have the necessary care and support concerning issues such as mental disorders (section 9). In addition to these laws and regulations, there are also many policies and guidelines to assist the management and operation of prisons by providing a clear and consistent framework regarding security, staffing, health and safety and discipline such as the National Offender Management Services Operating Standards for Prisons and Young Offenders Institutions.

The vast amount of legislation and regulations show the consideration of prison conditions and prisoner treatment/prisoner control despite the obvious importance put on power and control in the prison. This dissertation maintains that the standard of conditions and treatment has a direct impact on prisoners' ability to be rehabilitated. Studies have shown that prisoners whose cells had natural lighting and a view to the outdoors had lower levels of stress and were less likely to engage in violent behaviour,[9] prisons with overcrowding issues had higher rates of prisoner violence and self-harm,[10] and prisons with higher standards of cleanliness, order and safety reported increased positive attitudes towards their

[8] Anne Campbell and Steven Muncer "Causes of Crime" (1990) 17 *Criminal Justice and Behaviour* 410
[9] Alberto Urrutia, "CIE Session 2015," *Using Lighting to Enhance Positive Behaviour in Prisons*
[10] Stephanie Baggio and others, "Do Overcrowding and Turnover Cause Violence in Prison?" (2020) 10 Frontiers in Psychiatry

rehabilitation.[11] The Prison Act 1952 provides that the Secretary of State has general superintendence of prisons and will oversee the maintenance of prisons and prisoners as well as the examination of buildings, officers and conduct towards prisoners.[12]

This lack of separation between the administration and examination of the custodial institutions caused bias and lack of action leading to the case of *R v Deputy Governor of Camphill Prison, ex parte King,*[13] where Griffiths LJ explained that 'the court should... be prepared to assume that the Secretary of State will discharge the duty placed upon him by Parliament to unsure that the prison governor is doing his job correctly'. For these reasons, the Independent Monitoring Boards Regulations 2002 set out rules concerning the appointment and operation of an independent monitoring board to check on the conditions and treatment of prisoners in England and Wales. Another independent body inspecting prisons and other custodial institutions such as the Young Offenders Institution is the Prison Inspectorate. The difference in these two services is that the Inspectorate is appointed by the government and focuses on regular inspections of custodial institutions and producing reports of the findings on issues such as safety and security of the prison and the provision of education and training. Whilst the Independent Monitoring Board is made up of independent volunteers and is responsible for ensuring that the prisoners' rights are being respected and the prison is functioning within the law, they report on any issues or concerns they may have directly to the Secretary of State for Justice.[14]

When a person is sentenced to prison, they are first placed in a reception unit, they are then assessed on their needs and risks.[15] Prisoners are allocated to different prisons based on many things such as gender, age and length of sentence. Adult males are separated into four categories based on their needs and how likely they are to escape.[16] This evaluation and separation of people into several types of prisons is done to protect weaker groups like young offenders, women, and offenders with non-violent offences. This can make a difference to their rehabilitation as they will have different levels of access to certain programs and can feel safer amongst similar groups of individuals.[17] Male prisons are separated into resettlement prisons, local prisons or dispersal prisons depending on the sentence length the prisoner is serving and the severity of the crime that has been committed.[18] Resettlement prisons are for those with less than 12 months remaining of their sentence and are designed to help the prisoner adjust to life on the outside by learning vocational skills that they can later on pursue in life on the outside.[19]

Prisoners are sent straight to local prisons after being sentenced to be processed by the Observation, Classification and Allocation Unit. A prisoner may spend their whole sentence in a local prison if they are sentenced to under 18 months.[20] If the prisoner's sentence is over 18 months, then they may be sent to a dispersal prison that is most appropriate for their category. Prisoners may be moved to different prisons during various stages of their sentence.[21] Within a closed prison they are further categorised into standard risk, high risk or exceptional risk based on their likelihood of escape.[22] Prisons for women

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[11] Jo Nurse, "Influence of Environmental Factors on Mental Health within Prisons: Focus Group Study" (2003) 327 BMJ 480

[12] The Prison Act 1952, s.4(1)(2)

[13] *R v Deputy Governor of Camphill Prison, ex parte King* (1984) EWCA Civ J0731-4

[14] https://imb.org.uk/national-imb-priorities/

[15] https://www.familiesoutside.org.uk/publications/information-sheets/expect-starting-prison-sentence/#:~:text=After%20people%20are%20sentenced%2C%20they,to%20be%20taken%20into%20consideration.

[16] Stephen Livingston, Tim Owen QC, Alison MacDonald, *Prison Law*, (4th Edition, Oxford University Press 2008), chapter 4

[17] Mjåland K and others, "Contrasts in Freedom: Comparing the Experiences of Imprisonment in Open and Closed Prisons in England and Wales and Norway" [2021] European Journal of Criminology 147737082110659

[18] Separation of Detainees" (*Separation of detainees | Association for the Prevention of Torture*) <https://www.apt.ch/en/knowledge-hub/detention-focus-database/safety-order-and-discipline/separation-detainees> accessed April 11, 2023

[19] "Resettlement Prisons Definition" (*Law Insider*) <https://www.lawinsider.com/dictionary/resettlement-prisons> accessed April 11, 2023

[20] Nigel Walker, Nicola Padfield, *Sentencing Theory, Law, and Practise* (2nd edition, Butterworths 1996) chapter 12

[21] "Your A-D Guide on Prison Categories" (*Working in the Prison and Probation Service*) <https://prisonjobs.blog.gov.uk/your-a-d-guide-on-prison-categories/> accessed April 11

[22] Ibid

are not categorised in this way and there are only open prisons for less serious offences or closed prisons for severe offences.[23] This is because there is a relatively small number of female prisoners in the UK.[24] There are only around 15 female prisons in the UK, making up 4 per cent of the overall prison population in the whole of the UK.[25] Around 6 of these prisons have mother and baby units where an application can be made for a child to stay with its mother until it is 18 months old. This is available only for women prisoners as women are more likely to be anxious about children, partners, or dependant relatives whom they have left behind.[26] As for young offenders, those aged between 18 and 21 are placed in a Young Offenders Institute[27] and those under 18 are place in a secure centre for children.[28]

During their time in prison, prisoners are required to follow a strict daily routine although this tends to happen more in theory than in practise.[29] This could include working, education, exercise, recreation and visitation from friends and family.[30] Routines can be beneficial for a prisoner's rehabilitation as it provides structure and purpose meaning they have a sense of stability in their life which can be particularly helpful to those with any addictions or other issues before coming into prison.[31] It also supports reintegration into society by encouraging positive habits that they can maintain on the outside after leaving prison.[32] There are also many programs put in place to help rehabilitate and support prisoners when serving time. The Prison Rules 1999 states that 'every prisoner able to profit from the educational facilities provided at the prison shall be encouraged to do so'.[33] This enables prisoners to learn new skills or even earn degrees or certificates, helping them find work after being released. Other services such as cognitive behavioural therapy can help prisoners identify their issues and change negative patterns and behaviours that could have led to them being incarcerated.[34] Studies have found that CBT reduced reoffending rates by up to 28 per cent compared to control groups.[35] The National Health Service and Community Care Act 1990 requires that prisoners should receive the same access to health care services as the rest of the public. Therefore, prisoners can access the NHS CBT programs if they wish to. Studies have shown that programs such as addiction courses[36] or anger management classes[37] have also had a positive impact on the reduction of reoffending rates. This highlights the substantial effect these programs have on rehabilitation as regaining control over one's own impulses and behaviours will help prisoners reject criminal behaviour such as taking drugs or acting violently towards others.[38] They will also teach prisoners how to act in certain triggering circumstances to not

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[23] Ibid
[24] "Women and the Criminal Justice System 2021" (*GOV.UK*) <https://www.gov.uk/government/statistics/women-and-the-criminal-justice-system-2021/women-and-the-criminal-justice-system-2021#:~:text=The%20majority%20(96%25)%20of,for%20the%20last%205%20years.> accessed April 13, 2023
[25] "Prisons Data" (*Justice Data*) <https://data.justice.gov.uk/prisons> accessed March 20, 2023
[26] Murray J, *Effect of Imprisonment* (1st edn2005)
[27] Your A-D Guide on Prison Categories" (*Working in the Prison and Probation Service*) <https://prisonjobs.blog.gov.uk/your-a-d-guide-on-prison-categories/> accessed April 11, 2023
[28] Service GD, "Children in Custody" (*GOV.UK* November 25, 2014) <https://www.gov.uk/children-in-custody> accessed April 11, 2023
[29] "Daily Timetables" (*Doing Time, a guide to prison and probation* January 31, 2014) <https://doingtime.co.uk/how-prisons-work/how-do-prisons-actually-work/daily-timetables/> accessed March 20, 2023
[30] Ibid
[31] Wainwright DL and others, 'It Doesn't Have To Be Like This' (*Home | Prison Reform Trust*) <https://prisonreformtrust.org.uk/wp-content/uploads/2021/12/PPN_regimes_consultation_report.pdf> accessed 20 March 2023
[32] Ibid
[33] The Prison Act 1999, s32(1)
[34] 'Cognitive behavioural therapy (CBT) | College of Policing' (*College of Policing*) <www.college.police.uk/research/crime-reduction-toolkit/cbt> accessed 20 March 2023
[35] Ibid
[36] Holloway, Bennett & Farrington (2005) Effectiveness of drug treatment in reducing Drug-related Crime: a systematic review, London, Home Office Online Report 26/05
[37] McGuire (2008) A review of effective interventions for reducing aggression and violence, Philosophical Transactions of the Royal Society B, 363, 2577-2597
[38] Duckworth AL, Gendler TS and Gross JJ, 'Situational Strategies for Self-Control' (2016) 11(1) Perspectives on Psychological Science 35 <http://dx.doi.org/10.1177/1745691615623247> accessed 21 March 2023

make the same mistakes as they may have in the past.[39] This in turn will lower their chances of reoffending and going back to prison.[40]

As shown in this section, the legal framework of UK prisons is extensive and covers many aspects of managing and operating prisons. Therefore, this dissertation concludes that this framework aims to balance the need for punishment with the duty of care to prisoners and the goal of rehabilitating them to reintroduce them to the world as law abiding citizens. However, despite the existence of this legislation, guidelines and policies, there are still many criticisms regarding the prison system and its ability to rehabilitate prisoners which will be explored in the following chapters. The legislation outlined in this section safeguards prisoners' human rights by providing adequate guidelines and rules for the treatments of prisoners which all follow the rights presented in the Human Rights Act 1998. The regular monitoring and inspections of prisons is essential for identifying violations of prisoners' human rights and holding officials accountable for them.[41] It has also been suggested that upholding these rights leads to rehabilitation and lower rates of recidivism which will be demonstrated in the following chapter by comparing the penal systems of several different countries and looking at what leads to these statistics.

A comparative analysis of penal systems: Japan and Scandinavia

Criminal justice systems across the world vary significantly reflecting the diverse cultural values, political ideologies, and historical contexts of each country. This chapter will focus on the penal systems of the UK, Japan, and Scandinavian countries (mainly Norway, Finland, and Sweden) due to their distinct differences in approaches to criminal justice. The UK had been described as a 'stop and go' jurisdiction with the national government 'repeatedly changing its mind about whether the prison population should be reduced, contained or expanded and how these goals should be achieved'.[42] Whilst Japan has been named a 'oriental liberal corporatism' due to its comparatively low crime rates amid its urbanisation, economic growth, and its repressive totalitarian regimes in prisons.[43] The countries of Scandinavia on the other hand are said to be a 'social democracy',[44] with their focus being on rehabilitation aiming for social reintegration and the reduction of recidivism rates. This comparative analysis will identify the similarities and differences between the prison systems of these countries, recidivism rates and the impact on prisoners, among others.

The UKs current approach to the penal system has been stated to be the protection of the public, punishment, and rehabilitation,[45] but the system described in legislation and the system which is in place seem to be mismatched with data and statistics also contradicting themselves. There have been some improvements in British prisons in recent years such as the huge rise of budget going from £4.36 billion in 2019/2020 to £5.42 billion in 2021/2022.[46] However, the system remains in crisis with a global crime index of 4.89 which is 98th in the world,[47] and the rates of reoffending within two years being 60 per cent.[48] The UK prison population is 81,806[49] (as of December 2022) which is one of the highest in

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[39] Ibid
[40] Ibid
[41] Steve Foster 'Prison Conditions and Human Rights' (2008) *Web Journal of Legal Studies*
[42] Michael Cavadino, James Dignan, *Penal Systems, A Comparative Approach (*1st Edition, Sage Publications Ltd 2006/8) chapter 4
[43] Ibid, chapter 11
[44] Ibid, chapter 10
[45] David Gauke, "Prisons Reform Speech" (*GOV.UK* March 6, 2018) <https://www.gov.uk/government/speeches/prisons-reform-speech> accessed March 30, 2023
[46] 'UK prisons spending 2022 | Statista' (*Statista*) <www.statista.com/statistics/298654/united-kingdom-uk-public-sector-expenditure-prisons/> accessed 30 March 2023
[47] 'Crime Rate by Country 2023 - Wisevoter' (*Wisevoter*) <https://wisevoter.com/country-rankings/crime-rate-by-country/#crime-index-by-country> accessed 30 March 2023
[48] 'Nina Hodžić: The sad irony of prisons in the UK - Bright Blue' (*Bright Blue*) <www.brightblue.org.uk/the-sad-irony-of-prisons-in-the-uk/#:~:text=At%20first%20glance,%20the%20Norwegian,a%20significant%20difference%20in%20cost.> accessed 30 March 2023
[49] "Prisons Data" (*Justice Data*) <https://data.justice.gov.uk/prisons> accessed March 30, 2023

Western Europe,[50] leading to issues with overpopulation causing problems with resources, conditions, and control over the prisoners.[51] In their recent report, the Committee for the Prevention of Torture have found that levels of inter-prisoner violence along with prisoner-on-staff and staff-on-prisoner violence had all reached record highs, there were alarmingly high levels of substance abuse among prisoners and certain prisoners were confined to their cells for up to 23 hours a day,[52] which has been linked to overpopulation of the prisons. It is alleged that every prison has a range of accredited educational and offending behaviour programmes and interventions available to both prisoners and those on probation.[53] However, only 49,855 prisoners took part in these programmes between April 2021 and March 2022,[54] which is just over half of the prison population. This demonstrates that despite the many laws and regulations that have been dedicated to avoiding these issues, they still exist meaning that the UKs approach to prisons remains largely theoretical and is not applied sufficiently in practise.

To aid reintegration into society the UK have various programs available to those who have been released from prison as this transition can be exceedingly difficult, these programs include probation, education and training programs, substance abuse treatment, housing and employment support and mentoring and support groups. Organisations such as NARCO,[55] support roughly 28,000 people a year including 2200 people that are housed every night, this organisation also tutor those who have come out of prison to aid them with the completion of qualifications such as maths and English GCSEs to improve their chances of being employed. Others that are recommended by the Gov.uk webpage,[56] include the Prison Reform Trust,[57] which works to promote equality and human rights in the criminal justice system or Shelter[58] which helps house people struggling with homelessness such as those who have just left prison and need help restarting their lives.

