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Editorial

We are very pleased to publish the first issue of the twenty-ninth volume of the *Coventry Law Journal*. This issue contains many pieces covering essential contemporary legal issues, such as the right to assisted dying, hate and anti-diversity speech, illegal migration laws, international conflicts and environmental rights. These areas have been highlighted on our degree modules and their inclusion her allows staff and students to contribute to the legal and other debates.

There are also a number of case notes and recent developments on recurring matters such as free speech and privacy, sentencing and trade union rights. We are grateful to staff at the Law School, who contributed case notes and book reviews on various aspects of law: including one from our research fellow, Dr Rona Epstein. Again, we are grateful from contributions from academics outside of the Law School, including our former colleague, Sukhninder Panesar, who has contributed an article on property co-ownership in commercial ventures, and Steve Foster from Manchester Grammar School, who has co-written a piece with the other Steve Foster from our Law School.

The Journal also welcomes various contributions from our students. We have published four of our undergraduate students' dissertations, an essay on equality written by a student on the third year of the LLB, a number of shorter articles written by students as part of their course assessments on our exciting new module – Contemporary Issues in Law – a conference paper from students at SWUPL, and a case note on contract law by one of our first year students. We wish them all every success in the future as academic writers.

On a sad note, we bid farewell to Dr Mahmoud Masud, who leaves us to take up an exciting new position abroad. Mahmoud has been a student and teacher at Coventry University for 13 years, and has recently completed his PhD in Islamic Free Speech Law. He was a tremendously popular member of staff and provided great assistance to our students in Equity and Trusts, Property Law and Legal System. We also bid very fond farewells to Serena Sauba, who is off to De Montfort University to specialise in Gender and the Law; and Dr Neshat Safari, who will take her expertise in Company and Commercial Law to the University of Wolverhampton: we wish them all the best in the future.

We hope you enjoy reading this issue and find something that will interest you: either as a student to inform your law study, or as a scholar to inspire your future research and interest in law. We also look forward to receiving your contributions for future issues. We encourage contributions from students, academic staff and practitioners, and if you wish to contribute to the Journal and want any advice or assistance in being published, then please contact the editors. The next publication date is December 2024, and contributions need to be forwarded to us by early November 2024 at the latest.

The editors: Dr Steve Foster and Dr Stuart MacLennan

ARTICLES

HUMAN RIGHTS

The protection of Muslim minorities against cyber hate in Europe - a critique of the European Court of Human Rights protection of religious followers against hate expression

Dr Mahmoud Masud*

Introduction

Peaceful co-existence and reconciliation of significantly distinct legal systems, such as Islamic law and secularism, can only have a real potential of harmony if they engage in debating the possibility of harmonisation. One crucial aspect this article critically analyses is the impact of using digital media as a medium to disseminating anti-religious (mainly Islamic) expression and how this fits within the European Court of Human Rights (the ECtHR) general approach to anti-hate speech. Doing so will contribute towards debating a more consistent and clearer regulation of the limitations of freedom of expression under the European Convention on Human Rights (the ECHR). The overarching aim of doing so is to argue that unless the ECtHR reconsiders the limits of what constitutes hate speech so that Muslim (and other religious) minorities are afforded further protection against Islamophobia in general and the harm of cyber hate in particular, the main objective of international human rights law to combat discrimination against vulnerable minorities will be undermined. This takes into consideration the far-reaching powers of digital media today.[1] According to the UN Secretary General of the Council of Europe, Marija Buric, this, is the leading cause of the upsurge in offline discrimination, hate, and violence in Europe and worldwide.[2] As noted by Calvin, considering the growth of social media platforms as arbiters of truth through developing mechanisms that remove content that goes against community standards and safety, they remain malleable enough to generate unfavourable views regarding their regulation of freedom of expression.[3]

The article will first provide evidence of the prevalent role social media plays in the upsurge of hate expression, mainly anti-Islamic rhetoric, political or otherwise. This includes inciting discrimination and hate against Muslim minorities by negatively portraying, falsifying, and grossly offending the reputation of Islam and its ideals. Reports produced by UN agencies, and regional/international NGOs - such as Human Rights Watch, Amnesty International and the Council of Europe - will be used to establish cyber hate as a contemporary leading cause of Islamophobia today, including anti-Islamic offline and/or online acts of discrimination, hate, and violence in (mainly European) countries where Muslims live as dispersed minorities. The message of this article this will be aided by a brief reference

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[1] Sarah Sharma, "The Techno-Logics of Digital Islamophobia", (2021) ISJ 6, 8-10

[2] The European Commission against Racism and Intolerance where the UN Secretary General Marija Buric emphasised the importance of combatting hatred and offensive speech to protect disadvantaged communities against ultra-nationalism, anti-Sematic and anti-Islamic rhetoric. Access via https://www.coe.int/en/web/portal/-/ultra-nationalism-anti-semitism-anti-muslim-hatred-anti-racism-commission-raises-alarm-over-situation-in-europe

[3] Clayton Calvin, "Ministries of Truth: Free Speech and the Tech Giants", (2019) JBE&L 13, 35. This particular point also warrants an in-depth discussion of hatred against Muslims and its interrelation with state actors and digital infrastructure. See Vecellio Segate, "Channelled Beneath International Law: Mapping Infrastructure and Regulatory Capture as Israeli–American Hegemonic Reinforcers in Palestine" (2023) *Communication Law and Policy* 28(4), 353.

to similar forms of expression that other minority groups endured throughout history,[4] which international human rights law in the wake of WWII was reintroduced to combat.[5]

Second, this will be followed by a critical overview of the limitations of Article 10 and the protection of Article 17 of the ECHR, while introducing the Western notion to "shock, offend and disturb" as essential to Western society and its claim to broadmindedness, autonomy, and democracy. Intertwined into this critical overview are the notions of proportionality and the margin of appreciation as additional mechanisms utilised by the ECtHR in an attempt to determine whether State Members have fairly balanced various competing interests. This denotes the intersectional nature of this enquiry that is likely to engage other rights and duties, especially since Muslims are defined and targeted by their religious affiliation and ethnicity. Therefore, an anti-religious expression could engage, *inter alia*, the rights and protection of others, such as their freedom of religion under Article 9 of the ECHR and their right to non-discrimination under Article 14 of the ECtHR. This theoretical overview will be followed by a practical and chronological critique of the ECtHR's case law in order to argue that religions and their followers are becoming less significant in a manner that contradicts the objectives of international human rights law, tolerance towards minorities and their right to the effective enjoyment of substantive fundamental rights.[6]

Finally, the author will use the above findings to argue that a more consistent and protective approach by the ECtHR will, in addition to protecting Muslim minorities against the ostensible upsurge in Islamophobia, provide further guidance to national authorities in combatting the use of digital platforms to disseminate anti-Islamic hateful expression that has often translated into offline discrimination, hate, and violence. The article will conclude by arguing that a stricter approach is needed to further protect Muslims who live as scattered minorities in Western/European societies against the early signs of religious intolerance that frequently starts in the form of online hate. This justifies the article's focus on the regional jurisdiction of the ECtHR, which is where the majority of cases occur.

The internet, cyber hate, and Islamophobia

In the Preamble of the Convention on Cybercrime (in promoting unity among Member States), the Council of Europe emphasised, as a matter of priority, the need to (nationally) implement criminal measures to protect society from the use of computer systems to disseminate written, spoken or drawn racist and xenophobic material against any individuals, including religious followers.[7] This emphasis acknowledges the intersectional relationship between religion and race, and the major role religion plays in xenophobia. In recognising the negative and grave impact of online platforms, the Council of Europe also included in its advisory text the need to criminally legislate against the public insult of individuals (among other characteristics) race or religion using internet systems. This, according to evidence produced by William et al., has helped in facilitating the spread of hateful rhetoric against minority groups,[8] including Islamophobia. Although the author acknowledges the lack of a consensus on what Islamophobia exactly means, the term here refers to prejudice against Muslims because of their race

[4] This will be briefly referred to here, but is used in my thesis research entitled "Conceptual and legal harmonisation of offensive anti-religious speech: Reconciling the jurisprudence of the European Court of Human Rights with the approach of Muslim States for the protection of Islamic beliefs, and Muslim and non-Muslim minority groups*"* in more depth in chapter 5.

[5] Such as the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights and the European Convention on Human Rights

[6] For example, Article 55(3) of the UN Charter, among other things, calls for "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion". See also The Framework Convention for the Protection of National Minorities.

[7] Article 2 of the Convention on Cybercrime. Full text can be accessed via https://edoc.coe.int/en/cybercrime/11019-convention-on-cybercrime-protocol-on-xenophobia-and-racism-second-protocol-on-enhanced-co-operation-and-disclosure-of-electronic-evidence.html

[8] *Ibid,* at Article 5. See also Matthew Williams et al, "Hate in the Machine: Anti-Black and Anti-Muslim Social Media Posts as Predictors of Offline Racially and Religiously Aggravated Crime" (2020) BJC 60, 94

and belief, and how such prejudice may influence the national legislation of discriminatory policies and practices.[9]

According to the European Islamophobia Report, shortly after the 09/11 attacks,[10] the "war on terror" and the anti-Islamic baseless propagation of "the Islamisation of Europe",[11] significantly aggravated hate and intolerance against Muslims worldwide, primarily in Western (mainly European) States.[12] This, according to Beydoun, has led to a more aggressive form of private and public Islamophobia.[13] In countries such as Germany, Austria, the UK, Norway, and France, physical and verbal, including far-right abuse against Muslims has been growing sharply, with a large proportion of offline violence starting on the internet.[14] Between 2017 and 2018, the UK's Home Office, reported a sharp increase in online hate,[15] supported by evidence from the UK's Crown Prosecutor Service, which attributed the majority of cases to cyber hate.[16] For example, the controversial comment made by the former UK Prime Minister, Boris Johnson, in which he compared Muslim women who wear the veil to "letter boxes", led to a staggering 350 per cent increase in online anti-Islamic hate and discrimination, with a significant 'dark figure' of incidents remaining unreported.[17] More detrimentally to the reputation of Islam and Muslims, the comments led to a significant increase in the publication of online articles and podcasts portraying Islam and Muslims negatively.[18] Evidence presented by DEMOS (Demonstrate or Demonstration) at the Mayor of London's Policing and Crime Summit in 2017 confirmed that for 12 months, large numbers of tweets sent from the UK were derogatory and anti-Islamic.[19] DEMOS found that most of the tweets insulted Muslims,[20] conflated Muslims with terrorism, and accused Muslims with the desire to destroy the West.[21]

On an institutional level, in 2021 the French Government passed its 'Anti-Separatism' laws'.[22] The new laws have been accused of legalising Islamophobia under the name of "the battle against Islamic extremism", affecting the basic human rights of more than 5.4 million Muslims living in France.[23] By virtue of these provisions, the French Government has been granted the power to shut down anti-Islamophobic charitable organisations,[24] and limit Islamic religious practices in the name of 'anti-radicalisation'.[25] These initiatives rendered it the French citizens' mission to report Islamic practices (such as praying at work) as early signs of religious extremism.[26] The Commission Nationale Consultative Des Droits De L'homme, confirmed that since 2019, religious and racial hate (online and

[9] Kristin Henrard, "State Obligations to Counter Islamophobia: Comparing Fault Lines in the International Supervisory Practice of the HRC/ICCPR, the ECtHR and the AC/FCNM" (2020) ELR 3, 2
[10] This is where a series of airline hijackings by 19 militants associated with the Islamic extremist group al-Qaeda attacked different locations in the USA.
[11] For an expansive discussion of these particular initiatives, see Kleiner (2010), 101-105
[12] The full text can be accessed via https://www.islamophobiaeurope.com/wp content/uploads/2020/06/EIR_2019.pdf
[13] See in particular Khaled Beydoun, "Islamophobia, Internationalism, and the Expanse Between", (2021) BJA 28, 101.
[14] Rebecca Melnitsky, Islamophobia Surges in the U.S. Due to Global and National Tensions (2023) Access via https://nysba.org/islamophobia-surges-in-the-u-s-due-to-global-and-national-tensions/
[15] Hate Crime, England and Wales, 2017/18, Statistical Bulletin 20/18 16 October 2018. For full text, visit https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/748598/hate-crime-1718-hosb2018.pdf
[16] Can be accessed via https://www.cps.gov.uk/publication/hate-crime-report-2017-2018
[17] Full report can be downloaded via https://cfmm.org.uk/resources/publication/cfmm-report-british-medias-coverage-of-muslims-and-islam-2018-2020-launched/
[18] Full report can be downloaded via https://cfmm.org.uk/resources/publication/cfmm-report-british-medias-coverage-of-muslims-and-islam-2018-2020-launched/
[19] From March 2016 to March 2017
[20] For the full statement, visit https://demos.co.uk/project/anti-islamic-content-on-twitter/
[21] For captured tweets, visit https://committees.parliament.uk/writtenevidence/70035/html/#_ftn1
[22] Passed on the July 23, 2021. Legally known as the "Strengthening Respect for Republican Principles".
[23] See in particular Ahmed Waraich, "France's Anti-Separatism Bill: Systemic Institutionalisation of Islamophobia in the French Republic", CSP [2022] https://issi.org.pk/wp-content/uploads/2022/08/IB_-Ahmed_Waraich-_Aug_24_2022.pdf .
[24] Examples on anti-Islamophobic NGOs being shut down, please visit https://policyexchange.org.uk/french-highest-court-confirms-closure-of-islamist-groups-barakacity-and-ccif/
[25] *Ibid*.
[26] Leonard Faytre, "Islamophobia in France: National Report 2019", cited in Enes Bayraklı & Farid Hafez, Law, Istanbul, 291

offline) crimes against Muslims in France significantly increased.[27] Although beyond the scope of this article, prejudice in France can be demonstrated further by the imposed anti-Islamic dress restrictions triggering three grounds of discrimination: race, religion and gender.[28]

On a private level, far-right individuals, such as the Danish-Swedish politician Rasmus Paludan, utilise digital media and their right to freedom of expression to organise and execute their malicious anti-Islamic agenda of desecrating the Qur'an. Since 2017, Paludan, has (under the protection of the Swedish police) burnt the Holy Quran across Europe.[29] Intending to cause the gravest level of offence and provocation he possibly could, Paludan live-streamed the events of burning the Qur'an near Muslim neighbourhoods and mosques during the Holy month of Ramadan. Each live-streamed incident was followed by violence where mosques were defaced and Muslims were attacked.[30] Azra Muranovic, a Swedish and Social Democratic Party politician emphasised that the burning of the Qur'an was a planned anti-Islamic act under the protection of freedom of expression, which aimed at provoking riots.[31] Controversially, in January 2023, the Swedish authorities (who cited national and regional freedom of expression laws),[32] prevented a planned event of burning the Jewish Holly Torah outside of the Israeli Embassy in Stockholm by a Muslim protestor.[33] The 'Torah Burning' applicant admitted that burning other holy books contravenes Islam and that he never really intended to burn the Torah or cause offence to the Jewish minorities in Sweden, but rather to generate debate about the Swedish authorities' lack of equality and inconsistent use of freedom of expression laws.[34]

Among other politicians who are inspired by these events are Le Pen and Matteo Salvini, far-right politicians whose political parties arguably stand as a major spreader of institutionalised online and offline Islamophobia. By utilising social media as a way of promoting her election campaigns, Le Pen called for ethnic civil wars as a way of resolving the issues between secularism and Islam, while promising to fine Muslims for wearing religious attires. On the other hand, Matteo Salvini's party (Lega Nord) used veiled Muslim women's images during far-right campaigns to portray oppressed women.[35] Alarmingly, Le Pen who utilised digital media to openly use anti-Islamic material and rhetoric to promote her political campaigns was very close to winning the elections in France, while anti-Islam populist, Geert Wilders, has succeeded in the Netherlands.[36] This demonstrates the significant growth in public support for far-right Islamophobic, racist, and xenophobic ideology in Europe. This may have contributed to the increase of hate crimes against Muslims worldwide by private individuals who are inspired by the anti-Islamic far-right political agenda.[37] A recent example is self-confessed online-bred far right Australian fascist, Brenton Tarrant. Tarrant, who travelled the world and used digital media to smear and insult Islam and its followers, and who was driven by the (mainly political) online negative anti-Islamic propagation. Minutes after sending an email to New Zealand Prime Minister, Jacinda

[27] https://www.hrw.org/world-report/2021/country-chapters/france [last accessed 31st May 2022]
[28] *Supra*, note 9, at 3
[29] Most recently outside a mosque in Denmark For full account, visit https://www.aa.com.tr/en/europe/far-right-politician-paludan-burns-quran-in-front-of-denmark-mosque/2799500 [last accessed 3rd Dec 2023]
[30] See for example, Nils Adler, Quran desecrated at Sweden mosque during Eid al-Adha, Aljazeera, 2023. https://www.aljazeera.com/news/2023/6/28/quran-desecrated-in-sweden-during-eid-al-adha-holiday
[31] There were a number of reactions by Swedish politicians, visit http://serateshgh.com/international/what-you-need-to-know-about-quran-burning-in-sweden/
[32] In addition to their duties under Article 10 of the ECHR, there are four laws that are enshrined within the Swedish Constitution – 1- The Instrument of Government, 2- The Act of Succession, 3- The Freedom of the Press Act, and 4- The Fundamental Law on Freedom of Expression.
[33] See https://www.aa.com.tr/en/middle-east/torah-burning-in-front-of-israeli-embassy-in-stockholm-prevented-says-israeli-envoy/2799443
[34] https://www.jordannews.jo/Section-109/News/Swedish-authorities-stop-planned-Torah-burning-26682
[35] Marine Le Pen goes on trial for inciting hatred against French-Muslims, access via https://www.theguardian.com/world/2015/oct/20/marine-le-pen-trial-charged-anti-muslims-hate-speech see also https://www.theguardian.com/world/article/2024/may/08/model-legal-advice-matteo-salvini-the-league-party-image-anti-islam-poster
[36] Some a brief discussion of Geert Wilders election win, visit https://www.bbc.co.uk/news/world-europe-67504272
[37] For an archive of deleted tweets of offline and online of anti-Muslim hostility, visit https://tellmamauk.org/wp-content/uploads/resources/We%20Fear%20For%20Our%20Lives.pdf

Ardern,[38] Tarrant used digital media to live stream his '36 minutes' cold assassination of over 50 Muslim worshipers and civilians at (and outside) two Mosques in New Zealand.[39]

Historical relevance of anti-Semitism to Islamophobia

Before examining the ECtHR's approach towards forms of anti-religious expression, the detriment of anti-religious (Islamophobic) expression and intolerance, is better justified by briefly overviewing anti-Semitism.

It is important, therefore, to assert that Islamophobia largely replicates the intolerance the Jewish community endured throughout history. This is not to undermine the importance of other anti-minority/indigenous violations, but engaging in this comparative and analytical overview will hopefully generate debate that anti-Islamic hate largely starts as a digital insult and negative derogation, similar in intention and action to anti-Semitism. It is argued, therefore, that online expressions that intentionally portray Islam negatively, falsely defame, and insult its ideals are arguably the leading cause of offline discrimination, hate, and violence.

The Jewish struggle throughout history was not always a racial one but only developed as such shortly before the 20th Century.[40] Before this, the Jewish community was displaced and persecuted for refusing to yield to the Christian demands (Romans before this) to discard their religious attire and practices and follow the Christian way of living. By refusing to do so, Jews were labelled, discriminated against, falsely accused, had their places of worship demolished, and were left with no choice but to live as scattered minorities across Europe.[41] This further emphasises the intersectional relationship between religion and race. Therefore, anti-religious perpetrators (political or otherwise) and their over-reliance on freedom of expression as a protective tool to promote their far-right ideology to discriminate, derogate, and harm is not novel. Whether this is Nazi Germany against the Jews, or Marine Le Pen and others against Muslims today, they all disguise their hatred towards minority groups behind their right to freedom of expression and democracy, which they bolster by the notion to "shock, offend and disturb".[42] It is undeniable that debating and critiquing the truth about religions, even if their followers may be offended and shocked, is necessary in a democratic society for the cognitive development of citizens and the discovery of truth. However, falsifying facts and defaming the character of religions to incite hatred against minority groups, fragments society by creating a social hierarchy characterised by inferiority.

Hitler's hatred towards the Jews was founded on two millenniums of groundless publications, disparaging sarcasm, and religious discrimination.[43] This was despite the fact that the Jews played a key role in defending Germany before and during WWI, leading to Walther Rathenau becoming Germany's first Jewish Foreign Minister.[44] Similar to the American-led propagation of the "war against terror" and "Islamisation of the West" since the 9/11 attacks, "The Protocols of the Elders of Zion" was a 1900 Russian fabricated and circulated document, allegedly signed by Jewish leaders expressing their intention to dominate the world.[45] Furthermore, similar to Muslims living under policies that advocate

[38] For a critical overview, see in particular, Kazi (2020), pp. 210–213. This is disclosed to be a 16,000-word "manifesto", but the authorities stressed that it did not contain any information that would have presented the attacks.
[39] For a full timeline of the attack, see Boaz Ganor, "Terrorism Is Terrorism: The Christchurch Terror Attack from an Israeli CT Perspective", (2020) ASPI 1, 7–12.
[40] The Second Reich (1871 – 1919) and the Third Reich represents the leading period to the Holocaust (January 1933 to May 1945).
[41] See in full Albert Lindemann *Anti-Semitism before the Holocaust*, (Routledge, 2000)
[42] *Handyside v The United Kingdom* Application no. 5493/72, [1976]
[43] See in particular Attila Pok, "Atonement and Sacrifice: Scapegoats in Modern Eastern and Central Europe", (1999) EEQ 4, 533–6
[44] Jews, due to their faithfulness to Germany and willingness to fight their battle gained the recognition of Germans and they even won awards. Starting in 1914, the German Empire prevented the press from disseminating any anti-Semitic material and clamped down on anti-Semitic movements. *Supra*, note 69 at 76.
[45] For more on the detriment of this publication, visit https://encyclopedia.ushmm.org/content/en/article/protocols-of-the-elders-of-zion

for “togetherness”, such as the French 'Anti-Separatism' laws, and the USA Patriot Act,[46] Jews were always targeted as “the other” group because of their different religious ideals and culture.[47] Similar to contemporary online and offline anti-Islamic satirical, negative, and hateful publications/acts, such as the 12 Danish cartoons, the desecration of Islamic texts, and Rushdie’s ‘Satanic Verses’,[48] the 1800s witnessed a sharp rise in anti-Jewish publications.[49] As a result of the unfettered use of freedom of expression to disseminate anti-Jewish negative propagation for refusing to discard their religion, Jewish temples were destroyed; their sacred religious texts were burnt. Further, they were referred to as “Aliens” in European national policies,[50] were ridiculed because of their religious and cultural customs and practices,[51] were stripped of their citizenships and eventually (leading to the tragedies of the Holocaust) were incarcerated and offered by Nazi Germany to the world.[52] This is similar to what Muslim minorities have been experiencing, such as the Qur’an burning, mosques burning,[53] being portrayed as terrorists, the Uyghur camps in China, and, more recently, the controversy surrounding the deportation of Muslim asylum seekers from the United Kingdom to Rwanda;[54] accompanied by controversial comments that only white Ukrainian refugees are welcome to Europe.[55]

The use of digital media as a political and private platform to exercise freedom of expression to negatively portray and disparage Islam, its followers, and sentiments, has made it onerous for Muslims today to manifest their religion freely and be highly susceptible to discrimination, hatred, and violence.[56]

The scope of Articles 10 and 17 of the ECHR

Those who disseminate hateful expression (including using the digital media) rely on the rights and limitations enshrined under Article 10 of the ECHR to hold their states accountable for disproportionately interfering with their expression. The next section will critically discuss the consistency of the ECtHR’s interpretation and application of the limitations of Article 10(2) and its reference to Article 17 of the ECHR in cases of anti-religious expression.

Now that the need for further (cyber) hate regulation in the context of disseminating offensive and derogatory anti-religious expressions has been outlined, a brief critical overview of the jurisprudence of ECtHR when balancing the right to freedom of expression against its limitations and other freedoms will assist in understanding the author’s critique of the ECtHR’s approach. This overview will, on the

[46] The Act was introduced on the 26th of October 2001 as a mechanism of deterring terrorism, which then arguably made it lawful to enforcement agencies to search and detain Muslims without probable cause. For example, a contested section is Section 215, which allows the Federal Bureau of Investigation to “make an application for an order requiring the production of any tangible things for an investigation to obtain foreign intelligence information…providing that such investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution.”

[47] See in particular European Monitoring Centre on Racism and Xenophobia (2003), p. 61 For full report, visit https://fra.europa.eu/sites/default/files/fra_uploads/178-Report-RT3-en.pdf

[48] A 1988 notorious publication that falsified and denigrated established facts Islamic facts and figures.

[49] Most notably, ‘La France Juive’ by Edouard Drumont. Inspired by anti-Jewishness, Drumont collated negative and false facts about the Jews, which led to a further upsurge in discrimination and violence against the group. For the full impact of this publication, see in particular, Robert. F. Byrnes, Edouard Drumont and La France Juive.” 1948, Jewish Social Studies 10(2), 165.

[50] See, for example, the UK Police statement referring to Russian-Jews as aliens. See Routledge (2016), p. 131

[51] As reported by the United States Holocaust Museum. Access via https://www.ushmm.org/antisemitism/what-is-antisemitism/why-the-jews-history-of-antisemitism

[52] See William Brustein and Ryan King, “Anti-Semitism in Europe before the Holocaust”, (2004) IPSR 25, 35

[53] For example, Rambouillet Mosque in the Yvelines department of the Ile-de-France region was completely burnt in an arson attack. https://www.aa.com.tr/en/europe/fire-burns-down-mosque-in-northern-france-report/2676150

[54] Deportation of mainly Muslim/Arab asylum seekers was deemed lawful by the English High Court despite being blocked by the ECtHR as a human rights matter considering the poor human rights record of Rwanda. See N.*S.K. v. United Kingdom* application no.28774/22 [2022]

[55] Examples include far right Vox party Santiago Abascal and Bulgarian President Rumen Radev. https://www.middleeasteye.net/news/russia-ukraine-war-right-wing-welcome-refugees-not-muslims

[56] Despite being blocked by the ECtHR. Rights that are guaranteed under the ECHR, among other international treaties. Article 9 (Freedom of Thought, Conscience and Religion) and Article 14 (Prohibition of Discrimination) of the ECHR. See also the Article 19 Universal Declaration of Human Rights, Article and the 1981 Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief

one hand, appreciate the Court's commendable stance against anti-Semitic intolerance, but, on the other hand, raise concerns regarding its stance towards other minority groups. This will debate whether certain anti-religious expressions that intend to falsify, negatively portray, and disparage religions and their followers should be curtailed, using the same approach as anti-Semitism, especially if such expressions could escalate to discrimination, hate, and/or violence. The author concurs that religions are different from race due to their non-inherent nature, which automatically open them to criticism.[57] However, it needs to be noted that over-inflating the value of free speech will automatically diminish the importance of marginalised vulnerable groups and the relationship between their race and religious identities.[58]

The ECHR emerged as a regional human rights treaty to ensure that human rights are safeguarded from disproportionate state interference by imposing legally binding positive and negative obligations.[59] To further regulate freedom of expression, the ECHR enshrined, on the one hand, Article 10 and its limitations under Article 10(2) to assess the proportionality of a disputed State Member's interference with expression. On the other hand, Article 17 takes away the protection of Article 10 when:

> "…engaging in any activity or performing any act aimed at the destruction of any of the rights and freedoms set forth herein..."[60]

Following the overview below, the author will critically examine the consistency and rationale of the ECtHR when deciding between the use of Articles 10 and 17 of the ECHR. As previously stated, this aims to argue that, similar to anti-Semitic expressions, certain forms of anti-Islamic expressions that can lead to discrimination, hate and violence (which goes beyond criticism and mere offence) should be afforded the protection of Article 17.[61] In doing so, the author will argue that the ECtHR's approach – together with Western states' widespread abolition of blasphemy laws – has become less sympathetic to religious ideals, to the detriment of marginalised religious/Muslim minorities.[62]

Under Article 10, the right to freedom of expression includes the "freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers", which includes the use of digital media. However, the exercise of this freedom is subject to limitations and can be limited by State Members if such interference is prescribed by law, for a legitimate aim (such as the protection of the reputation and rights of others, and public morals) and is necessary in a democratic society.[63] Even if such limitations are met, the Court will still assess whether the interference was proportionate to the legitimate aim pursued and within the prescribed margin of appreciation (with political or press expressions being subject to a narrower margin of appreciation in comparison to anti-moral or commercial expressions).[64]

As was demonstrated in *Handyside v United Kingdom*,[65] the UK was afforded a wide margin of appreciation in restricting obscene speech, which would have been narrower if the expression in

[57] For example, the Islamic opposition against Christianity that Jesus in not the son of God, logically renders Islam prone to attacks regarding its own ideals. See in particular Tommaso Virgili, ''Respect for Religious Feelings': As the Italian Case Shows, Fresh Paint Can't Fix the Crumbling Wall of Blasphemy'. (2022) European Public Law 28(2), 303

[58] Dylan Asafo, "Confronting the Lies That Protect Racist Hate Speech: Towards Honest Hate Speech Laws in New Zealand and the United States", (2021) PBLJ 38, 1-31

[59] The preamble of the ECHR

[60] Article 17 of the ECHR entitled 'Prohibition of abuse of rights'

[61] In support, see UN Resolution 16/18 "Combating intolerance, negative stereotyping and stigmatization of, and discrimination, incitement to violence and violence against, persons based on religion or belief".

[62] Western/secular States, such as the UK, Denmark, Norway, Iceland, Malta, France, New Zealand, Canada, Greece, Scotland and the Republic of Ireland have abolished blasphemy laws. For a detailed discussion on this issue, see Rumy Hasan *Modern Europe and the Enlightenment* (Sussex Academic Press, 2021), 49

[63] Article 10(2) of the ECHR lists a number of other legitimate aims, such as "territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary"

[64] Political and press expressions much harder to interfere with due to being regarded in the public interest. For more details, see Steve Foster *Human Rights and Civil Liberties* (3rd ed Pearson Press, 2011), 55-60

[65] Application No. 5493/72 [1976]. For a detailed discussion on the operation. Of the margin of appreciation, see Leigh, (2011), 55.

question was political, which is generally upheld unless it incites hate, discrimination and/or violence. Nevertheless, the judgement reiterated the importance of freedom of expression as the cornerstone of democracy, tolerance and broadmindedness; including expression that others, including religious groups, may find undesirable, shocking, offensive, and/or disturbing.[66] In the author's view, *Handyside* is often used as a shield against claims of anti-religious hate or as a sword to attack religious practices that are considered to be contrary to Western ideals.

Introduction to the European Court's approach

Where the ECtHR believes that an impugned expression incites hate and, therefore, aims to destroy any of the rights enshrined within the ECHR, Article 17 will be applied. In making those decisions, the ECtHR has treated online and offline expressions equally in terms of being subjected to the same limitations and expectations. This article will now provide a critical overview of key decisions and their rationale when the ECtHR decides between Articles 10(2) and 17 of the ECHR. This will be used to demonstrate that the ECtHR is inconsistent and becoming less sympathetic when deciding on forms of anti-religious/Islamic expression that in the author's views should fall within hate and be accordingly dismissed under Article 17.

The ECtHR approach to racial hatred and satire

The author applauds the ECtHR's consistent and strict stance against anti-Semitic expression to protect the reputation and honour of the Holocaust victims and their families against the harm such expression might incite. In doing so, the ECtHR has consistently applied Article 17 of the ECHR on any form of expression regardless of their political or satirical nature,[67] and whether they were said privately or in public, verbally or in writing; online or offline. This is further demonstrated in cases where even if the Holocaust itself was not directly denied, the identity of the perpetrators and/or events that led to the Holocaust were disputed.[68] In *Garaudy v France*,[69] the ECtHR stressed that tolerating any form of anti-Semitic expression or any form of Holocaust denial (even remotely) is tantamount to "denying the survivors the true reasons for their suffering and the dead the true reasons for their death." A point of inconsistency that is worthy of note here is that the ECtHR has only offered this unwavering level of protection against anti-Semitic expression. For example, in *Perincek v Switzerland,*[70] the Court subjected an expression that denied the Armenian Genocide by calling it "an international lie" to the assessment of Article 10(2). The Court found that the Swiss authorities were in breach of Article 10 for applying a disproportionate and unnecessary restriction. The Court in *Perincek* was prepared to examine many factors, such as the intention of the perpetrator, the educational nature of the expression, the public interest element, and the proximity between the Armenian Genocide and the time the statement was made. Conversely, in *B.H., M.W., H.P and G.K v Austria* (*B.H*. hereafter),[71] the ECtHR used Article 17 in finding manifestly ill-founded an expression that disputed the number of the Jews who died leading up to (and during) the Holocaust.[72] This inconsistency was highlighted by Judges Vucinic and Pinto de Albuquerque: that while it is important to support the ECtHR for preserving the memory and dignity of the Jewish victims and their families, failing to offer the same to the Armenian victims and their families undermines their reputation.[73]

This demonstrates that the Court is inconsistent, not just when determining the legitimacy of expression that is anti-religious, but of a racial nature too. This will be used to support the argument that such inconsistency is further supported by evidence that the Court is also becoming gradually less

[66] *Ibid*, at para 45. Is also worth mentioning that the judgment has been by the American Supreme Court in *Boos v Barry* 485 U.S. 312 (1988) to emphasise the importance of freedom of expression to public debate, the discovery of truth.
[67] *M'Bala v France* Application No. 25239/13 [2015],
[68] *Witzsch v Germany* Application No. 7485/03, [2005].
[69] Application No. 65831/01 [2003].
[70] Application no. 27510/08, [2015].
[71] Application no. 12774/87 12 October 1989
[72] Similar controversy can be found in *Sürek v Turkey* (no. 1) [GC], no. 26682/95 [1999], at para 62 and *Faber v Hungary* Application no. 40721/08 [2012].
[73] Application no. 12774/87, [1989], at 22.

sympathetic when considering religions and the sensibilities of their followers. As previously stated, while it is sensible to argue that religions cannot expect to be protected from all forms of offensive expression, a more consistent approach to the application of Article 17 to further combat anti-Islamic expressions, followed by an upsurge in discrimination, hate, and/or violence, is needed.[74]

The ECtHR approach to hateful anti-religious expressions: Case studies

The chronological order of the case law below supports the claim that the ECtHR is yielding to the pressure of critics by becoming less sympathetic toward Islamic sensibilities, to the detriment of the safety of Muslim minorities. The findings will be used later to conclude that a more consistent and strict approach will help to combat the early stages of discrimination, hate, and/or violence, a link that has already been historically established.[75]

In *Norwood v The United Kingdom*,[76] the ECtHR was highly protective of the welfare of religious minorities. The applicant, who is a regional organiser for the British National Party, and who lived in a first floor flat, displayed a sign stating: "*Islam out of Britain, Protect the British People*", the crescent and star (Islamic symbols) in a prohibition sign, while displaying a photograph of the Twin Towers in flame. After being found in violation of s.5 of the Public Order Act 1986, for inciting hostility and causing distress to a religious group by displaying threatening, abusive, or insulting signs, Norwood accused the national authorities of violating his right to freedom of expression under Article 10 of the ECHR. While describing the applicant's conduct as a "vehement attack against all Muslims in Britain", the ECtHR found his claim to Article 10 to be incompatible *ratione materiae* with the provisions and values of the ECHR, mainly tolerance, social peace, and non-discrimination.[77] In response to the applicant's argument that the signs were displayed in a private dwelling and there being no evidence to suggest that a single Muslim had seen them, the Court emphasised that Article 17 will not allow the exploitation of totalitarian personal interests that undermine the principles enshrined within the Convention.[78]

Although it is commendable that the ECtHR took such a strict stance against the conflation of Muslims and their identity with terrorism, it remained unclear how the national authorities in the UK or the ECtHR found that the impugned expression caused distress, hate, or violence when they were not seen by potential victims. Additionally, it was also unclear whether the upsurge in Islamophobia after the 9/11 attacks played any role in such a decision. A clarification would have guided subsequent courts of what was the exact criteria it used to reach its decision. The decision was unfavourably received by free speech advocates who argued that it undermined the importance of political expression and blurred the line between protected offensive expression (as per the *Handyside* principles),[79] and expression that constituted hate.[80] Notwithstanding this, it appears that the ECtHR in *Norwood* set a clear anti-religious blanket prohibition that is tantamount to those found in anti-Semitic case law, regardless of whether there were victims, whether the expression was political, or whether it was displayed publicly or in private.[81]

In other cases, however, the Court had engaged Article 10 rights of the speaker and sought justification for its interference. In *Soulas and Others v France*,[82] three applicants were convicted by the French

[74] Many Western writers regard the "religious feelings" argument to be weak and undermines democracy and individuals' right to freedom of expression. See, for example, *supra*, note 57 at 297–318.
[75] Of course, there are opposing views that anti-blasphemy laws undermine freedom of expression and should never be linked to hate, and that the ECtHR has been inconsistent in this regard. See for example, Hauksdóttir (2021), 75-118.
[76] Application no. 23131/03, [2004].
[77] *Ibid*.
[78] The Court made reference to a number of relevant cases, such as *W.P. and Others v. Poland*, Application no. 42264/98, [2004]; *Garaudy v. France*, Application no. 65831/01, [2003]; *Schimanek v. Austria*, Application no. 32307/96, [2000].
[79] *Supra*, note 70.
[80] *Supra*, note 3, at 297–318.
[81] See for example *Perinçek v Switzerland*, Application no. 27510/08, [2015] and *Williamson v Germany* Application No. 64496/17 [2019].
[82] Application no. 15948/03.

authorities for inciting religious hatred through online and offline publications entitled "The Colonisation of Europe: True Speech on Immigration and Islam." The book called for ethnic civil wars against Muslims as a way of resolving the conflict between Islam and the West; it described Islam as encouraging the ritual rape of young white girls.[83] Local NGOs, such as the League against Racism and Anti-Semitism, filed national proceedings against the applicants for inciting hatred and violence against racial and religious groups.[84] In contrast to the private nature of the expression made in *Norwood*, the publication here was disseminated widely among the public, who readily comprehended the anti-Islamic and racist message directed at non-Western migrants and their efforts to Islamise Europe.

Rather than following the approach adopted in *Norwood*, the ECtHR engaged in a comprehensive assessment of Article 10 to determine whether the French interference was prescribed by law, necessary in a democratic society, and pursued a legitimate aim. Although the Court found no violation of Article 10 by the French authorities, it remained ambiguous how the anti-Islamic expression made in the impugned publications - which by the Court's admission incited racism, hate, and violence - were any different from the less impactful expressions made in *Norwood*. Islam and the Muslim Community in *Soulas* were portrayed negatively, denigrated as rapists, and calls for war crimes against them were made.[85] These are comments that are being normalised and used frequently by politicians worldwide today.[86] Nevertheless, a year later the same approach was followed in *Feret v Belgium*,[87] where anti-Islamic rhetoric, such as "save Belgium from the threat of Islam", was employed as part of a national anti-immigration and racist event. Again, the only reference made to Article 17 was its inapplicability, despite clear incitement to anti-religious hatred and violence. This demonstrates a clear departure from its strict stance in *Norwood,* reflecting a less sympathetic to religion and a more lenient approach to speech.

This approach – employing Article 10(2) to justify interference - has been followed in other cases. In *E.S. v. Austria*,[88] the applicant held several seminars entitled 'Basic Information on Islam' at the far-right 'Freedom Party Education' Institute. Online and offline platforms were used to disseminate leaflets, mainly among young voters. During her seminars, the applicant referred to Prophet Muhammed Peace be upon Him as a "warlord, who had many women, to put it like this, and liked to do it with children", who is a role model to all Muslim men.[89] In convicting the applicant of religious hatred under Article 283(1) of the Austrian Criminal Code, the prosecutor emphasised the scope of the provision, which penalises anyone who incites religious hatred towards any religion or religious community, race, or tribe. Nevertheless, the Vienna Regional Criminal Court dismissed the prosecutor's invocation of Article 283 by finding that the defendant was guilty of violating Article 188 instead. This Article prohibits the disparagement of religious ideals in a manner capable of inciting outrage among a religious community.[90] In arriving at this judgment, the Regional Court emphasised that had the matter been confined to criticising child marriage, no charges would have been filed. However, accusing someone of being a paedophile is fundamentally different. In doing so, the Regional Court acknowledged that the right to be safeguarded against groundless claims to protect religious peace is enshrined in Article 10 of the ECHR.

Endorsing the decision of the national court, the ECtHR rejected the applicant's defence that the statements made were grounded in established historical facts. It stressed that the right to freedom of expression carries responsibilities towards the rights and reputation of others.[91] Therefore, the ECtHR, after balancing the applicant's right under Article 10(1) against the limitations under Article 10(2) found

[83] *Ibid*, at para 43.
[84] *Ibid*, para 40 as interpreted by The Future of Free speech https://futurefreespeech.com/soulas-and-others-v-france/
[85] *Ibid*, at 41.
[86] *Supra*, notes 24-26.
[87] Application No. 15615/07, [2009].
[88] Application no. 38450/12, [2018].
[89] Ibid, at para 13.
[90] Ibid, at para 12.
[91] *Ibid*, at para(s) 54 and 55. The Court also cited a number of other case law to support its decision, such as *Medžlis Islamske Zajednice Brčko v. Bosnia and Herzegovina* Application no. 17224/11, [2017], *Von Hannover v. Germany* (No 2) Application no(s). 40660/08 and 6041/08, [2012].

that the Austrian interference "corresponded to a pressing social need and was proportionate to the legitimate aim pursued."[92] The decision elicited fierce opposition from academics and human rights advocates. The European Centre for Law and Justice accused the national and regional decision of creating a "chilling effect" on free speech, considering the restriction unnecessary in a democratic society.[93] Critics contended that the Court's ruling against the applicant's use of defamatory language against Islamic figures granted State Members a "too wide margin of appreciation" and disregarded key facts, such as the limited attendance of 30 participants of the seminars.[94] In Temperman's view, in cases of religious insults or gratuitous offences, the issue is better considered under religious hatred instead of religious feelings.[95]

What can be observed here is that such views would rather protect the freedom to defame religious figures and use false and baseless allegations to negatively portray a whole community in return for political gain. It is worth remembering that Brenton Tarrant's motivation to assassinate over 50 innocent Muslims was a result of false and baseless information he obtained online. Following this case, the Office for Documenting Islamophobia and anti-Islamic racism in Austria recorded an increase in Islamophobic attacks in 2018, mostly occurring online and against women.[96] Therefore, it is suggested that expression that transcends mere criticism by grossly insulting, falsifying facts and negatively portraying religions and their ideals is a matter that played a key role in the suffering of minority groups throughout history. Therefore, such expression - considering evidence of subsequent intolerance - should be dismissed through the application of Article 17 for attempting to rely on the protection of the Convention to destroy the rights enshrined within, *inter alia*, non-discrimination and the rights and reputation of others.

Puppinck and Bauer observed that shortly after the *E.S.* case, the mounting pressure and criticism directed at the ECtHR marked a notable decline in the Strasbourg Court's inclination to protect religious sensibilities against hate expression that is defamatory and negatively portrays religions.[97] For example, in *Tagiyev and Huseynov v Azerbaijan*, [98] the ECtHR found that the state breached the applicant's right to freedom of expression for being unnecessary in a democratic society and disproportionate to the legitimate aim pursued. In this case, the applicants authored and published articles that incited hatred against Islam, which mirrored the issues that were discussed in *Norwood*. For example, among other comments, Muslims were referred to as 'the others' in Europe, their identity was conflated with terrorism, and comments suggesting a reduction in the number of Muslims - by implying violence and civil wars - were made.[99] In contrast to the *E.S.* case, the Court reminded State Members that online and/or offline political and/or artistic expressions are of public interest and that State Members only enjoy a very narrow margin of appreciation when considering imposing restrictions. Once again, the Court appeared to establish a new threshold, prioritising baseless political anti-religious expressions that negatively portray religious groups as a matter of public interest, over the rights and reputation of others. This is despite the evidence previously discussed, demonstrating that expressions of such nature are widely used online by politicians, such as Le Pen, Zemmour, Matteo Salvini and Boris Johnson, to gain political advantage. Consequently, anti-Islamic cyber hate and offline discrimination, hate, and violence significantly increased. For example, online commercials have been aired depicting non-Western immigrants as societal parasites, while another presented an immigrant called Ali who is no longer able to cheat the new welfare system due to the new identification system.[100]

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[92] Ibid, at 57.
[93] Supra, note 94, at 38.
[94] Ibid, at 77.
[95] Jeroen Temperman, 'Blasphemy, Defamation of Religions and Human Rights Law' (2008) NQHR 26, 517
[96] Cited in Enes Bayrakli and Farid Hafez. European Islamophobia Report 2019, 89 - 93
[97] Grégor Puppinck and Nicolas Bauer, Criticism of Islam: the ECHR (Finally) Upholds Freedom of Expression, can be accessed via https://eclj.org/free-speech/echr/critique-radicale-de-lislam-la-cedh-defend-enfin-la-liberte-dexpression
[98] Application no. 13274/08, [2019].
[99] *Ibid*, at para 11.
[100] The new system in Austria has the photo of the person making a claim. For more details, visit https://www.trtworld.com/europe/austrian-right-wing-party-sparks-controversy-with-racist-video-21668

Religious disrespect as a trend in Europe

Considering the widespread abolition of blasphemy as a criminal offence in Europe, there appears to be greater societal tolerance towards disrespectful and disparaging anti-religious expression. This, in the author's view, has fostered anti-religious negative stereotyping and grave disrespect, which Muslim minorities consider integral to their identity, akin to race. This is not to suggest that all forms of religious criticism that followers find offensive should be prohibited in all forms. However, the rapid proliferation of such expressions, aided by social media, has rendered religious minorities more vulnerable to hate by normalising religious insults.

For example, in *Bouton v France*,[101] a feminist activist received a one-month suspended sentence by the French authorities for protesting topless in a church in December 2013 against the Catholic Church's stance against abortion. While depicting the cross sign using her full body, the applicant exposed her breasts with the slogan 'slut' written on them.[102] In finding the French interference disproportionate, the ECtHR defended being naked as a form of political and artistic expression, stating that it falls within the protection of Article 10 of the ECHR. The ECtHR found that the national authorities failed to adequately consider several factors: the exposure was part of a protest, the protest related to a topic of public interest, the words written were not shouted or directed as insults towards others, and the applicant left the scene when was requested to do so. In other words, the ECtHR found that the French authorities failed to "strike a fair balance between the competing interests sufficiently and following the criteria established in its case law."[103] Conversely, in *Gough v United Kingdom*,[104] a man who walked from England to Scotland naked was arrested, prosecuted, convicted, and imprisoned 30 times (totalling 7 years in prison between 2003 and 2012).[105] Although the Court struggled to fully fathom the severity of the penalties imposed, it found no violation of Article 10 and reiterated that the public morals and their protection from nuisance anti-social behaviour outweighed the applicant's claim to freedom of expression.[106]

What remains unclear is whether the Court's failure to consider insult and overly focus on the importance of public morals in *Gough* (contrary to *Bouton*) is to emphasise a progressive view that State Members enjoy a wider margin of appreciation when restricting freedom of expression in the context of religious (as opposed to public) morals. This argument illustrates that what is tolerable in the name of freedom of expression today would have been dismissed in 2014 or before. This highlights the progressively diminishing value religions, and their followers by affiliation, hold in Europe. This trend might not pose an equally significant detriment to followers of the majority religion in Europe as it does for followers of minority religions, such as Muslims, who have chosen to uphold their religious practices in a region where blasphemy is not a criminal offence. In the same vein, in *Rabczewska v Poland,*[107] the ECtHR appeared to demonstrate the progressively inferior status of religions against the right to offend, shock, and disturb. In this case, Polish pop singer, Dorota Aqualiteja Rabczewska (known as Doda), made blasphemous comments about the bible during an interview with an online newspaper. Replying to questions about her private life, Doda stated that the Bible's authors wrote it while "drinking wine and smoking some weed." In her defence, Doda argued that the language used was frivolous and colourful rather than hateful or intolerant of religions. Doda contended that such an approach would be more readily comprehendible to her young fans. In finding the Polish authorities in violation of Article 10, the ECtHR did not find the expression in question to disturb public peace.

Although this article does not intend to allude to offensive expressions that merely hurt religious feelings, it is worth noting that the Court established a four-stage connection to distinguish expressions

[101] App. No. 22636/19 Judgment [2022].
[102] For the news report of the incident, see https://www.businessinsider.com/france-catholic-church-topless-slut-protester-wins-human-rights-case-2022-10?r=US&IR=T
[103] The case can be accessed in English via https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22002-13834%22]}
[104] Application no 49327/11, [2014].
[105] *Ibid*, at para 174.
[106] *Ibid*, at para 176.
[107] Application no. 8257/13, [2022]

that must be restricted from expressions that must be tolerated. In doing so, the Court required a nexus between expressions that are provocative to religious followers, that such provocation hurt their religious feelings, that both provocation and hurt are expressed in an intolerant manner, and that such intolerance has incited hate or violence towards the religious followers.[108] The Court expounded that the lack of a uniform standard in Europe regarding blasphemous expressions allows State Members a wide margin of appreciation to ensure the peaceful coexistence of all religions.[109] Nevertheless, hurting religious feelings in a way that can lead to discrimination, negative and pointless stereotyping does not appear to be regarded as part of protecting the rights of others, which was previously identified in the landmark decision of *Otto-Preminger-Institut v Austria*.[110] This raises the question of whether mocking religion and its sentimental figures truly serves the public interest and whether such derogatory comments achieve any purpose worthy of debate.

In response to questions regarding the normalisation of anti-Islam hate expressions in Europe, the 2022 decision of the ECtHR *Zemmour v France*,[111] in Ghaleb Bencheikh's view, attempted to provide an answer.[112] During a TV interview in 2016, a well-known French politician and journalist, Eric Zammour, appeared on a TV show to discuss his latest book "*Un quinquennat pour rien"* - "A Five-Year Term for Nothing." The controversy arose regarding his comments on a subheading within the book entitled *"La France au défi de l'Islam"* – "France and the challenge of Islam."[113] Among Zammour's comments were that terrorism and Islam are the same, there are no Muslims who live in peace or are fully integrated in France, Muslims in France need to choose between France and Islam, and they need to discard their religion if they want to live in France. He concluded that France was being invaded and colonised, as evidenced by the veil-wearing Muslim women on the outskirts of the country.[114] The French Criminal Court found Zammour guilty of inciting discrimination, hatred, and violence against a minority religion and its followers.[115] Zammour was ordered to pay 5000 Euros, which was later reduced to 3000 Euros by the Court of Appeal. While the ECtHR recognised that the impugned expressions were political and formed part of a wide public debate, it emphasised that as a journalist who is capable of assessing the impact of his words, he was not exempt from the duties and responsibilities enshrined within the ECHR. Following from detailed assessment of the limitations of Article 10, the ECtHR emphasised the wider margin of appreciation State Members enjoy, while rejecting that the French interference in this instance is disproportionate. The decision does, therefore show some appreciation of religious protection, although the applicant's position as a responsible journalist appeared relevant.

Conclusion

Due to their controversial nature and views towards opposing ideologies, religions inherently subject themselves to a high level of critique from sceptical individuals. In doing so, it needs to be acknowledged that such critique may involve denying and disputing established religious facts, which many may find grossly offensive and insulting. However, these expressions need to be tolerated and debated to facilitate the discovery of truth and enhance the citizens' engagement in democracy and their cognitive abilities. On the other hand, the internet has been increasingly used to disseminate expressions that negatively portray and insult religions, akin to the historic anti-Jewish expressions. Certain expressions that involve labelling and defacing religious articles were followed by an upsurge in online and/or offline discrimination and hate. These forms of expression, in the author's view, need to be afforded the highest level of protection under the ECtHR jurisdiction, specifically the application of

[108] *Ibid*, at para 51.
[109] *Ibid*, at para 52.
[110] Application no 13470/87, [1995].
[111] Application no. 63539/19, [2022]. The case summarised by Frank Cranmer via https://lawandreligionuk.com/2022/12/21/article-10-echr-and-inciting-religious-hatred-zemmour/
[112] The President of the French Foundation of Islam. Visit https://www.euractiv.com/section/non-discrimination/news/zemmour-v-france-echr-ruling-points-to-normalisation-of-anti-islam-hate-speech/
[113] Application no. 63539/19, [2022], at para 5.
[114] *Ibid*, at 6.
[115] Section 4 of the 1881 Act.

Article 17 of the ECHR. Doing so will hopefully mitigate their escalation into offline discrimination, hate, and violence.

One further way to regulate this is by arguing that the ECtHR is inconsistent in applying the limitations of Articles 10(2) and 17 of the ECHR. The examined case law demonstrated that the Court initially demonstrated high dismissiveness of expressions that negatively portray religions and their followers. However, it has progressively become less sympathetic towards religious ideals and expressions that impact religious followers. From the cases examined, it was clear that the Court insufficiently rationalised the disparity in outcomes between cases that fall within the remit of Article 10 against those that were dismissed under Article 17. While safeguarding the right to freedom of expression is paramount and requires a thorough assessment of Article 10 to determine the legitimacy of state interference, online and offline expressions that have led to discrimination, (cyber) hate, and violence go against the underpinning principles of the ECHR of tolerance, broad-mindedness and equality. Consequently, such expressions must be curtailed through the application of Article 17.

The evidence supports the claim that there is a sharp increase in anti-Islamic hate, similar to what the Jewish and other communities endured throughout history. This necessitates a more stringent approach to prevent history from repeating itself, particularly given that signs have expeditiously surfaced, especially with the utilisation of modern technology as a medium. Certainly, this is a case-sensitive inquiry but an initial step of spreading awareness should start at a societal level by fostering debate about the value of religions to their followers. This also requires educational institutions to play a more active role by teaching more extensively the impact of colonisation and drawing parallels between historic catastrophes and their re-emergence today against present minority groups.

CONSTITUTIONAL LAW

Legislation, human rights and the rule of law: what was wrong with the Northern Ireland Troubles Act 2023 and the Illegal Migrants Act 2023?

Steve Foster* and Dr Steve Foster**

Introduction

Conservative governments since 2016 were certainly no strangers to legal challenges to their policies, or indeed legislation they managed to get through the parliamentary process. The Supreme Court halted both their plans to trigger Brexit without parliamentary approval,[1] and the Prime Minister's efforts to suspend Parliament in his effort to 'get Brexit done'.[2] More recently, the Supreme Court declared the Sunak government's Rwanda deportation policy unlawful and in breach of rights contained in the European Convention,[3] and the its attempts to overrule that decision by getting the Safety of Rwanda (Asylum and Immigration) Act 2024 passed into law were met with significant challenges from Parliament and face further examination before the domestic courts, and possibly the European Court of Human Rights.[4]

On 28 February 2024, the Northern Ireland High Court (King's Bench) delivered its judgment in *Re Dillon's Application for Judicial Review,*[5] declaring, under s.4 of the Human Rights Act 1998, that provisions under the Northern Ireland (Legacy and Reconciliation) Act 2023 Act were incompatible with Article 2 (right to life). Article 3 (prohibiting torture and inhuman and degrading treatment and punishment), Article 6 (the right to a fair trial), and Article 1 of the First Protocol (peaceful enjoyment of possessions) of the European Convention. The Court also invoked the rights under the Windsor Framework, made pursuant to the European Union (Withdrawal) Act 2018, in order to disapply certain provisions of the Act.

Eleven weeks later on 13 May 2024, the High Court in Belfast delivered its decision in *Re NIHRC and JR 295.* This case followed applications brought by the Northern Ireland Human Rights Commission (NIHRC) and a 16-year-old Iranian asylum seeker (JR 295).[6] Their application concerned the lawfulness of provisions of the Illegal Migration Act 2023. The respondents were the Secretary of State for Northern Ireland and the Home Secretary (SSHD). As with *Re Dillon*, the court ruled that this Act was incompatible with Articles 3, 6 and 8 (right to respect for private and family life) of the European Convention and duly issued a declaration of incompatibility. It also ruled that several provisions led to a diminution of the enjoyment of rights protected under the Windsor Framework: all of which were duly disapplied in Northern Ireland.

This article will examine both decisions with a view of identifying how the government, and Parliament, challenged the fundamental principles of constitutionalism and human rights in initiating and passing both pieces of legislation; and how the courts responded to the legislation within their constitutional

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1 *R (Miller) v Secretary of State for existing the European Union* [2017] UKSC 5.
2 *R (Miller) v Prime Minister* [2019] UKSC 41.
3 *AAA v Secretary of State for the Home* Department [2023] UKSC 42.
4 The Bill passed through Parliament on April 22, and was granted Royal Assent on 23 April 2024. On 7 July 2024 the High Court decided that civil servants had to follow the Minister's order to expedite deportations to Rwanda, despite that order being inconsistent with a ruling from the European Court of Human Rights: *R. (on the application of FDA) v Minister for the Cabinet Office* [2024] EWHC 1729 (Admin).
5 [2024] NIKB 11.
6 JR295 arrived in the UK on 26 July 2023 as an unaccompanied child after crossing the Channel by small boat. Crucially, this was six days after the Illegal Migration Act became law.

boundaries. Once more, the separation of powers, the rule of law and parliamentary (executive) sovereignty run through the discussions.

The background and claims in *Re Dillon's Application*

The Northern Ireland (Legacy and Reconciliation) Act was implemented in order to end investigations into Troubles-related incidents by police, ombudsmen, civil claims and inquests, creating the Independent Commission for Reconciliation and Information Recovery to carry out and publish reviews of deaths or other harmful conduct arising out of the Troubles.

The applicants in this case - victims or family members of victims of Troubles-related incidents - challenged various provisions of the Act as incompatible with various Convention rights. They also claimed that some provisions were in breach of the Windsor Framework and thus sought disapplication of those and other provisions under s.7A of the European Union (Withdrawal) Act 2018. Convention rights are, of course, given effect to by the Human Rights Act 1998, and under s.4 courts can issue declarations of incompatibility with respect to legislation that contravenes such rights. Section 7A of the 2018 Act, on the other hand, makes it clear that certain rights – for example with respect to trade in goods - are retained, and will allow the courts to disapply any provision in conflict with those rights. Section 7A(2) provides that those rights, powers, liabilities, obligations, restrictions, remedies and procedures concerned are to be recognised and available in domestic law, and enforced, allowed and followed accordingly.

In particular, the court had to consider the following issues:

- Whether s.41, under which no criminal enforcement could be taken against anyone for Troubles-related offences which were not serious, was compatible with the above rights;
- Whether the five-year time limit for requests for reviews established under s.38 of the Act was lawful;
- Whether the Commission was sufficiently independent and possessed sufficient investigative powers;
- Whether s.43 of the Act, which halted Troubles-related civil proceedings brought after May 2022, and prevented new ones from being brought, was compatible with those rights;
- Whether s.7 of the Act, which limited the use of compelled material obtained from immunity applications in criminal proceedings and whether s.8, limiting the use of protected material in civil proceedings, was compatible with Article 6;
- Whether the Act was compatible with Article 14 of the Convention, which guarantees the enjoyment of Convention rights free from discrimination on protected grounds;
- Whether Convention-incompatible provisions should also be disapplied under the Windsor Framework, and whether the court could also strike down the Act as conflicting with fundamental constitutional principles;
- Whether ss.46-47 of the Act, which reversed the Supreme Court's decision in *R v Adams (Gerard*),[7] which found that interim custody orders not made by the secretary of state at the time had been invalid, and which prohibited claims based on the prior unlawfulness of such orders, was retrospective and unlawful.

The decision in *Re Dillon's Application*

Granting Immunity and restricting access to the courts

Dealing with the immunity provisions contained in s.19 of the Act the court noted that immunity was mandatory if the conditions were met, there being no contrition requirement. The judge then noted that

[7] [2020] UKSC 19.

the Strasbourg Court had voiced strong opposition to granting amnesties with respect to the right to life and freedom from torture and other ill treatment,[8] such prohibition being especially strong where there was evidence – as in the present case - of state agent complicity in the taking of life or torture. Further, victims who suffered from paramilitary actions were entitled to the benefit of the procedural obligations contained in Articles 2 and 3.[9] In the judge's opinion, those rights were clearly undermined by the prospect of immunity from prosecution, which clearly breached both Articles. Noting that they had not been introduced in the context of an armed conflict or the ending of a violent political regime, they did not provide for exceptions for grave human rights breaches, and there was no evidence that immunity would contribute to reconciliation.

Turning to s.41 of the Act – granting immunity for non-serious offences – the court noted that a limitation on prosecutions was not, of itself, unlawful under the Convention, but was so where the offences engaged Articles 2 and 3.[10] Accordingly, life-endangering offences should not go unpunished, yet s.41 would extend unconditional immunity to such offences if no defined harm had been caused. As the state had a responsibility to deter and punish such conduct, s.41 contravened those articles and was thus incompatible.

However, the court refused to grant a declaration in terms of the five year limit for reviewing cases, imposed by s.38 of the Act. The court noted that it was not dealing with a concrete scenario and that the provisions were unlikely to affect the applicants, whose cases were already live. Thus, relevant deaths would have occurred 30-60 years earlier, and the prospects of successful prosecutions at that stage would be low. Although the concept of a time-limited investigation into legacy deaths was not novel, the lack of flexibility to deal with new evidence was concerning. However, in the court's view, if the scenario arose in future the state would have to find a mechanism to deal with it.

The independence and powers of the Independent Commission

The Court noted the state's obligations under the ECHR and through the Human Rights Act to investigate events that came under Articles 2 and 3.[11] Although the Commission was bespoke and not part of the courts, the issue was whether it was practically independent of those implicated in events under investigation, as required by Strasbourg case law.[12] In the court's view, the fact that the Chief Commissioner was a former police officer did not mean that he lacked the necessary independence under the Convention, as he had lengthy judicial experience and in appropriate cases he would have to recuse himself. Further, the Commission's preparatory work focused on operational independence and its draft principles were designed to align with the principles and case law of the ECHR. Accordingly, it was sufficiently independent.

With respect to its investigative powers, the court noted that the state could determine the means for carrying out an investigation that was Article 2 compliant. Inquests were not mandatory and the Commission would have powers to compel evidence and lead to prosecutions. Although the Act made no provision for disclosure to victims or next of kin, a compliant investigation was not impossible and would depend on implementation, and if the Commission fell short of its obligations under the ECHR it would be subject to court scrutiny.

Turning to s.43, which prohibited new claims being brought after May 2022, the court's task was to consider whether this breached Article 13 of the Convention, which guaranteed an effective remedy for breach of Convention rights in domestic law. This right is not listed in the Human Rights Act 1998, but the state is still required (under the ECHR – *Jordan v UK*, above – and, by implication, under the 1998 Act) to establish mechanisms to redress breaches of ECHR rights, including, in appropriate cases, to grant compensation (just satisfaction under s.8 of the 1998 Act). Section 43 established a strict limitation

[8] *Margus v Croatia*, Application No. 4455/10 (2016 EHRR 17.
[9] *Jordan v United Kingdom* (2003) 37 EHRR 2.
[10] *Oneryildiz v Turkey* (No. 2) (2005) 41 EHRR 20, and *Da Silva v United Kingdom* (2016) 63 EHRR 12.
[11] *McQuillan's Application for Judicial Review* [2021] UKSC 55.
[12] *Nachova v Bulgaria* (2006) 42 EHRR 43.

period for civil litigation in such actions, and while the 2023 Act did not prohibit claims against public authorities under the Human Rights Act, that only applied to post-2000 claims and did not cover paramilitary actions. Accordingly, s.43 interfered with the right to a fair trial under Article 6 of the ECHR, albeit not, in the court's view, at the very essence of those rights. The court noted that victims had had 25-60 years to bring proceedings, and that criminal prosecutions could still occur, with the possibility of compensation orders.

The question, therefore, was whether the interference was justified and proportionate in accordance with the test laid down by the Supreme Court on *Bank Melllat v HM Treasury:*[13] whether the interference with Convention rights bore some rational and proportionate relationship to the relevant statutory purpose of restricting those rights and that the restriction was a reasonably practicable, and least restrictive, means of ensuring that purpose. In the court's view, s. 43 pursued the legitimate and important aim of reducing burdens on the court, but the interference applied indiscriminately, including to proceedings regarding grave wrongs such as torture and unlawful killing. Nevertheless, it was within the state's margin of appreciation, with the exception of the retrospective effect of the section to May 2022, which, in the court's view, was disproportionate.

With respect to s.7, which limited the use of compelled material obtained from immunity applications in criminal proceedings, the court held that s.7(3) was unlawful in light of the immunity decision, above. However, the remainder of s.7 was confined to using material in criminal proceedings against the defendant who provided it. That, in the court's view, went no further than the common law or inquest rules regarding self-incrimination, and therefore did not breach the right to a fair trial in Article 6. ECHR. Further, although the prohibition on using material in civil proceedings contained in s.8 might encourage people to give information to the Commission, civil proceedings were a way for victims to validate their rights under Article 2, and thus s.8 interfered with those rights. However, there was no prohibition on using inquest or ombudsman material in civil proceedings, and given that Article 2 was unqualified, the interference was unlawful and unjustified. In addition, Article 6 (fair trial) rights were also engaged, and the court found that there was no fair balance between individual and community rights. Accordingly, s. 8 of the Act significantly impacted on those with extant civil claims, and Article 6(1) of the ECHR was breached.

Finally under this ground, the court considered the Act's compliance with Article 14 of the Convention (prohibition on discrimination). The court found that applicants, as victims or relatives of victims of the Troubles, possessed the characteristic of 'other status' within Article 14, the analogous groups arguably being victims of state/paramilitary torture or killings after 1998, or those who had already had ECHR-compliant inquests or civil or criminal proceedings. The Act proposed to deny court access to victims, but those provisions were designed to promote reconciliation (a legitimate aim) and there was an objective and reasonable justification for the differences in treatment. In the court's view, there was a rational basis for the chosen dates, reflecting the period of the Troubles. Current investigative mechanisms were slow and used significant resources, and this Parliament was entitled to devise a bespoke mechanism insofar as the Act met the requirements of the Convention.

Breach of the Windsor Framework

The Windsor Framework was adopted at the Withdrawal Agreement Joint Committee on 24 March 2023. The UK and the EU agreed a framework restoring the smooth flow of trade within the UK internal market by removing burdens that have disrupted East-West trade; safeguarding Northern Ireland's place in the Union, and addressing the democratic deficit at the heart of the original Northern Ireland Protocol.

The court made it clear that provisions of the 2023 Act which breached the Framework should be disapplied.[14] Article 2 of the Framework ensured no diminution of rights resulting from EU withdrawal,

[13] [2013] UKSC 39.

[14] (*R (Miller) v Secretary of State for Exiting the European Union*, and *Allister's Application for Judicial Review* [2017] UKSC 5.

provided the right had been included in the Good Friday Agreement. Respect for fundamental human rights was a core objective of the Good Friday Agreement, especially those of Troubles victims, and its reference to 'civil rights' included Articles 11 and 16 of the Victims Directive, as well as the right to life, freedom from torture, the right to court access and the right to dignity. Convention rights had had effect in domestic law before 2020, as did the Victims Directive and the relevant articles of the EU Charter of Fundamental Rights, and those rights had been underpinned by EU law, which had been removed following EU withdrawal. While Convention rights still applied, they only entitled victims to a declaration of incompatibility under s.4 of the 1998 Act, whereas a breach of Article 2 of the Framework resulted in disapplication of any offending provisions. There had via this Act been a diminution in enjoyment of the EU Charter rights, and the Victims Directive presupposed prosecution for breaches; consequently, removal of that possibility diminished enjoyment of the rights, and the appropriate remedy in respect of the breaching provisions was disapplication.

The constitutional arguments for challenging the 2023 Act

Although this challenge and decision had much to tell us on the arrangements of the United Kingdom constitution, and the behaviour and powers of all three organs of the state, this aspect of the challenge took little of the court's time and reflection. This was due to the fact that what was being challenged in this case was a sovereign Act of Parliament, in normal circumstances an unchallengeable legal source. Thus, in the court's view, there was little authoritative support for the proposition that the courts could rule that an Act of Parliament was contrary to the rule of law and therefore unconstitutional. That, in the court's view, would be contrary to reaffirmations of the parliamentary sovereignty principle.[15]

Nonetheless, the court noted that the circumstances giving rise to this judgment showed that Parliament itself has provided the court with the tools to scrutinise the legality of the provisions of the 2003 Act. However, that was only in line with the scope prescribed by the legislature under s.4 of the Human Rights Act 1998, and s.7A 2018 Act, securing the retention of EU rights. Those latter rights, as previously discussed, confers the power on the courts to subjugate provisions of primary legislation which are incompatible with the Windsor Agreement. This approach, in the court's view, is entirely consistent with the core tenets of parliamentary sovereignty, as the relief sought by the applicants in respect of this element of their challenge may be obtained, if successful, on the constitutionally safe ground provided by s.7A of the 2018 Act, and s.4 of the 1998 Act - both passed by Parliament and suspending its sovereignty in particular circumstances. It was, therefore, unnecessary for the court to explore the general constitutional question further, and to comment on judicial views which have reflected, on the legal theory of the possibility of the courts striking down an unconstitutional statute.