In comparison the focus of the penal system in Scandinavian countries is rehabilitation and the wellbeing of both prisoners and staff[59] with prisons being compared to 'summer camps'.[60] For instance, a place at Halden Prison, in Norway would cost roughly £98,000 for the year.[61] Contrasting with an average place in a UK prison costing around £41,000.[62] Some of the main legislation relating to the Scandinavian prison system is the Swedish Prison and Probation Service Act 2010, the Swedish Enforcement Code 1981, the Norwegian Correctional Services Act 2005, the Norwegian Enforcement Act 1992, the Finnish Criminal Sanctions Agency Act 2019, and the Finnish Enforcement of Sentences Act 2003. In general, the countries of Scandinavia have comparatively low reoffending rates with

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[50] 'Europe incarceration rate by country 2021 | Statista' (*Statista*) <www.statista.com/statistics/957501/incarceration-rate-in-europe/#:~:text=In%202021%20Russia%20had%20the,prison%20for%20every%20100,000%20inhabitants.> accessed 1 April 2023

[51] Michael Cavadino, James Dignan, *Penal Systems, A Comparative Approach (*1st Edition, Sage Publications Ltd 2006) chapter 4

[52] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *Report to the United Kingdom Government on the visit to the United Kingdom carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)* (CPT/Inf (2020) 18)

[53] 'Crime and Rehabilitation: An Overview' (*UK Parliament*) <https://lordslibrary.parliament.uk/crime-and-rehabilitation-an-overview/#heading-6> accessed 1 April 2023

[54]<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1107740/Prisoner_Education_2021_22.pdf> accessed 5 April 2023

[55] Home' (*Nacro*) <www.nacro.org.uk/> accessed 5 April 2023

[56] Government Digital Service, 'Leaving prison' (*GOV.UK*, 30 November 2011) <www.gov.uk/leaving-prison/support-when-someone-leaves-prison> accessed 5 April 2023

[57] 'Home | Prison Reform Trust' (*Prison Reform Trust*) <https://prisonreformtrust.org.uk/> accessed 6 April 2023

[58] 'Shelter - The housing and homelessness charity' (*Shelter England*) <www.shelter.org.uk/> accessed 6 April 2023

[59] Michael Cavadino, James Dignan, *Penal Systems, A Comparative Approach* (1st Edition, Sage Publications Ltd 2006) chapter 10

[60] 'This Norwegian prison is the nicest in the world' (*World Economic Forum*) <www.weforum.org/agenda/2017/06/this-norwegian-prison-is-the-nicest-in-the-world/> accessed 7 April 2023

[61] 'Nina Hodžić: The sad irony of prisons in the UK - Bright Blue' (*Bright Blue*) <www.brightblue.org.uk/the-sad-irony-of-prisons-in-the-uk/#:~:text=At%20first%20glance,%20the%20Norwegian,a%20significant%20difference%20in%20cost.> accessed 30 March 2023

[62] Ibid

Norway being one of the lowest in Europe with 20 per cent, Finland having 36% and Sweden at 43%[63] showing that their methods of rehabilitation are more effective than most. The global crime index in each country respectively is, 3.81 (ranked 151st in the world), 2.71 (ranked 178th in the world) and 4.56 (ranked 115th in the world),[64] leading to prison populations of 3068,[65] 2827,[66] and 7713.[67] However, statistics on these can vary based on various sources. The main legislation regarding rehabilitation is the Swedish Penal Code 1962, the Norwegian Execution of Sentences Act 2001, and the Finnish Criminal Code 1889. These were all amended in the years 2014, 2008 and 2014 respectively, to include a stronger focus on rehabilitation.

In these Nordic countries the dominant philosophy of punishment via rehabilitation is seen through their attempt to make the criminal justice system medical and therapeutic, especially for young offenders, mentally divergent offenders, chronic recidivists and misusers of alcohol or narcotics.[68] This is achieved by giving preventative sentences to these types of offenders whilst reserving sentences such as imprisonment and fines for more serious offences.[69] Unlike in the UK, Norwegian prisoners are obligated to take part in work, education, and other activities, if they do not accept these opportunities then they can be sanctioned.[70] This is paired with the use of the Import Model which divides the responsibilities for punishment and prisoner welfare between various administrations.[71] The prison administration takes care of control and security of the prison, it employs and pays prison officers and inspectors, among others.[72] In control of other responsibilities such as health care, social welfare, and education etc. the prisons employ professionals in those fields to maintain the quality of the services provided.[73] In Finland, the Smart Prison Project introduced new digital services to help rehabilitate, educate, and reintegrate prisoners.[74]

The phasing in of the new systems was rapidly accelerated by the restrictions of Covid-19 aided the opening of Hameenlinna Smart Prison which equipped each of the 100 cells with a cell terminal in March 2021. This allowed the inmates to contact the staff, the prison health care services and other authorities as well as communicate with their relatives and close friends but restricted access to the internet.[75] As for support after being released, similarly to the UK there are various programs and organisations to aid ex-prisoners rebuild their lives by finding jobs and housing. The Krami scheme employ social workers to train ex-offenders to 'install a positive mentality and work ethic'. This encompasses partaking in social activities including sports, cooking and excursions which is viewed as the key to rehabilitation.[76] After this guidance period, participants get assigned to internships that last between eight weeks and six months, these can lead to permanent employment, and participants can choose to work with their guidance councillor even after finding permanent employment.[77] It was found

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[63] 'Recidivism Rates by Country 2023' (*2023 World Population by Country (Live)*) <https://worldpopulationreview.com/country-rankings/recidivism-rates-by-country> accessed 8 April 2023

[64] 'Crime Rate by Country 2023 - Wisevoter' (*Wisevoter*) <https://wisevoter.com/country-rankings/crime-rate-by-country/#crime-index-by-country> accessed 30 March 2023

[65] 'Norway | World Prison Brief'(*World Prison Brief | an online database comprising information on prisons and the use of imprisonment around the world*) <www.prisonstudies.org/country/norway> accessed 8 April 2023

[66] 'Finland | World Prison Brief' (*World Prison Brief | an online database comprising information on prisons and the use of imprisonment around the world*) <www.prisonstudies.org/country/finland> accessed 8 April 2023

[67] 'Sweden | World Prison Brief'(*World Prison Brief | an online database comprising information on prisons and the use of imprisonment around the world*) <www.prisonstudies.org/country/sweden> accessed 8 April 2023

[68] Michael Cavadino, James Dignan, *Penal Systems, A Comparative Approach (*1st Edition, Sage Publications Ltd 2006) chapter 10

[69] Ibid

[70] 'This Norwegian prison is the nicest in the world' (*World Economic Forum*) <www.weforum.org/agenda/2017/06/this-norwegian-prison-is-the-nicest-in-the-world/> accessed 7 April 2023

[71] Ibid

[72] Ibid

[73] Ibid

[74] 'Smart Prison Facility Spurs Rehabilitation in Finland - Correctional News' (*Correctional News*) <https://correctionalnews.com/2021/11/03/smart-prison-facility-spurs-rehabilitation-in-finland/> accessed 8 April 2023

[75] Ibid

[76] "Sweden Uses Psychological Support to Get Ex-Offenders Back into Work" (*Apolitical*) <https://apolitical.co/solution-articles/en/sweden-uses-physiological-support-get-ex-offenders-back-work> accessed April 8, 2023

[77] Ibid

that ex-prisoners that participated in this scheme were 40 per cent more likely to find full time employment than those that did not.[78]

Japan's criminal justice system seems to be the most contradictory out of the countries analysed in this chapter. Despite maintaining the death penalty for serious crimes such as murder, it has a reputation for being remarkably lenient towards its offenders.[79] However, with the reoffending rates being 23.3%[80] it can be concluded that their approach achieves what it hopes to. The global crime index for Japan is 4.53 ranking it 117th in the world, making it more dangerous than most Scandinavian countries but safer than the UK. Therefore, it could be said that due to the most serious offenders being executed by the state, their opportunities to reoffend are taken away, contributing to the current rates of recidivism. Laws on rehabilitation in Japan include the Offender Prevention and Rehabilitation Act 1949, the Probation of Persons with Suspension of Execution of the Sentence Act 1953, the Urgent Aftercare of Discharged Offenders Act 1950, the Offender Rehabilitation Services Act 1995, and the Offender Rehabilitation Act 2007.[81] These acts specify that the purpose of offender rehabilitation is to prevent recidivism and support the reintegration of the offenders. Despite these laws being present the main focus in Japanese prisons still seems to be punishment through a system based on rigidity and discipline rather than any sort of rehabilitation,[82] leading to routine violations of human rights such as the right to human dignity.[83] Prisoners in Japan live in cleanliness and abundance of food. However, the lack of human contact with both the outside world and other prisoners makes living conditions quite intolerable.[84]

Japanese prisons have extremely strict schedules with talking only allowed during exercise or free time which is typically around three or four hours a day, the rest of their time is spent working or completing vocational training.[85] This demonstrates that little rehabilitation occurs whilst in prison with the focus being on breaking down an individual's will and forcing compliance whilst in the institution.[86] However, Japan does have rehabilitation incentives for newly released convicts such as Rehabilitation Program Centres which provide support for inmates trying to find employment post-release through educational programs and offer a variety of occupational and work training to promote a law abiding lifestyle.[87] Japan also promote the importance of probation and parole supervision as it enables provides guidance and support for people who just got out of prison[88]. There are approximately 47,000 volunteer probation officers (Hogoshi) in Japan.[89] Their duties include interviewing and advising probationers and parolees, helping with reintegration to society and conducting awareness raising activities to prevent crime.[90] Hogoshi are an indispensable part of the Japanese Criminal Justice System as they serve as a gateway to the community and rehabilitation of offenders[91]. There are also other types of voluntary supporters for offenders such as the Big Brothers and Sisters Movement (BBS) and the Women's Association for Rehabilitation Aid (WARA). BBS is a youth volunteer organization that works with juveniles to teach them how to solve their own problems and support each other in personal

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[78] Ibid
[79] Michael Cavadino, James Dignan, *Penal Systems, A Comparative Approach (*1st Edition, Sage Publications Ltd 2006) chapter 11
[80] Measures to Reduce Reoffending in Japan - Unodc.org" <https://www.unodc.org/documents/justice-and-prison-reform/ReducingReoffending/MS/Japan_-_Input_on_reducing_reoffending.pdf> accessed April 9, 2023
[81] "Offender Rehabilitation in Japan" <https://www.moj.go.jp/content/001345372.pdf> accessed April 9, 2023
[82] "Prison Conditions in Japan - Human Rights Watch" <https://www.hrw.org/sites/default/files/reports/JAPAN953.PDF> accessed April 9, 2023
[83] European Convention on Human Rights 1953, Article 1
[84] Ibid
[85] "What Is Life like in Japanese Prison?" (*English Lawyers Japan* July 9, 2020) <https://englishlawyersjapan.com/what-is-life-like-in-japanese-prison/> accessed April 9, 2023
[86] "Prison Conditions in Japan - Human Rights Watch" <https://www.hrw.org/sites/default/files/reports/JAPAN953.PDF> accessed April 9, 2023
[87] Rehabilitation Programs: Shimane Asahi Rehabilitation Program Centre" (*Rehabilitation Programs | Shimane Asahi Rehabilitation Program Centre*) <http://www.shimaneasahi-rpc.go.jp/english/torikumi/> accessed April 9, 2023
[88] "Offender Rehabilitation in Japan" <https://www.moj.go.jp/content/001345372.pdf> accessed April 9, 2023
[89] Measures to Reduce Reoffending in Japan - Unodc.org" <https://www.unodc.org/documents/justice-and-prison-reform/ReducingReoffending/MS/Japan_-_Input_on_reducing_reoffending.pdf> accessed April 9, 2023
[90] Ibid
[91] Ibid

growth and development, it has 4000 members in Japan.[92] WARA is also an association that assists juvenile delinquents, it focuses on supporting the healthy upbringing of youth and reforming those who have committed offences, there are approximately 130,000 members of WARA in Japan. This family and community involvement in rehabilitation, especially youth rehabilitation, is integral to the process as it promotes the feeling of safety and acceptance which is beneficial to offenders, encouraging them to work and develop themselves.[93]

This demonstrates how cultural values can impact a countries approach to rehabilitation. Both the UK and the Scandinavian countries are individualistic societies.[94] This means they value independence, self-reliance and personal autonomy resulting in most of their rehabilitation programs being available in prison making the responsibility fall mostly on the prisoner to progress and achieve. Alternatively, Japan is a collectivist country,[95] meaning the focus is more on support and the community as a whole over the individual. This is demonstrated through their rehabilitation organisations being mostly available after leaving prison as well as them being ran by volunteers from the ex-prisoners community. Although done in separate ways, both Scandinavian countries and Japan have a more effective way for rehabilitation resulting in lower reoffending rates and more peaceful prisons. This leaves the UK with many necessary changes to their system in order to match the standard of others across the world. Some recommendations for these changes along with academic opinions will be discussed in the following chapter.

Recommendations on rehabilitation regimes

The issue of rehabilitation in prisons is a complex one due to the variety of needs attitudes that prisoners might have. Therefore looking at the recommendations and academic opinions of experts provide a valuable insight as they consider empirical evidence, theoretical frameworks and years of experience working with prisoners or other academics. They can help identify strengths and weakness of the penal system as well as provide innovative solutions. This chapter will explore suggestions that have been made to improve the penal system to help aid rehabilitation and therefore decrease recidivism rates. It will also look at recent suggestions that have been executed to analyse what effect they have had on the current system. By examining various recommendations and opinions, the key reoccurring themes can be identified and compared against each other. Rehabilitation in the UK is a particularly significant field as it impacts public safety as well as the overall functioning of society.[96] There is a growing political consensus in the UK that rehabilitation and education is the way to decrease recidivism rates and reintegrate prisoners into society after their sentence.[97] However, these programs can be difficult to administer as the needs and backgrounds of each prisoner must be considered to decide what would be the most promising program for them.[98] Especially when considering human rights, this dissertation concludes that there is little argument left for a strict and brutal punishment being the best way forward for the penal system.

The UK government has proposed a range of measures aimed at reforming the prison system, a key document introducing these measures is the latest Prison Strategy White Paper which was released in December 2021. Its aims are to 'cut reoffending and protect the public', by supporting prisoners in their

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[92] Ibid

[93] "Offender Rehabilitation in Japan" <https://www.moj.go.jp/content/001345372.pdf> accessed April 9, 2023

[94] "Individualistic Countries "(*Individualistic countries 2023*) <https://worldpopulationreview.com/country-rankings/individualistic-countries> accessed April 10, 2023

[95] "Collectivist Countries "(*Collectivist countries 2023*) <https://worldpopulationreview.com/country-rankings/collectivist-countries> accessed April 10, 2023

[96] Latessa EJ, Johnson SL and Koetzle D, "What Works in Re-entry" [2020] What Works (and doesn't) in Reducing Recidivism 261

[97] "Prisons Strategy White Paper - Gov.uk" (*Prison Strategy White Paper*) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1038765/prisons-strategy-white-paper.pdf> accessed April 11, 2023

[98] Latessa EJ, Johnson SL and Koetzle D, "What Works in Re-entry" [2020] What Works (and doesn't) in Reducing Recidivism 261

education, skills, and addictions to help them achieve crime-free lives.[99] The government aim to do this by having a zero tolerance attitude towards drugs by installing body scanners and airport-style security in prisons to minimise the amount of drugs being smuggled into prisons so prisoners cannot continue their criminal behaviours whilst being incarcerated and to address addictions by assessing all prisoners upon their arrival and making a comprehensive plan for them to help battle them, through abstinence and support.[100] They also aim to prioritise education and vocational training by ensuring that every prisoner has a basic level of English and maths to increase job prospectus, this will be followed by employment support which will consist of a job-matching service upon release and dedicated employment advisors that will help offenders find work.[101] A new resettlement passport will be introduced, including a CV, identification, a bank account and contact information for support services in the community to help prisoners reintegrate back into society. Finally, a new route for punishment will be introduced where penalties are linked to the offence for example, a prisoner who damages any property will be required to repair it.[102]

In terms of rehabilitation, many studies have shown that the focus of education and training programs is essential for prisoners. Latessa et al highlighted that although these efforts show a reduction in recidivism, it is important to keep in mind the offender's gender, age, crime type etc. in order to provide better suited programs for each individual.[103] Davis et al found that prisoners who took part in education programs in prison were 43% less likely to reoffend and recommended that further studies should be undertaken to identify the specific characteristics of effective programs in order to replicate them.[104] There have been several criticisms of this reform by organisation such as the Howard League of Penal Reform which disapproved of the resettlement passports as they include the need to participate in training and support programs which penalises ex-prisoners for non-engagement with these services maintaining that this is 'misguided and counterproductive'.[105] The Prison Reform Trust added that the government should first assess why the very similar Transforming Rehabilitation (TR) programme, which presided for the previous decade, had failed before attempting the implication of a new programme.[106] They advise that the passport should not be a paper document but an online database to allow data sharing and to create a necessary infrastructure which TR failed to incorporate.

Another popular recommendation for penal reform is to revise the Criminal Justice Act 2003 and the Sentencing Act 2020 among others to promote non-custodial sentences for minor and non-violent crimes. Crimes such as non-violent drug offences, property offences, immigration offences and traffic offences are the most often recommended for this change.[107] This would be advantageous as costs of non-custodial sentences are often lower than imprisonment,[108] which means that the money saved could be put towards useful programs such as therapy or anger management for these offenders to get to the root cause of their actions, so they do not make the same mistakes again. These rehabilitative focused alternatives reduce rates of reoffending more effectively than prison sentences with studies showing

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[99] Justice Mof, "New Prison Strategy to Rehabilitate Offenders and Cut Crime" (*GOV.UK* December 7, 2021) <https://www.gov.uk/government/news/new-prison-strategy-to-rehabilitate-offenders-and-cut-crime> accessed April 10, 2023

[100] Ibid

[101] Ibid

[102] Ibid.

[103] Latessa EJ, Johnson SL and Koetzle D, "What Works in Re-entry" [2020] What Works (and doesn't) in Reducing Recidivism 261

[104] Davis L and others, "Evaluating the Effectiveness of Correctional Education: A Meta-Analysis of Programs That Provide Education to Incarcerated Adults" Santa Monica, CA: RAND Corporation, 2013. https://www.rand.org/pubs/research_reports/RR266.html

[105] "Howard League for Penal Reform's Submission" <https://howardleague.org/wp-content/uploads/2022/02/Howard-League-response-to-the-Prisons-Strategy-White-Paper.pdf> accessed April 10, 2023

[106] "Prisons Strategy White Paper Response - Prison Reform Trust" <https://prisonreformtrust.org.uk/wp-content/uploads/2022/02/Prisons-Strategy-White-Paper-PRT-response.pdf> accessed April 10, 2023

[107] Krueger L, "*Smart Decarceration: Achieving Criminal Justice Transformation in the 21st Century,* by Matthew W. Epperson and Carrie Pettus-Davis (Eds.)" (2018) 41 Journal of Urban Affairs 266

[108] "Key Facts" (*Penal Reform International* May 20, 2021) <https://www.penalreform.org/issues/alternatives-to-imprisonment/key-facts-2/> accessed April 10, 2023

that people who have served time are often more likely to reoffend.[109] This is because prison is a social environment that exposes prisoners to pro-criminal attitudes which incentivises them to adjust to prison life and criminality, these experiences added to loss of autonomy and privacy often trigger psychological strain and provoke criminal coping mechanisms such as partaking in violence or narcotics.[110] Alternatively, community-based sentences force offenders to take more responsibility for their crimes,[111] especially when the sentence is related to the crime, for example the sentence for vandalism being the repairs of the damaged property or objects.

Another disadvantage of prisons in the UK is that it often punishes the whole family not only the individual which affects the rehabilitation of the offender due to feelings of guilt and unworthiness to be rehabilitated, this is particularly seen in incarcerated mothers.[112] Imprisonment can affect families when children live with their mothers in prison, the family breadwinner is imprisoned, leaving the family in financial hardship,[113] or children are taken away from their homes and families. Statistics show that only 5 per cent of children remain in their homes after their mother is imprisoned, only 9% remain in the care of their father and 14 per cent go straight into the care of the local authorities.[114] This knowledge often makes it even harder for mothers in prison to concentrate on their rehabilitation as they feel as if they have failed their child and that they are being judged not only as a criminal but also a mother which affects their ability to control their emotions and cope with the separation from their children.[115] This can lead to mothers cutting themselves off from both their families and their emotions which has negative effects on rehabilitation.[116]

Former Director General of the Prison Services, Martin Narey, stated the importance of family support to achieve effective rehabilitation and reduce reoffending,[117] supporting non-custodial sentences which allow the offender to remain with their family while serving their sentence and undergoing rehabilitation programs. Switching to non-custodial sentences for minor and non-violent crimes would also decrease the prison population which would help combat overcrowding, overcrowding related violence and living conditions[118]. This recommendation is a part of Penal Reform International's (PRI) 'Ten-Point Plan to Reduce Prison Overcrowding'.[119] Combating overcrowding would allow prisoners to have more space and privacy, rehabilitation and education programs inside prisons would also have less prisoners to focus on enabling them to receive a higher standard of education and support.[120] The PRIs plan also includes improving pre-trial detention practises, underlying causes of committing crime such as mental health and addiction issues and promoting diversion and restorative justice programs.[121] Other sources such as the Centre of Crime Prevention disagree with this motion and argue that community sentences are failing to protect the public and producing higher reoffending rates, claiming that more than 70 per

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[109] Www.sentencingcouncil.org.uk" <https://www.sentencingcouncil.org.uk/wp-content/uploads/Effectiveness-of-Sentencing-Options-Review-FINAL.pdf> accessed April 10, 2023

[110] *ibid*

[111] United Kingdom Parliament – Cutting Crime: the case for justice reinvestment" <https://publications.parliament.uk/pa/cm200910/cmselect/cmjust/94/94i.pdf> accessed April 10, 2023

[112] "Sentencing Criminal Law OL.181 Mothers in Prison - Nicco.org.uk" <https://www.nicco.org.uk/userfiles/downloads/5ac5cb6cad237-mothers-in-prison.pdf> accessed April 10, 2023.

[113] "Key Facts" (*Penal Reform International* May 20, 2021) <https://www.penalreform.org/issues/alternatives-to-imprisonment/key-facts-2/> accessed April 10, 2023.

[114] Minson, S, Nadine, Earle, J. The Sentencing of Mothers (2015) Prison Reform Trust. <http://www.prisonreformtrust.org.uk/Portals/0/Documents/ sentencing_mothers.pdf>

[115] "Sentencing Criminal Law OL.181 Mothers in Prison - Nicco.org.uk". <https://www.nicco.org.uk/userfiles/downloads/5ac5cb6cad237-mothers-in-prison.pdf> accessed April 10, 2023

[116] Ibid.

[117] "Contents" <https://prisonreformtrust.org.uk/wp-content/uploads/2005/02/KEEPING_IN_TOUCH.pdf> accessed April 10, 2023.

[118] Penal Reform International Ten-Point Plan to Reduce Prison Overcrowding" <https://cdn.penalreform.org/wp-content/uploads/2013/05/10-pt-plan-overcrowding.pdf> accessed April 10, 2023.

[119] Ibid.

[120] Ibid.

[121] Ibid.

cent of all offenders in prison have previously been given at least one community sentence with over 60 per cent receiving 2 or more, and 35 per cent receiving 5 or more community sentences.[122]

When being released from prison, a majority of prisoners face a difficult transition back into society. Consequently, making sure that they have the necessary support to successfully reintegrate into society is vital to their rehabilitation.[123] This could be done through programs that help prisoners find a job and a place to live or helping them continue their education or enhance their skills.[124] The benefit of these post-release programs can be seen in countries like Japan who have a big focus on continuing rehabilitation after the offender has left the prison as covered in the above chapter. Although some programs of this kind already exist such as 'Through the Gate',[125] they are poorly funded and as a result do not provide much help to prisoners who have been newly released.[126] This scheme provides endless employability assessments without ever assisting the ex-prisoners in developing their employability resulting in low enthusiasm to cooperate with the system.[127] The Centre for Crime and Justice Studies recommends a reform of the Rehabilitation of Offenders Act 1974 to enable the breaking down of barriers that prevent former offenders from being employed.[128]

Additionally, this organisation believes that the government should engage with employers who already offer work to prisoners such as Cisco, Travis Perkins, and Network Rail, to encourage other businesses to do the same and remove the stigma behind hiring ex-offenders.[129] This seems to be an achievable task as recent statistics show that already 6 out of 10 employers have said that they would consider hiring an ex-offender.[130] However, one third of British people have said that they would feel less secure if one of their co-workers was known to have a criminal record.[131] Following their release, one of the biggest barriers to reintegration and rehabilitation is the stigma of being an ex-prisoner and the general negative public attitude among the public.[132] This suggests that further education of the public and awareness about the potential for successful rehabilitation that community support and reintegration into society can have on ex-offenders is needed.

Another obstacle for newly released offenders is finding permanent housing. If they do not have family or friends that are willing to take them in, their options can be limited.[133] Despite there being several organisations that help house ex-prisoners when they leave prison such as NACRO,[134] Shelter,[135] and Emmaus UK,[136] there were still over 7000 people released out of prison into homelessness in

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[122] "Community Sentences" (*Centre for Crime Prevention* July 17, 2017) <http://www.centreforcrimeprevention.com/news/community-sentences/> accessed April 10, 2023

[123] "Why Re-entry Programs Are Important" (*HOPE for Prisoners* August 6, 2020) <https://hopeforprisoners.org/why-reentry-programs-are-important/#:~:text=Successful%20reentry%20programs%20give%20former,recidivism%20and%20improving%20public%20safety> accessed April 10, 2023.

[124] Ibid.

[125] Prison advice, "Through the Gate Mentoring Services" (Prison Advice and Care Trust) <https://www.prisonadvice.org.uk/through-the-gate-mentoring> accessed April 10, 2023.

[126] "Transforming Rehabilitation - Centre for Social Justice" <https://www.centreforsocialjustice.org.uk/wp-content/uploads/2018/03/Justice-Inquiry-Transforming-Rehabilitation-FINAL-TIDY-COVERS.pdf> accessed April 10, 2023.

[127] Ibid.

[128] Tim Hope and others, CJM: Criminal Justice Matters (ISTD 2011).

[129] Ibid.

[130] "Most Employers Would Consider Hiring Ex-Offenders in 2023" (*HR Magazine*) <https://www.hrmagazine.co.uk/content/news/most-employers-would-consider-hiring-ex-offenders-in-2023/> accessed April 10, 2023.

[131] Brown J, "Third of Employees Feel 'Less Secure' Working with Ex-Offenders, Research Finds" (*91270*February 25, 2021) <https://www.peoplemanagement.co.uk/article/1743078/third-of-employees-feel-less-secure-working-with-ex-offenders> accessed April 10, 2023.

[132] Rade CB, Desmarais SL and Mitchell RE, "A Meta-Analysis of Public Attitudes toward Ex-Offenders" (2016) 43 Criminal Justice and Behaviour 1260.

[133] "Nacro Responds: Homeless Prison Leavers" (*Nacro* February 23, 2023) <https://www.nacro.org.uk/news/nacro-response-to-new-homeless-prison-leavers-statistics/> accessed April 10, 2023.

[134] 'Home' (*Nacro*) <www.nacro.org.uk/> accessed 5 April 2023.

[135] 'Shelter - The housing and homelessness charity' (*Shelter England*) <www.shelter.org.uk/> accessed 6 April 2023.

[136] "The Charity Working to End Homelessness" (*Emmaus UK* March 28, 2023) <https://emmaus.org.uk/> accessed April 10, 2023.

2020/2021.[137] Homelessness can end hope for rehabilitation and makes reoffending much more likely which is why putting more support in place for prisoners that have left prison is so important.[138] Ultimately, therapy and mental health support should be a priority as the majority of ex-prisoners suffer from mental health issues.[139]

Although there is a variety of resources that can be utilised for mental health help such as Change, Live, Grow,[140] Mind,[141] Samaritans,[142] or Shout,[143] that can be useful for aiding rehabilitation, ex-prisoners require more than just public voluntary organisations such as these. This is because they often experience trauma, stress and social isolation which needs to be addressed by a professional who specialises in helping ex-prisoners reintegrate into society as this will greatly impact their rehabilitation in a positive way.[144] Therefore, this dissertation suggests that supporting people directly after they leave prison is one of the most important steps in helping with their rehabilitation, as the more structure and normality they gain in their life, the less likely they are to make the same mistakes and reoffend.

In summary, different offenders require different strategies to be successfully rehabilitated but the ones considered above are some that would make a difference to all offenders. Currently, some organisations do exist that aid in prisoner rehabilitation and integration but there are significant issues that prohibit prisoners from receiving the full advantages that these organisations have to offer for several reasons. Overall, the UK government need to take a full system approach to the penal system as all aspects are interconnected and the improvement of any one aspect will aid the others in achieving their goal.