Interim Custody Orders and the right to a fair trial

Finally, the court considered s.47 of the Act, which retrospectively prohibited claims based on the prior unlawfulness of such orders, before those orders were made 'lawful' by the overruling of a Supreme Court's decision via passing of the Act. The court noted that the s.47 prohibitions were founded on the retroactive validity of such orders, as established in s.46 of the 2023 Act. Thus, only compelling grounds of general interest were sufficient to justify retrospective/retroactive legislation influencing the judicial determination of a dispute (as established by the European Court of Human Rights in *Vegotex International SA v Belgium*.)[16] These sections of the Act clearly interfered with the relevant applicant's rights under Article 6 of the Convention. They had been added to the Act late and their retrospective/retroactive effect of prohibiting extant civil claims by an acquitted applicant had been unforeseeable. There were, therefore, no compelling grounds for their justification, and there had been a breach of Article 6 (right to fair trial), and Article 1 of the First Protocol to the Convention (peaceful enjoyment of possessions.

[15] After his own review of the authorities, Humphreys J reached exactly the same conclusion in *Re NIHRC and JR295*.
[16] (2023) 76 EHRR 15.

The background and claims in *Re NIHRC and JR 295*

The Illegal Migration Act 2023 is a high profile and highly controversial statute which aims to deter asylum seekers from entering the UK by irregular routes: principally small boat crossings of the English Channel. To this effect, it places duties on the SSHD to remove from the UK any person who meets four, qualifying conditions, whilst simultaneously either disapplying or reducing the scope and effect of protection and human rights claims.[17] In theory, irregular arrivals face the *inevitability* of either removal to their country of origin or a safe third country. Other notable provisions include: disregarding children's status as a protected category of asylum seeker, widening the SSHD's detention powers, and disapplying statutory protections available to potential victims of trafficking and modern slavery. It is also notable for the many ouster and partial ouster clauses denying access to the courts. These are especially relevant to those seeking to prevent or delay their removal, or challenge age assessments.

When considering the claim that the Act is incompatible with the European Convention, the court examined the following issues:

- Whether ss.2, 5 and 6 of the Act, which enable the SSHD to remove any asylum seeker who meets the four statutory conditions[18] *before* considering their protection or human rights claims, breached Article 3;
- Whether s.22, which disapplies protections available to victims of trafficking (modern slavery) under the Nationality and Borders Act 2022, breached Article 4 ECHR (prohibiting slavery and servitude), constructed in light of Articles 10, 12-14 ECAT;[19]
- Whether s.13, which significantly restricts the courts' ability to review the detention of asylum seekers, breached Article 5;
- Whether the SSHD's *duty* to remove accompanied child asylum seekers (s.6) and their *power* to do so where the child is unaccompanied (s.4),[20] breached Article 8, constructed in accordance with Article 3.1 of the CRC;[21]
- And whether s.57, which also restricts both the scope and effect of legal challenges of age assessments, breached Article 6 and/or Article 8.

These provisions also formed the substance of the second claim: diminution of rights protected by Article 2 of the Windsor Framework.

The Decision in *Re NIHRC and JR 295*

The Incompatibility Claim

This claim had five elements. The application for a declaration of incompatibility was approved in respect of the first (imposition of a duty to remove), the second (denial of protections previously available to potential victims of human trafficking and modern slavery), and the fourth (denial of protections previously available to children). It was not granted in respect of detention or age assessments, though for different reasons in each case.

The respondents had submitted that since so many of the Act's provisions had yet to commence, granting relief would be inappropriate: a submission also made in the diminution of rights claim. After considering the case law on *ab ante* (pre-emptive) challenges, the judge (Humphreys J) cited several

[17] For an account of the Bill, see Steve Foster,
[18] See s.2(2)-(5). These are that the claimant: entered the UK without the required permissions on or after 20 July 2023; did not come directly from a country in which their life and liberty were under threat; and, finally, did not have the required leave to enter or remain.
[19] See: *VCL and AN v United Kingdom* (2021) 73 EHRR. 'ECAT' is the acronym for the *Council of Europe Convention against Trafficking in Human Beings*. It was agreed in Warsaw on 16 May 2005 and entered into force in the United Kingdom on 1 April 2009.
[20] It should be noted that, once an unaccompanied child attains majority, the power to remove reverts *de facto* to a duty.
[21] The *United Nations Convention on the Rights of the Child,* signed by the UK on 19 April 1990 and ratified by it on 16 December 1991. The UNCRC was brought into force in the UK on 15 January 1992.

cases as authority for the rule that relief can be granted in such instances.[22] Here, he felt that it was significant that the government had vowed to proceed with bringing the Act into force.

Removals

In cases where the SSHD's removal duty applies, two options are available (s.6(3)): removal to the country-of-origin, or, if this is impractical or impossible,[23] removal to a 'safe' third country listed in Schedule 1 of the Act. Crucially, removal can take place regardless of whether a person has made a third country human rights claim under s.5(1), i.e. that their removal to that particular third country would risk breaching their rights under Article 3 of the Convention.

Of the ten specific observations included in the decision, the most important concerned the duty to remove prior to the determination of the third country claim without the rigorous assessments of the receiving country required under the *Ilias* principles.[24] In this respect, the court noted Lord Kerr's emphasis on the importance of examining the deportee's individual circumstances prior to removal, in order to ascertain the risk of a breach of Article 3.[25] Whilst other measures within the Act can prevent removal,[26] Humphreys J doubted they made it Convention-compatible. The outcome is inevitable: deportees will be removed even when they have valid claims to remain in the UK. Critically, the British authorities will not examine the risk of them suffering treatment contrary to Article 3, as they are legally obliged to do, despite the possible gravity of the consequences.

Trafficking (modern slavery)

In *VCL v UK*,[27] the Strasbourg Court clarified that duties arising from Article 4 of the Convention must be construed in light of ECAT. Adhering to this interpretation of the Convention, the court in *Re NIHRC and JR295* found that the Illegal Migration Act breached ECAT in several ways: removal following a favourable 'reasonable grounds' decision[28] yet before a final determination of status breached Article 10(2); disregard for a potential victim's entitlement to at least thirty days of 'recovery and reflection' breached Article 13(1); disregard for the 'basic level' of assistance requirement breached Article 12; and disregard for the requirement to grant victims leave to remain where this is necessary given their personal circumstances breached Article 14(1)(a).[29] Equally, the court duly noted Lord Reed PSC's warnings on the lack of domestic legal effect of unincorporated international treaties.[30] Citing *R (Ullah) v Special Adjudicator* as authority.[31] Nevertheless, Humphreys J still considered it legitimate to consider how the Strasbourg jurisprudence engages with international treaties (in this case ECAT) when interpreting Convention rights.

The court also considered the respondents' argument that any breaches of ECAT were justified by the need to maintain public order with reference to the exception in Article 13(3). The court disagreed strongly and ruled, firstly, that the exception applied only to the 'recovery and reflection' period. Crucially, it did not apply to protection against removals under Article 10. Secondly, he ruled that it was inconceivable that a threat to public order arose from the mere presence of an asylum seeker in the UK. As a result, the breaches of ECAT were both unjustified and rendered s.22 incompatible with Article 4.

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[22] Two of these were judgments of the Supreme Court: *Christian Institute v Lord Advocate* [2016] UKSC 51 and *Re Abortion Services (Safe Access Zones) (Northern Ireland) Bill* [2022] UKSC 32. Another judgment referred to was the Northern Ireland Court of Appeal's ruling in *Department of Justice v JR123* [2023] NICA 30.
[23] Most obviously, because it would breach Article 33 of the Refugee Convention.
[24] See: the Grand Chamber's judgment in *Ilias and Ahmed v Hungary* (2020) 71 EHRR 6.
[25] *R (EM(Eritrea)) v SSHD* [2014] UKSC 12.
[26] Most obviously, the suspensive claims at ss.42-43.
[27] Note19, above.
[28] This is the first stage of the process leading to the identification of a claimant as a victim.
[29] In *R (EOG) v SSHD* [2023] QB 351, the EWHC judged that the term 'personal circumstances' included pursuing a protection claim based on fear of being re-trafficked. Such claims cannot be made under s.5(2) of the Illegal Migration Act.
[30] *R(SC) v SSWP* [2021] UKSC 26.
[31] [2004] UKHL 26.

Children

In accordance with Article 3.1 of the CRC, in cases of alleged interference with Article 8 of the Convention a child's best interests must be a primary consideration. The NIHRC contested that the Act (at ss.6 and 4) failed to comply with this rule, as a result of which any resulting interference could not be 'in accordance with the law' as required by Article 8(2): questions of proportionality being immaterial.[32] The respondents countered by arguing that the 'best interests' requirement was in fact met by s.55 of the Borders, Citizenship and Immigration Act 2009, which places a duty on the SSHD to have regard to the need to safeguard and promote the welfare of children when discharging immigration and asylum functions.

The decision came in two parts. With regards to *accompanied* children, Humphreys J ruled that the duty to remove without first processing their protection or human rights claims overrode the safeguards put in place by s.55 of the 2009 Act. As such, removal could not be in the child's best interests and was not therefore in accordance with the law. His decision regarding *unaccompanied* children was more nuanced. On the one hand, government policy that the removal power remains subject to the s.55 safeguards meant that s.4 was at least capable of being Convention compatible. Equally, the duty to disapply an unaccompanied child's protection and human rights claims meant that it was inevitable that they would be removed on attaining majority; an outcome which also meant that their best interests could not be a primary consideration. For this reason, s.6 was additionally incapable of being compatible with the Convention.

Detention and age assessments

Here, the incompatibility claim was rejected. Under s.13(3)-(4) of the Act, decisions to detain asylum seekers meeting the four conditions are final and cannot be appealed. Whilst detainees can apply for judicial review, they cannot do so for 28 days. It was argued that these provisions violated Article 5(4) of the Convention.[33] However, the court ruled that it was still possible that they *could* operate in ways that were compatible. The decision arose from one of the limited exceptions provided by s.13: an application for a writ of habeas corpus. Citing Lord Brown in *R (Khadir) v SSHD*,[34] he accepted the respondents' argument that the 'Hardial Singh principles' applied to cases concerned with the *exercise* of the detention power, (the essence of judicial review) as well as its *existence* (the essence of habeas corpus).[35] Consequently, judges could choose to revive and extend habeas corpus as a remedy for unlawful detention decisions under s.13. Both the discretionary nature of s.4 of the Human Rights Act and the *ab ante* nature of the application influenced the court's reasoning on this point.

The age assessment application concerned s.57 of the Act. It was denied after Humphreys J revisited his initial ruling and held that JR295 lacked standing under s.18(4) of the Judicature (Northern Ireland) Act 1978. In this, as in a number of instances, he followed the judgment in *Re. Dillon.*[36] Even so, other aspects of the decision should be noted. Firstly, the court ruled that the rights affected by age assessments constituted civil as opposed to public law rights and, as such, were subject to Article 6 of the Convention. Secondly, the restrictions placed on challenges of age assessment when applying for judicial review were heavily criticised. Not only would successful challenges be prevented from having suspensive effect (i.e. removal will still take place); more importantly, the court is prevented from reviewing the assessment on its facts: relief being available only if the decision was wrong in law. Thirdly, neither internal Home Office safeguards nor the respondents' arguments regarding necessity

[32] The Commission relied on Lady Hale's judgment in *ZH (Tanzania) v SSHD* [2011] UKSC 4 that any decision taken without having regard to the child will not be in accordance with the law.
[33] These require that detainees can speedily challenge detention decisions before a court empowered to order their release.
[34] [2005] UKHL 39
[35] *R v Governor of Durham Prison ex p Hardial Singh* [1984] 1 WLR 704. The main principles are that: detention in immigration cases is only permissible where there is an intention to deport; detention can be used only for that purpose; and that the period of detention can be no longer than that is reasonable in all the circumstances. When it becomes apparent that deportation is not possible within that period, the power should be exercised no longer.
[36] His reasons were that JR295's age assessment had been now resolved in his favour. Whilst there was a risk it might be reviewed (and overturned), Humphreys J added that there was nothing to indicate that this would occur. In any event, s.57 had not yet commenced; as a result JR295 has not been denied a fact-finding remedy.

and legitimacy addressed the inevitable consequence that asylum seekers who are in fact children will be unable to effectively challenge inaccurate age assessments. Such interference will, in all cases where minors seek to challenge incorrect fact-based assessments, violate their Convention rights.

The Diminution of Rights Claim

This claim concerned alleged breaches of Article 2 of the Windsor Framework, as implemented by s.7A of the Withdrawal Act.[37] With express reference to *Re SPUC Pro Life Limited's Application*,[38] Humphreys J explained that his final determination boiled down to three issues: the rights created by and enjoyed under EU law; the relevant statutory provisions of the Act; and, most importantly, whether the latter have caused or will cause a diminution of the rights enjoyed under EU law.

The legal background

The first of three 'background' issues concerned the legal *status* of rights created by EU law. As noted above, this had been already considered in *Re Dillon*. Consequently, the principle of judicial comity applied: to depart from Colton J's analysis would oblige the court to conclude that his approach was either 'plainly wrong' or 'clearly incorrect', the conclusion urged upon him by the respondents. They argued that the decision in *Re Dillon* had failed to consider the qualitative difference between the rights safeguarded by Article 2 and those 'trade' laws made applicable by Article 5: the difference being that the former merely obligate the government to ensure that diminutions can be challenged in court and, where necessary, appropriate remedies made available. Accordingly, this interpretation of Article 2 relegates rights included in the Good Friday Agreement to the status of a legal 'benchmark'.

In his judgment, Humphreys J examined the wording of, one, the Withdrawal Agreement and the Withdrawal Act and, two, the latter and the European Communities Act 1972. Following Colton J in *Re Dillon*, he concluded that s.7A(2) of the Withdrawal Act mirrored the language of s.2 of the 1972 Act by providing that 'all rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Withdrawal Agreement' are given legal effect without further enactment. He described s.7A is the 'conduit pipe' via which the Withdrawal Agreement flows into domestic law. Further, Article 4(1) of the Agreement provides for two distinctive categories of rights: those made directly by the Agreement itself and those EU laws it also 'makes applicable'. The rights referred to in Article 2 of the Windsor Framework are part of the first category; those referred to in Article 5 being part of the second. However, their effect in domestic law is the same: both can be directly relied upon providing they meet the conditions for direct effect under EU law. Finally, Humphreys J ruled that the obligation placed on the UK government to ensure compliance with Article 4(1) includes the enactment of domestic legislation,[39] empowering judges to disapply inconsistent or incompatible provisions. *Factortame* reverberates still: rights and obligations under the Withdrawal Agreement must prevail over any inconsistent domestic law.

> 'The rights relied upon by the applicants arising from the EU Directives were clear and precise and therefore had direct effect on 31 December 2020. The Dublin III Regulation was directly applicable.'[40]

The second question proved to be even more significant, politically as well as legally: were rights relied on by JR295 the 'civil rights…of everyone in the community' and hence protected by the Good Friday Agreement? Humphreys J considered this question during JR295's grant of leave hearing, when he concurred with Colton J's rejection of the argument that the civil rights protected by the Good Friday Agreement were 'frozen in time and limited to the political context of 1998'.[41] Accordingly, he concluded that JR295 was entitled, via Article 2(1) of the Windsor Framework, to rely on rights enshrined in the several EU Directives and Regulations, together with the Charter, when challenging

[37] As with *Re. Dillon,* these provisions require UK governments to ensure that there will be no diminution of the rights set out in the 'Rights, Safeguards and Equality of Opportunity' section of the Good Friday Agreement.
[38] [2023] NICA 35
[39] In this case, s. 7A of the Withdrawal Act.
[40] [2024] NIKB 35, para. 60.
[41] [2024] NIKB 7. Colton J had articulated this view of the Good Friday Agreement in Re *Angerson's Application.*

the Act. This was especially important, since the respondents acknowledged that, in a category of cases, a diminution of rights *would* occur if Good Friday Agreement protections were recognised by the court: prominent examples included s.5(2) and s.5(4) on the examination and grant of asylum applications and the combined effect of ss.2, 5-6 on removals.

This aspect of the decision was subsequently criticised by the Minister for Legal Migration and the Border, Mr. Tom Pursglove. He objected that the Good Friday Agreement had been creatively interpreted in ways that the treaty never intended (and by necessary implication, Parliament never intended when it passed the Northern Ireland Act 1998). The first disregarded the fact that rights-protection under the Agreement sought only '…to address long-standing, specific issues relating to Northern Ireland's past'. The second was that the Agreement has been expanded to cover reserved matters, i.e. immigration, where relevant laws had always applied on a UK-wide basis.[42] Mr. Pursglove was joined in his criticism by former Justice Secretary, Sir Robert Buckland, who, given the seriousness of the constitutional issues raised by *Re NIHRC and JR295* (and *Re Dillon*, to which he also made express reference), urged the minister to refer both judgments to the Supreme Court at the earliest opportunity.

The third issue concerned a reiteration of the argument that relief ought not to granted in respect of uncommenced statutory provisions. Should it find against them, the respondents invited the court to either identify the areas of breach or make declaratory relief, whereby the government could consider rectification without having to comply with an order. Once again, Humphreys J was unimpressed: ministers intended to commence the Act as soon as possible, the NIHRC had an express statutory jurisdiction to seek to impugn future breaches of the Windsor Framework, and, finally, in *Re Dillon* Colton J had not distinguished the commenced and uncommenced provisions of the Legacy Act, ruling that *any* provisions breaching the Windsor Framework should be disapplied. He also explained that Article 4 of the Withdrawal Agreement and s.7A of the Withdrawal Act were 'juridically aligned' both to the 1972 European Communities Act and *Factortame*. In the event of inconsistency, it followed that domestic law must be disapplied. Following Colton J, he concluded that where the Windsor Framework is breached, s. 7A of the Withdrawal Act *mandates disapplication* of the offending provision (emphasis added).

The Nine 'Areas'

In each of the nine 'areas' into which the claim had been deconstructed, the court ruled that a diminution of rights had occurred: the relevant rules being contained in the Procedures, Qualification and Trafficking Directives,[43] together with the Charter of Fundamental Rights. Unaccompanied children had also suffered a diminution of rights under the Dublin III Regulation.[44] As a result, no fewer than eight provisions of the Act were disapplied.[45]

The disapplication decision broadly paralleled the declaration of incompatibility. This is especially so in the following areas: the examination and grant of asylum protection, denial of an effective remedy, removal, trafficking in human beings, and children and unaccompanied children. However, it also extended to areas lying beyond the declaration's scope. One such was the risk of indirect refoulement contrary to Article 21 of the Qualification Directive and Articles 25-27 of the Procedures Directive. This occurs when, owing to processing or other failures in the receiving country, an asylum seeker is relocated to another country where they are at risk of persecution.[46] Under the Directives, mitigating that risk requires appropriate assessments of the receiving country and the claimant's personal circumstances. Humphreys J agreed with the NIHRC that the Act failed to meet these requirements, a decision influenced by the weaknesses in the available remedies. Indirect refoulement is not listed in the s.6 exceptions to the removal duty, and while it can figure in a serious harm suspensive claim,[47] the

[42] See: House of Commons Hansard, 14 May 2024, 'Illegal Migration Act: Northern Ireland', vol. 750. col. 141, 142.
[43] Respectively: Council Directive 2005/85/EC, Council Directive 2004/83/EC and Council Directive 2011/36/EU.
[44] Regulation (EU) 604/2013.
[45] These were: s. 2(1), s. 5(1), s. 5(2), s. 6, s. 13(4), s. 22(2), s. 22(3) and s.5.7
[46] This was central to the Supreme Court's judgment in *AAA*, a point noted by the court.
[47] S. 42.

test - a 'real, imminent and foreseeable risk' of (specified) harm[48] - prevents the claim succeeding even where convincing evidence of processing failures had been presented.

The disapplication also included two areas – detention and age assessments - which had been expressly excluded from the incompatibility declaration. The court ruled that s.13 caused a diminution of the right to seek 'speedy judicial review' protected by Article 18 of the Procedures Directive. It also rejected the respondents' argument that, since Article 18 protections only applied to asylum seekers, they were not available to any person whose claim had been disapplied under s.5(2) of the Act.[49] Instead, it held the deprivation of the right to have an asylum claim processed both entailed a diminution and formed the legal context in which the inability to seek speedy judicial review should be viewed. The fact that the remedy sought - disapplication under s.7A of the Withdrawal Act – was non-discretionary was important in this instance.

Regarding age assessments, the court ruled that the denial of fact-based judicial review challenges represented a clear diminution of rights in a defined category of cases. Before the Act, age assessments could be challenged in UK courts, where determinations would be made on matters of fact,[50] and on the balance of probabilities.[51] Under s.57 this is no longer the case for any person meeting the four conditions. This breached rights recognised in the European Convention, especially Articles 6 and 8; rights that are also required for the purposes of analysis by the Windsor Framework.[52] Diminution of rights under Article 47 of the CFR - the guarantee of an effective remedy in respect of the violation of any EU law right – was also raised. Since JR295's standing was no longer relevant, Humphreys J duly added age assessments to the disapplication.

The effect of the decisions in *Re Dillon* and *Re NIHRC and JR 295* on the United Kingdom Constitution

It is incredible how many constitutional issues were raised in these cases, and indeed in the *Miller* cases, and the recent Supreme Court ruling in *AAA*, above, and how much they tell us about the United Kingdom constitution in respect of parliamentary sovereignty, the separation of powers, the constitutional role of the courts, the rule of law, and human rights' protection.

It is trite law that the UK constitution is based on the doctrine of parliamentary, rather than constitutional sovereignty, and that no court or body can question an Act of Parliament. However, Parliament itself, through statute, can limit that doctrine and provide the courts with greater powers of judicial review of legislation. This was done under s.2 of the European Communities Act 1972, giving the courts power to ignore domestic legislation that conflicted with European Community (later Union) law.[53] This was also achieved in the 2018 EU Withdrawal Act, which retained certain EU rights as sovereign over domestic law, or at least until Parliament expressly overruled that legislation. This is said not to conflict with parliamentary sovereignty, as it is Parliament itself that passed the legislation allowing its future legislative powers to be reviewed and disapplied by the domestic courts. That sovereignty can, of course, be regained by passing legislation expressly overruling the 1972 Act (achieved generally through the 2018 Act), or by expressly amending or repealing the 2018 Act. Indeed, following the decision in *Re Dillon*, the government may have wished to rush legislation through Parliament restoring sovereignty in this area.

Such indeed was the advice given to it by Conservative backbench MPs in the Urgent Question debate the day following the decision in *Re NIHRC and JR295.*[54] Noting the nature of s.2 of the Safety of

[48] S. 39(4)(c) read alongside s. 39(4)(a).
[49] S. 5(2)
[50] *R (A) v Croydon LBC* [2009] UKSC 8
[51] *Re JR147* [2023] NIKB 67
[52] This is in line with in line with the judgment of Colton J in *Re Dillon*
[53] *R v Secretary of State for Transport, ex parte Factortame* [1991] 1 AC 603.
[54] Tabled by Gavin Robinson, DUP Member for Belfast East.

Rwanda (Asylum and Immigration) Act 2024,[55] several Members demanded legislation expressly affirming the superiority of domestic over EU law in the broad area of immigration and asylum policy.[56] Sir Bill Cash also repeated his criticism made when seeking to amend the Safety of Rwanda Act, i.e. that the Illegal Migration Act, the Windsor Framework and the European Union (Withdrawal Agreement) Act should have been worded differently on the issue of sovereignty 'so as to remove the grounds for this judgment'.[57] Other Conservatives, joined by several Members of the Democratic Unionist Party, went further by advocating legislation that would, in their view, deal with the problem at source: in effect by rewriting the Windsor Framework and the Withdrawal Agreement.

A similar, but not different example of limiting sovereignty was achieved by the passing of the Human Rights Act 1998, s. 4 of which allows the High Court and above to declare primary and secondary legislation incompatible with rights contained in the European Convention of Human Rights. This power was used by the High Court in the present cases to declare certain sections of the Legacy Act and Illegal Migration Act incompatible with various Convention rights. Yet the 1998 Act makes it clear that the power under s.4 does not extend to ignoring, disapplying or striking down any offending legislation passed or authorised by Parliament. Once a declaration is made, the offending provision continues in force and must be amended by Parliament itself in line with the procedure laid down in s.18 of the 1998 Act.

The different methods of entrenchment or limitation adopted in relation to EU and ECHR law reflect the status of both treaties in terms of the predominance of treaty law over national law and sovereignty. EU membership was always intended to give predominance to treaty law over national law,[58] whilst Convention law and rights were intended to guide national human rights law to comply with the general principles laid down in the Convention; the Council of Europe, the Convention itself, and the Strasbourg Court always recognising their subsidiary roles in this area. Further, the entrenchment of certain EU rights in the 2018 Act reflected Parliament's intention to retain those rights despite the withdrawal from the European Union. That presumably was the government's intention at the time, and the 2023 Legacy Act is either a reversal of those promises, or a genuine misinterpretation on its part that it complied with the rights entrenched by the 2018 Act. Similarly, those provisions in the Legacy Act that have been declared incompatible might have been passed in the genuine belief that they *were* compatible with the ECHR and the Human Rights Act, and that the courts would find them compatible.

Alternatively, the Legacy Act could have been passed as a show of parliamentary (and governmental) might, with the clear intention of ignoring any challenge from the domestic courts, or indeed the Strasbourg Court. This possibility is peculiarly pertinent in the case of the Illegal Migration Act. During its parliamentary passage, ministers acknowledged that it had a novel even experimental quality designed, at least in part, to test human rights laws. It is a position they subsequently maintained.[59] Yet, whilst they asserted their confidence that the Act would comply with the Convention, this did not merit making a s.19(1)(a) statement: a point noted by Humphreys J.

The Act was heavily criticised on these points by the Joint Committee on Human Rights (JCHR). Whilst acknowledging that a s.19(1)(b) statement is not necessarily an admission that legislation is non-compliant with the Convention, the Committee was clear that the Act involved a 'piecemeal' dismantling of the Human Rights Act and, in particular, ran counter to the very principle of universal

[55] That all 'decision-makers' defined by s. 2(2) must treat the Republic of Rwanda as safe for the purposes of removal decisions. The courts, in particular, must not consider challenges to removal decisions brought on the grounds that Rwanda's asylum application processing arrangements could result in indirect refoulement or otherwise breach that country's obligations under the Refugee Convention (s. 2(3)-(4)).
[56] Sir John Redwood, Mr. David Jones and Sir Christopher Chope. See: House of Commons Hansard, 14 May 2024, 'Illegal Migration Act: Northern Ireland', vol. 750. col. 144, 148-149.
[57] Ibid., col. 142
[58] *Costa v Enel* Case 6/64 [1964] ECR 585.
[59] In the immediate aftermath of the judgment, the minister, Tom Pursglove, told the Commons that "As a government, we recognise and have consistently said that this (the Illegal Migration Act) is a novel approach to tackling the issues but such challenges require novel solutions". House of Commons Hansard, 14 May 2024, 'Illegal Migration Act: Northern Ireland', vol. 750. col. 150.

human rights. Further, the decision to include, at what became s.55, a provision enabling ministers to disregard interim measures made under Article 39 of the European Convention only added to the sense that the government was looking for a confrontation with Strasbourg: possibly one designed to prepare the ground for withdrawal from the Convention itself.

The extent and depth of the JCHR's concerns are indicated by the forty amendments it proposed, covering no fewer than twenty-nine of the original clauses.[60] The Committee was also unequivocal that the Act was highly vulnerable to defeat if challenged in the courts, a point which its Chair – the SNP Member for Edinburgh South West, Joanna Cherry – drew to the attention of the government in the aftermath of the decision in *Re NIHRC and JR295*.[61] There is no evidence that ministers paid any heed. Instead, the impression given – then as now - was that the Sunak government simply intended to 'plough on' with the Act regardless of the weight of political criticisms or the threat and later the actuality of legal defeat. It is an impression affirmed by the inclusion of a commitment to commence the Act in the Conservatives' 2024 general election manifesto.

In terms of the separation of powers and the constitutional role of the courts, many (mostly but not exclusively politicians) ask why a court, with unelected judges, should be able to disturb government policy, authorised by Parliament, by declaring such policies unlawful. Of course, much of that doubt has been answered in our above discussion, on parliamentary sovereignty: Parliament itself has set limits on its sovereignty by passing legislation that limits the scope of the government's powers, and the courts are simply carrying out that mandate. This was made clear by the court in *Re NIHRC and JR 295*.

> 'This outcome does not occur at the whim of the courts but represents the will of Parliament as articulated in the Withdrawal Act.'

However, not all aspects of the recent judgments can be explained on that basis alone; the High Court also passed judgment on the application and execution of potentially lawful actions. For example, in *Re Dillon* it concluded that interferences with ECHR and retained EU rights were not justified on the evidence presented to the court. The judge ruled that 'there was no justification for breaching Convention rights, as there was no evidence that the granting of immunity under the Act will in any way contribute to reconciliation in Northern Ireland; indeed, the evidence is to the contrary.' On a similar note, in *Re NIHRC and JR295*, the judge pointed out that attempts to justify beaches of Article 4 of the European Convention with reference to Article 13(3) of ECAT could not rely on the assertion that public order was threatened by the mere fact that asylum seekers were present on UK soil.

> '…it cannot conceivably be the case that mere presence in a state alone can trigger the public order exception. Something more must be required'.[62]

For some, this is evidence of courts overstepping their constitutional remit, and ruling on the merits of government policy; a task for an accountable executive. Such arguments invite a three-pronged response. First, reviewing actions on grounds of proportionality and necessity (the tools of both European Courts) was given to the courts by both the 1998 Act and the 1972 (and 2018) Acts. Thus, again, the domestic courts are merely carrying out the legislative mandate of Parliament and the government by ruling on those issues. Second, although review under both Acts should not extend to replacing the policy and judging the pure merits of such – that would be institutionally and

[60] Joint Committee on Human Rights, *Legislative Scrutiny: Illegal Migration Bill*, Twelfth Report of Session 2022-23 HC 1242, HL Paper 208, paras. 73 and 90, and para. 7 of 'Conclusions and Recommendations'.
[61] See: House of Commons Hansard, 14 May 2024, 'Illegal Migration Act: Northern Ireland', vol. 750. col. 148, where Ms. Cherry pointedly observes that: '…the Joint Committee on Human Rights has repeatedly warned that many aspects of the Government's asylum policy breach the Human Rights Act. That was not just our view, but the weight of the expert evidence that we heard; in fact, those with legal expertise who disagreed with our findings were decidedly thin on the ground. This judgment vindicates our position that on a number of fronts, the Government's asylum policy breaches the Human Rights Act, particularly as regards the duty to remove.'
[62] [2024] NIKB 35

democratically wrong – the decision in *Re Dillon* is not simply a case of the courts disagreeing on the evidence. Thus, there was *no evidence* that the granting of immunity will in any way contribute to reconciliation in Northern Ireland; indeed, *the evidence is to the contrary*.' That does not suggest simply a difference of opinion, but that the executive, being asked to provide the necessary evidence to justify prima facie breaches of fundamental rights, have failed to provide any relevant evidence, and have in fact added to the case that the breaches were unjustifiable. Review on the grounds of no evidence or taking into account irrelevant considerations has been part of judicial review well before the introduction of European law,[63] and failure to provide any cogent evidence to support a policy, albeit given effect to via an Act of Parliament, cannot excuse arbitrary and unreasoned policy and actions.

Third, we should recall that some of the claims made by the claimants were rejected; the court applying judicial deference and the margin of appreciation in deciding that some measures were within the law, including those that possessed the *capacity* of being developed to that effect by the courts.

Conclusions

Ultimately, these cases reveal the Sunak government's position on and approach to the protection of human rights, and its belief in the law and the rule of law.[64] Many Conservative politicians obviously have a distrust of European human rights law and European judges, and they may yet, if given the opportunity, reintroduce plans to scrap to Human Rights Act 1998, and to withdraw from the European Convention and the jurisdiction of the European Court of Human Rights. Yet these judgments, and many others alluded to in this article, are not simply repeating the ideas and judgments of a European Court; many of the decisions are based on common law principles of the right to life, freedom from cruel and unusual punishment, fairness, due process rights, freedom from retrospective law, and property rights – rights which have existed well before the incorporation of European rights and principles, and which have been upheld by our courts.

If our judges continue to rule against governments in these areas, then governments are running out of places to hide. You can pass legislation to say a country is safe, when the courts have told you that all evidence points to it being unsafe, and you can introduce a policy (on detention without trial or investigating deaths or refusing to process protection and human rights claims), believing that this is the most suitable and convenient way to deal with a situation. However, unless a government prohibits review of any kind, the judges will continue to come after it, and only legislation that prohibits any judicial intervention will restore a distinctly conservative idea of constitutionalism.

It is an idea rooted in a particular interpretation of the rule of law. This was apparent in the government's consultation document on the British Bill of Rights Bill, it appeared throughout the parliamentary passage of the Illegal Migration Act and again, more recently still, during the parliamentary debates on the Safety of Rwanda Act. In essence, it reduces the meaning of the rule to the implementation by the courts of any and all laws passed by Parliament, providing the latter's intention is clear in the wording: nothing more. In the process it detaches the rule from other legal principles, such as abiding by international law, maintaining equality before the law, respecting fundamental human rights and guaranteeing access to the courts,[65] which might give it substance and offer greater protection to individuals.

The rationale for this stance is based in part on constitutional tradition but increasingly on what amounts to a fetishisation of the House of Commons' status as an elected chamber.[66] The consequence is that those institutions which also possess meaningful constitutional claims to roles in the making and

[63] *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997.
[64] See Steve Foster, 'The Rule of Law in the UK Constitution: not a Pritti sight' (2022) 2 *Coventry Law Journal* 1.
[65] The articulation made by Baroness D'Souza during the first day of debating on the Report Stage of what was then the Safety of Rwanda Bill (House of Lords Hansard, 4 May 2024, vol. 836, col. 1328)
[66] Such, for example, is the interpretation of former Minister for Immigration, Robert Jenrick MP during the Committee Stage of the Bill: "…we are not a parish council…We are a sovereign Parliament. The power is in our hands. The law is our servant, not our master." (House of Commons Hansard, 16 January 2024, vol. 743 col. 717).

implementation of the law (most obviously the House of Lords and the senior courts) have been marginalised with increasing regularity, something evident again in the Safety of Rwanda Act. Interestingly, in this case had some Conservative backbenchers got their way, questions over the lawfulness of removal decisions would have been placed, to all intents and purposes, altogether beyond the courts' jurisdiction.[67] Further, when implementing the Act the courts would have been excluded from taking into consideration *all* international laws, including the European Convention.[68]

To their credit, on this occasion ministers stood their ground and faced down the rebels. Yet even so, their conduct, including their policies in *Re Dillon* and *Re NIHRC and JR295,* has raised serious questions about accountability in our Constitution. In particular, it reminds us of Lord Sumption's observation that, reduced to its essentials, the Constitution consists of the principle of parliamentary sovereignty and several conventions designed to influence its use. Should those conventions ever lose their hold on a party of government, this would naturally start the conversation about a new UK Constitution.

The Sunak government appealed the decision in *Re Dillon*, proceedings commencing in the Northern Ireland Court of Appeal on 11 June 2024.[69] An appeal against the ruling in *Re NIHRC and JR295* was also planned, leading to an application for a stay on the order of the court: rejected by Humphreys J on 31 May 2024. Therefore, it will be interesting to see if the Court of Appeal believe that the Northern Ireland High Court over-stepped its constitutional powers, or gave too little deference to the government. Whatever the outcome, the conflict between Parliament and the courts is unlikely to abate, with more calls for a reform of human rights law to restrict the influence of European human rights law, or, with the election of a Labour government on 4 July, a call to reform the constitution to increase control over parliamentary (executive) sovereignty. Further, before going to press, the new Labour government have announced its plans to repeal Conservative legislation and policies on immigration and asylum, including the Safety of Rwanda (Asylum and Immigration) Act 2024.[70] This, hopefully, will restore a rights-based approach in this area, ensuring that the law and practice is compliant with our international obligations under the European Convention and other treaties.

[67] An amendment proposed by Mr. Robert Jenrick. Its effect would have been to permit challenges only on the grounds that the decision-maker had acted in bad faith or that the deportee was medically unfit to travel.
[68] The proposal of veteran right-wing Conservative MP, Sir Bill Cash
[69] 'NI Troubles: government appeals High Court ruling on Troubles Act', BBC News: https://www.bbc.co.uk/news/uk-northern-ireland-68499113
[70] Tim Baker, Government to divert tens of millions from Rwanda plan to new Border Security Demand', Sky News, 7 July 2024

HUMAN RIGHTS

The formula for justifying dismissal and discipline for diversity-critical speech

Dr Steve Foster*

Introduction

Problems arise where an employee's religious or philosophical views conflict with a public or contractual duty to uphold equality or diversity,[1] also identifying various personal and philosophical views.[2] This conflict can never justify discrimination by that individual, and in *McClintock* v *Department of Constitutional Affairs*,[3] it was established that an employer was fully justified in insisting that all magistrates apply the law of the land, without exception based on moral or principled objection.[4] Thus, in that case it was held that a Christian magistrate who had objected to carrying out his duty to place children with same-sex couples had not been discriminated against on the basis of his philosophical views. Similar principles apply where the individual's views (speech) on equality and diversity are regarded as inconsistent with the holding of that position, as illustrated in *Page v Lord Chancellor,*[5] and *Page v National Health Service*,[6] concerning an individual's views on homosexuality and their consistency with his posts of, respectively, lay magistrate and non-executive director of the NHS.

However, two recent decisions, one of the Employment Appeal Tribunal and another of an Employment Tribunal, show that the distinction between penalising an individual for their genuine beliefs and disciplining for another reason, such as evidence of discrimination or the impact of the claimant's speech, is often difficult to apply in practice. The decision in *Higgs v Farmors School*,[7] below, seems to establish that employees should not be penalised for holding and manifesting protected beliefs unless the measures taken against them are legitimate and necessary and proportionate in the circumstances. This is to ensure that the employee's rights to free speech and religion and belief, are weighed appropriately with the need to secure equality and diversity and the rights of others. On the other hand, the decision of the Employment Tribunal in *Randall v Trent College,*[8] and indeed the decisions of the Court of Appeal in *Page*, accept that in some cases the real reason for the disciplinary action is not sufficiently related to protected beliefs, but rather to the manner or circumstanced in which those views were expressed.

Thus, courts and tribunals must decide what the real reason was for the employee's dismissal or discipline – was this relate to the employee's religion or belief, or was it for some other substantial reason, such as to prevent discrimination or to resolve a diversity dispute from escalating? Once that issue has been resolved, the court or tribunal will then need to consider the ultimate question: has the employee, in all the circumstances, been unfairly treated by the employer for manifesting their religion and belief? This will require the judge to assess a number of factors, such as the nature of employment, the content of the employee's speech and actions, and the impact of those words or actions on the contract of employment and diversity and equality

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[1] See Steve Foster, 'Free Speech, Equality and Diversity: the legitimacy of protecting content-based expression under the ECHR and domestic law' (2023) 28 (3) *Communications Law* 102.

[2] See, recently, Oscar Davies, 'Gender Critical Cases: making bad law' (2024) 174 (8068) NLJ 8; and Maya Forstater and 'Gender-Critical Cases: sex matters' (2024) 174 (8075) NLJ 10.

[3] [2008] IRLR 29.

[4] *McClintock* v *Department of Constitutional Affairs* [2008] I.R.L.R. 29, at [62]. See also *London Borough of Ealing v Ladele* [2010] 1 WLR 995, where a registrar, had refused to participate in civil partnerships. See also, *Ladele and McFarlane v United Kingdom*, Application Nos 51671/10 and 36516/10, Decision of the European Court, September 1, 2011.

[5] [2021] EWCA Civ 254.

[6] [2021] EWCA Civ 255.

[7] [2023] ICR 1072.

[8] [2023] 2 WLUK 493.

Establishing the reason for dismissal or discipline: the decisions in *Higgs v Farmor Schools* and *Randall v Trent College*

These cases consider whether the employee's critical diversity speech or actions leading to dismissal or discipline constituted religion and belief under the Equality Act 2000, or come within the right to religion, thought and conscience under Article 9 of the European Convention on Human Rights. This, therefore, is the threshold question as to whether the Act or ECHR rights are engaged, thus providing enhanced protection to the employee.[9]

Facts and decision in Higgs

Higgs was employed by the school as a pastoral administrator and work experience manager. She was dismissed for gross misconduct after the school received an external complaint about Facebook posts that she had made, criticising the nature of sex education in schools and, in particular, the teaching of 'gender fluidity'. The school considered that someone reading the posts might conclude that she not only felt strongly that gender fluidity should not be taught in schools, but was also hostile towards the LBGTQ+ community, and Tran's people in particular. Higgs brought claims of direct discrimination and harassment on the ground of her protected beliefs under the Equality Act 2010, including her lack of belief in gender fluidity and that a person can change their biological sex. An employment tribunal dismissed her claims, finding that while those beliefs were protected under the 2010 Act, she had been dismissed not because of her beliefs, but because of the school's concern that she would be perceived as holding homophobic and transphobic views.

Higgs then appealed to the Employment Appeal Tribunal, who upheld the appeal and remitted the case back to the tribunal to decide on the proportionality of the dismissal in the circumstances. The Appeal Tribunal noted first that under ss.2 and 3 of the Human Rights Act 1998, the tribunal was required to determine any claim under the 2010 Act in accordance with the rights conferred by the European Convention on Human Rights (and given effect to by virtue of the 1998 Act). In this case that included the claimant's rights under Articles 9 (freedom of thought, conscience and religion) and 10 (freedom of expression) of the Convention.[10] Thus, the tribunal should have determined whether the employee's actions amounted to a manifestation of a belief protected by the 2010 Act and the Convention, and this involved asking whether there was a sufficiently close and direct nexus between her conduct and her beliefs.[11]

In the Appeal Tribunal's view, if there had been a restriction on manifestation of belief or freedom of expression, that restriction would have to be prescribed by law, pursue a legitimate aim, and be necessary in a democratic society, as outlined in the qualifying words in Articles 9(2) and 10(2) of the Convention. In other words, that the interference was prescribed by law, and necessary in a democratic society for the purpose of achieving a legitimate aim (in this case the protection of the rights of others).[12] Further, in assessing the necessity of the measure, a proportionality assessment would be required. Importantly, in establishing the reason why the relevant decision-maker acted as they did for the purpose of a direct discrimination claim under the 2010 Act, it will not be possible to rely on a distinction between an objectionable manifestation of a belief and the holding or manifestation of the belief itself, if the action taken by the employer was not a proportionate means of achieving a legitimate aim. If, on the other hand, the action or response *can* be justified, and is found to be by reason of the objectionable manner of the manifestation, the tribunal can permissibly find that the reason why the respondent acted did not involve the belief but only its objectionable manifestation.[13]

[9] However, a dismissal might still be held unfair by a tribunal where those rights are not engaged: because the grounds for dismissal are inadequate, or where there has been a procedural breach by the employer: Employment Rights Act 1995.
[10] *Higgs v Farmor's School* [2023] EAT 89 [35].
[11] *Higgs v Farmor's School* [2023] EAT 89 [41].
[12] *Higgs v Farmor's School* [2023] EAT 89 [41-42].
[13] *Higgs v Farmor's School* [2023] EAT 89 [57-58].

Applying those principles to the present case, the Appeal Tribunal concluded that the tribunal's findings on the reasons for the school's actions did not follow the above, correct, approach. Rather, the tribunal had found that the school's reason for disciplining and dismissing him was not because of, or related to, his actual beliefs, but because of the concern that her posts might be seen as evidence that she held other beliefs, which might be described as 'homophobic' or 'transphobic'.[14] Thus, the difficulty with the tribunal's analysis was that it did not engage with the question whether this was, nonetheless, because of, or related to, his manifestation of her beliefs.[15] In answering that question, the school's views or concerns were not relevant; the tribunal needed, first, to consider whether there was a sufficiently close or direct nexus between her protected beliefs and her posts.

Further, to the extent that the tribunal addressed that question, it was apparent that it did so through the prism of the school's view of her posts. Those views were relevant when determining whether there had in fact been any interference with her right to manifest her beliefs and to freedom of expression, in other words whether its treatment of her was because of, or related to, her exercise of those rights. However, those views could not determine the prior question: whether there was a sufficiently close or direct link between her posts and her beliefs such as to mean that those posts were to be viewed as a manifestation of her beliefs.[16] If they were, then the tribunal needed to determine the 'reason why' question by asking itself whether this was because of, or related to, that manifestation of belief - prohibited under the 2010 Act - or whether it was in fact because she had manifested her belief in a way to which objection could justifiably be taken.[17] However, in order to determine whether or not the manifestation can properly be said to be 'objectionable', it was necessary to carry out a proportionality assessment: keeping in mind the need to interpret the 2010 Act consistently with the relevant Convention rights. Thus, at that stage, there can be nothing objectionable about a manifestation of a belief, or free expression of that belief, that would not justify its limitation or restriction under Articles 9(2) or 10(2).[18]

The Appeal Tribunal thus allowed the appeal, but as this was not a case where only one outcome (on proportionality) was possible, the matter was remitted back to the tribunal for determination. Such remittal was on the basis that it has already been established that the Facebook posts in issue had a sufficiently close or direct nexus with the employee's beliefs, such as to amount to a manifestation of those beliefs.[19] On the other hand, it will be for the tribunal on the now to determine, recognising the essential nature of her rights to freedom of belief and freedom of expression, the following questions: first, whether the measures adopted by the school were prescribed by law; and, if so, secondly whether those measures were necessary in pursuit of the protection of the rights, freedoms or reputation of others.[20]

The Appeal Tribunal then proceeded to lay down guidelines for the tribunals in case such as this, recognising that a danger arises from any attempt to lay down clear rules. Nevertheless, it set out the following basic principles that will underpin the approach in assessing the proportionality of any interference with rights to freedom of religion and belief and freedom of expression. First, the foundational nature of the Convention rights must be recognised; the freedom to manifest belief (religious or otherwise) and to express views relating to that belief are essential rights in any democracy, whether or not the belief in question is popular or mainstream and even if its expression may offend.[21] Second, those rights are qualified and manifestation of belief, and free expression will not be protected where the law permits the limitation or restriction of such manifestation or expression to the extent necessary for the protection of the rights and freedoms of others.[22] Further, where such limitation or restriction is objectively justified given the manner of the manifestation or expression, that is not,

[14] *Higgs v Farmor's School* [2023] EAT 89 [81].
[15] *Higgs v Farmor's School* [2023] EAT 89 [82].
[16] *Higgs v Farmor's School* [2023] EAT 89 [ibid].
[17] *Higgs v Farmor's School* [2023] EAT 89 [ibid].
[18] *Higgs v Farmor's School* [2023] EAT 89 [ibid].
[19] *Higgs v Farmor's School* [2023] EAT 89 [91].
[20] *Higgs v Farmor's School* [2023] EAT 89 [ibid].
[21] *Higgs v Farmor's School* [2023] EAT 89 [94]. See *Handyside v United Kingdom* (1976) 1 EHRR 737.
[22] *Higgs v Farmor's School* [2023] EAT 89 [ibid].

properly understood, action taken because of, or relating to, the exercise of the rights in question but is by reason of the objectionable manner of the manifestation or expression.[23]

Third, whether a limitation or restriction is objectively justified will always be context-specific. Although the fact that the issue arises within a relationship of employment will be relevant, different considerations will inevitably arise, depending on the nature of that employment.[24] Fourth, it will always be necessary to ask: (i) whether the objective the employer seeks to achieve is sufficiently important to justify the limitation of the right in question; (ii) whether the limitation is rationally connected to that objective; (iii) whether a less intrusive limitation might be imposed without undermining the achievement of the objective in question; and (iv) whether, balancing the severity of the limitation on the rights of the worker concerned against the importance of the objective, the former outweighs the latter.[25]

Finally, in answering those questions within the context of a relationship of employment, regard should be had to: (i) the content of the manifestation; (ii) the tone used; (iii) the extent of the manifestation; (iv) the worker's understanding of the likely audience; (v) the extent and nature of the intrusion on the rights of others, and any consequential impact on the employer's ability to run its business; (vi) whether the worker has made clear that the views expressed are personal, or whether they might be seen as representing the views of the employer, and whether that might present a reputational risk; (vii) whether there is a potential power imbalance given the nature of the worker's position or role and that of those whose rights are intruded upon; (viii) the nature of the employer's business, in particular where there is a potential impact on vulnerable service users or clients; (ix) whether the limitation imposed is the least intrusive measure open to the employer.[26]

Thus, as the Appeal Tribunal has already established the nexus between her speech and the protected rights under the Act and the Convention, the tribunal must make a decision as to the proportionality of the employee's treatment of the employee, taking into consideration all the factors outlined in the Appeal Tribunal's guidance.

Facts and decision in Randall v Trent College Ltd

In this case, the claimant, a former school chaplain, claimed harassment, direct discrimination, victimisation and unfair dismissal against the respondent school, an Anglican foundation co-educational, independent day school, when he had been dismissed for airing his views on LGBT rights. The claimant's views were based on his belief that marriage should only be between men and women, that sexual activity outside of marriage was morally problematic, and that a person could not change their gender or sex. Under the Education (Independent School Standards) Regulations 2014, the school was required to actively promote the fundamental British values of democracy, the rule of law, individual liberty, and mutual respect and tolerance of those with different faiths and beliefs. Further, failure to comply with the Regulations could result in regulatory or enforcement action against the school.

In 2016, the claimant had embarked on a series of sermons delivered to pupils aged 11 to 18 years old focusing on gender equality, gay marriage and LGBT+ rights, which had prompted numerous complaints from staff, students and parents. The claimant was spoken to by the school's designated safeguarding lead. He explained that LGBT+ pupils were statistically far more vulnerable to suicide, self-harm and emotional distress than the rest of the community, that the message from his sermon, irrespective of his intended meaning, had been that it was wrong to be gay, and that the message had caused harm by increasing vulnerability of the school's LGBT+ pupils. In 2018, the school adopted an Ofsted and Department for Education recognised best practice programme called Educate and Celebrate, which had the aim of taking a whole-school approach to tackling homophobic, biphobic and

[23] *Higgs v Farmor's School* [2023] EAT 89 [ibid].
[24] *Higgs v Farmor's School* [2023] EAT 89 [ibid].
[25] *Higgs v Farmor's School* [2023] EAT 89 [ibid].
[26] *Higgs v Farmor's School* [2023] EAT 89 [ibid].

transphobic bullying and ingrained attitudes. The claimant considered that much of the programme was contrary to Christian teaching, and in 2019, he delivered sermons to 11 to 17 year-olds, conveying the message that it was wrong to be LGBT+ and that religious belief allowed people to discriminate. The school received a significant number of complaints and a disciplinary process resulted in the claimant being summarily dismissed.[27] He issued his first employment tribunal claim, but because of the COVID-19 pandemic, the school suffered financial difficulties and in 2020 made several staff members redundant, including the claimant. The claimant then issued a second employment tribunal claim.

Dealing with the claim of direct discrimination and the reason for dismissal, the tribunal noted that after the 2016 sermon, the claimant had been well aware that the topics of orthodox Christian beliefs on marriage concerning sex, sexual orientation and gender identity were not appropriate topics for chapel sermons. Thus, dealing with those issues in chapel risked not only causing upset to pupils and staff but also real distress and the risk of psychological harm to vulnerable LGBT+ students who were coming to terms with their sexual identity.

In the tribunal's view, his contract of employment and job description did not give him free rein in the chapel or override his, and the school's, duty to protect pupils from harm. Further, many of the terms used in the 2019 sermon had been pejorative. The claimant had used inflammatory language and rhetoric that went way beyond the teaching of a particular perspective and amounted to an intent to persuade pupils to agree with his views. That, in the tribunal's view, fell outside the permissibility of faith teachings within the Regulations and ignored the obligations to ensure pupils understood issues and encouraged respect for all people, having particular regard for those with protected characteristics. Further, the claimant held a position of trust and had abused that position by delivering the sermons armed with the knowledge of the potential for harm, as well as ambushing the school by not allowing it to facilitate debate on the topic in an appropriate environment. Accordingly, it was not the claimant's beliefs nor their manifestation that was the reason for, or a substantial cause of, his treatment; rather, it was because of the time, the place, to whom he had expressed his beliefs and the manner in which he expressed them which was objectionable and caused his dismissal.[28]

The tribunal then considered the justification for the employer's action, noting that the school had already tried a less intrusive approach in 2016 by seeking to educate the claimant in the potential harm of delivering such sermons. Despite that, he chose to embark on the same path in 2019 because of his objection to the Educate and Celebrate programme, and in doing so placed pupils at the risk of harm again. In doing so, he abused his position of trust and acted contrary to his safeguarding duties and obligations to comply with the Regulations. Given the claimant's stance that he was just doing his job, had done nothing wrong, had been discriminated against and deserved an apology, the school could have no confidence that he would not do the same again, and it had been justified in concluding that his conduct amounted to gross misconduct and that summary dismissal was appropriate.[29]

The tribunal then found that there had been no breach of his Convention rights – Article 9 (freedom of thought, conscience and religion) and Article 10 (freedom of speech. The school's actions were justified to meet its legitimate objectives of safeguarding pupils from the risk of harm and complying with the Regulations, and thus there had been no breach of the right to freedom of thought, conscience and religion under Article 9. Further, the duty to safeguard pupils from the risk of harm and the requirement to comply with the Regulations outweighed the claimant's right to express his beliefs in the manner he did in a school environment, and thus there was no breach of his right to freedom of speech under Article 10.[30]

[27] On appeal, he was reinstated subject to compliance with various management instructions, but as he was reinstated part-way through the academic year, he was not given a teaching timetable.
[28] *Randall v Trent College Ltd* [2023] 2 WLUK 493 [262, 283-285, 290, 295].
[29] *Randall v Trent College Ltd* [2023] 2 WLUK 493 [304-306].
[30] *Randall v Trent College Ltd* [2023] 2 WLUK 493 [311-313].

Accordingly, all his claims of direct discrimination failed.[31] Similarly, with respect to his claim of harassment, the tribunal noted that a referral to the Government Prevent programme and the imposition of management restrictions had not been related to the claimant's beliefs, but to the objectionable manifestation of them. The claimant had used his position of authority to risk harm for his own gratification and it was therefore not reasonable to subsequently claim that the consequences amounted to harassment.[32] The tribunal also rejected his claim for victimisation, finding that there was no evidence that the non-allocation of the claimant's timetable had been linked to the presentation of his employment tribunal claim. His dismissal by reason of redundancy was genuine and not artificially orchestrated to get rid of him in consequence of him issuing proceeding, and any allegations of victimisation were not well-founded.[33] Finally, the tribunal found that the decision to dismiss the claimant fell within the range of reasonable responses of a reasonable employer in the circumstances, and thus his claim of unfair dismissal was not well-founded.[34]

This decision, thus, follows the decision in *Page*, finding that the reason for the employee's treatment was not related to the claimant's beliefs nor their manifestation; but rather, it was because of the time, the place, to whom he had expressed his beliefs, and the manner in which he expressed them which was objectionable and caused his dismissal. The tribunal's consideration of the fairness of his treatment thus appears to be conducted outside the scope of the rights contained in Article 9 of the Convention, as that right was not engaged. On the face of it the Appeal Tribunal's decision and approach in *Higgs* appears complex. However, put simply it means that in deciding to dismiss or take action against an employee for expressing diversity-critical views, an employer must first establish whether there is a sufficient link between those views and the rights protected under the 2010 Act and the European Convention. If that is the case then the employer needs to make it clear that the reason for dismissal was that the employee manifested them in an (objectively) objectionable manner, it not being for the employer to exclude the protection of that belief on grounds that they, as employers, perceived it as objectionable. That was the error into which the tribunal fell – it declared that the reason was not related to a protected belief without enquiring into the nexus issue - and hence the appeal was allowed. Then, once that nexus is established, a tribunal must assess the dismissal in terms of its compatibility with the criteria established by the Convention – that the interference was sufficiently prescribed by law, had a legitimate aim (the rights of others), and was necessary and proportionate in achieving that aim. In such a case, the tribunal would consider all the circumstances, including the tone on the comments, how they would be perceived and what effect they might have, and the position and duties of the employee.

Accordingly, the Employment Tribunal in *Randall* appear to have fallen into the same trap as the Tribunal in *Higgs*, by not asking whether the teacher's views were sufficiently connected with his religious or philosophical beliefs, and *then* considering whether the employer was justified in disciplining him for the way in which the views were manifested. To say that he was not dismissed for manifesting such views, but for his attitude towards the regulations thus appears to conflate both aspects of the enquiry, and although the outcome may be the same, this approach is contrary to the one advocated in *Higgs*. Consequently, the issues of legitimacy and proportionality of the employer's actions are in danger of being side-stepped.

[31] *Randall v Trent College Ltd* [2023] 2 WLUK 493 [356].
[32] *Randall v Trent College Ltd* [2023] 2 WLUK 493 [359, 363].
[33] *Randall v Trent College Ltd* [2023] 2 WLUK 493 [375, 386].
[34] *Randall v Trent College Ltd* [2023] 2 WLUK 493 [395].

On the other hand, in both the *Page* cases, the Court of Appeal accepted that the claimant's beliefs on adoption were not the reason for dismissal; rather it was the appearance of bias with regard to how he would carry out those duties. Accordingly, a dismissal in response to a complaint of discrimination would not constitute victimisation if the reason for it was not the complaint as such but some feature of it that could properly be treated as separable. This was shown in the recent decision in *Omooba v Michael Garrett Associates Ltd (T/A Global Artists), Leicester Theatre Trust Ltd*,[35] where the Employment Appeal Tribunal confirmed that an actor had not been dismissed for her religious views on homosexuality, but for the need to deal with the dysfunctional situation that had arisen was because of her posts. In other words, the reason for the dismissal was the commercial risk to the employer's business if clients and agents left as a result of the posts.[36] These decisions follow the test of 'but for' and concentrate on whether religion and belief significantly influenced the respondent's decision,[37] but it is unclear now that tribunals can take that approach if there was sufficient link between the beliefs and the disciplinary action.

Balancing the free speech rights of employees with equality and diversity

Ultimately, the proportionality of the employer's disciplinary action will be tested by the court or tribunal, but the different approached adopted in these cases causes some confusion about what strength a judge should give to those views and any interference with them.

There is still, therefore, a distinction between cases where the reason for a sanction is that the claimant held and/or manifested the protected belief, and where the claimant had manifested that belief in some particular way to which objection could justifiably be taken.[38] Whether such actions are justified should be judged by a careful assessment of all the circumstances of the case, and must strike a fair balance between the rights of the individual and the legitimate interests of the institution for which they worked.[39] This is supported by the decision of the Court of Appeal in *Ngole*,[40] overruling the decision of the High Court that the university's issue with anti-gay comments on social media was not the religious motivation or the religious content of the postings, but how they could be accessed and read by people, service users included, who would perceive them as judgemental, incompatible with service ethos, or suggestive of discriminatory intent.[41] Thus, following *Ngole*, courts should insist that the full context and other circumstances of the speech and its impact are considered, underpinned by essential free speech, and, to a reasonable degree, the religious or other Article 9 rights of the speaker.

This flexible approach was also taken recently by the Employment Tribunal in *Forstater v GDP Europe and others,*[42] a case which clarified the meaning of belief under the Equality Act 2010 and Article 9 of the Convention, and stressed the need for proportionality in such cases. F, a consultant for the respondents, posted tweets expressing her concerns about, inter alia, proposed changes to the Gender Recognition Act 2004. In a hearing to determine whether her belief was a philosophical belief,[43] the

[35] [2024] I.R.L.R. 440.
[36] [2024] I.R.L.R. 440, [154-155]. The case was complicated by the fact that the claimant was to play the role of a lesbian woman in the play, *The Colour Purple,* a role that she later admitted she would not play because of her beliefs.
[37] *Nagarajan v London National Transport* [2001] 1 AC 501.
[38] In September 2023, in *Corby v ACAS*, Leeds Employment Tribunal, 6 September 2023, an employment judge ruled that holding a view that does not subscribe to critical race theory was a protected characteristic under the Equality Act 2010. An employee of ACAS took the organisation to an employment tribunal after managers ordered him to remove comments he posted on a workplace social media platform that were critical of Black Lives Matter, arguing that critical race theory is divisive because it portrays white people as racist. In the Tribunal, Ayre J ruled that he had given his beliefs careful consideration and they fell under the "religion or belief" section of the 2010 Act. In April 2024 the tribunal will consider whether he was unlawfully discriminated against. See Matt Dathan, **'**Critical race theory opponent is protected, EA rules', *The Times*, 29 September 2023, 17
[39] *Page v National Health Service* [2021] EWCA Civ 255 [100-101].
[40] *R (Ngole)* v *University of Sheffield* [2019] EWCA Civ 1127
[41] *R (Ngole) v University of Sheffield* [2017] EWHC 2669 (Admin) [169].
[42] Decision of the London Central Employment Tribunal, 6 June 2022 (unreported).
[43] *Grainger Plc v Nicholson* [2010] 2 All E.R. 253. The criteria is as follows: the belief must be genuinely held; it must be a belief and not an opinion or viewpoint based on the present state of information available; it must be a belief as to a weighty and substantial aspect of human life and behaviour; it must attain a certain level of cogency, seriousness, cohesion and

tribunal held that her belief failed to satisfy the fifth criterion, namely that the belief had to be worthy of respect in a democratic society, and should not conflict with the fundamental rights of others.[44] On appeal, the Employment Appeal Tribunal held that her gender-critical belief was a protected philosophical belief,[45] and that the fifth *Grainger* criterion was only not satisfied where there existed an extremely grave threat to European Convention principles.[46] In this case, the gender-critical belief was widely shared, including amongst respected academics, and such a belief demanded particular care before it could be condemned as not worthy of respect in a democratic society.[47] When the case was referred back to the tribunal to determine whether she had been discriminated against on the basis of that belief,[48] it stated that the tweets had to be considered with reference to Article 9(2) of the Convention, and that expressing opposition to that reform had a potential impact on the rights of others.[49] However, that did not mean that debate on proposed legal reforms could not take place or could be significantly restricted in a democratic society.[50] At the very least, therefore, diversity critical views, if sufficiently linked to the individual's religion or belief, must be pitted against diversity and equality policies and the rights of others, and any interference with the speaker's free speech and religion and belief rights must be prescribed by law and necessary and proportionate to uphold any legitimate aim.[51] On the facts, therefore, the tribunal upheld the claimant's claim.

Further evidence of this an increased latitude to diversity critical speech is seen in two recent employment tribunal decisions. The first decision, in *Meade v Westminster City Council,*[52] was, as with *Ngole,* decided in the context of social work employment, where we would expect the policies on diversity to be more strictly applied. In this case, the tribunal upheld the employee's claim for discrimination and victimisation after she had shared gender critical posts on social media. After Social Work England received a complaint about her posts, she was subjected to a Fitness to Practise investigation, concluding with a formal sanction, later withdrawn. When the council learned of the sanction, Ms Meade was suspended on charges of gross misconduct. The tribunal held that the claimant's Facebook posts and other communications fell within her protected rights for freedom of thought and freedom to manifest her beliefs as protected under Articles 9 and 10 ECHR. Further, it considered it wholly inappropriate that an individual such as the claimant, espousing one side of the debate should be labelled discriminatory, transphobic and to pose a potential risk to vulnerable service users. That, in the tribunal's view, equates her views as being equivalent to an employee/social worker espousing racially discriminatory or homophobic views. The opinions expressed by the claimant could not sensibly be viewed as being transphobic when properly considered in their full context from an objective perspective, but rather her expressing an opinion contrary to the interpretation of legislation.[53]

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importance; and it must be worthy of respect in a democratic society, not be incompatible with human dignity and not conflict with the fundamental rights of others.

[44] *Forstater v GDP Europe and others*, decision of London Central Employment Tribunal 18 December 2019 (unreported). See Robert Wintemute, 'Belief vs action in Ladele, Ngole and Forstater' [2021] *Industrial Law Journal* 104. See also, *Fahmy v Arts Council England* [2023] WLUK 423 (ET).

[45] *Forstater v GDP Europe and others* [2022] ICR 1.

[46] ibid [82], following *Campbell v United Kingdom* (1982) 4 EHRR 293 and *R. (on the application of Williamson) v Secretary of State for Education and Employment* [2005] UKHL 15.

[47] ibid [110-115]. See Sharon Cowan and Sean Morris 'Should "gender critical" views about trans people be protected as philosophical beliefs in the workplace? Lessons for the future from Forstater, Mackereth and Higgs' (2022) 51 (1) *Industrial Law Journal* 1.

[48] *Forstater v GDP Europe and others,* decision of the London Central Employment Tribunal, 6 June 2022 (unreported).

[49] ibid [287]. It then rejected the respondent's argument that they were being compelled to manifest gender-critical belief by association with the claimant ([291-293]).

[50] *ibid* [287].

[51] Thus, the claimant will not automatically succeed in their claim, simply because they were sanctioned for their beliefs. See *Mackereth v Department of Work and Pensions* [2002] ICR 1609, discussed below. In that case, the tribunal found that the employer's practice and policy had the legitimate aims of ensuring that service users were treated with respect and did not suffer discrimination in respect of the department's services and complying with an overarching policy of commitment to equal opportunities.

[52] Decision of the Employment Tribunal 24 November 2023 (case numbers 2201792/2022 2211483/2022.

[53] In April 2024, Rachel Meade was awarded £58,000 in exemplary damages for harassment and sex discrimination, the tribunal concluding that Social Work England's actions were a "serious abuse of its power as a regulatory body". The

The second case, *Pheonix v Open University,*[54] was decided in the context of academic debate at universities, where there has been much social and moral controversy over the expression of gender critical speech.[55] In this case, the tribunal held that a university professor had been constructively dismissed, discriminated against and harassed because of comments relating to biological sex and gender identity. The claimant was a Professor of Criminology at the Open University, known for her research on sex, gender, and justice. Before the tribunal she claimed that there had been a public campaign of harassment after she expressed views about the silencing of academic debate on trans issues, criticised Stonewall's influence in universities, expressed views that male-bodied prisoners should not be in female prisons, and set up the Open University Gender Critical Research Network. She claimed that she was publicly vilified by hundreds of her colleagues, called transphobic, compared to a racist by managers, and silenced and shunned within her department. She claimed that she had been discriminated against on grounds of her "philosophical belief", in other words, that biological sex is real and important; a person cannot change their biological sex, and that biological sex should not be confused with gender identity.

The tribunal noted that the right to freedom of expression comes with duties and responsibilities, and can be subject to limitations over public safety and the protection of rights and reputations. However, the extent to which an employer can restrict an employee's manifestation of religious beliefs must be determined by factors such as the content, tone, extent, and impact of the speech, as well as the nature of the employer's business and any power dynamics. The tribunal found that the unwanted conduct related to Phoenix's gender-critical beliefs, the University believing that her views caused divisiveness, and she was effectively telling her off for having expressed those beliefs. This followed the setting up in 2021 of the Open University gender-critical Research Network by the claimant, focusing on promoting research from a gender-critical perspective. There followed an open letter signed by 368 OU staff and researchers, calling for the withdrawal of the OU's support for the GCRN and asserting it conflicted with OU's obligations under the Equality Act 2010. The tribunal found that the open letter was not an exercise in academic freedom, but rather stigmatised Phoenix and aimed to damage her reputation. It also found it to be aimed at countering gender-critical beliefs. The tribunal also found that the University's failure to respond directly to Phoenix's concerns of harassment was unwanted conduct, and was related to Phoenix's gender-critical beliefs – and that while that was not intended to violate her dignity or create an intimidating environment, it was due to a fear of a faction within the OU and being seen to be gender-critical. Dealing with the complaints and criticisms from staff who found a podcast offensive and insensitive towards trans people, the tribunal found the podcast did not cross the line of acceptability, disagreeing with claims that it was demeaning or belittling. While the tribunal recognised some comments in the podcast lacked 'sensitivity', it did not interpret them as outright hostility towards trans individuals.

The tribunal's task in these cases, therefore, is to distinguish between expressing views simply representing one side of the transgender debate, and expressing discriminatory transphobic or homophobic views.[56] In *Meade*, the posts in question were regarded by the tribunal as merely repeating or adding to the ongoing debate on this issue: the central thesis that individual were not capable of

tribunal also called on it and the Council to train their employees in the principles of free speech and protected belief. See Jonathan Ames and Catherine Baksi. 'Social worker suspended over gender-critical views £58,000', *The Times*, 29 April, 2024.

[54] Decision of Watford Employment Tribunal, 24 January 2024 (case numbers 3322700/2021/ 3323841/2021.

[55] The best-known dispute in this area involves Kathleen Stock, a former Professor of Philosophy at Sussex University who caused national controversy when claiming, before Parliament, that "the claim "transwomen are women" is a fiction, not literally true", and that "spaces where women undress and sleep should remain genuinely single-sex".