Conclusions

This dissertation has provided a critical evaluation of the UKs rehabilitative prison system. It has concluded that the main purposes of UK prisons are to protect the public from dangerous and violent individuals, to punish the offenders by depriving them of their liberty and to rehabilitate them by giving them the opportunity to reflect on their actions.[145] This is shown through the legal framework which set out the basic structure and functions of the prison system and the human rights legislation that protects prisoners' rights when they are serving their custodial sentences. This legislation is critical to the prisoner's rehabilitation as it ensures that prisoners are treated fairly with dignity and respect. However, there are still concerns about the treatment of prisoners by many organisations such as The Prison Reform Trust and Prison Reform International, specifically in terms of violence against prisoners and inadequate mental health services. This legislation itself fails to establish whether the aims of prison are to punish or to rehabilitate its prisoners, government reports such at the Prison Reform White Paper have shown an increasing inclination to focus their plans for reform around rehabilitation.[146]

The comparison of the UK prison system to the prison systems of Scandinavian countries and Japan has shed some light on how other parts of the world tackle the issues of rehabilitation in prisons and following release. It has been highlighted that Scandinavian countries have a strong aim of

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[137] "Nacro Responds: Homeless Prison Leavers" (*Nacro* February 23, 2023).<https://www.nacro.org.uk/news/nacro-response-to-new-homeless-prison-leavers-statistics/> accessed April 10, 2023.
[138] Ibid.
[139] Burgess-Allen J, Langlois M and Whittaker P, "The Health Needs of Ex-Prisoners, Implications for Successful Resettlement: A Qualitative Study" (2006) 2 International Journal of Prisoner Health 291.
[140] "Change Grow Live - Believe in People" (*Change Grow Live | Charity | We can help you change your life*) <https://www.changegrowlive.org/> accessed April 10, 2023.
[141] Home" (*Mind*) <https://www.mind.org.uk/> accessed April 10, 2023.
[142] Contact a Samaritan" (*Samaritans*) <https://www.samaritans.org/how-we-can-help/contact-samaritan/> accessed April 10, 2023
[143] Free, 24/7 Mental Health Text Support in the UK" (*Shout 85258*) <https://giveusashout.org/> accessed April 10, 2023.
[144] Pękala-Wojciechowska A and others, "Mental and Physical Health Problems as Conditions of Ex-Prisoner Re-Entry" (2021) 18 International Journal of Environmental Research and Public Health 7642
[145] David Gauke, "Prisons Reform Speech" (*GOV.UK* March 6, 2018). <https://www.gov.uk/government/speeches/prisons-reform-speech> accessed April 12, 2023.
[146] "Prisons Strategy White Paper - Gov.uk" (*Prison Strategy White Paper*) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1038765/prisons-strategy-white-paper.pdf> accessed April 11, 2023.

rehabilitation, specifically focussing on the treatment and support of its prisoners through the various programmes and classes that they have available but also the help their offenders receive after leaving prison.[147] This approach has proven extremely helpful in fulfilling their aims of reducing crime and rehabilitation offenders. On the other hand, Japan, although also focussed on rehabilitation has a more disciplined and tough approach to prison conditions,[148] which has been criticised by the Human Rights Watch Prison Project.[149] Despite these criticisms, Japan are still achieving their goals of reducing recidivism and crime as a whole. As all these countries have lower crime rates and lower rates of recidivism, the UK certainly has a lot to learn from them and should potentially implement some of their tactics into its own penal system.

The principal areas of reform suggested in this dissertation are to revise existing legislation, provide sufficiently funded programmes and support for released offenders and enhance public awareness and education. By revising legislation such as the Criminal Justice Act 2003 and the Sentencing Act 2020 so non-violent and minor crimes do not demand custodial sentences but community sentences and restorative justice programs. This forces offenders to witness the effects that their crime has had first hand and take more responsibility for it.[150] It would also help decrease the prison population which would decrease the risks of overcrowding and prison riots and would have a positive impact on prisoners' rehabilitation.[151] Additionally, enhancing the public's awareness and education about prisoners and ex-prisoners would remove the stigma surrounding prisons and enable the public to contribute to prisoner rehabilitation after leaving prison.[152] This would make post-release programmes more popular with the public so they would be more inclined to volunteer or help fund them.[153] Educating the public about the challenges that prisoners face, and the importance of rehabilitation could promote a more supportive and understanding community that would help them reintegrate into society.[154]

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[147] Michael Cavadino, James Dignan, *Penal Systems, A Comparative Approach* (1st Edition, Sage Publications Ltd 2006) chapter 10.
[148] "Prison Conditions in Japan - Human Rights Watch" <https://www.hrw.org/sites/default/files/reports/JAPAN953.PDF> accessed April 9, 2023
[149] "Prison Conditions in Japan - Human Rights Watch" <https://www.hrw.org/sites/default/files/reports/JAPAN953.PDF> accessed April 9, 2023
[150] United Kingdom Parliament – Cutting Crime: the case for justice reinvestment" <https://publications.parliament.uk/pa/cm200910/cmselect/cmjust/94/94i.pdf> accessed April 10, 2023
[151] Penal Reform International Ten-Point Plan to Reduce Prison Overcrowding" <https://cdn.penalreform.org/wp-content/uploads/2013/05/10-pt-plan-overcrowding.pdf> accessed April 10, 2023.
[152] Rade CB, Desmarais SL and Mitchell RE, "A Meta-Analysis of Public Attitudes toward Ex-Offenders" (2016) 43 Criminal Justice and Behaviour 1260.
[153] Ibid.
[154] Ibid.

STUDENT LEGAL BLOGS

HUMAN RIGHTS

The Online Safety Bill: Have too many hands spoiled the Bill?

Tasewa Abigail Shomide*

Introduction

The Online Safety Bill[1] is how the Conservative Party is delivering on their manifesto promise to make the United Kingdom "the safest place in the world to be online while defending free expression."[2] The Bill looks to obligate tech companies that host user generated content i.e., social media platforms and search engines such as Google, to ensure illegal and harmful content is not searchable or hosted on their platforms. This is especially so regarding material that relates to terrorism,[3] child sex exploitation and abuse.[4] The entire Bill puts the onus on protecting children online, but the provisions also cover vulnerable people and everyone in general. OFCOM are to be appointed regulators of this Bill and sanctions proposed include tough fines that would have to pay to the regulator OFCOM who are proposed to be in charge of regulating this law when it is passed.

There are many controversies surrounding the Bill and the two areas that will be discussed are; is it going to effectively ensure that freedom of expression is protected; and how strong an authority will it be – in other words have too many cooks spoiled the broth?

Cases such as that of Molly Russell highlighted the importance of this Bill as the demand for social media platforms to be more regulated continues to grow. Molly Russell, aged 14, took her own life in 2017, and in a landmark decision into the inquest of her passing, it was found that the harmful online content she viewed had likely contributed to her death "in a more than minimal way" as the content is believed to have encouraged her to do this.[5] If this Bill was passed and made law, this type of content, would be prohibited as it would not be compliant with this law, and the Bill proposes that non-compliance would be faced with hefty fines. Molly's father, Ian Russell, is now an online safety campaigner and has been one of the many advocates for the passing of this long-awaited Bill. The delay is an issue for cases like Molly Russell's, as the Bill is particular about protecting children from harm, and it could mean social media platforms are better regulated. The NSPCC's latest research had found that 3.500 online sex crimes are taking place every month the Online Safety Bill continues to be delayed.[6]

Why the delays?

Since its inception from White Paper to now, it has seen four Prime Ministers and seven different changes to the Digital, Culture, Media, and Sport Department. This has resulted in many opposing

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[1] Online Safety Bill HC Bill (2022-23) [121]

[2] Online Safety Bill Factsheet: policy paper, (GOV.UK, 19 April 2022) https://www.gov.uk/government/publications/online-safety-bill-supporting-documents/online-safety-bill-factsheet#:~:text=The%20Online%20Safety%20Bill%20delivers,outcome%20of%20extensive%20Parliamentary%20scrutiny. Accessed 3 December 2022

[3] Online Safety Bill HC Bill (2022-23) [151] Schedule 5

[4] Ibid Schedule 6

[5] Dan Milmo, ' Social media firms 'monetising misery', says Molly Russell's father after inquest' (The Guardian 30 September 2022) https://www.theguardian.com/uk-news/2022/sep/30/molly-russell-died-while-suffering-negative-effects-of-online-content-rules-coroner accessed 30 September 2022

[6] NSPCC, 'There will be more than 3,500 online child abuse crimes every month the Online Safety Bill is delayed' (*NSPCC,* 8 August 2022) <https://www.nspcc.org.uk/about-us/news-opinion/2022/child-abuse-crimes-online-safety-bill-delay/> accessed 12 September 2022

opinions as to the format of the Bill: the biggest area of contest, and also the main area of debate in relation to the implications this has on freedom of speech and privacy.

The 'priority offences',[7] listed in Schedule 17, are a list of topics that social media platforms would have to have policies on. The fear here is that 'legal but harmful' cannot be defined and anything that cannot be defined is open to interpretation. Article 10 of the European Convention establishes that there will be "*restrictions have to be… necessary in a democratic society*" so arguably therefore, is 'legal but harmful' a necessary phrase? Would it be justified to have tech executives determine the parameters of 'harmful' content that they may label misinformation, but could just be a difference in opinion. The CEO of The Index of Censorship has deemed this a 'fundamentally broken Bill',[8] and has been urging the government to reconsider the Bill.

Lord Sumption has also criticised this as he stated that the government would have "control over the flow of information,''[9] so the lack of definition allows for too much control on part of the tech companies to decide the boundaries of harmful content and speech online – in other words, there may be too much room for interpretation. It is open to too much discretion and with so many hands in this Bill, what Nadine Dorries MP as the head of the department deems 'legal but harmful' may change when it finally gets it second reading before the end of the year; with the new prime minister Rishi Sunak and the new head of department, Michelle Donelan MP making these amendments as they see fit. We know members of the government Kemi Badenoch are opposed to this Bill and would not want to legislate for "hurt feelings.''[10] Who knows what she would have added or retracted to the Bill if she won the role for the Conservative party leadership then!

As of December 6, 2022, this Bill has been amended and gone through its second reading with the new government, and the removal of the obligation on social media platforms to remove 'legal but harmful' content. In regard to free speech, this change regulates speech in a clearer manner, not one determined by interpretation. Michelle Donelan on the BBC Radio Best of Today has said that it was preventing the bill from moving forward and created "*quasi-legal category between illegal and legal*".[11] It arguably did, because as mentioned above, what does that phrase really mean? How would OFCOM regulate speech content consistently when the barometer is so unclear? It gave the government, and the technology bosses too much control on what they could consider falling below criminality but still being wrong, as they are self-regulated. Which is arguably part of the reason why this Bill came about in the first place, to keep everyone, especially children, safe from harm the same way we see it being done off-line.

Conclusions

Now, more has been added to the soup, which is this Bill. The removal of this clause has watered down the rigidness to prevent freedom of expression complications, but it has also 'strengthened' the Bill,[12]' as provisions such as the inclusion of restrictions on self-harm content and the demand for appropriate child risk assessments with age restriction confirmations being made more effective.[13] These additions

[7] Online Safety Bill HC Bill (2022-23) [121] schedule 7

[8] Ruth Anderson, 'A new chance to protect freedom of expression online' (*Index on Censorship,* 14 July 2022) < https://www.indexoncensorship.org/2022/07/a-new-chance-to-protect-freedom-of-expression-online/> accessed 20 November 2022.

[9] Law Pod podcast, '169: Government Control over the Flow of Information: Lord Sumption on the Online Safety Bill' (6 October 2022) <https://open.spotify.com/episode/5mZvYnPkfGNZJeckBhPnFv?si=a667308005c848fc> accessed 30 October 2022

[10] Kemi Badenoch, 'Online Safety Bill opinion' (*Twitter,* 13 July 2022) <https://twitter.com/kemibadenoch/status/1547294743394131969> accessed 20 November 2022

[11] BBC Radio 4 Best of Today, 'Changes to online safety bill no longer force platforms to remove legal but harmful content' (*BBC,* 29 November 2022) < https://www.bbc.co.uk/programmes/p0dkjy1m> accessed 1 December 2022

[12] Ibid

[13] Jessica Elgot, 'UK minister defends U-turn over removing harmful online content' (*The Guardian)* https://www.theguardian.com/technology/2022/nov/29/minister-defends-u-turn-over-removing-harmful-online-content-online-safety-bill accessed 3 December 2022.

are compromising its effectiveness, and too many eventualities are being considered, without enough thought on execution. The onus of online safety seems to still be self-regulation, which it should be rectifying; but now seems to go back towards - knowing this has not been effective. It will be interesting to see how and if, this pans out.

STUDENT CASE NOTES

Wierowska v HC-One Oval Ltd [2022] UKET 1403077/2021.

Harshit Choudhary*

Introduction

The case was heard in an employment tribunal on a preliminary issue concerning the employee's refusal to take a covid vaccine because of their religious belief. The claimant brought an action against the employer for unfair dismissal, and the case brings into play the right to religion in the work environment.

The Facts

Miss Wierowska worked as a care worker in a care home until she was dismissed from her post on 28 April 2021. She claimed that the reason for her dismissal was her refusal because of her religious objections to take a covid vaccine. As a Roman Catholic, her belief is based on three grounds: it involves the use of foetal blood; she fears that this might interfere with DNA in the nucleus of cells; and that in her opinion that they are, or were, experimental, with unknown long-term repercussions. In the case management order preceding the hearing, her position was stated thus:[14]

> The claimant believes, in accordance with the dicta of Roman Catholicism that blood is God given and therefore sacrosanct, and it is therefore contrary to the tenets of the faith to alter the blood by adding man made vaccines. Further, life is sacrosanct and it is contrary to the tenets of the faith to use foetuses in the creation of Covid vaccines.

Although Miss Wierowska accepted the Vatican's declaration that it was acceptable to take the covid vaccine, she argued that she had God-given free will and no one could take that decision from her. At the same time, she argued that she was doing everything to protect the covid transmission to the residents of the care home. It was submitted that her views on vaccines were important in her religious perspective and worldview, and therefore, they do not need to be the mainstream or represent the orthodox viewpoint of the Roman Catholic Church.[15] Thus, she submitted that a religious belief may be protected even when it is not required by the claimant's faith, as long as it manifests her beliefs.

On behalf of the employers it was argued that Miss Wierowska's views on vaccines should meet with the *Grainger* criteria,[16] and that it was a philosophical rather than religious belief. The five *Grainger* criteria are: firstly, the belief must be genuinely held; secondly, the belief must not simply be an opinion or viewpoint based on the present state of information available; thirdly, the belief must concern a weighty and substantial aspect of human life and behaviour; fourthly, the belief must attain a certain level of cogency, seriousness, cohesion and importance; and lastly, the belief must be worthy of respect in a democratic society, not be incompatible with human dignity and not be in conflict with the fundamental rights of others.[17] Her claim was also compared with the case of *McClintock v Department of Constitutional Affairs*,[18] in which Mr McClintock's objection to same-sex couple adoption was

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[14] *Wierowska v HC-One Oval Ltd* [2022] UKET 1403077/2021, [3].
[15] Ibid, [10].
[16] *Grainger plc v Nicholson* [2010] IRLR 4.
[17] Ibid, [24].
[18] [2008] IRLR 29.

determined to be merely an opinion based on the information or lack of information available to him, and in any case incompatible with equality and the rights of others.

The decision in *Wierowska v HC-One Oval Ltd*

Employment Judge Fowell stated that Miss Wierowska's view was a religious rather than a philosophical one:

> This is an issue which has troubled the worldwide Catholic community, so much so that the definitive statement had to be made by the Vatican on behalf of the Pope in an effort to resolve matters. Even that declaration did not go so far as to criticise any catholic for refusing to take the vaccine on moral grounds, and it is implicit in the statement made that this remained an issue of personal conscience. Those moral concerns are closely linked to the longstanding Catholic position on abortion and to the resulting opposition to the use of stem cells or foetal material in medical experiments of any sort. They are, therefore, part and parcel of a fundamental view about the sanctity of human life.[19]

Therefore, applying the test in *Eweida v United Kingdom,*[20] which stated that:

> A religious belief will be a 'manifestation' if it is 'intimately linked to the religion or belief' and there is 'a sufficiently close and direct nexus between the act and the underlying belief. Whether or not the act is mandated by a recognised religion is irrelevant.