[56] See two recent tribunal decisions where the claimants beliefs on race issues, were not deemed to be protected. The first case was *Cave v Open University* [2023] 5 WLUK 25. Here, an employee, who described himself as an English nationalist, was dismissed after he made racist posts on social media. The tribunal found that his belief in English nationalism could not be categorized as a philosophical belief worthy of protection under the Equality Act 2010 because it was not worthy of respect in a democratic society, was incompatible with human dignity and conflicted with the fundamental rights of others. The second case was *Sunderland v The Hut.com Ltd* [2023] UKET 2300911/2022, where an employee's dismissal for anti-religious comments made on social media did not amount to discrimination and harassment based on her conservative philosophical beliefs. The tribunal found that there was insufficient evidence to demonstrate a belief in conservatism or a belief that went beyond a political viewpoint.

changing their sex, and highlighting examples where gender recognition can be dangerous and damaging to women's rights. Thus, the tribunal examined a number of posts, such as a link to a petition to the International Olympic Committee that male athletes should not compete in female sports; and a link to a petition that women have the right to maintain their sex-based protections, to include female only spaces such as changing rooms, hospital wards, sanitary and sleeping accommodation, refuges, hostels and prisons. The tribunal also examined a number of satirical posts relating to the ongoing controversy surrounding the JK Rowling affair, and other conflicts between both sides.[57] The Tribunal was obviously influenced by the employee's naivety and lack of intent to discriminate and offend, and felt that the language used by the employee did not deprive her of her protection under Article 9.

Establishing 'trump' rights in balancing belief and speech with privacy and freedom from discrimination

Although these cases will be decided by employment tribunals on the basis of employment and discrimination laws, they obviously engage ECHR rights, which tribunals and courts must consider when determining the dispute, and balance effectively and in conformity with the principles of legality and proportionality. To carry out this task, courts and tribunals will also have to assess the importance of each right, without accepting that any right has 'trump' status over the other,[58] but providing adequate recognition and protection of each right in all the circumstances. The recent judgment in *Adams v Edinburgh Rape Crisis Centre,*[59] not only illustrates the courts and tribunals' desire to safeguard diversity critical speech against inflexible equality and diversity policies, but also the difficulties in balancing those views with the fundamental rights of others.

The claimant held gender critical beliefs and believed that biological sex was especially relevant in relation to sexual violence, and that a trauma-informed approach to supporting survivors of sexual violence entailed respecting both their understanding of others as male or female and their choice about whether they wished to engage with male or female support workers. The centre had recently employed a trans woman, and the claimant wished to discover how those two employees should be referred to service users. Following complaints that the claimant had humiliated the employees by suggesting that the claimant and others should disclose their sexual identity, the claimant was subjected to disciplinary proceedings and subsequently resigned, claiming harassment, discrimination and constructive dismissal.

Giving judgment for the claimant, the tribunal first decided that the claimant was subject to harassment on account of her beliefs, as she had been subjected to intimidating, hostile, degrading, humiliating or offensive environment. In the tribunal's view, the claimant had not been disciplined because of her suggested response to the service user; the real reason being that the claimant held gender critical views.[60] The claimant's views were at the root of the way the processes unfolded: the respondent was not simply exercising a normal disciplinary rule in respect of an employee who had sent an email which amounted to misconduct, as there was ample evidence that the claimant was being criticised for her beliefs, which were regarded as equivalent to transphobia.[61]

[57] The JK Rowling post commented on the author's treatment by the Inquisitorial Squad for following the wrong people on Twitter. It also looked at the reposting a tweet from an organisation called Mayday with a cartoon showing two women prisoners with one asking the other "what are you in for?" and the other saying "for saying that Ian Huntley is a man", and a post from Fair Play for Women entitled "meet Karen" and referring to Karen as a male prisoner who had committed sexual assaults against women in prison and asking to sign their petition to get the prison policy changed, and a satirical post stating: "Boys that identify as girls to go to Girl Guides. Girls that identify as boys to go to Boy Scouts. Men that identify as paedophile go to either."

[58] In terms of free speech versus privacy, it has been established that free speech does not have any trump status over privacy, the outcome depending on the application of proportionality.

[59] [2024] 5 WLUK 572.

[60] *Adams v Edinburgh Rape Crisis Centre,* [196-197].

[61] *Adams v Edinburgh Rape Crisis Centre,* [210-229].

With respect to the discrimination claim, the tribunal found that there was a clear nexus between the claimant's beliefs and the behaviour that the respondent said was the reason for her treatment. The claimant had a right to freedom of belief and freedom to express that belief and her views were worthy of protection, and the question was whether there was a conflict between the claimant's right to freedom of expression and freedom of belief, and other Convention rights, including the right to private life of the two employees. The tribunal held that although, as a matter of the general civilities of life, it was entirely appropriate in a workforce to call colleagues by their preferred pronoun that did not involve any breach of a right under the Convention. Although some individuals might be sensitive about having their "gender history" revealed, that was not something that flowed axiomatically from Article 8. In the vast majority of cases, there would be no controversy in asking someone their biological sex, their sex at birth, or their gender identity, and one was required to look at the context. Here the employee worked at a rape crisis centre, and it was a genuine occupational requirement that she be a woman. There was no breach of her right to privacy in those circumstances of telling a service user she was assigned female at birth and now identified as non-binary, and there was no breach of trust and confidence by the respondent in telling that employee that it would respond to service user requests in the manner suggested by the claimant. Accordingly, the respondent unlawfully discriminated against her.[62]

Several aspects of this decision, and the approach taken by tribunal, are worthy of comment. First, the tribunal adopt the *Higgs* approach and find a sufficient nexus between the claimant's beliefs and her treatment. This obviously puts the employer on the 'back foot' as there is a presumption of harassment and discrimination, and the employer needs to justify the disciplinary action. This is indeed possible, as the case of *Mackereth v Department of Work and Pensions* shows,[63] where the dismissal of an employee for refusing to use neutral pronouns towards colleagues was held to be fair, despite the refusal being based on a protected belief. Nevertheless, in cases such as *Adams*, where the tribunal has rejected the employer's claim that the action was taken for traditional disciplinary reasons, it will be difficult for the employer to show that their discriminatory actions are justified in all the circumstances.

Secondly, the tribunal's finding on the scope of the privacy rights of the affected employees, weakened the strength of those claims and, accordingly, skewed the balance between belief and privacy. In the tribunal's view, there was nothing to suggest that the disclosure of other employees' sexual identity, or whether they were born male or female, involved a breach of Article 8 ECHR. Two points need to be made here. One is that an employment tribunal is hardly in a position to lay down precedents and guidance with regard to scope of ECHR rights, and indeed cited no real authority in support of such a proposition. Second, even if they are right in declaring that there is no absolute or general rule prohibiting such disclosure, it is another step to say that an individual employee has the right to make that disclosure. On the facts, given the nature of the centre and the employment contract, there may be an argument in favour of making such disclosures, but again, that should be the responsibility of the employers and not individuals motivated by their personal, philosophical beliefs. The decision is, therefore, questionable on those grounds, and an appeal is likely.

Conclusions

It will be interesting to see whether the tribunal in *Higgs* finds that the dismissal violates Articles 9 and 10 of the Convention, after applying the legitimacy and proportionality test to the specific facts, and the status of the employee. Similarly, it will be interesting to see whether there will be an appeal in the *Adams* case. Proving a protected belief and the required nexus does not guarantee that the action will succeed, and the tribunal must consider all the circumstances, and in particular, whether those views are objectionable with respect to the employer's equality policies, the duties of the employee and the tone and level of offensiveness of the employee's views. In the meantime, the

[62] *Adams v Edinburgh Rape Crisis Centre,* [230-238]. The tribunal also found that the respondent's practice of disciplining gender-critical views amounted to indirect discrimination (paras 239-241), and that the respondent's treatment of the claimant and her belief amounted to constructive dismissal (paras 245-246).
[63] [2002] ICR 1609.

decision of the Appeal Tribunal established a prima facie right to hold and express those views, subject to the employer satisfying us that the interference was justifiable.

On that basis, the Tribunal decision in *Randall,* although correct in terms of overall fairness, is likely to be wrong in its approach if we rely on the reasoning in *Higgs*. However, the Court of Appeal decisions in *Page,* and the EAT's decision in *Omooba***,** appear to allow a tribunal or court to look beyond the connection with the claimant's religious or philosophical beliefs, and decide that the *real* reason for dismissal or victimisation was something separable from victimisation of a protected belief. Thus, until *Page* is overruled by an appropriate court, there is room for a court or tribunal to find that an individual had not been disciplined on grounds of a protected belief, but for the way, and the circumstances in which that view was expressed. Whichever approach is adopted by the courts and tribunals, the decisions in these cases are creating a growing jurisprudence in an attempt to distinguish between protected and impermissible anti-diversity speech.[64] What is accepted is that not all diversity-critical views are worthy of dismissal or other penalties, some attracting protection under the Convention rights of free speech and religion and conscience. However, as most cases are fact-sensitive and dependent on various factors, it will be quite some time before that case law provides clarity and coherence in what is an area filled with attrition and mistrust.

The decision in *Meade*, on the other hand, adds to a building jurisprudence concerning the acceptability or otherwise of diversity critical speech. Views on homosexuality and Trans gender issues that are simply contrary to ideas of diversity and respect for such groups will not offend principles of free speech and religious or other opinions. There must be some evidence of discrimination or clearly objectionable language or conduct. However, as we have witnessed in the cases above, that is a fluid distinction, made more uncertain by the nature of the employee's duties and the functions and outreach of the employer.

Finally, the law and its application will benefit from a measured balance of the conflicting rights by higher judicial authorities than employment tribunals. If employment law is now affected by human rights law, then serious consideration should be given to the scope of those rights and the jurisprudence of the domestic courts, and to the Strasbourg Court.

[64] In Scotland, the Hate Crime and Public Order (Scotland) Act 2021 has just come into force, on 1 April 2024, and which creates a new crime of stirring up hatred against any of the protected groups covered by the Act, including sexual orientation and transgender identity.

LEGAL HISTORY

More legal tales from the Sawyer vaults

John Sawyer [*] and Dr Steve Foster[**]

Introduction

Previous editions of the *Coventry Law Journal* have included tales of legal history, researched by John Sawyer and relating to his ancestors, and analysed by Steve Foster in terms of those laws' modern equivalent.[1]

In this article, John continues to come across examples of legal cases which his forebears were involved, and turns his attention ten miles or so across Salisbury Plain to Wilton, the ancient capital of Wessex, where the Musselwhite family were established as key members of the community. John examines a couple of cases, reported in local papers that, hopefully, will be of interest to the readers of the Journal.

The tragic death of Mr JJ Fleming: Newspaper report of the death of Hester Talbot's nephew, John 10, April 1903

The first case researched by John, in 1903, relates to an inquest following the death of John Fleming. The inquest jury found that he had shot himself whilst being temporarily insane whereas there was sparse evidence of insanity. The report recognises the legal formality of inquest hearings, particularly at that time, when issues of family bereavement and sadness are really the fundamental concerns. In that way, it tells us a good deal of the pomposity of the law, but deep down, the need of the law to provide a legal ending to a personal and family tragedy. It also tells us a great deal about the personal tragedy behind legal proceedings and judicial decisions; something that we, as lawyers, should always be conscious of.

The painful news that Mr. James John Fleming, of Wilton, had committed suicide by shooting himself with a revolver on Monday was not known among the townspeople until early on Tuesday morning. The announcement of Mr. Fleming's death under such distressing circumstances caused melancholy sensation in the town and was accentuated by the sympathy felt on all hands for his family who are much respected by all classes. The painful story of the suicide was disclosed by the father at inquest held by Mr. Coroner Wilson at the Town Hall on Tuesday evening.

He told the jury that he was a saddler, his dead son was 31 years of age, and was unmarried, assisted witness in his business, and went out to South Africa with contingent of Wilts Imperial Yeomanry. He went through the campaign until he was invalided home about two years ago. He was wounded in the hand, which had since caused him some inconvenience and he also suffered from abscess on the liver occasioned by the rough life he was obliged to live in South Africa. On Monday, John (deceased) was at work as usual, and at about ten minutes to four in the afternoon asked him about some harness he was working at. Witness, after expressing to his son the hope that he would finish the collar he was doing as it was wanted, had tea, and the deceased came in shortly afterwards. The witness never saw his son alive again. He expected to see him shortly after five o'clock but he did not and at about quarter to five be heard the report of a gun. He did not take any notice of it at the time, thinking that it was caused by a neighbour shooting at a pigeon. Time passed on and his son did not return but the witness, thinking that he had probably gone to Salisbury did not trouble more about it. He went out and returned a few minutes before nine o'clock and sat reading at home until twenty minutes past ten. His daughter

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[1] See John Sawyer and Steve Foster 'Ale not be accepting that as payment, thank you. Payment in beer and the decision in Shore v Sawyer' (2020) 25(2) Cov. L.J. 89, and John Sawyer and Steve Foster 'The dodgy billet: 'The past is a foreign country; they do things differently there' (2022) 27(2) Cov. L.J. 51.

then asked him Has John come in? He replied that he had not. At half past ten he went to bed, and lay awake, listening for his son, until half-past eleven. He then went into his son's bedroom, but did not find him there. The deceased's mother asked, "Isn't he there?" and the witness said no." She said, "Do go and see where he is," and the witness accordingly dressed and went into the street. He waited there quite an hour, and the gun .report he had heard earlier in the evening re-dawned upon his mind. He wondered whether anything had happened, and determined that before he went to bed again he would find out. He went into the garden and then into the footpath at the bottom of the rectory garden. There he saw something white lying across the path, and could see that it was an apron. He went straight to it, and seeing that it was his son, felt his hand. He was lying flat on his back. His hands and face were quite cold, and as there were no signs of life, the witness struck some Incifers (lamps) and made a search for a gun. He did not find a gun, but afterwards found a revolver by his son's side. He picked up the revolver and opened it and took out of the chambers three live cartridges and a shell. It was a six-chamber revolver. He afterwards gave it to Inspector Grant.

The Coroner asked: *What state had he been in since he came home?* The witness replied that he was very depressed and very low. His hand gave him a lot of trouble. At other times he was particularly bright. *Did he ever say anything about taking his life*? No, I never heard him say a word. *Was he pretty steady at his work*! Yes sir. *You never had any thought would do it?* Not the least. Is there any reason that he should do it? Not that I am aware of sir. Mr. Grant found in his pocket a photograph of a young lady he was engaged to, but that was broken off on account of his going to South Africa. Whether anything of that sort drove him out his mind I don't know: he never spoke of it.

William Clavell, labourer, of Wilton, stated that he saw the deceased at about five o'clock on Monday afternoon. The deceased was then in the Church Walk and shortly after that he heard a report like that of a gun. Dr. Straton said he knew the deceased, and had attended him frequently. He was called at about one o'clock on Tuesday morning and saw the body at nine o'clock. When he was called he went to the spot described by Mr. Fleming, Senior. The body was across the footpath, and the young man was quite dead. A bullet had entered the right temple and come out at the back of deceased's head, so that death must have been instantaneous. He had concussion of the brain some seven years ago, caused by striking his head against bracket. The witness did not think he was strong-minded. He was more childish in his mind than a man of his age should be, and recently seemed to be more uncertain.

This was all the evidence, and the Coroner remarked that it was one of those sad cases which one could not understand. It was quite clear that the young man shot himself and it was the jury's duty to say what state of mind he was in the time. There did not appear to be any reason for his act. Sometimes one found reason, either in something a man may have done, through fear and shame, which would make him take away his life, but there seemed to be nothing of the sort in this case. In answer to the Coroner Mr. Fleming, Senior said that his son had been more excitable since his illness. A juror remarked that they saw the deceased at three o'clock on Monday afternoon and that he was then joking. Several jurors and Inspector Grant informed the Coroner that the deceased had recently talked a lot of General Hector Macdonald's death. The whole of his conversation seemed be on that subject. Sir Hector Archibald MacDonald, also known as Fighting Mac, was a soldier, and finished his career as a Major General and was knighted for his service in the second Boer War. He committed suicide in 1903 following accusations of homosexual activity with local boys. Paradoxically, the death of Sir Hector Macdonald by the same means, two weeks previous to John Flemming's, was seen by his military peers, and much of Scotland, as the decent thing to do, and regarded as the death of a working class hero; 30,000 people attended his funeral.

The jury found a verdict of "Suicide whilst temporarily insane." We should at this stage, note the important role of an inquest in examining the cause of death, and further action in terms of investigation, inheritance and the local community. Findings of "suicide" had implications for the reputation of the individual and their family, as well as sanctions, such as barring burial in consecrated ground.

A lady's slander action: Bristol Assize Nisi Prius Court (Before Mr Justice Grantham)

The second report is on a case of slander brought by Kathleen Musselwhite, John's first cousin three time removed, against the landlord of the local public house, who questioned Kathleen's chastity and morality. The case is an interesting insight into the law of defamation and public morality at the time, although, theoretically, such allegations are still capable of causing 'serious harm' in the modern law, now covered essentially under the Defamation Act 2013.

The newspaper report stated that a special jury was empanelled for the hearing of action for slander (temporary defamation) brought by Miss Kathleen Musselwhite, professional musician, living at Wilton, near Salisbury, against Sidney Henry Beckett, landlord of the Bell Inn, Wilton. She was a professional musician and teacher of singing, and the defendant was Sidney Henry Beckett, landlord of the Bell Inn, Wilton, and former mayor of that town. The action related to the plaintiff (now claimant) and the local trainee doctor, Mr Racker, being in Grovely Wood together, and included reference to articles of her apparel which had been found in the wood. The defendant admitted that he spoke the words complained of, but pleaded that they were spoken upon a privileged occasion. The jury found for the plaintiff and she was awarded £50 plus costs. It appears that the original case was lodged in the name of Mr Racker but that the legal authorities had suggested that Kathleen should make the claim. Mr F. R. Y. Radcliffe, K.C. (instructed Messrs Wilson and Son), appeared for the plaintiff, and Mr Emanuel (instructed by Mr H. J. King) represented the defendant.

In opening the case, Mr Radcliffe said that there were slanders and slanders - some trumpery, some serious; and he thought when they had heard the facts of that case the jury would be of the opinion that this was a very serious slander, inasmuch as it amounted to imputation upon the chastity of a very promising young lady. She was 23 years of age, and was starting life with every prospect of success, and just at the outset of her career when she was met with this accusation. He doubted whether any slander could be more serious than that when they were dealing with a young lady. The plaintiff was professional musician, daughter of Mr Musselwhite, sanitary inspector and collector rales for Wilton, near Salisbury, and had early developed talent for music. So much that the people of the neighbourhood subscribed to help her to finish her musical education, she went to London, and became associate of the Royal College of Music, returning last June, when she started with very successful concert Salisbury. She was very much taken up and patronised by the people of the district. In the course last year she became engaged to Mr Racker, a young man who lived at Wilton and was at that time assistant and dispenser to a doctor, but had since become a qualified medical man. The couple walked out together, and often visited a favourite spot for lovers called Groveley Wood.

The defendant in 1903 was Mayor of Wilton, and on the 6th November Mr Musselwhite saw the defendant's uncle, who was also a rate collector, enter the *Bell Inn*, and as he wanted to see Kim he went into the house after the uncle. The uncle and defendant were talking in a private room, and Mr Musselwhite stood in the bar waiting. After some time, they came out, and the defendant went inside the bar, his uncle joining the plaintiff's father just outside the bar. There may or may not have been people in the taproom, and if there were they could have heard what was said.

The defendant was rather excited and put out, and he said to Mr Musselwhite: "What you think my uncle has been told! —that I am bankrupt and have someone in possession, and that it's all over the town." Mr Musselwhite said that he had heard a Mr Whatley had issued writ against him for £6O, but on asking Whatley he had been told it was only tallied to the amount the defendant owed. Thereupon the defendant asked Mr Musselwhite if he had heard the tale about his daughter Kathleen and Racker. Mr Musselwhite replied. What tale there about! The defendant then said that certain garments belonging to Miss Musselwhite had been picked up at Groveley Wood. It was said in a loud voice, the defendant apparently being annoyed at what the defendant had said to him. Mr Musselwhite was proud and fond of his daughter, and was very much upset at what he heard. He at once consulted his wife and daughter and Racker, and the latter took steps to vindicate the young lady's character, being naturally averse to exposing her to the disagreeable position of having to come into court and give evidence in a case of that kind.

Next day a solicitor's letter was sent asking for apology, but the reply was that what had been said was not actionable in the case of a man, unless he could prove pecuniary damage. This was perfectly true, but as a female could sue under the circumstances, even if she could not prove pecuniary damage, the action was brought by Miss Musselwhite. The defendant said he was not the originator of the rumour, and even now he did not suggest that the imputation was true, so that the jury might take it for the purposes of the action that it was unfounded and was a bit of malevolent gossip going round this wretched little country town. The only defence was that the words were uttered on a privileged occasion, and that they were uttered on the invitation of the plaintiff's father.

The defendant further said he was an old friend of the plaintiff's father, and had heard the rumour and repeated it to him to enable him to stop the further circulation of story which tended to compromise the reputation of one of his daughters. If that were true, however, he might have taken him aside and told him confidentially. The only object of the action was to clear this young lady's reputation - it was the only way of doing it when people would not give apology. If in court the defendant would act like a man and publicly retract what had said, and say there was no foundation for it, and would repay what it had cost to bring the action, the plaintiff would be content. If he would not, counsel asked the jury not for extravagant damages, but for such sum as would recognise people in the neighbourhood that there was ground for the aspersion on Miss Musselwhite's character. William Webb Henry Musselwhite, the plaintiff's father, said that when defendant told him of the scandal about his daughter he was very much upset. It was repeated in the public bar in a loud voice, and the defendant spoke as if he was offended over the conversation he had with his uncle.

The witness could not say whether anybody was in the taproom. Next day he went with the defendant to see Mr Wilson, Mr Racker's solicitor. The defendant told Wilson he was not the originator of the rumour. He was on intimate terms with the defendant, and they had called each other by their Christian names until the defendant became Mayor, when, the witness called him Mr Beckett. (Laughter in the court). The witness did not tell Mr King, the defendant's solicitor, that he knew the defendant only spoke to him in a friendly way about his daughter. It was not true that the defendant prefaced the story with the remark, 'I hope you will not take offence. I am telling you as a friend.' The witness did not reply 'I shall be pleased." Robert Alfred Beckett, the uncle, said he was a poor-rate collector for Wilton. He went to see his nephew in consequence of what he had heard of his financial position. He heard what the defendant said to Mr Musselwhite. He heard at the *White Horse* that there was scandal going about Wilton concerning a young lady and gentleman, but no names were mentioned, his informant remarking 'You will very likely hear who they are." The plaintiff next gave evidence, she was doing well until this scandal got about, but since she had only had one engagement, and that she accepted in November. She had been jeered at in the streets by children until it came to such a pass that she had to remain indoors and afterwards seek the protection the police. Mr Emanuel (cross-examining) stated '*I don't suggest this alleged slander was true, but do you say that a repetition of it to your father has been the cause of any damage to you Plaintiff*'; yes, of course it has. *What has your father not given you in consequence* – she replied, nothing.

The defendant refused to give the name of the person who told him the story or to apologise for repeating it, and this was the plaintiff's case. Mr Emanuel said the two questions for the jury to decide were: whether the defendant was liable all, and, if so, what damage had the plaintiff sustained. He contended that the defendant was not liable at, all, and even if he were, that no damage had been sustained. The defendant simply repeated what was being said in order to put the plaintiff and her family on the *qui vivo*. Wilton was evidently a town where stories freely circulated. A rumour had been going about that the Mayor himself was bankrupt, and he in turn had heard what was said about the plaintiff and Mr Racker. Could the jury blame the defendant for telling her father of it! He acted without malice, and ought not to mulcted in damages for a friendly act.

The defendant was called, and said he had known Mr Musselwhite and his family all his life. His uncle knew of the rumour about Miss Musselwhite and Mr Racker when he visited his house on the day in question, and told witnesses what he had heard of at the *White Horse*. It was all over the place, in fact: "Considering the position I hold and the position you hold, I think it my duty tell you what is being said about your daughter." Mr Musselwhite replied: What is it? I shall be pleased to hear it." The witness

then told him the tale. Mr Musselwhite thanked him and said he would see what he could do to stop the rumour. Witness had ill-will against the parties, and he had his youngest son learning music from Miss Musselwhite the time. Mr Radcliffe (cross-examining) asked; *did you first hear this story from the lady*, *mentioning no name*? The defendant replied: I first heard it from son. *Did you not hear it from a lady T*—l heard it from forty ladies. (Laughter) it was all over the town. Generally, when tales are going about they are heard in the carpet factory. The Judge then said: 'Oh, that's the great disseminator of scandal, is it? (Laughter.), to which the defendant: 'It is, my lord'. (Laughter.) Mr Radcliffe; *did not the lady in question ask you whether you had the articles mentioned on view at your public-house*? Witness: No, I have never seen any, so I don't know what they are like. (Laughter.) *Had your pot man in your house on the previous night been showing some of these things?* —Not the previous night. I am positive. *Did he show them to some young men, who gave him a pint of beer for doing so*? —I say deliberately it is a lie. They were never shown in my house. Have you never heard of it? l have since, but they were not shown as this lady's. They were some he had brought from Portsmouth. *He had shown something of the sort in your house?* —So it proves since, but I had not heard anything of it.

His lordship, in summing up said it was an unfortunate case. There could be no doubt, whatever of the great injury the plaintiff would suffer if such slander as this got abroad in a town which was apparently not only celebrated for a certain article of furniture, but was an emporium of scandal and gossip. (Laughter.) The defendant had told them that he spoke to the plaintiff's father in his capacity of Mayor, but although certain privileges attached to a Mayor, his lordship did not know that one was the dissemination of scandal. He was afraid Wilton was rather a bad place for scandalmongers. He did not know whether any of the jury lived there: if so they bad better look out for squalls. (Laughter.) The jury found for the plaintiff, damages of £50.

The dispute in this case might now appear out-dated, but at that time a woman's chastity was fundamental, ad allowed actions to be brought in slander without proving any financial loss. The Slander of Women Acts allowed women whose chastity was questioned to sue more easily for sexual slander by removing the burden of having to prove economic loss, known as 'special damage' in an action for slander. Women then brought actions in the thousands seeking to vindicate their reputations when subject to slurs of prostitution, un-chastity, fornication, or adultery.[2]

Such actions are still possible nowadays, especially where, as in the case above, there is a danger of the slander causing harm to the claimant's career and earning prospects. Even without such loss, it can still be claimed that such allegations, would cause the claimant 'serious harm' (s.1 Defamation Act 2013), which might be the case particularly if the claimant was a public figure or held a position of trust and confidence. The success of that action would be subject to the claimant being able to prove, under s.2, the truth (or substantial truth) of the statement, or that it was (under. s.3) an honest opinion and assumption based on the facts presented to the defendant. Instead, in our case, the defendant attempted to use his position as mayor to justify the disclosure on the grounds that he had a public duty to relate the gossip to her father, who had a duty or right to receive it. This was rejected by the court.

Conclusions

Once again, our thanks go to John for his research into his family's history, allowing us to retell news reports of those cases. What history shows us is that painful incidents at the time can then be viewed many years later less painfully, and as reminders of how times, social mores, and law have changed. Reading news reports of these events also allows us to immerse ourselves in history and find out why these proceedings took place, and what they meant in that particular community at that particular time.

[2] See Jessica Lake 'Protecting 'injured female innocence' or furthering 'the rights of women?' The sexual Slander of Women in New York and Victoria (1808–1887) 2022 (31) 3 *Women's History Review* 451.

TAX LAW

On the boundaries between tax regulation and the transactional behavior of market participants – the substantive tax principle

Jiang Yajuan[**] and Zhang Hua[****]

Introduction

The iterative development of the economy constantly affects the markets. Market business models, transaction forms and market operations are constantly giving rise to new forms of business. In adjusting the transaction behaviour of market entities, China's tax law and the relevant norms of civil law and economic law have reflected each other in the collision of values and goals and the fusion of systems, forming a representative case and institutional system. In recent years, there have been many cases of tax evasion by entertainment stars in China. If the tax authorities and taxpayers do not have a common understanding of a tax-planning scheme, how should the tax base be determined? Especially when the taxpayer's and others' valid transactions are based on the principle of autonomy and compliance with civil law, can the tax authority intervene and reassess the determination of the tax law? What happens if the tax authority and the taxpayer disagree on the tax base? If the dispute arises due to unclear provisions of tax law, who will make an interpretation? These issues are very common in market transactions and the cases are complicated and need to be clarified.

Fiscal intervention in market transaction behaviour

The income of the celebrities involved in the cases was eventually recognised as tax evasion, despite meticulous tax planning. The "Viya tax evasion" case is a typical example. On 20 December 2021, the Inspection Bureau of Hangzhou Taxation Bureau, Zhejiang Province, China, found that live streamer Huang Wei, known as Viya, an internet celebrity with tens of millions of followers and who has used her platform to sell a variety of products,[1] evaded taxes by hiding her personal income as well as other financial offences between 2019 and 2020. Huang Wei was decided on tax administrative processing penalties, tax recovery, adding late payment fees, and imposed fines totalling 1.341 billion yuan according to law.[2] The multi-channel network (MCN) company to which Viya belongs is called Qianxun (Hangzhou) Culture and Media Company Limited (hereinafter referred to as Qianxun Culture). According to the official website of Qianxun Culture, the company was founded in 2017 and is the TOP1 new content e-commerce live broadcasting organisation. There are more than 50 anchors under its banner, including Taobao's No. 1 anchor Viya, and more than 50 other anchors. The actual controller of Qianxun Culture is Dong Haifeng, Viya's husband. However, Qianxun Culture is not a husband-and-wife business of Viya, but has carried out equity incentives and established two well-known funds, namely Junlian Capital under Lenovo and Yunfeng Fund under Ma Yun. According to Qianxun Culture's official website, it plans to apply for a stock exchange listing in 2025. Compared to the wages and salaries Viya received as an employee of Qianxun Culture, Viya would save about 180 million yuan in taxes by signing a labour contract with Qianxun Culture and thus receive income from compensation for labour. However, with a tax burden of 720 million yuan, Viya still felt burdened, which later led to more aggressive personal income tax planning and tax administrative penalties.

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[1] Kerry Allen. Viya: *Top Chinese live-streamer fined $210m for tax evasion*, 20 December 2021.https://www.bbc.com/news/world-asia-china-59732499 accessed 15 March 2024.
[2] Cheng Mengke: *The Boundary between Remuneration for Labor and Income from Business--Taking the Via Case as an Entry Point*, Journal of Southeast University (Philosophy and Social Science), 2022, Vol.25, 101.

The main avenues of tax evasion in the Viya case were fictitious business, conversion of the nature of income, and concealment of personal income. The specific practices are as follows. First, set up a shell company in a low-tax region. Since 2019, several individual sole proprietorships and partnerships have been set up one after another, such as Shanghai Viya Enterprise Management Consulting Centre and Shanghai Dusu Enterprise Management Consulting Partnership, etc. Fictitious Business (hereinafter referred to as the "Shell"), and through the "Shell" it entered into an agreement with the Qianxun Culture. By signing the agreement with Qianxun Culture, the nature of the income is changed, and the personal income is transformed into the income of the enterprise, which is subject to a lower tax rate and enjoys tax incentives. Second, apply for approval from the tax bureau. The "shell" (including sole proprietorships and partnerships) applies to the relevant tax bureau for payment of personal income tax in the form of "authorised taxation". Once Viya has paid the personal income tax, the funds are withdrawn from the "shell" account.[3] Third, concealment of income. From 2019 to 2020, Huang Wei concealed her commission income from the live platform and converted the commissions, pit fees and other remuneration income from the live broadcast of goods for services into business income.[4] As a result of the above practices, Huang Wei's personal income tax liability was reduced by 650 million yuan.

Unlike other public figures whose tax evasion cases have been exposed by news reports, the tax authorities detected Viya's tax evasion case by using big data and information technology.[5] It is common for taxpayers to avoid taxes through fictitious market transactions or by circumventing the provisions of the tax law and the tax evasion behaviour of taxpayers will not only lead to a large loss of tax, but also affect the fairness of the tax. However, market behaviour is not a vacuum for tax law intervention.

The principle of tax intervention in market behaviour – the substantive tax principle

The origin of substantive taxation and the fight against tax avoidance

For tax law to intervene in market behaviour, the principle of substantive taxation is indispensable. The principle of substantive taxation originated in Germany. After the First World War, the German economy was in disarray. However, some taxpayers used loopholes in the tax code to avoid paying taxes, putting a strain on German public finances. To revive the German economy, the German legal profession proposed the principle of substantive taxation for this type of tax avoidance behaviour. After the First World War, the German Imperial Tax Code stipulated that taxpayers should not abuse the form of civil law transactions to avoid the tax burden, but should be taxed according to the substance of the economic behaviour behind the legal relationship. In recent times, the substantive tax principle has been widely transplanted and adopted in both civil law and common law jurisdictions, while a consensus has been reached on the application of the substantive tax principle. The principle of substantive taxation means that a certain situation cannot be based solely on its appearance and form to determine whether it should be taxed, but on its actual situation. In particular, in order to achieve a fair, reasonable and effective tax, it should pay attention to its economic purpose and economic substance to determine whether it is in line with the elements of taxation.[6] In judging whether a particular person or event satisfies the elements of taxation and should be subject to tax obligations, the substance should be explored in depth through the appearance of legal and economic facts, and when the substantive conditions satisfy the elements of taxation, the tax obligations should be recognized in accordance with the direction of the substantive conditions, thus realising the substantive justice of the tax law.[7]

[3] Li Peizhi, *Research on the Implementation of Tax Collection and Management Policies for the Online Live Broadcast Industry in S Province*, Master's Thesis, Shandong University, December 10, 2022, 29.
[4] Zhao Shujing, Lin Yuwei: *Viya fined for tax evasion, Live broadcasting ends savage growth*, Beijing Business Today, December 21, 2021.
[5] Jiang Fei: *Changes in tax collection from Viya's tax evasion penalty*, China Reform, Vol.2, 2022, 65
[6] Guo Changsheng: *Theoretical Interpretation of the Principle of Substantive Taxation*, Journal of Chongqing University (Social Science Edition), 2023(1), Vol. 29, 206.
[7] Ma Weiwei: *Test Analysis of The Composition of The Conditions of Sale for The Payment of Royalties to Third Parties*, Journal of Customs and Trade,Vol.37,2016(6),p.104.

Economic substance and the avoidance of tax evasion

Tax avoidance is hard to define. Tax avoidance is not only a legal form of innovation, but also a necessary part of any business transaction. Tax considerations are always part of the transaction. In fact, tax avoidance is the exploitation of loopholes and shortcomings in existing rules for the benefit of an individual or a company. There is a difference between "tax avoidance" and "tax evasion". Tax avoidance is the use of ambiguities or omissions in existing laws and regulations to reduce or evade taxes to obtain benefits without directly violating the provisions of the tax law. Tax evasion refers to all types of behaviour in which the taxpayer evades the established tax obligations by using a series of means to reduce or eliminate the tax burden.[8]

Legitimate tax avoidance does not entail a loss of tax revenue or a divergence between form and substance. The reason why tax authorities look at economic substance is that the National Treasury revenue is harmed by the abuse of transaction form as a means of self-defence against the tax law. The judge will consider mainly whether the main purpose is to avoid tax or to save some tax incidental to the transaction to achieve business. If the purpose of all parties to the transaction is to make money out of the tax system or to engage in institutional arbitrage without business reason and purpose, it is necessary to penetrate from the transaction form to the economic substance of the case to make a tax law judgment.

Not all tax avoidance practices require tax approval. For example, Article 47of the Enterprise Income Tax Law sets out the specific cases for tax approval by the tax authorities.[9] Where "an enterprise engages in other arrangements that do not have a reasonable commercial purpose and reduce its taxable income or taxable profit", the tax authorities have the right to adjust an enterprise's taxable amount in a reasonable manner in accordance with the principle of substantive taxation. If an individual or enterprise conducts a transaction based on a reasonable commercial arrangement, the purpose of which is not to obtain tax benefits, and does not violate the provisions of the tax laws, the conduct does not involve the abuse of the provisions of the tax laws or the abuse of the form of transaction provided by law, and is not, thus, subject to the principle of substantive taxation, which does not give rise to tax approval.

The consequence of the principle of substantive taxation is that, if a transaction has no economic substance, but only aims to achieve the purpose of tax evasion, the judge and the tax authority will deny the legal effect of the act and an anti-avoidance regulation will be applied to the transaction. As tax avoidance directly affects the interests of the national income treasury, the lack of regulation of tax avoidance behaviour will cause tax horizontal equity and vertical equity; therefore, tax avoidance behaviour must be included in the scope of law adjustment. Substantive taxation is regulated in China's Enterprise Income Tax Law, Tax Administration Law, and Individual Income Tax Law, for example, tax adjustments for related enterprises, special tax adjustments and general anti-avoidance clauses for cases of abuse of tax incentives, abuse of the form of enterprise organization, tax avoidance using tax havens and other arrangements that have no reasonable commercial purpose. Where the existing legal provisions are unclear, they are often regulated and corrected in various ways, such as improvement of the tax law system, legal interpretation, legal application, and judicial review.

The judicial practice of substantive taxation in China - the case of the Guangzhou Defa

Economic substance is easy to define but difficult to identify. In addition to the subjective situation of tax avoidance, there is the objective problem of legal application. As the first tax administrative case to be heard by the Supreme People's Court of the People's Republic of China (SPC) and one of the ten typical administrative cases heard by SPC, the case of Guangzhou Defa Real Estate Construction Co. (hereinafter referred to as the "Defa Case") is a representative case of the application of the principle of economic substance taxation. In the case, there were disputes over "the conflict between the right to tax

[8] Zhang Shouwen: *Tax evasion and its regulation*, Taxation Research, Vol.201, 2002 (2), 38.
[9] *Enterprise Income Tax Law*. Signed in Beijing on 23 April 1996 and came into force on 1 February 2002. Article. 3.

approval and the principle of freedom of contract in civil law", "whether the relevant transactions could be tax approved" and "how to approve the disputes". The conclusions of SPC's review judgment in the case of the conflict between the right to tax approval and the principle of freedom of contract in civil law, whether the relevant transaction can be tax approved, how to approve the dispute, and other disputes, have caused widespread concern in society and affected relevant tax practices.

Background to the "Defa Case"

In 2004, Guangzhou Defa Real Estate Construction Co. (hereinafter referred to as "Guangzhou Defa") held a public auction for its own property, the Bank of America Centre, which had a total area of more than 60,000 square metres and was internally valued by Guangzhou Defa at 563 million yuan. However, on 19 December 2004, a company called Sheng Feng Industrial from Hong Kong, the only bidder for the property, won it at a low price of 138 million. Subsequently, Guangzhou Defa declared and paid the relevant taxes on the transfer of the property at the transaction price of 138 million yuan and obtained the tax clearance certificate issued by the tax bureau. However, in 2006, the First Inspection Bureau of the Guangdong Local Taxation Bureau conducted an inspection of the tax situation of Guangzhou Defa during the period from 2004 to 2005, which included the above auction property transaction. The inspectors concluded that the actual transaction price of the property was much lower than the price of similar properties during the same period.[10] It was not until September 2009 that the Inspection Bureau finally decided on the treatment of Guangzhou Defa. The Inspection Bureau considered that Guangzhou Defa's auction price of the property was obviously low and had to be adjusted, and the approved taxable price after adjustment was 312 million yuan and it was calculated that Guangzhou Defa should pay 8.67 million yuan in back taxes based on the adjusted price, and at the same time add an overdue fine of 2.8 million yuan.

Guangzhou Defa appealed the above decision and applied for administrative review, but the original decision was upheld. Guangzhou Defa then filed an administrative lawsuit, and the first instance court did not support Guangzhou Defa's claim, and the second instance court upheld the original decision. However, Guangzhou Defa still refused to accept the above verdict and filed an application for retrial with SPC in 2013, and on 29 June 2015, the Supreme Court held a public hearing on the case. The case was decided by the SPC on 7 April 2017 with the following results: 1. It overturned the administrative rulings of the first and second instance; 2. It overturned the decision of the Audit Bureau to impose an overdue sales tax fine and an overdue slope protection fee fine on Defa; 3. it ordered the First Guangzhou Municipal Inspection Bureau to return the above overdue fine and pay the corresponding interest.

The "Defa Case": contentious issues

First, it is often debated whether inspectorates have the same qualifications as tax bureaus as subjects of law enforcement at all levels. According to the Tax Collection and Administration Act, tax authorities include tax inspection bureaus under the tax authorities, and further clarification on tax inspection bureaus can be found in the provisions of the Tax Collection and Administration Act. The legal status of the tax inspection bureau is clearly stipulated in the Tax Collection and Administration Law and its implementation regulations. In this case, the Guangzhou Tax Inspection Bureau has the qualification of a tax enforcement subject.

The second issue is whether the tax authorities can re-approve the taxable amount when the auction price is already available. SPC certainly confirms the power of the tax inspection department to approve the tax, and held that although there is no clear legal basis in the laws and regulations of the State Administration of Taxation on whether the tax inspection department has the power to approve the taxable amount as stipulated in the Tax Administration Law, if the tax inspection department encounters special circumstances as stipulated in the Tax Administration Law in the course of investigating and

[10] Wang Xia: *The application of the judicial standard of proof for tax authorization from the "Defa case"*, Science of Law (Journal of Northwest University of Political Science and Law), Vol.37, 2019 (4), 193.

handling the tax-related cases, such as the tax base is low, and if the tax inspection department does not have the power to approve the taxable amount, it will certainly cause difficulties in the inspection work and also reduce the quality of the investigated cases.

The third argument is whether the valid behaviour regulated by civil law excludes the approval right of the tax authorities. In this case, the auction company carried out the auction activities where only one company bid, especially where the Guangzhou Defa's property auction transaction price is obviously lower than the valuation of the property. In this case, people believe that the bidding in such an auction is not sufficient. However, under certain circumstances, the Tax Inspection Bureau may also re-approve the amount of tax payable by the taxpayer and overrule the calculation of tax payment according to the auction transaction price, which is conducive to avoiding the loss of government tax revenue. In addition, in SPC's judgment of "tax base is low and there is no justifiable reason for the judgment" generally has a strong discretionary power, SPC's reasons for the judgment shows that for the tax authorities in the statutory investigation procedures based on the professional determination, the people's court should be supported and respected,[11] unless the determination made by the tax authorities is manifestly unreasonable or manifestly an abuse of power.

Jurisprudential analysis of the judgment in the "Defa Case"

Authorized levy power and tax inspection

In the division of administrative powers, the power to authorize the collection of taxes is regarded as a type of taxing power of the tax authorities, and it is generally believed that it should be the exclusive power of the tax collection department. Thus, it seems that the exercise of the power to authorize the amount of tax payable by the tax inspection bureaus is indeed controversial in terms of overstepping the limits of their powers. According to the current practice and the business scope of the inspection bureaus at all levels, the inspection bureaus, in addition to the general work content, should also assume the responsibility of assisting and cooperating with the work of the tax collection and management departments. At this level, the Guangzhou Inspection Bureau's approval of the taxable amount of the company in this case is in accordance with the relevant provisions of the law, and SPC has also recognized this view. For the standardization and control of tax authorization, the standard of tax authorization discretion should be formulated to limit the abuse of administrative discretion by tax administrative law enforcement authorities, and then protect the legitimate rights and interests of taxpayers. Discretionary standards for tax authorization should be improved, stipulating the conditions, procedures, authority, and time limits for tax authorization. Matters of tax approval should be made public and justified, and the decision on tax approval should be discussed collectively during the tax approval process. Where there is an error in tax authorization, the relevant subjects should be held legally accountable for the action taken and publicized.[12]

Auction price and tax basis

The view of academic research generally recognises that the phrase "the tax basis is obviously low" refers to tax basis being lower than the seventy percent of the market price of similar goods. The property involved in this case was sold at auction price is 44.52 per cent of the price of similar properties in the comparable market, and thus it is reasonable to consider such as obviously low. However, an auction is a statutory mechanism for fair price formation. In this case, if the Inspectorate has doubts about the authenticity of the auction price of Defa, it should bear the burden of proof on its collusion to avoid tax.[13] In other words, the conflict between the transaction price and the tax basis in the "Defa Case" reflects the contradiction between the interests of private law and the interests of public law. It is

[11] Zhang Xuegan, Jia Xiaodong: *Legal Analysis of the Supreme People's Court's Judgment on the Arraignment of Defa,* Taxation Research, Vol.401, 2018(6), 62-63.
[12] Li Dengxi; Li Daqing: On the Discretionary Attributes and Legal Control of Tax Approval Power - A Study Based on the "Defa Case" and Article 35 of the Tax Levy Control Law, Tax and Economic Research, Vol.112, 2018(6), 87-88.
[13] Wang Xia: The application of judicial proof standard for tax approval from "Defa case", Science of Law (Journal of Northwest University of Political Science and Law), vol.37 2019(4), 193.

important to balance the interest's conflict between private law and public law, which in this case is the conflict between transaction price and tax basis. The price of private law transactions is taken into account because the transaction parties recognize the transaction price and their rights have been respected by law, and the rationality of their private transactions should be respected. However, the tax law/tax basis has public transaction rationality, which aimed at balancing the rationality of the state taxing rights and private property rights.[14] The realization of the state's interests must be based on the realization of private interests. In this case, the state's interests cannot override private interests. The company selling the property cheaply in private law is rational behavior, when there is an absence of sufficient evidence to prove that the company have sold the property cheaply for an improper purpose, the state tax right should maintain rationality, and the tax authorities should recognize the transaction price as the tax basis for calculation.

It is often a difficult point in practice to judge the terms "tax basis is obviously low and without justifiable reasons" in the process of tax approval. Legal service providers tend to interpret the existing legislation, while academics tend to analyze different cases theoretically to promote the innovation of law.[15] In terms of the practice of tax collection and management, it is not practical to require tax authorities to conduct a complete handling of all tax-related illegal cases in strict accordance with the audit procedure. This will greatly increase the cost of the tax collection and management process. What can be considered is that the tax authorities may try to adopt the method of tax assessment when dealing with tax-related illegal cases for which they do not yet have strong evidence. The lesson from this case is that tax audits require a high degree of certainty about tax-related violations and there should be a serious crackdown on them when the procedures are legal, and the evidence is sufficient. The tax collection and management mainly focus on controlling the cost of tax collection by the relevant tax authorities, and in fact pays more attention to the improvement of administrative efficiency and economic efficiency. A clear distinction should be made between the right of tax collection and management and the right of tax inspection. In addition, it is necessary to improve the system of late payment of tax based on the conditions of application of late payment of tax, the collection rate, and the starting and ending time of calculation.

Harmonizing the contradiction between civil law norms and tax administrative law norms

When civil legal norms and tax administrative legal norms are in conflict, the principle of civil legal norms will be applied in general, and tax administrative legal norms will be applied if necessary or when there are special circumstances. In the case of Defa, after the auction company conducted the auction of the entrusted property, there was no statutory subject to issue any explanation or notification on the validity of the auction. The tax authority should apply the principle of civil legal norms, recognizing that the auction price is legal as the basis for tax calculation. Only when it is necessary to safeguard the interests of the state can the tax authority, in accordance with the purpose of the law on tax administration, measure the transaction price by the strict basis for tax calculation, Without considering this case, if the tax authorities are required to determine the tax basis in accordance with the auction price, it is likely that autonomy under civil law will invalidate tax authority, and it is also likely to lead to the damage of the state's tax interests. Therefore, although the auction was found to be valid, the tax authority's power to approve the amount of tax payable cannot be completely denied, and at the same time, the tax authority's exercise of the power to approve the collection of taxes should be strictly limited.

SPC adopted the position of "fitness for purpose" that the auction is valid and legal and affirm the significance of private law to make contracts and establish prices in the "Defa Case". However, in cases where "the tax basis is obviously low and there is no justifiable reason for it", to protect the national

[14] Li Dengxi; Li Daqing: On the Discretionary Attributes and Legal Control of Tax Approval Power - A Study Based on the "Defa Case" and Article 35 of the Tax Collection and Management Law, Tax and Economic Research, Vol.112, 2018(6) 87.
[15] Zhang Xuegan, Jia Xiaodong: *Legal analysis of the Supreme People's Court's judgement on the arraignment of the case of Defa*, Taxation Research, Vol.401, 2018(6), 61.

tax interests, the tax authorities may check the substance of the transaction and authorize the taxable price.

Boundaries of the application of the substantive taxation principle

Collision and balance between the application of tax law and civil law

The tax code, whether civil or common law, is statutory law and only the legislator can write what is in the code. However, many concepts in tax law are defined by other laws, such as company law, property law, and contract law. From this point of view, tax law is dependent on other laws that are involved mainly in regulating the behavior of the market. Market operation is through piecemeal transactions, such as labour, loans, and intellectual property rights into products that form the tax base. Taking income tax as an example, the definition of income comes from transactions, while the transactions are regulated by the law of the market, and the market law in turn influent the income tax law. Therefore, the principle of freedom in civil law and the principle of equality in tax law are not contradictory, but just have different missions and they are in fact compatible with each other. For example, in the "Defa Case", there are multiple concepts in collision between both the civil law and tax law systems, such as the party's autonomy and the discretion of the tax authorities, the auction price and the market price, the auction price and the taxable price, and the legal transaction and the tax authorities of the approved power. It is an example of the conflict and integration between different legal systems in a specific transaction behavior. In other words, the case of dubious forms of transactions, it is necessary to look at the appearance of the transaction through the legal form to find the economic substance.

Civil law regulates the most basic social relations. The subject of market transaction is the subject of both civil law and tax law, and the behavior of market transaction belongs to both civil transaction behavior and tax object. Therefore, the synergy of civil law and tax law can not only make the subject of market transactions more clearly the effect of behaviour, but also more conducive to the establishment of a harmonious and stable market order.[16] In fact, the tax law norms and civil law norms of synergistic intermingling has long existed. The realization of tax law norms depends on civil law norms, such as ownership, contract, etc.; the implementation of tax law depends on civil law to establish the rights and obligations of the subject relationship. The intermingling of tax law norms with civil law norms has also resulted in tax concepts, such as tax guarantees and tax subrogation.

In general, the determination of the nature of civil transactions is based on the principle of autonomy, while the characterization of tax law transactions needs to consider the economic substance. When the form of transaction is consistent with the economic substance, tax law can directly recognize the civil law on the determination of the nature of civil transactions. However, where there is a mismatch between the form of the transaction and its economic substance, and where the party to the transaction is abusing the law or violating the principle of good faith, it is time to apply the principle of substantive taxation to protect the value of tax law. In general, tax law will not interfere with the civil transaction behavior of taxpayers, and only in the case that the subject of the transaction may abuse the right of transaction, violate the principle of honesty and credit and lack of reasonable business purposes (based on the protection of national tax interests) will the tax be approved according to the principle of substantive taxation. Therefore, it is necessary to establish a balancing mechanism between respecting the free will of taxpayers and safeguarding the interests of taxation to prevent the abuse of taxpayers' rights as well as the abuse of power of tax authorities.[17]

[16] Xiong Wei, Liu Shan: *Harmonization and Convergence: The Impact of the Implementation of the Civil Code on Tax Law*, Taxation Research, 2021(1), 20.
[17] Xiong Wei, Liu Shan: *Harmonization and convergence: the impact of the implementation of the Civil Code on tax law*, Taxation Research, 2021(1), 22.

"Substance" of substantive taxation

Whether a taxpayer satisfies the tax elements must be assessed on a case-by-case basis, depending on the taxpayer's method of tax avoidance and the nature of the transaction.[18] For example, a taxpayer avoids tax by signing two or more contracts with different contents on the same subject matter for the sale of a house, stating a price of $200,000 in one contract instead of the true transaction price of $800,000 to the State Administration of Taxation (SAT). Will it be taxed at $200,000 or $800,000? Neither. SAT will determine a taxable price according to the approved method of taxation, the same lot, and the same time of transaction. For example, if a taxpayer reduces its taxable income through transfer pricing from a related entity, the taxpayer should be taxed at the price determined by the tax bureau. Therefore, the tax authorities have the right to reassess the taxable price and calculate the taxable amount, accordingly, based on the principle of substantive taxation.[19] The significance of the substantive taxation principle lies in judging the factual relationship and determining its purpose and economic significance to prevent tax avoidance and evasion by taxpayers, or to fill the legal loopholes or impose purposive restrictions.

The introduction and implementation of the Civil Code of the People's Republic of China,[20] is a major event to be remembered in the process of the rule of law in taxation and will certainly open a new chapter in tax governance. Civil law is the private law that regulates the relationship of rights and obligations between equal civil subjects and is characterised by its emphasis on equality, equivalence, and compensation. In civil law, the rights and freedoms of the individual are paramount, as is the pursuit of fairness and justice. In most cases, concepts in tax law relate directly to concepts in civil law, such as the relationship between sale and purchase. However, some taxpayers will use some means to avoid the tax relationship under tax law, for example, by "borrowing" money from the target company to receive disguised "dividends". This difference determines that the application of tax law should not ignore the fundamental role of civil law, with attention attached to the balance and coordination between tax law and civil law.

Tax authorisation powers of the tax authorities

The principle of substantive taxation not only provides a better response to the problem of tax avoidance by taxpayers, but also compensates to some extent for the problems in the application and interpretation of the tax law arising from the overly rigid, abstract, or even vague provisions of the law. However, under China's current tax administration system, the checks and balances of power, and supervision mechanisms are not in place, and the possibility of tax authorities abusing the principle of substantive taxation is relatively high. In the "Defa Case", the SPC believed that it was risky for the tax authorities to make interpretations if they could. At present, interpretations are also mainly made by SAT. Excessive discretion would negate the form of the law and the transaction. All powers, including the power to approve taxes, tend to be expansive, and the exercise of administrative power is aimed at realising the public interest, which is uncertain. Thus, administrative power is the most expansive of all public rights. Substantive taxation in individual cases relies mainly on the judgement and examination of tax officials, and there is a conflict between the purpose of individual cases, the applicable rules and the general application of the law. Taxpayers are reluctant to file lawsuits due to the influence of the administrative relationship between the tax authorities and taxpayers. Further, the risk of the tax authorities being held accountable is relatively low, and their supervisory power is weak. It is therefore necessary to define the limits of the principle of substantive taxation. Where are the limits of civil autonomy, freedom of contract, protection of taxpayers' rights and protection of the public interest? Who interprets legal rules? What forms of law are acceptable or unacceptable? It is not only the excessive application of substantive taxation that is likely to affect the market, but the restrictions on transactions can also affect the tax base and innovation.

[18] He Xiaolu: *Substantive Taxation Principle - The Unification of Efficiency and Equity,* Southern Discourse, 2007 (6), 28.
[19] Liu Yiwen: *Difference Analysis of the Provisions on Revenue Recognition in Accounting and Tax Law*, International Taxation in China, 2002 (11), 61.
[20] *Civil Code of the People's Republic of China*. Signed in Beijing on 28 May 2020 and came into force on 1 January 2021.

Tax authorisation shall be based on the following conditions. First, the inability to make a true determination of the tax facts in certain specific cases requires a reservation in the law, thereby giving the tax authorities administrative discretion. Second, tax authorities should protect the taxpayer's right to the presumption of honesty in tax enforcement and in dealing with specific cases. Third, tax authorities should respect civil legal relationships and civil matters governed by civil law. Fourth, the provisions of tax law should be applied in determining taxable facts. The principle of substantive taxation is not a general principle, but a specific one in tax administration law. The application of the principle of substantive taxation must be based on the principle of statutory taxation and applied in a prudent and objective manner. In the practice of tax collection and administration, different tax authorities have the right to apply the principle in a flexible manner; therefore, different law enforcement agencies, and even courts, may have different understandings and interpretations of tax law provisions and different judgments on similar cases. Therefore, only by unifying the application of the principle of substantive taxation in accordance with the principle of lawful taxation and principles of fairness of taxation, can the use of public power be limited, and the legitimate rights and interests of taxpayers.

While the SPC clarified that the tax authorities have the right to apply the principle of "substantive taxation" and to keep the right within the cage of the institution, it also explained that there are necessary conditions for the application of this principle. This means that the tax authorities should respect the autonomy of private rights and that the principle of substantive taxation must be applied subject to conditions. The tax authorities must bear the burden of proof to establish the substantive relationship, and the evidence should be precise without affecting the stability of civil transactions or posing a significant threat to the rights and interests of the parties.

Conclusions

The purpose of the substance over form principle is to prevent tax avoidance and evasion by taxpayers and to promote fairness in the application of tax laws. The effect of economic substance is a matter of legal interpretation. Substantive taxation reflects the degree of integration between different legal systems in each transactional behaviour. Tax law and civil law are eclectic from the perspective of the tax law ecosystem. Tax authorities should respect the autonomy of the private rights of market participants to encourage them to participate more in competition and innovation. According to the working procedures of the National People's Congress and the Standing Committee of the National People's Congress, it is unlikely that timely interpretations or legislation can be made in a timely manner to deal with the numerous cases that have arisen in practice. While taxpayers do not have the right to interpret the law, neither do the tax authorities as law enforcement agencies and litigants. At the same time, international tax and accounting rules are converging, and all parties to international trade expect China to provide clear explanations on key issues that commonly arise in market trading activities.

These objective conditions have prompted Chinese judges to respond to the case, and judges have had to face this practical challenge and take on the task of interpreting tax law. This is also the reason why the judge in the "Defa Case" undertook to interpret the law. While China has been carrying out compliance risk management, the interaction between tax law and civil law will run through the whole process of tax legislation, tax law interpretation, and tax law enforcement and adjudication. This in turn will also expand tax law theories and practices, such as the transaction characterization theory, the substantive taxation principle, and the anti-avoidance principle.

PROPERTY LAW

Determining the nature of co-ownership in property acquired for a commercial venture

Professor Sukhninder Panesar*

Introduction

Modern property law has seen a significant development in the case law concerning the nature of co-ownership and the quantification of beneficial interests in property. The development has been primarily in the context of co-ownership and co-habitation of the domestic family home.[1] It is fair to say that the law has developed in a clear and defined way allowing the courts to determine, on any given set of facts, the nature and extent of the beneficial interests of co-owners of property in the family context. Typically, the courts have had to decide on several matters such as the nature of the co-ownership, for example, is the legal title held as joint tenants or tenants in common. In other situations, where the title is held in the sole name of one of the co-owners, the courts have had to determine whether any other person has a beneficial interest in the disputed property and the extent of that beneficial interest. In answering these questions, the courts have used the common intention constructive trust to determine the nature and extent of the rights of the co-owners of the disputed property.

More recently, the question has arisen as to how, if at all, the cases decided in the context of the family home apply to the co-ownership of business assets. In particular, do the well-defined presumptions on shared ownership in the context of domestic settings apply to commercial settings? This article considers some of the more recent cases in the context of a commercial setting, which displace traditional rules applied in a family context. It is arguable that the principles on shared ownership developed in the context of domestic family setting simply do not apply to shared ownership in the context of commercial settings. This article makes the case that the principles decided in the domestic family context are not inconsistent or in contradiction to the principles decided in commercial disputes concerning co-owned property. Those principles squarely apply to the commercial context, the difference being their application produces rather different outcomes because of the context in which the disputes have arisen. In *Jones* v *Kernott,*[2] Lord Kerr explained that context is all-important in deciding matters over disputed property.[3]

The Nature of Co-ownership and the Common Intention Constructive Trust

It is not intended to rehearse the principles governing the co-ownership of property save to say that where property is conveyed into the names of two or more individuals, the co-ownership will take the form of either a joint tenancy or a tenancy in common. In the context of a joint tenancy, no individual co-owner has a share in the property. Collectively the co-owners in a joint tenancy own the entire property. Unless the joint tenancy has been severed, on the death of one joint tenant, the property vests collectively in the remaining joint tenants. This is otherwise known as the right of survivorship, which we will see later, can be an attractive argument in the context of property held for business purposes as from a commercial perspective the remaining joint owners take control and ownership of the property. The problem with this finding in a commercial context is that it does not take into consideration the context of the business and actual intentions of the parties to the business. A tenancy in common, on the other hand, treats each co-owner as having a separate share in the co-owned property, which can

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[1] See, for example, the leading statements of the law in *Stack* v *Dowden* [2007] UKHL 17 and *Jones* v *Kernott* [2011] UKSC 53. See also academic commentary by R. Probert, "Co-habitation and Joint Ownership: The Implications of *Stack* v *Dowden"* (2007), 37 Fam. Law 924, and S. Gardner & K. Davidson QC, "The Supreme Court on Family Homes" (2012) 128 L.Q.R. 178.

[2] [2011] UKSC 53.

[3] [2011] UKSC 53, 66.

devolve to his or her successors in title on their decease. The right of survivorship does not apply in such situations.

In so far as the common intention constructive trust, when applied in the context of the co-ownership of land, allows the courts to determine the actual size of each co-owner's beneficial interest based on their actual or inferred common intentions. A common intention constructive trust is not concerned with the pattern of money contributions *per se*. Rather, the common intention constructive trust is imposed to give effect to the common intention of the parties. The quantification of a beneficial interest under a constructive trust can give a claimant significantly more than what he or she may have initially contributed to the purchase price. At the heart of the common intention, constructive trust is the element of a common intention or bargain. Typically, the common intention or bargain will have been made at the time of the acquisition of the property. However, it is possible for the common intention or bargain to have been made after the acquisition of the property. Equally important is the element of detriment or change of position. This requires the claimant to have acted upon or relied on the common intention to his detriment. The importance of the common intention constructive trust lies in the fact that, whether the title is conveyed in joint names or in the sole name of one of the co-owners, provided the requisite criteria is met; it can alter the extent of the beneficial interest in the property.

It is not possible to have a detailed discussion of the law relating to the common intention constructive trust, but for the purposes of this article the landmark decision of the House of Lords in *Lloyds Bank plc* v *Rosset*[4] detail the precise circumstances giving rise to a common intention and detrimental reliance in English law. The facts of the case involved Mr. and Mrs. Rosset who married in 1972. In 1982, Mr. Rosset became entitled to money under a trust fund, which had been created, in his favour by his grandmother. Mr. Rosset decided to use the trust money to purchase a derelict house and renovate it. The house was conveyed in the name of Mr. Rosset, this primarily as a result of a request by the trustees of the trust fund who were advancing the trust money to Mr. Rosset. Mrs. Rosset helped with the renovation works on the property and supervised the builders. Mr. Rosset then managed to acquire a mortgage on the property without telling Mrs. Rosset. When the relationship broke down, Mr. Rosset left the house without paying the mortgage instalments. Lloyds Bank attempted to enforce their security by seeking vacant possession of the land with a view to selling it. Mrs. Rosset, however, argued that she had acquired a beneficial interest in the house and, as a result, the bank was bound by her interest, on the grounds that it was an overriding interest under s. 70(1)(g) of the Land Registration Act 1925.[5] The House of Lords, however, held that Mrs. Rosset has no interest in the house.

The leading judgment in *Rosset* was delivered by Lord Bridge, who explained the grounds for the imposition of a common intention constructive trust. In the course of his judgment, Lord Bridge explained when a common intention would be found on any given set of facts. His Lordship explained that the fundamental question was whether a common intention between the parties had arisen; and that a common intention could arise in one of two situations. Firstly, the parties may well have discussed the matter as to the ownership of the disputed property, in which case they were deemed to have had an express common intention. In the absence of an express common intention, the court could infer a common intention from their conduct. As to the nature of the conduct giving rise to the trust, Lord Bridge explained that anything short of direct contributions to the purchase price would be insufficient for the finding of an implied common intention.

Decided Principles in the Context of the Family Home

In *Jones* v *Kernott* Lord Walker and Lady Hale summarised the law relating to the quantification of beneficial interests in the family law as follows. His Lordship and her Ladyship explained that "in summary, therefore, the following are the principles applicable in a case such as this, where a family

[4] [1991] 1 AC 107.

[5] Overriding interests in land bind purchasers and third parties irrespective of notice. See Schedule 3 paragraph 2 of the Land Registration Act 2002 that replaced s. 70(1)(g) of the Land Registration Act 1925.

home is bought in the joint names of a cohabiting couple who are both responsible for any mortgage, but without any express declaration of their beneficial interests.

(1) The starting point is that equity follows the law, and they are joint tenants both in law and in equity.

(2) That presumption can be displaced by showing (a) that the parties had a different common intention at the time when they acquired the home, or (b) that they later formed the common intention that their respective shares would change.

(3) Their common intention is to be deduced objectively from their conduct: 'the relevant intention of each party is the intention which was reasonably understood by the other party to be manifested by that party's words and conduct notwithstanding that he did not consciously formulate that intention in his own mind or even acted with some different intention which he did not communicate to the other party' (Lord Diplock in *Gissing* v *Gissing* [1971] AC 886, 906). Examples of the sort of evidence, which might be relevant to drawing such inferences, are given in *Stack v Dowden, a*t para. 69.

(4) In those cases where it is clear either (a) that the parties did not intend joint tenancy at the outset, or (b) that the parties had changed their original intention, but it is not possible to ascertain by direct evidence or by inference what their actual intention was as to the shares in which they would own the property, 'the answer is that each is entitled to that share which the court considers fair having regard to the whole course of dealing between them in relation to the property': Chadwick LJ in *Oxley* v *Hiscock* [2005] Fam 211, para. 69. In our judgment, 'the whole course of dealing . . . in relation to the property' should be given a broad meaning, enabling a similar range of factors to be taken into account as may be relevant to ascertaining the parties' actual intentions."[6]

There have been a series of cases post *Jones* v *Kernott* which have continued to emphasize the need to examine the whole course of dealings when quantifying a beneficial interest under a common intention constructive trust. Furthermore, these subsequent cases confirm that the decisions in *Stack* v *Dowden* and *Jones* v *Kernott* are now firmly the bedrock of the existing law on common intention constructive trusts.

Joint tenancy, tenancy in common and the right of survivorship in commercial settings

Where title to property is taken in joint names in a commercial setting, does the right of survivorship apply on the basis that the title is held as joint tenants? The matter fell to be decided in the recent decision of the Court of Appeal in *Williams* v *Williams* where the Court of Appeal had to determine whether the right of survivorship applied in the context of the joint ownership of a farm as a business venture.[7] The facts concerned the joint ownership of a farm between a father (Mr. Williams), a mother (Mrs. Williams) and a son called Dorian. Although Mr. Williams had been farming on the disputed land since the 1940's, the farm was conveyed into the joint names of himself, his wife Mrs. Williams and their son, Dorian. The facts revealed that all three of them would farm and run the land in partnership as a business. There was no express declaration in the conveyance that the land was conveyed to the three of them as beneficial joint tenants. A few years later, more land adjoining the farm was acquired by a mortgage by the three of them and was included in the assets belonging to the partnership. Indeed, the farm and the adjoining land, which had been taken in the joint names of Mr. and Mrs. Williams and Dorian, formed part of the partnership assets for accounting and tax purposes. Over the course of the years Mr. and Mrs. Williams had made several wills leaving the farm and the adjoining land to all of

[6] [2011] UKSC 53 at para.51.
[7] [2024] EWCA Civ. 42.

their three children in different shares, the last surviving will leaving the disputed lands to Dorian, his brother and sister.

In the context of the above facts, Dorian claimed that both pieces of land belonged to him absolutely. The claim was based on two grounds, Firstly; the disputed pieces of land were held jointly in a partnership and belonged to that partnership. On the basis that this was a joint ownership of the land, the right of survivorship operated to vest absolute beneficial title to the land in him alone. Secondly, that by the operation of the equitable doctrine of proprietary estoppel, Dorian had been promised that the disputed properties would be his and he had worked on the land for several years as a result of this assurance. At first instance, the trial judge found that the ownership of the disputed pieces of land were held as beneficial tenants in common. As a consequence, no right of survivorship applied, and Mr. and Mrs. Williams could transfer their interests in the disputed lands to their three children in the way that they did in their respective wills.

The grounds for the appeal were that the judge at first instance had erred in applying the law as laid down in cases such as *Jones* v *Kernott,*[8] and *Stack* v *Dowden*.[9] Judgement in the Court of Appeal was given by Nugee L.J. who started with a review of the existing law on the question of how land is owned beneficially when it is conveyed in joint names but without express declaration of trust. Nugee L.J. started with reference to the judgment of Lady Hale in *Stack* v *Dowden*[10] where her Ladyship explained that in the context of a domestic setting, where land was conveyed in the joint names of two or more persons, the presumption was that the legal and beneficial ownership was held as a joint tenancy. Her Ladyship held that this presumption could only be rebutted by either a resulting trust pointing to the pattern of financial contribution or more appropriately the application of the common intention constructive trust which allowed the court to infer a different beneficial interest based on the inferred common intention of the parties.[11] In the course of her judgment in *Stack* v *Dowden,* Lady Hale explained that there were a whole host of factors the court would like into and "in the cohabitation context. Thus, mercenary considerations may be more to the fore than they would be in marriage, but it should not be assumed that they always take pride of place over natural love and affection. At the end of the day, having taken all this into account, cases in which the joint legal owners are to be taken to have intended that their beneficial interests should be different from their legal interests will be very unusual.'[12]

Nugee L.J then reviewed the decision of the Supreme Court in *Jones* v *Kernott.*[13] This case was heavily relied by counsel for Dorian as conclusive of the fact that Dorian was entitled to the disputed land absolutely and beneficially on the basis of the right of survivorship. In *Jones* v *Kernott.* Lord Walker and Lady Hale (JJSC) were at pains to make it clear that 'the time has come to make it clear, in line with *Stack v Dowden [2007] 2 AC 432* (see also *Abbott v Abbott [2008] 1 FLR 1451*), that in the case of the purchase of a house or flat in joint names for joint occupation by a married or unmarried couple, where both are responsible for any mortgage, there is no presumption of a resulting trust arising from their having contributed to the deposit (or indeed the rest of the purchase) in unequal shares. The presumption is that the parties intended a joint tenancy both in law and in equity. But that presumption can of course be rebutted by evidence of a contrary intention, which may more readily be shown where the parties did not share their financial resources.'[14]

In the face of the overwhelming statement of the law in the decided cases to the effect that a conveyance of real or personal property in the joint names of two or more owners, the position in both law and equity is that the co-owners are beneficial joint tenants. The Court of Appeal in *Williams* v *Williams*[15] sought to address the appeal on a number of grounds including the importance of the context in which

[8] [2011] UKSC 53.
[9] [2007] 2 AC 432.
[10] [2007] 2 AC 432.
[11] [2007] 2 AC 432 at para.60.
[12] [2007] 2 AC 432 at para.69.
[13] [2011] UKSC 53.
[14] [2001] UKSC 53 at para.25.
[15] [2024] EWCA Civ. 47.

the co-ownership had arisen as well at reference to academic commentary. In relation to the question of context, the Nugee LJ explained that 'legal disputes never take place in a vacuum. They are always rooted in the real world. Where land is bought and transferred into joint names, there will always be a background to the purchase and other surrounding circumstances that shed light on the context in which the purchase took place. In addition, in this area of law "context is everything.'[16] With this in mind, his Lordship was at pains to explain that even in the decided cases in the context of a domestic setting those cases made it very clear that the outcome in a commercial setting would be rather different. His Lordship referred to a passage of the judgment of Lady Hale in *Stack* v *Dowden* where her Ladyship explained that 'another development has been the recognition in the courts that, to put it at its lowest, the interpretation to be put on the behaviour of people living together in an intimate relationship may be different from the interpretation to be put upon similar behaviour between commercial men. To put it at its highest, an outcome which might seem just in a purely commercial transaction may appear highly unjust in a transaction between husband and wife or cohabitant and cohabitant.'[17]

With the commercial context in mind, Nugee L.J. proceeded to explain that the present context in *Williams* v *Williams*[18] was very different to a situation where land had been purchased for a domestic family setting usually in the context of a marriage. Both the farm and the adjoining land were purchased for a business venture and was conveyed not just in the names of Mr. and Mrs. Williams as a married couple, but also in the name of Dorian. Although they lived on the land, the real and effective reason for the purchase was to run a business and not to establish a family home. On this basis Nugee L.J. held that 'there is a very longstanding and well-established principle that equity will usually assume that co-owners acquiring property for business purposes do not intend survivorship.'[19] To further support this finding Nugee L.J. referred to leading academic commentary, citing the view expressed in *Megarry & Wade* where the editors of the 9th edition comment at that ' Where partners acquire land as part of their partnership assets, they are presumed to hold it as beneficial tenants in common. It was an ancient rule that the right of survivorship had no place in business. The rule extends to any joint undertaking carried on with a view to profit, even if there is no formal partnership between the parties, and even if the property has not been purchased but acquired by inheritance by the persons who use it for business.'[20]

Common intention constructive trusts in commercial settings

A further question that has arisen in more recent times is whether a common intention constructive trust can be applied in a commercial setting. For example, where properties have been conveyed in the joint names of two parties for the purposes of investments, rather than for the purposes of a family home. The matter fell to be decided by the Privy Council in *Marr* v *Collie.*[21] The facts concerned the appellant and respondent who had been in a relationship for some seventeen years. During that relationship, they had acquired a number of properties in the Bahamas by way of investments, as well as a collection of art works and a boat. The properties were conveyed in their joint names. When the relationship between the parties had broken down, the question arose as to the beneficial ownership of the properties that had been conveyed in their joint names. The appellant argued that since he had provided the purchase price for properties, he was the sole beneficial owner of the properties. The trial judge in the Bahamas held that since the appellant had provided the purchase price for the properties, a presumed resulting trust arose in his favour that had not been rebutted by the respondent.[22] Further, the Supreme Court of the Bahamas held that the principle that a conveyance into the joint names of parties indicated a legal and beneficial joint tenancy only applied in the context of a domestic family setting and not to a commercial one.

[16] [2024] EWCA Civ. 47 at para. 46.
[17] [2007] 2 AC 432 at para. 42.
[18] [2024] EWCA Civ. 47.
[19] [2024] EWCA Civ. 47 at para. 58.
[20] Megarry & Wade, *The Law of Real Property* (2019) 9th edn (Sweet & Maxwell), 21-29.
[21] [2017] UKPC 17. See also, J. Roche, "Returning to Clarity and Principle: The Privy Council on *Stack* v *Dowden"* (2017) 76(3) C.L.J, 493-496.
[22] See *Laskar* v *Laskar* [2008] 1 WLR 2695.

In allowing the appeal, the Privy Council held that the principle of a common intention constructive trust was not confined to a domestic setting. Lord Kerr was clearly of the opinion that the principle in *Stack* v *Dowden*,[23] while principally applied in the context of a domestic setting also extended to properties that had been purchased for a commercial venture. In the course of his judgment, Lord Kerr referred to the judgment of Baroness Hale in *Stack* v *Dowden.*[24] Lord Kerr explained that:

> At para 56 of her opinion in *Stack* v *Dowden* [2007] 2 AC 432 Baroness Hale expressed the fundamental principle in commendably clear and simple terms: 'the starting point where there is joint legal ownership is joint beneficial ownership'. Although that statement was made in a case where the dispute between the parties was in relation to property which was a family home, there is no reason to doubt its possible applicability to property purchased by a couple in an enterprise reflecting their joint commercial, as well as their personal, commitment. When Baroness Hale said, in para 58, that, 'at least in the domestic consumer context, a conveyance into joint names indicates both legal and beneficial joint tenancy, unless and until the contrary is proved', it is clear that she did not intend that the principle should be confined exclusively to the domestic setting. Of course, when the conveyance occurs in circumstances where the parties are involved only in a personal relationship, the fact that they have elected to have the property in their joint names may make it easier to infer an intention that they should share the beneficial ownership. But that does not mean that where there is a commercial dimension to the acquisition of the property, the decision to have the legal ownership declared to be jointly shared is bereft of significance. The intention of the parties will still be a crucial factor.[25]

Having decided that the principle of a common intention constructive trust was not confined to a purely domestic setting, the Privy Council referred the case back to the Supreme Court of the Bahamas - to determine whether on the facts a common intention to share the properties 50 per cent each existed, and failing that, the matter to be decided on the principles of a resulting trust. Lord Kerr referred to the judgment of Lord Walker in *Stack* v *Dowden* where Lord Walker explained that:

> The doctrine of a resulting trust (as understood by some scholars) may still have a useful function in cases where two people have lived and worked together in what has amounted to both an emotional and a commercial partnership. The well-known Australian case of *Muschinski* v *Dodds (1985)* 160 CLR 583 is an example. The High Court of Australia differed in their reasoning, but I find the approach of Deane J, at p 623, persuasive: 'That property was acquired, in pursuance of the consensual arrangement between the parties, to be held and developed in accordance with that arrangement. The contributions which each party is entitled to have repaid to her or him were made for, or in connection with, its purchase or development. The collapse of the commercial venture and the failure of the personal relationship jointly combined to lead to a situation [*643] in which each party is entitled to insist upon realisation of the asset, repayment of her or his contribution and distribution of any surplus.[26]

Conclusions

The principles relating to the determination of the beneficial ownership where title is conveyed in joint names without express declaration are now well cemented in the common law of England and Wales. It is clear that, at least in the context of domestic family situations, a conveyance of property in the joint names of two or more persons creates a joint tenancy at law and in equity. That ownership structure is only departed from where the courts can infer a common intention amongst the co-owners that they intended a rather different quantification to their shareholding, and this is found by the application of the common intention constructive trust as discussed in this article. It has often been said that the principles that have been decided in the domestic context do not apply to a commercial setting where the property is acquired for a commercial venture. For example, post the Court of Appeal decision in *Williams* v *Williams*[27]it has often been said that those rules do not apply to a commercial setting. This article argues that one should err on the side of caution before suggesting that they do not apply and that a different set of principles govern co-ownership disputes relating to business property.

[23] [2007] UKHL 17.
[24] [2017] UKHL 17.
[25] [2018] AC 631 at para. 40.
[26] [2017] UKHL 17 at para. 32.
[27] [2024] EWCA Civ. 47.

The argument advanced here is that they squarely apply and remain good law in the context of business property, but in applying them to the facts of disputed cases such as *Williams* v *Williams* and *Marr* v *Collie*[28] the outcomes are rather different because of the importance of context and the relevant inferred intentions that are applied in that context. Unlike in domestic family settings where the context is very much one of affection between the co-owners and in general an understanding to collectively own property, the same cannot be said for a commercial setting. In a commercial setting, even where the property is purchased and co-owned for the purposes of running a business, it cannot be said that the property is co-owned for the mutual benefit of each other, rather the property is co-owned by each individual in the furtherance of the business.

[28] [2017] UKPC 17. See also, J. Roche, "Returning to Clarity and Principle: The Privy Council on *Stack* v *Dowden"* (2017) C.L.J. 76(3) at 493-496.

RECENT DEVELOPMENTS

HUMAN RIGHTS

Pre-charge disclosures, contempt of court, privacy and free speech

Dr Steve Foster*

WFZ v BBC [2023] EWHC 1618 (KB) High Court, King's Bench

Introduction

Following the Supreme Court decision in *Bloomberg LP v ZXC,*[1] a person under criminal investigation has, prior to being charged with any offence, a reasonable expectation of privacy in respect of information relating to that investigation. Thus, as a starting point at least, the revelation of those details will be a breach of an individual's expectation of privacy, as protected by the tort of misuse of private information and by Article 8 of the European Convention (as given effect to under the Human Rights Act 1998). That will be the case unless such disclosure can justified by the particular circumstances of the case, or later in the full trial by employing a public interest defence to outweigh that initial expectation of privacy.

The High Court used the principle in *Bloomberg* in a recent decision where it 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 who had not at that point been charged.[2] In that case the court used the rules of contempt of court, rather than (or in addition to) the law of misuse of private information, and found that the press's freedom to publish and the public's 'right to know' of the arrest were outweighed by the powerful public interest in the criminal justice proceedings not being impeded or prejudiced.

The rule in *Bloomberg* has excited a great deal of academic debate regarding the balance between individual privacy (and reputation) and press freedom,[3] but this commentary will focus on the use by the High Court of contempt of court law to justify the interference with the press' freedom to inform the public of ongoing criminal investigations. It will argue that whatever the merits of the principle in *Bloomberg,*[4] the use of contempt of court to stifle discussion on criminal investigations needs to be restrained in line with the intention and sprit of the Contempt of Court Act 1981. That Act was passed

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[1] [2022] UKSC 5.
[2] *WFZ v BBC* [2023] EWHC 1618 (KB)
[3] In 2002, five articles were published in the *Journal of Media Law* as part of a symposium on the case: Thomas D.C. Bennett 'Confidence, privacy, and incoherence (2002) 14(2) JML 245; Robert Craig ' Defendant anonymity until charge, the presumption of innocence and the taxonomy of misuse of private information' (2002) 14(2) JML 266; Jeevan Hariharan 'Privacy and defamation in ZXC: some concerns about coherence' (2002) 14(2) JML 238; Gavin Phillipson 'Privacy, defamation and ZXC v Bloomberg, Supreme Court confirms suspects' privacy rights: the judgment clarified, two criticisms answered' (2022) 14(2) JML 257; Nicola Moreham 'Privacy, defamation and ZXC v Bloomberg' (2022) 14(2) JML 226. See also Nicola Moreham 'Privacy, confidentiality, and reputation: a reasonable expectation of privacy while under criminal investigation' [2023] 139 LQR 360.
[4] Recently, the Northern Ireland High Court ruled that legislation that made it an offence to identify suspected sex offenders before they were charged (the ban lasting until 25 years after their death) was beyond the Assembly's powers and incompatible with Article 10 of the ECHR. The Court noted that the provision had a chilling effect on press freedom: Alan Erwin, 'Legal challenge by Belfast Telegraph successfully overturns law on sex offence suspects' anonymity', *Belfast Telegraph*, 31 May 2024.

to ensure that the tenets of free speech on matters of public interest are balanced against the administration of justice and the right to a fair trial, thus ensuring that that domestic law complied with Article 10 of the European Convention on Human Rights.[5] Thus, it will be argued that the use of contempt law in these cases risks the courts' ability to depart from the starting point of privacy expectation established by the Supreme Court in *Bloomberg*, and thus uphold the public interest in publication of police investigations into crime.[6] The article will also examine a recent decision of the European Court of Human Rights, which further protects an individual's rights not to be prejudiced by pre-trial statements, in this case made by state prosecutors.[7]

Facts and decision in *WFZ*

The claimant, a high-profile man who had been arrested on suspicion of sexual offences against several complainants but not charged, applied for an interim injunction to restrain the BBC's intended publication of his identity. The BBC wished to identify Z by name to serve as an illustration of allegations of serious sexual offences within his industry, which were not acted upon by employers. The claimant submitted that publication would constitute an invasion of his right to privacy, a contempt of court and/or an unjustified interference with his rights to a fair criminal trial as guaranteed by Article 6 of the European Convention.

Granting the application granted, the court noted that this was an unusual case in that the BBC was proposing a departure from the uniform general practice not to publicly identify individuals who had been arrested before a charging decision had been made. In that sense, courts had plenty to say retrospectively about cases in which suspects had been identified after arrest and before charge and where catastrophic consequences had flowed.[8] The Supreme Court had recently established that the starting point was that a claimant under criminal investigation, prior to being charged, had a reasonable expectation in law that he would not be identified.[9]

With respect to the claim in contempt of court, since the claimant's current status was as a person under arrest, the court should begin with the question of contempt. It was not in dispute that the claimant had not been named by an authoritative source, so the naming of him by the BBC would be a substantial game-changer and would be a major news story in its own right. His naming would cause an uncontrolled explosion of personal speculation that he would be powerless to stem.[10] Further, he would not have a fair opportunity to respond publicly and the intended publication would present the allegations in an incomplete and unbalanced manner.[11] The court then listed the likely negative effects of the BBC's intended publication on the course of justice: publicity could incite false complainants; complainants would be exposed to allegations at any future trial that they had been influenced by the publicity; the publication might discourage defence witnesses who might be unwilling to publicly associate themselves with Z; and bad character material might be put into the public domain which would be inimical to the prospects of a fair trial. These, in the court's view, were all issues associated with post-arrest, pre-charge publicity, and as the period between arrest and charge was governed by the statutory strict liability contempt provisions, fundamental respect was due to the complainants' desire and expectation that the claimant would face formal justice.[12]

In the court's view, the law of contempt was designed to ensure that (their) voices were heard without advance jeopardy, and in this case, the court was sure that naming the claimant created a substantial

[5] The 1981 Act was passed to ensure after the European Court's ruling in *Sunday Times v United Kingdom* (1979) 2 EHRR 245, considered below.
[6] Steve Foster, 'Balancing expectations of privacy in police investigations with press freedom: the Supreme Court's decision in Bloomberg v ZXC' (2022) 27(1) *Coventry Law Journal* 95.
[7] *Narbutas v Lithuania,* Application No. 14139/21, decision of the European Court of Human Rights 19 December 2023.
[8] Citing *A-G v MGN Ltd* [2011] EWHC and *Sicri v Associated Newspapers Ltd* [2020] EWHC 3541 (QB).
[9] *WFZ v BBC* [2023] EWHC 1618 (KB), [39, 45-47], citing *Bloomberg PL v ZXC*, n. 1.
[10] *WFZ v BBC* [2023] EWHC 1618 (KB), [52]
[11] *WFZ v BBC* [2023] EWHC 1618 (KB), [57].
[12] *WFZ v BBC* [2023] EWHC 1618 (KB), [55-58].

risk that the course of justice in the proceedings would be seriously impeded or prejudiced, a risk that was not capable of being mitigated.[13] Although the court had regard to Article 10 of the European Convention, the press's freedom to publish and the public's "right to know" were outweighed by the powerful public interest in criminal justice. That, in addition to the suspect's interests, was the public interest specifically protected by the Contempt of Court Act 1981.[14]

The court then held that it been necessary to decide, it would have been satisfied that the claimant would be likely to establish at trial that publication would have amounted to a misuse of his private information.[15] In its view, the dominant features of the case were the intimate sexual nature of the conduct in question and the likely destructive effect on the claimant's autonomy, reputation and prospects of justice of immense publicity at the instant stage of the criminal proceedings. Thus, the claimant had a reasonable expectation of privacy in those circumstances.[16]

Analysis

In contrast to more recent cases that have prevented the media and others from disclosing pre-trial information, the present case was decided under the law of contempt of court rather than misuse of private information, although the High Court stated that the claimant would also have been successful had the action been brought in misuse of private information. Traditionally, contempt of court has been used where an individual's right to a fair trial would be compromised by public (media) discussions of guilt or possible outcome before the trial, thereby jeopardising the right to a fair trial; although the main purpose of contempt law is to protect the administration of justice, and the public's confidence in such. In such cases, it must be shown that the media intended to interfere with proceedings, or, under s.2 of the Contempt of Court Act 1981, that the publications would create a *substantial risk* that the course of proceedings in question will be *seriously impeded or prejudiced*.[17] Further, legal proceedings begin at the point of arrest,[18] although a recent Law Commission report into contempt of court has invited consultees' views on whether criminal proceedings should continue to be considered active from the point of arrest, or be moved to the point of charge.[19] Any such change would not disturb the ruling in *Bloomberg* with respect to misuse of private information cases, but would relieve the press from threats of contempt actions.

However, contempt of court can be employed with respect to interferences with the pre-trial process, and in *Attorney-General v MGN Ltd*,[20] the court accepted that the vilification of a suspect under arrest readily fell within the protective ambit of s.2(2) of the Act, and as a potential impediment to justice. In the court's view, at the simplest level, publication of such material might deter or discourage witnesses from coming forward and providing information helpful to the suspect's defence. Accordingly, it was not an answer that a combination of the directions of the trial judge and the integrity of the jury would ensure a fair trial; the evidence at trial could be incomplete or its existence might never be known or only come to light after conviction. It is in this sense, therefore, that contempt laws are being employed in pre-arrest cases, and the media and others need to get round not only the *Bloomberg* starting point, below, but also defend a charge of contempt. This also leaves unresolved the question whether the public interest defence, contained in s. 5 of the 1981 Act,[21] is available to those who disclose such

[13] *WFZ v BBC* [2023] EWHC 1618 (KB) [70].
[14] *WFZ v BBC* [2023] EWHC 1618 (KB). [70-72]
[15] *WFZ v BBC* [2023] EWHC 1618 (KB). [75]
[16] *WFZ v BBC* [2023] EWHC 1618 (KB). [86], citing *Murray v Express Newspapers Plc* [2008] EWCA 446.
[17] *Attorney-General* v *Newsgroup Newspapers* [1987] 1 QB 1.
[18] Section 2 and Shed 1, Contempt of Court Act 1981.
[19] Law Commission, *Reforming the Law: Contempt of Court*, Consultation Paper 262, 9 July 2024, chapter 5, 5.102. However, the Commission concluded that arguably the present restriction is necessary and proportionate to protect the fair trial rights of the person who has been arrested. On that basis, therefore, it felt that it may be appropriate to continue treating criminal proceedings as active from the point of arrest (at 5.101).
[20] [2012] 1 WLR 2408.
[21] Section 5 provides that a publication made as part of a discussion in good faith of public affairs or other matters of general public interest is not to be treated as a contempt of court under the strict liability rule if the risk of impediment or prejudice to the particular legal proceedings is merely incidental to the discussion

information, and how that defence could be accommodated in the law relating to misuse of private information.

In *Bloomberg*, 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, 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 that refute or outweigh that initial expectation of privacy. *Bloomberg*, and the High Court ruling in *Cliff Richard v BBC,*[22] gave rise to several areas of concern with respect to media freedom and the public interest defence. Thus, the decisions might be unduly restrictive of press freedom and investigative journalism, clashing with many of the principles that the European Court has established in the area of public interest free speech.[23] There are also concerns that *Bloomberg* is 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.[24] The Supreme Court held that this principle only applied where a person is *actually convicted* of a criminal offence or investigated and found to have committed the alleged misconduct. The European Court has certainly allowed interference with privacy rights where that involves the reporting of public events *after* the claimant's arrest, and where there is a public interest in disclosing those details.[25] The expectation of privacy may also be lost where the information has already entered the public domain, especially where the claimant was responsible for that disclosure.[26]

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. It is, thus, getting more difficult to imagine cases where pre-trial disclosure might be justified, beyond those cases where the individuals themselves had been responsible for putting the information in the public domain. Despite that, the Northern Ireland High Court recently ruled that the Justice (Sexual Offences and Trafficking Victims) Act (Northern Ireland) 2022, which granted anonymity to sexual offence suspects, and made it a criminal offence to identify such persons before they were charged, was incompatible with press rights to freedom of expression.[27] That ruling was on the compatibility of secondary legislation with Article 10 (and the Assembly's legislative powers).[28] In this case, the court finding incompatibility because: the Assembly had failed to consider organisations such as the media throughout the legislative process; the Act contained no public interest defence available to the media; and that the media were not identified as persons who could challenge or modify the statutory ban. Thus, that judgment does little to question the *Bloomberg* ruling, or indeed resolve the conflict in our present case, but certainly clarifies the absoluteness of the rule and starting point of privacy in such cases.

Despite the arguments against pre-arrest disclosure, the Strasbourg Court is keen to protect the individual from a disproportionate and unnecessary interference with their private and reputational rights. It has, thus, imposed limitations on the press when reporting on criminal investigations as a means of upholding due process and individual privacy, including the right to be forgotten and to facilitate the process of rehabilitation.[29] It has also approved of restrictions that uphold the

[22] [2018] EWHC 1837 (Ch).
[23] *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).
[24] *Gillberg v Sweden* (2012) 34 BHRC 247.
[25] *Axel Springer v Germany* (2012) 55 EHRR 6.
[26] *RTBF v Belgium, A*pplication no. 417/15, decision of the European Court of Human Rights, 11 December 2022.
[27] *In the Matter of an Application by Mediahuis UK Limited and the Irish News Limited for Judicial Review* [2024] NIKB 45.
[28] Under s.6 of the Northern Ireland Act 1998, a provision of an Act is not law if it is outside the legislative competence of the Assembly, and where it is incompatible with ECHR rights; see s.21, Human Rights Act 1998, which states that laws passed by the assembly are subordinate legislation and thus can be struck down as incompatible with ECHR rights.
[29] *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

administration of justice, and where the media have misused confidential information in the reporting on the case.[30] In a recent judgment, in *Narbus v Lithuania*,[31] the Court found a violation of Article 8 when the President, the Minister of Health and several members of the Seimas (parliament), had made public comments implying his guilt after he had been subjected to provisional detention on suspicion of fraud. There had also been a complaint that the investigating authorities had disclosed excessive information about the case to the media, including his full name, thereby harming his reputation. Although the Court accepted that providing information to the public about the trial contributed to a debate of public interest – concerning his involvement in purchase of Covid-19 tests - the disclosure of his identity had greatly increased media interest in the case. The Court also noted that the applicant had not been a politician or in public office at the time (he had been a university lecturer, the head of a private company and a self-employed consultant). Further, his previous public role had not made him comparable to a politician or public official, to justify the disclosure of his identity.

Similarly, in domestic law the courts can protect the identities and private life of those who are facing legal proceedings, even after charge and during the proceedings. Thus, in the recent case of *JWS v JZX,*[32] the court granted an anonymity order against the defendant, a well-known public figure in the early stages – the claim form had not yet been served - of a civil claim relating to historic sexual abuse of a minor (the claimant). The court found that the defendant's Article 8 rights were clearly engaged, as the complaints were likely to cause the wider public to hold derogatory opinions of him, beyond what would generally be expected of a party to litigation. This intrusion would be more than pure embarrassment, and would imply criminality. Further, there was no justification for, or public interest in identifying him at such an early stage in proceedings when the materials raised highly significant evidential questions that would need to be addressed for the claim to be successful.[33]

As to the defendant being a well-known public figure, the court found that while it was not the court's function to protect a party from all embarrassment or stigma caused by involvement in litigation, in this case the defendant would suffer irreparable damage to reputation by identification. Further, there would be significant losses to numerous other individuals working in/associated with enterprises with which he was concerned and which were wholly unconnected with the alleged claim.[34] The Court also noted that any event, the defendant had accepted that, if he was unsuccessful in his defence, his anonymity should be waived, and at that point (if not earlier), the public would have the full benefit of the facts with which to satisfy any legitimate interest in his conduct.

The key to Convention-compliance appears to be a willingness of the domestic courts, and the legislature, to accommodate the underlying values of *both* the right to privacy and freedom of expression, and to accommodate the public interest in free speech and press freedom in appropriate cases. However, recent case law has shown a preponderance towards protecting the various privacy and fair trial rights of the individual, recognising the dangers of trial my media and the lack of public interest in unwarranted intrusions into the right of private life of those facing investigations and undergoing legal proceedings.

Conclusion

For many, the starting point established by the UK Supreme Court in *Bloomberg* attached undue weight to the fact that the media might breach the practice of confidentiality whilst reporting on ongoing criminal proceedings. Further, the use of contempt laws in the *MGN* and *WFZ* cases augments the individual's right of privacy and reputation, adding their due process rights to those already guaranteed

[30] *Bedat v Switzerland* (2016) 63 EHRR 15
[31] Application No. 14139/21), decision of the European Court of Human Rights, 19 December 2023.
[32] [2024] EWHC 1345 (KB).
[33] Further, there was medical evidence as to the likely health impact on him of a loss of privacy in the claim. Such evidence would not necessarily be sufficient reason to prefer private life over freedom of expression, the evidence of future health risk in this case was well-defined and met the applicable standard to merit interference with the usual principles of open justice.
[34] Another significant factor was the very real risk of for jigsaw identification of the vulnerable, already anonymised claimant by waiving anonymity of the defendant.

by Article 8. Thus, in most cases the media might fail in any public interest defence by breaching confidentiality and the presumption of privacy, added to their transgression of contempt laws.

Adding contempt of court laws to the claimant's armoury will make it more difficult for the media and others to justify public discussion of these matters pre-trial. The rulings in *Bloomberg* and the present case do not impose a blanket ban of the publication of pre-arrest information, but the fact that it provides the starting point of the court's balance might mean that that media investigation into suspected criminal or immoral behaviour might become the exception rather the norm. This might be advantageous in discouraging trial by media – the traditional purpose of contempt laws – but detrimental to genuine investigations into suspected criminal behaviour and public debate on matters of clear public interest.

CASE NOTES

Human rights – environmental damage – climate change – global warning – state responsibility - private and family life – effective remedies

Verien Klimaseniorinnen Schweiz v Switzerland Application No. 53600/20, decision of 9 April 2024

European Court of Human Rights

Background and facts

As global temperatures rise, the urgency to address climate change and protect those most at risk becomes paramount. The impacts of climate change are increasingly evident, disproportionately affecting vulnerable populations - heatwaves pose significant health risks and exacerbate existing conditions, particularly for the elderly. In this context, the case of *Verein KlimaSeniorinnen Schweiz v. Switzerland* highlights the pressing need for effective climate policies and the legal obligations of states to safeguard the well-being of their citizens.

The applicants were Verein KlimaSeniorinnen Schweiz, an association under Swiss law promoting effective climate protection on behalf of its 2000 members, primarily older women (one-third of whom are over 75), and four women, all members of the association and aged over 80. They complain of health problems exacerbated by heatwaves, significantly affecting their lives, living conditions, and well-being. Tragically, the eldest of the four applicants died during the proceedings before the Court.

In 2016, under section 25a of the Federal Law on Administrative Procedure, the applicants submitted a request to the Federal Council and other Swiss environmental and energy authorities, pointing to various failings in the area of climate protection and seeking actions to be taken (Realakte). They also called on the authorities to take the necessary measures to meet the 2030 goal set by the Paris climate agreement in 2015. In particular, that the Swiss state is compelled to enact legislation to reduce greenhouse gas emissions as part of the global effort to keep global temperatures increase to well below 2°C above and pursue efforts to limit it to 1.5°C above pre-industrial levels. In April 2017, the Federal Department of the Environment, Transport, Energy and Communications (DETEC) declared the request inadmissible, finding that the applicants were pursuing general-public interests and were not directly affected in terms of their rights and could not therefore be regarded as victims. They further held that the general purpose of the applicants' request was to achieve a reduction in CO2 emissions worldwide and not only in their immediate surroundings. In November 2018, the Federal Administrative Court dismissed an appeal, finding that women over 75 were not the only population group affected by climate change and that they had not shown that their rights had been affected in a different way to those of the general population. In May 2020, the Federal Supreme Court dismissed an appeal, finding that the individual applicants were not sufficiently and directly affected by the alleged failings in terms of their right to life under Article 10(1) of the Constitution (Article 2 of the European Convention: the right to life), or their right to respect for private and family life and their home (Article 8), so as to assert an interest worthy of protection within s.25a of the Federal Law on Administrative Procedure. The Federal Supreme Court left open the question whether the association had standing to lodge the appeal at all.

The applicants complained of various failures by the Swiss authorities to mitigate the effects of climate change, in particular the effect of global warming, which they claimed adversely affects their lives, living conditions and health. They complained that the Swiss Confederation had failed to fulfil its duties under the Convention to protect life effectively (Article 2), and to ensure respect for their private and family life, including their home (Article 8). In particular, they complained that the State had failed to introduce suitable legislation and to put appropriate and sufficient measures in place to attain the targets for combating climate change, in line with its international commitments. They further complained that

they had not had access to a court within the meaning of Article 6(1) of the Convention, alleging that the domestic courts had not properly responded to their requests and had given arbitrary decisions affecting their civil rights. Lastly, the applicants complained of a violation of Article 13 (right to an effective remedy), arguing that no effective domestic remedy had been available to them for the purpose of submitting their complaints under Articles 2 and 8. The President of the Court decided that in the interests of the proper administration of justice the case should be assigned to the same Grand Chamber as the applications in *Carême v. France*, Application no. 7189/21, and Duarte *Agostinho and Others v. Portugal and 32 Others*, Application No. 39371/20).

Decision of the European Court of Human Rights

Although the Court stressed that it could only deal with the issues arising from climate change within Article 19 of the Convention - to ensure the observance of the engagements undertaken by the High Contracting Parties to the Convention - it noted that inadequate State action to combat climate change exacerbated the risks of harmful consequences and subsequent threats for the enjoyment of human rights. These threats, therefore, involved compelling present-day conditions, confirmed by scientific knowledge, which the Court could not ignore in its role in the enforcement of human rights. Accordingly, the Court found that there are sufficiently reliable indications that anthropogenic climate change exists, and there is a causal relationship between the emissions of, and presence of increasing concentrations of atmospheric CO_2. Due to the capacity of CO_2 to retain heat energy, it can be a decade before the maximum effect on atmospheric chemistry is felt, thus it is a temporal, intergenerational issue for the law.

The Court accepted that such developments pose a serious current and future threat to the enjoyment of human rights guaranteed under the Convention, that States are aware of this and are capable of taking measures to address it effectively, and that the relevant risks are projected to be lower if the rise in temperature is limited to 1.5°C above pre-industrial levels, if action is taken urgently. It also noted that current global mitigation efforts are not sufficient to meet that target, and that while the legal obligations arising for States under the Convention extend to those individuals currently alive, it is clear that future generations are likely to bear an increasingly severe burden of the consequences of present failures and omissions to combat climate change.

The Court then examined the individual applicants' victim status, the applicant association's right to submit a case to a court of law (*locus standi*), and the applicability of Articles 2 and 8 of the Convention to the claim. It stated that in order to claim victim status under Article 34 in the context of complaints concerning climate change, individual applicants needed to show that they are personally and directly affected by governmental action or inaction. This depends on two key criteria: (a) high intensity of exposure of the applicant to the adverse effects of climate change, and (b) a pressing need to ensure the applicant's individual protection. The threshold for establishing victim status in climate change cases is especially high, the Convention not admitting general public-interest complaints (*actio popularis*). Having carefully considered the nature and scope of the individual applicants' complaints and the evidence submitted by them, it found that the four individual applicants did not have victim-status under Article 34 of the Convention, and, therefore, declared their complaints inadmissible.

However, as regards the standing of associations, it held that the special feature of climate change as a common concern of humankind and the need to promote intergenerational burden sharing rendered it appropriate to make allowance for recourse to legal action by associations in this context. Nevertheless, the exclusion of general public-interest complaints under the Convention requires that in order for the association to have the right to act on behalf of individuals and to lodge an application on account of the alleged failure of a State to take adequate measures, it must comply with a number of conditions. The Court added that the right of an association to act on behalf of its members or other affected individuals is not subject to a separate requirement that those on whose behalf the case has been brought would themselves meet the victim-status requirements for individuals. On the facts, the Court found that the applicant association fulfilled the relevant criteria and had the necessary standing to act on behalf of its members in this case. They had representative rights over people (including young and future generations) who could arguably claim to be subject to specific threats or adverse effects on their life, well-being and quality of life.

Turning to the substantive claims, the Court first found that in view of its finding that Article 8 applied to the applicant association's complaint, below, it would not examine the case from the angle of Article 2, and the State's duty to protect life; although the principles developed under Article 2 are to a very large extent similar to those developed under Article 8.

With respect to Article 8, the Court found that the Article encompasses a right for individuals to effective protection by the State authorities from the serious adverse effects of climate change on their lives, health, well-being and quality of life. Thus, a State's main duty is to adopt, and to apply in practice, regulations and measures capable of mitigating the existing and potentially irreversible, future effects of climate change. This obligation, in the Court's view, flows from the causal relationship between climate change and the enjoyment of Convention rights, and that its provisions must be interpreted and applied so as to guarantee practical and rights. Although it is only competent to interpret the provisions of the Convention, in line with the international commitments undertaken by the member States (the United Nations Framework Convention on Climate Change (UNFCCC) and the 2015 Paris climate agreement), and the compelling scientific advice, States need to put in place the necessary measures aimed at preventing an increase in GHG concentrations and a rise in global average temperature beyond levels capable of producing serious and irreversible adverse effects on human rights under Article 8.

This requires States to undertake measures to reduce their GHG emission levels, with a view to reaching net neutrality, in principle within the next three decades, and need to put in place relevant targets and timelines, which must form a basis for mitigation measures. As regards the applicant association's complaint in relation to Switzerland, it found that there had been critical gaps in the process of putting in place the relevant domestic regulatory framework, including a failure by the Swiss authorities to quantify, through a carbon budget or otherwise, national greenhouse gas (GHG) emissions limitations. Furthermore, Switzerland had previously failed to meet its past GHG emission reduction targets and had not acted in time and in an appropriate way to devise and implement the relevant legislation and measures in accordance with their positive obligations under the Convention. The Swiss Confederation had therefore exceeded its 'margin of appreciation' in this area and had failed to comply with its duties under Article 8.

Turning to Article 6, the Court noted that the association had victim status under that provision, whereas the individual applicants did not. The Court then accepted that the decisions of the domestic courts had sought to distinguish the issue of individual protection from general public interest complaints, as only the protection of individual rights were guaranteed under section 25a of the Federal Law. However, it found that the rejection of the applicant association's legal action amounted to an interference with their right of access to a court. The national courts had not provided convincing reasons as to why they had considered it unnecessary to examine the merits of the complaints, and had failed to take into consideration the compelling scientific evidence concerning climate change, and, thus had not taken the association's complaints seriously. Accordingly, as there had been no further legal avenues or safeguards available to the applicant association, or individual applicants/members of the association, it found that there had been a violation of Article 6. The Court emphasised the key role which domestic courts play in climate change litigation, and highlighted the importance of access to justice in this field. Thus, given the principles of shared responsibility and subsidiarity, it fell primarily to national authorities, including the courts, to ensure that Convention obligations are observed. Given its findings under Article 6, the Court did not examine the association's complaint separately under Article 13 of the Convention (duty to provide effective remedies for breach of ECHR rights).

As regards Article 46 ECHR (binding force and execution of judgments), in certain cases, the Court has indicated the type of measure that might be taken to put an end to the violation. In this case, given the complexity and the nature of the issues, it found that it could not be detailed or prescriptive as regards any measures to be implemented in order to effectively comply with the judgment. Given the discretion accorded the State in this area, it considered that the Swiss Confederation with the assistance of the Committee of Ministers was better placed to assess the specific measures to be taken. It thus left it to the Committee of Ministers to supervise the adoption of measures aimed at ensuring compliance with Convention requirements and this judgment. Under Article 41, the Court also held that Switzerland was

to pay the applicant association 80,000 euros (EUR) in respect of costs and expenses, but as no claim had been submitted for damages, no sum was awarded for pecuniary or non-pecuniary loss.

Judge Eicke expressed a partly dissenting and partly concurring opinion to the majority ruling. Thus, whilst recognising the nature or magnitude of the risks and the challenges posed by anthropogenic climate change and the urgent need to address them, in the judge's view, the Court should have focussed on a violation of Article 6 of the Convention. At a push, it could have focused on a *procedural* violation of Article 8 relating in particular to the right of access to court and of access to information necessary to enable effective public participation to ensure proper compliance with and enforcement of those policies. In the judge's view, therefore, the majority clearly 'tried to run before it could walk' and went beyond what was legitimate for the Court in ensuring 'the observance of the engagements by the High Contracting Parties in the Convention' by means of 'interpretation and application of the Convention' (Article 19).

Analysis

The decision is important in respect not only of the application of the Convention and human rights law to environmental disputes, but also to the question of legal standing required to bring such disputes, both in domestic law and under the machinery established by the European Convention on Human Rights. Climate case law has been notoriously difficult for the Court, as existing jurisprudence is largely comprised of situations in which there has been a specific environmental harm that had a direct effect on the applicant. Where these intergenerational, temporal issues are concerned, it is difficult to ascertain what each individual state will need and require within the context of its capacity to respond to climate change.

The decision on standing is both interesting and, it is argued, generous. Thus, the Grand Chamber found that the four individual applicants had failed to show that they were personally and directly affected or there was a pressing need to ensure their protection by the government's failure to take appropriate measures to mitigate the effect of climate change and global warning. Consequently, they were not victims for the purpose of Article 34, as they had not been directly and specifically affected by the state's failure to safeguard individuals from environmental harms. However, the Grand Chamber then proceeded to find that the association representing its members, including those who were found to have no standing in this case, *were* victims, as they had representative rights over people *who could arguably claim* to be subject to specific threats or adverse effects on their life, well-being and quality of life. The Court emphasising that climate change is different from previous environmental case law due to its unique characteristics, stressing that this created a pressing need for policies that involve intergenerational burden sharing, affecting both current and future generations. In this manner, the ECHR did not specifically refer to 'inter-generational equity' in the assessment of its decision, referring to it indirectly as they addressed the question of the 'intergenerational burden' created by climate change. Such a finding was not, in the Court's view, inconsistent with the finding on the status of the four individual applicants and was made possible by the Court's appreciation of the increasing risks of environmental harm, including future, and thus presently unidentifiable victims (to the exclusion of children within the definition).

The ECtHR acknowledged that future generations would bear a greater burden from present failures to combat climate change and lack a voice in current decision-making processes. This ruling from the Grand Chamber on standing and victim status is important with respect to domestic rulings on standing is such cases, as the Court found that there was a breach of Article 6 – right to access to the court as part of the right to a fair trial - by the domestic court's dismissal in the domestic proceedings. Thus, it found a breach of Article 6 in this case because the association's legal claims had been 'arbitrarily and without reason' rejected by the national courts, on the grounds that it was a general, public interest claim with no victims at the heart of the dispute. The state's argument here is that the European Court has entertained a public interest and political claim rather than dealing with breaches that effect specific victims. The Convention does not entertain general public interest claims - the *actio poularis* rule – but a flexible interpretation of representative victim claims in this context has provided the Court with jurisdiction in this case. This will also call for a more liberal application of the domestic rules on standing in cases where such representative groups are seeking to provide protection and redress on

such a fundamental issue as environmental damage, and where incorporated Convention rights are threatened.

Turning to the Court's ruling on the substantive Convention rights, as no identifiable person had been threatened with a breach of their right to life, there was no need for the Court to consider the claims under Article 2 (duty of the state to protect the life of individuals within its jurisdiction). In any case, in its view the claims made under Article 8 (respect for private life) covered the same relevant issues as those under Article 2, thus making a ruling on Article 2 unnecessary. The Court was then satisfied that on the facts there was a breach of Article 8, and the state's positive duty to safeguard the right to private and family life and home. This was because there had *been critical gaps* in the process of putting in place the relevant domestic regulatory framework, including a failure to quantify national greenhouse gas emissions, as there had been in the past. Similarly, the U.K. High Court will hear a judicial review claim concerning the UK NAP 3, where its statutory objectives have been replaced with 'risk reduction goals'.

It is also interesting to note that the Court stressed that it was only dealing with the application under the European Convention and its articles - in other words, whether there was there a breach of Article 8 - and not whether the state's actions complied with other environmental treaties, such as the Paris Agreement. Article 8 continues to be somewhat of a laboratory in climate case law, as avenues of action are explored when dealing with politically sensitive, polycentric issues under the absolute rights versus the qualified rights of the convention. The use of Article 8, within the context of intergenerational considerations, allows for a balance of interests between climate change as an issue in law, versus the difficult socio-political and financial decisions.

However, the Court then made it clear that whether the state had complied with those other treaties was relevant to the question whether the state had broken the positive duty to respect private life under the ECHR. Thus, other international obligations in this area, normally labelled as 'soft law', have become justiciable via the machinery under the European Convention, with the European Court being able to provide a full judicial hearing on the ECHR claim, whist considering the state's compliance with what in other forums would be judicially unenforceable. Equally, in appropriate cases, this allows the granting of just satisfaction to a victim, theoretically for breaching ECHR rights, but in reality for infringing its other international obligations. This provides a more effective international remedy in dealing with environmental breaches by individual states.

Conclusions

As jurisprudence on climate change is furthered, those sceptical of the ECHR and the expanding role of the Strasbourg Court, including of course, the United Kingdom, will argue that the Court has exceed its jurisdiction in this case, ruling on obligations from environmental 'soft law', involving itself with political policy, and at the same time threatening national sovereignty. This will, no doubt, increase the call for reform the ECHR, and the reform or repeal of our Human Rights Act 1998. On the other hand, the Court would normally be expected to give states a wide margin of appreciation, and it was only because the state had clearly failed to abide by their commitments, based on the clear scientific evidence, that the Court ruled against the state.

Aside from those political and diplomatic arguments, the practical questions will concentrate on the impact of this ruling on domestic challenges in this area. Indeed, in his partly dissenting opinion, Judge Eicke stated that the majority were giving (false) hope that litigation and the courts can provide 'the answer' without there being, in effect, any prospect of litigation (especially before this Court), thus accelerating the taking of the necessary measures towards the fight against anthropogenic climate change. In fact, in the judge's opinion, there was a significant risk that the new right/obligation created by the majority (alone or in combination with the much-enlarged standing rules for associations) will prove an unwelcome and unnecessary distraction for the national and international authorities, detracting attention from the on-going legislative and negotiating efforts to address the need for urgent action

That warning aside, case law in climate justice has grown year-on-year, often yielding mixed results. Cases like *Urgenda v. Kingdom of the Netherlands*, *Greenpeace & Norwegian Ungdom Duarte Agostinho and Others* (Hague Court of Appeal, 9 October 2018), have seen successful elements, but arguably they have provided symbolic victories as they all relied on provisions of the developing jurisprudence of the European Convention on Human Rights in holding their respective governments to account. Will this trend continue? Will victims (or representative groups) now bring cases against public bodies, using relevant articles of the ECHR, and what evidence of non-compliance will be necessary for the courts to interfere? Further, will, or should, the courts involve themselves in scientific and policy detail in making any judgment, and what form of compensation, if any, will be granted? All these questions will soon need to be addressed by government, private bodies whose practice imposes an environmental hazard, support groups and individuals affected by such hazards, and lawyers and judges.

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Trade unions – Trade union activities - Industrial action- Detriment – Right of Association - Declarations of incompatibility

Secretary of State for Business and Trade v Mercer [2024] UKSC 12

Supreme Court

Background and facts

Mercer had been employed as a support worker by a care services provider, was a workplace representative for the trade union, UNISON, and had been involved in planning lawful strike action. During the strike action, she was suspended, and although she received normal pay during her suspension, she received nothing for the overtime she would have worked in that period. She brought an action under s.146 of the Trade Union and Labour Relations (Consolidation) Act 1992. The employment tribunal found that s.146 of the Act did not protect workers from detriment short of dismissal whilst participating in lawful industrial action as a member of an independent trade union, and thus dismissed the claim.

On appeal to the Employment Appeal Tribunal ([2021] IRLR 1958], it was held that the phrase 'activities of an independent trade union' in s.146 could include industrial action. Although on the ordinary principles of construction, s.146 excluded industrial action, using s.3 of the Human Rights Act 1998, the provision could be read down to comply with the right to freedom of association in Article 11 of the Convention. Thus, it was not going against the 'grain' of the 1992 Act to achieve a conforming interpretation of s.146 by adding a new sub-paragraph (c) to the definition of 'appropriate time' in s.146(2), to read 'a time within working hours when he is taking part in industrial action'. That would not involve judicial legislation, but would simply give effect to a clear and unambiguous obligation under Article 11 to ensure that employees were not deterred, by the imposition of detriments, from exercising their right to participate in strike action

That decision was overruled the Court of Appeal ([2022] EWCA Civ. 379), which held that as a matter of legislative design lawful industrial action was not included within the phrase 'activities of an independent trade union', and to interpret that provision compatibly with the ECHR would result in impermissible judicial legislation. In the Court's view, when s.146 was viewed as part of the Act as a whole, industrial action was not included within the phrase. Although legislation should be read down to give an ECHR-compliant meaning wherever possible, that was subject to the modified meaning being consistent with the fundamental features of the relevant legislation. In this case a number of policy

questions were engaged in this case: whether protection against detriment should be given to all industrial action or only to official industrial action called by the trade union; and whether Article 11 required protection to be given against every form of detriment, at any rate in a private sector case, in response to industrial action. In such a highly sensitive area, those issues of policy were best left to Parliament, and adding a sub-clause would result in impermissible judicial legislation rather than interpretation as sanctioned under the HRA. The Court of Appeal also refused to grant a declaration of incompatibility, under s. 4 of the HRA, as in this case there was a lacuna in the domestic law generally rather than a specific statutory provision that was incompatible. Thus, the extent of the incompatibility was unclear and the legislative choices were far from being binary questions.

Decision of the Supreme Court

Allowing Mercer's appeal in part, the Supreme Court first considered the compliance of the 1992 Act with Article 11 ECHR and relevant case law of the European Court of Human Rights. The Court noted that the protection afforded by s.146 was limited to activities that were outside working hours, whereas industrial action would normally be carried out during working hours if it were to have the desired effect. Further, separate protection against *dismissal* for participating in the activities of a trade union at an appropriate time was contained in s.152. By contrast, employees who participated in lawful industrial action had limited protection against dismissal under ss.237-238 of the Act. Thus, to interpret s.152 as including protection for participation in lawful industrial action in working hours would mean that an employee dismissed for engaging in such industrial action at an appropriate time could bring a claim for unfair dismissal under s.152, making redundant the carefully constructed regime that gave more limited protection for dismissal in s.237 to s.238A. It followed, therefore, that s.146 did not provide protection against detriment short of dismissal for taking part in or organising industrial action. However, under Article 11, the UK legislative scheme had to strike a fair balance between the competing interests of employers and workers, and domestic law did not provide any protection for a worker faced with a disciplinary sanction short of dismissal for a lawful strike. Employees were therefore unable to strike without exposing themselves to detrimental treatment, and that placed the UK in breach of its obligations under Article 11.

Moving to the question of interpretation and remedies, the Court stated that s.3 of the 1998 Act did not enable the court to change the substance of a provision from one where it said one thing into one that said the opposite. In the instant case, there was no reading of s.146 that would avoid having to make a series of policy choices with potentially far-reaching practical ramifications. That, in the Court's view, would amount to impermissible judicial legislation rather than interpretation, and would contradict a fundamental feature of the legislative scheme.

The Court then considered the granting of a declaration in incompatibility under s.4 of the Act. Noting that the Court of Appeal refused to make a declaration because the incompatibility arose from a gap in domestic law, rather than from a specific provision in primary legislation, the Supreme Court stressed that s.146 was the only route that could be available to the appellant to vindicate her Article 11 rights in domestic law, but that route was blocked by the interpretation given to that section. That, in the Court's view, was what was inherently objectionable in the terms of s.146, meaning that it was incompatible with Article 11. Courts had a discretion as to whether to make a declaration of incompatibility, and there might be cases where it was not appropriate to make a declaration, although this was not such a case. Such policy choices as might be required in determining how to strike a fair balance between the competing interests at stake were matters for Parliament to address, and it was for Parliament to choose whether to legislate in this area, and if so, how. However, that was not a basis for refusing to make a declaration. The Supreme Court thus made a declaration under s.4 that s.146 was incompatible with Article 11, insofar as it failed to provide any protection against sanctions short of dismissal, intended to deter or penalise trade union members from taking part in lawful strike action organised by their trade union.

Analysis

The judicial challenges to the law and its application – from the employment tribunal proceedings, through to the appeals to the Employment Appeal Tribunal, the Court of Appeal and to the Supreme Court – have raised a number of issues surrounding employment law, trade union law and domestic and European Human Rights Law. The decision of the Supreme Court is, therefore, important in terms of employees' rights, the application of trade union law to employment protection rights, and the methods by which the domestic courts can ensure that domestic law is consistent with the European Convention and its case law. The case has also raised issues of statutory interpretation and judicial review, including the scope of the courts' power to interpret primary legislation in line with the Convention (s.3 Human Rights Act 1998 (HRA)), and its power to declare primary legislation incompatible with Convention rights (s.4 HRA).

The constitutional issues

The finding on interpretation and s.3 of the Human Rights Act 1998 approves of the Court of Appeal's traditional stance in this area: that interpretation must not amount to judicial legislation or destroy the fundamental meaning and purpose of the legislation. Thus, it was clear that the 1992 Act intended to give limited protection to employees on strike, and to interpret s.146 to include strike action as a trade union activity would have gone against the grain of the whole legislative scheme. The EATs approach in this case could be considered convoluted and clearly contrary to the intention of Parliament, as evidenced in the whole Act, and inspired by an intention to avoid an incompatibility with an ECHR right. Although the courts have taken a bold approach to interpretation, including adding words to an Act of Parliament (*R v A (Sexual History)* [2002] 1 AC 45), they cannot radically alter the statute (*Re S and W* [2002] 2 AC 291), and in this case adding the required protection would have done that.

Further, the desire to hand over the policy issues regarding the application and scope of compatible legislation to Parliament is another reason not to use s.3 in an overly generous manner. If there are still issues regarding scope and compatibility, even when it is technically possible to remove the incompatibility, then that is best left to Parliament (*Bellinger v Bellinger* [2003] 2 AC 467). However, in the Supreme Court's view, that was no reason for the Court of Appeal not to grant a declaration of incompatibility under s.4 in this case, as those policy questions could be addressed and resolved by Parliament once the declaration was made. That process avoids judicial legislation, but provides a suitable remedy to victims so as to address incompatible legislation. The Supreme Court then used its discretion to grant a declaration, overturning the Court of Appeal's reasoning that the statute merely evidenced a gap in statutory protection, rather than including a specifically incompatible provision. In the Court's view, the traditional interpretation of s.146 resulted in the lack of protection offered by Article 11, and thus that section blocked compatibility. The gaps, of course, will be resolved by the way in which Parliament responds to the declaration of incompatibility.

The decision and trade union rights

As was stated in the judgment by Lady Simler, there is no express statutory (or other) protection in domestic law against action short of dismissal for employees, or indeed, workers who participate in lawful strike action. As alluded to, the courts have traditionally been reluctant to support instances of industrial action (*Taff Vale Railway Co v Amalgamated Society of Railway Servants* 1901] AC 426, HL, *Quinn v Leathem* [1901] AC 495, HL), and there has been a degree of legislative hostility regarding industrial action in recent years (see the Strikes (Minimum Service Levels) Act 2023). The overall approach was reflected in the previous appellate decision in this case (see [2022] EWCA Civ 379, [2022] ICR 1034). Instructively, within the instant case, Lady Simler recounted the statutory matrix of the right in question by way of outlining its parameters and numerous qualifications. Regarding the crossover with human rights, Article 11 was regarded as the *lex specialis* as regards Trade Union activity. The European Court of Human Rights has been more accommodating as regards the 'right to strike' (*Enerji Yapi-Yol Sen v Turkey* (Application No.68959/01), ECtHR), with recent cases such as *Danilenkov and others v Russia,* (Application No.67336/01, ECtHR) indicating a more liberal approach in respect of detriment.

Significantly, in the instant case, the action taken by the respondent was regarded as being protected action being taken in relation to an official industrial action. In spite of arguments raised including an observation of the potential 'chilling effect' of detriment short of dismissal regarding industrial action, s.146 was held to offer no such protection in and of itself, and the state was held to be under no positive obligation to protect employees universally and in all conceivable circumstances from a range of detriments to dissuade them from taking lawful strike action. It was accepted that such a position should be viewed in the context of the range of other protections available to employees, both in legislation – such as relevant provisions within the TULRCA 1992 and the Employment Relations Act 1999 (Blacklist) Regulations 2010 (SI 2010/493) – and at common law (the implied term of mutual trust and confidence), in addition to relevant ACAS provisions. Crucially, however, these remedies were not regarded as adequate in the context of this particular case, and the chilling effect of the absence of any specific protection regarding detriments was regarded as unacceptable. Thus, the limited protection offered by s.146 meant that the United Kingdom was in breach of its Article 11 obligations and a declaration of incompatibility was made by the Court.

The absence of such specific protections, in the Supreme Courts view, meant that a 'fair balance' between the interests of labour and industry was effectively impossible. By not providing such specific protections against the elusively defined 'detriment' (this term has been defined broadly, see *British Airways Engine Overhaul Ltd v* Francis 1981 ICR 278, EAT, *Murphy v Blackpool Grand Theatre Trust* Ltd ET Case No.27062/81, *Robb v Leon Motor Services Ltd* 1978 ICR 506, EAT and *Edgoose v Norbert Dentressangle Ltd* ET Case No.2601906/08), the state had failed in its obligations to uphold human rights protections in its role as the regulator of private relationships.

Although falling short of declaring an 'absolute' right to strike – which is, in any case, unlikely to happen in the foreseeable future – this case is a significant and an unprecedented development in respect of industrial action specifically, and labour law generally. It marks the first time a declaration of incompatibility has been made regarding a piece of employment legislation. It will further be of great interest to labour lawyers and trade union members alike to observe the manner in which the declaration is to be resolved in the wake of the upcoming general election.

Conclusion

The decision, and indeed the entire legal challenges in all courts, raised a number of constitutional issues regarding the interpretation and compatibility of UK legislation with the Human Rights Act 1998. Whist the Court of Appeal showed a cautious approach to interpretation under s.3, the Supreme Court took a bolder approach to declaring the legislation incompatible with Article 11 of the ECHR. That allows Parliament the opportunity to confront the incompatibility of the Act with ECHR rights, or wait for a challenge and decision of the Strasbourg Court on this matter. What alternative is taken will depend on the government's views on whether the European Court would agree with the Supreme Court, or offer discretion to the UK on this matter.

Dr Alexander Simmonds, Lecturer in Law, Dundee University and Dr Steve Foster, Associate Professor in Law, Coventry University

Sentencing– Murder – Minimum term – Young offenders

R v Jenkinson and Ratcliffe (unreported)

Manchester Crown Court, 2 February 2024

The facts

Brianna Ghey was 16 years' old when she was killed by Jenkinson and Ratcliffe, both aged 15 at the time. Brianna was a vulnerable young person, who suffered from anxiety and was nervous about going out. Jenkinson had befriended Brianna and suggested that they meet at a local park. When she arrived, Brianna was attacked by Jenkinson and Ratcliffe using a knife that Ratcliffe had carried with him. The injuries inflicted were extensive, including numerous deep stab wounds to the head, neck, chest and back, indicating a sustained and violent attack.

Despite attempts made to cover their tracks, Jenkinson and Ratcliffe were arrested shortly after the murder. The knife used to kill Brianna was found in Ratcliffe's bedroom along with his blood-soaked clothes. Jenkinson had developed a deep desire to kill and had co-opted Ratcliffe for his help. Jenkinson kept a list of people she wanted to kill and had previously planned how she would kill Brianna by poisoning, but Brianna's own plans changed meaning she did not attend on the originally planned day. Jenkinson had formed a separate plan to kill a boy by luring him into the local park and stabbing him. When he did not respond to her messages, she used that plan against Brianna instead.

Ratcliffe had not shown the same interest in killing as Jenkinson had. He had initially tried to move her thinking away from killing, but as her fantasies developed into real plans to kill, Ratcliffe supported and encouraged her. The judge rejected any suggestion that Ratcliffe was under Jenkinson's control, but she accepted that he was not the driving force behind the plan to kill. There was insufficient evidence to find that Ratcliffe was personally motivated by any sadistic desire, nevertheless, he was aware of Jenkinson's own desires, which he set out to encourage and support. He was also motivated in part by hostility toward Brianna because she was transgender.

The decision and sentence

Beyond determining that Ratcliffe had inflicted some of the wounds, the sentencing judge could not be sure precisely who did what. Nevertheless, the judge was satisfied that murdering Brianna was a joint plan that the offenders had carried out together. Both were sentenced on the basis that they had each played a full part in killing Brianna, and that they had intended to kill her. Murder carries a mandatory life sentence, but it is for the sentencing court to determine what proportion of the life sentence the offender will spend in custody – the 'minimum term'. Schedule 21 of the Sentencing Act 2020 provides a statutory framework that the court must have regard to when determining the minimum term. The judge concluded that this was a murder of particularly high seriousness which, given the age of the offenders, led to a starting point of 20 years.

Having determined the appropriate starting point, the judge moved to identify the relevant aggravating and mitigating factors that have the effect of increasing or reducing the minimum term set against the starting point. The aggravating factors were considerable. The offence was planned and premeditated, with more general plans made to kill other people. A previous attempt had been made to kill Brianna a few weeks earlier. Brianna was a vulnerable victim and was therefore an easy target. She was befriended by Jenkinson who in turn abused Brianna's trust. Ratcliffe was aware that Jenkinson was preying on Brianna in this way, so his offence was similarly aggravated, albeit to a lesser degree. Both Jenkinson and Ratcliffe had entered not guilty pleas. Jenkinson in particular demonstrated no remorse for the killing.

In terms of mitigation, both were said to have been of good previous character, although this must be viewed in the context of the very serious offending. Both suffer their own vulnerability, and are less mature than others their own age. Jenkinson is diagnosed with conduct-dissocial disorder, one of the features of which is having no empathy toward others. As such, she did not have the 'mental brake' that most people have to stop them from wanting to harm others. That said, this diagnosis offered limited mitigation as while her conduct may not have *felt* wrong, the court was satisfied that Jenkinson *knew* it was wrong to act as she did. Ratcliffe had a little more by way of mitigation. He had been described as 'severely vulnerable', with mental functioning similar to that of a much younger child.

In weighing the aggravating and mitigating factors, the court concluded that Jenkinson's aggravating factors were significant and would have led to a substantial uplift in sentence but for the mitigation, particularly that factor relating to maturity and mental disorder. The uplift would therefore be moderated, leading to a minimum term of 22 years. In Ratcliffe's case, the court concluded that the aggravating factors were not quite as high as in Jenkinson's case, and he benefitted from more compelling mitigation. The effect was that his aggravating and mitigating factors cancelled each other out, resulting in a minimum term of 20 years.

Commentary

Schedule 21 of the Sentencing Act 2020 provides a general framework for sentencing offenders convicted of murder. First, the court should identify the most appropriate starting point from those provided within the Schedule, having regard for the seriousness of the offence and the age of the offender. The court must then consider any relevant aggravating and mitigating factors that have not been taken into account in determining the starting point, to determine the minimum term of imprisonment. The Court of Appeal has repeatedly made clear that, notwithstanding this statutory framework, the sentencing decision remains one for the judge (see, for example, *R v Peters* [2005] EWCA Crim 605).

A significant amendment to Schedule 21 was made by s.127 of the Police, Crime, Sentencing and Courts Act 2022 relating specifically to young offenders. A single 12-year starting point, which had previously applied to all offenders aged under 18 at the time of the murder, was replaced with nine new starting points ranging from eight to 27 years, which provide greater differentiation of the starting point depending on the offender's age and the relative seriousness of the offence.

In terms of determining the starting point, the judge had two realistic options available to her. If the seriousness of the offence was deemed to be particularly high, the appropriate starting point under Para 3 of Sch. 21 for a 15 or 16-year-old offender is 20 years (this compares with a starting point of 30 years for the offences of the same seriousness committed by adult offenders). If the court did not believe that the features of the offence fell within this category, the judge would have applied a 17-year starting point under Para 4 of the Schedule (compares with a starting point of 25 years for adults) as the offence involved use of a knife. Paragraph 3 of the Schedule establishes that a case will fall within the higher category if the seriousness of the offence is 'particularly high'. It gives examples of cases that will normally fall within this category, of which two are relevant here: 'a murder involving sadistic conduct', and 'a murder that is aggravated by hostility related to transgender identity'. These descriptors do not compel the judge to impose the higher starting point, but they nevertheless provide useful guidance to judges as to what constitutes a murder of 'particularly high seriousness'. There is some conflation within the judgment of 'sadistic motives' (which are not themselves sufficient to bring a case within Para 3) and 'sadistic conduct' (which could bring a case within Para 3). The judge appears to rely on Jenkinson's deep desire to kill as evidence of a sadistic motive. Her later admission that she enjoyed the killing was also used as evidence of sadistic conduct, despite previous cases finding that deriving pleasure from an attack is not enough to constitute sadistic conduct for the purposes of Para 3 (*R v Bonellie and Others* [2008] EWCA Crim 1417). The challenge here is that the conflation of sadistic motive with sadistic conduct does not assist the court in applying the higher starting point to Ratcliffe, who did not have the same motive. Rather, the court concluded that the higher starting point should apply to Ratcliffe on two grounds. First, while he did not share Jenkinson's motive, he knew what she wanted to do and why; he understood her desire to see Brianna suffer. This has the effect of transposing

Jenkinson's motive onto Ratcliffe. Second, the court found that Ratcliffe was motivated *in part* by hostility toward Brianna because she was transgender.

Inclusion of the word 'normally' within Para 3 does not preclude the possibility that other cases may reach the necessary level of seriousness required for the higher starting point. This equally also works in reverse: a case that would 'normally' attract a particular starting point may not reach the required level of seriousness because of its own particular facts. The brutality of the murder in this case, along with the extent of the injuries sustained, are likely of themselves to justify the higher starting point. Had the judge not reached the conclusion that the higher starting point applies, she could have treated Jenkinson's sadistic motives and Ratcliffe's transphobic comments as aggravating factors, which could then have resulted in the same minimum term, albeit derived from a lower starting point.

Having identified the appropriate starting point, the court proceeded to consider the aggravating and mitigating factors. In doing so, the court is under a duty to avoid double counting any factors that were considered in setting the starting point (Sch.21, Para 7 Sentencing Act 2020). Consideration of the aggravating and mitigating factors may result in a minimum term of any length, regardless of the starting point used (Sch. 21, Para 8), and the Court of Appeal has in the past imposed minimum terms which bear little correlation with the relevant starting point. For example, in *R v Inglis* [2010] EWCA Crim 2637, where the Court of Appeal imposed a five-year minimum term compared with a 15-year starting point to give sufficient weighting to the mitigating factors present. The context of each aggravating and mitigating factor will vary. It is not a case of listing the aggravating and mitigating factors and deciding which is longer. A short list of mitigating factors may outweigh a long list of aggravating factors, as was the case here with Ratcliffe whose maturity level was significantly lower than would ordinarily be the case in a person of his age.

Conclusion

The judgment provides little insight into how the court assessed and weighed the various aggravating and mitigating factors. However, the imposition of a 20-year minimum term for Ratcliffe, which was two years less than that for Jenkinson, was said to reflect the fact that Ratcliffe's aggravating factors were not 'quite as high' as in Jenkinson's case, while at the same time Ratcliffe benefitted from slightly more compelling mitigation in the form of his reduced maturity. However, it appears that reduced maturity does not mean that the offender is treated as if they are younger. At most, Ratcliffe's reduced maturity led to a two-year reduction in sentence. Had Ratcliffe been 14 years old at the time of the murder, the appropriate starting point would have been 15 years (Sch. 21 Para 5A (2) Sentencing Act 2020), five years less than that which was applied.

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Right to die – assisted suicide – private life – freedom from discrimination – margin of appreciation

Karsai v Hungary, Application No. 32312/23, decision of the European Court of Human Rights, 13 June 2014

Introduction

In *Karsai v Hungary*, Application No. 32312/23, the European Court of Human Rights has recently delivered a judgment with respect to the compatibility of Hungarian law with the European Convention on Human Rights in this area. The Court had the opportunity to rule that the state has a duty to allow assisted dying and thus offer individuals the right to a dignified death, but followed previous case law (*Pretty v United Kingdom* (2002) 32 EHRR 1), allowing the state a margin of appreciation, and dismissed the applicant's claim

The facts and decision

The applicant is affected with a type of motor neurone disease - amyotrophic lateral sclerosis (ALS) and claims a right to a self-determined death. He is in an advanced stage of ALS, a progressive neurodegenerative disease with no known cure, which consists in the gradual loss of motor neurone function, and hence of the voluntary control of muscles. It was accepted by the Court that at the end-stage of ALS, most muscles responsible for volitional motion are paralysed, and that speech, unaided breathing and swallowing becomes very difficult and ultimately impossible. It was also accepted that sensory and cognitive abilities may stay largely intact, and that patients may maintain their intellectual functions and consciousness throughout the progression of the disease. The applicant first experienced the symptoms of ALS in July 2021, and is no longer able to walk and take care of himself without assistance. He maintained before the Court that within a year from now, he will be completely paralysed and will not be able to communicate; that he will be "imprisoned in his own body without any prospect of release apart from death"; and that his existence will consist almost exclusively of pain and suffering. Thus, he would like to end or at least to shorten that phase of his disease through some form of assisted dying before he reaches a state that he considers unbearable. However, under Hungarian law, it is a criminal offence to help somebody to end his/her own life, including when that person is of sound mind but has an incurable degenerative disease and does not wish to live any longer (s.162 of Act C of 2012 on the Criminal Code).

In his application, he maintains that, even if he were to die of assisted suicide or euthanasia outside Hungary, the relevant provision of the Criminal Code would apply and anyone assisting him in ending his life could face criminal charges in Hungary. He argues that the lack of any prospect of ending his life on his own terms is having a detrimental effect on his mental state and his ability to cope with the challenges of the disease. He also complains that there is a blanket and extraterritorial ban on assisted suicide, and that the lack of any possibility for him to decide how to die is disproportionate. Thus, he argues that Hungary is under an obligation to provide a possibility for him to end his life on his own terms with dignity. Relying on Articles 3, 8 and 9, and the same provisions in conjunction with Article 14 of the Convention, he argues that the choice to die is open to those who by nature of their disease can terminate or shorten their life by declining life-prolonging treatment, but not to those who – like himself – do not require such treatment. In his opinion, that makes him a victim of discrimination under Article 14. Using Article 8 ECHR, K submitted that his case differed from *Pretty* because it also concerned the extraterritorial effect of the Hungarian ban on assisting suicide; that prosecution of the offence of assistance in suicide was mandatory; and that the legal and social context in Europe had changed since the Court had adopted that judgment. Thus, there had been growing trend towards legalisation of physician-assisted dying (*Haas v Switzerland* (Application No. 31322/07) and *Mortier v Belgium* (Application No. 78017/17).

The Court accepted that Article 2 ECHR (the right to life) did not prevent national authorities from allowing or providing physician-assisted dying, so long as appropriate and sufficient safeguards were in place to prevent abuse, but that it was for the national authorities to assess whether assisted dying could be provided within their jurisdiction in compliance with the ECHR. K's request involved intertwining duties, in other words, both "negative and positive obligations" including provision of access to medical intervention, such as access to life-ending drugs. This raised sensitive moral, ethical and policy issues in respect of which the national authorities were better placed to assess priorities, use of resources and social needs, although it acknowledged that there was a growing trend towards decriminalisation of medically assisted suicide, especially with regard to patients with incurable diseases. Although there had been important legal developments in favour of granting some form of access to assisted dying in certain European countries, the majority of member States continued to prohibit and prosecute assisted suicide, including by physicians. Further, the Council of Europe's Oviedo Convention provided no basis for concluding that the member States were advised, let alone required, to provide access to such assistance. Thus, Hungary should be granted considerable discretion in deciding whether to allow it in Hungary, the question was whether Hungary was overstepping that discretion and whether a fair balance had been struck between his desire to end his life through assistance, and the legitimate aims behind the legislation in question.