Thus, Judge Fowell was satisfied that her views about the vaccine were intimately connected with her religious faith and that there was a sufficiently close and direct connection between her refusal to take a covid vaccine and her underlying beliefs as to entitle her to rely on that religious faith as a protected characteristic.[21]

Analysis

In this case, the tribunal ruled in favour of Miss Wierowska in not taking the vaccine because of her religious grounds, despite it conflicting with the advice from the Vatican; the orthodox, Roman Catholic community in Venice declaring that the covid vaccine is acceptable. Despite that, the judge stressed that 'personal conscience' falls under Article 9(1) of the European Convention, which protects 'conscience and religion', and the decision based on her religious views on the vaccine showed a 'manifestation', and was 'intimately linked to the religion or belief'. Further, there was a sufficiently close and direct connection between her act of refusal and the underlying belief.[22] Thus, Judge Fowell accepted her view in this case on moral grounds and her personal conscience, covered by Article 9 ECHR, instead of accepting the Vatican's advice on taking the vaccine. This was because there was still debate, even in the Catholic Church, over this moral and religious issue.

In addition, the view of Miss Wierowska may constitute a philosophical belief rather than a religious one, because of her views concerning the vaccine and the possible side effects for pregnant women. Thus, she was concerned that in the future she might not be able to have children and this may be viewed as a philosophical view rather than a religious views.[23] Thus, the judgment in this case created a complexity about the protected characteristics of the Equality Act 2010 on personal views.[24]

Nevertheless, it is argued that the judgment should also consider Article 9(2) ECHR, where freedom to manifest one's religion or beliefs can be subject to limitations as are prescribed by law and are necessary

[19] Ibid, [25].
[20] App. No. 48420/10, [2013] ECHR 37.
[21] Ibid, [27].
[22] Ibid.
[23] Ibid (n 9).
[24] Equality Act 2010, Section 10.

in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others. Therefore, it could be argued that Miss Wierowska cannot refuse to take a vaccine while she is working in the care home. For example, in *Chaplin v United Kingdom,*[25] refusing to obey an order not to wear a necklace justified disciplinary action because of public health and the safety of patients in the hospital. Therefore, it is argued that the judge may consider article 9(2) ECHR in the case of Miss Wierowska, after deciding under Article 9(1) on the issues of personal conscience, religion and belief. Thus, the safety of residents living in the care homes where Miss Wierowska worked as a caring staff might overrule her religious beliefs.

Conclusion

This judgment positively impacts on the protection not only of religious views but also the protected person's right of personal conscience and freedom from discrimination in the workplace. Nevertheless, the judgment thus far has failed to directly approach the issue of the health and safety of persons in home care, despite the initial right to refuse to take a vaccine on religious grounds and personal conscience. That will be decided in subsequent proceedings, as this ruling was only on the preliminary point of whether she could rely on her views as a protected belief.

[25] App. No. 48420/10, [2013] ECHR 37.

STUDENT SHORT STORIES

‘No Place like Home’

Aya Salih*

This story has been inspired by the case of *Appiah v Leeds City Council* [2022] EWHC 2546 KB, where a mental health patient made a claim against her local authority, that she had been detained in bad faith or without reasonable care. Please note that this story and its characters are entirely fictional and do not pertain to the facts of the case.

Please be aware there are some strong depictions of violence and depression

Evangeline had forgotten what a cool breeze felt like against her skin, its gentle caress, the rich blue of the sky or the way the sun was sometimes so blinding that even when you closed your eyes it did nothing to help. She’d lost count of how many years it had been since she was admitted into the asylum, it was all a blur now. She’d found it difficult to adjust, to the same grey walls, the same medicine, the people, the sheer loneliness.

There was only one place that felt like home and that was inside Evangeline’s mind, not that she had much choice, and so every night after her last meal, after they walked her to her small-boxed room, both serious and wary expressions marked on their faces, her medicine administered, she would slip in between the rough white sheets - the roaring silence of the asylum so deafening that couldn’t help the thoughts that would burrow into her mind.

Evangeline was so tired of life, tired of being barricaded inside her weak feeble mind. But where else could she go, where else could she turn to feel that familiar warm embrace? Every night when Evangeline would retreat into her mind, she would find herself kneeling, slumped, a dark mist surrounding her that seemed to stretch forever into the abyss of her mind, shadowing the horrors that would soon come to torment her. Tonight, Evangeline’s mind chose to bestow a mirror in front of her. She lifted her head meekly and looked into it. The mirror spoke. Spoke of how it would reveal Evangeline’s true self to her, the monster lurking beneath the innocent pretence she hid behind, but she could not hide from it in here. No, she would see her hollow face, her gaunt body sunken as if all blood and water had been drained dry of her, leaving her skin plastered against her skeleton, her skin wearing the same colour as the dead.

Then there were her eyes, it has been said the eyes are the windows to the soul, but if you peered into hers, you’d find nothing. Almost as if she was an empty shell left there to remind others of her existence but inside, lifeless. This is what would happen if she left her thoughts eat away at her, if only she would invite them in, embrace them. *NO***!** She couldn’t, not after what had happened when Evangeline did let them in, when she listened to the constant noise in her head, when she gladly consumed them.

Evangeline did not understand the purpose of this display, she felt an itching sensation at her fingertips as if something was trying to protrude out of them. Looking down she found midnight blue claws, no talons, elongating from where the tips of her fingers should be. Perplexed she looked back up into the mirror and found her once sunken face whole and plump again. Evangeline now understood the purpose of this display. So, she obeyed, she dragged the talons across her face, her mind made no mistake in making them sharp, letting her feel, hear the way they pierced and descended into her skin so effortlessly. She repeated the same movements over and over again, starting from her scalp and ending at her collarbone, making sure to shut her eyes so that in the end she could see her work. Over and over, she repeated the same feral movements, screaming the same words searing into her mind.

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‘‘I am a monster’’ - ‘‘I will never be loved’’ – ‘‘I am evil incarnate’’ – ‘‘I will never be wanted’’. - ‘‘I am Death stealing life from others’’.

When she felt satisfied, Evangeline looked to see what was left. The imagine reflected in the mirror was visceral, if the blood oozing between the deep gashes was not enough to make you sick, it would surely be the skin peeling from Evangeline’s face revealing watery fresh pink flesh underneath that looked sensitive to the touch. Then, in the silence, a primal shriek ripped through the endless void, and this was how most of Evangeline’s nights would go. Slowly the shadows crept closer to Evangeline intending to swallow her whole into the darkness. She crouches into a foetal position, all energy and fight drained out of her years ago, yes let the darkness consume her, the quicker she accepted her fate the quicker her suffering would end, and she would awake. But what if she decided to fight? Evangeline dared only a peek lest there were monsters lurking in the midst, but all her eyes could see was the vast darkness. What if she decided to fight, could this mean she could finally escape from herself? Rising from the ice cold floor, Evangeline didn’t think twice and took flight, she ran, the sound of her quickening breath and the pounding of her feet echoing loudly.

In the far distance Evangeline makes out a door. Without hesitation she runs towards it and flings the door open. Before her is a dark hallway and at the end of it Evangeline could see a bright light. A chuckle of relief and off she went, away from the recesses of her mind. But quickly she found hope was a fickle thing, Evangeline kept running but the bright light kept growing further away from her. Suddenly hands jut out of the walls at either side and pull at her hair, her skin, and her clothes. She tries to fight them off but it’s no use, the light at the end of the hall begins to fade, Evangeline frantically tries to reach the end, but the hands pull her back, chunks of her hair are missing, scratches all over her skin.

Some nights were good, she would be administered with a high dosage of drugs because her behaviour during the day was unacceptable, a danger to others which meant she couldn’t go to the place that felt like home, but most nights were not. It’s been said Evangeline is put in a room below grounds so that no one can hear her screams.

But it was not her fault; not like they made it out to be. Once she had a home, a family, a normal perfect life, but it was all her mother’s doing. Evangeline heard her mother in the dead of night, her whispers travelling to her room of threats to kill, cleanse Evangeline from this world. It was all in her head they told her, the whispers were not real, Evangeline needed help, her mental state was unbalanced, it was making her see and hear things that were not truly there.

No! They were wrong; they were all wrong, she had to save herself. Because they were not there when every morning Evangeline would come down for breakfast and wolf down her favourite cereal, the unsettling feeling of dread rising with every bite, the way her mother would eerily peer from her cup, her face contort, the tips of her smile stretching to an impossible length, promising death.

Much.

Much like the way you are looking at her now…

‘Silent Grief’

Olukemi Ayorinde*

This short story is based on the decision in *Dance v Barts Health NHS Trust* [2022] EWCA Civ 1106, in which the court refused to grant a further stay for an order which authorised the removal of life support of a 12-year-old boy. This story details the life of the mother after she has lost her son and how it has impacted on her mental health and personal life. This story also uses flashbacks to depict a fictional telling of how the mother found her son unconscious at their home. This story does not reflect their opinion and the dates, characters and other details are entirely fictional.

Please be aware this story contains some strong language.

13 January, 2022

Dear Diary,

They said there was no hope for him.

“Ms. Matins, we want to speak to you privately for a second. As we discussed previously, we have been monitoring Ikenna’s vitals for a while.”

I gulped down a still-beating heart. I knew that moment was coming, but it didn’t make it any easier.

The doctor continued, “The team have discussed the best options for Ikenna, and in this case, it is unfortunate, but we will have to end his li—”.

Those were the last words I heard, possibly the last words I ever comprehended. Zahrah -Ikenna’s older sister - let out a shrill scream, doubling over as if she was in pain, and sobbed. Her eyes were bloodshot and filled with tears. She lunged towards the doctor and he frantically stepped back, but not quick enough: Zahrah took a handful of his scrubs and screamed,

“Bring my brother back, please, I’m begging you. Bring him back. I can’t live without him.”

My eldest and toughest daughter. She was our rock and seeing her break down like that snapped the cords that held me together. From that moment, I realised – I wouldn’t be able to cope.

Since then, I have just been floating through life.

“Fuck, sorry. That was a lot” I say as I clear my throat, swallowing the bile that’s forcing its way up. I’m not sure why I am apologising. Still, something about sitting here in this room with the dull yellow walls and her reading my diary makes me feel vulnerable.

“No need to apologise. You’ve done well. I can imagine writing these thoughts can make you emotional”.

She slides the box of tissues towards me, and I stare at it blankly. It’s almost as if she *wants* me to cry, but I haven’t been able to shed a single tear since that day.

“Amara...” she sighs and adjusts herself in her seat, taking a new approach.

It’s okay to cry, honestly. You’ve suffered a great loss and whatever you’re feeling is acceptable. You see, grief manifests itself in lots of wa—”

“I’m fine.” I dismiss her, no longer wanting to be here.

“Okay!” she exclaims, clearly trying to change the mood. “So, this is good material, but as I said in the last session, people suffering from delayed grief benefit from getting *all* their feelings down on paper.”

Her eyes flicker between me and the notepad sticking out my bag. I quickly try to hide it.

“Are you comfortable with reading it to me?” she asks. I consider for a moment acting clueless, but there’s no use.

“I’d rather you read it yourself”, I say as I pass it to her. “Please”. It comes out almost as a whisper.

She sighs, lying back in her seat. “Okay”.

7 October, 2021

“See you tomorrow, love”, I waved back to my colleague, Jennifer, as I walked out of the door.

Careful not to drop my grocery bags, I sauntered to my car, shifting the weight of my tote as I grabbed the keys out of my pocket. As I entered my car, I collapsed with a sigh and called Ikenna. No answer. He must be asleep; I thought as I rolled my eyes.

I fumbled with the house keys as I pushed through the door, calling Ikenna's name to come and help me with my bags. I called out his name once more. There was no answer. The house was eerily silent; I could not even hear the faint sound of his snoring or the TV blaring.

Call it mother's intuition, but at that moment, I knew something was wrong.

"Ikenna!" I called out while I shot up the stairs two at a time. I could hear the panic in my voice as I jogged down the first-floor hallway towards his room. I froze as I swung the door open, paralysed on the spot from witnessing the sight in front of me.

My heart sank into the deepest pit of my stomach, and bile rose in my throat while I stared blankly at my son's lifeless body on his bedroom floor. I immediately ran to the bathroom to empty the contents of my stomach. As I sat on the cold hard floor, I dialled 999.

From that moment onwards, everything was a blur. The three months Ikenna was in the hospital went by in a haze as we were met with a flurry of doctors. Family and friends constantly filled the room until the day he took his last breath, but the whole time I was alone.

I look up at the therapist, and a single tear betrays me as it escapes my eye, trickling down my face and landing in the corner of my mouth. She stares back at me with understanding in her eyes. Adjusting in her seat, she opens her mouth to talk, but nothing comes. We stare at each other in silence.

"You're tired Amara… emotionally, I mean. It's okay, you can let go".

And so, I do.

I double over and wail, unable to bear the heartache any longer. I cry because I miss him, because I'm angry, because I feel betrayed, because I used to eat at a dinner table for four chairs, and now there's just one. I cry because of the time we had and the time we could've had. It's gut-wrenching and yet relieving at the same time. I cry because I know I will not make it without him.

After I cry for what feels like hours, I sit back in the chair, exhausted.

"How do you feel?"

"Hurt", I admit.

"Good. That's good progress; we want you to feel."

I nod.

She hands me back my diary. "I'll see you next week with your new diary entry. Oh, and don't forget to keep holding onto hope."

"I will", but deep down, I know there's no use. Hope gets you nowhere. Hope gets you three hellish months without your son and a lifetime more. Hope gets you a divorce and an empty house. Hope gets you a dining table where four used to eat; now, there's only one. Hope leaves you empty inside.

But I don't say this to her. I look up and smile, before I walk out the door and head home.

When I get home, I pour myself a drink and sit at the table.

Dear Diary, I'm sorry. I really did try.

BOOK REVIEWS

Indirect Criminalisation, by Stavros Demetriou, Hart Publishing 2023

This is a book on a topic which matters, yet has had little academic attention. It is based on Stavros Demetriou's PhD thesis, and is the first detailed study of 'indirect criminalisation' – the legal treatment of anti-social behaviour through civil preventive measures such as the Anti-Social Behaviour Orders (ASBOs) and Anti-Social Behaviour Injunctions (ASBIs) in England and Wales.

The book examines whether the implementation of injunctions under Part 1 of the Anti-social Behaviour Crime and Policing Act 2014 resulted in the indirect criminalisation of certain kinds of anti-social behaviour (ASB). Injunctions and other civil preventive measures aim to prevent certain kinds of unwanted and troublesome behaviour. What is problematic about civil preventive measures is that they introduce means of circumventing the enhanced procedural and evidential protections afforded to those facing criminal prosecution. From being civil preventive measures they thus become a form of indirect criminalisation.