The Court noted that the wider social implications and the risks of abuse and error entailed in the provision of such assistance weighed heavily in how to accommodate the interests of those who wished to be helped to die. The Court had been referred to the challenges in ensuring that a patient's decision to use assistance was genuine, free from any external influence and not underpinned by concerns, which should be effectively addressed by other means, including the possibility that the patient might change his or her mind as the disease progressed. Effective communication with a patient required special skills, time and significant commitment on the part of medical and other professionals, as did the provision of adequate palliative care, and this fell within the national authorities' discretion. The Court also considered that high-quality palliative care, including access to effective pain management, was essential to ensuring a dignified end of life, and that the available options in palliative care, including the use of palliative sedation, were generally able to provide relief to patients in the applicant's situation and allow them to die peacefully. K had not contested the adequacy of the palliative care available to him, nor had he argued that he would be unable to refuse breathing assistance when the time came. Although he maintained that that course of action would only become available to him after he had been "locked inside his body" for a prolonged period of time and exposed to unbearable "existential suffering" while fully conscious, it felt that a personal preference to forego otherwise appropriate and available procedures could not in itself require the provision of alternative solutions, let alone to legalise assisted dying.

The Court did not accept that 'existential suffering' could lend itself to an objective assessment and noted that it was not for it to determine the acceptable level of risk involved in assisted dying in such circumstances. Although such a heightened state of vulnerability warranted a fundamentally humane approach to the management of the situation, including palliative care guided by compassion and high medical standards, K had not alleged that such care would be unavailable to him. The criminal prohibition on assisted suicide was intended to deter life-endangering acts and to protect interests arising from considerations of a moral and ethical nature, and there was nothing unusual or excessive in the fact that the State's prohibition applied also to suicides carried out abroad. Thus, issues relating to the coherency of the national-law system and the collective moral and ethical considerations underpinning the prohibition of assisted suicide provided reasonable grounds for the Hungarian authorities' reluctance to introduce the type of exception sought by the applicant. Further, mitigating factors could be taken into account and where justified, the sentence imposed could be lower than the statutory minimum. Therefore, there had been no violation of Article 8 of the Convention. However, in the Court's view, the Convention had to be interpreted and applied in the light of the present day. The need for appropriate legal measures should therefore be kept under review, regarding the developments in European societies and in the international standards on medical ethics in this sensitive domain.

K claimed a breach of Article 14 in conjunction with Article 8 because some patients could refuse life—saving treatment and thus choose to die, whereas that was not available to hum. However, the Court noted that the right to refuse or request discontinuation of medical treatment in end-of life situations was inherently connected to the right to free and informed consent to medical intervention, widely recognised and endorsed by the medical profession, whereas assisted dying was not. The Court therefore considered that the alleged difference in treatment of the two groups was objectively and reasonably justified and that there had been no violation of Article 14 taken in conjunction with Article 8 of the Convention.

The Court also declared his claims under Articles 3 (freedom from inhuman and degrading treatment) and 9 (freedom of thought and conscience), inadmissible as manifestly ill founded; following the judgment made by the Grand Chamber in *Pretty*. Judge Wojtyczek expressed a partly concurring, partly dissenting opinion, arguing that Article 2 of the ECHR, protecting the right to life, precluded any argument under the ECHR for the right to assisted dying. Judge Felici, on the other hand, dissented by relying on an interpretation of Article 8 that looks at the individual circumstances of the case, rather than rejecting the idea of imposing a positive obligation to respect self-determination through the doctrine of the margin of appreciation. He also felt that there was a breach of Article 14, as both sets of patients are, in effect, receiving end of life treatment. In his view, the ability to choose to end one's life should be based an assessment of the illness and suffering of the patient, not the type of treatment that the illness requires

Analysis

As expected, the Court adopted a cautious approach, maintaining the states' discretion in formulating their own laws in this area. The Court was particularly influenced by the fact that so few states in the Council of Europe allow euthanasia and assisted suicide, and that there is little consensus on this issue. Nevertheless, the Court stressed that several developments have taken place since *Pretty*, and that Hungary should keep the matter under review. A similar warning was issued to the UK government in respect of its treatment of transsexuals, until the Court established a breach of Articles 8 and 14 in *Goodwin v United Kingdom* ((2002) 38 EHRR 18). That leaves open the possibility that the Court may change its approach in the future, and insist on some form of assisted dying in appropriate cases. The Court also refused to accept that Article 9 is engaged in these claims, upholding the finding in *Pretty*. Had it done so, it would then have had to considerer whether that article would enhance the claim beyond the claim under Article 8 (and 14), or whether it would offer a similarly wide margin of appreciation to the state in securing the right to life and the prevention of abuse in terminating life.

A central feature of the applicant's case was that Hungarian law has an extraterritorial effect, making it unlawful to assist suicide in another state that allows assisted dying. If the Court had found Hungarian law to be arbitrary, it may have found a breach of the applicant's Convention rights, but the Court saw nothing unusual in this aspect of the domestic law. This was despite the argument that the law was embedded in statute that admitted on no exceptions; unlike UK law, which allows for prosecutorial discretion within the DPPs policy guidelines.

What is of equal interest in this case is the varying opinions voiced by the two dissenting judges. On the one hand, Judge Wojtyczek, agreeing with the dissenting opinion of Judge Serghides in *Mortier*, above, noted that Article 2 of the Convention provided an exhaustive list of exceptions to the state's duty to protect life, euthanasia and medically assisted suicide not being mentioned. Thus, Article 2 called for a strict interpretation and excluded the insertion of additional exceptions, particularly the decriminalisation of euthanasia and medically assisted suicide. For the Judge, Article 2 reflects the underlying assumption that human life is priceless and has an objective and intrinsic value, which do not depend on subjective feelings about the meaningfulness or meaninglessness of life. The Judge also doubted whether physician-assisted death could be carried out in compliance with Article 2. Although personal autonomy was a very precious freedom, given the clear letter of Article 2, it cannot encompass decisions about one's own life and death: the very notion of private life – which presupposes life-, does not extend to the choice of death by means of medically assisted suicide or euthanasia. What is not clear is whether the Judge would also find the withdrawal of life-saving treatment, at the request of the patient or not, to be incompatible with Article 2, and thus not within the scope of Article 8.

On the other hand, Judge Felici, advocated a different, more rights-based approach to the question, in line with the 'living instrument' approach to the Convention and its protection of ECHR rights. In the Judge's view, the core of the applicant's case was not a general right to assisted dying as an expression of self-determination, but rather the specific and circumstanced right of a terminally-ill patient who wishes to die to access a remedy responding to his desire to end his life. Previous case law in this area dealt with different claims and did not have the special features of the present case. Under the Convention, first, it is clear that respect for private life encompasses the right to resist one's physical suffering, even if this involves the termination of life. Second, if the Convention imposes on a state a duty against medical negligence, it is difficult to see that there would be no violation if a state fails to provide an effective remedy to address intolerable suffering such as complained of in the present case. Third, it was indisputable that the magnitude of a global trend in favour of recognising at least some form of assisted dying could not be questioned.

Thus, in the light of those points, there were no insurmountable legal obstacles in imposing a duty on the state, having regard to all the circumstances of this case. Further, it does not appear that the state can be granted any margin of appreciation in this situation; and in the absence of that margin, no assessment of proportionality and mitigation (that sentences would be low) is required. This argument appears to use the right of dignity and self-determination under Article 8 as an absolute right, similar to the one under Article 3, protecting individuals from inhuman and degrading treatment; although the

Judge does not mention Article 3, or the Court's rejection of that claim. Overall, the Judge felt that in this case the majority had used case law to ensure coherence with the Convention, rather than deciding the case on its merits. The argument of the majority, that a different law may be open to abuse, is, in the Judge's view, no legal argument, as the state is under a duty to ensure that there is no abuse. He was also critical of the Court not referring the case to the Grand Chamber, depriving the highest judicial body to make a ruling in this area.

Both dissenting views illustrate the wide parameters of the arguments in this controversial area, and, with respect, appear to be formulated on the basis of personal and philosophical beliefs rather than pure legal reasoning.

Conclusions

The issue of assisted suicide continues to attract a variety of moral and ethical opinion, as well as arguments in favour of judicial deference at the national, and an extended margin of appreciation at the international level. Despite the arguments on human right and dignity, it appears that a number of factors are combining to justify the Courts' approach in this area. One is that the case raises particularly delicate moral, social, ethical and other issues. Second, unlike the many other human rights issues, national approaches to assisted dying do not show a common European standard or consensus to justify challenge in the European Court of Human Rights. Third, it is clear that the European Court agrees with the domestic courts' reluctance to question the law and its rationale where Parliament has already debated the issues and then failed to legislate.

These factors point to the likelihood of the Court's case law being maintained: that it is not in breach of the ECHR for a state to pass and enforce a law of assisted dying, but that there is no obligation under the Convention to force them to pass such laws. Provided the state makes provision for any pain and suffering of the victims, by offering suitable palliative care and pain relief, states will be allowed to maintain the distinction between allowing patients to refuse life-saving treatment, and those who simply wish to end their lived early with the direct assistance of others. That provides little redress and comfort to individuals such as the applicant in the present case, who are denied an effective remedy based on where they reside, and the will of the national authorities in enforcing their criminal laws against those who are willing to assist them.

STUDENT WORK

STUDENT DISSERTATIONS

FINANCE LAW

Cross-border establishment of credit institutions: a study into whether supervision and authorisation facilitate economic integration for Member States and third countries, in light of Brexit

Anastasia Brown*

Introduction

The primary purpose of this article is to address the following question: Does the law on cross-border supervision and authorisation of credit institutions facilitate economic integration through granting full access to the Internal Market? The rationale behind conducting this question derives from the need for convergence and adherence to the co-ordinated global policy for financial supervision in order to promote global financial stability.[1] This is essential for ensuring financial stability as effective supervision of cross-border banking establishments should mitigate against cross-border spill over effects and impacts of banking failures,[2] as seen in the March 2023 Banking Crisis,[3] since many globally active banks can be considered 'too big to fail.'[4] Accordingly, this highlights the need for Europe to have a strong and integrated system of financial regulation and supervision in order to achieve these aims, enforced by the European Union.[5] Therefore, integration in the financial sector should be viewed through the lens of fostering financial stability. This consequently promotes integration through co-ordinated regulations, ensuring financial stability, when granting authorisation of cross-border banking.[6] As well as this, the main way in which the EU promotes integration is through access and enjoyment of the Internal Market, with the focus being on the free movement of capital.[7]

Thus, the main issue to be discussed in this dissertation concerns whether the EU law for cross-border supervision and authorisation of credit institutions facilitates economic integration, and, if not, whether any proposals can be made to facilitate greater economic integration. This is going to be assessed through analysing authorisation and supervision for EEA credit institutions within the Eurozone, and in light of the United Kingdom having left the European Union on the 31st of January 2020, which resulted in a loss of passporting rights for UK banks, leaving them with restricted access to the Internal Market. (Additionally, post-Brexit access of EEA institutions into the UK will be addressed). Accordingly, with the aim of answering the research question, this dissertation will be split into four sections. The first is an overview of the objectives of the laws and regulations governing cross-border establishment of banks. The second section presents the legal framework, attempting to synthesise international

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[1] The High-Level Group on Financial Supervision in the EU Chaired by Jacques de Larosiere, 'Report' (25 February 2009) < https://ec.europa.eu/economy_finance/publications/pages/publication14527_en.pdf > accessed 5 of February 2024, (Jacques de Larosiere) 3.

[2] Basel Committee on Banking Supervision (BCBS), 'The Basel Framework' < https://www.bis.org/baselframework/BaselFramework.pdf > accessed 19 January 2024; 'BCP01 The core principles' Version effective as of 15 December 2019, para 01.5.

[3] Basel Committee on Banking Supervision, 'Report on the 2023 banking turmoil' (October 2023) < https://www.bis.org/bcbs/publ/d555.pdf > last accessed 5 April 2024

[4] Iris H-Y Chiu and Joanna Wilson, *Banking Law and Regulation* (1st edn, Oxford University Press 2019) 7.

[5] Jacques de Larosiere (n 1).

[6] ibid, 4.

[7] Article 63 TFEU.

regulations, the EU's framework for Member States' credit institutions and the UK's framework post-Brexit, and finally discusses how the law achieves the objectives set out, most importantly economic integration. The third section provides a critical analysis into third country access routes that the UK can use to access the Internal Market, while pinpointing any shortcomings and deficiencies of the law. The fourth section aims to analyse a proposal of how greater economic integration can be achieved.

Overall, the main argument running through this dissertation is that while EU law for the supervision and authorisation of EEA credit institutions does facilitate economic integration, EU law relating to third country bank's access to the Internal Market does not fully achieve this objective due to the numerous restrictions on accessing the Internal Market.

Objectives of the law

Following on from the introduction, this section will be concerned around identifying the aims and objectives of the laws governing cross-border banking establishment. This section will commence by summarising the objectives of the Basel Accords as they have been implemented at both supranational and national levels, consequently having a large impact on EU and UK law.

International regulations – The Basel Accords

The foundational objective for the Basel Accords is to ensure and promote effective supervision of banks,[8] from international to national banks, for all member countries of the Bank for International Settlements. The Framework provides a basic minimum standard,[9] to be complied with and implemented by all member countries in their banking sectors.

Within the Framework are 29 core principles[10] applicable to all member countries, which are intended to be the standard for supervision. Through the concept of proportionality,[11] these principles are implemented with the aim of accommodating the financial needs of all countries. Thus, the Basel Committee on Banking Supervision (BCBS) takes into consideration the different states of the individual countries' economies and financial stability, constituting a broad approach used for implementation.[12]

The primary objective for the implementation of the Basel Accords is to ensure the safety and soundness of banks/the banking system[13] and to ensure financial stability.[14] It should be noted that it is not an objective of banking supervision to guarantee the prevention of banking failures.[15] Rather, the aim is to mitigate the adverse impacts of potential banking failures through effective supervision. This is because bank failure is a potential consequence in the business of banking, and banks run this risk at their own expense. To address financial stability, close compliance to the regulations by member countries should create financial stability in all member countries, although financial stability is not guaranteed.[16]

The European Union – free movement of capital

The initial purpose for the establishment of the European Community was, and still is, the integration of Europe.[17] This has been achieved primarily through the formation of the Internal Market, which encompasses the free movement of goods, persons, capital and services.[18] The main aim of the Internal

[8] Basel Committee on Banking Supervision (BCBS), 'The Basel Framework' < https://www.bis.org/baselframework/BaselFramework.pdf > accessed 19 January 2024; 'BCP01 The core principles' Version effective as of 15 December 2019, para 01.2.
[9] ibid, para 01.1.
[10] BCBS (n 8) 'BCP01, The core principles' Version effective as of 15 December 2019.
[11] ibid, para 01.14.
[12] BCBS (n 10) para 01.14.
[13] BCBS (n 10) para 01.13.
[14] BCBS (n 10) para 01.35.
[15] ibid.
[16] BCBS (n 10) para 01.35.
[17] Preamble TEU, para 1.
[18] Article 26(2) TFEU.

Market is found in Article 3 of the Treaty on European Union[19] (TEU), which states that this market shall work towards the development of Europe through economic growth and price stability.

With the principle objective of the EU and the Internal Market established, the focus will now be on the free movement of capital found in Article 63 of the Treaty on the Functioning of the European Union[20] (TFEU). Article 63 states, '[W]ithin the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.' This is achieved through two main concepts, the first being the approximation of laws and the second, mutual recognition. The approximation of laws, also known as harmonisation, is found in Article 114 TFEU,[21] with the aim of making laws of all Member States as similar as possible. If Member States' laws are different, this can lead to potential obstacles or barriers to free movement within the Internal Market. Thus, harmonisation aims at converging Member States' laws to remove all barriers, whether already in existence or those that could potentially arise. The latter concept of mutual recognition stems from Article 34-36 TFEU,[22] but was established in the case of *Cassis de Dijon*.[23] This is the concept that once a product, in this case, is accepted in one Member State, the prohibition of acceptance into another Member State would constitute an obstacle to free movement in the Internal Market. Thus, these two concepts help to facilitate the integration of capital, and thus the economies between Member States.

Concerning the integration of the European economies, it is acknowledged in the de Larosiere Report[24] that although the Union has its own aims, it must also meet and comply with international standards for the furtherance of global objectives, for example standards set by the Bank for International Settlements, the International Monetary Fund (IMF), the G20[25] and the World Trade Organisation. To do so requires compliance with both international and supranational supervision regulations, and requires that Europe be integrated in order to achieve these aims.[26] Jacques de Larosiere reiterated that, as with the Basel Accords, the aim of supervision within the EU is financial stability achieved through the implementation of these regulations in the financial sector.[27]

Having regard to the aims stated above, this paragraph will discuss the objectives of the Capital Requirements Regulation[28] (CRR) and the Capital Requirements Directive[29] (CRD IV), which together form the single rulebook for credit institutions. Commencing with the CRR, the Commission's reason for proposing this legislation was to restore stability to the banking sector, and that it also implements global standards for credit institutions to harmonise all provisions relating to this area of legislation.[30] The overall aim is to produce effective institution regulation in the Union, and to ensure the operation of services and their establishment without any barriers to trade.[31] The CRD IV's primary objective is to coordinate and harmonise national rules for credit institutions through the supervisory framework.[32] Furthermore, this Directive also aims at enhancing the Internal Market[33] by allowing movement of credit institutions across the Internal Market under the freedom of establishment[34] and freedom to

[19] Article 3(3) TEU.
[20] Article 63 TFEU.
[21] Article 114 TFEU.
[22] Articles 34-36 TFEU.
[23] Case 120/78 *Cassis de Dijon* [1979] ECR 649.
[24] The High-Level Group on Financial Supervision in the EU Chaired by Jacques de Larosiere, 'Report' (25 February 2009) < https://ec.europa.eu/economy_finance/publications/pages/publication14527_en.pdf > accessed 5 of February 2024, (Jacques de Larosiere).
[25] ibid, 3.
[26] Jacques de Larosiere (n 24), 3.
[27] Jacques de Larosiere (n 24), para 149.
[28] Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No. 648/2012 [2013] OJL 176 (CRR).
[29] Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms [2013] OJL 176 (CRD IV).
[30] Commission, 'Proposal for a regulation of the European Parliament and of the Council on prudential requirements for credit institutions and investment firms' COM/2011/0452 final, Recital 1.1.
[31] Recital 11 CRR.
[32] Recital 2 CRD IV.
[33] ibid, Recital 5.
[34] Article 49 TFEU.

provide services.[35] Hence, mutual recognition[36] applies for credit institutions established in one Member State to be established in another, and that there should be no obstacles that constitute unauthorised restrictions.

The United Kingdom's financial regulation

The principle issue to understand in relation to UK banks, especially systemically important banks, is what is termed as 'too big to fail.'[37] This is the concept that banks are of such financial/economic significance, whether at a national or international level, that failure would have detrimental effects and therefore these consequences should be reduced. One way in which banking failure consequences are mitigated is through the overarching aim of ensuring the stability of the financial system, as seen in s 2A Bank of England Act 1998.[38] The two main authoritative bodies concerning the UK's financial regulation are the Financial Conduct Authority[39] (FCA) and the Prudential Regulation Authority[40] (PRA), whose statutory authority comes from the Financial Services Act 2012[41] (FSA 2012), amending the Financial Services and Markets Act 2000[42] (FSMA 2000). Collaboration between these authorities helps to supervise financial firms. The reasoning behind passing FSMA 2000 was to incorporate the advances of globalisation,[43] the aims of market confidence, public awareness, protection of consumers, and the reduction of financial crime in the UK's financial regulation.[44]

Focusing on the dual regulated bodies, the FCA has the strategic objective of ensuring that the relevant markets, i.e. financial markets, function well.[45] While endeavouring to achieve this, the operational objectives of consumer protection and integrity must be adhered to.[46] Concerning the objective of integrity, this includes both the stability and soundness of the financial system and the system not being subject to financial crime.[47] The PRA, which is the main authority responsible for the supervision and regulation of banks, has the general objective of promoting the safety of PRA authorised firms.[48] Under this general aim comes the need to ensure that authorised persons are administered in a way that avoids negative effects on the stability of the financial system, especially the effects of potential failure.[49]

To conclude this section, it is evident that the main objectives of the law are to ensure financial stability through the effective supervision of banks, in order to mitigate adverse impacts in the event of banking failures. On a supranational level, the law is concerned with promoting economic integration throughout the Union and removing restrictions to the Internal Market.

The framework for supervision and authorisation

The previous section sought to provide an overview of the objectives of the law relating to cross-border establishment of banks, filtering down from international to national level. The aim of this section will be to synthesise all such related regulations and laws of cross-border banking, to provide a synopsis of the legal framework to understand how this framework facilitates economic integration by providing access to the Internal Market.

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[35] Article 56 TFEU.
[36] Annex I, Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms [2013] OJL 176.
[37] Iris H-Y Chiu and Joanna Wilson, *Banking Law and Regulation* (1st edn Oxford, University Press 2019) 7.
[38] Bank of England 1998, s 2A.
[39] Financial Services and Markets Act 2000 (FSMA 2000), s 1A.
[40] ibid, s 2A.
[41] Financial Services Act 2012, s 6(1).
[42] FSMA 2000.
[43] HL Deb, 18th May 2000, vol 613, cols 363.
[44] ibid.
[45] FSMA 2000, s 1B(2).
[46] FSMA 2000, s 1B(3)(a) and (b).
[47] FSMA 2000, s 1D(2)(a) and (b).
[48] FSMA, s 2B(2).
[49] FSMA 2000, s 2B(3)(a) and (b).

The Basel Framework

At an international level, this framework applies to all holding companies, i.e. a company which is a parent entity overseeing all other entities,[50] to ensure that there is adequate supervision of all banking groups and banks. This links back to the idea, that there are some banks that are so complex and consequential in size that measures should be in place to mitigate the potential impacts that bank failure would cause.[51] Thus, this framework aims to establish a global minimum agreement[52] as to the operation of such institutions and supervision of banks to ensure financial stability.[53]

Concerning cross-border banking, the primary aim of core Principle 8[54] is for supervisors to take a forward-looking approach to supervision,[55] which means taking into consideration the risks to which a bank is exposed, by examining the information provided by the banks themselves and national supervisors.[56] This, in turn, leads to supervisors taking into account risks that might potentially lead to financial unrest within a bank, which is crucial for mitigating cross-border spill over effects. Next is Principle 12, which states that supervisor's must perform consolidated supervision[57] by understanding the structure of the relevant banking group and all activities engaged in, whether they be deposit taking/lending or other financial activities. In carrying out consolidated supervision, it ensures banking activities are regulated with the intention of monitoring the governance of banks, to ensure that able staff run the institutions effectively and to avoid financial crime. Next, Principle 13 establishes the relationship between the home and host countries.[58] The aim of this Principle is to ensure that not only is there effective cooperation between home and host supervisors, but also that no bank or their foreign establishment escapes effective supervision.[59] It is presumed that both authorities will carry out their supervisory roles through the communication of necessary information.[60] In doing so, host authorities can supervise institutions within their territory while cooperating with home supervisors responsible for the consolidated supervision of banking groups and all their foreign established entities.[61]

Building on Principle 13, there are four minimum standards for supervision of international banking groups and their establishment.[62] The first is that the home country should be able to capably perform consolidated supervision.[63] Although there is no criteria for this, there is a range of factors to be taken into consideration. For example does the home supervisor receive financial information on a regular basis; can global risks be controlled; is there adequate authorisation procedures by the home country supervisors; and is there routine inspection of foreign entities/affiliates? The second standard is that cross-border banking establishments should receive consent from both the home and host country.[64] This relates back to the concept that no bank should escape supervision, for example those of shell branches or "sister" institutions.[65] Consolidated supervision is carried out by national authorities in a proportionate manner based on the financial state of the country, and ensures effective procedures for

[50] Basel Committee on Banking Supervision (BCBS), 'The Basel Framework' < https://www.bis.org/baselframework/BaselFramework.pdf > accessed 19th January 2024; 'SCO10 Introduction' Version effective as of 15 Dec 2019, para 10.2.
[51] ibid, 'SCO40 Globally systemically important banks' Version effective as of 9th November 2021, para 40.1.
[52] ibid, para 40.2.
[53] BCBS (n 50) 'BCP01, The core principles' Version effective as of 15 December 2019, para 01.35.
[54] ibid, para 01.79.
[55] BCBS (n 53) para 01.80 (2).
[56] BCBS (n 53) para 01.80 (6).
[57] BCBS (n 53), para 01.89.
[58] BCBS (n 53) 1828.
[59] BCBS, 'Principles for the Supervision of Banks' Foreign Establishments (May 1983)' < https://www.bis.org/publ/bcbsc312.pdf > accessed 19th February 2024, 2.
[60] BCBS (n 53) para 01.93(2).
[61] BCBS (n 53) para 01.90(4).
[62] BCBS, 'Minimum Standards for the Supervision of International Banking Groups and their Cross-Border Establishments (July 1992)' < https://www.bis.org/publ/bcbsc314.pdf > accessed 18 February 2024.
[63] ibid, 3.
[64] BCBS (n 62) 3.
[65] BCBS 'The Supervision of Cross-Border Banking (October 1996)' < https://www.bis.org/publ/bcbs27.pdf > accessed 18 February 2024, 2.

authorisation of banking groups, cooperation by home/host supervisors and makes sure all authorities understand their roles and responsibilities.

EU supervision

Focusing on supervision in the EU, it is important to recall that economic integration is facilitated through effective supervision ensuring financial stability, which is of great importance when granting authorisation for cross-border activity of credit institutions.

To provide an overview of the supervisory institutions, within the European Banking Union there are three main pillars, namely the Single Supervisory Mechanism (SSM), Single Resolution Mechanism (SRM) and the Single Deposit Protection Scheme. The focus will be on SSM, which the European Central Bank (ECB) operates through to act as the prudential supervisor of over 6,000 credit institutions in the euro area.[66] Furthermore, the ECB follows the technical standards set by the European Banking Authority (EBA), whose aim is to provide a centralised set of prudential rules for financial institutions within the EU.[67]

The objective of the SSM concerns strengthening integration in the financial sector because of the fragmentation caused by the 2007/08 financial crisis.[68] Furthermore, through the SSM, the implementation of prudential supervision is carried out, applying to all institutions that come under the authority of the ECB, i.e. all Eurozone Member States plus any non-participating Member States which want to come under ECB supervision. With the difference in supervision applied by different supervisors having been one of the reasons for the financial crisis within the SSM,[69] ECB supervision ensures that minimum harmonisation of national laws applies to the majority of Member States. Hence, the ECB works in partnership with the National Competent Authorities (NCA(s)) to both directly and indirectly supervise credit institutions,[70] which ensures the carrying out of consolidated supervision acknowledging the implementation of Principle 12 in the Basel Framework.

The banking sector is overseen by the ECB in two ways. Firstly, the ECB directly supervises significant institutions through Joint Supervisory Teams (JSTs),[71] which have been established for each significant supervised entity within the Member States and are involved in the day-to-day running of supervision.[72] The second method of supervision is indirect supervision through NCAs, who supervise less significant institutions.[73] Furthermore, supervision is also carried out by a college of supervisors, suggested in the Basel Framework to be flexible structures for collaboration, coordination and information sharing.[74] Thus, at a Union level, colleges of supervisors are used for this precise reason for the supervision of the separate entities of banking groups and branches. Within a college of supervisors, the ECB is the consolidating supervisor.[75] However, in non-participating Member States, the ECB is a member, and the NCAs are observers in participation.[76] The ECB can also take the role of being the consolidating

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[66] Matthias Haentjens and Pierre de Gioia Carabellese, *European Banking and Financial Law* (2nd edn, Routledge 2020) 106.
[67] ibid, 108.
[68] Recital 2, Council regulation (EU) No 1024/2013 of 15th October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions [2013] OJ L 287 (SSM Regulation).
[69] Almudena de la Mata Munoz, 'The Future of Cross-Border Banking after the Crisis: Facing the Challenges through Regulation and Supervision' (2010) 11(4) European Business Organization Law Review 575, 596. See also The High-Level Group on Financial Supervision in the EU Chaired by Jacques de Larosiere, 'Report' 25 February 2009 < https://ec.europa.eu/economy_finance/publications/pages/publication14527_en.pdf > accessed 5 of February 2024 (Jacques de Larosiere).
[70] Article 6 SSM Regulation.
[71] Article 3, Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation) (ECB/2014/17) [2014] OJ L 141.
[72] European Central Bank | Banking Supervision, 'Supervisory Manual' < https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.supervisory_guides202401_manual.en.pdf > accessed 22 February 2024, 9.
[73] Article 6(4) SSM Regulation.
[74] Basel Committee on Banking Supervision, 'Principles for effective supervisory colleges (June 2014)' < https://www.bis.org/publ/bcbs287.pdf > accessed 3 March 2024.
[75] Article 9 SSM Framework Regulation.
[76] ibid, Article 10.

(home supervisor) for colleges from non-EU countries, or the host supervisor.[77] It can be argued that all forms of supervision mentioned above highlight changes made after the financial crisis that help to reduce the potential for conflict between home and host supervisors due to the complexity and cost of supervision.[78] This will maximise efficiency in resolving crises and promote effective supervision of banks, which will ensure the safety and soundness of the banking system. This also ensures financial stability that promotes economic integration, as this co-ordinated and regulated supervision carried out by the EU avoids regulatory loopholes that have the potential to undermine financial stability, while promoting a highly competitive integrated financial sector.[79]

EU passporting rights

With the framework regarding supervision being set out, analysis will now be provided of the EU passporting rights regime. Through Article 33 CRD IV, the principles of freedom of establishment[80] and freedom to provide services[81] provide that a credit institution established in one Member State is able to establish itself and provide services in another Member State without having to gain additional authorisation as its activities are subject to mutual recognition.[82] The effective passporting right for credit institution branches is found in Article 17,[83] which states "[H]ost Member States shall not require authorisation or endowment capital for branches of credit institutions authorised in other Member States." Firstly, authorisation must be obtained in the home state,[84] for which the Member States must notify the EBA which develops standards to be met, for example information to be provided by the NCA,[85] or, if the Member State is subject to ECB supervision, the ECB must be notified in order to grant authorisation.[86] It is important for there to be efficient communication between competent authorities, i.e. the home Member State where the institution is primarily established and the host Member State, which will admit the branch into their territory. Once authorisation is granted, the credit institution has passporting rights, and is subject to mutual recognition.[87] The liberal market access provided by the passporting regime promotes the globalisation of the banking sector, facilitating the internationalisation of banks that wish to provide services to global clients,[88] and facilitates the development of structurally and systemically large banks to operate across borders.[89] This limits restrictions on the free movement of capital within the single market furthering economic integration.

To link passporting rights to prudential supervision of credit institution branches, the supervision of the institutions is the responsibility of competent authorities of the home Member State.[90] Notwithstanding this, competent authorities must collaborate closely to supervise such institutions.[91] In accordance with Article 56,[92] it is evident that there has to be a free flow of information between competent authorities in order that they may fulfil their duties to supervise financial sector entities and to maintain the stability of the financial system across the Member States. The exchange of information within the limitations

[77] European Central Bank | Banking Supervision, 'Supervisory Manual' < https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.supervisory_guides202401_manual.en.pdf > accessed 22 February 2024, 30.
[78] Almudena de la Mata Munoz, 'The Future of Cross-Border Banking after the Crisis: Facing the Challenges through Regulation and Supervision' (2010) 11(4) European Business Organization Law Review 575, 577.
[79] The High-Level Group on Financial Supervision in the EU Chaired by Jacques de Larosiere, 'Report' 25 February 2009 < https://ec.europa.eu/economy_finance/publications/pages/publication14527_en.pdf > accessed 5 of February 2024, 60.
[80] Article 49 TFEU.
[81] Article 56 TFEU.
[82] Annex I, Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms [2013] OJL 176 (CRD IV).
[83] Article 17 CRD IV.
[84] Article 8 CRD IV.
[85] Article 8(2)(a) CRD IV.
[86] Article 14(1-3) Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions [2013] OJ L 287.
[87] Annex I CRD IV.
[88] Almudena de la Mata Munoz, 'The Future of Cross-Border Banking after the Crisis: Facing the Challenges through Regulation and Supervision' (2010) 11(4) European Business Organization Law Review 575, 577.
[89] ibid, 587.
[90] Article 49 CRD IV.
[91] Article 50 CRD IV.
[92] Article 56 CRD IV.

of professional secrecy[93] and confidentiality[94] will ensure that in the event of potential banking failures, all authorities involved in cross-border supervision of institutions have access to all information necessary for mitigating the risk and impact of failure. It will also coordinate a system of crisis management with the aim of ensuring financial stability within the Union.

UK supervision and authorisation of banks

The main body in charge of regulating banks within the UK is the PRA in conjunction with the FCA. The PRA carries out its prudential supervision of banks on a judgement-based and forward-looking approach to mitigate potential crises and make firms more resilient, thus maintaining the safety and soundness of the financial system[95] and financial stability. The FCA adopts a forward-looking approach, aiming at identifying issues and performing intervention before they crystallise.[96] This is done through proactive, reactive and thematic based approaches to supervision to cover all present and potential problems.[97] Through coordination between these regulators, the exchange of information will help both bodies to achieve statutory objectives, despite acting independently when managing different institutions.[98]

To address the authorisation of all banks within the UK, the procedure is found under Part 4A FSMA 2000.[99] In s.55A[100] the applicant must be an individual or partnership, or in this case a body corporate, for which the PRA is the regulator. Before authorisation can be granted, the threshold conditions[101] must be met. Such conditions include that the bank has its registered head office in the UK,[102] is capable of being supervised by the FCA,[103] and resources available must be appropriate to the functioning of the activities to be enjoyed.[104] With the permission of the FCA, the PRA will give consent to the applicant.[105] In doing so, the institution should be cooperative to both institutions, disclosing any information concerning the institutions that the PRA would reasonably expect. This, in summary, is the process for authorisation within the UK for banks to be able to be established.

Post-Brexit passporting rights of EEA credit institutions

One of the issues to be discussed is the authorisation procedure for EEA institutions post-Brexit. Pre-IP completion day, EU credit institutions were eligible for free admission into the UK under the passporting regime discussed above. Post-Brexit, these rights have been removed for all EU institutions operating in the UK. The main piece of legislation concerning the transitional arrangements, temporarily amending FSMA 2000, is the EEA Passport Rights Regulations 2018.[106]

Thus, the PRA and FCA, post-IP completion day, are still the regulators under the meaning of this Regulation, to approve the application of institutions to continue regulated activities under Part 4A.[107] In accordance with Regulation 8,[108] institutions with permission under this Regulation are treated as

[93] Article 53 Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms [2013] OJ L 176 (CDR IV).
[94] Article 54 CRD IV.
[95] Bank of England PRA, 'The Prudential Regulation Authority's approach to banking supervision (July 2023)' < https://www.bankofengland.co.uk/-/media/boe/files/prudential-regulation/approach/banking-approach-2023.pdf > accessed 3 March 2024, 12.
[96] Financial Conduct Authority, 'FCA Handbook' < https://www.handbook.fca.org.uk/handbook > accessed 2 March 2024, SUP 1A.1 Application and purpose, SUP 1A.3.1.
[97] ibid, the scope of the supervision model for firms, SUP 1A.3.4.
[98] Financial Conduct Authority (n 93). The nature of the FCA's relationship with the PRA, SUP 1A.3.8.
[99] Financial Services and Markets Act 2000 (FSMA 2000), Part 4A.
[100] FSMA 2000, s 55A.
[101] FSMA 2000, s 55B.
[102] FSMA 2000, Sch 6 2B(1)(a).
[103] FSMA 2000, Sch 6 2C(1).
[104] FSMA 2000, Sch 6 2D(1).
[105] FSMA 2000, s 55F(2).
[106] The EEA Passport Rights (Amendment, etc., and Transitional Provisions) (EU Exit) Regulations 2018 (EEA Passport Rights).
[107] FSMA 2000, Part 4A.
[108] The EEA Passport Rights (Amendment, etc., and Transitional Provisions) (EU Exit) Regulations 2018 (EEA Passport Rights), Regulation 8(1).

institutions with permission to carry on activities under Part 4A, i.e. those who have authorisation before IP completion day to carry on activities. For this regulation to apply, conditions in Regulation 10[109] must be satisfied, meaning the institutions authorised under section 31(1)(b) or (c) of FSMA 2000,[110] along with Regulation 14.[111] Under Regulation 14, the person must make an application, which has not been withdrawn immediately before IP completion day, and must have notified the relevant regulator, including all information the regulator requires. Approval for such applications, once given, would commence on IP completion day and ends three years thereafter.[112]

To conclude, this section attempted to set out the framework for cross-border supervision and authorisation of banking activity. It is clear that effective supervision and passporting rights facilitate economic integration within the Internal Market through the enjoyment of free movement of capital and consequently promote economic integration within the Union. Concerning the UK, as EEA institutions still have access to the UK banking sector, this promotes financial globalisation transcending national boundaries.[113]

Third country access into the Internal Market after Brexit

While the previous section analysed the procedures for supervision and authorisation of EEA credit institutions and how the framework facilitates and achieves economic integration, this section will address the issue of the restricted access that UK banks have into the Internal Market due to the loss of passporting rights now that the UK is a third country. The main argument to be presented is that EU laws regarding third country access to the Internal Market, for banks, partially achieve the aims and objectives of the law. It is important to remember that the EU needs to achieve full integration in Europe in furtherance of global objectives.[114] Hence, this section will set out EU interests for third country market access and critically analyse third country regimes in order to pinpoint existing deficiencies.

International standards

As stated, the UK's withdrawal from the EU has resulted in a loss of passporting rights – the likes of which achieved maximum mutual recognition[115] of credit institutions within the Union and minimum restrictions to the three freedoms mentioned. Accordingly, with the UK now classed as a third country, there is no set agreement for financial service transactions between the EU and UK, and that all such arrangements follow international standards set by the BCBS, IMF, Financial Stability Board, but more specifically, the rules set by the World Trade Organisation (WTO) in the General Agreement on Trade in Services implemented through the Trade and Cooperation Agreement.'[116] WTO rules govern the establishment of commercial presence between countries,[117] or in this present case, between the EU and UK. Under WTO rules, one nation must not be favoured over another, i.e. Most-Favoured-Nation treatment (MFN),[118] meaning that transactions of a commercial nature cannot favour the UK more than other third countries, or likewise disadvantage the UK more than other third countries. This is furthered by the principle of non-discrimination,[119] which provides that there must not be unnecessary discriminatory measures between countries in order to promote international economic integration.

[109] EEA Passport Rights, Regulation 10(a).
[110] FSMA 2000, s 31(1)(b) and (c).
[111] EEA Passport Rights, Regulation 14(a)(ii).
[112] EEA Passport Rights, Regulation 17(1)(a).
[113] Almudena de la Mata Munoz, 'The Future of Cross-Border Banking after the Crisis: Facing the Challenges through Regulation and Supervision' (2010) 11(4) European Business Organization Law Review 575, 578.
[114] The High-Level Group on Financial Supervision in the EU Chaired by Jacques de Larosiere, 'Report' (25 February 2009) <https://ec.europa.eu/economy_finance/publications/pages/publication14527_en.pdf > accessed 5 of February 2024, 3.
[115] Annex I, Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms [2013] OJ L 176.
[116] Trade and Cooperation Agreement 2020.
[117] World Trade Organisation, Understanding on Commitments in Financial Services, para 5.
[118] Article II GATS.
[119] Article XIII (1), General Agreement on Trade in Services 1995.

Ultimately, in relation to third country access to the Internal Market, the Union will primarily protect its own interests over third country interests.[120] This is because the EU aims at making EU membership desirable by ensuring non-Member countries do not enjoy the same benefits as Member States,[121] thus meaning membership benefits enjoying a degree of exclusivity. Although this technically goes against the principle of MFN treatment,[122] it is permitted as although Member States have the benefits of membership, they also have financial obligations that third countries do not have. Such obligations include Member State national contributions to the EU budget,[123] as a method for the EU to be financed wholly from its own resources,[124] which is used to fund the EU's objectives/policies and contribute towards the progression of Member State's economic development.[125] According to data from 2019, Member State benefits from the single market exceeded six times their contributions, meaning a one-to-six return on investment varying across different Member States, with some benefitting even more.[126] Hence, this is why Union membership benefits, like full access to the Internal Market, enjoy a degree of exclusivity that third countries cannot fully enjoy or take advantage of, as they do not make these kinds of investments to the EU. Furthermore, while the EU is looking to promote economic integration internationally, when considering applications for third country access into the Internal Market the overall financial stability of the country's economy, and their supervisory practices and management of banks should be taken into consideration.[127] In turn, this acts as a defence mechanism for the Union against 'high-impact' third countries, which could have a negative influence on financial stability or market integrity,[128] while opening the door for increased competition on a global scale.

With the EU's interests in mind, under EU legislation there are two main arrangements for the establishment and provision of services by third countries in the Union, which allow market access while prohibiting full enjoyment of the three freedoms within the Internal Market. The first arrangement to be considered is the authorisation of branches[129] by individual Member States. Branches of third country banks authorised in a Member State enjoy the free movement of capital[130] within that particular Member State. This form of establishment is allowed so long as the rules applied to those branches are not more favourable,[131] than those applied to branches of banks of the Member State and the prudential supervision of the third country bank is equivalent to that of the EU.[132] This means that the minimum supervisory and regulatory rules are applied by the competent authorities of the home country,[133] which ensures effective supervision[134] as there will be effective communication between the third country and host State. This allows for supervisory tasks to be assigned to all authorities involved and permits crisis management solutions to be formed, thus ensuring the safety and soundness of the banking system and financial stability for both the EU and the third country. In addition, the ECB expects that the majority

[120] Commission, 'The European economic and financial system: fostering openness, strength and resilience' COM (2021) 23 final, chapter 4.
[121] European Commission, 'Questions & Answers: EU-UK Trade and Cooperation Agreement' (24 December 2020) < https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_2532 > accessed 13 March 2024.
[122] Article II, General Agreement on Trade in Services 1995.
[123] Articles 310 and 314 TFEU.
[124] Article 311 TFEU.
[125] Commission, 'Benefits of the EU budget' < https://commission.europa.eu/strategy-and-policy/eu-budget/long-term-eu-budget/2021-2027/benefits-eu-budget_en > last accessed 31 May 2024.
[126] ibid; Commission, 'EU budget for the future| Technical briefing on EU's next long-term budget' (5 November 2019) < https://commission.europa.eu/document/download/5f058880-4661-4d50-8796-a71d1e78c984_en?filename=2019-11-05_eu_budget_technical_briefing_-_with_covers.pdf > last accessed 31 May 2024.
[127] Commission, 'Equivalence in the area of financial services' COM (2019) 349 final.
[128] ibid.
[129] Article 47, Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms [2013] OJ L 176 (CRD IV).
[130] Article 63 TFEU.
[131] Recital 23 CRD IV.
[132] Article 47(3) CRD IV.
[133] Commission Staff Working Document, 'EU equivalence decisions in financial services policy: an assessment' SWD (2017) 102 final, 7.
[134] Articles 48 and 127, Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms (CRD IV).

of financial activities be to be carried out within the Union, rather than in a third country.[135] By establishing branches within the Union, this means that services are being offered to EU clients from within the Union rather than from outside, which consequently promotes market access for third countries, while ensuring EU supervision over the branches.

Despite this, it is evident that there is a lack of legal certainty pertaining to the authorisation of branches in the Member State. This is due to each Member State having their own legal systems with different rules regarding authorisation,[136] which evidences a lack of harmonisation in Member State laws. Therefore, this leads to authorisation being landlocked and banks needing a licence in each Member State,[137] hence why this form of authorisation does not enjoy the freedom of establishment[138] or services[139] within the Union, clearly meaning that this restricts the free movement of capital.[140] In turn, this hinders the facilitation of economic integration.

The second form of establishment for third countries is through a subsidiary.[141] It is deemed appropriate that should a subsidiary, which is a separate legal entity from the parent or group company,[142] be established in a Member State it should enjoy mutual recognition of authorisation among all other Member States.[143] This method of establishment has both advantages and disadvantages for third countries. Positively, it provides legal certainty and increases market confidence for the particular subsidiary established within the Union. This is due to the subsidiary enjoying passporting rights, thus meaning that once authorisation is acquired, there can be no withdrawal of this authorisation by individual Member States. Consequently, in contrast to establishing a branch, establishing a subsidiary grants greater access to the Internal Market, promoting economic integration. It is evident that this form of establishment also benefits the EU, as, due to the services being provided primarily within the EU, there is more flow of capital from third countries. For example, it was estimated that UK banks planned to move €1,200 billion to their euro firms.[144] Concerning effective supervision, it can be argued that establishing a subsidiary contributes to and maintains the stability of the financial system,[145] as Article 48 provides for there to be cooperation for consolidated supervision between the Member State and the third country, through the passing of information between the supervisory authorities.[146] This is furthered by the conclusion of cooperation agreements between the Member State and third country to ensure the exchange of information,[147] thus ensuring the safety and soundness of the banking system.

However, although this benefits the Union, as there is minimal restriction to the free movement of capital and it protects the Union's financial stability, for the UK, there would be special difficulties concerning the establishment of a subsidiary within the Union. To establish a subsidiary in a Member

[135] European Central Bank, 'Brexit: banks should prepare for year-end and beyond' (18 November 2020) < https://www.bankingsupervision.europa.eu/press/publications/newsletter/2020/html/ssm.nl201118_2.en.html > accessed 13 March 2024.
[136]International Regulatory Strategy Group (IRSG), 'The EU's Third Country Regimes and Alternatives to Passporting' <https://www.irsg.co.uk/assets/IRSG-Full-report-The-EUs-third-country-regimes-and-alternatives-to-passporting.pdf> accessed 13 March 2024, 118.
[137] Henning Berger and Nikolai Badenhoop, 'Financial Services and Brexit: Navigating Towards Future Market Access' (2018) 19(4) *European Business Law Review* 679, 690.
[138] Article 49 TFEU.
[139] Article 56 TFEU.
[140] Article 63 TFEU.
[141] Article 48(b) CRD IV.
[142] Article 4(1)(15), Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms [2013] OJ L 176.
[143] Recital 20 CRD IV.
[144] Stephanie Bergbauer and others, 'Implications of Brexit for the EU financial landscape' (Financial Integration and Structure in the Euro Area, March 2020) < https://www.ecb.europa.eu/pub/fie/article/html/ecb.fieart202003_01~690a86d168.en.html > last accessed 10 April 2024.
[145] Almudena de la Mata Munoz, 'The Future of Cross-Border Banking after the Crisis: Facing the Challenges through Regulation and Supervision' (2010) 11(4) *European Business Organization Law Review* 575, 592.
[146] Article 48 CRD IV.
[147] Article 55 CRD IV.

State would mean having to transfer much of the business from the parent bank,[148] located in the third country, into the subsidiary in order to ensure that the subsidiary has sufficient authority within itself and is not subject to the authority of the parent bank,[149] except for the purpose of supervision. Although this complies with the objective that the majority of banking business should be carried out within the EU, it means the bank will be primarily under the supervision of the EU and not the UK, which may affect the subsidiary from carrying through the group or parent bank's business strategy.[150] Furthermore, by transferring much or all of the business to the subsidiary in the EU, this would mean that the UK parent bank has less control and management over the subsidiary.[151] This could potentially cause disruption to the stability of the UK's financial system in the event that the subsidiary were to fail. Failure would result in loss of passporting rights for banks that chose to take this route, and would weaken the overall parent bank established in the UK, as much of their business would be conducted through this subsidiary.

With these two regimes set out, it is evident that the EU's law for third country cross-border establishment of banks partially achieves the objectives of the law, specifically economic integration, while protecting its own interests. Despite this, several shortcomings of the law have been highlighted, with the main shortcoming relating to the restricted access that the UK along with other third countries have into the Internal Market, which constitute barriers to the free movement of capital. This hinders the facilitation of economic integration within Europe, which the EU should be encouraging in furtherance of global objectives, even at the expense of their own interests.

An equivalence regime for the banking sector?

With the existing regimes set out, it is evident that third country cross-border establishment access to the Internal Market is heavily restricted. Consequently, this shows that EU law does not fully achieve economic integration due to the many restrictions to the free movement of capital, establishment and services, especially in relation to the UK. Therefore, in order to facilitate greater economic integration, it will be proposed that an equivalence regime[152] for credit institutions should be adopted by EU law. It will be argued that this will be for the mutual benefit of both the EU and the UK (and other third countries) while facilitating greater international economic integration. Prior to Brexit, the UK represented a gateway for third countries to access the Internal Market and many global investment banks accessed the euro area from London.[153] Therefore, it would benefit both the EU and the UK, if the UK has greater access to the Internal Market through the potential adoption of an equivalence regime.

The equivalence regime

As there is no official equivalence regime for the banking sector in the EU, apart from a very minor equivalence regime for determining branch access into the EU,[154] the aim of this section will be to analyse what equivalence is and how it operates for third countries. Equivalence can be summed up as a third country's financial framework/regulation for prudential supervision being so similar to that of the EU's that it is considered 'equivalent' to the EU's supervisory framework.[155] There are several equivalence regimes within the European Union enabling third country access to the Internal Market,

[148] International Regulatory Strategy Group (IRSG), 'The EU's Third Country Regimes and Alternatives to Passporting' < https://www.irsg.co.uk/assets/IRSG-Full-report-The-EUs-third-country-regimes-and-alternatives-to-passporting.pdf > accessed 13 March 2024, 121.
[149] ibid, 16.
[150] Almudena de la Mata Munoz, 'The Future of Cross-Border Banking after the Crisis: Facing the Challenges through Regulation and Supervision' (2010) 11(4) *European Business Organization Law Review 575*, 580.
[151] IRSG (n 149) 16.
[152] Henning Berger and Nikolai Badenhoop, 'Financial Services and Brexit: Navigating Towards Future Market Access' 19(4) (2018) *European Business Law Review* 679, 706.
[153] Stephanie Bergbauer and others, 'Implications of Brexit for the EU financial landscape' (March 2020) Financial Integration and Structure in the Euro Area < https://www.ecb.europa.eu/pub/fie/article/html/ecb.fieart202003_01~690a86d168.en.html > last accessed 27 March 2024.
[154] Article 47(3), Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms.
[155] Commission, 'Equivalence in the area of financial services' COM (2019) 349 final.

for example the equivalence regime for financial markets found in Directive 2014/65/EU[156] and Regulation (EU) No 600/2014.[157] It is evident that the objective of an equivalence regime is to balance the need for financial stability in the EU, while maintaining an open and globally integrated economy.[158] Furthermore, through equivalence regimes the EU promotes regulatory convergence of international standards and increasing the level of supervisory cooperation between third countries.[159]

Advantages of an equivalence regime

Considering the need for MFN treatment and non-discrimination to be complied with, Berger and Badenhoop acknowledge that the introduction of an equivalence regime for the banking sector would comply with these principles. This is because, although the UK would be primarily benefiting from this regime, it would apply to all third countries who choose to take this route to access the Internal Market.[160] Thus, the EU would neither be treating the UK favourably, nor discriminating against other third countries. In turn, this would avoid the situation where the UK would try to negotiate a 'special deal' that would give the UK the benefits of membership without being burdened with the financial obligations other Member States have.[161]

Furthermore, as the EU does not want to grant third countries the same access into the Internal Market as Member States (discussed in the previous section), introducing an equivalence regime would facilitate greater access into the Internal Market without the UK enjoying the same rights as Member States. This would happen for several reasons. First, the authorisation of such a regime can be unilaterally withdrawn[162] by the Commission (as equivalence decisions are unilateral and discretionary acts conducted by the Commission). This is based on several factors such as the third country not complying with EU standards, divergence from the EU financial framework/regulations, and the third country posing a high risk to EU financial stability through,[163] for example, money laundering or the use of shell banks. The ability to withdraw authorisation on such grounds means that the EU is protecting its financial stability and the integrity of the single rulebook, while offering better access to the Internal Market for the UK.[164]

The main approach taken by the EU for equivalence in financial services for supervision involves an assessment of the third country's framework to enable reliance on the third country's regulations and supervisors.[165] Hence, an equivalence regime would seek to make sure that this objective is fulfilled, not only for the sake of financial stability but also to make sure international standards are being adhered to. By encouraging maintaining compliance with international standards, this consequently means similar risks could be addressed by all jurisdictions in a similar manner to safeguard against systemic risks that operate cross-borders. In turn, this would facilitate integration of the EU's financial market, supported by effective supervision to protect against financial instability.[166] Furthermore, Berger and Badenhoop posit that in order to promote effective supervision, a college of supervisors could be established between the relevant NCAs.[167] Thus, along with negotiated agreements[168] between the

[156] Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments, [2014] OJ L 173.
[157] Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments [2014] OJ L 173.
[158] COM (2019) 349 final (n 156) 3.
[159] Commission Staff Working Document, 'EU equivalence decisions in financial services policy: an assessment' SWD (2017) 102 final, 5.
[160] Henning Berger and Nikolai Badenhoop, 'Financial Services and Brexit: Navigating Towards Future Market Access' (2018) 19(4) *European Business Law Review* 679, 694.
[161] David Howarth and Lucia Quaglia, 'Brexit and the Single European Financial Market' (2017) 55(SI) *Journal of Common Market Studies* 149, 161.
[162] Henning Berger and Nikolai Badenhoop (n 161) 707.
[163] COM (2019) 349 final (n 156) 6.
[164] ibid.
[165] COM (2019) 349 final (n 156) 2.
[166] COM (2019) 349 final, (n 156) 3.
[167] Henning Berger and Nikolai Badenhoop, 'Financial Services and Brexit: Navigating Towards Future Market Access' (2018) 19(4) *European Business Law Review* 679, 708.
[168] Article 48(1), Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms (CRD IV).

NCAs regarding the exercise of supervision and cooperation agreements[169] to facilitate the exchange of information between supervisory authorities, there would be sufficient cooperation between the third country and the host Member State, so that efficient communication of information and risk management would be implemented. Consequently, effective supervision would be carried out by all authorities involved, which ensures the stability of both the EU's and the UK's financial systems. This would allow the EU to respond to supervisory developments and external risks, in order that the EU maintains a prudential framework that is resilient to cross-border activity to protect against negative effects on financial stability.[170]

Finally, through the points mentioned above, equivalence promotes economic integration not just supra nationally across the EU, but internationally. This due to third countries accessing the Internal Market and being able to enjoy the freedoms of capital, establishment and services throughout the Union, which, although it would not permit as much access as the passporting regime, would allow for higher market access than offered by the other routes examined in section three. Furthermore, although authorisation can be unilaterally revoked,[171] authorisation cannot be disallowed by individual Member States, consequently meaning that an equivalence regime removes restrictions on the free movement of capital that exists for the landlocked regime for branches. An equivalence regime for the banking sector would promote economic integration not only in the EU, but also internationally across the European nations that do not participate in the EEA, along with countries in other continents. It would ensure a level playing field for a globally integrated financial services sector through promoting regulatory convergence to international standards and EU financial regulation, while ensuring confidence in the safety and soundness of the EU's financial system as a whole.[172]

Disadvantages of an equivalence regime

Although Berger and Badenhoop[173] provide some good arguments regarding the advantages of adopting an equivalence regime, there are some flaws in introducing this regime for credit institutions for both the UK and other third countries. Concerning the UK, the primary aim for post-Brexit financial cooperation with the EU is for the UK to maintain autonomy over decision-making and the ability to legislate for their own interests,[174] with future cooperation being based on the principles of regulatory autonomy, transparency and stability.[175] Thus, in protection of the UK interests, Moloney[176] highlights the point that introducing an equivalence regime for credit institutions would become highly political for the UK, evidenced by several factors that would need to be taken into consideration, as examined below.

First, although the UK has previously adopted the single rulebook[177] and, according to HM Treasury,[178] the UK's regulatory framework is currently equivalent to that of the EU, the UK would have to maintain equivalence by following new EU developments (regulations and directives) and enact them into UK national law.[179] Whether the UK currently plans to diverge from the EU's framework remains unclear,

[169] Article 55 CRD IV.
[170] Commission, 'Equivalence in the area of financial services' COM (2019) 349 final, 1.
[171] Henning Berger and Nikolai Badenhoop (n 168) 704.
[172] The High-Level Group on Financial Supervision in the EU Chaired by Jacques de Larosiere, 'Report' (25 February 2009) <https://ec.europa.eu/economy_finance/publications/pages/publication14527_en.pdf > accessed 5 of February 2024, 60.
[173] Henning Berger and Nikolai Badenhoop (n 168).
[174] HM Government, *The future relationship between the United Kingdom and the European Union* (Cm 9593, 2018).
[175] 'Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom' < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/759021/25_November_Political_Declaration_setting_out_the_framework_for_the_future_relationship_between_the_European_Union_and_the_United_Kingdom__.pdf < last accessed 31 May 2024, 9.
[176] Niamh Moloney, 'Financial Services, the EU, and Brexit: An Uncertain Future for the City?' (2016) 17(SI) *German Law Journal* 75, 78.
[177] ibid, 78.
[178] HM Treasury, 'The Capital Requirements Regulation Equivalence Directions 2020' < https://www.legislation.gov.uk/uksi/2019/541/pdfs/uksiod_20190541_en_015.pdf > last accessed 27 March 2024.
[179] International Regulatory Strategy Group, 'The EU's Third Country Regimes and Alternatives to Passporting' < https://www.irsg.co.uk/assets/IRSG-Full-report-The-EUs-third-country-regimes-and-alternatives-to-passporting.pdf > accessed 13 March 2024, 13.

however there are signs that the UK might do this. For example, the Financial Services and Markets Act 2023[180] will revoke all subordinate EU legislation in the area of financial services, when Schedule 1 Part 2 receives Royal Assent, including the EEA Passport Rights Regulation[181] mentioned in the second section. The adoption of EU legislation into national law would go directly against the UK's interest of maintaining regulatory autonomy to enact legislation in accordance with their own interests; rather the UK would have to adopt legislation working in the interests of the EU's objectives and aims to ensure equivalence is maintained.

Furthermore, pre-Brexit, UK had a direct say in policy and decision-making due to the UK being one of the largest EU Member States in terms of GDP and, under qualified majority voting rules, the UK along with France, Germany and Italy, as the largest Member States, could block proposed pieces of financial legislation.[182] Consequently, the UK used its influence to support a more liberal 'market-making' regulatory approach to promote third country access into the EU, as opposed to the stricter approach of 'market-shaping' taken by France and Germany, concerned with safeguarding the EU against financial instability imported from third countries.[183] Now that the UK has left the EU, the approach to third country market access, and indeed the potential adoption of an equivalence regime for the banking sector, may be stricter without the UK's influence to make the financial regulation more market-friendly[184] for third countries. (This can be further evidenced by the proposal of COM (2021) 663 final,[185] to increase harmonisation of secondary legislation regarding supervision and third country branches to converge the fragmented regulatory landscape that exists across Member States, which is set to amend the CRD IV).

In continuation of this point, as the UK is not part of the EEA and is no longer a Member State, the UK would not have a seat or voting power in the supervisory authorities and so would not be able to influence regulations being adopted.[186] For example, pre-Brexit, the UK would often complain about the financial regulations produced in order to get them 'toned down.'[187] Therefore, with the UK now having left the EU, financial regulations adopted by the EU will probably be very different without the UK's contribution, consequently making the regulations adopted less suitable and more burdensome for the UK.[188] That being the case, through participating in the adoption of an equivalence regime for banks, the UK would have very little authority to be able to diverge from the EU's financial framework and regulations, without potentially having their authorisation revoked as their regulatory framework would no longer be considered equivalent.[189]

Consequently, UK would have to follow a highly technical set of rules enforced by the European Supervisory Authorities.[190] Although having effective supervision is at the centre of cross-border establishment of banks internationally, should the UK adopt such a regime this would result in the UK having to enforce stricter supervision or change its approach, due to the complexity of determining equivalence decisions based on supervision.[191] Thus, the UK would essentially be under the jurisdiction

[180] Financial Services and Markets Act 2023.
[181] The EEA Passport Rights (Amendment, etc., and Transitional Provisions) (EU Exit) Regulations 2018.
[182] David Howarth and Lucia Quaglia, 'Brexit and the Single European Financial Market' (2017) 55(SI) *Journal of Common Market Studies* 149, 150.
[183] ibid, 151.
[184] David Howarth and Lucia Quaglia (n 183) 162.
[185] Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/36/EU as regards supervisory powers, sanctions, third-country branches, and environmental, social and governance risks, and amending Directive 2014/59/EU.
[186] Niamh Moloney, 'Financial Services, the EU, and Brexit: An Uncertain Future for the City?' (2016) 17(SI) *German Law Journal* 75, 78.
[187] David Howarth and Lucia Quaglia (n 183) 161.
[188] ibid.
[189] International Regulatory Strategy Group, 'The EU's Third Country Regimes and Alternatives to Passporting' <https://www.irsg.co.uk/assets/IRSG-Full-report-The-EUs-third-country-regimes-and-alternatives-to-passporting.pdf> accessed 13 March 2024, 13.
[190] Niamh Moloney, 'Financial Services, the EU, and Brexit: An Uncertain Future for the City?' (2016) 17(SI) *German Law Journal* 75, 79.
[191] Niamh Moloney, 'Financial Services, the EU, and Brexit: An Uncertain Future for the City?' (2016) 17(SI) *German Law Journal* 75, 79.

of the EU's supervisory authorities. These authorities are arguably technocratic, due to the Commission's reliance on the supervisory authorities to adopt highly technical components of the single rulebook[192] to mitigate against risks to financial stability posed by third country participation in the Internal Market and to centralise/align third country financial regulation with the single rulebook. Thus meaning that the UK, again, would not have full independence to enact legislation contrary to the EU's interests and objectives and would ultimately become, through all the points mentioned above, 'rule-taking'[193] which would directly contradict the interest of ensuring post-Brexit regulatory autonomy.

To conclude this section, it is apparent that proposing an equivalence regime to be adopted by the EU, for the banking sector, would mean that the EU facilitates stronger economic integration in Europe, by promoting the centralisation of third country laws with the EU's framework, while removing restrictions in the Internal Market. However, it has become clear that participating in a potential equivalence regime for credit institutions would be increasingly challenging for the UK, due to the multiple objections the UK would have in safeguarding their own interests and potential divergence from the EU financial framework. Nevertheless, it is clear that despite the disadvantages of the UK participating in such a regime, if the UK wanted to have better market access than that provided by existing routes, the UK would have to be willing to compromise. The adoption of an equivalence regime for credit institutions would be the best access route into the Internal Market without the UK having to join the EEA. For the EU, introducing such a regime would protect the EU's interest in not benefitting third countries more than Member States, and protect their overarching aims relating to financial stability and effective supervision.

Conclusions

This conclusion will commence by restating the overall research question of this dissertation: 'Does the law on cross-border supervision and authorisation of credit institutions facilitate economic integration through granting full access to the Internal Market?'

The main argument flowing through this dissertation accepts that EU law regarding supervision and authorisation of Member States' credit institutions facilitates economic integration through largely unrestricted access to and enjoyment of the Internal Market. However, EU law regarding authorisation of third country banks to access the Internal Market does not fully achieve this objective due to restrictions on the free movement of capital,[194] establishment[195] and services[196] within the single market.

To summarise the conclusions reached through this dissertation, section 1 identified the objectives of all laws relevant to cross-border banking activity, understanding how international regulations, EU and UK law facilitate effective supervision of banks, fostering the safety, soundness and stability of the banking and financial system, while at the same time promoting globalisation of financial markets facilitated through economic integration. Section 2 examined the existing legal framework for supervision and authorisation of EEA institutions participating within the single market, and concluded that supervision and authorisation does facilitate maximum economic integration within the EU, through effective supervision and the use of passporting rights subject to mutual recognition. Section 3 concluded that the existing regimes for third countries, while understandably not granting third countries the same benefits as Member States, do embody various restrictions on accessing the Internal Market.

Taking into consideration these conclusions, and after conducting extensive research into this topic, to answer the research question: the law on cross-border supervision and authorisation of credit institutions partially facilitates economic integration. This is because third countries do not enjoy full access to the Internal Market. Although this is achieved for EEA credit institutions within the EU, the existing third

[192] Niamh Moloney, 'Brexit and Financial Services: (Yet) another re-ordering of institutional governance for the EU financial system?' (2018) 55(SI) *Common Market Law Review* 175, 189.
[193] Niamh Moloney, 'Access to the UK Financial Market after the UK Withdrawal from the EU: Disruption, Design, and Diffusion' (2024) 25(1) *European Business Organization Law Review* 25, 31.
[194] Article 63 TFEU.
[195] Article 49 TFEU.
[196] Article 56 TFEU.

country regimes for cross-border banking authorisation embody numerous restrictions to the enjoyment of the fundamental freedoms within the Internal Market, therefore constituting a barrier to integration. Consequently, section 4 aimed to propose that an equivalence regime[197] for the banking sector should be adopted into EU law. There is much scholarly debate surrounding the potential adoption of such a regime, mainly relating to the highly political[198] and legislative nature of complying with such a regime. However, this regime would facilitate greater economic integration to ensure the EU furthers global objectives,[199] while mutually benefitting both the EU and the UK. It would promote greater economic integration and centralisation of third country jurisdictions with the EU, through harmonisation of supervisory regulations/framework and authorisation into the Internal Market.

[197] Henning Berger and Nikolai Badenhoop, 'Financial Services and Brexit: Navigating Towards Future Market Access' (2018) 19(4*) European Business Law Review* 679, 706.
[198] Niamh Moloney, 'Financial Services, the EU, and Brexit: An Uncertain Future for the City?' (2016) 17(SI) *German Law Journal* 75, 78.
[199] The High-Level Group on Financial Supervision in the EU Chaired by Jacques de Larosiere, 'Report' (25 February 2009) < https://ec.europa.eu/economy_finance/publications/pages/publication14527_en.pdf > accessed 5 of February 2024, 3.

INTERNATIONAL CRIMINAL LAW

Accountability in international law for sexual crimes against women in situations of conflict and mass atrocity

Lori Ryder*

Introduction

In the vast majority of conflicts and mass atrocities, there is a silent war of violence waged on women, which international law seeks and often struggles to address. In this context, "sexual crimes against women" (SCAW) refer to violent and non-consensual sexual acts against women that meet a criminal standard of gravity, which in this dissertation are treated synonymously with sexual and gender-based violence (SGBV). SCAW was an "integral part of the hostilities" in Burundi,[1] and were "committed in a systematic and widespread manner" in the Central African Republic,[2] and were reported in a variety of conflicts throughout the world.[3] Despite developments in international law, these crimes are still being committed in conflicts today.[4]

This piece will focus on the development of international law when addressing SCAW and the efficiency of the law and accountability for these crimes. SCAW includes rape, sexual assault, forced pregnancy, forced marriage, forced abortions and public nudity,[5] which occur in the context of hostilities, conflicts and situations of mass atrocity. Although it references crimes, it will not only focus on International Criminal Law (ICL), but will also explore the linked areas of International Humanitarian Law (IHL) and International Human Rights Law (IHRL) to discover how they all complement one another. This topic is essential as it recognises grave violations of international law where the law either works, or fails to hold those responsible accountable for their actions or to provide redress for victims of these violations. The first part will consider the development of sexual crimes by looking at specific examples, such as the cases of *Akayesu, Čelebici* and *Furundžija,* before focusing more specifically on the law surrounding these crimes. The third and fourth parts will look at legal challenges in addressing sexual crimes and the lack of accountability and detail available means of redress for victims, respectively. The final part will cover limitations and gaps in the law and how they affect current events, specifically looking at the current conflict in Gaza.

The development of sexual crimes against women in international Law

SCAW appears to be a consistent reoccurring issue within a variety of conflicts and mass atrocities throughout the world.[6] Rape was used as the "prevalent form of torture"[7] of women in Kuwait by Iraqi soldiers as well as being used to "punish and humiliate the entire community"[8] in Kashmir under the administration of the Indian army. Throughout the non-international armed conflict (NIAC) in Peru,

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[1] Megan Bastick, Karin Grimm and Rahel Kunz, *Sexual Violence in Armed Conflict: Global Overview and Implications for the Security Sector* (Centre For The Democratic Control Of Armed Forces 2007), 33.
[2] Ibid, 35.
[3] Ibid, 23.
[4] OHCHR, 'Sudan: UN experts appalled by use of sexual violence as a tool of war' (30th November 2023) < https://www.ohchr.org/en/press-releases/2023/11/sudan-un-experts-appalled-use-sexual-violence-tool-war > Accessed 9th April 2024.
[5] Gloria Gaggioli, 'Sexual Violence in Armed Conflicts: A Violation of International Humanitarian Law and Human Rights Law' (2014) 96 *IRRC* 503, 506.
[6] Christine Chinkin, 'Rape and Sexual Abuse of Women in International Law' (1994) 5 *EJIL* 326, 328.
[7] Amnesty international, 'Iraq/Occupied Kuwait Human Rights Violations since 2 August' (1990), 34. < https://www.amnesty.org/en/wp-content/uploads/2021/05/MDE140161990ENGLISH.pdf > Accessed 20th March 2024.
[8] Asia Watch, Human Rights Watch (Organization and Physicians for Human Rights U.S.), *the Human Rights Crisis in Kashmir: A Pattern of Impunity* (Human Rights Watch 1993), 14.

women were targets of sexual violence from both parties to the conflict.[9] Sexual violence has been prevalent throughout history,[10] but the perception by the special rapporteur appointed by the United Nations Commission on Human Rights is that it is not only used as an abuse of power and control but also to "humiliate, shame, degrade and terrify" entire groups of civilians.[11]

Early development of ICL in gender violence can be seen in the post-World War II *ad hoc* tribunals. The 1945 International Military Tribunals at Nuremberg (IMT) was established to prosecute major war criminals of the Nazi regime,[12] and the 1946 Tokyo International Military Tribunal for the Far East (IMTFE) to prosecute those responsible for the Japanese atrocities of the Second World War.[13] These tribunals focused on crimes against peace but largely ignored sexual violence.[14] Within the IMT, there was mass evidence of sexual violence, which was extensively documented, yet the tribunal did not expressly prosecute such crimes[15] and did not list rape as a crime.[16] The tribunal implicitly recognised sexual violence as torture when referring to the young girls who were raped, stripped naked and endured miscarriage by brutality.[17] Rape was classified in the Control Council Law No. 10 as a crime against humanity,[18] but neither the IMT nor the Nuremberg Military Tribunals (NMT) charged the defendants with rape.[19] In the IMTFE, rape was explicitly referred to for the first time; however, it was not placed at a level to stand-alone.[20] There was never punishment for the crime of "comfort women" in the Tokyo Tribunal, even though there was overwhelming evidence.[21] The sexual slavery of around 200,000 women[22] obligated to "serve" Japanese soldiers was not punished until 2001 when the Woman's International War Crimes Tribunal found Emperor Hirohito guilty based on precedent from the International Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).

After these trials, there was a hiatus in international tribunals until 1993, when the UN Security Council established a commission to investigate violations of IHL in the former Yugoslavia[23] due to reports of systematic rape to further policies of ethnic cleansing.[24] Utilisation of Chapter VII of the UN Charter led to the establishment of the ICTY and the ICTR in 1994. These tribunals focused more on gender violence than the previous post-World War II tribunals. The UN Special Rapporteur on the situation in Rwanda reported that within the conflict "rape was a rule and its absence the exception",[25] as rape was used systematically as a "weapon".

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[9] Human Rights Watch, 'Untold Terror: Violence against Women in Peru's Armed Conflict' (1 December 1992) < https://www.hrw.org/report/1992/12/01/untold-terror-violence-against-women-perus-armed-conflict> Accessed 7th march 2024.
[10] Chinkin (n 6) 327.
[11] UNCHR, Forty-ninth Session Agenda item 27 'Report on the situation of human rights in the territory of the former Yugoslavia' (10 February 1993) E/CN.4/1993/50, para 19.
[12] Anders Henriksen, *International Law* (4th edn, OUP 2023) 310.
[13] Ibid.
[14] Kelly D. Askin, 'Prosecuting Wartime Rape and Other Gender Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles' (2003) 21(2) *Berkeley J Int. Law* 288, 301.
[15] Ibid.
[16] Judith Gardam, 'Women, human rights and international humanitarian law' (1998) 38(324) *IRRC* 421, 423.
[17] Trial of the Major War Criminals before the International Military Tribunal, (14 November 1945-1 October 1946), Volume 6, transcript at 177.
[18] Trials of War Criminals before Nuremberg Military Tribunals under Control Council Law No. 10 (1945), Article 2(1)(c).
[19] Kevin John Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (online edn, OUP 2011), 245.
[20] David J. Scheffer, 'Rape as a War Crime' (29 October 1999) < https://www.peacewomen.org/node/90353 > accessed 10th March 2024.
[21] Women's Caucus for Gender Justice, 'RE: Judgement of the Women's International War Crimes Tribunal 2000 for the Trial of Japanese Military Sexual Slavery' (2000) < http://iccwomen.org/wigjdraft1/Archives/oldWCGJ/tokyo/judgmentannounce.html#:~:text=%22The%20Tribunal%20finds%2C%20based%20on,as%20a%20crime%20against%20humanity > Accessed 20th March 2024.
[22] Alexis Dudden, 'A Guide to Understanding the History of the 'Comfort Women' Issue' (16 September 2022) < https://www.usip.org/publications/2022/09/guide-understanding-history-comfort-women-issue > Accessed 8th March 2024.
[23] UNSC Res 780 (6 October 1992) UN Doc S/Res/780.
[24] Askin (n 14) 305.
[25] UNCHR 'Report on the Situation of Human Rights in Rwanda by Rened Degni-Segui, Special Rapporteur of the Commission on Human Rights' U.N. Docs. E/CN.4/1996/68 (1996), para 16.

The case of *Akayesu* was the first ever conviction for genocide as well as the first conviction for rape and sexual violence as genocide within an international tribunal.[26] Initially, *Akayesu* was not being charged with any form of gender crimes until a witness spontaneously testified of the gang rape by three Interahamwe soldiers of her six-year-old daughter, a testimony that resulted in a following witness testifying against also being a victim and witness to other rapes committed by members of the Hutu militia.[27] The case referred to sexual violence as "forcible sexual penetration of the vagina, anus or oral cavity by a penis and/or of the vagina or anus by some other object, and sexual abuse, such as forced nudity"[28] before declaring that rape constitutes torture.[29] This case also went further than the historical definition of rape. It incorporated the insertion of objects to take into consideration the Interahamwe's "thrusting a piece of wood into the sexual organs of a woman as she lay dying",[30] extending the *actus reus* of rape within ICL. The progression of recognising rape as torture may have taken too long, but this is due to torture being a *jus cogens norm* which places an obligation on states to act against perpetrators of this crime, and sexual violence was considered a 'lesser crime' and a 'necessary by-product of conflict'.[31] Even within this case, sexual violence was put in the fourth category with petty theft until the Tutsi women marched to the capital in protest leading to the reclassification of rape as one of the most serious crimes within the ICTR.[32] This landmark case placed sexual violence on equal footing with other crimes[33] and now sits as the foundation for the development and accountability of SCAW.

In 1998, the ICTY reaffirmed the precedent in the *Čelebići* case[34] that rape constitutes torture under customary law. The case entailed an indictment against four defendants who were part of an operation involving taking control of villages inhabited mainly by Bosnian Serbs. They subsequently detained them in the Čelebići prison camp, where they were subject to torture, sexual assault, death, and other forms of inhuman treatment.[35] The actions contained in the crime of sexual assault included gang rape, sexual humiliation, and rape during interrogation.[36] The defendants were either charged with individual responsibility for the crimes they committed, and those who had superior authority or 'effective control' over their subordinates were prosecuted for command responsibility either for a positive act or culpable omission[37] such as having authority to prevent or punish these acts but not doing so.[38] This case marks the point where international law finally put sexual violence on a level playing field with other serious crimes as it was decided that if sexual violence satisfied the elements contained in the Convention Against Torture, then it would constitute torture.[39] This involves the act being committed due to discrimination by a person acting in an official capacity.[40] Looking at this alongside the examples, the Chamber found that the victim raped during interrogation was raped for discriminatory purposes due to

[26] United Nations, International Residual Mechanism for Criminal Tribunals '*The Prosecutor* v. *Jean-Paul Akayesu* (ICTR-96-4-A)' < https://www.internationalcrimesdatabase.org/Case/50/Akayesu/#:~:text=His%20was%20the%20first%20conviction,as%20a%20crime%20against%20humanity. > Accessed 8th March 2024.
[27] Askin (n 14) 318.
[28] *The Prosecutor v. Jean-Paul Akayesu* (Trial Judgement) ICTR-96-4-A, Para. 10A.
[29] Ibid, 597.
[30] Ibid, 686.
[31] Saumya Uma, 'Where does International Criminal Law Stand When It Comes to Sexual and Gender Based Violence?' < https://pure.jgu.edu.in/id/eprint/5263/1/5%20Sexual%20and%20Gender-Based%20Violence.pdf > Accessed 10th March 2024.
[32] *The Uncondemned* (Directed by Nick Louvel and Michele Mitchell, 2015).
[33] Scheffer (n 20).
[34] *The Prosecutor* v. *Zdravko Mucić, Hazim Delić, Esad Landžo and Zejnil Delalić* (IT-96-21). (Mucić et al)
[35] *Celebici case: the Judgement of the Trial Chamber,* press release (16 November 1998) CC/PIU/364-E. < https://www.icty.org/en/press/celebici-case-judgement-trial-chamber-zejnil-delalic-acquitted-zdravko-mucic-sentenced-7-years > Accessed 10th March 2024.
[36] Askin (n 14) 322.
[37] Mucić et al (n 34) 333.
[38] Ibid, 378.
[39] Ibid. 333.
[39] Ibid, 480.
[40] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Adopted 10 December 1984 UNGA Res 39/46) art 1.

being a woman of an opposing group.[41] Classifying rape as torture allows courts to recognise the seriousness of the offence. The Chamber considers the "rape of any person to be a despicable act which strikes at the very core of human dignity and physical integrity".[42] In 1998, we also saw the broadening of the scope of rape in the *Furundžija* trial, which addressed physical elements of sexual violence. This involved examples of sexual humiliation and intimate sexual lethal threats with a weapon,[43] as well as sexual assault to the point of the witness passing out from exhaustion[44] in the presence of *Furundžija.* The Chamber found that the elements of rape were met, but the issue of consent was not raised, as the position of the Trial Chamber was that "any form of captivity vitiates consent".[45] The court attempted to consider whether oral penetration is categorised as rape or whether it is treated as sexual assault. The Trial Chamber held that the oral penetration constitutes "a most humiliating and degrading attack upon human dignity,"[46] which is what IHL and IHRL focus on protecting.

Nevertheless, it also recognises the principle of *nullum crimen sine lege* and whether they could prosecute the accused with oral penetration as rape when in his own jurisdiction, it would only constitute sexual assault.[47] The assault occurred against defenceless civilians during time of armed conflict, which would transform the act from mere sexual assault to sexual assault as a war crime.[48] Therefore, as long as the sentencing is per Article 24 of the Statute of the Tribunal,[49] which considers the gravity of the offence, the only issue the accused may have is the stigma around the categorisation. This is not a concern for the tribunal as this kind of assault is humiliating and traumatic for the victim in the same way that vaginal or anal penetration is, outweighing the complaints of the accused. Broadening the definition of rape in this way protects human dignity. The trial chamber came to the final decision that sexual penetration of the vagina, anus or mouth of the victim by coercion, force or threat of force constitutes rape.[50] This was also the first case to consider rape as an act of genocide,[51] a grave breach of the Geneva Conventions or a violation of the laws or customs of war. This was clarified following *Akayesu,* which concluded that rape constituted genocide.[52]

This same year, 120 States adopted the Rome Statute, leading to the establishment of the International Criminal Court (ICC) in 2002, aiming to "end impunity for the perpetrators of the most serious crimes of concern to the international community"[53] for crimes committed after 1 July 2002. In 2021, the court brought the trial of Dominic Ongwen. Ongwen personally committed crimes involving the enslavement of seven abducted girls, which he forced to be in a conjugal relationship with him.[54] The victims were repeatedly forced to have sex with him, and two of the girls endured forced pregnancy.[55] The girls were subject to beatings, and one victim was forced to kill another abductee, causing severe anguish.[56] As a leader, *Ongwen* also had control of soldiers whom he relied on to abduct girls to distribute them to members of the Sinia brigade.[57] The abductees were considered 'wives' of the male members they were

[41] Mucić et al (n 34) 941.
[42] Ibid 495.
[43] "The accused continued to interrogate Witness A, who was forced to remain naked
in front of approximately 40 soldiers. Accused B drew a knife over the body and thigh of
Witness A, threatening, inter alia, to cut out her private parts", *Prosecutor* v. *Anto Furundžija* (Judgement) IT-95-17/1-T (10 December 1998) (Furundžija), para 82.
[44] Ibid, 88.
[45] Ibid, 271.
[46] Ibid, 183.
[47] Ibid, 184.
[48] Ibid.
[49] Updated Statute of the International Criminal Tribunal for the Former Yugoslavia (2009), Article 24 (2).
[50] Furundžija (n 43) 185.
[51] Ibid, 172.
[52] International Residual Mechanism for Criminal Tribunals, Landmark Cases < https://www.icty.org/sid/10314 > Accessed 11th March 2024.
[53] International Criminal Court, 'The ICC at a Glance' < https://www.icc-cpi.int/sites/default/files/Publications/ICCAtAGlanceENG.pdf > Accessed 11th March 2024.
[54] *The Prosecutor* v. *Dominic Ongwen* ICC-02/04/-1/15 (Judgement) (4 February 2021) (Ongwen), para 206.
[55] Ibid, 207.
[56] Ibid, 209.
[57] Ibid, 214.

assigned to from the time they were first forced to have sex with them.[58] This case allowed over 4000 victims to participate in the trial[59] and gave hope for possible justice for victims. *Ongwen* was convicted of a record number of charges in ICC history and sentenced to the second-largest prison sentence imposed by the ICC.[60] It also focused on forced marriage as a gender-based crime, which had never been adjudicated at the ICC before.[61] While this development signals progress in ICC convictions, it is still too premature to categorise it as a positive trend in ICC outcomes rather than a mere isolated exception.

SCAW have been shown to be prevalent throughout various armed conflicts, so it is essential to recognise reasons for this behaviour. Rape is anticipated as an inevitable and expected side effect of war[62] but need not be because if this were the case, then it would fail to explain why sexual violence is widespread in some conflicts but not others.[63] Another theory discussed by Thornhill and Palmer is that men inherit a genetically transmitted propensity for rape, which then increases with opportunity in wartime due to regulatory measures being weaker.[64] Brownmiller stated that "war provides men with the perfect psychological backdrop to give vent to their contempt for women".[65] This is considered a misconception because rape is not due to sexual desire but instead an expression of dominance and power.[66]

Additionally, an increase during wartime is not merely due to opportunity, but wartime experience increases incentive due to the relationship between competition, increased testosterone, and engagement in sexual violence.[67] This is also due to armed forces comprising young men far from standard social control.[68] This reasoning explains why sexual violence is more common in wartime than in peacetime. It is considered that wartime amplifies peacetime patterns of rape, and therefore rape becomes more frequent due to weakened community and family networks.[69] Increased frequency can also be attributed to militaristic norms, which strengthen patriarchal social practices that support rape and other forms of sexual violence,[70] as similarly discussed by Chinkin.[71]

The incentive aspect is also referred to as a "war booty",[72] which is displayed in the example of *Borislav Herek,* who admitted that his superiors gave him women to rape as a reward for good behaviour in the armed conflict in Bosnia and Herzegovina.[73] In addition to being an incentive, it is also viewed as a war strategy.[74] Coomaraswamy identified that SCAW in armed conflict is due to the ideology that 'to rape a woman is to humiliate her community', which encapsulates the men's defeat as they failed to protect 'their' women.[75]

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[58] Ibid, 216.
[59] Redress, 'Domicic Ongwen: Ugandan Victims Must Be at the Centre of Reparations Proceedings (2022) < https://redress.org/news/dominic-ongwen-ugandan-victims-must-be-at-the-centre-of-reparations-proceedings/ > Accessed 11th April 2024.
[60] Juan-Pablo Perez-Leon-Acevedo and Fabio Ferraz de Almeida, 'Lights and Shadows of the *Ongwen* Case at the International Criminal Court', (2023) 23(5-6) *IntlCLR* 667, 668.
[61] Ibid, 670.
[62] Maria Eriksson Baaz and Maria Stern, 'Why Do Soldiers Rape? Masculinity, Violence, and Sexuality in the Armed Forces in the Congo (DRC)', 2009 53(2) *Int Studies Quarterly* 495, 498.
[63] Dara Kay Cohen, Amelia Hoover Green, and Elisabeth Jean Wood, Special Report 323 'Wartime Sexual Violence: Misconceptions, Implications, and Ways Forward' (2013) *United States Institute of Peace* (Special Report 323), 2.
[64] Elisabeth Jean Wood, 'Variation in Sexual violence during War' 2006 36(3) *Sage Journals* 307, 321.
[65] Susan Brownmiller, *Against Our Will: Men, Women and Rape* (Simon and Schuster 1975), 32.
[66] Cohen (n 63,) 6.
[67] Wood (n 64), 323.
[68] Ibid, 321.
[69] Cohen (n 63), 5.
[70] Ibid.
[71] See Chinkin, 'Women and Peace: Militarism and Oppression', in Kathleen Mahoney and Paul Mahoney, *Human Rights in the Twenty-First Century: A Global Challenge* (Springer 1993) 405.
[72] Baaz and Stern (n 62) 498.
[73] Claudia Card, 'Rape as a Weapon of War' (1996) 11(4) *Women and Violence* 5, 10.
[74] Gaggioli (n 5) 505.
[75] Coomaraswamy, 'Of Kali Born: Violence and the Law in Sri Lanka', in M. Schuler (ed.), *Freedom from Violence: Women's Strategiesfrom Around the World* (1992) 49. As cited in Chinkin (n 6) 328.

International Law relating to sexual crimes

IHL, IHRL and ICL all intersect to address regulations on SCAW. The three sectors complement and reinforce each other,[76] referred to as "cross fertilisation".[77] For example, the ICTY in the *Čelebići* case referred to both the Inter-American Commission on Human Rights (IACHR) and the European Court of Human Rights (ECtHR), precisely the case of *Aydin v Turkey,* when attempting to ascertain whether rape constitutes torture. The case of *Aydin v Turkey* also referred to the ICTY for torture based on allegations of rape.[78] It is noticeable that the sectors intertwine to reinforce each other and give substance to the precedence.

Focusing on IHL, Geneva Convention IV 1949, Additional Protocol I to the Geneva Conventions[79] and Additional Protocol II prohibit SGBV. It is important to note that this convention applies to "persons taking no active part in hostilities".[80] Article 27(2) provides that women be "especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault".[81] Article 76 of Additional Protocol I is focused on the protection of women "against rape, forced prostitution and any other form of indecent assault"[82] within international armed conflicts (IAC). Article 4 of Additional Protocol II[83] protects victims within NIACs and prohibits "outrages upon personal dignity, in particular, humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault".[84] Common Article 3 also prohibits "outrages upon personal dignity, in particular humiliating and degrading treatment".[85]

IHRL prohibiting SCAW can be interpreted in Article 12 of the Universal Declaration of Human Rights (UDHR), which states that no one should be subject to "attacks upon his honour and reputation".[86] Although not intended to be a legally enforcing instrument, "its content can now be said to form part of customary international law".[87] The World Conference on Human Rights in Vienna has a more direct approach to SGBV as it stressed the elimination of violence against women and specifically references rape, sexual slavery and forced pregnancy.[88] The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) is another IHRL Instrument that addresses sexual violence. Recommendation 35 states that gender-based violence can constitute torture or cruel, inhuman, or degrading treatment[89] in specific circumstances, which are understood using a gender-sensitive approach to analyse the level of pain and suffering experienced by women,[90] including cases of rape. The Recommendation also points out that gender-based violence can constitute international crimes, including crimes against humanity and war crimes.[91]

It is also vital to recognise regional instruments of IHRL. The European Convention on Human Rights (ECHR) does not explicitly provide a right to be free from sexual violence, but through case law, state parties are responsible for rape crimes in cases where either state agents perpetrated the crime or the

[76] Gaggioli (n 5), 532.
[77] Boyd van Dijk, "Human Rights in War: On the Entangled Foundations of the 1949 Geneva Conventions" (2018) 112(4) *AJIL* 553, 556.
[78] *Aydin v. Turkey* (1997) 57/1996/676/866, para 51.
[79] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.
[80] Geneva Convention Relative to the Protection of Civilian Persons in Time of War Of 12 August 1949 (GC4), Article 3.
[81] Ibid, Article 27(2).
[82] Protocol I (n79) Article 76(1).
[83] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.
[84] Ibid, Article 4(e).
[85] GC4 (n 80)
[86] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A (III) (UDHR) Article 12.
[87] Geoffrey Marston (ed), "United Kingdom Materials on International Law" (1991) 62 *BYIL* 535, 592.
[88] World Conference on Human Rights Vienna 14-15 June1993 A/CONF.157/23 (Vienna WCHR), para 38.
[89] CEDAW, General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19 (14 July 2017) CEDAW/C/GC/35, para 16.
[90] Ibid, 17.
[91] Ibid, 16.

state failed to provide adequate remedy for the crime.[92] The case *X & Y v. The Netherlands* held that rape was a violation of The ECHR Article 8's right to privacy,[93] but later, *X & Y* followed the progression of the IACHR and classified rape as a form of torture in *Aydin v Turkey*.[94] The 1979 CEDAW directly addresses SGBV. At the same time as the UDHR, post-Second World War, the Council of Europe was founded, and in 1950, it adopted the ECHR.[95] Then, in 1993, the World Conference on Human Rights recommended strengthening and harmonising human rights, taking new steps to protect women's rights.[96] This included supporting the creation of a 'Special Rapporteur on Violence against Women', ensuring the integration of violence against women into UN human rights framework.[97]

ICL is now predominantly provided within the Rome Statute 1998, which established the ICC. Article 7 addresses crimes against humanity which includes "Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity"[98] if it is committed as part of a widespread or systematic attack. Article 8 gives the ICC jurisdiction in respect of war crimes, which includes "Committing rape, sexual slavery, enforced prostitution, forced pregnancy, […] enforced sterilisation, or any other form of sexual violence"[99] for IAC and the same is recognised for a NIAC.[100] The Elements of Crimes provides clarification for the courts to interpret the elements required for rape and sexual violence. Article 7(1)(g) focuses on gender-based crimes against humanity,[101] while Article 8(2)(b)(xxii) describes required elements for gender-based war crimes within IAC[102] and 8(2)(e)(vi) the same for NIAC.[103] There have also been several *ad hoc* tribunals set up for specific situations that addressed these types of crimes and included them within the statutes. For example, the Statute to the ICTY Article 5(1)(g) listed rape as a crime against humanity,[104] as did the Statute to the ICTR in Article 3(1)(g).[105] The Special Panel for Serious Crimes in East Timor qualified rape as a crime against humanity in Section 51,[106] and the Statute for the Special Court of Sierra Leone listed "Rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence"[107] as a crime against humanity and as a violation of the Geneva Conventions. The Extraordinary Chambers in the Court of Cambodia also listed rape as a crime against humanity.[108]

Kunerac et al. set out the conditions and material scope of war crimes by applying Article 3 of the Statute of the ICTY. *Kunerac* was convicted for directly committing torture and rape as well as aiding and abetting gang rape by several of his soldiers in the Bosnian Serb Army.[109] To apply the Statute, there needs to be an armed conflict and the act must be closely related to the armed conflict. Armed conflict exists where there is a resort to armed force or violence between states or governmental authorities and organised armed groups, but the law of war applies in the whole territory of the states

[92] Patricia Viseur Sellers, 'The Prosecution of Sexual Violence in Conflict: The Importance of Human Rights as Means of Interpretation' (2008) *Women's Human Rights and Gender Unit* 32.
[93] *X&Y* v. *The Netherlands* (1983) 8978/80.
[94] *Aydin v. Turkey* (n 78).
[95] Henriksen (n 12) 175.
[96] Vienna WCHR (n 88).
[97] UNCHR, 'Special Rapporteur on violence against women and girls' < https://www.ohchr.org/en/special-procedures/sr-violence-against-women > Accessed 9th April 2024.
[98] Rome Statute of the International Criminal Court 2011 (Rome Statute), Article 7(1)(g).
[99] Ibid, Article 8(2)(b)(xxii).
[100] Ibid, Article 8(2)(e)(vi).
[101] International Criminal Court Elements of Crimes 2013, Article 7(1)(g).
[102] Ibid, Article 8(2)(b)(xxii).
[103] Ibid, Article 8(2)(e)(vi).
[104] Statute ICTY (n 49) Article 5(1)(g).
[105] Statute of the International Tribunal for Rwanda 2007, Article 3(1)(g).
[106] United Nations Transitional Administration in East Timor on the establishment of panels with exclusive jurisdiction over serious criminal offences (6 June 2000) (UNTAET/REG/2000/15), Section 5.1(g).
[107] Statute of the Special Court for Sierra Leone 2000, Article 2(1)(g).
[108] Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006), Article 5.
[109] Kunerac, Kovač & Vukavić (IT-96-23 and 23/1) case information sheet.

involved, and therefore, there can be a violation even in a place where the fighting is not taking place.[110] In deciding whether the crime is sufficiently related to the armed conflict, the Trial Chamber takes into account: 'the fact that the perpetrator is a combatant; the fact that the victim is a non-combatant; the fact that the victim is a member of the opposing party; the fact that the act may be said to serve the ultimate goal of the military campaign; and the fact that the crime is committed as part of or in the context of the perpetrator's official duties'.[111] For an offence to be prosecuted under Article 3 of the Statute, there are four conditions concerning a serious violation constituting an infringement of a rule of IHL, which must be customary, and the violation must entail individual criminal responsibility of the person breaching the rule.[112] The case also states that rape is regarded as a war crime under customary law.[113]

The case of *Ongwen,* which shows the ICC's most recent success, as discussed in chapter one, sets out the requirements for a crime to be classified as a war crime or crime against humanity regarding an IAC. Referencing the Rome Statute, the Trial Chamber recognised that rape and other forms of sexual violence could be classified as a 'crime against humanity' when committed as "part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack".[114] The Chamber uses the case of *Ntaganda*[115] to explain what this phrase means. This is defined as "a course of conduct involving the multiple commissions of acts"[116] in which rape and sexual assault are listed, not directed at individual civilians but a collective.[117] The civilian population must also be the primary target rather than an accidental victim.[118] This distinction between a legitimate target and protected people is labelled the 'principle of distinction'.[119] The term' widespread or systematic attack' requires a large-scale nature, assessed on all relevant factors rather than exclusively quantitative or geographical.[120] 'Systematic' refers to the attack not being random[121] but reiterating the organisational objective. The requirement for 'knowledge of the attack' is particularly relevant for many of the cases discussed in the first chapter because the accused did not commit the crimes themselves but instead had command responsibility over those perpetrating the attack. For this requirement, the perpetrator must know that their action is part of a widespread attack directed against a civilian population.[122] If they are to be convicted due to command responsibility, they must have effective control or command over the force that committed the crime and knew or should have known that the crimes were being committed or about to be committed. They then must have failed to take necessary measures to prevent or repress the crimes, which resulted from the commander's failure to exercise proper control over the forces.[123]

For a war crime to be committed in a NIAC, two requirements are set out in *Ntaganda.* The conduct must have occurred in and been associated with the armed conflict, and the perpetrator must have been aware of an armed conflict.[124] To ensure the crime is not an isolated occurrence, there is a "nexus requirement" which ensures that the perpetrator's conduct must be "closely linked to the hostilities".[125] The requirements are very similar to those of an IAC, and the Chamber used the precedence set out in *Kunerac.* The main difference is the establishment of a NIAC, which exists in 'protracted armed

[110] *Prosecutor* v. *Dragoljub Kunerac, Radomir Kovac and Zoran Vukovic* (Trial Judgment) IT-96-23-T & IT-96-23/1-T (22 February 2001) (*Kunerac et al*), para 57.
[111] Ibid, 59.
[112] Ibid, 66.
[113] Ibid, 195.
[114] Rome Statute (n 98), Article 7.
[115] *The Prosecutor v. Bosco Ntaganda* (Trial Judgement) ICC-01/04-02/06 (8 July 2019).
[116] Rome Statute (n 98), Article 7(2)(a).
[117] *The Prosecutor* v. *Jean-Pierre Bemba Gombo* (Judgement pursuant to Article 74 of the Statute) ICC-01/05-01/08 (21 March 2016), para 152.
[118] *The Prosecutor* v. *Germain Katanga* (Judgement pursuant to article 74 of the Statute) ICC-01/04-01/07 (7 March 2014), para 1104.
[119] For international armed conflicts see Protocol I (n 79), Article 48; for non-international armed conflicts see Protocol II (n83), Article 13.
[120] Bemba (n 117), 163.
[121] Ntaganda (n 115), 691.
[122] Kunerac et al (n 110) 102.
[123] Bemba (n 117), 170
[124] Ntaganda (n 115), 698.
[125] Ibid, 731.

violence between governmental authorities and organised armed groups or between such groups within a State'.[126]

Problems in achieving accountability in the law for sexual crimes in conflict

After discussing the development of sexual crimes and their prohibition within international law, it is essential to analyse problems with these prohibitions before examining instances of legal violations. This includes accountability for sexual crimes and the challenges encountered when ensuring that justice is served for such crimes. Accountability is more than a criminal conviction but also redress for the victims. The basic principles for redress include reparation, restitution, compensation, rehabilitation, and satisfaction and guarantees of non-repetition.[127] However, this part will focus on criminal convictions, or lack thereof and the fourth part will discuss details of redress.

Instruments of international law hold many different issues when referring to SCAW. Looking at IHL, the Geneva Convention is criticised because it directly correlates rape with a woman's honour, not reflecting the seriousness of the offence[128] and focuses the protection of women on their reproductive roles.[129] IHL rules also conceptualise rape as a by-product of war and a necessary sacrifice, as the combatants, who are almost invariably men, are at risk when fighting.[130] Gardam recognises that this is an unfair analysis as it assumes that women's interests mirror the male interest and ignores structural discrimination.[131]

Regarding IHRL, the UDHR does not address sexual violence directly but instead suggests its prohibition by referring to attacks upon honour and reputation. This becomes an issue as the crime is not put explicitly but must be interpreted. Additionally, woman's rights activists are critical of the link between rape and honour.[132] This perpetuates the societal belief that a raped woman is dishonourable.[133] Niarchos points out the drawbacks of this link which fails to capture the real significance of the harm inflicted upon the women and causes rape to appear as seduction with "just a little persuading" instead of the severe and violent attack that it is.[134] Another pitfall is that presenting honour as something that needs to be protected reiterates the idea that a raped woman is disgraced.[135] A final reason is that describing rape as a mere attack on honour disregards the scale of the crime, making it appear less worthy of prosecution than other injuries to the person.[136] To deal with the indirect law, the World Conference on Human Rights directly addressed the prohibition of violence against women.[137] Although this may appear progressive for SCAW, it is a soft law guideline that lacks the enforcement power necessary to impose legal obligations on states. CEDAW is another convention that is direct in dealing with gender-based violence; however, the issue with these conventions is that not all states recognise them. For example, CEDAW has not yet been ratified by the United States.[138]

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[126] Ibid, 701.
[127] ECOSOC 'The right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms' Res 1999/33 (18 January 2000).
[128] Judith Gardam, 'Women and the Law of Armed Conflict: Why the Silence?' (1997) 46(1) *ICLQ* 55, 74.
[129] Cordula Droege and Eirini Giorgou, 'How international humanitarian law develops' (2022) 104(920-921) *IRRC* 1798, 1818.
[130] Judith Gardam, 'A Feminist Analysis of Certain Aspects of International Humanitarian Law' (1992) 12 *Australian Year Book of International Law* 265, 277.
[131] Ibid.
[132] Dyani, Ntombizozuko, "Protocol on the rights of women in Africa: protection of women from sexual violence during armed conflict" (2006) 6(4) *Afr. Hum Rts LJ* 166, 171.
[133] Ibid.
[134] Catherine N. Niarchos, 'Women, War, and Rape: Challenges Facing the International Tribunal for the Former Yugoslavia' (1995) 17(4) *Hum Rts Q* 649, 674.
[135] Rhonda Copleon, 'Surfacing Gender: Re-Engraving Crimes against Women in Humanitarian Law' (1994) 5 *Women's Law Journal* 243, 249.
[136] Niarchos (n 134), 674.
[137] Vienna Declaration and Programme of Action, Adopted by the World Conference on Human Rights in Vienna 25 June 1993, Para 18.
[138] Human Rights Watch, 'United States Ratification of International Human Rights Treaties' (24 July 2009) < https://www.hrw.org/news/2009/07/24/united-states-ratification-international-human-rights-treaties#_Convention_on_the > accessed 15th March 2024.

Even though there are issues with how sexual violence is addressed in international law, Gaggioli recognises that the grey areas have minimal impact in practice due to case law clarifying questions of law.[139] Although it may be helpful for a binding treaty combining IHL, IHRL and ICL rules concerning sexual violence to be developed, it is unlikely that a new treaty will be introduced due to the framework already being strong and the States having a lack of appetite for a new treaty.[140] Several risks would come with a treaty-making exercise, as it would open negotiation points solved within case law, jeopardising existing framework and making it unlikely that the benefits outweigh the costs.[141] Instead, it is important to look at why there is still discrepancy between prohibition of sexual crimes and criminalisation of perpetrators. This can be explained by the implementation of the rules and lack of effective prosecutions.[142] This is because international law must be integrated into domestic law; otherwise, the rules will be ineffective.[143] Specifically with gender violence, domestic legal framework must prohibit and criminalise sexual violence adequately.[144] This is due to the principle of complementarity in Article 1 of the Rome Statute, which states that the ICC "shall be complementary to national criminal jurisdictions".[145] This ensures that the court does not impinge on state sovereignty while also prosecuting serious crimes for which national courts may not have the capacity.[146]

The ICC addresses SGBV expressly; however, the court was set up to prosecute perpetrators of the "most serious crimes",[147] and the Office of the Prosecutor (OTP) focuses on prosecuting those "most responsible",[148] usually meaning high-ranking perpetrators. This may fail to hold those with a lower ranking status accountable, as Article 17 of the Rome Statute states it is inadmissible when a case is not of sufficient gravity.[149] Waschefort points out that those who fall "between the petty crimes of little people and the evils of men of great power […] remain beyond the reach of the law".[150] O'Brien argues that applying the broader gravity factors would allow the ICC to extend its reach to include low-ranking offenders, ensuring that individual perpetrators are held accountable rather than just the commanders,[151] thereby enhancing the courts' efficiency.

Looking at whether accountability of SCAW is just and effective, cases such as *Lubanga, Katanga* and *Bemba,* display the lack of prioritisation regarding sexual violence within the ICC. The investigation in *Lubanga* disclosed evidence of sexual violence as he enlisted girl soldiers to serve as sex slaves and instructed his soldiers to terrorise the people in the Democratic Republic of Congo (DRC) by committing rapes.[152] However, the ICC did not deem the acts to meet the crimes against humanity threshold[153] and charged him solely for enlisting and conscripting children to participate in active hostilities.[154] This failure of the prosecutors to acknowledge the accounts of the women in court has a psychological and symbolic effect on the victims.[155] The victims are likely already scarred from the

[139] Gaggioli (n 5) 532.
[140] Ibid, 532-533.
[141] Ibid.
[142] Gaggioli (n 5), 533.
[143] Ibid
[144] Ibid.
[145] Rome Statute (n 98), Article 1.
[146] Mohamed M. El Zeidy, 'The Principle of Complemetarity: A New Machinery to Implement International Criminal Law' (2002) 23(4) *Mich J Intl L* 869, 890.
[147] Rome Statute (n 98), Article 1.
[148] Office of the Prosecutor, Policy paper on case selection and prioritisation (15 September 2016), para 42.
[149] Rome Statute (n 98), Article 17(1)(d).
[150] Gus Waschefort, 'Gravity as a requirement in international criminal prosecutions: implications for South African courts' (2014) 47(1) *CILSA* 38, 63.
[151] Melanie O'Brien, 'Using the Gravity threshold to Categorise Low-Ranking Perpetrators and Peacekeepers as "Most Responsible" for International Crimes', *ICC Forum* (1st July 2021) < https://iccforum.com/gravity#OBrien_fn2 > Accessed 8th April 2024.
[152] K'Shaani O. Smith, 'Prosecutor v. Lubanga: How the International Criminal Court Failed the Women and Girls of Congo' (2011) *How LJ* 467, 468.
[153] Tanja Altunjan, 'The International Criminal Court and Sexual Violence: Between Aspirations and Reality' (2021) 22 *German Law Journal* 878, 884.
[154] *The Prosecutor v. Thomas Lubanga Dyilo* (Judgement pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012).
[155]O. Smith (n 152) 485.

atrocities that were inflicted upon them, but being ignored by the prosecutor after having to relive the events in court "can result in increased feelings of inequity on the part of victims, with a corresponding increase in crime-related psychological harm".[156] This is notably worse with victims of rape as they tend to suffer from post-traumatic stress disorder or other psychological effects such as anxiety, depression, insomnia, and social withdrawal.[157] However, by bringing charges, the victims can find solace in knowing that the perpetrator cannot commit the crime again, their voice has been listened to, and they will not have to fear that the culprit will violate them again, relieving psychological strain and helping deal with the physical violation.[158] The systematic importance allows the victims to have faith in their legal system, encouraging them to report crimes and effectively preventing future crimes.[159] The prosecutor's failure to hold *Lubanga* accountable for sexual violence displayed that women's interests are not represented and not viewed as crucial as other interests by the court.[160]

Following *Lubanga,* the case of *Katanga* was the first trial within the ICC to explicitly deal with sexual violence.[161] The Pre-Trial Chamber found that there was sufficient evidence of rape and sexual slavery constituting war crimes and crimes against humanity.[162] The Woman's Initiative for Gender Justice (WIGJ) carried out documentation of the gender-based crimes that allegedly took place and found that the women whom they interviewed had been victims of attacks involving rape, gang rape, rape in front of family members (including their children) and losing consciousness from rape.[163] However, *Katanga* was acquitted of the charges of rape and sexual slavery due to insufficient evidence linking him to the charges.[164] Accountability in *Katanga* is crucial, particularly given the DRC's distinction for having the 'highest rate of sexual violence in the world'. Accountability in the ICC would recognise the legal rights of women, which are disregarded within the DRC's domestic jurisdiction.[165] The Executive Director of the WIGJ states that the acquittal is a "devastating result for victims"[166] and expresses how the judgement "demonstrates the ways in which the ongoing practice of gender inequality, distorts and impedes the possibility of gender justice".[167] This stems from the fact that rape is a daily occurrence in armed conflict, yet accountability is still exceptional.[168]

In 2016 the ICC sentenced *Bemba* to 18 years imprisonment for crimes against humanity and war crimes involving murder, rape and pillaging in the Central African Republic.[169] This was a ground-breaking case as *Bemba* was the most senior leader to be successfully convicted by the ICC[170] and was also the first conviction by the court for sexual crimes.[171] Initially, this appeared to be a significant advancement for developing SCAW in international law; however, two years after sentencing, *Bemba's* conviction was overturned in full.[172] This is due to inadequate evidence of command responsibility, resulting in the

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[156] Erin Ann O'Hara, 'Victim Participation in the Criminal Process' (2005) 13(1) *Journal of Law and Policy* 229, 244.
[157] O. Smith (n 152) 487.
[158] Ibid, 486.
[159] Ibid, 489-490.
[160] Ibid, 489-491.
[161] Altunjan (n 153), 885.
[162] *Katanga* (n 118).
[163] Brigid Inder, 'Statement by the Women's Initiatives for Gender Justice on the Opening of the ICC Trial of Germain Katanga and Methieu Ngudjolo Chui' (23 November 2009) < http://www.iccwomen.org/news/docs/Katanga-Statement.pdf > Accessed 31st March 2024.
[164] Woman's Initiative for Gender Justice, 'Partial Conviction of Katanga by ICC. Acquittals for Sexual Violence and Use of Child Soldiers' (7 March 2014) < http://iccwomen.org/images/Katanga-Judgement-Statement-corr.pdf > Accessed 31st March 2024.
[165] Inder (n 163).
[166] Woman's Initiative for Gender Justice (n 164).
[167] Brigid Inder, 'Expert Panel: Prosecuting Sexual Violence in Conflict – Challenges and Lessons Learned' (11 June 2014) *Global Summit to End Sexual Violence in Conflict*, 7 < http://iccwomen.org/documents/Global-Summit-Speech.pdf > Accessed 31st March 2024.
[168] Ibid.
[169] Bemba (n 117), 7.
[170] Joseph Powderly, 'Prosecutor v. Jean-Pierre Bemba Gombo: Judgement on the Appeal of Mr. Jean-Pierre Bemba Gombo against Trial Chamber III's' (2018) 57 *ILM* 1031, 1031.
[171]Altunjan (n 153), 885.
[172] International Criminal Court, Press Release: 'ICC Appeals Chamber acquits Mr Bemba from charges of war crimes and crimes against humanity' ICC-CPI-20180608-PR1390 (8 June 2018) < https://www.icc-cpi.int/news/icc-appeals-chamber-acquits-mr-bemba-charges-war-crimes-and-crimes-against-humanity > Accessed 11th March 2024.

acquittal of all charges, which was a major setback in prosecuting crimes of this nature in the ICC. While the grounds for acquittal did not specifically relate to the sexual violence charges, the consequences are likely to disproportionally hinder future prosecutions of such crimes.[173] Due to the limited number of prosecutions, the acquittal of *Bemba* appears to be a greater loss and demonstrates a significant setback for the accountability of SCAW. It emphasises the lack of a single, final conviction for such crimes even sixteen years after the Rome Statute implementation.[174]

These cases highlight the ICC's inability to successfully prosecute perpetrators of SCAW, which would also result in the loss of reparation to the victims due to the link between reparation and conviction.[175] However, there are alternative methods beyond ICL to ensure accountability. This can be seen in the situation of Iraq, which involved a system of organised rape, sexual slavery and forced marriage by the Islamic State on Yazidi women that may constitute SCAW.[176] Still, Iraq has not ratified the Rome Statute, so the ICC and UN Security Council would struggle to impose penal sanctions. However, Iraq instead uses a counterterrorism law in which they can charge suspects for ISIS membership, support, sympathy, or assistance.[177] This may be easier to convict regarding evidentiary matters, but it becomes problematic when seeking to punish the most serious crimes. It also fails to provide judicial documentation of the specific crimes nor deliver justice for the victims. In addition to this, the UN Security Council adopted a resolution to allow the investigation and preservation of evidence of serious crimes committed by ISIS, but the evidence team cannot provide Iraqi courts with the evidence since it allows for the death penalty for ISIS suspects. The policies of the UN do not allow for supporting or assisting processes, which could lead to the death penalty. Therefore, they urge that Iraqi authorities suspend the death penalty for these trials.[178] Human Rights Watch recommend that Iraqi and KRG authorities pass laws that criminalise war crimes and crimes against humanity.[179]

The principle of Universal Jurisdiction provides for national courts in third countries to address international crimes where the crimes did not occur on the state's territory[180] to "prevent impunity for perpetrators of particularly serious offences".[181] This principle enabled Germany to convict members of ISIS for crimes against humanity, war crimes and genocide in 2021. The Higher Regional Court of Hamburg charged Jalda A. with gender-based persecution and aiding and abetting rape.[182] The Higher Regional Court of Koblenz convicted Nadine K. of war crimes, including aiding and abetting rape.[183] Although it is not a common occurrence, criminal responsibility is still possible where states have not ratified the Statute due to the 'responsibility to protect', which is a principle that encourages the international community's responsibility to protect populations against genocide, war crimes, ethnic cleansing, and crimes against humanity.[184]

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[173] Altunjan (n 153) 885.
[174] Susana SáCouto and Patricia Viseur Sellers, 'The BEMBA Appeals Chamber Judgement: Impunity for Sexual and Gender-Based Crimes' (2019) 27 *Wm & Mary Bill Rts J* 599, 599.
[175] Luke Moffett and Clara Sandoval, 'Tilting at windmills: Reparations and the International Criminal Court' (2021) 34 *LJIL* 749, 750.
[176] Zeynep Kaya, 'The Causes and Consequences of Sexual Violence in Conflict' *LSE Middle East Centre Report* (28 November 2019), 13.
[177] Iraqi Counterterrorism Law, No. 13 of 2005.
[178] Human Rights Watch, *Flawed Justice: Accountability for ISIS crimes in Iraq* < https://www.hrw.org/report/2017/12/05/flawed-justice/accountability-isis-crimes-iraq > Accessed 11th March 2024.
[179] Ibid.
[180] European Centre for Constitutional and Human Rights glossary < https://www.ecchr.eu/en/glossary/universal-jurisdiction/ > Accessed 11th March 2024.
[181] Henriksen (n 12) 89.
[182] Sofia Koller, 'Prosecution of German Women Returning from Syria and Iraq' (2022) *Counter Extremism Project,* 13. < https://www.counterextremism.com/sites/default/files/2022-08/CEP%20Policy%20Paper_Prosecution%20of%20German%20Women%20Returning%20from%20Syria%20and%20Iraq_August%202022_final.pdf > Accessed 11th April 2024.
[183] Sofia Koller, 'ISIS Women in Court: Nadine K. – What Role in the Yazidi Genocide?' (2023) *Counter Extremism Project.* < https://www.counterextremism.com/blog/isis-women-court-nadine-k-what-role-yazidi-genocide > Accessed 11th April 2024.
[184] UNGA Res 60/1 (16 September 2005) A/RES/60/1.

The challenges with accountability extend beyond failed prosecutions to how jurisdictions ensure accountability by preventing crimes before they occur with effective rules. Gloria Gaggioli recognises how rules prohibiting and criminalising sexual violence become effective when implemented at a national level and supported by robust State institutions.[185] This involves ensuring that the security sector is adequately staffed and trained; the justice system is appropriately equipped to investigate and sanction allegations, and a strong health system with specially trained staff to recognise sexual violence and provide necessary assistance to victims.[186] In many countries, these crimes are prohibited, but prosecutions are rare due to inadequate referral systems for victims, distrust in state institutions and reluctance of the judicial systems to prosecute sexual crimes which deters victims from reporting.[187] It is also noted that this assistance indirectly prevents sexual violence as it reduces vulnerability of the community and concerned parties. In addition, the International Conference of the Red Cross and Red Crescent highlighted the need for States to ensure all feasible measures to prevent SCAW.[188]

General accountability avenues for victims in the context of sexual crimes

It is evident that while international law primarily focuses on punishing war criminals, it fails to equally address the rights and interests of the victims. Referring to crimes of violence, Lord Hilhorne emphasises the point that "for innocent victims of such crimes we all feel sympathy, but we feel that sympathy alone is not enough".[189] It is important that victims of war crimes receive reparations for the harm suffered, as "a right without remedy is no right at all".[190] The General Assembly's resolution on the Basic Principles of Rights to Reparations (2005 Basic Principles) states that victims "are persons who individually or collectively suffered harm… through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law".[191] In addition, the International Law Association clarifies that 'reparation' aims to eliminate harmful consequences resulting from a breach of international law during armed conflict, restoring conditions to their pre-violated state.[192] The principles for reparation to victims of armed conflict are set out in the 2005 Basic Principles following the Final Report of Mr. M. Cherif Bassiouni, which set out four forms of reparation: restitution, compensation, rehabilitation, and satisfaction and guarantees of non-repetition.[193]

Restitution refers to restoring victims to their original state, including legal rights, social status and family life.[194] Compensation is provided for economically assessable damage, including material damages, physical or mental harm, or even harm to reputation or dignity.[195] Rehabilitation includes mental and psychological care for the victims.[196] Satisfaction involves full public disclosure, assistance with search and identification of bodies, public apology and acceptance of responsibility, and tributes to victims[197]. Guarantees of non-repetition prevent the recurrence of violations.[198]

Rights for reparation is also part of customary law as International Committee of the Red Cross rule 150 of IHL states that "a state responsible for violations of international humanitarian law is required

[185] Gaggioli (n 5), 533.
[186] Ibid.
[187] Ibid.
[188] International Conference of the International Red Cross and Red Crescent Movement, Geneva, 28 November-1 December 2011, 31IC/11/R2.
[189] United Kingdom, 'Compensation for Victims of Crimes of Violence', Parliament, House of Lords, House of Lords Debates (Hansard), HL Deb 07 May 1964 vol. 257 cc1351–1419 at 1352.
[190] Lord Denning in *Gouriet v Union of Post Office Workers*, [1978] AC 435 cited in R. Higgins, "The role of domestic courts in the enforcement of international human rights: The United Kingdom", in B. Confortiand F. Franciani (eds.), *Enforcing International Human Rights in Domestic Courts*, Martinus Nijhoff Publishers, The Hague, 1997, 620.
[191] UNGA Res 60/147 (21 March 2006) A/Res/60/147, para 8.
[192] International Law Association, International Committee on Reparation for Victims of Armed Conflict, Article 1.
[193] ECOSOC (n 127).
[194] Ibid, para 22.
[195] Ibid, para 23.
[196] Ibid, para 24.
[197] Ibid, para 25.
[198] Ibid, para 25(i).

to make full reparation for the loss or injury caused".[199] The Hague Convention IV demonstrates that "a belligerent party which violates the provisions of the said Regulation shall, if the case demands, be liable to pay compensation".[200] Right for remedy is a secondary right which can only occur based on the primary right under IHL being violated. Therefore, Article 30 of Geneva Convention IV provides that protected persons have the right to file a complaint based on an infringement of the convention.[201] However, the Geneva Conventions do not provide remedies for the victims; instead, they focus on punishing individuals who commit crimes[202] because no general international mechanism allows them to assert their rights. Furthermore, the International Committee for the Red Cross lacks official mechanisms for providing the right to remedy[203] despite claiming to be the primary international body for protection of war victims.[204] However, the reasoning behind this is that it lacks capacity to render legally binding decisions regarding claims of individuals who allege to be victims, nor is that its purpose.[205]

Where IHL seems deficient, human rights treaties provide a platform for addressing violations of humanitarian law. They are equipped with committees, commissions, and courts capable of receiving individual complaints, providing them with a remedy.[206] Human Rights tribunals, such as the United Nations Compensation Commission (UNCC) and the Eritrea-Ethiopian Claims Commission (EECC), were set up to provide remedies for victims of violations to IHL following armed conflict. Typically, a claim is submitted directly to the commission by the individual, or they submit their complaint to the government, which then deals with the commissions.[207] The latter process is used for the UNCC and EECC, which can be argued to benefit victims due to the difficulty of resolving claims on a case-by-case basis, especially during armed conflict since there is a mass scale of victims, which would overwhelm the bodies' already limited resources, making compensatory measures problematic.[208] Mass claims also mean that individuals have no individual right to compensation and have restricted involvement in the procedure. Consequently, the absence of proceedings for victims results in a lack of individualised resolution.[209]

Looking at ICL, the Rome Statute incorporates more avenues for redressing victims, following the lack of attention given to victims within the ICTY and ICTR. The Statute established principles for reparations as restitution compensation and rehabilitation.[210] It did not explicitly exclude the principle of satisfaction and guaranteed non-reptation, acknowledged in the 2005 Basic Principles. This principle involves the state's official verification of facts and public disclosure, acceptance of responsibility, and an apology.[211] Preventing reoccurrence requires the state to strengthen independence of the judiciary, strengthen human rights training in all sectors of society, and create mechanisms for monitoring conflict resolution.[212] The ICC has no jurisdiction over states and therefore does not possess the power to ensure states follow these principles.[213] However, it recognises two avenues for compensation: payment from convicted defendants through fines and forfeitures and awards from the Victims Trust Fund (VTF),

[199] International Committee Red Cross, Rule 150 Reparation.
[200] Convention IV respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907, Article 3.
[201] GC4 (n 80), Article 30.
[202] Liesbeth Zegveld, 'Remedies for victims of violations of international humanitarian law' (2003) 85(851) *IRRC 497*, 514.
[203] Ibid 515.
[204] International Committee of the Red Cross, 'The ICRC's mandate and mission' < https://www.icrc.org/en/mandate-and-mission > Accessed 11th April 2024.
[205] Zegveld (n 202) 515.
[206] Ibid, 520.
[207] Ibid, 522.
[208] Ibid.
[209] Ibid.
[210] Rome Statute (n 98) Article 75.
[211] ECOSOC (n 127), 25.
[212] Ibid, 25(i).
[213] Linda M. Keller, 'Seeking Justice at the International Criminal Court: Victims' Reparations' (2007) 29 T Jefferson L Rev 189,195.

established by the decision of the Assembly of State Parties (ASP).[214] Issues arise with these avenues due to convicted defendants lacking adequate resources to provide reparations.[215]

Article 79 of the Rome Statute established the VTF[216] to complement retributive justice achieved through prosecution.[217] The establishment "reflects a growing international consensus that reparations play an important role in achieving justice for victims".[218] The ICC awards reparations individually or collectively[219] but favours group trials, as they are more efficient and appropriate.[220] This approach is more effective because 'victims of mass atrocities cannot be made whole by compensation alone'.[221] Furthermore, given the limited resources, substantial compensation on an individual basis would not be feasible given the scale of international crimes.[222] Attempting to compensate all victims would exhaust the financial capacities of the trust fund. Victims eligible for reparations are divided into two categories to separate those who suffered at the hands of a defendant being prosecuted by the ICC and victims of the same conflict but whose perpetrator is not being tried by the court. The latter shall benefit from "other resources"[223] which refers to 'resources other than those collected from awards for reparations, fines and forfeitures'.[224] As previously mentioned, the OTP is more likely to prosecute commanders or high-ranking individuals, so allowing reparations to indirect victims provides justice for those excluded from court-ordered reparations.[225] Collective awards are also more effective in achieving restorative justice because they are tied to society as a whole, thereby facilitating more comprehensive social healing. They benefit broader society by simultaneously reconciling victims, including unidentified victims and other groups.[226] For instance, initiatives such as memorial museums commemorate victims while educating others, exemplifying how this approach works. The VTF provides examples of successfully supporting victims of SGBV, both economically and with medical and mental health support.[227] There have also been successful reparations in previously mentioned cases, such as *Lubanga,* where the ICC based cost of reparations on the harm suffered by both individual victims and the collective.[228]

The Rules of Procedure and Evidence is an instrument for applying the Rome Statute. Section III, subsection four specifically refers to reparations for victims. This highlights limits to victims as there is evidence needed in a request for reparation, which is not feasible for victims within armed conflicts. This is due to victims of war-torn countries often having to flee their homes with nothing, so they hold no material proof, and there are usually no death certificates.[229] It is also particularly difficult for victims of sexual violence as their suffering goes unrecognised due to difficulty being vocal about their hardship.[230] Problems with the reparation are due to the urgent needs of victims being outside of the reach of the ICC, which has lengthy procedures that do not match such urgency.[231] Proposed strategies for improving the ICC's rights to remedy include expanding its framework, specifically within the

[214] Rome Statute (n 98) Article 79.
[215] Keller (n 213), 196.
[216] Rome Statute (n 98), Article 79.
[217] Keller (n 213), 191.
[218] Marieke Wierda and Pablo de Greiff, 'Reparations and the International Criminal Court: A Prospective Role for the Trust Fund for Victims' (2004) *International Centre for Transitional Justice.*
[219] International Criminal Court Rules of Procedure and Evidence 2013 (ICC Rules P&E), rule 97.
[220] Ibid rule 98(3).
[221] Keller (n 213), 191.
[222] Ibid.
[223] ICC Rules P&E (n 219), rule 98(5).
[224] Resolutions adopted by the Assembly of State Parties, Resolution ICC-ASP/4/Res.1, para 47.
[225] Keller (n 213), 204.
[226] Ibid, 212.
[227] The Trust Fund for Victims, 'Supporting victims of gender and sexual-based violence' < https://www.trustfundforvictims.org/en/about/our-impact/supporting-victims-sexual-gender-violence > Accessed 11th April 2024.
[228] The Prosecutor v. Thomas Lubanga Dyilo (Judgment on appeals against Trial Chamber II's 'Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable') ICC-01/04-01/06 A7 A8 (18 July 2019), para 108.
[229] Amissi M.Manirabona and Jo-Anne Wemmers, 'Specific Reparation for Specific Victimization: A Case for Suitable Reparation Strategies for War Crimes Victims in the DRC' (2013) 13(5) *IntlCLR* 977, 999-1000.
[230] Ibid.
[231] Ibid, 1011.

financial capability of the Trust Fund, to adequately support all victims and address their needs effectively. Additionally, strengthening national legal and judicial mechanisms is crucial for preventing recurrence, a pivotal aspect of reparations.[232]

Issues involving reparations specifically affect women due to armed conflict bringing unique burdens onto women as they experience sexual violence and exploitation at a disproportionate rate to men,[233] more particularly experiences of "torture, mass rape, forced pregnancy, sexual slavery, forced prostitution and trafficking".[234] It is important to note that the 2005 Basic Principles state that "reparation should be proportional to the gravity of the violations and the harm suffered".[235] Therefore, due to the physical and psychological trauma inflicted on women at a higher proportion and the significant impact of these heinous crimes on them, it may be inequitable to overlook the issue of reparation for female victims of sexual violence in armed conflicts, particularly when resources are limited for numerous other victims.

Limitations and lacuna within international law relating to sexual crimes

Having dealt with the history of International Law, the limitations of accountability and accountability avenues for victims it is important to look at gaps within the law which leads to these limitations.

Limited resources, which lead to lack of prosecutions, are a barrier to developing accountability for SCAW. *Ad hoc* tribunals such as the ICTY and ICTR were instrumental in proscribing rape and sexual violence amid conflict, but international law may not have the capacity to properly convict these crimes. For example, within the ICTY only seventeen out of the eighty-six cases brought to the tribunal included counts of any form of sexual assault.[236] In comparison, within the seventy-four indictments in the ICTR, only twenty-eight involved charges of rape or sexual violence.[237] Furthermore, even where there have been cases of perpetrators being indicted and convicted for a number of sexual crimes at the same time as other crimes, they may serve their terms concurrently while retaining the opportunity for early release.[238] Looking at the case of *Furundžija,* mentioned in chapter one, the charges for 'outrages upon personal dignity including rape' were served concurrently[239] with a ten-year sentence, but he received an early release after serving over six years.[240]

This punishment may seem gentle in comparison to the severity of his crimes and may give the wrong message to victims who had to endure suffering through his crimes and then throughout the trial. While prison is intended to rehabilitate offenders and protect victims, as opposed to locking them away forever, it sets an example that these severe crimes are not met with adequate punishment which also fails to fulfil the role of deterrence. Likewise, the ICC's endeavour to convict perpetrators has resulted in a series of "false starts and 'almosts".[241] This can be seen in the previously mentioned cases of *Lubanga, Katanga* and Bemba. This highlights the law's failure to secure convictions for sexual violence due to procedural issues, with *Bemba's* proving short-lived following his acquittal.[242]

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[232] Ibid.
[233] Chile Eboe-Osuji, 'From Sympathy to Reparation for Female Victims of Sexual Violence in Armed Conflicts' (2011) 4(3) *African Journal of Legal Studies* 257, 295.
[234] United Nations, 'Report of the Secretary-General on women, peace and security', Doc No S/ /2002/ 1154 of 16 October 2002.
[235] UNGA Resolution (n 191), para 15.
[236] John D. Haskell, 'The Complicity and Limits of International Law in Armed Conflict Rape' (2009) 29 BC Third World LJ 35, 60.
[237] Ibid, 61.
[238] See *Furundžija* (n 43)
[239] Ibid, para 295.
[240] *Prosecutor v Anto Furundžija* (IT-95-17/1-T) case information sheet, 4.
[241] Rosie Fowler, 'Great expectations: A critique of the International Criminal Court's commitment to victims of sexual and gender-based violence' (2021) 2 *Journal of International Criminal Law* 27, 39.
[242] Bemba (n 117).

It is acknowledged that the state also does not have the resources or judicial capacity to offer the survivors access to justice and legal remedies.[243] The judges in the ICTY and ICTR decided not to offer women reparation, as they believed that "the responsibility for processing and assessing claims for compensation should not lie with the tribunal but other agencies within UN systems".[244] This was due to the view that economic consequences experienced by victims of sexual violence are of a political nature rather than a legal one, thereby extending beyond the scope of international law.[245] In contrast, the ICC established principles of reparation to victims, which include 'restitution, compensation and rehabilitation'[246] but are only granted 'upon request' or 'in exceptional circumstances'.[247] This implies that reparations are still secondary considerations compared to determinations of innocence or guilt.[248] As mentioned above, the ICC favours collective reparations. The problem is that Procedural Rules stipulate that the Victims Trust Fund can order collective reparations not paid to the survivors but to intergovernmental, international, or national organisations.[249] The procedural and evidentiary requirements for receiving reparation are also likely to impede women from the process, particularly rape victims who cannot offer physical proof of rape or present a witness, given that witnesses may be deceased or unwilling to testify.[250]

Lacuna in the law is evident due to weak implementation and enforcement. This could be due to regulations on human rights applicable to SCAW being based on non-legally binding soft law instruments[251] leading to a discrepancy between framework and implementation of the law. It is recognised that violence against women tends to occur in private and thus to exist within the private sphere, which holds less significance in the eyes of the law.[252] However, construction of human rights treaties does not consider this private sphere where SCAW occur.[253] This results in not all states recognising that SCAW constitutes a human rights violation directly affecting how the laws are implemented at the national level.[254] The introduction of participation schemes for victims seemed like development towards victim-centric ideals;[255] however, it instead represents another gap in the law due to the lack of victims' support discouraging victims from coming forward.[256] Victims are hesitant to come forward due to cultural, religious, and personal reasons.[257] The law associates sexual violence with dishonour,[258] so, logically, women expect shame from their community if they admit to being raped.[259] Even where they do come forward, the court does not have capacity to deal with the vast number of victims. For example, the court authorised 5229 victims in *Bemba*, yet only three were permitted to "directly present their views and concerns".[260] Where the opportunity arises for victims to be present in court, the scheme presents as impractical as a 'victim-centric ideal'. Fowler recognises that the process of ICL is a 'blunt tool', which is not suited to victims who have a complex, traumatic

[243] Diana Amneus, 'Insufficient legal protection and access to justice for post-conflict sexual violence' (2011) 55 *Development dialogue* 67, 67.
[244] Breton-Le Goff, 'Analysis of Trends in Sexual Violence Prosecutions in Indictments by the International Criminal Tribunal for Rwanda from November 1995 to November 2002 p.92, as cited in John D. Haskell, 'The Complicity and Limits of International Law in Armed Conflict Rape' (2009) 29 BC Third World LJ 35, 78.
[245] Haskell (n 236), 78.
[246] Rome statute (n 98), article 75.
[247] Ibid, Article 75.
[248] Haskell (n 236), 79.
[249] ICC Rules P&E (n 219) rule 98(4).
[250] Haskell (n 236), 79.
[251] Amneus (n 243), 78.
[252] Gardam (n 128) 65.
[253] Amneus (n 243), 78.
[254] Ibid.
[255] Fowler (n 241,) 28.
[256] Ibid 41.
[257] Kas Wachala, 'The tools to combat the war on women's bodies: rape and sexual violence against women in armed conflict' (2012) 16(3) *IJHR* 533, 547.
[258] "No one shall be subjected to arbitrary interference with… attacks upon his honour and reputation", UDHR (n 86), Article 12.
[259] Carlo Koos, 'What Do We Know About Sexual Violence in Armed Conflicts?' (2015) 275 *GIGA Working Papers,* 19.
[260] *The Prosecutor* v. *Jean-Pierre Bemba Gombo* (ICC-01/05-01/08) Case information sheet.

and emotional narrative.[261] This is also likely to clash with the court's prerogative due to the disconnect between what is legally useful and the victim's experience.[262]

The law's inability to hold perpetrators accountable is evident in the persistence of war crimes by states, demonstrating the failure of the law to effectively deter such actions in current conflicts. For example, while the UN Security Council have investigated sexual assault on Palestinian women and girls over several decades, it has yet to hold a meeting on the matter[263] of these allegations. The Permanent Observer for the Observer State of Palestine recognised that the lack of accountability for leaders or members of the Israeli Occupation forces regarding their allegations against Palestinians over the last 75 years has enabled the persistence of these actions.[264] The aim of the international law on armed conflict and occupation is to prevent unnecessary suffering, but Sumina and Gilmore hold the opinion that the ongoing torture of Palestinian women has displayed where the law fails in its job.[265] UN experts found reports of women and girls being subject to sexual assault, including rape and strip searches, which may constitute serious crimes in ICL and grave violations of IHRL and IHL.[266] Although these allegations have not yet been verified in court, initiating criminal proceedings would be a measure of the progress, evaluating whether international law has effectively developed to hold perpetrators of SCAW accountable.

Conclusion

International law addressing SCAW in conflicts has developed rapidly in recent years, particularly following the establishment of the *ad hoc* tribunals. The advancements of the developments of ICL within ICC marks significant progress in recognising and addressing grave violations of international law. However, this has not been reflected in accountability of perpetrators. Despite situations where evidence has been obtained,[267] there is a notable scarcity of cases and convictions. Landmark cases from *Akayesu* to *Ongwen* highlight the challenges of achieving justice, ranging from jurisdictional limitations to complexities with prosecuting SCAW. These challenges highlight the need for a better legal framework and a more practical investigation process. The advancement of redress for victims and schemes for participation is progressive in theory, yet in practice, it appears challenging to apply for it, or the court simply does not have the capacity for the number of victims. The gap between theory and practice emphasises the need for legal systems to evolve in both victim-centric ways and capable of managing the scale of atrocities encountered.

The significance of the topic extends beyond legal analysis as the persistent occurrence of sexual violence is more than just a violation of individual rights and instead reflects upon the international community. It is a reminder that gender inequalities still exist and are exacerbated by conflict and addressing the issues are important to uphold certain principles, such as the welfare of civilians in a conflict. Advancements made thus far must be retained and built upon. Following the success in *Ongwen,* the ICC must continue this trend of successful prosecutions rather than allow a case like *Ongwen* to be an exception. The international community must punish crimes of sexual violence to ensure the prevention of future reoccurrence and to give justice to the victims of the crimes. Adopting

[261] Fowler (n 241), 42.
[262] Ibid.
[263] Riyad Mansour, Permanent Observer for the Observer State of Palestine – UN News, Civilians in Israel and Palestine 'cannot be abandoned', says top UN official on sexual violence in conflict. < https://news.un.org/en/story/2024/03/1147477#:~:text=%E2%80%9CCivilians%20and%20their%20families%20in,We%20cannot%20fail%20them.%E2%80%9D > Accessed 7th April 2024.
[264] Ibid.
[265] Svetlana Sumina and Steven Gilmore, "The Failure of International Law in Palestine' (2018) 20(2) The *Scholar: St. Mary's Law Review on Race and Social Justice* 135, 187.
[266] OHCHR, 'Israel/oPt: UN expert appalled by reported human rights violations against Palestinian women and girls' (19th February 2024) < https://www.ohchr.org/en/press-releases/2024/02/israelopt-un-experts-appalled-reported-human-rights-violations-against?fbclid=PAAabQHVMSBixigPFY4DbDFmjABgh8aFSScbQwMd33ayQgS7jhyd3acMK-_3A_aem_AaBhddevhp99s5CstCGeK6pxbukq04mPeCkfUUw_DXEAtj87dXdNZD26AaKOn_8rmmo > Accessed 7th April 2024.
[267] See, *Lubanga* (n 154).

victim-centred approaches may assist with enforcing preventative measures suggested by Gaggioli, including ensuring that national justice systems are staffed and trained appropriately.[268]

In addition, supporting survivors reduces vulnerabilities (such as cultures not accepting victims of rape) within the community, which indirectly prevents sexual crimes from reoccurring. Providing platforms for victims to come forward and allowing reparations from the Victims Trust Fund without a successful conviction allows a comprehensive response to SGBV that is focused on restoration to victims. The law must continue adapting in order to support victims of these heinous crimes and continue the fight against SCAW in conflict. By doing so, the international community can move closer to a future whereby sexual violence is not viewed as a 'by-product' of war, and women not directly involved in the fighting do not have to fear that they will experience this despicable treatment simply for existing at a time of conflict.

[268] Gaggioli (n 5), 533.

Expanding the utilisation of suspended sentences on young adults in deterring reoffending

Megan Loxton*

Introduction

The UK's Youth Justice System exists with the '…principal aim…to prevent offending by children and young persons.[1]' This distinct system was first introduced in 1998[2] following extensive research dating back as far as the Gladstone Report and Lushington Committee of the 1890s - both of which had highlighted the need for a separate approach to youth justice.[3] In the modern day, this system provides a set of sentencing guidelines, overarching principles, and criminal punishments for young offenders distinct to those available to adults. The legitimacy of such a system is largely underpinned by the recognised cognitive differences between adults and children, and the impact such a difference has on offending behaviour.

Colloquially, it is recognised that a 'child' describes any person under eighteen years old, and an 'adult' describes any person aged eighteen or over. Legally however, three different age categories of offender are recognised, which determine which set of rules, procedures, and guidelines must be used in legal proceedings. With the existence of such separate systems, it is essential that such categorisations exist, to ensure that cohesion, consistency and legitimacy are upheld in UK criminal proceedings and the wider legal system. Hereafter referred to as a 'child', the law determines that anybody '…under the age of [ten] years can[not] be guilty of any offence[4]'. Whilst such individuals can consequently not be charged with having committed any criminal offence, they may be given a local child curfew or child safety order for any suspected criminal involvement to protect the welfare of themselves and wider society.[5] The second categorisation, hereafter referred to as that of a 'young offender', describes offenders '…above the age of 10… but below the age of 18.'[6] In dealing with such an age group, courts must give sufficient consideration to the principle aim of preventing youth offending[7], alongside the '…welfare of the child or young person[8]' when making sentencing decisions. The legal standing of such considerations highlights historical attempts to balance justice and welfare-based approaches to youth justice.[9] Finally, the law recognises an 'adult', to include any individual aged eighteen or over and will sentence them as such.