Anti-social behaviour (ASB) affects the health and wellbeing of millions of people. During 2022, England & Wales's police forces received 1,039,579 reports about anti-social behaviour. This is a decrease of 27 per cent from 2021's figure of 1,416,946 reports of anti-social behaviour, giving an overall rate of 17 per 1,000 people in 2022 and a rate of 24 per 1,000 people for 2021.[1]

A powerful report broadcast on BBC Radio 4 *File on Four* on 6 June 2023 (https://www.bbc.co.uk/programmes/m001mlth) vividly illustrated some aspects of this multi-faceted problem:

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

This book is of special interest to me. For the past three years I have been studying judgments published by the judiciary[2] of decisions made by county courts where ASBIs have been breached, reporting the sanctions imposed, in particular, imprisonment.[3]

Since the 1990s many Western jurisdictions have introduced a range of civil preventive measures aimed to prevent and deal with various types of nuisance and criminality. Although the stated objective of these interventions is the prevention of crime, their implementation can result in the imposition of restrictions akin to criminal punishment, leading to the indirect criminalisation of certain kinds of behaviour.

The purpose of Demetriou's study is to apply a working definition of criminalisation to examine whether the implementation of the injunction introduced under Part 1 of the Anti-social Behaviour,

[1] Defining and measuring anti-social behaviour United Kingdom Government
https://assets.publishing.service.gov.uk › dpr26

[2] https://www.judiciary.uk/judgments/

[3] See: https://www.thejusticegap.com/anti-social-behaviour-law-punishing-the-poor-and-vulnerable
and https://www.crimeandjustice.org.uk/resources/go-directly-jail-shouting-begging-and-rough-sleeping

Crime and Policing Act 2014 led to the indirect criminalisation of certain kinds of anti-social behaviour (ASB).

A Public Spaces Protection Order has much in common with an Anti-Social Behaviour Injunction. Recent research on the application of these measures was published in 2022. Peter Squires writes in the preface to the research report: *Living within a public spaces protection order: the impact of policing ASB on people experiencing street homelessness* (Vicky Heap Sheffield Hallam University, and colleagues):

Hermann Mannheim, perhaps the first criminologist to establish a distinction between 'crime' and a less precisely defined notion of 'anti-social behaviour' (Mannheim, 1946), noted that the latter concept was most frequently invoked to castigate the *behaviours* of the poorest (drunkenness, disorderliness, vagrancy). His own view implied that the *decisions* of the rich and powerful (tax evasion, exploitation, wealth hoarding) were at least as deserving of attention. Of course, such distinctions about the impact of legal regulation only reiterate wider criticisms regarding the overall effect of criminal law enforcement: one law for the rich, as the saying goes.

Having contributed to several textbooks, criminological dictionaries and encyclopaedias, and frequently pointing out that the precise appeal of anti-social behaviour (ASB) powers to enforcing authorities lay in their flexibility and utility, I was led to conclude, on several occasions, that the first generation ASB provisions would only be replaced when more insidious, nuanced and flexibly deployable powers became available. Having closely observed the Sheffield Hallam University (SHU) research from the beginning, as a member of the project steering group, I'm inclined to believe that both Mannheim and I had it correct.

This comment provides a good introduction to the topic of Demetriou's monograph.

As befits a PhD thesis it is a very thorough account of the literature on ASB and introduces the reader to the term 'indirect criminalisation'. This is the process by which behaviour which is commonly agreed to be anti-social (such as playing loud music at night and in other ways disturbing one's neighbours, directing obscene and abusive language at neighbours, being drunk and disorderly in public, allowing a flat in a communal building to become dilapidated thus encouraging infestations of vermin, etc.) becomes criminalised. This happens when the civil courts impose injunctions prohibiting such behaviour, and then later when the behaviour continues, deal with breach of injunctions. Although heard in civil courts under civil law, the penalty can be up to two years in prison.

Dr Demetriou outlines the empirical research he carried out during his PhD studies. Civil preventive measures which have been widely introduced in the past two decades, such as those coming within the Anti-Social Behaviour, Crime and Policing Act 2014 and the Terrorism Prevention and Investigations Measures 'fall into a legal lacuna with fewer rights and less protection than those prosecuted for a criminal offence', and this is important because these measures 'allow for the imposition of severe restrictions on the liberty of those against whom they are used. These restrictions can be so severe that they can amount to a form of criminal punishment resulting in the indirect criminalisation of the behaviour regulated.' His research set out to establish whether the injunctions under the 2014 Act (Anti-Social Behaviour Injunctions, ASBIs) resulted in the indirect criminalisation of anti-social behaviour (ASB). He sought to determine whether the ASBI operates as a *de facto* criminal measure, and if so, what kinds of behaviour are criminalised through this procedure. He found the enforcement agents - that is those dealing with complaints of ASB (police and housing officers) - used a range of informal interventions, such as sending out warning letters and engaging those involved in mediation and restorative justice procedures, before applying to a court for the issue of an injunction. There was a belief amongst local enforcement agents that in order for interventions to be successful in the long term, they needed to address the underlying causes of the perpetrators' behaviour, 'their behaviour is often the product of deep-seated socio-economic issues'.

Dr Demetriou explains that the research he conducted could be used by those who make laws and decide policy to adopt a more welfarist as opposed to a more punitive approach to ASB. This would incorporate

adopting a multi-agency approach and increasing efforts and resources to address the underlying causes of ASB as well as paying more attention to the potential impact of enforcement measures on those on whom they are imposed. 'That is, whether the requirements local enforcement agents sought to obtain would *unjustifiably* interfere with the perpetrators' liberty'. Dr Demetriou has now published a guide for the enforcement of ASBIs.[4]

The author cites the interesting study by J Donoghue who found that many members of the judiciary were concerned about the fact that they could only impose negative obligations on those against whom an ASBO was to be issued; she reported that judges were aware of the underlying causes of perpetrators' behaviour such as alcohol and drug addiction, and that the imposition of bland prohibitions could not permanently address the behaviour at issue. That study was published in 2010, this book was published in 2023, so it is surprising that at this point the author does not mention the report issued by the Civil Justice Council in 2020 on the sanctions imposed by the county courts for breach of ASBIs.[5] The CJC working party investigated punishment for breaches of ASBIs and noted how little or nothing was to be found in the way of referrals to agencies to help perpetrators deal with the underlying causes of anti-social behaviour. The CJC report found the current system to be profoundly unsatisfactory, frequently imposing disproportionate punishments on defendants who were often not in court and not represented. The CJC made 15 recommendations[6]: none have so far been implemented. 'Civil Justice Council' cannot be found in the index: a very surprising omission.

There is much to praise in this erudite tome. However, the book is not easy to navigate. There is no bibliography, so one cannot search for a researcher's name to see how their work fits into the author's analysis. Furthermore, there is no list of cases. There have been few reported cases where decisions on sanctions for breach of ASBIs have been challenged in the higher courts. Those that do exist are significant – but there is no way to find references to them in this book. To conclude: this monograph gives a detailed and scholarly account of indirect criminalisation. It is an important book on an important topic: every university library should have a copy.

Rona Epstein, Honorary Research Fellow, Coventry Law School

[4] Demetriou, Stavros and Lukera, Mary Frances (2022) *Addressing anti-social behaviour: a guide for local enforcement agents.* Technical Report. SRO, Sussex. License Creative Commons Attribution.
Download (572kB)

[5] Anti-social behaviour and the Civil Courts, Civil Justice Council October 2020
https://www.judiciary.uk/guidance-and-resources/anti-social-behaviour-and-the-civil-courts/

[6] See: R Epstein, The rich go to rehab, the poor go to prison: imprisonment for contempt of court, January 2022 https://crimetobepoor.org/2022/01/05/the-rich-go-to-rehab-%e2%88%92-the-poor-go-to-prison-imprisonment-for-contempt-of-court/

The Cambridge Companion to the International Court of Justice, by Carlos Espósito (Editor) and Kate Parlett (Editor), Cambridge University Press 2023

The editors are Carlos Espósito, Professor of Public International Law at the Universidad Autónoma de. Madrid, and Dr Kate Parlett, a barrister specialising in in public international law and international arbitration.

This recent volume is the most recent contribution to Cambridge Companions, a series intended to bring a wide variety of topics across academic fields such as theatre, politics and philosophy as well as law. It is an edited edition that brings together a number of prominent international lawyers as contributors and, as with other volumes in the series, such as *The Cambridge Companion to International Law*,[1] it is an affordable and comprehensive assessment for its size, with a wide scope. The book brings a focus onto a court whose role in international law is always controversial, and which has a contemporary value in addressing conflicts between states and of its value in current conflicts. It fills a gap in scholarly assessment not recently available to those interested in this area.

I found the book of particular interest as it was published shortly after the recent death of the American lawyer Benjamin Ferencz in April 2023. Ferencz was the last surviving prosecutor of the Nuremburg Military Tribunals, a professor of international law in the US and a strong advocate of the creation of an international criminal court, now the ICC. Courts such as the ICC and the ICJ have had the mandate and ability since their creation in the post-war period to interpret international law, and in the case of the ICJ to act as the principal judicial organ of the United Nations.

The editors here have sought to provide a "thorough, reflective and critical study of the role of the ICJ".[2] Contributors to the volume include former judges of the ICJ, practicing barristers in international law who have been before that Court, and a number of distinguished academics. In order to do so the editors have divided the contributions into three parts to address both developments and critical perspectives.

Part I addresses the historical development and contemporary nature if the ICJ, Part II examines the role of the ICJ in settling international disputes and Part III, how the ICJ has itself contributed to the development of international law since it was created.

The articles within are illustrative of the changing nature and scope of the Court. Whereas it's 'function is to decide in accordance with international law such disputes as are submitted to it', the distribution of states submitting cases has broadened from primarily European states, to 'states from the Asia-Pacific region and from the Middle East, and especially from Central and South America'.[3] Having said that, Tom Ginsburg qualifies the scope, observing that 'it is helpful to understand that the ICJ is profoundly limited by its institutional design and the international system. Without coercive powers, and dependent on State consent for cases, the [ICJ] was destined to play a limited role from the outset, in a world in which States were not actively seeking to adjudicate disputes' noting that 'its most important contributions have been in the development of the law, a task not formally assigned to the Court at all.'[4] Although these assessments suggest that the ICJ has grown and matured beyond its modest beginnings, some see that its effectiveness has been limited.

Yet despite its limitations, the ICJ has carved its niche. For example, Marcelo Cohen and Mamadou Hébié have noted that, in the context of territorial disputes, the law in this area is primarily the law as

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[1] James Crawford and Martti Koskenniemi, (Eds), Cambridge University Press 2015.

[2] Carlos Espósito and Kate Parlett (Eds), *The Cambridge Companion to the International Court of Justice*, Cambridge University Press 2023, 2.

[3] Judge James Crawford, Freya Baetens and Rose Cameron, 'Functions of the International Court of Justice' in Carlos Espósito and Kate Parlett (Eds), *The Cambridge Companion to the International Court of Justice*, Cambridge University Press 2023, 44.

[4] Tom Ginsburg, 'The Institutional Context of the ICJ', in Carlos Espósito and Kate Parlett (Eds), *The Cambridge Companion to the International Court of Justice*, Cambridge University Press 2023, 99.

specified by the ICJ. It has brought clarity and predictability by "choosing to focus on law, in a field where disputing parties make all kind of political, historical, religious and sociological arguments." As a result, "the Court was able to bring some welcome rationality"[5] Similarly, the ICJ has contributed to the Law of the Sea, but primarily its cases have been in the area of maritime boundary delimitation. Notably "since the 1969 *North Sea Continental Shelf* cases the Court has consistently declined to recognise any one method of delimitation as representing a rule of customary international law."[6] In both these areas, the contributors have demonstrated that the ICJ has had to draft new methodologies in order to solve novel cases.

Rotem Giladi and Yuval Shany argue that notwithstanding 'the Court has made some, albeit modest, contribution to international peace and security … its jurisdictional limits, resource constraints and never-utilised enforcement capacities… the potential impact of the Court on its international environment is likely to remain modest'.[7] Indeed, in some circumstances its impact is barely measurable. Regarding international environmental law, Daniel Bodansky states clearly "[t]he most important potential impact of the Court would be on the actual behaviour of States. But this impact is, at present, difficult to assess." He finds at best that these are to be found in the citations by courts and scholars.[8]

Additionally, the ICJ's brief to take cases based on the consent of the parties has been by Jean-Marc Thouvenin to be outdated. Thouvenin cites the example of Judge Cançado Trindade, a Brazilian judge of the ICJ for two terms up until his death in 2022. Cançado Trindade considered this consent to be an "anachronism of reliance upon the will of States and on their consent as a precondition of access to justice", citing his dissenting opinion in *Georgia v Russia*[9] as a "brilliant and convincing plea for compulsory jurisdiction."[10]

In summary, this volume is not just a collection lauding the successes of the ICJ in helping shape modern international law by settling disputes between states. Rather, the anthology explores the ideals of the ICJ (and whether they have been met), its working practices and procedures, the extent of its jurisdiction, and its impact on international law. The contributors are clearly free to critique and highlight failings of the ICJ. For example, Alejandro Chehtman, while highlighting that the ICJ has played an important part in developing the UN framework on the use of force, he equally notes that the court has received criticism in this area.[11]

This *Companion* is a valuable resource in a critical study of the ICJ and has much to recommend it. It provides biographies of its contributors to put their submissions into context, and provides links to further reading in each chapter. Although the editors acknowledge that the manuscript was completed before the Russian Invasion of Ukraine, it does mention the ICJ made provisional measures in March 2022. This book's contents should be a valuable guide to understanding the complex nature of the role of the ICJ in this and other diverse matters that come under its wide scope.

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[5] Marcelo Cohen and Mamadou Hébié, 'Territorial Disputes', in Carlos Espósito and Kate Parlett (Eds), *The Cambridge Companion to the International Court of Justice*, Cambridge University Press 2023, 362.
[6] Nilüfer Oral, 'The Law of the Sea', in Carlos Espósito and Kate Parlett (Eds), *The Cambridge Companion to the International Court of Justice*, Cambridge University Press 2023, 386.
[7] Rotem Giladi and Yuval Shany, 'Assessing the Effectiveness of the ICJ', in Carlos Espósito and Kate Parlett (Eds), *The Cambridge Companion to the International Court of Justice*, Cambridge University Press 2023, 119.
[8] Daniel Bodansky, 'The Institutional Context of the ICJ', in Carlos Espósito and Kate Parlett (Eds), *The Cambridge Companion to the International Court of Justice*, Cambridge University Press 2023, 99.
[9] Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (*Georgia v Russian Federation*) 1 April 2011. < https://www.icj-cij.org/case/140> accessed 21 June 2023.
[10] Jean-Marc Thouvenin, 'The Jurisdiction of the Court', in Carlos Espósito and Kate Parlett (Eds), *The Cambridge Companion to the International Court of Justice*, Cambridge University Press 2023, 145.
[11] Alejandro Chehtman, 'Use of Force, in Carlos Espósito and Kate Parlett (Eds), *The Cambridge Companion to the International Court of Justice*, Cambridge University Press 2023, 1468.