In recent years however, support has grown for the addition of a fourth recognised category of offender for those aged between eighteen and twenty-one, hereafter referred to as 'young adults'. Such reforms have been campaigned for largely on the basis that the immediate shift between the welfare-orientated youth justice system and punitive-focused adult system upon an offender reaching eighteen years of age is too harsh. This movement also highlights that the absence of a middle-ground approach causes a lack of legal acknowledgement for those making the transition between childhood and adulthood and does not effectively capitalise on this demographics' enhanced capacity for rehabilitation that could otherwise lead to a crime-free-future. The implied solution for such an issue would be a remedy/system blending these two approaches to effectively recognise, represent and address the needs and developmental status of such offenders. This dissertation will explore the proposal that suspended

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[1] Crime and Disorder Act 1998, s.37(1).
[2] Ibid
[3] Adam Crawford and Tim Newburn, *Youth Offending and Restorative Justice*, (1st edn, Willan Publishing 2011) 6
[4] Children and Young Persons Act 1993, s.50.
[5] Crawford and Newburn (n 3)
[6] Peter Joyce and Wendy Laverick, *Criminal Justice: An introduction*, (4th edn, Routledge 2023) 163
[7] CDA 1998 (n.1)
[8] CYPA 1993 (n 4) s.44(1).
[9] Martin Stephenson, Henri Giller and Sally Brown*, Effective Youth Practice in Youth Justice*, (2nd edn, Routledge 2011), 2.

sentences are a remedy effectively combining the welfare and punitive approaches of the adult and youth justice system and are consequently capable of bridging the gap between these two systems.

Suspended sentences are custodial sentences defined by the Sentencing Act 2020, as '…an order providing that a sentence of imprisonment or detention in a young offender institution… is not to take effect unless… an activation event occurs…'[10] The term 'activation event' describes situations in which a defendant has committed a further offence in the UK during the operational period or violated any community requirements imposed by the order.[11] Once this has occurred, the courts have the authority to impose the custodial sentence and send the defendant into custody.[12] As a sentence introduced in 1967'[13] eligibility requirements for imposing such a sentence have changed over the years, with requirements for 'exceptional circumstances' in 1991,[14] and removal of such in 2003.[15] The maximum sentence length eligible for such an order has also changed, reducing to one year in 2003[16] and returning to two in 2012[17]. Under the current system, a sentence may only be suspended if it has crossed the custody threshold (due to its nature as a custodial sentence) and has a term of '…at least six months and…not more than two years.[18] The courts may also impose community requirements during this term, aimed at facilitating rehabilitation of the offender and reparations to the local community[19].

Under the current system, as custodial sentences are only given to young offenders in the most serious cases,[20] such offenders are not eligible for suspended sentences. Offenders between the ages of eighteen and twenty-one however, may receive a suspended sentence when facing a term of detention in a young offenders' institute,[21] or adult prison, provided that the term does not exceed two years. This dissertation proposes that expanding young adult offenders' eligibility for suspended sentences would effectively increase their rates of imposition in order to grant more young adult offenders an opportunity to take responsibility for their own rehabilitation and address their offending behaviours. It is believed that this age-demographic in particular would be engaged by such a scheme, based on their unique stage of development and the impacts that a custodial sentence may have on their future prospects.

In exploring this motion, the first chapter will identify the aims and principles surrounding both the adult and youth justice systems to identify the gap in approaches and the underlying issues with treating all offenders over the age of eighteen as adult. The second chapter will then discuss why suspended sentences may be the perfect remedy for bridging this gap, using analysis of international examples before exploring how such an idea may work in practical application. The final chapter will then identify the potential challenges such a reform may face and evaluate the extent to which their influence could diminish the effectiveness of such a solution. Finally, the conclusion will explore all areas discussed in order to come to a reasoned decision as to whether a unique approach to this age group is justified, and whether the expansion of suspended sentences imposed upon this demographic would be effective in reducing reoffending rates.

Minding the gap between youth and adult sentencing

The UK's youth justice system exists to establish and uphold criminal policy and processes tailored to the welfare needs of young offenders, yet its effectiveness is hindered by the abrupt transition to the punitive adult system imposed once an offender turns eighteen. Such an immediate shift is ignorantly

[10] Sentencing Act 2020, s.286(1).
[11] Ibid, s.3.
[12] Ibid, sch 16, s 13(1).
[13] Criminal Justice Act 1967, s.39
[14] Criminal Justice Act 1991, s.5(2(b)
[15] Criminal Justice Act 2003, s.189(1)(b)
[16] Ibid, s 189 ss 1
[17] Legal Aid, Sentencing and Punishment of Offenders Act 2012, s.68(1).
[18] SA 2020 (n10) s.2.
[19] SA 2020 (n10) s.292.
[20] Sentencing Council, 'Types of Sentences for Children and Young People' (2023) <https://www.sentencingcouncil.org.uk/sentencing-and-the-council/types-of-sentence/types-of-sentences-for-young-people/> Accessed 19th March 2024
[21] SA 2020 (n 10) s.264.

unrepresentative of the mutual vulnerabilities and incomplete cognitive development coexisting between young offenders and young adult offenders. This chapter will compare the aims and principles guiding the adult and youth justice systems and resultant contrasting sentencing options. Such comparison will then be used to argue that a new, unique approach is needed for young adult offenders' to effectively bridge the gap between the welfare and punitive approaches of the respective systems. This suggestion is made on the basis that a smoother transition between the two approaches would facilitate more effective punishment better capable of reducing reoffending rates within this demographic.

The differing aims of the adult and youth justice system

The UK's youth justice system upholds binding recognition of the inherent cognitive and developmental differences existing between young and adult offenders and ensures that such differences are reflected in sentencing decisions. Owing to such differences, the youth system principally focuses on the deterrence of crime and reoffending by young people as encompassed by the legislative aim '… of the youth justice system to prevent offending by children and young persons…'[22] In balancing such a preventative goal with the practical challenges of youth offending, the system also aims to protect '…the welfare of the child or young person'[23] at all stages of legal proceedings. In comparison, the adult justice system aims to '…deliver justice for all, by convicting and punishing the guilty and helping them to stop offending, while protecting the innocent.'[24]' Such a statement highlights a more punitive approach to justice rooted in the belief that punishing offenders for their criminal wrongs will best protect the public and provide justice for victims. In pursuit both systems' respective aims, supporting aims and principles have naturally developed and been established by way of guidelines for decision makers and differing sentencing options.

In support of the welfare-based approach to the youth justice system, a significant focus is placed upon the rehabilitation of young offenders' – encouraging them to address their offending behaviour and make positive changes to reduce the likelihood they will commit further offences. The case of Kinlan and Boland[25] set the precedent, in support of this aim, that when sentencing courts must '…take account of the young offender's lack of maturity, capacity for change and…best interests. Rehabilitation is an important consideration.' Such an aim is central to the treatment of young offenders within the youth justice system, with the guidelines further establishing that youth sentences '… should focus on rehabilitation where possible.'[26] Such an aim exists in recognition that whilst the impressionable nature of young offenders can lead to increased propensity to commit offences, it can also pave the way for rehabilitation of factors driving offending behaviour. It is highlighted however, that the effectiveness of such measures is heavily dependent upon the defendant's level of personal-motivation and engagement with such programmes. It is clear that '…passive involvement is not enough'[27] and that if offenders are not '…engaged, the programme is unlikely to be successful[28]'. Somewhat similarly, the Sentencing Act 2020 enshrined 'the reform and rehabilitation of offenders'[29] as one of the key purposes of sentencing those aged over eighteen for the purposes of reducing the likelihood of reoffending. The effectiveness of such an aim is somewhat limited however, as it exists alongside other aims surrounding 'the punishment of offenders' and 'the protection of the public.[30] Balancing such aims means that whilst offences deemed less severe may enjoy a non-custodial order with rehabilitative requirements, many

[22] CDA 1998 (n 1).
[23] CYPA 1933 (n 4) s.44(1).
[24] The National Archives, 'Aims and Objectives' (2010) <https://webarchive.nationalarchives.gov.uk/ukgwa/20100920201828/http://www.cjsonline.gov.uk/aims_and_objectives/> Accessed 1st June 2024
[25] *Kinlan and Boland v HM Advocate* [2019] 7 WLUK 166
[26] Sentencing Council, 'Sentencing Children and Young People Definitive Guideline' (2017) <https://www.sentencingcouncil.org.uk/wp-content/uploads/Sentencing-Children-and-young-people-Definitive-Guide_FINAL_WEB.pdf> Accessed 20th March 2024
[27] Martin Stephenson and others 2011 (n 9) 73
[28] Ibid.
[29] SA 2020 (n 10) s.57 (c).
[30] SA 2020 (n 10) s.57 (a) and (c).

more offenders will face imprisonment than their youth counterparts despite having committed the same offences, thus this aim is lesser achieved.

In enforcing such an aim, two sentencing options exist focusing mainly on rehabilitation of young offenders. The first of these is a youth rehabilitation order,[31] a form of community sentence with one or more requirements aimed at addressing factors driving the committal of offences. There are eighteen available requirements,[32] from which the court will select which to impose based on the individual offender and the facts of the case. The second is a referral order,[33] a form of restorative justice by which offenders meet with a panel and arrange a contract of commitments lasting between one and three years also aimed at addressing offending behaviour.[34] The only rehabilitative sentence available to offenders over the age of eighteen however, is that of a community order[35]. Operating similarly to a referral order, the court may impose one or more requirements aimed at addressing the offenders' conduct but is uniquely bound to '…include at least one… imposed for the purpose of punishment.[36] The presence of this requirement unique to the adult system is highly indicative of the retributive approach taken it in comparison to the youth system.

Perhaps the most influential principle of these respective systems surrounds the distribution of custodial sentences. Both adult and youth offenders may be made subject to a mandatory custodial sentence[37] if found guilty of serious offences such as murder.[38] In discretionary decisions however, the youth justice system aims to minimise the distribution of custodial sentences to young offenders, reserving such to a '…measure of last resort… when the offence is so serious that no other sanction is appropriate[39]' in the interests of welfare. Such an objective is supported by the courts' binding obligation to take '… steps for removing… [young offenders]… from undesirable surroundings…[40]', of which it is widely accepted that detention facilities qualify. In practice, such an objective is achieved by guidance that they are to consider '…any factors that may diminish the culpability of a child or young person[41]' alongside the harm caused in determining a sentence. The establishment of this principle within the youth sentencing guidelines often enables the courts to reduce the severity and length of sentences imposed, consequently minimalizing the number of custodial sentences given to such offenders. The justification for such reductions comes from growing scientific evidence suggesting that the incomplete nature of young offenders' cognitive development and maturity cause flawed decision-making and a more impressionable nature – heightening their propensity to commit offences. It is however highlighted by the case of *BKY*[42] that certain offences such as murder necessitate such a sentence, and the age of the offender cannot outweigh the severity and necessity for deliverance of justice and public protection. Contrastingly, the adult system has long held a more punitive approach, with the aforementioned aim of 'the punishment of offenders' and 'the protection of the public'[43] more frequently justifying the imposition of custodial sentences.

In pursuit of minimising the imposition of custodial sentences against young offenders,[44] the courts may add an intense supervision and surveillance requirement to a youth rehabilitation order for offences punishable by imprisonment to whom the only other option is a custodial sentence. When its imposition against a young offender over the age of twelve is justified, such is usually passed in the form of a detention and training order[45] with a term between four months and two years. Such an order involves

[31] SA 2020 (n 10) s.173.
[32] SA 2020 (n10) s.174.
[33] SA 2020 (n 10) s.83.
[34] Sentencing Council 2017 (n 26).
[35] SA 2020 (n10) s.200.
[36] SA 2020 (n10) s 208(10).
[37] SA 2020 (n10) s.399.
[38] SA 2020 (n810 sched. 21.
[39] Sentencing Council 2017 (n 26)
[40] CYPA 1993 (n4) s.44.
[41] Sentencing Council 2017 (n 26).
[42] *R v BKY and others* [2023] EWCA Crim 1095.
[43] SA 2020 (n10) s 57(2).
[44] (As required by) United Nations Convention on the Rights of the Child, Art. 37(b)
[45] SA 2020 (n 10) s.233.

imprisonment within a '…secure children's home, a secure training centre, or a young offender institution …'[46] In extreme cases, a sentence of extended detention or detention for life may be imposed, assuming that the court considers that the offender poses a '…significant risk of serious harm to members of the public from them committing further specified offences[47].' Such cases are exceedingly rare, however. Custodial sentences are much more commonly given to adult offenders, with legislation requiring that to meet the custody threshold, offence/s must be '…so serious that neither a fine alone nor a community sentence can be justified[48]'. Such sentences range from those which are determinate, by which an offender will likely only serve half of the term imposed,[49] to life sentences carrying a minimum term.[50]

Finally, the youth justice system seeks to facilitate seamless reintegration of young offenders into society following completion of their sentence. Such an aim exists on the basis that where successful, such will minimise the likelihood of young offenders' reoffending and the reduce the negative impact of their sentence on their future '…prospects and opportunities…'[51]' A general consensus exists that educational programs/orders which '…encourage children and young people to take responsibility for their own actions and promote re-integration into society…'[52] will prove most effective in facilitating such integration. It has frequently been suggested that restorative justice disposals providing '…an alternative way of responding to offending behaviour… aiming to restore victims, encourage offenders to take responsibility… [and] reintegrate offenders into the community…'[53] are most effective in achieving such an aim. The legislative aims of the adult system do not mention reintegration of offenders but do aim to facilitate 'the making of reparation by offenders to persons affected by their offences[54]'. Such an aim somewhat suggests a restorative justice focus rather than one of reintegration – further highlighting the victim-focused approach of the wider adult justice system. Under the current system this seems limited in its effectiveness as the main restorative justice disposals used are costs granted to victims by the court and conditional discharge requirements.[55] There are, however, systems in place to ensure that adult offenders are released and sent back into society gradually and in a way that minimises the risk to the public as far as is possible.

The reintegration of youth offenders who have faced detention is made smoother by a transitional period after they have served half of their sentence during which they are made subject to supervision and training until the completion of the sentence term.'[56] Somewhat similarly, adult offenders are released from custody after having served half of their custodial sentence on licence unless their conduct deems them in exception.[57] On licence, they will stay at an approved address and be made subject to conditions such as a curfew, aimed at protecting the public and reducing the likelihood of reoffending, until completion of the remainder of their sentence term.

The above comparisons highlight the stark differences in nature between the youth and adult criminal justice systems. The adult system takes a more punitive approach largely aiming to protect victims and the public, where the youth system is more occupied with protecting the welfare of the young offender and promoting rehabilitation to reduce the likelihood of reoffending. As a consequence of these

[46] Steve Wilson and others, *English Legal System* (4th edn Oxford University Press 2020) p774
[47] Sentencing Council 2023 (n 20).
[48] SA 2020 (n 10) s.230(2).
[49] Sentencing Council, 'Determinate prison sentences' (N.D) <https://www.sentencingcouncil.org.uk/sentencing-and-the-council/types-of-sentence/determinate-prison-sentences/> Accessed 5th March 2024
[50] Sentencing Council, 'Life Sentences' (N.D) <https://www.sentencingcouncil.org.uk/sentencing-and-the-council/types-of-sentence/life-sentences/> Accessed 7th March 2024.
[51] Sentencing Council 2017 (n 26).
[52] Sentencing Council 2017 (n 26).
[53] Katherine Doolin, 'But what does it mean? Seeking Definitional Clarity in Restorative Justice' (2007) 71 *Journal of Criminal Law* 427.
[54] SA 2020 (n10) s 57(2)(e).
[55] Sentencing Council, 'Restorative Justice' (2020) <https://www.cps.gov.uk/legal-guidance/restorative-justice> Accessed 28th May 2024.
[56] Steve Wilson and others 2020 (n 46), 774.
[57] CJA 2003 (n 15) s.244.

differences in approach, the differences in punishments are also stark and mean that an adult and youth offender charged with the same offence may receive vastly different sentences.

The young adult gap

As aforementioned, the UK's criminal justice system does not currently identify young adult offenders as a distinct demographic of offenders. The consequence of this is an immediate transfer to the adult system occurring automatically upon an individual reaching eighteen years of age. The stark nature of this shift creates the opportunity for an offender committing an offence two minutes prior to their eighteenth birthday to face a different sentencing process and punishment than one who had committed the same offence two minutes prior to turning eighteen. The principle that an individual reaches full adulthood at eighteen somewhat comically implies that young people become fully mature, cognitive humans from the first minute of their eighteenth birthday, instantly eliminating any and all factors that may have diminished their culpability prior. Although exaggerative, this example highlights the abruptness of this transition and evidences a gap for a middle-ground approach for offenders aged between eighteen and twenty-one capable of acknowledging and better representing the development occurring within this developmental period.

Whilst formal recognition of young adults as a distinct category of offender has not yet been established, an undeniable degree of informal recognition pre-exists, as such offenders remain eligible for detention within a young offenders' institution until reaching the age of twenty-one.[58] This implies a level of legal acknowledgment of the developmental differences existing between a young and older adult offender and of the differing needs and rehabilitative potential arising as a result. Furthermore, the law identifies an offender under the age of twenty-five's 'age and/or lack of maturity'[59] as a mitigating factor capable of justifying reductions to the sentence imposed upon them. Inclusion of this factor in the sentencing guidelines further implies a degree of acceptance of a young adult offenders' incomplete development and of the impact this may have on their offending behaviour. These informal acknowledgements somewhat support the idea of need for a unique approach to the treatment of young adult offenders within the criminal justice system, but more formal action is needed to enshrine this and make this principle effective in practice.

The case for a unique approach to young adult offenders

One of the most significant arguments for adopting an approach to young adult offenders unique to that used with older adults is based around growing evidence that an individuals' cognitive development remains incomplete at the age of eighteen. Scientific studies support the idea that the development of the '…control of impulses and regulation and interpretation of emotions, continue into early adulthood; the human brain is not 'mature' until the early to mid-twenties.'[60] The on-going nature of this development not only highlights the injustices that come with treating all adults as equally cognitive and culpable in criminal proceedings but also highlights the importance of training and education for this demographic in pursuit of achieving effective desistence. In support, it has been stated that dealing '…effectively with young adults while the brain is still developing is crucial… [to them] making successful transitions to crime-free adulthood.'[61] The implied risks of ineffective treatment failing to aid and enhance such development therefore suggest a detrimental impact on the likelihood that a young adult offender will continue to reoffend. Such suggestions highlight a missed opportunity regarding current treatment of young adult offenders and their rehabilitative potential and may explain the

[58] SA 2020 (n 10) s 262(1)(a).
[59] Sentencing Council, 'General guideline - Age and/or lack of maturity' (N.D) <https://www.sentencingcouncil.org.uk/droppable/item/general-guideline-age-and-or-lack-of-maturity/> Accessed 17th January 2024.
[60] David Prior and others, *Maturity, young adults and criminal justice: A literature review*, (University of Birmingham Institute of Applied Social Studies 2011) 35
[61] Barrow Cadbury Trust, 'Lost in transition' (2004) <https://t2a.org.uk/wp-content/uploads/2011/09/Lost-in-Transition.pdf> Accessed 7th June 2024

overrepresentation of young adults within the criminal justice system.[62] It is not disputed that most young-adult offenders will have completed a greater proportion of brain development than that of a young offender. Hence, it would be unjustified to attempt to resolve the gap in representation by expanding the definition of a young offender to include those of a young adult. Instead imposing a middle-ground approach to bridge the gap between youth and adulthood is essential to maintaining a legitimate criminal justice system which best facilitates justice for all and effectively enables effective desistence from crime for such offenders.

In addition to incomplete cognitive development, it is widely accepted that milestones such as leaving education, learning to drive and moving out of the family home contribute towards a young adults' development. In recent years, such development has undoubtedly slowed, both due to societal changes and the current economic climate which makes affording these more challenging. In support of this, it has been stated that '…people no longer, if they ever did, reach all of the associated responsibilities and recognised attributes of adulthood by the age of 18. Young adults in the 21st century live at home for longer, and depend on their families financially and emotionally for longer… In fact, almost half of 18–25-year-olds still rely on their parents for money as they are unable to meet the daily costs of living.'[63] Such a suggestion highlights that whilst young people left education, entered the working world and became more financially independent at an earlier age in the past that is not the case in the modern world. As a direct consequence of such, it is strongly suggested that the maturity of young adults has also slowed, contributing to their heightened propensity to commit offences. The inferred suggestion made as a result is that young people are taking longer to fine-tune their maturity and self-control/regulation - attributes which it is widely accepted, drive offending behaviour.

Another significant justification for a unique approach to young adult offenders, is the suggestion that the adult system's increased imposition of custodial sentences is ineffective and even damaging to young adult offenders. With only five young offenders' institutions in the UK, it was previously highlighted that these '…are often full, many young men are placed in adult prisons[64]'. This issue is ongoing, with the 2021 HM Inspectorate of prisons noting that the '…lack of coherent response at national level...'[65] had led to young adult offenders being held within adult prisons without rationale and '… no evidence that placement decisions are made on the basis of need.'[66]' Such statements highlight the issue of oversubscription for young offenders' institutes meaning that young adult offenders are sent to prisons with a majority of older inmates, where they are unable to receive the targeted rehabilitation and training intended by the original custodial order. As young adult offenders are innately more impressionable and likely to concede to peer pressure than their older counterparts are, such environments are both unsafe and unsuitable, potentially placing them at heightened risk of further disruption and reducing the likelihood of meaningful reform leading to a crime-free future. Furthermore, during this time in their lives most young adults are undertaking further education/courses aimed at making them more employable individuals, exclusion from which will likely limit their future prospects and make reintegration into society post-release more challenging.

Further supporting the proposals to a unique approach for young adults is that such has already been recognised and implemented in other jurisdictions. Germany was the trailblazer in such an approach, enabling cases involving young adults[67] to be handled in the juvenile courts from 1953[68]. Such eligibility

[62] HM Inspectorate of Probation, 'Young Adults' (N.D) <https://www.justiceinspectorates.gov.uk/hmiprobation/research/the-evidence-base-probation/specific-sub-groups/young-adults/> Accessed 1st June 2024

[63] Transition to Adulthood, 'Young Adults in the Criminal Justice System' (2011) <https://barrowcadbury.org.uk/wp-content/uploads/2011/01/T2A-A-New-Start-Young-Adults-in-the-Criminal-Justice-System-2009.pdf> Accessed 15th March 2024

[64] Barrow Cadbury Trust 2002 (n61)

[65] HM Inspectorates of Prisons, 'Outcomes for young adults in custody' (2021) <https://t2a.org.uk/wp-content/uploads/2022/03/Young-adults-thematic-final-web-2021.pdf> Accessed 4th June 2024

[66] Ibid

[67] Note that in Germany, this includes offenders aged 18-20.

[68] Josine Junger-Tas and Scott H. Decker, *International Handbook of Juvenile Justice* (1st edn Springer, 2008) 247

exists for young adult offenders able to evidence that they were '…like a juvenile[69]' in their development at the time of offending and that the '…motives and the circumstances of the offence are similar to those of a typical juvenile crime.[70]' The proven success of such a system has led to adoption of similar approaches by nations such as the Netherlands and Croatia[71]. More locally, the 2022 Scottish sentencing guidelines extended the definition of a 'young person' to include anyone under the age of twenty-five, to whom unique approaches to sentencing are required on account of their inherent '…lower level of maturity and…greater capacity for change and rehabilitation…[72]'.

Building the bridge between youth and adult sentences

It has been established that a notable gap exists between the approaches of the youth and adult justice, and that young adults are significantly unaccounted for under the current system despite making up roughly '…30 to 40 per cent of [UK] cases…'[73] Such data suggests the current approach to young adult offenders is ineffective in deterring offending and evidences the need for a better-informed approach. This chapter will justify the position that suspended sentences are best suited to meeting the unique needs of young adult offenders, before evaluating how such may be implemented in practice and how the method selected may impact the effectiveness of such a reform.

Why suspended sentences are best suited to bridge the gap

With the incomplete nature of a young adult's cognitive development enabling them a greater capacity for rehabilitation, it is believed that expansions in the use of suspended sentences imposed upon young adults could lead to greater success in their reform and desistence from committing offences in the future. As suspended sentences may include requirements involving rehabilitation and treatment programs, it is believed that expansions in their imposition upon young adult offenders could enable those who would otherwise be remanded in custody a chance at turning their lives around before it is too late. The uniquely flexible nature of these sentences enables a greater degree of effectiveness, as courts are able to use advice from the probation service and legal counsels to determine which programs will be most impactful to which offenders - therefore facilitating a tailored case-by-case approach. It is also believed that a suspended sentence better protects the welfare of young adult offenders by reducing the number of immediate custodial sentences imposed. The wider idea that suspended sentences are more effective than short-term prison sentences is already evidenced, with nine percent less offenders reoffending when given a suspended sentence than those given a custodial sentence in 2021[74]. Instead encouraging this demographic of offender to help themselves and take a degree of responsibility over their own freedom and future prospects is likely to be more effective in promoting positive cognitive development better facilitating a life of desistence from crime.

Suspended sentences also contain a punitive element in the form of enforceable consequences should an offender refuse/fail to engage with the set requirements, as they will have to return to court following which they may be sent to formally serve the rest of their custodial term immediately. Such a consequence is clearly communicated to the offender at sentencing, providing a more authoritative warning, which may aid their cooperation with such orders and therefore enhance the overall effectiveness of such a sentence in deterring reoffending. The formality of such a warning is essential to the success of this and is consequently mandated by the sentencing guidelines that state that courts must inform the offender that should the sentence have been ineligible for suspension, they would have

[69] Friedrich Lösel, Anthony Bottoms and David P. Farrington, *Young Adult Offenders: Lost in Transition?* (1st edn, Willan Publishing, 2012), 21
[70] Ibid
[71] Jennifer Ward, 'Criminal Court Sentencing: The Case for Specialist 'Young Adult' Courts' (2023) 63 *The British Journal of Criminology* 1046
[72] Scottish Sentencing Council, 'Sentencing Young People' (2022) <https://www.scottishsentencingcouncil.org.uk/media/4d3piwmw/sentencing-young-people-guideline-for-publication.pdf>
[73] House of Commons Justice Committee, 'The treatment of young adults in the criminal justice system' (2016) < https://publications.parliament.uk/pa/cm201617/cmselect/cmjust/169/169.pdf> Accessed 4th February 2024
[74] Sentencing Academy, 'The effectiveness of sentencing options (2021) <https://www.sentencingacademy.org.uk/wp-content/uploads/2023/09/The-Effectiveness-of-Sentencing-Options-1.pdf> Accessed 19th May 2024

imposed a custodial sentence to be served immediately.[75] Establishment of this principle within the guidelines ensures cohesiveness in decisions is upheld and leaves little room for inconsistencies and misunderstandings of what is expected of the offender. As a result, suspended sentences are able to offer offenders a final warning and chance to make better choices not dissimilar to those given in youth courts, whilst ensuring such threats are not empty and that breaches have real, enforceable consequences. It is also argued that such sentences better facilitate justice for victims than those available within the youth system, as the court requires that the offender take a greater degree of accountability for their actions and the consequences of such – also aligning such a sentence with the aims of the adult system.

O*ptions for implementation*

Facilitating expansion to the number of suspended sentences given to young adults could be achieved in a number of different ways. These range from loosening legislative eligibility constraints, increasing the mitigative credit given by judges to aid eligibility and implementing overarching guidelines to promote wider usage.

Under the current sentencing guidelines, an offender's '…age and/or lack of maturity…[76]' may constitute a mitigating factor justifying a reduction in the sentence term or severity. Whilst the 'age' component of such a factor is generally accepted to include those between the ages of eighteen and twenty-five,[77] ambiguity remains amongst sentencers as to the appropriate context and degree of credit to be awarded in relation to an offender's lack of maturity. Such uncertainty has limited the usage of this mitigative factor, with its implementation seemingly reserved to cases '…where there is extreme immaturity[78]'; as evidenced in a study observing that '…In almost half of all sentence appeal cases [studied] involving young adults, neither age nor maturity were considered.'[79] In addition, contributory to limited considerations and subsequent applications of such a factor is the fact that courts are not required to consider an offenders' level of maturity unless this is '…raised in mitigation on [the offenders'] behalf.'[80] The cost of such improper mitigative considerations given in the sentencing of young adult offenders cannot be understated in the context of deterring reoffending, as such reductions may be the difference between a suspended sentence facilitating impactful rehabilitation for an impressionable offender and one that is deemed ineligible.

It is subsequently suggested that expansion of the degree of mitigative credit awarded to young adult offenders on account of their age/lack of maturity during sentencing would increase eligibility for suspended sentences more effective in deterring reoffending. If implemented within the current legislative framework, such a change would enable sentences given to young adults with a starting point above the two-year maximum period for suspension, to be reduced to a term of a qualifying length, therefore facilitating their eligibility. Such a change may impact, for example, a 20-year-old offender charged with s.20 GBH,[81] whose involvement was lesser within an offending group (category B) but who had contributed to category 1 harm suffered by the victim. Where this offender would currently be given a starting point of three years and may be unable to receive sufficient credit to be eligible for a

[75] Sentencing Council, 'Imposition of community and custodial sentences' (2017) <https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/imposition-of-community-and-custodial-sentences/#Imposition%20of%20custodial%20sentences> Accessed 20th May 2024

[76] Sentencing Council, 'General guideline - Age and/or lack of maturity' (N.D) <https://www.sentencingcouncil.org.uk/droppable/item/general-guideline-age-and-or-lack-of-maturity/> Accessed 17th January 2024.

[77] (See for example) Sentencing Council, 'Inflicting grievous bodily harm' (2021) <https://www.sentencingcouncil.org.uk/offences/crown-court/item/inflicting-grievous-bodily-harm-unlawful-wounding-racially-or-religiously-aggravated-gbh-unlawful-wounding/> Accessed 5th April 2024

[78] Justice Committee 2016 (n73)

[79] Howard League, 'Judging Maturity' (2017) <https://howardleague.org/wp-content/uploads/2017/07/Judging-maturity.pdf> Accessed 11th March 2024

[80] Justice Committee 2016 (n 73)

[81] Sentencing Council, 'Inflicting grievous bodily harm' (N.D) <https://www.sentencingcouncil.org.uk/offences/crown-court/item/inflicting-grievous-bodily-harm-unlawful-wounding-racially-or-religiously-aggravated-gbh-unlawful-wounding/> Accessed 1st April 2024

suspended sentence, provided that the Judge felt that this was proportionate and that the offender would not pose a danger to public safety, one could be imposed.

In light of the uncovered uncertainty surrounding young adult offenders' eligibility for mitigation by way of 'lack of maturity' amongst the judiciary and other sentencers, it appears that alterations to the sentencing guidelines and/or an advisory report would best facilitate the implementation and therefore effectiveness of such changes. To aid its impact, such guidance should provide a clear and unified definition of lack of maturity, the level of credit it can give rise to – particularly in cases in which a suspended sentence could be passed, and suggest ways maturity may be assessed, such as by way of a pre-sentence report. Whilst it may also be suggested that new legislation mandating considerations of this factor would bear more authority, none of the other mitigating factors are currently enshrined in this way, making such an option inconsistent and reducing the individuality of such an approach.

As mentioned above, the utilisation of suspended sentences imposed in the UK is limited by the legislative requirements set out by the Sentencing Act 2020.[82] Under such restrictions, only sentences of detention in young offenders' institutes for a term of no more than two years are eligible for suspension. The rigidity of this criterion significantly reduces the usage and subsequent impact of such sentences on young adults, as many offences commonly committed by this demographic have starting points and category ranges exceeding this maximum term. Consequently, it is proposed that expansion of the volume of suspended sentences given to young adult offenders could instead be achieved by extending the maximum sentence term eligible for suspension by a year for this demographic of offender. Such a change would deter reoffending by increasing the volume and diversity of sentences eligible for suspension and consequent continued supervision. As a secondary advantage, such a shift would also provide greater rehabilitative opportunities for such offenders, with the judiciary better able to able to impose community requirements targeted at their individual developmental needs and habits driving offending behaviour. In particular, it is widely accepted that young people are often driven to '…offending, specifically violent offending, through the psychopharmacological effects [of drug misuse],'[83] which it is proposed, could be effectively managed by drug rehabilitative requirements facilitating treatment under such a sentence[84].

Implementation of this proposal would enable young adult offenders facing custodial sentences with a minimum term of over two and not surpassing three years to receive suspended sentences for which they are currently ineligible. Such a shift would affect, for example, a young adult offender convicted of theft in breach of trust,[85] having stolen a high value of goods (category 1) and determined to be of high culpability (A).[86] Under the current system, the lowest end of the category range being two years and six months would deem him ineligible for a suspended sentence. Should this term be extended as suggested however, he would not automatically be ineligible and could therefore be given a suspended sentence perhaps including an unpaid work requirement to make reparations to the wider community. Such expansion would also impact a nineteen-year-old having been convicted of possession with intent to supply class A drugs,[87] as seen in the case of Rex and Raqab Mohammed.[88] Though the Court of Appeal accepted that the defendant had been incorrectly categorised and insufficient credit had been granted on account of his lack of maturity in this case, it was unable to reduce the term to one facilitating

[82] SA 2020 (n 10) s 277(2).
[83] Whitney DeCamp, 'Victim–Offender Trajectories: Explaining Propensity Differences from Childhood to Adulthood Through Risk and Protective Factors' (2018) 58, The British Journal of Criminology, 667
[84] Sentencing Council, 'Imposition of community and custodial sentences' (2017) <https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/imposition-of-community-and-custodial-sentences/> Accessed 24th January 2024
[85] Theft Act 1968, s 1
[86] Sentencing Council, 'Theft – general' (2016) <https://www.sentencingcouncil.org.uk/offences/magistrates-court/item/theft-general/> Accessed 31st March 2024
[87] Sentencing Council 'Possession of a controlled drug with intent to supply it to another' (2021) <https://www.sentencingcouncil.org.uk/offences/magistrates-court/item/supplying-or-offering-to-supply-a-controlled-drug-possession-of-a-controlled-drug-with-intent-to-supply-it-to-another/> Accessed 23rd March 2024
[88] *Rex v Raqab Mohammed* [2023] EWCA Crim 1325

suspension. Under the proposed changes however, the sentence which was imposed of two years and three months would have qualified for such.

Due to the legislative status of the maximum term currently in force, implementation of this proposal would require legislative reform of s.2 of the Sentencing Act 2020, amending this requirement to specify its extension to three years for offenders falling within the young adult category. Completion of such amendments may be a lengthy process, however, due to their unique and potentially contentious approach to sentencing that would likely cause further delays due to 'parliamentary ping pong' between the House of Commons and the House of Lords.[89]

The impact of the method on effective deterrence

It is consequently clear that expanding the overall use of suspended sentences within the demographic of young adults either requires reducing the length of sentences passed, or extending the maximum term eligible for suspension, to enable more cases to fall within such a criteria.

The former may prove more effective on the basis of the wider impact that increased mitigative credit given to young adult offenders in respect to their age and/or lack of maturity may have on sentencing decisions outside of suspended sentences. Over the last decade growing interest and public pressure has grown advocating for an entirely different system for young adults, with T2A leading a movement aimed at identifying and promoting the '…need for a distinct and radically different approach to young adults in the CJS…. proportionate to maturity and responsive to specific needs.'[90] Such public pressure suggests that effectiveness of deterrence may also be measured by the impact on the overall classification and treatment of offenders of which it appears that mitigating factors would apply to a wider variety of young adults within the criminal justice system, not exclusively limited to those whose offences may justify a suspended sentence.

The latter, however, would bring such a unique approach into physical legislation, arguably better protecting its practical application from inconsistencies and failures to adopt such principles. Changing such legislative restrictions would implicitly better protect those between eighteen and twenty-one from flawed interventions not recognising '… young adults' maturity… [Which] slow desistance and extend the period of involvement in the system…'[91] and subsequently '…approaches to holding young adults in custody…doing more harm than good.'[92] It is noted however that such application is less far-reaching, and that parliament may not agree to implement such recommendations, as has been their approach in the past.

In summary, it would appear that the decision as to how best to facilitate expansion of the use of suspended sentences is heavily dependent upon considerations as to whether the authority of a more limited approach would outweigh the wider-spread impact of a method more broadly applied. Both methods carry a degree of risk and uncertainty in their effectiveness, as the UK government are yet to explicitly express intention to realise young adults as a distinct group, which may make attainable changes to legislation and the sentencing guidelines more challenging. It seems fair to suggest that as the rates of offending in the young adult demographic increase annually, such a change will inevitably need addressing, but delays in such changes seem both unrepresentative and insufficient in proper delivery of justice. Assuming that such changes could be achieved however, the rigid nature of the current restrictions on suspended sentences and simultaneous confusion surrounding mitigative credit for the age and/or lack of maturity of an offender suggest that a blended approach would best secure maximised effectiveness of such changes to deterrence of reoffending within young adult offenders. Such a system would ensure expand utilisation of suspended sentences to reduce reoffending amongst

[89] Steve Wilson and others 2020 (n 46) 182
[90] Transition to Adulthood, 'Effective Approaches with Young Adults' (2015) <https://t2a.org.uk/wp-content/uploads/2015/09/Probation-guide_Ver4_sml.pdf> Accessed 15th February 2024
[91] Justice Committee 2016 (n 73)
[92] House of Commons Justice Committee, 'Young Adults in the Criminal Justice System' (2017) <https://publications.parliament.uk/pa/cm201719/cmselect/cmjust/419/419.pdf> Accessed 27th March 2024

young adult offenders, whilst extending such recognition to the sentences of offenders remaining unable to receive such a sentence, creating a more cohesive approach.

Potential barriers to implementation

Whilst the perceived promise of such a proposal has been evidenced, the likely concerns and questions surrounding such a proposal must now be considered in the interests of thorough investigation and reaching an informed conclusive answer to the question raised by this report. The central concerns likely to be raised following such a proposal surround stakeholder perceptions of this change and its enforceability. This chapter will review further evidence surrounding such issues, to determine the scale of the impact they may have and whether solutions are available to reduce the impact these have on the effectiveness of the proposal.

The first concern likely to be raised in response to a shift towards expansion of suspended sentences is that placing a stronger emphasis on the rehabilitation of young adult offenders may limit the sense of justice felt by victims and stakeholders following sentencing decisions. Whilst such a concern is unlikely to lead to direct opposition or protests against such a shift, it is highlighted that a '…degree of public acceptance of, and confidence in, criminal justice practices is clearly necessary for a well-functioning system'[93] without which '…a loss of perceived legitimacy, and support for the sentencing process…'[94] may harm public perceptions of the criminal justice system as a whole. As previously identified, should expansion of the imposition of suspended sentences be achieved by way of extending the maximum term of sentences eligible for suspension, offenders committing more serious offences or who have had a heavier degree of involvement in minor offences may become eligible. As this does not mean that highly dangerous prisoners or those leading high-level offences will be eligible, the public's confidence should not reduce dramatically, as their safety continues to be protected as a priority. It appears therefore that the most significant degree of dissatisfaction following such a reform may come from victims who wish to see justice for the wrongs committed against them. In managing such concerns whilst attempting to make a greater-representative system, it appears as though the judiciary would need published guidance highlighting the continued importance of proportionality and justice for victims. If a victim's level of harm is exceedingly high and releasing their attacker into the local community poses them or others at significant risk of harm – whether physical or psychological, it is the role of the courts to determine whether passing a suspended sentence is safe and proportional. It is also possible for the judge to handle such situations by imposing an exclusion requirement,[95] prohibiting the defendant from entering the area the victim resides in, as is currently possible.

Another obstacle facing the imposition of this proposal is the history of governmental apathy regarding such reforms. The labour government first promised to '…extend to young adult offenders the focused and specialised attention that it had tried to provide for juveniles during its first term…[96]' in its 2001 manifesto, on account of the recognised similarities in characteristics present between offenders in their mid-teenaged and late-teenaged years, including '…immaturity, low educational attainment, poor parenting, behavioural problems, alcohol or drug problems…[97]' but ultimately failed to do so. Following this, a 2010 Justice Select Committee also highlighted in its findings that '…it does not make financial sense to continue to ignore the needs of young adult offenders. They will become the adult offenders of tomorrow. Particular effort should be made to keep this group out of custody.[98]' Such a report was similarly fruitless. Even in the modern day, the conservative government show similar ignorance to such an issue, failing to adopt the proposals set out by the Justice Committee on the topic of young adult underrepresentation and instead stating its commitment to '…developing operational

[93] Anthony Bottoms, Sue Rex, Gwen Robinson, *Alternatives to Prison* (1st edn, Willan Publishing 2004) 83
[94] Sue Rex and Gwen Robinson, 'Sentencing Riot-Related Offending' (2013) 53 *The British Journal of Criminology* 234, 236
[95] CJA 2003 (n 15) s.205
[96] Friedrich Lösel and others 2012 (n 69) XIV
[97] Barrow Cadbury Trust 2004 (n 61) 11
[98] Justice Committee, 'Cutting crime: the case for justice reinvestment' (2010) <https://publications.parliament.uk/pa/cm200910/cmselect/cmjust/94/9408.htm#a23> Accessed 5th April 2024

practice in response to maturity…'[99] which appears unfulfilled. Such a plethora of missed opportunities to properly acknowledge and address the underrepresentation of young adults as a unique category of offenders highly suggests that the legislature do not feel that such a shift is worthy of priority. Ultimately, it is the legislative who must establish such reforms by way of legislation, failing which proposals will remain ineffective.

Conflicting judicial attitudes to such a reform may pose another obstacle to its implementation and effectiveness if passed. As previously discussed, it appears that judicial understanding of the position and significance of an offenders' age and/or lack of maturity varies under the current system, consequently requiring clarification should such a change be legislatively established. Simultaneously, whilst an incentive could be introduced to promote the wider imposition of suspended sentences upon young adult offenders, the discretionary nature of sentencing leaves unavoidable room for inconsistencies and differing approaches between courts – even when working within a guideline. It appears inevitable that some members of the judiciary would be apprehensive regarding a reform and may feel a stronger sense of concern imposing more suspended sentences. Whilst this cannot be prevented, it seems essential that should such a change be imposed, sufficient guidance be provided to the courts as to the new rules and how to balance the aims of rehabilitating offenders with protection of the public when making such decisions. Such a strategy would also not only require that suspended sentences imposed carried requirements for the purposes of rehabilitation, but that violations of these were continually enforced to ensure decisions are not unduly lenient.

Conclusions

This dissertation has explored the stark contrasts between the adult and youth justice system, identifying a gap in legal recognition and representation for young adult offenders who cannot yet be deemed fully adult or nor still a child. This identification highlighted the need for a unique approach to the sentencing of young adult offenders to establish binding recognition of their position as more cognitively culpable than a young offender, but not capable of the same level of culpability and informed decision-making as an older adult. It was then established that suspended sentences appear to be the best remedy capable of effectively combining the youth and adult justice systems due to its unique ability to weigh up the importance of undertaking rehabilitative activity with the punitive threat of serving a custodial sentence for offenders failing to engage. It was next determined that expansions to young adult offenders' eligibility for suspended sentences would likely either need to take the form of mitigative credit capable of reducing a sentence term to one falling within the current maximum term, or expansion of the maximum term by one year to allow more cases to fall within such without being overly lenient. Both options carry their advantages and disadvantages, but the legislative status of expanding the maximum term for young adult offenders may make such a reform more influential and therefore effective. Finally, the obstacles facing such a proposal were highlighted, with the potential issues with public and judiciary perceptions of such a reform seeming manageable through guidelines and balances with the wider aims of justice to ensure change is not disproportionate or unsafe. Such analysis did however highlight the fundamental factor determining whether such a strategy could be implemented being the legislatives' position on such a matter. Whilst campaigning can and should continue to lobby for representation of this group and judicial awareness of the impact of age and/or lack of maturity will aid fairness of decisions, it is up to the legislature to determine whether or not such a strategy be trialled and implemented.

In coming to a conclusive answer as to the validity of the proposal, it appears obvious that the UK government need to follow the international examples of countries such as Germany and expand their currently limited degree of recognition as to the unique position of young adults to one that is legislatively enforced and protected in sentencing decisions. When considering whether expanding the use of suspended sentences in particular would reduce reoffending rates, the evidence also suggests that it would. This is particularly true in the current climate by-which young offenders' institutes are oversubscribed, resulting in a lack of rehabilitative opportunities for young adults facing custodial

[99] Justice Committee 2017 (n92)

sentences. This conclusion is made on the basis of all of the acquired evidence highlighting the effective balance such a penalty can strike between prioritising welfare and enforcing punitive measures. It is however noted that the degree of such success would likely be dependent upon the quality of supporting advice distributed to decision makers, without which inconsistencies in application are inevitable.

The author does acknowledge, however, that suspended sentences will not be suitable for the sentencing of all young adult offenders. In the same way as currently applies to determining an offenders' eligibility for such a sentence,[100] it must first be determined whether an offender is likely to meaningfully engage with such a sentence, and whether they show a willingness to commit to such requirements and cease offending for the period of suspension. There is little merit in imposing a suspended sentence against an offender who has a long-standing history of non-compliance with court orders, as breach is highly likely; in the same way that the public would not be safe if an offender highly likely to reoffend received a suspended sentence. The aim of such a proposition is to make suspended sentences more accessible to offenders who have suffered poor decision-making skills, but who truly wish to make meaningful efforts to engage with the relevant services and turn their lives around for the good of their future.

The next steps required to implement such measures, should the legislature look to impose such a proposal, would likely require that local pilots take place to further evidence the success and maintenance of public safety occurring under such arrangements. Should such trials be run, they would likely benefit from governance by Transition 2 Adulthood due to their extensive knowledge of the field and pool of evidence regarding the effectiveness of approaches to justice for young adults.

[100] Sentencing Council 2017 (n 26)

STUDENT ARTICLES

EMPLOYMENT LAW

The merits and shortcomings of the inclusion and application of the duty to make reasonable adjustments

Umar Siksek*

Introduction

Historically, the laissez-faire principle of state abstinence from interfering in the free market was deep-rooted, permitting discrimination in employment.[1] This approach shifted with the Disabled Persons (Employment) Act 1944, introducing a quota system.[2] However, the act did little to promote equality as "implementation was not vigorously pursued"[3] and the Act did not ensure parity of work for disabled persons. Additionally, disabled persons faced discrimination beyond just employment. Eventually, after much campaigning and "as many as sixteen unsuccessful attempts,"[4] the Disability Discrimination Act (DDA) 1995 was finally introduced, including a duty to make reasonable adjustments for "disabled persons"[5] in various areas. The DDA was subsequently amended,[6] to align with Directive 2000/78/EC and eventually incorporated into the Equality Act (EA) 2010.[7] This article shall focus on the duty's operation in the employment context as compared to the services and public functions context, exploring whether the definition of disability acts as an overly restrictive gatekeeper to the duty, the merits and shortcomings of the inclusion and application of the duty, the underlying theories of equality pursued, the broader social and economic context which limits the duty's promotion of equality and possible reforms to further the removal of barriers.

Scope of disability

The duty is only applicable to "disabled persons"[8] (persons with the protected characteristic of a disability).[9] Therefore, the definition of disability acts as a gatekeeper for the duty. For the purpose of the act, a person has a disability if they have a physical or mental impairment, and the impairment has a substantial (more than minor or trivial)[10] and long-term adverse effect on their ability to carry out normal day-to-day activities[11]. A broad purposive approach has been taken to interpret the already broad definition of disability.[12] However, the definition ultimately still follows a medical individualist model with a focus on the functional limitations of the individual rather than the barriers they face, hindering their participation in society.[13] The discomfort arising from the details of one's impairment being publicly scrutinised may discourage individuals from pursuing claims of a breach of the duty.[14] Even

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[1] See *Thomas Francis Allen v William Cridge Flood and Walter Taylor* [1898] AC 1 (HL); *Roberts v Hopwood* [1925] AC 578, (HL).
[2] Disabled Persons (Employment) Act 1944, s.9.
[3] Colin Barnes, Geoffrey Mercer, and Toby, Brandon 'Disability Policy and Practice: Applying the Social Model' (2006) 21 *Disability and Society* 744.
[4] Sandra Fredman, *Discrimination Law* (3rd edn, Oxford University Press 2022), 152.
[5] Disability Discrimination Act 1995, s.6.
[6] Disability Discrimination Act 1995 (Amendment) Regulations 2003.
[7] Equality Act 2010, s.20.
[8] Ibid, s.20.
[9] Ibid, s.6(2).
[10] Ibid, s.212(1).
[11] Ibid, s.6(1).
[12] The EAT confirmed a purposive approach should be adopted - *Goodwin v Patent Office* [1999] ICR 302 (EAT), 307.
[13] Sarah Butlin, 'The UN Convention on the Rights of Persons with Disabilities: Does the Equality Act 2010 Measure up to UK International Commitments' (2011) 40 *Industrial Law Journal* 428, 433.
[14] Anna Lawson, 'Disability and Employment in the Equality Act 2010: Opportunities Seized, Lost and Generated' (2011) 40 *Industrial Law Journal* 359, 362.

where cases are pursued, 11.5 per cent of Employment Tribunal (ET) preliminary hearings alleging disability discrimination fail due to not meeting the definition set out.[15]

In contrast, the United Nations Convention on the Rights of Persons with Disabilities (CRPD)[16] states that persons with disabilities "include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others".[17] The CRPD adopts a primarily social model, focusing on the barriers to access rather than the nature of the impairment. However, it does retain a medical component while removing the "substantial" or "normal day-to-day" requirements. Adopting such an approach domestically would allow the continued preferential treatment of persons with medical impairments whilst also broadening the scope of disabilities and, consequently, the scope of the duty's protection. This approach would also shift judicial focus away from the individual's functional limitations to the alleged discrimination,[18] which could encourage more disabled individuals to pursue claims of a breach of the duty, furthering its effectiveness at removing barriers.

The duty to make reasonable adjustments

Despite the medical model adopted by the definition of disability, the duty encapsulates a social model, acknowledging that physical and social factors may provide barriers to full participation in society.[19] Section 20 outlines that the duty is engaged where "a disabled person" is placed at a substantial (more than minor or trivial) disadvantage "in comparison with persons who are not disabled" by virtue of a provision, criteria, practice (PCP), or physical feature; or by failure to provide an auxiliary aid.[20] All three of these potential requirements have a broad scope.

Section 20(10) outlines that "physical features" include references to building design, access, fixtures, fitting, chattel and more.[21] Whilst "PCP" lacks a statutory definition, the Equality and Human Rights Commission's (EHRC's) Codes of Practice (COPs) describe them as formal or informal policies, rules, practices, arrangements, and qualifications, including one-off decisions.[22] While auxiliary aids are described as things that can support a disabled person.[23] Although the codes are not law, they are admissible in proceedings and must be considered by the judiciary where relevant.[24] Thus, these broad descriptions increase the potential scope of when the duty is engaged, furthering the removal of barriers.

Where the duty arises, it is required "to take such steps as… is reasonable... to avoid the disadvantage."[25] Examples of adjustments that might be considered reasonable include altering buildings, such as widening doorways;[26] altering policies, such as allowing disabled persons to work flexible hours; and

[15] Laura William, Birgit Pauksztat and Suzan Corby, 'Justice obtained? How disabled claimants fare at Employment Tribunals' (2019) 50 *Industrial Relations Journal* 314, 325.
[16] Convention on the Rights of Persons with Disabilities (adopted 12 December 2006, entered into force 3 May 2008) 2515 UNTS 3.
[17] Ibid, Art 1.
[18] Sarah Butlin, 'The UN Convention on the Rights of Persons with Disabilities: Does the Equality Act 2010 Measure up to UK International Commitments' (2011) 40 *Industrial Law Journal* 428, 434; and Anna Lawson, Disability and Employment in the Equality Act 2010: Opportunities Seized, Lost and Generated (2011) 40 *Industrial Law Journal* 359, 362.
[19] Stephen Bunbury, 'The Employer's Duty to Make Reasonable Adjustments. When is a Reasonable Adjustment not Reasonable' (2009) 10 *International Journal of Discrimination and the Law* 111.
[20] Equality Act 2010, s.20.
[21] Ibid, s.20(10).
[22] Equality and Human Rights Commission, 'Employment Statutory Code of Practice' (2011) <https://www.equalityhumanrights.com/sites/default/files/employercode.pdf> accessed 7 March 2024, ch 6.10; Equality and Human Rights Commission, 'Services, public functions and associations Statutory Code of Practice' (2011) <https://www.equalityhumanrights.com/sites/default/files/servicescode_0.pdf> accessed 7 March 2024, ch 7.43.
[23] Ibid (Employment Statutory Code of Practice), ch 6.13, (Services, public functions and associations Statutory Code of Practice), ch. 7.45.
[24] Equality Act 2006 s.15(4).
[25] Equality Act 2010, s.20.
[26] Equality and Human Rights Commission, 'Employment Statutory Code of Practice' (2011) <https://www.equalityhumanrights.com/sites/default/files/employercode.pdf> accessed 7 March 2024, ch 6.33.

providing equipment, such as an adapted keyboard[27], amongst other things.[28] Section 21 makes failure to comply with the duty discrimination,[29] and s.22 allows regulations to be prescribed, providing further details as to what is or is not: a reasonable step, a PCP, a physical feature, an alteration of physical features, or an auxiliary aid.[30]

The duty hinges on reasonableness, requiring duty-bearers to take "reasonable" steps, a concept highly context-dependent. Although there is no statutory definition, the COPs provide factors that might be considered when determining reasonableness, such as the costs, practicability and extent of disruptions required to make the steps, amongst other things[31]. Even with this guidance, what is considered reasonable is still very uncertain,[32] imposing concerns about expectations and litigation, with advocates of state abstinence from the free market, such as Epstein, viewing the duty as an undue burden, arguing in favour of "jettisoning" such systems.[33] However, as Lawson and Orchard highlight, this uncertainty is a corollary to flexibility, allowing the duty to respond to the circumstances of individual cases.[34]

Furthermore, the duty is essential for promoting substantive equality for disabled persons as it departs from the Aristotelian concept of treating like alike. Although equal treatment inherently resonates with our intuitive ideas of fairness,[35] it is highly problematic for disabilities, as exemplified by *Lewisham v Malcolm,*[36] Malcolm, a schizophrenic individual, sublet his council home, leading to possession order proceedings. He claimed this was disability-related discrimination, as it was his disability that made him decide to sublet. However, the House of Lords (HL) held that as a non-disabled tenant would have also been evicted for subletting, Malcolm had not been discriminated against. Hence, while treating like alike may at times be necessary, such as in cases of direct discrimination, solely relying on treating like-alike places those with disabilities at a substantial disadvantage as it completely overlooks the individual's specific needs, demonstrating why favourable treatment is at times necessary for disabled persons.

Importantly, the test of reasonableness is objective.[37] As such, rather than the defendant's perspective, it is the judiciary's view of what is reasonable on the facts of the case that determines what is reasonable. This makes the test more difficult for defendants and more protective for claimants, furthering equality.[38]

The duty in the employment context

The duty's operation differs depending on context. In employment, it is reactive, with schedule 8 outlining the reference to "a disabled person" in section 20 as a reference to an "interested disabled person"[39] (applicants or pre-existing employees).[40] This means the employer is under no obligation to anticipate and alter PCPs or physical features, which might put disabled persons generally at a

[27] Ibid, ch. 6.33.
[28] See - Ibid, ch 6.33; Equality and Human Rights Commission, 'Services, public functions and associations Statutory Code of Practice' (2011) <https://www.equalityhumanrights.com/sites/default/files/servicescode_0.pdf> accessed 7 March 2024, ch 7.80.
[29] Equality Act 2010, s.21.
[30] Ibid, s 22.
[31] Equality and Human Rights Commission, 'Employment Statutory Code of Practice' (2011) <https://www.equalityhumanrights.com/sites/default/files/employercode.pdf> accessed 7 March 2024, ch 6.28; Equality and Human Rights Commission, 'Services, public functions and associations Statutory Code of Practice' (2011) <https://www.equalityhumanrights.com/sites/default/files/servicescode_0.pdf> accessed 7 March 2024, ch 7.30.
[32] Anna Lawson and Maria Orchard, 'The anticipatory reasonable adjustment duty: removing the blockages?' (2021) *Cambridge Law Journal* 308, 319.
[33] Discussing Equivalent US provision – Richard Epstein, 'Forbidden Grounds: the case against Employment Discrimination Laws' (1992) 44 *Stanford Law Review* 1583.
[34] Anna Lawson and Maria Orchard, 'The anticipatory reasonable adjustment duty: removing the blockages?' (2021) *Cambridge Law Journal* 308, 320.
[35] Sandra Fredman, *Discrimination Law* (3rd edn, Oxford University Press 2022), 42.
[36] *Malcolm v Lewisham LBC* [2008] UKHL 43, [2008] 1 AC 1399.
[37] *British Gas Services Ltd v McCaull* [2000] 9 WLUK 341 (EAT).
[38] Ian Smith and Owen Warnock, *Smith & Wood's Employment Law* (16th edn, Oxford University Press 2023), 347.
[39] Equality Act 2010, Sch 8, para 20(2).
[40] Ibid, Sch 8, para 20(2).

disadvantage. Furthermore, the duty does not arise unless the employers know or ought to have known that an interested disabled person is likely to be exposed to a substantial disadvantage.[41]

Lawson argues in favour of implementing a group-based anticipatory duty for all potential disabilities in the employment context to further the removal of barriers[42]. However, whilst a powerful way of furthering equality, proactively implementing accommodations for all potential disabilities in the workplace would be resource-intensive and may not be feasible for many employers. Additionally, the reactive approach allows limited resources to be allocated to making tailored, flexible adjustments for the specific needs of the individual. Therefore, it is unlikely to be either in the employer's or the disabled employees' best interest for there to be an anticipatory duty in the employment context.

The leading authority for the application of reasonable adjustments is *Archibald v Fife.*[43] Archibald, a road sweeper, became unable to walk, thus making her unable to fulfil her role. The council subsequently retrained her for office work and put her on the shortlist for all office vacancies showing some level of preferable treatment. However, they maintained a policy of competitive interviews. After 2 years and over 100 unsuccessful interviews, Archibald was eventually dismissed on the grounds of incapability to carry out her role. Consequently, Archibald complained that the council had failed to make reasonable adjustments by requiring her to undergo the competitive interview process.

The HL interpreted arrangements (now covered by PCPs) broadly, ruling that the job description itself was an arrangement, and part of this was the implied terms of liability to be dismissed upon becoming incapable of fulfilling the role[44]. Thus, in comparison to others who were not at risk of being dismissed due to an inability to do the job because of a disability, Archibald was placed at a substantial disadvantage.[45] To remove this disadvantage, the HL held that a step could include transferring a disabled person from a post they can no longer do to an available post at a higher level, without a competitive interview in preference to a better-qualified candidate, if it was reasonable to do so in the circumstances.[46] Thus, an "employer is not only permitted but obliged to treat a disabled person more favourably than others."[47]

As discussed, abandoning a like-for-like approach is essential for achieving substantive equality. However, the question arises as to whether the favourable treatment demonstrated in *Archibald v Fife* went too far. Indeed, the council had already shown preferable treatment aimed at equality of opportunity,[48] which is an attractive concept as it removes barriers to access whilst still resonating with the intuitive ideas of fairness by allowing decisions to be made on merit,[49] which inherently benefits organisations. However, the HL ruled that the preferable treatment does not have to stop at equality of opportunity, and it may be reasonable to pursue equality of outcome.[50] Equality of outcome completely abandons any notion of treating like alike, being primarily concerned with the end result[51]. Such an approach is controversial not only for undermining the employer's interests,[52] but also for making the adversely affected group suffer for belonging to "a group whose membership is not immoral."[53]

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[41] Ibid, Sch 8, para 20(1).
[42] Anna Lawson, 'Disability and Employment in the Equality Act 2010: Opportunities Seized, Lost and Generated' (2011) 40 Industrial Law Journal 359, 369.
[43] *Susan Archibald v Fife Council* [2004] UKHL 32, [2004] ICR 954.
[44] Ibid, [11] (Lord Hope), [33] (Lord Rodger), [62] (Lady Hale).
[45] Ibid, [12] (Lord Hope), [42] (Lord Rodger), [64] (Lady Hale).
[46] *Susan Archibald v Fife Council* [2004] UKHL 32, [2004] ICR 954, [20] (Lord Hope), [44] (Lord Rodger), [65] (Lady Hale).
[47] Ibid, [68] (Lady Hale).
[48] Ibid, [57] (Lady Hale).
[49] Sandra Fredman, *Discrimination Law* (3rd edn, Oxford University Press 2022), 55.
[50] *Susan Archibald v Fife Council* [2004] UKHL 32, [2004] ICR 954, [20] (Lord Hope), [44] (Lord Rodger), [65] (Lady Hale).
[51] Sandra Fredman, *Discrimination Law* (3rd edn, Oxford University Press 2022), 50.
[52] Tarunabh Khaitan, *A Theory of Discrimination Law* (1st edn, Oxford University Press 2015), 225-228.
[53] Ibid, 228-233.

Following *Archibald v Fife*, the scope of this preferential treatment was left relatively open-ended. However, the scope of the duty was made more apparent in *Griffith v Secretary of State.*[54] The Court of Appeal (CA) held whilst it could be reasonable to extend the absence allowance for disabled employees[55], these extensions did not have to be open-ended, and such proposed adjustments were not reasonable, based on the facts of Griffith, as they would not have removed the disadvantage.[56] The case of *G4S v Powell,*[57] also helps understand the limits. The claimant became disabled through a back injury, making them unable to continue their current role. Subsequently, they were transferred to a less well-paid position with pay protection, which was eventually removed. The EAT held maintaining the pay protection could be a reasonable step, noting the legislation plainly envisaged an element of cost to the employer[58]. Importantly, however, the EAT also noted this would not be reasonable in every case and that the financial considerations will always have to be weighed in the balance.[59]

Thus, from these cases, we can infer that preferable treatment amounting to equality of outcome at a cost to the employer can still be considered reasonable. However, it will not always be reasonable, and a delicate balancing act that does not completely ignore the employer's interests is needed. Indeed, the COP outlines factors, such as the employer's "financial or other resources" and "the type and size of the employer", amongst others,[60] that might be considered when determining reasonableness. Accordingly, only employers with the necessary resources are likely to have to show such high levels of preferable treatment.

Whilst even this more constrained form of equality of outcome might be objectionable to some, it is essential to look at the broader context of why such measures may be needed. As recognised in *G4S v Powell*, part of the purpose of the EA was to keep disabled persons employed.[61] However, currently, only 53.7% of disabled individuals are employed compared to 82.7 per cent of non-disabled individuals[62]. While the nature of some disabilities can explain part of the gap, it is also clear that disabled persons still face many barriers, which may make finding or keeping employment harder. Hence, to keep disabled individuals in employment, preferable treatment may be needed. Whilst adopting a narrower equality of opportunity approach may be more beneficial for employers and those adversely affected; it would only worsen this employment gap. Consequently, the court's approach of using both equality of opportunity and, in some cases, equality of outcome is morally justifiable to further enable disabled individuals to participate in employment, helping achieve the CPDR's article 27 right to "work and employment."[63] Indeed, a person's career may often be a key aspect of their identity; thus, by further enabling participation in employment, the court's approach upholds the dignity of disabled individuals.

Services and public functions

In services and public functions, the duty is anticipatory, with schedule 2 outlining the reference to "a disabled person" in section 20 as a reference to "disabled persons generally."[64] This means there is an obligation to anticipate the needs of potential disabled persons generally and proactively make adjustments. The services and public functions COP also outlines that the duty is evolving, demanding

[54] *Griffiths v Secretary of State for Work and Pensions* [2015] EWCA Civ 1265, [2017] ICR 160.
[55] Ibid, [78] (Lord Justice Elias).
[56] Ibid, [75-78] (Lord Justice Elias).
[57] *G4S Cash Solutions (UK) Ltd v Powell* [2016] 8 WLUK 343 (EAT).
[58] Ibid, [44] (Judge Richardson).
[59] Ibid, [60] (Judge Richardson).
[60] Equality and Human Rights Commission, 'Employment Statutory Code of Practice' (2011) <https://www.equalityhumanrights.com/sites/default/files/employercode.pdf> accessed 7 March 2024, ch 6.28.
[61] *G4S Cash Solutions (UK) Ltd v Powell* [2016] 8 WLUK 343 (EAT), [44] (Judge Richardson).
[62] Aged 16-64 - House of Commons Library, 'Disabled people in employment' (19 June 2023) <https://researchbriefings.files.parliament.uk/documents/CBP-7540/CBP-7540.pdf> accessed 10 March 2024.
[63] Convention on the Rights of Persons with Disabilities (adopted 12 December 2006, entered into force 3 May 2008) 2515 UNTS 3, art 27.
[64] Equality Act 2010, Sch 2, para 2(2).

that duty-bearers keep the ways they are meeting the duty under regular review[65]. Consequently, this proactive group-based approach has much greater potential to drive systemic change than the reactive approach. Indeed, the anticipatory duty goes beyond even the CRPD's "reasonable accommodations" duty,[66] which is reactive.[67] Consequently, it is an even more powerful way of harnessing article 9, "accessibility rights,"[68] than the CRPD envisioned.

Despite being group-based, in s.21, the reference to "a disabled person" remains singular. This means although the anticipatory duty arises regardless of whether a particular individual is placed at a substantial disadvantage, the breach will only constitute unlawful discrimination if a particular person can show that they suffered a substantial disadvantage due to the breach.

Several high-profile cases illustrate the duty's broad implications,[69] such as *Paulley v FirstGroup.*[70] The claimant (a wheelchair user) was unable to board the bus as the wheelchair space was occupied by a woman with a child in a pushchair who refused to vacate the seat upon request. The defendant's policy outlined that other customers would be asked to move; however, if they refused, the wheelchair user would have to wait for the next bus. The recorder judge held that a reasonable adjustment to the policy would be requiring non-disabled passengers to vacate the seat if needed by a wheelchair user, plus an enforcement mechanism.[71] Conversely, the majority of the Supreme Court (SC) took a narrower approach, ruling such steps would not be reasonable[72]. Although, a reasonable adjustment to the company policy would be to require drivers to take further steps where the refusal is unreasonable, such as rephrasing the polite request to a more forceful request or pressurising the passenger by stopping the bus for a few minutes, amongst other suggestions.[73]

While it was an overall success for accessibility, Pearson criticises the SC for not considering the CPDR[74]. Whilst the judiciary does not have to consider international obligations when interpreting legislation[75], they are entitled to do so.[76]Article 9 of the CRPD lists accessibility as a right[77]. Additionally, accessibility to public transport can be central to achieving wider rights listed in the CRPD, such as education,[78] health,[79] work and employment,[80] and social,[81] political,[82] and cultural[83] activities. Thus, Pearson argues for a position closer to the recorder's decision. However, it is essential

[65] Equality and Human Rights Commission, 'Services, public functions and associations Statutory Code of Practice' (2011) <https://www.equalityhumanrights.com/sites/default/files/servicescode_0.pdf> accessed 7 March 2024, ch 7.27.
[66] Convention on the Rights of Persons with Disabilities (adopted 12 December 2006, entered into force 3 May 2008) 2515 UNTS 3, art 2.
[67] Committee on the Rights of Persons with Disabilities, 'General Comment No.2 (2014) on Article 9: Accessibility' (22 May 2014) UN Doc CRPD/C/GC/2, [26].
[68] Convention on the Rights of Persons with Disabilities (adopted 12 December 2006, entered into force 3 May 2008) 2515 UNTS 3, art 9.
[69] See – *Road v Central Trains* [2004] EWCA Civ 1541, [2004] 104 CON LR 456; Royal Bank of Scotland v Allen [2009] EWCA 1213, [2009] 11 WLUK 505; *ZH v Commissioner of Police of the Metropolis* [2012] EWHC 604, [2012] 3 WLUK 434; *Pauley v FirstGroup Plc* [2017] UKSC 4, [2017] 1 WLR 423.
[70] *Paulley v FirstGroup Plc* [2017] UKSC 4, [2017] 1 WLR 423.
[71] See - *Ibid* [29].
[72] Ibid, [46-48] (Lord Neuberger), [83-86] (Lord Toulson), [92] (Lord Sumption); dissenting in part [135] (Lady Hale).
[73] Ibid, [66-69] (Lord Neuberger), [83-86] (Lord Toulson), [92] (Lord Sumption), [129] (Lady Hale), [146-147] (Lord Clarke).
[74] Abigail Pearson, 'The debate about wheelchair spaces on buses goes 'round and round': access to public transport for people with disabilities as a human right' (2018) 69 *Northern Ireland Legal Quarterly* 1, 4-7.
[75] *Regina (Hurst) v London Northern District Coroner* [2007] UKHL 13, [2007] 2 AC 189.
[76] Supreme Court, 'International Law in the UK Supreme Court' (13 February 2017) <https://www.supremecourt.uk/docs/speech-170213.pdf> accessed 12 March 2024.
[77] Convention on the Rights of Persons with Disabilities (adopted 12 December 2006, entered into force 3 May 2008) 2515 UNTS 3, art 9.
[78] Ibid, art 24.
[79] Ibid, art 25.
[80] Ibid, art 27.
[81] Ibid, art 28.
[82] Ibid, art 29.
[83] Ibid, art 30.

to note the CRPD itself contains a notion of "reasonable accommodations."[84] Thus, the rights are qualified, meaning the same decision may have been reached even with a rights-based approach.

It is, therefore, perhaps unsurprising that Pearson also criticises the CRPD for not taking the rights-based approach to its "logical conclusion" and calls for an "absolute right to access."[85] Whilst dignity is already implicit in the duty as it allows disabled persons to participate more fully in society, an "absolute right to access" would only further cement this promotion of dignity,[86] by potentially contributing to a near-complete reduction in barriers. Whilst an admirable concept, an absolute right to access would likely not be feasible due to the high costs and resource demands associated with such an approach.

Conversely, several feasible steps can improve the operation of the anticipatory duty. As discussed, the anticipatory duty has great potential to drive systematic change. However, as an EHRC report suggests, disabled persons still experience significant barriers to accessing services and public functions[87]. Lawson and Orchard argue the lack of visibility of the anticipatory duty has a role to play in this,[88] with both types of reasonable adjustments being "shoehorned" into ss.20-22,[89] whilst the individualistic language of the sections is only indicative of the reactive approach.[90] Only by changing the wording in schedule 2 does the duty emerge, which may lead to individuals overlooking or not understanding the duty. Lawson and Orchard argue a simple solution would be to create a separate section for the anticipatory duty in the main body of the Act.[91] The poor visibility is exacerbated by the COP covering all protected characteristics, which may lead to the anticipatory duty being overlooked. Consequently, the HL committee has recommended the EHRC issue a separate specific COP for reasonable adjustments[92]. However, as Lawson and Orchard highlight[93], issuing statutory codes requires the government's willingness to lay it before parliament,[94] which has not been provided.[95] Additionally, EHRC funding faced significant cuts from £70m in 2007[96] to £17.1m in 2023,[97] limiting its ability not only to publish codes but also to provide financial support for individual discrimination cases. Without proper funding and political will, the EHRC is constrained in promoting the application of the duty.

Underfunding also hampers access to legal aid, with the Legal Aid, Sentencing and Punishment of Offenders Act 2012 causing a substantial reduction in the availability of legal advice services.[98] Whilst

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[84] Ibid, art 2.
[85] Abigail Pearson, 'The debate about wheelchair spaces on buses goes 'round and round': access to public transport for people with disabilities as a human right' (2018) 69 *Northern Ireland Legal Quarterly* 1, 8-9.
[86] Sarah Butlin, 'The UN Convention on the Rights of Persons with Disabilities: Does the Equality Act 2010 Measure up to UK International Commitments' (2011) 40 *Industrial Law Journal* 428, 438.
[87] Equality and Human Rights Commission, 'Being Disabled in Britain: A Journey Less Equal' (01 April 2017) <https://www.equalityhumanrights.com/sites/default/files/being-disabled-in-britain.pdf> accessed 12 March 2024, ch 8.2.
[88] Anna Lawson and Maria Orchard, 'The anticipatory reasonable adjustment duty: removing the blockages?' (2021) *Cambridge Law Journal* 308, 316-318.
[89] Ibid, 316.
[90] Reference to "a disabled person" - Equality Act 2010, s.20.
[91] Anna Lawson and Maria Orchard, 'The anticipatory reasonable adjustment duty: removing the blockages?' (2021) Cambridge Law Journal 308, 316.
[92] The House of Lords Select Committee, 'The Equality Act 2010 the impact on disabled people' (11 June 2015) <https://publications.parliament.uk/pa/ld201516/ldselect/ldeqact/117/117.pdf > accessed 12 March 2024, ch. [231].
[93] Anna Lawson and Maria Orchard, 'The anticipatory reasonable adjustment duty: removing the blockages?' (2021) Cambridge Law Journal 308, 318.
[94] Equality Act 2006, s.15.
[95] The House of Lords Select Committee, 'The Equality Act 2010 the impact on disabled people' (11 June 2015) <https://publications.parliament.uk/pa/ld201516/ldselect/ldeqact/117/117.pdf > accessed 12 March 2024, ch. [163].
[96] Government Equalities Office, Department for Culture Media and Sport, 'Comprehensive Budget Review of the Equality and Human Rights Commission' (January 2013) <https://assets.publishing.service.gov.uk/media/5a78c097ed915d07d35b2272/Comprehensive_Budget_Review_of_the_EHRC_.pdf> accessed 12 march 2024.
[97] Government Equalities Office, ' Equality and Human Rights Commission: annual report and accounts' (26 July 2023) <https://www.gov.uk/government/publications/equality-and-human-rights-commission-annual-report-and-accounts-2022-to-2023/ehrc-annual-report-and-accounts-2022-to-2023-html#statement-of-accounts> accessed 12 March 2024.
[98] Women's and Equality Committee, 'Enforcing the Equality Act: the law and the role of the Equality and Human Rights Commission' (17 July 2019) <https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/1470/1470.pdf> accessed 12 March 2024, para 198.

this causes issues for both forms of the duty, enforcement of the anticipatory duty also suffers from the fact that employment tribunals,[99] do not impose fees while county courts do, with the EHRC indicating that it paid, on average, £28000 to support each discrimination case.[100] Additionally, damages awarded if successful are relatively low,[101] and courts no longer require an unsuccessful defendant to pay the success fees[102] or after-the-event costs.[103] All these factors may discourage disabled individuals, who are already a disproportionately impoverished group,[104] from pursuing claims of a breach of the duty. A reversal of austerity measures and adequate funding could help more individuals pursue claims, furthering the duty's powerful potential for removing systemic barriers.

However, as the Women and Equalities Committee notes, primarily relying on a "piece-by-piece approach" is insufficient for tackling "systemic and routine discrimination."[105] Additionally, over-reliance on individual enforcement of the duty may undermine disabled individual's dignity, as they feel they need to fight for equality instead of it automatically being granted. An alternative approach to relying on individual enforcement already exists, as the EHRC can already challenge breaches of the duty independently of litigation brought by individual claimants.[106] However, once again, enforcement of this power is stifled by a lack of resources.[107]

Conclusion

In conclusion, the existence of the duty and the judiciary's broad multi-dimensional approach of employing equality of outcome, equality of opportunity, and implicit dignity in interpreting the duty to make reasonable adjustments have been quintessential in the promotion of equality for disabled individuals through the removal of barriers. However, the ability of the duty, especially the anticipatory duty, to tackle systemic issues has been stifled by austerity cuts, a lack of political will to support the EHRC, poor statutory wording, a restrictive medical model of disability, and an overly individualistic approach for enforcement. Until such issues are addressed, the potential of the duty to promote an equal society for disabled individuals shall not be truly realised.

[99] *R (UNISON) v Lord Chancellor* [2017] UKSC 51.
[100] Women's and Equality Committee, 'Enforcing the Equality Act: the law and the role of the Equality and Human Rights Commission' (17 July 2019) <https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/1470/1470.pdf> accessed 12 March 2024, para 193.
[101] As argued by claimant - *R (on the application of Leighton) v the Lord Chancellor* [2020] EWHC 336, [2020] ACD 50, [37].
[102] Legal Aid, Sentencing and Punishment of Offenders Act 2012, s 44(4).
[103] Ibid, s.46(1).
[104] Disability Rights UK, 'Nearly half of everyone in poverty is either a disabled person or lives with a disabled person' (6 February 2020) <https://www.disabilityrightsuk.org/news/2020/february/nearly-half-everyone-poverty-either-disabled-person-or-lives-disabled-person> accessed 12 March 2024.
[105] Women's and Equality Committee, 'Enforcing the Equality Act: the law and the role of the Equality and Human Rights Commission' (17 July 2019) <https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/1470/1470.pdf> accessed 12 March 2024, para 12.
[106] Equality Act 2006, ss. 20-27.
[107] Anna Lawson and Maria Orchard, 'The anticipatory reasonable adjustment duty: removing the blockages?' (2021) *Cambridge Law Journal* 308, 335.

COMPETITION LAW

Competition soft law: Chinese experiences on monopoly challenges

Chen Li' an*

Introduction

In the recent case of *Federal Trade Commission v. Meta Platforms,*[1] it seems undeniable that the characteristics of digital platforms, such as cross-border operation, dynamic competition, network effect and user stickiness, have drastically increased the severity of the monopoly problem. The overpowering market strength of super-platforms has seriously jeopardized fair competition and technological innovation in the market, while anti-monopoly has been widely regarded as the most effective weapon to regulate super-platforms.[2] However, the EU and China choose hard law and soft law respectively to decline monopoly risk, both leading to effective results in their respective fields.[3] Aimed at exploring the adaptation of the competition soft law as the Chinese experiences in EU monopoly regulation, this short article will be divided into three sections. The first part will focus on the definition and overviews of soft law, whilst the subsequent sections will elaborate on the mechanisms and basic types of soft law and the benefits of soft law for EU antitrust regulation.

The definition and overviews of soft law

Soft law is a term that is commonly used to describe what was previously known as 'near-law.' It represents a set of norms that do not have formal legal consequences, but intends to guide individuals regarding their actions.[4] Despite not being binding in the traditional sense, it is capable of producing legal effects, qualifying as a type of imperfect norm. Soft law instruments that embody these norms generally share certain broad characteristics, whether at domestic or international levels. First, they seek to influence or regulate the conduct of those to whom they are directed, thereby encouraging compliance. Second, they do not, by themselves, impose obligations or confer rights upon the targeted audience. Third, the form and structure of these instruments bring them closer to resembling legal rules, indicating a certain degree of formalization.[5]

The earliest academic description of soft law stems from an article by Baxter in, 1980, who argues that soft law has the ability to adapt to the needs of all parties, facilitating movement and change.[6] However, Beil and Klabber criticized, respectively, the 'relative normativity,[7] and the definition of soft law,[8] due to the fact that the conventional role assigned to soft law can be adequately met by the conventional binary conception of law. Chinkin's work in 1989 exhibits a great deal of foresight, as she evaluates the positive and negative aspects of soft law. Her analysis takes into consideration the impact of soft law on both law-making procedures and the implementation and adjudication of international law.[9] Abbott and Snidal's 2000 work goes a step further, as they transcend disciplinary boundaries and criticism to argue that the threshold for soft law is reached when legal arrangements are weakened in terms of obligation, precision, or delegation.[10] D'Aspremont and Aalberts' 2012 scholarship on the state of the

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[1] *FTC v. Meta Platforms Inc*., No. 5:22-cv-04325-EJD, 2023 U.S. Dist. LEXIS 222277 (N.D. Cal. Jan. 31, 2023)

[2] Jin Sun, 'Anti-Monopoly Regulation of Digital Platforms' [2022] *Social Sciences in China* 70

[3] Kena Zheng, Francis Snyder, 'China and EU's wisdom in choosing competition soft law or hard law in the digital era: a perfect match?' [2023] China-EU Law Journal 26.

[4] Snyder, Francis, 'The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques' [1993] *Modern Law Review* 64.

[5] Stephen Daly, 'The Rule of (Soft) Law' [2021] *King's Law Journal* 4.

[6] Judge R R Baxter, 'International law in 'her infinite variety' [1980] *International and Comparative Law Quarterly* 566

[7] Weil Prosper, 'Towards Relative Normativity in International Law?' [1983] *American Journal of International Law* 440.

[8] Jan Klabbers, 'The Redundancy of Soft Law' [1996] *Nordisk Journal of International Law* 168.

[9] Christine M Chinkin, 'The Challenge of Soft Law: Development and Change in International Law' [1989] *International and Comparative Law Quarterly* 851

[10] Kenneth Abbott and Duncan Snidal, 'Hard and Soft Law in International Governance' [2000] *International Organization* 422.

art for soft law offers an invaluable analysis of different legal theories on international law and seeks to unearth answers to the questions that soft law poses.[11] The study of soft law was first concentrated in the field of international law studies, while at the beginning of the 21st century there were several researches focusing on the application of soft law on the economic area, which helped to form the basis of Chinese antitrust regulation.

Mechanisms and types of Chinese soft law in the economic sphere

The basis for the generation of soft law in the economic field is to respond to the double failure problem[12] Purpose-oriented organizations such as the government, social middle-tier organizations, and market players participate in decision-making on typical and recurrent economic issues. They formulate and apply laws through cooperative systems for economic governance, thereby building a purpose-oriented legal order.[13] From the perspective of sociology, there are structural modernization risks in the field of market operation and economic regulation. The legal system launched by the government (including hard law and soft law) and the legal system launched by non-official organizations (i.e. soft law), jointly constitute the legal pluralism in industrialized society or post-industrial society. In China, the political foundation for the generation of soft law in the economic field is consultative democracy. Consultative democracy indicates that in the governance of public affairs, state organs, civil organizations, or individual citizens consider public policies with collective binding force through dialogue, consultation, and other means, and confer legitimacy on hard law or soft law containing the intention of public policies.[14]

Moving to the types of Chinese soft law, the conventions of politics and law in the economic field exist in both countries with statute law, and countries with case law.[15] In addition, public policies in the economic field play their roles in their respective areas in the forms of market access policies, competition policies, consumer policies, industrial policies, regional economic policies, fiscal and tax policies, monetary policies, and distribution policies, and are formulated and implemented in the forms of outline, plan, guidance, suggestion, requirement, and demonstration. Another type that is more common in China are self-regulatory norms. In practice, this is manifested in company statutes, codes of conduct, codes and rules of practice, self-regulatory conventions, and which embody the phenomenon of rules 'expressed on the basis of common interest and mutual trust'. Lastly, professional standards belong to soft law; depending on the subject of formulation, they can be divided into standards formulated by State institutions, standards formulated by associations and guilds and recognised by State institutions, as well as standards formulated by social autonomous organisations. In the context of public governance, professional standards play an active role in regulating, restraining, guiding and evaluating market regulation and macroeconomic control.

Structural analysis and operational logic of soft law norms in the field of competition law

A structure of soft law in the field of competition law is generally based on rules of rights and obligations, or rules of powers and duties. The Guidelines on Overseas Antimonopoly Compliance for Enterprises issued by China, for example, contain clear provisions on the obligation to cooperate with overseas antimonopoly investigations and the right to respond to investigations. Another type of structure is based on responsiveness or purpose. Purpose-based law is characterised by the 'result-oriented' nature of its operation. In contemporary society, it is the purposive, or responsive law that has been adapted to the need to resolve socio-economic conflicts; and purposive legal thinking has become an indispensable structural element in both the soft and hard law of this type of law. Furthermore,

[11] Jean D' Aspremont and Tanja Aalberts, eds. 'Symposium on Soft Law' [2012] *Leiden Journal of International Law* 372.
[12] Philippe Nonet, Philip Selznick, and Robert A. Kagan, *Law and Society in Transition: Toward Responsive* Law (Transaction Publishers 2001).
[13] Teja Sukmana, Zahrah Salsabillah Ashari and Yadi Darmawan, 'Responsive Law and Progressive Law: Examining the Legal Ideas of Philip Nonet, Philip Selznick, and Sadjipto Raharjo' [2023] *Peradaban Journal of Law and Society* 93.
[14] Eliantonio, Mariolina and Stefan Oana, 'The Elusive Legitimacy of EU Soft Law: An Analysis of Consultation and Participation in the Process of Adopting COVID-19 Soft Law in the EU Special Issue on COVID-19 and Soft Law' [2021] *European Journal of Risk Regulation* 159.
[15] Aileen McHarg, 'Reforming the United Kingdom Constitution: Law, Convention, Soft Law' [2008] *Modern Law Review* 853.

according to Gunther Teubner's systems theory, the auto-poietic core is a structural element of soft law in the economic sphere. The term auto-poietic is derived from biology and is used in jurisprudence to mean that the legal system is capable of self-observation, self-adjustment, self-description, self-constitution and self-reproduction. In the context of public governance of platform enterprises, the strengthening of civil self-governance and democratic participation has been realised at the level of the competition law system, which ensures the resilience of the legal system, composed of both soft and hard law, to adapt to the needs of society.

When it comes to the legislative side, soft law can fill the gaps in specific areas of hard law and serve as experimental legislation to accumulate experience for the formulation of hard law. On the law enforcement side, soft law can enhance the operability of hard law through quantification and refinement, so as to improve the effectiveness of hard law. On the judicial side, judicial practice, jurisprudence and legal principles all have an impact on the application of hard law. For example, China's State Council issued the Guidelines of the Anti-Monopoly Committee of the State Council on the Definition of Relevant Markets in 2009.

How EU can increase the application of competition soft law on the present basis

Most monopoly behaviour in the digital economy era are innovative and hidden, and it is difficult to regulate all new monopoly behaviours through a certain number of classifications. At the same time, conflicts may arise between the application of the EU Digital Market Act 2023 and EU competition law, as some Member States have strengthened their own antitrust laws. For example, the regime of significant cross-market competitive effects under s.19a of the German Anti-Restrictive Competition Act conflicts with the gatekeeper regime in the EU Digital Markets Act. The low threshold for application of the Digital Market Act, whereby a gatekeeper's conduct can be found to be unlawful without proof of anti-competitiveness, and Germany's granting of a party's right to a defence based on the objectivity of the conduct, cause the risk of fragmentation of the EU's antitrust regulation of the digital economy. Soft law, as a more flexible legal norm, is an effective solution to the lack of harmonisation of regulations across regions. Thus, the introduction of soft law incentives in the EU has a certain degree of feasibility.[16]

Where appropriate, the EU could introduce specialised government-led incentive compliance guidelines. Objectively speaking, the necessity for platform operators in the digital economy in order to open up their own important facilities to other competing operators, needs to be viewed in a prudent manner, and a lack of attention may lead to the suspicion that antitrust law is overly interfering with the market.[17] Therefore, the author believes that adopting the soft law of compliance guidelines to regulate the monopolistic behaviour of platform enterprises can not only maintain the appropriate intervention of the law in market behaviour, but also expand the innovation space of enterprises. In the process of formulating soft law, the joint participation of multiple subjects should be emphasised, so that its legal rules on digital platforms better reflect the will of the majority of subjects. In addition, the effectiveness of soft law norms should be further clarified, and it is recommended that the nature of soft law be determined in the form of legislation or judicial interpretation, and that the links between it and laws, regulations, rules and relevant policies be reconciled, with a view to better serving judicial practice.

Regulatory bodies can also encourage companies to participate in signing self-regulatory conventions. Taking China as an example, "antitrust guidelines on the country's platform economy",[18] as a representative of the basic rules of platform operation, the self-regulation agreement jointly signed between platforms and the related compliance management rules present a good role in management. Besides, the self-regulatory mechanism of digital platforms can be constructed to solve the problem of

[16] Commission (2015) 'Better regulation for better results–An EU Agenda' (Communication) COM (2015) 215 final.
[17] Joskow P. L., Rose N. L., The effects of economic regulation (Elsevier Science Publisher 1989)
[18] Xinhua, 'China unveils antitrust guidelines on platform economy', (english.www.gov.cn, February 7, 2021) <https://english.www.gov.cn/policies/latestreleases/202102/07/content_WS601ffe31c6d0f72576945498.html>accessed 12 March, 2024.

platform monopoly and guide platform enterprises to use their private power correctly.[19] Platform rules should be formulated in a fair, just and open manner, neither violating the law nor disregarding public order and morality due to excessive consideration of traffic and attention. At the same time, platform rules should be clearly expressed through language and text, avoiding ambiguity. Engineers and algorithms will be relied upon to implement the platform rules, ensuring that the algorithms operate transparently; called transparency of implementation.[20] At the same time, the platform should establish an internal and external self-reflection mechanism for the whole process, and should face all platform users and assess and account for its rules on time, so as to keep abreast of the times, and with a view to improving the platform's rules and transparency mechanism.

One of the feasible options from soft law is that starting from tax incentives, enterprises can be graded into four levels - A, B, C, and D - based on the construction of anti-monopoly compliance systems and the supervision of competition policy compliance on digital platforms. Different tax policies can then be implemented for different companies, ultimately achieving counteracting competition distortions.

Conclusion

In summary, soft law governance in China's economic sphere has gradually emerged in the course of the reform of the economic system and the construction of a nation based on the rule of law. Although research on soft law governance in the field of competition law is not in-depth, studies related to this area are undoubtedly of great value to the accumulation of theoretical resources and the enrichment of the results of regulatory practice in dealing with monopoly risks in the EU.

[19] Michael A Cusumano, Annabelle Gawer, David B Yoffie, 'Can Self-Regulation Save Digital Platforms?' [2021] *Industrial and Corporate* Change 1259.
[20] Joseph Antel and Barbu-O'Connor et al, 'Effective Competition in Digital Platform Markets: Legislative and Enforcement Trends in the EU and US' [2022] *European Competition and Regulatory Law Review* 35.

RECENT DEVELOPMENTS

INTERNATIONAL CRIMINAL LAW

From Nuremberg to The Hague: exploring international criminal accountability

Ffion Forteau*

Introduction and historical context

This blog explores the historical significance and ongoing relevance of the International Criminal Court (ICC) in recent times. It focuses on the court's role in prosecuting individuals who commit major international crimes, its aim to ensure accountability. By delving into the realm of international criminal law, the ICC upholds human rights, the rule of law, and international justice, curbing abuses of power by individuals in positions of authority. This blog highlights, *inter alia*, the ICC's jurisdiction, its case acceptance criteria, and sentencing practices. Therefore, understanding the origins of the ICC and its offerings is essential for a comprehensive understanding of its impact in the pursuit of global justice.

The origins of the ICC can be traced back to the international military tribunals established after World War II, most notably the Nuremberg trials conducted between 1945 and 1946, which aimed to prosecute high-ranking officials for their involvement in war crimes.[1] This precedent laid the groundwork for the establishment of ad hoc tribunals in the 1990s, established by the UN Security Council.[2] These tribunals served as temporary courts for addressing international crimes in the former Yugoslavia and Rwanda. Building on these earlier efforts, the ICC originated from the Rome Statute of International Criminal Court 1998,[3] and began operating in July 2002, having been ratified by 60 countries. Situated in The Hague, Netherlands, the ICC holds jurisdiction over crimes committed after July 2002 within ratifying countries or by individuals from such countries, regardless of their own national affiliation.[4]

Individual liability and international crimes

When considering individual liability for international crimes within the ICC framework, it is important to note that the Court only prosecutes individuals rather than the states themselves. While ratification is required for ICC jurisdiction, there are other avenues for holding individuals accountable.

Under Article 12 of the Rome statute,[5] geographical jurisdiction plays a significant role in determining prosecutorial reach. This means that the crimes committed by the citizens of non-parties on the territory of parties can still be prosecuted. Additionally, through ad-hoc authorisation, states can participate in specific cases, even if they have not joined the ICC. For instance, this scenario could apply to Ukraine and Russia, given they both are not in the ICC. Therefore, ad-hoc authorisation provides the ICC greater flexibility to exercise jurisdiction beyond just its member states.

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[1] United States Holocaust Memorial Museum, 'International Military Tribunal at Nuremberg' (*Ushmm.org*2019) <https://encyclopedia.ushmm.org/content/en/article/international-military-tribunal-at-nuremberg> accessed 2 April 2024.

[2] 'Ad Hoc Tribunals - ICRC' (*www.icrc.org*29 October 2010) <https://www.icrc.org/en/doc/war-and-law/international-criminal-jurisdiction/ad-hoc-tribunals/overview-ad-hoc-tribunals.htm> accessed 2 April 2024.

[3] International Criminal Court, 'Rome Statute of the International Criminal Court' (International Criminal Court 1998) <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf> accessed 2 April 2024.

[4] Amy McKenna, 'The International Criminal Court (ICC)', *Encyclopædia Britannica* (2019) <https://www.britannica.com/story/the-international-criminal-court-icc> accessed 2 April 2024.

[5] International Criminal Court, 'Rome Statute of the International Criminal Court' (International Criminal Court 1998) <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf> accessed 2 April 2024.

Article 5 of the Rome Statute identifies four international crimes: genocide, crimes against humanity, war crimes, and the crime of aggression.[6] These offences form the basis for individual liability and potential prosecution. The Court's jurisdiction over these grave breaches of international law aims to prevent the future commission of these atrocities and ensure accountability, even for those in positions of power. By recognising the ICC's mandate to investigate and prosecute these core crimes, states affirm the principle of the rule of law – that everyone is equal to the law –in connection to the most serious violations of human rights and humanitarian law.

An example that demonstrates individual accountability is the case of Thomas Lubanga Dyilo, the former leader of the Union Congolese Patriots (UPC) militia group in the Democratic Republic of the Congo. He was convicted by the ICC in 2012 for the war crimes of conscripting and enlisting children under the age of 15 and using them to participate actively in hostilities. Despite not having pulled the trigger himself, Lubanga was found criminally responsible under the principle of individual criminal liability. The Court determined that as the leader of the UPC, Lubanga had control over the under-aged soldiers and was aware that they were being recruited with the intention of using them in armed conflict. His failure to prevent or punish these crimes committed by his subordinates led to his conviction.[7]

Challenges faced by the ICC

The ICC plays a vital role for promoting accountability in cases of international crimes. However, the ICC encounters significant weaknesses that hinder its effectiveness. One of the primary challenges is its limited jurisdiction, which poses difficulties in ensuring universal accountability. The ICC's jurisdiction operates on the principle of complementarity, meaning it can intervene only when national courts are unable or unwilling to genuinely prosecute crimes.[8] This principle respects state sovereignty but could create jurisdictional gaps in situations where a non-member state chooses not to join the ICC and fails to prosecute crimes domestically. Without the option for ICC intervention, this would leave serious international crimes without any avenue for accountability.

This limitation becomes evident in conflicts like Syria, where the ICC has been unable to address alleged crimes due to Syria's non-membership and the absence of a UN Security Council (UNSC) referral. [9] The Security Council's inability to make consistent referrals hinders the ICC's jurisdiction, as seen with the invasion of Ukraine by Russia (which is not an ICC member),[10] and the ongoing conflict between Israel and Hamas, where Palestine only recently joined the ICC in 2021 while Israel has not recognised its jurisdiction.[11] Resolving these challenges, through reforms to the ICC's framework or the UNSC's decision-making process, is crucial to strengthen the Courts capacity to ensure accountability for the most serious international crimes, even without full state cooperation.

Recent events, such as the invasion of Russian soldiers in the conflict in Ukraine, further underscore the jurisdictional constraints of the ICC, as Russia is not an ICC member and no referral has been made by the Security Council. The ongoing war between Israel and Hamas also underscores the jurisdictional constraints of the ICC, as Palestine ratified the Rome Statute only in 2021, while Israel has expressed its non-recognition of the ICC's jurisdiction. This makes it challenging to impose accountability on

[6] International Criminal Court, 'Rome Statute of the International Criminal Court' (International Criminal Court 1998) <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf> accessed 2 April 2024.
[7]International Criminal Court, 'Lubanga Case' (*Icc-cpi.int*2019) <https://www.icc-cpi.int/drc/lubanga> accessed 15 May 2024.
[8] 'Informal Expert Paper: The Principle of Complementarity in Practice' (2003) <https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/20BB4494-70F9-4698-8E30-907F631453ED/281984/complementarity.pdf> accessed 2 April 2024.
[9] United Nations, 'Referral of Syria to International Criminal Court Fails as Negative Votes Prevent Security Council from Adopting Draft Resolution | UN Press' (*press.un.org*22 May 2014) <https://press.un.org/en/2014/sc11407.doc.htm> accessed 2 April 2024.
[10] Andrew Henderson, 'Six Countries That Aren't Part of the ICC' (*Nomad Capitalist*29 August 2018) <https://nomadcapitalist.com/global-citizen/countries-arent-part-of-icc/>.accessed 2 April 2024
[11] Reuters, 'ICC Prosecutor Says Israel Must Respect International Law' (*Reuters*3 December 2023) <https://www.reuters.com/world/europe/icc-prosecutor-urges-israel-hamas-respect-international-law-2023-12-03/> accessed 2 April 2024.

these states, and addressing these challenges is imperative to strengthen the ICC's capacity to hold perpetrators accountable and ensure justice for victims.

Political interference poses another significant challenge to the ICC, jeopardising its impartiality and undermining it mandate. Powerful states often exert political pressure or non-cooperation to hinder or obstruct the courts work when their interests are at stake. The United States, for instance, has been highly critical of the ICC and has taken measures to impede its functioning. In 2019, the U.S. revoked the visa of the ICC's chief prosecutor, Fatou Bensouda, and imposed travel restrictions on ICC personnel investigating alleged war crimes by U.S. military personnel in Afghanistan.[12] Political pressure on the ICC is not limited to the U.S. - other states have also sought to influence the Court. Some African countries, for example, have accused the Court of exhibiting partisan behaviour and targeting African leaders,[13] resulting in threats of withdrawal. Additionally, Palestinians have accused the ICC prosecutor of bias following their visit to Israel.[14] These actions raise concerns about national sovereignty and politically motivated prosecutions.

Lastly, enforcement challenges weaken the ICC's impact, hindering its ability to bring suspects to justice and ensure effective judgments. Article 86 and 59(1) showcases the requirement on member states' cooperation to execute arrest warrants and enforce sentences.[15] A notable example is the case of former Sudanese president Omar al-Bashir, who managed to evade multiple ICC arrest warrants and travel freely, despite facing charges of genocide, war crimes, and crimes against humanity.[16] This example vividly highlights the obstacles that the ICC faces in enforcing its decisions.

Strengthening accountability within the ICC

To address the weakness of accountability within the ICC, two points must be considered. First, expanding the ICC's jurisdiction by encouraging more states to join and ratify the Rome Statute is crucial. For instance, cooperation with regional courts and tribunals can bridge jurisdictional gaps, ensuring accountability for crimes committed in non-member state territories. Additionally, bringing greater diversity in the composition of judges and prosecutors at the ICC, in terms of geographical representation, legal traditions, and professional backgrounds, would broaden the court's perspectives and experiences.[17] This would significantly strengthen its capacity to hold perpetrators accountable by enhancing its understanding of different cultural contexts and legal frameworks, and allowing it to navigate complex jurisdictional challenges more effectively.

Second, political interference undermines the ICC's impartiality and effectiveness. Safeguarding the independence and impartiality of the ICC is vital in addressing this challenge. Recognising the need to enhance state cooperation is a significant step. As the court is "almost completely dependent on state cooperation"[18], active engagement with individual states would promote greater cooperation.

Conclusion

The ICC remains a vital institution in ensuring international criminal accountability. Its unwavering commitment to prosecuting individuals accused of the gravest offences is integral to upholding the

[12] 'US Revokes ICC Prosecutor's Visa over Afghanistan Inquiry' (*The Guardian*5 April 2019) <https://www.theguardian.com/law/2019/apr/05/us-revokes-visa-of-international-criminal-courts-top-prosecutor> accessed 2 April 2024.
[13] Amy McKenna, 'The International Criminal Court (ICC)', *Encyclopædia Britannica* (2019) <https://www.britannica.com/story/the-international-criminal-court-icc> accessed 2 April 2024.
[14] Mat Nashed, Zena Al Tahhan, '"Alarming": Palestinians Accuse ICC Prosecutor of Bias after Israel Visit' (*Al Jazeera*9 December 2023) <https://www.aljazeera.com/features/2023/12/9/alarming-palestinians-accuse-icc-prosecutor-of-bias-after-israel-visit> accessed 2 April 2024.
[15] International Criminal Court, 'Rome Statute of the International Criminal Court' (International Criminal Court 1998) <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf> accessed 2 April 2024.
[16] Ahmad Hassan and others, 'President of the Republic of Sudan' (1993) <https://www.icc-cpi.int/sites/default/files/CaseInformationSheets/AlBashirEng.pdf> accessed 2 April 2024.
[17] Jeremy Sarkin, 'Reforming the International Criminal Court (ICC): Progress, Perils and Pitfalls Post the ICC Review Process' (*Sciendo* 2021)
[18] Ibid, 15-16.

principles of global justice. The ICC's commitment to ensuring the rule of law, regardless of position or power, solidifies its place as a cornerstone of the international justice system. Its unwavering dedication to international criminal accountability stands as the backbone against the worst excesses of human cruelty, upholding the fundamental principle that justice must prevail, no matter how powerful the perpetrator. However, it is suggested that by addressing jurisdictional constraints and combating political interference, the ICC can strengthen accountability mechanisms and enhance its effectiveness in delivering justice.

Balancing diversity with freedom of speech and religion: finding the correct balance

Will Cleary*

Introduction:

The topic of free speech and diversity focuses on the opposition between the desire to promote diversity and equality on the one hand, and the need to ensure an individual's right to express themselves on the other. It incorporates issues of refusing to provide public services on religious grounds and the restriction of anti-diversity religious speech and actions, particularly in an employment setting.

This piece will examine the relevant legal framework, and analyse cases demonstrating the application of relevant law and the conflicting interests that are present. It will consider whether a correct balance exists between the need to protect freedom of speech and religion, and the popular desire to promote diversity, as well as suggesting that the current law is, at least in certain circumstances, overly restrictive. For example, in the case of *Randall v Trent College Ltd*,[1] a school chaplain was made redundant after telling students that they "did not have to accept the… ideologies of LGBT+ activists where they conflict with Christian values".[2]

The legal framework

Article 10 of the European Convention on Human Rights sets out an individual's "right to freedom of expression", which includes "freedom to hold opinions and to… impart information". Furthermore, Article 9 is particularly important in this context, as it sets out an individual's right to "freedom of thought, conscience and religion", encompassing a right, "in public or private, to manifest [one's] religion or belief". Articles 9 and 10, however, are conditional rights and states can interfere with them where it is deemed "necessary in a democratic society" for protecting the rights of others.[3] For example, if someone were to express homophobic speech, their article 9 and 10 rights could be lawfully restricted in an effort to protect another's article 8 "right to respect for… private and family life". Furthermore, article 9 could be limited pursuant to a state's duty, under article 14, to ensure people are free from "discrimination on any ground", in their "enjoyment of the [ECHR] rights".

There are also relevant statutory provisions. For example, s.29(1) of the Equality Act 2010 states that "[a] person… concerned with the provision of a service to the public… must not discriminate against a person requiring the service by not providing the person with the service." The Act also prevents direct discrimination "because of a protected characteristic",[4] which includes "gender reassignment" and "sexual orientation."[5] Furthermore, the criminal law can also be applicable, as the Public Order Act 1986 states that it is an offence to use "threatening words or behaviour," with the intention "to stir up religious hatred… or hatred on the grounds of sexual orientation".[6] Additionally, the Hate Crime and

* LLB, year 1, Coventry University
[1] [2023] 2 WLUK 493 (ET).
[2] DLA Piper, 'Randall v Trent College (2020)' (7 February 2024) <https://blogs.dlapiper.com/beaware/randall-v-trent-college-2020/> accessed 25 May 2024.
[3] Article 10(2), Article 9(2).
[4] Equality Act 2010, section 13(1).
[5] Ibid, s. 4.
[6] Public Order Act 1986, section 29B(1).

Public Order (Scotland) Act 2021, heavily criticised by JK Rowling,[7] affords "similar protections to people on grounds including… religion… and transgender identity."[8]

Analysis of case law – how do the courts attempt to resolve conflicts?

This section will examine cases relevant to diversity and freedom of religion in an effort to demonstrate some conflicts that exist. Briefly, these include the conflict between an employee's belief and their employer's diversity policy, and the duty to provide public services. It is important to establish what sort of beliefs are and are not subject to protection. The case of *Grainger Plc v Nicholson*[9] is helpful as it sets out the criteria for a "philosophical belief". These criteria can also be used to determine whether a belief is subject to protection pursuant to article 9 ECHR and the Equality Act. They include a requirement that the belief is "genuinely held", that the belief concerns "a weighty and substantial aspect of human life and behaviour", that it does "not conflict with the fundamental rights of others", and that it is "not incompatible with human dignity".[10] Thus, for example, English nationalism was held not to be a philosophical belief,[11] because it was "not worthy of respect in a democratic society".[12]

Regarding the conflict between freedom of religion and promoting diversity, many examples can be found within an employment setting. For example, in *Eweida and Others v United Kingdom*,[13] Ms Ladele, a Christian, saw marriage as "the union of one man and one woman"[14] and thus refused to be involved in creating same-sex civil partnerships, culminating in the loss of her job.[15] Similarly, Mr McFarlane, also a Christian, worked as a counsellor and expressed "difficulty in reconciling working with couples on same-sex sexual practices and his duty to follow the teaching of the Bible."[16] He was later dismissed.[17] Concerning both Ladele and McFarlane, the European Court, attempting to balance the applicants' rights with the employers' equality policies,[18] held that both employers were acting to protect the rights of others, and that there was no violation of the applicants' rights.[19] At first sight, therefore, the European Court considered that protecting the rights of others was more significant than securing rights pursuant to Article 9.

Domestic judges have also expressed this view. For example, in *Mackereth v DWP*,[20] a Christian doctor, relying on Genesis 1:27, was opposed to transgenderism and believed "that it would be irresponsible and dishonest" for him "to accommodate and/or encourage a patient's "impersonation" of the opposite sex".[21] He refused to call transgender clients by their preferred pronouns, and thus lost his job. The *Grainger* test was applied to his beliefs, and the tribunal rejected them, as "they were incompatible with human dignity and conflicted with the fundamental rights of others".[22] Furthermore, the aims of the employer (for example, "to ensure transgender customers were treated with respect and in accordance with their rights under the 2010 Act"[23]) were held to be legitimate,[24] and their actions were judged as

[7] The Standard, 'Arrest JK Rowling? No, cheer her free speech fight over Scotland's new hate crime law' (2 April 2024) <https://www.standard.co.uk/comment/jk-rowling-scotland-hate-crime-law-b1148931.html> accessed 2 April.
[8] The Standard, 'Why are Scotland's new hate crime laws prompting concern?' (2 April 2024) <https://www.standard.co.uk/news/politics/scotland-scottish-government-jk-rowling-scottish-parliament-snp-b1148757.html> accessed 2 April 2024, see also Hate Crime and Public Order (Scotland) Act 2021, section 4(2)-4(3).
[9] [2010] ICR 360 (EAT).
[10] ibid, [24] (Burton J) See also *R (Williamson) v Secretary of State for Education and Employment* [2005] UKHL 15, [2005] 2 AC 246 [23] (Lord Nicholls).
[11] *Cave v Open University* [2023] (ET) [47] (Employment Judge Manley).
[12] ibid, [44].
[13] (2013) 57 EHRR 8 (ECtHR).
[14] ibid, [23].
[15] ibid, [102].
[16] ibid, [34].
[17] ibid, [37].
[18] ibid, [24] and [32], respectively.
[19] ibid, [106] and [109]-[110], respectively.
[20] [2022] EAT 99, [2022] ICR 1609.
[21] ibid, [15].
[22] See note 30, [37].
[23] ibid, [51].
[24] ibid, [138].

"necessary and proportionate".[25] The appeal was dismissed. In the employment context, therefore, apart from exceptions such as *Forstater v CGD,*[26] the law tends to favour diversity over ensuring the protection of Article 9.[27]

Outside of employment, however, the case of *Lee v Ashers Baking Co Ltd*[28] provides an example where religious opinions were upheld. In this case, Mr Lee (a gay man) asked Ashers Baking (run by the McArthurs, a Christian couple) to produce a cake with "Support Gay Marriage" iced on it. Mrs McArthur contacted Mr Lee to say that they could not proceed, as they were Christians. Mr Lee alleged unlawful discrimination, under article 3(1) of the Fair Employment and Treatment (NI) Order 1998/3162 ("the 1998 Order"), but the Supreme Court later rejected this, holding that the McArthurs' refusal to complete the order was based on "their religious objection to gay marriage."[29] It was not based solely on Mr Lee's personal sexuality.[30] Moreover, the courts are under a duty to interpret legislation, where possible, "in a way which is compatible with the Convention rights",[31] and it was held that articles 9 and 10 "included the right not to be forced to express an opinion with which one disagreed".[32] Thus, Baroness Hale stated that "the 1998 Order should not be read or given effect in such a way as to compel providers of goods, facilities and services to express a message with which they disagree".[33] This case was distinguished with *Bull v Hall*,[34] where Christian hoteliers refused to provide a gay couple with a double-bedded room.[35] That decision – that the hoteliers *intended* to discriminate against same sex partners on grounds of their sexual orientation,[36] was distinguished in Lee, where the shop owners were being forced to agree with the message.

Can a correct balance be found?

This section aims to provide a critique of the law, and argues that the law, at least in certain circumstances, is overly restrictive and places too much weight on what are referred to as "legitimate" aims. It is easy for many in today's culture to value diversity and inclusivity over religious beliefs. Foster states that "the state's primary duty is to protect individuals and groups from anti-diversity speech and discrimination, rather than seek to equally balance the rights of free speech and conscience and religion with the right not to be subjected to such discrimination."[37] Religious views could be seen as archaic and offensive, but this does not render them all unimportant.

In fact, "a person's religion is often a core element of their identity."[38] They should not be compelled to speak or act in a way which goes against their conscience and should have the right to manifest this key part of their identity without undue interference, even if that discriminates against others. Therefore, it is argued that the decision in *Eweida and Others*[39] was too harsh and inflexible. Had the court weighed the competing interests differently and decided in her favour, due to fact that she should not be compelled to speak or act in a way which goes against her beliefs, the judgment would likely have been fairer. It is difficult to see why the court did not take this approach, as they did in *Ashers*.[40]

[25] ibid.
[26] [2022] ICR 1 (EAT).
[27] See *Page v NHS Trust* [2021] EWCA Civ 255, for another example.
[28] [2018] UKSC 49, [2020] AC 413.
[29] ibid, [28].
[30] ibid, [13].
[31] Human Rights Act 1998, section 3(1).
[32] See note 41, 415.
[33] ibid, [56].
[34] [2013] UKSC 73.
[35] ibid, [10] (Lady Hale).
[36] ibid, [17].
[37] Steve Foster, 'Free speech, equality and diversity: the legitimacy of controlling content-based expression under the ECHR and in domestic law' (2023) 28(3) Comms L 102, 103.
[38] See note 41, 420.
[39] See note 23.
[40] See note 41.

However, it is possible that the decision relating to Mr McFarlane[41] and the decision in *Mackereth*[42] were both fair. Assuming that they lost their jobs because of their refusal to follow their employers' equality policy, it could be argued that this is acceptable (both morally and legally), if the employees were aware of and understood this policy, before accepting the position, which appears to be true of both cases.[43] These cases can be distinguished from Ms Ladele's case, where the requirement that she participated "in the creation of civil partnerships ''was added during the course of her employment.'' This helps show how cases of this sort are highly dependent on specific facts.

Therefore, it is possible that there is no single approach that the courts should universally adopt, which would be suitable in all cases of this nature. That is not to say that a correct balance does not exist. It is argued that in each case relating to free religious speech and diversity, there is a correct approach to weighing the competing interests that is both legally and morally acceptable. Whether the courts can discern and apply this approach, however, is a separate matter.

Conclusion

This piece has provided an overview of law concerned with the topic of free religious speech and diversity, and has critiqued relevant cases. To summarise, it is argued that in some cases the law is overly restrictive and gives too little weight to individuals' rights pursuant to articles 9 and 10. However, although the courts too often fail to reach a correct balance, it is argued that one always exists, which correctly weighs the competing interests. Looking forward, it is impossible to know how the law will develop, yet it is hoped that the courts will adopt a more sympathetic approach towards those rightfully using their freedoms under articles 9 and 10, and will weigh these rights against diversity considerations appropriately.

[41] ibid.
[42] See note 30.
[43] See note 23, [17] and note 30, [109].

The purpose of the Digital Markets, Competition, and Consumers Bill: what do the experts think?

Malaika Kalsoom*

Introduction

The study of the Digital Markets, Competition, and Consumer Bill (DMCC) – now an Act of Parliament - involves applying the definition of digital markets to real-life examples, such as Meta (Facebook), and the harm such platforms can cause to service users. This includes limiting competition, which can result in a smaller range of innovative goods for consumers at an unfair price.[1] This involves reviewing the Competition and Markets Authority (CMA), and the role it plays in the proposals from the DMCC.

It is important to mention that the DMCC has now passed its final stages and became an Act of Parliament on May 24, 2024.[2] Thus, throughout this piece, the DMCC will be referred to as the Act. This piece will examine how the DMCC was a response to recent economic changes, focusing on the role of the DMCC in relation to consumer protection, digital markets, and competition. In particular, it will comment on Part 1 of the Act, covering strategic market status.

What is the purpose of the DMCC?

DMCC was proposed as a response to the 47 per cent increase in online sales from 2019 to 2020.[3] This caused digital markets to become prone to 'tipping' by relying on user data.[4] This is when e-commerce websites gather information about the buying patterns of their customers, which helps them sell more goods.[5] Facebook is famous for doing this through personalised advertisements, giving them an advantage over new businesses entering the market that do not have access to such data. This was reflected when Facebook's revenue rose from £5 to £50 per user in eight years as they created a monopolistic environment.[6] The CMA would not have been able to accurately regulate how Facebook functioned then, and this shows why the DMCC was put forward to ensure that designated undertakings would comply with rules to treat consumers and smaller businesses fairly.[7]

There are three main aims of the Act: consumer protection, regulation of digital markets, and the encouragement of competition.[8] The CMA wants to protect consumers by maintaining their rights, and this is how they will identify and penalise businesses that engage in unfair practices. CMA has established a Digital Market Unit (DMU) within itself, whose job it is to foster a competitive environment for innovations by holding digital firms accountable for their actions.[9] The investigation and enforcement powers of the CMA would be strengthened in order to take speedy action against anti-competitive behaviour.[10] An example of this is Clause 19, which allows the CMA to impose conduct

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[1] Competition and Markets Authority, 'About Us' < https://www.gov.uk/government/organisations/competition-and-markets-authority/about > accessed 3 April 2024.

[2] Digital Markets, Competition and Consumers Act 2024 c.13.

[3] Department for Business, Energy & Industrial Strategy, 'Reforming Competition and Consumer Policy' (PDF) (online), CP 488, July 2021, 83.

[4] Shalchi, A., & Mirza Davies, J., 'Digital Markets, Competition and Consumers Bill: digital markets and competition provisions' (2023) House of Commons Research Briefing Number CBP 9794, 8.

[5] Ibid, 9.

[6] Competition and Markets Authority, 'New regime needed to take on tech giants' (1 July 2020) < https://www.gov.uk/government/news/new-regime-needed-to-take-on-tech-giants > accessed 3 April 2024.

[7] Shalchi, A., & Mirza Davies, J., 'Digital Markets, Competition and Consumers Bill: digital markets and competition provisions' (2023) House of Commons Research Briefing Number CBP 9794, 8.

[8] Competition and Markets Authority, 'New bill to stamp out unfair practices and promote competition in digital markets' (25 April 2023) < https://www.gov.uk/government/news/new-bill-to-stamp-out-unfair-practices-and-promote-competition-in-digital-markets > accessed 3 April 2024.

[9] Ibid.

[10] Ibid.

requirements such as fair dealings or transparency on designated companies.[11] This shows that the DMCC's goal is to prevent monopolistic behaviour while promoting a beneficial competitive environment for customers.

Exploring Part 1 of the DMCC

This section identifies which designated businesses have enough power to be given a 'Strategic Market Status' (SMS).[12] It empowers the CMA, as they can take proactive measures to resolve competition-related issues, such as mandating information sharing and upholding merger disclosure laws.[13] This is because they can impose penalties such as fines of 10 per cent of a company's worldwide revenue for non-compliance.[14] An issue of subjectivity could arise in this situation, as businesses must have "substantial and entrenched market power'' to be classified as having SMS.[15] Therefore, while the criterion for designation is clear, it is open to interpretation and could lead to future disputes.

The expert opinion on Part 1 of the DMCC

Sarah Cardell, the CMA chief executive, believes the Act has "potential to be a watershed moment in the way we protect consumers in the UK and the way we ensure digital markets work for the UK economy, supporting economic growth, investment, and innovation."[16] Ensuring that digital markets are efficient could lead to economic growth as business activity and job creation accelerate. This suggests that markets would be considered commercially important as better services would be offered to consumers. While Cardell is not an academic expert, the decisions she makes rely on academic research and in-depth knowledge of the DMCC. Still, it is essential to consider potential biases that could occur, making her judgements partial. This shows the importance of maintaining objectivity and considering diverse viewpoints.

Similarly, the government conducted an impact assessment on Part 1 of the Act,[17] where, it was estimated that the total cost of the regime would be £1.022 billion, while the net benefit would be £5.167 billion over 10 years.[18] Conducting an assessment demonstrates that the potential effects of the DMCC have been considered in order to assess whether implementing the regime would be useful or not. However, the true costs of the regime will depend on the "types of interventions taken by the DMU following SMS designation."[19] This creates a sense of uncertainty as the actual impacts cannot be accurately predicted and could lead to unintended consequences from overly restrictive regulation. Hence, there would be a negative economic impact; markets could become distorted, deterring investments.

In contrast, law firm Sidley Austin states that the disparities between the UK and EU regimes could "risk creating a complex web of parallel and overlapping obligations and may lead to conflicting outcomes."[20] This situation could cause businesses in the UK and EU to become inefficient due to confusion in regimes. This is problematic because digital markets would have to comply with multiple sets of regulations that have different requirements and standards, and which may overlap. This would present challenges for businesses, as they would have to determine which jurisdictions to prioritise. In

[11] Shalchi, A., & Mirza Davies, J., 'Digital Markets, Competition and Consumers Bill: digital markets and competition provisions' (2023) House of Commons Research Briefing Number CBP 9794, 18.
[12] Digital Markets, Competition and Consumers Act 2024 c.13, s.2 (1b).
[13] Shalchi, A., & Mirza Davies, J., 'Digital Markets, Competition and Consumers Bill: digital markets and competition provisions' (2023) House of Commons Research Briefing Number CBP 9794, p 17.
[14] Digital Markets, Competition and Consumers Act 2024 c. 13, s.2 (2a).
[15] Ibid, s, 85 (4a).
[16] Competition and Markets Authority, 'New bill to stamp out unfair practices and promote competition in digital markets' (25 April 2023) < https://www.gov.uk/government/news/new-bill-to-stamp-out-unfair-practices-and-promote-competition-in-digital-markets > accessed 3 April 2024.
[17] Impact Assessment – 'A new pro-competition regime for digital markets' (PDF), 21 April 2023, 9.
[18] Impact Assessment – 'A new pro-competition regime for digital markets' (PDF), 21 April 2023, 9.
[19] Ibid.
[20] Sidley Austin, 'New UK Digital Markets Regime: Key Differences with the EU Digital Markets Act' (27 April 2023) < https://www.sidley.com/en/insights/newsupdates/2023/04/new-uk-digital-markets-regime-key-differences-with-the-eu-digital-markets-act > accessed 3 April 2024.

addition, inefficiency could impede innovation and growth. This raises issues of commercial importance because of the implications for business activities, including compliance costs and legal certainty. Sidley Austin has expertise in various areas such as privacy and data security, as well as international trade and regulatory affairs. This illustrates that they have a solid understanding of potential challenges arising from the differences between UK and EU regulatory regimes, especially the DMCC.

Likewise, Alan Davis, a lawyer at Pinsent Masons, acknowledges issues that may occur from the Act's passing and enforcement. As he states, this is because the DMCC could "increase the compliance burden and risks faced by businesses active in the UK."[21] This indicates that businesses would require additional time and resources to meet the legal requirements that the DMCC would introduce. Markets that face difficulties meeting the requirements would be at risk of facing legal consequences such as fines for non-compliance. A potential social issue would be businesses' inability to fulfil their social responsibilities when serving their customers. This could lead to diplomatic issues; for instance, cooperation with international trade partners would be hindered. This shows that more complex complications are not considered by the Act.

Conclusion

The DMCC is extremely valuable as it is an example of how the law adapts to external factors other than legal issues, such as economic advancements. This highlights how the government responded to unpredictable situations, such as the impacts of the pandemic on services like digital markets. In accordance with experts' views, the DMCC does well to tackle designated businesses that misuse their big platforms to harm service users. It also takes small businesses into account, as it takes measures to provide them an equal chance to flourish and excel. Further, the government has tried its best to use the sources available to predict the long-term impact of the Act. This shows the commitment of policymakers in assessing whether the benefits outweigh the costs when designing the DMCC.

However, it appears the DMCC has not considered the effects it could have on those other than businesses and consumers. This is because law firms are already anticipating the difficulties they might face when advising clients. This includes the regulatory divergence between the UK and EU regimes, which creates misunderstandings for businesses operating across borders, as they would need to comply with two different sets of rules and standards. This is an issue that hopefully will be dealt with appropriately when applying the Act in real-life situations.

[21] Pinsent Masons, 'UK government publishes Digital Markets, Competition and Consumers Bill' (25 April 2023) < https://www.pinsentmasons.com/out-law/news/uk-digital-markets-competition-consumers-bill > accessed 3 April 2024.

STUDENT CASE NOTES

Exclusion Clauses - telecommunication contracts - damages for breach of contract

EE Ltd v Virgin Mobile Telecoms Ltd. [2023] EWHC 1989

Introduction

This case addresses important legal principle under exclusion clauses concerning a breach of an exclusivity clause in a Telecommunication Supply Agreement (TSA). As Clause 34.5 (a) of that agreement provided that ‘’neither party would be liable to the other in respect of anticipated profits’’, the case is particularly important in distinguishing between anticipated profit damages and reliance loss in the law of contract.

The facts

EE was a mobile network operator (MNO) and VM was a mobile virtual network operator (MVNO). VM provided its services to customers using the network of EE pursuant to the TSA whereby EE was required to supply to VM various services, including the provision of access to its mobile network to enable VM’s customers to be provided with 2G, 3G, and 4G, which are network bands that provide network (Internet) as part of mobile services. VM agreed to exclusively use EE’S network during a defined exclusivity period. The TSA was amended in 2016 with a view to enable VM to provide 5G services to its customers. When EE and VM could not agree to provide 5G services, VM sourced 5G services from third-party network providers such as Vodafone, and subsequently O2, where VM would also be entitled to provide its customers with 2G, 3G, and 4G services sourced from the said alternative supplier. EE alleged that VM wrongfully and in breach of exclusivity clause had migrated non-5G customers onto the alternative supplier’s network. EE claimed that by reason of VM’s breach, they had suffered an estimated loss (‘’anticipated profits’’) of around £24.6 million.

The decision

The court gave a decision following a summary judgment application, wherein it was alleged by the claimant that VM had wrongfully precluded EE from providing services to customers through its breach of an exclusivity clause. The claim asserted by EE was distinct from a debt claim for charges due under the TSA, and instead, EE sought damages for diversion of customers and claimed for loss of bargain, or loss of profit. Thus, crux of EE’s claim was to recover the loss of profit it would have made, had VM’s customers used the services offered by EE pursuant to the terms of the TSA.

In arriving at a summary determination, and focused on the interpretation of the clause 34.5 (a) of the TSA, the court held that EE’s claim amounted to a claim for loss of profit, based on legal precedents such as *Omak Maritime Ltd v Mamola Challenger shipping Co Ltd* [2010] EWHC 2026, and *Galtrade Ltd v BP Oil International Ltd* [2021] EWHC 1796. The court thus examined the clause to ascertain whether VM bore liability for damages arising from the alleged diversion of customers. The clause, as construed by the court, excluded liability for damages pertaining to anticipated profits. The language of the clause was deemed to be clear and unambiguous in its exclusion of claims for damages arising from loss of profits, with an exception carved out for damages arising from reckless or wilful breach or gross negligence. The court highlighted that this exclusion recognised that a claim encompassing damages for loss of profits was foreseeable in cases of such breach.

To interpret the clause, the court considered the natural meaning of the phrase ‘anticipated profits’ within the context. It referred to the principle in *Gilbert Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689 that clear words are required to rebut the presumption that neither party

intended to abandon any remedies arising by operation of the law. The court also highlighted that the language of the TSA and its surrounding clauses did not indicate a different construction. The TSA, being a bespoke and detailed contract negotiated by sophisticated parties, was deemed interpretable primarily through textual analysis as seen from case of *Fujitsu Services Ltd v IBM United Kingdom Ltd* [2014] EWHC 752, and *Kudos Catering (UK) Ltd v Manchester Central Convention Complex Ltd* [2013] EWCA Civ 38.

The court thus concluded that VM's construction of the clause did not render the contract commercially ineffective. The judgment clarified that with EE's claim for damages, loss of profits was excluded by the clause, although it would not preclude other potential claims, such as wasted expenditure or injunctive relief for breach for the exclusivity clause. Hence, the court granted summary judgment in favour of VM, holding that EE's claim was excluded by the clear and unambiguous words of the clause.

Commentary

As pointed out by Professor Beale, subject to several controls, the parties may specify the remedy available to the innocent party following the other's breach:

> In the absence of such tailor-made clause on the remedy, the law on damages fills the gap with 'default' provisions on the assessment of monetary compensation, which apply to all types of contracts. The general principle is that damages for a breach of contract committed by the defendant are compensation to the claimant for the damages, loss, or injury he has suffered through the breach (Hugh Beale, *Chitty on Contracts* (35th edn, Sweet & Maxwell 2023).

Unlike criminal law, damages in contract do not, in general, usually punish the defendant for the breach. The purpose of contractual damages is to restore the innocent party in the position they would have been in had the contract been performed as agreed, thereby compensating them for the loss suffered due to the breach by the defaulting party. The principle is often referred to as the principle of ''restitutio in integrum,'' meaning restoration to the original position of the contract (Paul Richards, *Law of Contract* (14th edn, Pearson 2019). When a party breaches the contract, the innocent party may incur financial losses, and experience a shortfall in the expected benefits, or face additional losses due to the breach. Contractual damages aim to remedy these losses suffered by awarding compensation equivalent to the actual loss/ injury suffered.

There are three limits to availability of damages - causation, remoteness and mitigation. The relevant limit in this case was causation as EE had to establish a causal link between loss and breach as the breach of TSA agreement caused actual loss to EE. In contract law, this loss must be shown to have resulted from the breach. In *C&P Haulage v Middleton* [1983] 1 WLR 1461, the terms of a license provided that fixtures were not to be removed at the end of the license. Thus, when the licensee expended money on fixtures he was not entitled to claim the cost of fixtures as damages when the licensor ejected him in breach of contract. The claimant claimed for the cost of improvements effected by him in the licensed premises. However. the judge held that although the defendant was in breach of contract by ejecting the claimant, the claimant had suffered no loss since he had been able to move to his home rent free and the expenditure on improvements to the premises would still have been lost had the license been validly terminated. His appeal was dismissed, the court holding he had not suffered any loss, since he was in no worse position than if the contract had been performed. To compensate him at the defendant's expense for the bad bargain he had made would leave him in a better position had the contract been performed.

In general, there are four heads of damages awarded to compensate for breach of contract: expectation loss, reliance loss, diminution of value, and cost of cure (Paul Richards, *Law of Contract* (14th edn, Pearson 2019). The two relevant headings in this case were expectation loss (for anticipated profits) and reliance loss. In this case EE sought to claim anticipated loss of profits, which was not granted to EE because such loss was excluded under clause 34.5 (a) of the TSA. The other is reliance loss (wasted expenditure), and had the claimant sought such he may have been awarded provided they were able to establish incurring such loss.

Expectation loss on the other hand are forward looking - to compensate the claimant for the anticipated benefits if the contract was performed properly in line with the terms of the contract. This was seen in *Western Web Offset Printers Ltd v Independent Media Ltd* (''IM'') [1996] CLC 77. In this case, W, a printing company, sought damages representing lost gross profit when IM repudiated a contract to print 48 issues of a weekly newspaper. IM argued that the quantum of damage should be represented by W's anticipated net loss and an award was made on the basis. W appealed, and allowing the appeal it was held that the correct principle in such cases was to compensate for the loss of benefit and bargain caused by the breach. As a result, W was entitled to damages equivalent to gross profit, after deductions for direct expenses. Although W had spare capacity, the recession in the market could not reduce the loss by attracting work from other sources. Accordingly, W had not failed to mitigate its loss and was entitled to the gross profits.

Reliance loss is 'backward looking', meaning that the injured party can claim for expenses incurred because of entering into the contract. This type of remedy is often claimed if the anticipated profits are incalculable even if the contract been performed. This principle was illustrated in *Anglia Television Ltd v Reed* [1972] 1 QB 60. In this case, the defendant, an actor, had entered a contract with the claimants to produce a film. At the last moment, the defendant withdrew from the contract causing the claimants to abandon the whole project. They decided not to sue the defendant for expectation loss, since these would be clearly speculative, but instead sued for loss of expenses (reliance losses) in respect of moneys expended hiring other actors, finding locations, and engaging scriptwriters. The court allowed the claim for these items of expenditure. The court stressed that the claimant can either claim for his loss of profits or wasted expenditure, but must elect between them, but cannot claim for both. Thus, If the claimant has not suffered any loss of profit, or if the cannot prove what his exact profits would have been had the contract been performed, they can claim for the expenditure which has been wasted by reason of the breach.

The court's judgment may have been in EE's favour if they claimed for reliance loss and had substantial evidence (receipts) for costs they incurred to supply the said services. In this situation, the claim was for estimated profit and considering the clause in TSA, it was ruled that it was impermissible for EE to claim for such loss because the clause safeguarded both parties from excessive damages.

The present case also raised the issue of exclusion, or exemption clauses, as the clause in question excluded claims for loss of profits, thus restricting the innocent party's claim to reliance loss. Exclusion clauses is a term representing one of the sub-headings under the umbrella heading of exemption clauses. An exclusion clause, therefore, is the most extreme form of exemption clause, for example, stating that 'regardless of the circumstances the parties are not liable for any damages. Exclusion clauses exclude liabilities for any loss or damage caused by the breach. Exclusion clauses are regarded as the terms of the agreement and must be incorporated into the contract and, on its proper construction, cover the breach. They must also comply with statute law, in our case the Unfair Contract terms Act, 1977 (UCTA), as the contract between EE Ltd and VM Ltd was a business-to-business contract. Once it is established that UCTA is applicable, the Act will have the effect of rendering any clause void if the clause is unreasonable. The reasonableness test lies under the s.11 and the accompanying Schedule.2 of the 1977 Act, and s. 11(5) of the Act states that, the burden of showing reasonableness is on the party seeking to rely on the term.

The party seeking to rely upon on the term is likely to have the clause construed against them – the *contra proferentem* rule. This is because the law tries to maintain a level playing field, and if there is something wrong with a particular term, whether it is vague, or unreasonable, the party relying on the term will have the term construed against them. Schedule 2 of the 1977 Act provides, guidelines that would indicate if a term in the contract is unreasonable, include the bargaining power of the parties in contract. Thus, if there is substantial inequality between the bargaining positions of the parties, it is more likely that the clause fails the test of reasonableness. Other guidelines include the presence of inducements, the knowledge of the parties, and the practicality of complying with the term. This will ensure that the exclusion clause (term) in the contract is not unreasonable/unfair to either party to the contract. In our case, both parties are business people and the relevant clause applied to both parties,

thus appeared to comply with the reasonableness test as well as being sufficiently clear to cover the exclusion of expectation (profit) loss.

Conclusion

The case highlights the critical importance of carefully drafting exclusion (and other) clauses in contracts. The court's ruling in favour of VM was influenced by the unambiguous language of clause 34.5 (a), excluding liability for anticipated profits. The judgment further emphasizes the need for parties to consider alternative remedies, such as reliance loss in breaches of contract under TSA agreements. In essence, this case illustrates the significance of exclusion clauses in commercial agreements. It also neatly illustrates the different heads of damages used in awarding compensation for the innocent party's losses.

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BOOK REVIEWS

Lucy Baldwin*, Gendered Justice: Women, Trauma and Crime***,** Waterside Press 2022

This collection of articles and reports of recent research has 18 contributors, covering a wide range of experiences, expertise and professions. Among them are two are women, writing anonymously, who have had lived experience of the criminal justice system (CJS). Among the authors are academics, the Women's Lead, East Midlands and the Women's Lead, West Midlands Probation Service, a consultant clinical forensic psychologist and psychoanalytic psychotherapist, and Kate Paradine, formerly the CEO of Women in Prison and now Visiting Adjunct Fellow at the Stefan Cross Centre for Women, Equality and Law, University of Southampton and CEO of Voice 21 (https://voice21.org/). Professor Loraine Gelsthorpe, Director of the Institute of Criminology at the University of Cambridge has provided the foreword.

As one would expect, given the range of expertise and experience, this book provides a committed and indeed passionate call for a gender- and trauma-informed approach to women in the CJS, as well as reports of much important and interesting recent research and a wide range of information, insights and expertise. As Professor Gelsthorpe writes in the foreword: 'They encourage implementation of a holistic approach, and suggest ways of ensuring 'justice' rather than injustice'. As put by one of the authors, what is needed is an 'ethics of empathy' and compassion, in order to ensure that criminal justice is linked to social justice.

In her introduction, the editor, Lucy Baldwin sets out the theme of the book: 'We know that women who come into contact with the CJS, i.e. who become criminalised and labelled as 'offenders', have rarely escaped traumatic experiences in their lives. The lines between 'victim' and 'perpetrator' are often blurred, especially concerning women … Many if not most women who come into contact with the CJS, have experienced trauma as an adult, as a child or often both'. Thus the call for a trauma-informed approach to women in the CJS.

Here is a vivid and tragic illustration of the trauma referred to above. Readers will remember Ms A, now known to be Rianna Cleary, who was in prison in HMP Bronzefield, Surrey, on remand in September 2019 when she went into labour, and pressed the cell call button for help. There was no response. The next morning her cell was found awash with blood and her baby was found dead in her arms. It was indeed a shocking event, causing much comment in the media. Many asked: why was this very vulnerable 18 year-old, eight months pregnant and ill at the time, sent by magistrates to prison on remand (R. Epstein, G. Brown, M. Garcia De Frutos: Why are pregnant women in prison? Coventry University, 2022. https://www.coventry.ac.uk/research/research-directories/current-projects/2020/why-are-pregnant-women-in-prison/). The answer was not revealed by the Ombudsman's report (despite that report stating that its purpose was both to examine both the reasons for remand in custody and the circumstances of the ante-natal care and the unattended birth). The reason was revealed in a *Guardian* interview on 2 August 2023 (Interview by Diane Taylor, the Guardian https://www.theguardian.com/society/2023/aug/02/the-tragedy-of-rianna-and-baby-aisha-cleary-teenager-gave-birth-all-alone-in-a-prison-cell). Ms Cleary had *asked to be sent to prison on remand* as she believed that prison would provide help and support. What was the level of trauma in her life and in the circumstances under which she was accused of a crime for her to ask to go to prison?

Dr Nicola Harding's chapter reports on, and is written with 28 women with experience of the CJS. It explores the trauma in their lives before imprisonment, and the further trauma caused by incarceration. It is painful to read, and underlines the importance of the theme and purpose of this powerful book. Her chapter begins: 'When a woman enters the Criminal Justice System it is often the most recent catastrophic event in a life that has been punctuated by trauma'. The author 'invites those who work with women in criminal justice to understand a little more, enabling the creation of trauma-informed spaces, and condemn a little less'.

Isla Masson and Natalie Booth's chapter reports on their 2021 research on the experiences of mothers (including step-mothers and foster mothers) and grandmothers of women in custody on remand. They give a wide-ranging, in-depth and vivid picture of the many difficulties faced by these family members supporting both the families outside and the women in prison. This is, in my view, a very important study, which has not received the wide coverage it is due. It is indeed tragic to think of so much suffering imposed on women and their families, when the incarceration is *on remand*, that is the 'offender' has not yet been found guilty or not yet sentenced. Very few women commit violent offences, very rarely do they pose any danger to the public. We have to ask, and keep on asking again and again, why they are in custody on remand. After this book was published JUSTICE published its report on the reasons so many people are in prison on remand.[1] It is largely due to hasty and poorly considered decision-making on the part of magistrates (see R. Epstein, *Remand decision-making: what is going wrong* https://www.thejusticegap.com/remand-decision-making-what-is-going-wrong/, and *Women on Remand in Custody*, The Justice Gap https://www.thejusticegap.com/women-in-prison-remand-in-custody/).

Kate Paradine argues that if academics, charities and practitioners are to maximise their impact and create real change in the imprisonment of women, they need to focus on three areas for change:

- Strengthening the case for feminist prison abolition and building a vision for the future (while focusing on the 'long game' of the incremental victories that are needed);
- Speaking out for change together, amplifying their collective voices; and
- Sharing power and creating new collaborative tools for change.

This book is a rich source of information and insights into the situation of women in the CJS, as well as a call for action. As Lucy Baldwin points out in her introduction, it is a tragedy and a sad indictment and reflection on society, that women, particularly women living with, or escaping traumatic experiences, have described prison as the 'safest place I've ever been'.

We will let Professor Gelsthorpe have the last word: 'This is an important and inspirational book which should be compulsory reading for policy-makers and sentencers'.

Dr Rona Epstein, Honorary Research Fellow, Coventry Law School

[1] Remand Decision-Making in the Magistrates' Court, Justice https://files.justice.org.uk › uploads › 2023/11