OBITUARIES

The legacy of the late Ben Ferencz: Prosecutor of the Nuremberg Trials and a pioneer of the International Criminal Court

Dr Tony Meacham*

Introduction

Benjamin Ferencz is not a name that comes to mind readily for many people, yet his work in helping develop an international rule of law, together with advocating for an international criminal court was instrumental in establishing accountability for individual crimes of an international nature. The media in obituaries and articles quietly observed the recent death of the American lawyer Benjamin Ferencz in April 2023.[1] While his passing was without fanfare, his life was of quiet achievement devoted to developing international law generally, and international criminal law principles in particular. He was said to be a man who sought 'Peace through Law'.[2] Ferencz was the last surviving prosecutor of the Nuremburg Tribunals, dying at the age of 103. The *New York Times* said of him that "[I]n addition to convicting prominent Nazi war criminals, he crusaded for an international criminal court and for laws to end wars of aggression."[3] He was also known as an "advocate for atrocity victims, rather than as a prosecutor of atrocity perpetrators".[4]

Benjamin B. Ferencz, was born in the Carpathian Mountains of Transylvania, in 1920 in Şomcuta Mare, which was then in Hungary, later to become part of Romania. His family fled due to anti-Semitic persecution when he was a boy[5] and he was raised in the Hell's Kitchen area of Manhattan in New York, USA. Here he formed his first views on the law and crime, remarking that he "would rather be on the side of the law, than on the side of the criminals."[6]

He graduated from Harvard Law School in 1943. Following an interest in criminal law, he became a Crime Investigator for the New York Legal Aid Society, gaining insight into the victims of crime, and an appreciation of the criminal justice system and the work of defence attorneys.[7] Shortly afterwards he joined the military, becoming part of an artillery battalion preparing for the invasion of France.[8] He landed at Normandy at Omaha beach on D-Day in 1944. As his battalion entered Germany, he encountered for the first time possible war crimes.[9]

As Nazi atrocities were uncovered, Ferencz was transferred to a newly created war crimes branch of the army to gather evidence of these crimes. As a war crimes investigator, he visited prisoner camps such as Buchenwald where he encountered scenes of emaciated inmates, the smell of burnt flesh from

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[1] Owen Bowcott, 'Benjamin Ferencz obituary' *The Guardian* (11 April 2023)

[2] Oliver Beauvallett, *Justice Info* 'Benjamin Ferencz: The Man Who Sought Peace Through Law' (13 April 2023) < Benjamin Ferencz: the man who sought peace through law (justiceinfo.net)> accessed 17 May 2023.

[3] Robert D. McFadden, 'Benjamin B. Ferencz, Last Surviving Nuremberg Prosecutor, Dies at 103' *The New York Times* (8 April 2023).

[4] Gregory S. Gordon, 'Benjamin Ferencz and the Treatment of Victims in International Criminal Law: Mapping Out Lex Lata and Lex Ferenda (Ferencza?) in an Emerging Field' (2023) 23 *International Criminal Law Review* 239–283, 240.

[5] Owen Bowcott, 'Benjamin Ferencz obituary' *The Guardian* (11 April 2023).

[6] Harvard Law School, 'Benjamin B. Ferencz, Interview by Harvard Law School Dean Martha Minnow', 1 October 2013, <www.youtube.com/watch?v=skmQgtaFjRM > accessed 30 June 2023.

[7] Gregory S. Gordon, 'Benjamin Ferencz and the Treatment of Victims in International Criminal Law: Mapping Out Lex Lata and Lex Ferenda (Ferencza?) in an Emerging Field' (2023) 23 *International Criminal Law Review* 239–283, 240.

[8] "A diminutive corporal in the American army, some five feet two inches in height", John Cooper, 'Obituary: Benjamin Ferencz', *The Jewish Chronicle* (4 May 2023) < https://www.thejc.com/news/news/obituary-benjamin-ferencz-4GRzXOFPGkTogCuYOJ63If> accessed 3 July 2023.

[9] Paul Gradvohl, 'Benjamin Berell Ferencz, American Nuremberg trials prosecutor, has died' Le Monde (11 April 2023) <Benjamin Berell Ferencz, American Nuremberg trials prosecutor, has died (lemonde.fr)> accessed 30 June 2023.

a crematorium and of the SS guards running away. He wrote that he had been "indelibly traumatized" by the scenes that he had witnessed. He went on to recall, "Few had enough strength to muster a smile of gratitude. My mind would not accept what my eyes saw. It built a protective barrier to enable me to go on with my work in what seemed an incredible nightmare. I had peered into Hell."[10] He also had some experience investigating war crimes in the last months of the war in formerly occupied France and in Germany visiting villages where pilots had been shot down, and in his words, "almost invariably beaten to death by the German mob" in what was called the 'allied flier cases' where downed pilots had been killed by villagers.[11]

In 1945, he returned to New York prepared to practice law. The next year Ferencz was sent to Berlin to set up a group of investigators that had the brief to find evidence of war crimes in the ruins and buildings of what remained of the 'Foreign Ministry, the Treasury, the SS offices, the Army, the Navy'. In other zones, the occupying powers would do similarly. Ferencz had found it quite remarkable that many records remained as "[t]he Nazis had tried hard to destroy their records, but they were so methodical in their record-keeping that much was left" and in some nearby villages such as Dahlem there were "subterranean chambers blocks long, holding some 10 million Nazi files." From such sources, documents relevant to the current and future trials of Nazi leaders at the International Military Tribunal were collated.[12]

The Nuremberg Trials

His death brings our attention to the beginnings of the contemporary system of international law that seeks consensus between states to address crimes of a scope beyond that of solution by domestic law. The end of the World War II left the victors with a need bring to account the leaders of Nazi Germany, those who had instigated harm through the crime of aggression in international customary law.

The nature and scope of this aggression required a revised thinking[13] on how to assess, curtail and prevent future such acts. Immediately following the war however there was no clear legal framework on how to do so. The Charter of the International Military Tribunal[14] and the Nuremberg trials[15] that followed gave a legal basis for the first time, and brought liability and accountability to the individuals who instigated that aggression, rather than their states. However, Justice Robert Jackson emphasised caution "[t]hat four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason."[16]

Ferencz had an important role in the Nuremberg trials. When he joined, the trials of senior Nazi figures such as Hermann Goering were already in progress, with Telford Taylor, a Harvard lawyer in charge. Ferencz became the chief prosecutor in what became known as the "Einsatzgruppen case" that was conducted between 1947 and 1948. It involved 24 SS[17] officers charged with mass murders that occurred in the then Soviet Union. The *Einsatzgruppen* was a special SS task force that followed the German army as it moved into the former Soviet Union. Their brief was 'security' but in actuality they

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[10] Benjamin B. Ferencz, 'Investigating Nazi Concentration Camps', BenFerencz.Org < Investigating Nazi Concentration Camps | Benjamin B. Ferencz (benferencz.org) > accessed 26 June 2023.

[11] BBC Hardtalk 6 October 2021 <BBC World Service - HARDtalk, Ben Ferencz, prosecutor at the Nuremberg Nazi Trials> and < https://archive.org/details/BBCNEWS_20230414_033000_HARDtalk > accessed 26 June 2023.

[12] Hekelina Verrijn Stuart and Marlise Simons, 'The Prosecutor: Interview with Benjamin Ferencz', in Heikelina Verrijn Stuart and Marlise Simons, *Prosecutor and the Judge: Benjamin Ferencz and Antonio Cassese, Interviews and Writings* (Amsterdam University Press, 2009), 13.

[13] Kirsten Sellars, *'Crimes against Peace' and International Law* (Cambridge University Press 2013), 40.

[14] United Nations, <https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.2_Charter%20of%20IMT%201945.pdf.> accessed 17 May 2023.

[15] 20 Nov 1945 – 1 Oct 1946.

[16] Claudia Hyde, 'Reflecting on Nuremberg's Legacy, 75 Years on', *Holocaust Memorial Day Trust* (18 November 2020) <https://www.hmd.org.uk/news/reflecting-on-nurembergs-legacy-75-years-on/#:~:text=During%20the%20Nuremberg%20trials%2C%20US, man%20must%20live%20in%20fear.> accessed on 3 July 2023.

[17] *Schutzstaffel* (protection squad). Originally Adolf Hitler's protection unit.

were to remove those thought to be 'dangerous', such as Jews, Gypsies and Communists. Ferencz became involved in this case through receiving extensive and almost complete detailed records covering a two year period from 1941 onwards. The documents recorded in detail as the army advanced the places and means by which people were killed and who had been in charge. Ferencz recalled "I sat down in my office with a little adding machine, and I began to count the people that were murdered in cold blood. When I reached a million, I said that's enough for me. I flew from Berlin to Nuremberg, to see Telford Taylor, who by then was a general. And I said, we've got to put on another trial." Such a large job required additional staff and resources, with Ferencz not wishing that such events go unanswered. In his words, "I offered to handle it. Taylor asked if I could do it in addition to my other activities. I said sure. So, I thereby became the chief prosecutor in what was later called the biggest murder trial in human history."[18] Benjamin Ferencz was then just 27.

Although the records showed that there were 3,000 men in the *Einsatzgruppen*, only 24 were tried as there was only enough room in the dock for that number. Only a sample could be tried. When it was observed that this group had operated primarily in the Soviet Union, Ferencz was asked whether he had considered passing his accumulated evidence to the Soviets. His response was brief: "Not a chance, no chance whatsoever." He explained that at the time relations between the Soviet Union and the US were not good and that the Soviet way of dealing with prisoners was to "disappear them" and not give them a fair trial, according to Russian he met. Additionally he had witnessed the Dachau trials whilst collecting information for prosecutions, which were run at much the same time as Nuremberg. Ferencz considered that "the Dachau trials were utterly contemptible. There was nothing resembling the rule of law. More like court-martials."[19] He therefore chose to conduct the trials at Nuremberg.

Ferencz's opening statement at Nuremberg is as valid today as it was in 1945.

> It is with sorrow and with hope that we here disclose the deliberate slaughter of more than a million innocent and defenceless men, women, and children. This was the tragic fulfilment of a program of intolerance and arrogance. Vengeance is not our goal, nor do we seek merely a just retribution. We ask this Court to affirm by international penal action man's right to live in peace and dignity regardless of his race or creed. The case we present is a plea of humanity to law.[20]

His evidence collated to try this case has been said to be so persuasive that witnesses were not necessary.[21] Additionally, no witnesses called by the prosecution because Ferencz felt that "the worst testimony you can get is eyewitness testimony." Called upon to explain, he said that

> We had camps full of displaced persons all over Germany. I could have called any 50 people and said, here are my 22 defendants, do you recognize any of them, did you see any of them commit crimes? All fifty of them would tell me, yes. And they would believe it. I didn't need that. I had the reports, and I could prove the validity of the reports, although they challenged them, of course.[22]

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[18] Hekelina Verrijn Stuart and Marlise Simons, 'The Prosecutor: Interview with Benjamin Ferencz', in Heikelina Verrijn Stuart and Marlise Simons, *Prosecutor and the Judge: Benjamin Ferencz and Antonio Cassese, Interviews and Writings* (Amsterdam University Press, 2009), 14-15.

[19] Hekelina Verrijn Stuart and Marlise Simons, 'The Prosecutor: Interview with Benjamin Ferencz', in Heikelina Verrijn Stuart and Marlise Simons, *Prosecutor and the Judge: Benjamin Ferencz and Antonio Cassese, Interviews and Writings* (Amsterdam University Press, 2009), 16-17.

[20] Trial of the Major War Criminals. vol. IV. 494. Nuremberg. 1947. < https://www.archives.gov/iwg/research-papers/trial-of-war-criminals-before-imt.html> accessed 28 June 2023.

[21] United States Holocaust Memorial Museum, 'Ben Ferencz and the fight for International Justice' <https://encyclopedia.ushmm.org/content/en/article/ben-ferencz-and-the-fight-for-international-justice> accessed 19 June 2023.

[22] Hekelina Verrijn Stuart and Marlise Simons, 'The Prosecutor: Interview with Benjamin Ferencz', in Heikelina Verrijn Stuart and Marlise Simons, *Prosecutor and the Judge: Benjamin Ferencz and Antonio Cassese, Interviews and Writings* (Amsterdam University Press, 2009), 17.

The prosecution rested its case after two days, although the defence took months.

These recollections of Benjamin Ferencz do read of a methodical and careful lawyer, keen to ensure that trials were fair. Each defendant had their day in court supported by two lawyers paid for by the court. On the opening day of the trial he had declared that 'every man in the dock had had committed horrendous crimes with full knowledge and intent'. Ferencz was quite clear of his intent as prosecutor that "If these men be immune, then law has lost its meaning, and man must live in fear."[23] He was however not immune to the testimony or ignorant of what had been allegedly done by those in the docks. After listening to one such defendant who had refuted the evidence and denied the accusations, he felt outraged to the point where "We had the records of every day that man was out murdering, and he had the gall to say that. I was ready to jump over the bar and poke my fingers into his eyes."[24]

Despite not requesting specific sentences, the outcome of the case was that all were found guilty with 14 sentenced to death.[25] When asked about why he had specifically advocated this sentence, Ferencz replied that "I'm not against the death penalty. I felt very deeply about this, I could never figure out a sentence that would fit the crime. It was so grotesque, a crime of such magnitude. You could not balance the lives of these 22 people in the dock against the million they had killed. There was no way to find any balance or justice."[26]

Nuremberg as victor's justice

The Nuremberg trials were not without critics of the process then and since. Some have suggested that the Nuremberg trials were a victor's justice, a concern that the trials were political in nature and not serving substantive justice, doing away with standards of proof used in national criminal courts.[27] Ferencz said simply

> No, they were not. If we wanted victors' justice, we would have gone out and murdered about half a million Germans. The top people, Robert Jackson,[28] Telford Taylor,[29] and many of us at the Nuremberg court were not trying to get revenge, but to show how horrible it was, in order to deter others from doing the same. And to be just, not to convict anybody unless there was absolutely clear proof of their guilt. This was the main principle. It wasn't perfect. But Nuremberg firmly and properly defined aggression as an international crime. It helped to develop crimes against peace and crimes against humanity.[30]

On the allegation of the Nuremberg trials charging defendants on crimes that did not exist prior to the tribunals,[31] criminalising actions that were legal in international law at the time they were committed, Ferencz simply stated, "The judgment included 55 pages analysing the validity of the law. But it can be

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[23] Claudia Hyde, 'Reflecting on Nuremberg's Legacy, 75 Years on', *Holocaust Memorial Day Trust* (18 November 2020) <https://www.hmd.org.uk/news/reflecting-on-nurembergs-legacy-75-years-on/#:~:text=During%20the%20Nuremberg%20trials%2C%20US, man%20must%20live%20in%20fear.> accessed on 3 July 2023.

[24] Hekelina Verrijn Stuart and Marlise Simons, 'The Prosecutor: Interview with Benjamin Ferencz', in Heikelina Verrijn Stuart and Marlise Simons, *Prosecutor and the Judge: Benjamin Ferencz and Antonio Cassese, Interviews and Writings* (Amsterdam University Press, 2009), 19.

[25] International Nuremberg Principles Academy, 'Ben Ferencz turns 100', (2020) < https://www.nurembergacademy.org/news/detail/f3f4eedd2f2097fe04750689bc25f243/ben-ferencz-turns-100-334/> accessed 18JUN2023.

[26] Hekelina Verrijn Stuart and Marlise Simons, 'The Prosecutor: Interview with Benjamin Ferencz', in Heikelina Verrijn Stuart and Marlise Simons, *Prosecutor and the Judge: Benjamin Ferencz and Antonio Cassese, Interviews and Writings* (Amsterdam University Press, 2009), 21-22.

[27] Gary Bass, 'Victor's Justice, Selfish Justice' (2002) 69(4) *Social Research* 1035, 1036; James Meernik, 'Victor's Justice or the Law?' (2003) 47(2) *Journal of Conflict Resolution* 140, 159.

[28] Associate Justice Robert H. Jackson of the United States Supreme Court.

[29] Principal prosecutor at Nuremberg.

[30] Hekelina Verrijn Stuart and Marlise Simons, 'The Prosecutor: Interview with Benjamin Ferencz', in Heikelina Verrijn Stuart and Marlise Simons, *Prosecutor and the Judge: Benjamin Ferencz and Antonio Cassese, Interviews and Writings* (Amsterdam University Press, 2009), 24.

[31] Retrospective laws, penalising conduct that was lawful when it occurred, also known as *ex post facto* laws.

put briefly. The prosecution had not invented the crime of murder, or mass murder. And the judges wrote: 'Certainly no one can claim that there is any taint of ex post factoism in the law of murder.'"[32] The Court made quite clear that the defendants were not remote from the crimes of which they were accused:

> …in this case the defendants are not simply accused of planning or directing wholesale killings through channels. They are not charged with sitting in an office hundreds and thousands of miles away from the slaughter. It is asserted with particularity that these men were in the field actively superintending, controlling, directing, and taking an active part in the bloody harvest.[33]

Post-Nuremberg

Ferencz on reflection said that, "The most important achievement of the Nuremberg trials was the confirmation that war-making is no longer a national right, but has instead become an international crime. That great historical step forward in the law must be sustained."[34] To that end Ferencz continued the work begun in Nuremberg.

After the Nuremberg trials, Ferencz developed the international treatment of criminal acts. He began with the example of General Dr Otto Ohlendorf, one of the six SS generals tried by him at Nuremberg. Ferencz recalled that Ohlendorf was "an intelligent, well-educated man, who had made some good legal arguments, trying to show he had no criminal intent. He did his duty as he saw it, without questioning Hitler who had said that Germany was about to be attacked by the Russians. That was the excuse they all used." Ohlendorf's defence was based on the argument that his actions were based on superior orders and 'self-defence'. Self-defence the General explained was anticipatory attacks on multiple countries to pre-empt the attacks on Germany they expected as told to them by his superiors. The argument went that he could not challenge his Head of State, someone with more information than he had.[35]

Ferencz observed "genocides are committed in presumed defence of some particular ideal; whether it be religion, ideology, race, self-determination, or nationalism. These are the things that usually motivate people to go out and kill and prepare to be killed." He resolved to change the way people think. He did acknowledge however strongly held and indoctrinated ideals can be difficult to change. One such idea is that of sovereignty, which he considered an ancient and obsolete notion, in the sense that "a sovereign state can do whatever it wishes within its own borders" and that "[n]o nation and no person should be above the law."[36]

After the war and the Nuremberg Trials, Ferencz joined Telford Taylor as a partner in a law firm in New York, but became critical of the United States and its involvement in the Vietnam War. Disillusioned with private law practice, he devoted his time to writing about aggression in international law and the achievement of world peace.[37]

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[32] Hekelina Verrijn Stuart and Marlise Simons, 'The Prosecutor: Interview with Benjamin Ferencz', in Heikelina Verrijn Stuart and Marlise Simons, *Prosecutor and the Judge: Benjamin Ferencz and Antonio Cassese, Interviews and Writings* (Amsterdam University Press, 2009), 24.

[33] Nuremberg Military Tribunal, *United States of America vs. Otto Ohlendorf, et al.* (Einsatzgruppen trial).

[34] Benjamin B. Ferencz, 'Enabling the International Criminal Court to Punish Aggression' (2007) 6 *Wash U Global Stud L Rev* 551, 566.

[35] Henry T. King Jr. , Benjamin B. Ferencz & Whitney R. Harris, 'Origins of the Genocide Convention' (2007) 40 *Case W Res J Int'l L* 13, 22-25.

[36] Henry T. King Jr., Benjamin B. Ferencz & Whitney R. Harris, 'Origins of the Genocide Convention' (2007) 40 *Case W Res J Int'l L* 13, 26.

[37] 'Obituary: Benjamin Ferencz', *The Jewish Chronicle* (4 May 2023) < https://www.thejc.com/news/news/obituary-benjamin-ferencz-4GRzXOFPGkTogCuYOJ63If> accessed 3 July 2023.

The International Criminal Court

Ben Ferencz was instrumental in the creation of the International Criminal Court (ICC), which was established by the Rome Statute in 1998. He was quite clear as to its purpose: "As part of the movement toward a more just and humane world, those responsible for aggression must learn that they will no longer be immune, but will be held accountable by an International Criminal Court acting in the name of all peace-loving nation."[38]

Gordon, makes clear that the trial of the *Einsatzgruppen* had a marked effect upon the subsequent atrocity trials such as Adolf Eichmann (1961), Slobodan Milošević (2006) and Radovan Karadžić (2016).'[39] He quotes B Leebaw who said that of the Nuremberg trials, 'the trials were primarily concerned with determining the guilt or innocence of individual defendants . . .'[40] Ferencz had convinced the trial manager at Nuremberg, Telford Taylor, to base the trial on victim considerations (especially the number of victims and the widespread and systematic nature of their deaths). This he made clear in his opening statement at Nuremberg that he was there as a voice of the victims. This led directly to the victim-based approach in the Eichmann trial, and in the temporary courts for the former Yugoslavia and Rwanda. From there the strategy was followed in the ICC, where Ferencz's approach was followed and the Rome Statute's creation benefited from his counsel in developing its normative framework. Additionally, Gordon emphasises that "Ferencz was a pioneer in, first, restitution, and then compensation for atrocity victims. Article 75 of the Rome Statute provides for victim reparations, 'including restitution, compensation."[41]

When asked whether the creation of the ICC helped prevent crimes against humanity, the war crimes, Ferencz stated that "It has helped, but not enough. Certainly, the existence of laws prohibiting certain behaviour has some deterrent effect, but we have to bear in mind that for centuries we have glorified war making ever since David hit Goliath in the head with a rock, and we have glorified the parades and the marching. No politician appears without its flags flying on all sides and the bands going and marching and I was a soldier and I know when they gave me all the battle stars and they gave me all the decorations and all that stuff. We've got to reverse those thousands of years of practice because the World has changed. We're not throwing rocks anymore. We're going to kill everybody from cyberspace. We can cut off the electrical grid of any city on this planet. Are you all crazy? You're standing here watching it happen, but students don't have money to pay tuition, refugees have no homes to go to, and the old people are dying because they can't afford the medical care and you're pouring billions of dollars every day into killing machines.[42]

His thoughts on the contemporary world

Ferencz emphasised that "The primary lesson of Nuremberg was that individuals, regardless of rank or station, could be held criminally responsible by an international tribunal. Medieval notions of sovereignty had become obsolete in the modern world. No nation or person could be above the law.

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[38] Benjamin B. Ferencz, 'Enabling the International Criminal Court to Punish Aggression' (2007) 6 Wash U Global Stud L Rev 55, 566.

[39] H. Earl, 'Legacies of the Nuremberg ss-Einsatzgruppen Trial after 70 Years', (2017) 39(1) *Loyola Los Angeles International and Comparative Law Review* 95, 97 as cited in Gregory S. Gordon, 'Benjamin Ferencz and the Treatment of Victims in International Criminal Law: Mapping Out Lex Lata and Lex Ferenda (Ferencza?) in an Emerging Field' (2023) 23 *International Criminal Law Review* 239–283, 268.

[40] B. Leebaw, *Judging State-Sponsored Violence, Imagining Political* Change (Cambridge University Press, Cambridge, 2011), 35.

[41] Gregory S. Gordon, 'Benjamin Ferencz and the Treatment of Victims in International Criminal Law: Mapping Out Lex Lata and Lex Ferenda (Ferencza?) in an Emerging Field' (2023) 23 *International Criminal Law Review* 239–283, 267.

[42] BBC Hardtalk 6 October 2021 <BBC World Service - HARDtalk, Ben Ferencz, prosecutor at the Nuremberg Nazi Trials> and < https://archive.org/details/BBCNEWS_20230414_033000_HARDtalk > accessed 26 June 2023.

Law must apply equally to everyone."[43] Even after he had turned 100, Benjamin Ferencz was still contributing to international discourse on the rule of law.

Not every development in the development of the ICC went his way. Ferencz was concerned about the US Trump administration's antipathy to the ICC. The then National Security Advisor John Bolton in September 2018 had threatened the ICC with US sanctions if it were to prosecute US servicemen over alleged abuse of detainees during war in Afghanistan. Bolton had "called the court 'illegitimate'[44] and vowed the US would do everything "to protect our" citizens"[45] A report by the ICC in 2016 had said that there was a reasonable basis to believe that torture had been committed by the US military during the Afghanistan conflict.[46]

Ferencz felt it necessary to comment on this matter in response to Bolton's words, stating that "I believe a few words are in order about what the ICC is and what it is not. Contrary to the current administration's anti-ICC rhetoric, the court is neither unaccountable nor anti-American. It is a treaty-based organization whose statute has been ratified by 123 countries, including 27 of our 28 NATO allies." In respect of the US and other non-members of the ICC, he stated that:

> The ICC recognizes the primacy of the national courts of all nations, including the United States. Its operating statute provides that countries which are willing and able to prosecute their own citizens may do so in their own domestic courts and that such rights supersede the jurisdiction of the ICC. … It is only where national courts fail in their obligation to genuinely and impartially investigate their own nationals that the ICC may move forward in exercising its jurisdiction.[47]

He went on to emphasise that the ICC's operating structure has safeguards and limitations to ensure that the ICC does "not become some sort of supra-national court run amok" noting that judges and prosecutors are elected for fixed terms by a governing assembly representative of the ICC's membership.[48]

More generally in response to John Bolton's statements he emphasised the scope of the ICC:

> The ICC recognizes the primacy of the national courts of all nations, including the United States. Its operating statute provides that countries which are willing and able to prosecute their own citizens may do so in their own domestic courts and that such rights supersede the jurisdiction of the ICC.
>
> It is only where national courts fail in their obligation to genuinely and impartially investigate their own nationals that the ICC may move forward in exercising its jurisdiction. It is a court of last resort designed to assure that otherwise voiceless victims of atrocity

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[43] Benjamin Ferencz, 'Will We Finally Apply Nuremberg's Lessons?' Ben Ferencz.com September 2010 < Will We Finally Apply Nuremberg's Lessons? | Benjamin B. Ferencz (benferencz.org) https://benferencz.org/articles/2010-present/nuremberg-trial-prosecutors-warning-about-trumps-war-on-the-rule-of-law/> accessed 26 June 2023.

[44] The US has to date refused to join the ICC.

[45] BBC, 'John Bolton threatens ICC with US sanctions', BBC 11 September 2018, <https://www.bbc.co.uk/news/world-us-canada-45474864> accessed 26 June 2023.

[46] ICC, 'Report on Preliminary Examination Activities (2016)', International Criminal Court, 24 November 2016, [211], 47 <The Office of the Prosecutor (icc-cpi.int)> accessed 26 June 2023.

[47] Benjamin Ferencz, 'Nuremberg Trial Prosecutor's Warning About Trump's War on the Rule of Law' Ben Ferencz.com 20 July 2020 < https://benferencz.org/articles/2010-present/nuremberg-trial-prosecutors-warning-about-trumps-war-on-the-rule-of-law/> accessed 26 June 2023.

[48] Benjamin Ferencz, 'Nuremberg Trial Prosecutor's Warning About Trump's War on the Rule of Law' Ben Ferencz.com 20 July 2020 < https://benferencz.org/articles/2010-present/nuremberg-trial-prosecutors-warning-about-trumps-war-on-the-rule-of-law/> accessed 26 June 2023.

> crimes may ultimately have their day in court, whether it be before national courts or before the ICC itself if necessary.49

Conclusion

Reflecting on the Nuremberg trials, Ferencz emphasised that:

> At Nuremberg, the United States and its allies tried Nazi leaders who dragged their nation into war to the tune of Deutschland Uber Alles. They considered themselves a law unto themselves, and it was their undoing. The Nuremberg Trials were intended … to help establish a rule of law to deter future international crimes, regardless of who the perpetrators might be.[50]

Benjamin Ferencz was determined to not have the Nuremberg trials to be a unique process, and for the development of international law to restrain or mitigate the effects of war. Indeed, he expressed quite clearly that "I prefer law to war under all circumstances." He was quite clear that tribunals and courts were not a complete solution:

> To be sure, punishing aggression will not, by itself, eliminate wars, but it is an important component of a vast matrix which encompasses social justice, disarmament, and a system of effective enforcement. If peace is to be protected, it is essential that all national leaders be aware that individuals responsible for the crime of aggression will be held criminally accountable before the bar of international justice-no matter how long it takes.[51]

Ferencz acknowledged that the ICC is not without its own faults. “It is a relatively young institution[52] that relies on the cooperation of countries around the world to bring perpetrators to justice. It is a challenging task, as not all countries make the cooperative effort that they should. But it is much too early to suggest that we should throw out the baby with the bathwater by condemning or by threatening the ICC. To do so is to repudiate Nuremberg and the rule of law for which so many around the world have sacrificed.”[53]

To emphasise the need for courts such as the ICC, Benjamin Ferencz reflected that:

> Nuremberg taught me that creating a world of tolerance and compassion would be a long and arduous task. And I also learned that if we did not devote ourselves to developing effective world law, the same cruel mentality that made the Holocaust possible might one day destroy the entire human race.[54]

Although Benjamin Ferencz is now gone, his work from Nuremberg to the ICC and beyond remains. We must all be thankful for the work to which Benjamin Ferencz devoted his long life.

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[49] Benjamin Ferencz, ‘Nuremberg Trial Prosecutor’s Warning About Trump’s War on the Rule of Law’ Ben Ferencz.com 20 July 2020 < https://benferencz.org/articles/2010-present/nuremberg-trial-prosecutors-warning-about-trumps-war-on-the-rule-of-law/> accessed 26 June 2023.

[50] Benjamin Ferencz, ‘Nuremberg Trial Prosecutor’s Warning About Trump’s War on the Rule of Law’ Ben Ferencz.com 20 July 2020 < https://benferencz.org/articles/2010-present/nuremberg-trial-prosecutors-warning-about-trumps-war-on-the-rule-of-law/> accessed 26 June 2023.

[51] Benjamin B. Ferencz, 'Enabling the International Criminal Court to Punish Aggression' (2007) 6 Wash U Global Stud L Rev 551, 566.

[52] It is 25 years in July 2023 since the passage of the Rome Statute treaty that established the ICC.

[53] Benjamin Ferencz, ‘Nuremberg Trial Prosecutor’s Warning About Trump’s War on the Rule of Law’ Ben Ferencz.com 20 July 2020 < https://benferencz.org/articles/2010-present/nuremberg-trial-prosecutors-warning-about-trumps-war-on-the-rule-of-law/> accessed 26 June 2023.

[54] United States Holocaust Memorial Museum, ‘Ben Ferencz and the fight for International Justice’ <https://encyclopedia.ushmm.org/content/en/article/ben-ferencz-and-the-fight-for-international-justice> accessed 19 June 2023.