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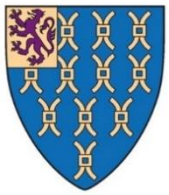

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Cohabitation and the Common Intention Constructive Trust: Time to Separate?

Oliver Murrell

Introduction

Since 1991, societal attitudes towards marriage, families and cohabitation have undoubtedly become more relaxed.[1] The 21st century has brought significant changes to domestic cohabitation and the family home.[2] Yet, cohabitation jurisprudence is still rooted in the 1990s. The common intention constructive trust ("CICT") is the current method of resolution when cohabitation breaks down, and disputes over property arise. The CICT has been the subject of "a long line of authorities",[3] and perhaps the two most important property law cases of the last century.[4] However, the CICT remains fused to the principles from *Lloyds Bank v Rosset* in 1990.[5] Following the famous cases of *Stack v Dowden*[6] and *Jones v Kernott*,[7] the notion the law had moved on since *Rosset* seemed to ring true.[8] Yet, it become apparent that was a not the case; the CICT is still tethered to *Rosset*.

Stack and *Jones* had an opportunity to bring clarity to the law, but both failed to do so. They introduced a more modern approach but did so in a confusing and uncertain way. Lady Hale, who has presided over the leading 21st century cohabitation cases, has made clear what is needed: legislative reform.[9] This article shall first analyse the current law and argue it is unfit for property disputes arising from family cohabitation. Scotland's legislative scheme governing family cohabitation and the Law Commission's 2007 proposals for a statutory scheme will then be considered. These examples demonstrate how and why a statutory scheme should be implemented. Ultimately, this article will conclude it is time for family cohabitation disputes and the CICT to separate, and for a statutory scheme to take its place.

The Current Law

To establish a CICT and a beneficial interest, a claimant must answer two questions: firstly, was there a common intention the claimant was to have a beneficial interest, or a different beneficial

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[1] Anne Barlow, 'Just a Piece of Paper? Marriage and Cohabitation', in Alison Park et al (eds), *British Social Attitudes: Public policy, social ties. The 18th Report* (2001, SAGE) table 2.2

[2] The Law Commission reported that between 1991 and 2031, the number of unmarried cohabiting couples is predicted to have increased nearly threefold

[3] CPS v Piper [2011] EWHC 3570 (Admin) at [7] (Holman J)

[4] Chris Bevan, 'The search for common intention: the status of an executed, express declaration of trust post-Stack and Jones' (2019) 135 L.Q.R. (Oct) 660, 660

[5] [1991] 1 AC 107

[6] [2007] UKHL 17; [2007] 2 A.C. 432

[7] [2011] UKSC 53; [2012] 1 A.C. 776

[8] Stack (n6) [60] (Lady Hale)

[9] Gow v Grant [2012] UKSC 19; [2013] S.C. (U.K.S.C.) 1 [47]

interest? If so, what was the size of their beneficial interest intended to be? These are referred to as the acquisition stage and quantification stage. Cases are then split into sole name cases and joint name cases. In sole name cases, a claimant is not registered as a legal owner; in joint name cases, the claimant and defendant are both legal owners. Answering these questions and issues has caused the judiciary difficulty, much to the pain of academics, lawyers, and cohabitees. Before the current law can be examined, it is necessary to discuss the principles from *Rosset*. These principles are arguably still in full force.

Lord Bridge and *Rosset*

Lord Bridge set out two categories of CICT: express discussions and detrimental reliance; and direct contributions to the purchase price of the property and detrimental reliance.[10] There is some flexibility in these categories. The express discussions may be vaguely remembered and absent of precise terms.[11] The contributions to the purchase price of the property may be very small and part of a joint gift or the payment of mortgage instalments.[12] However, the flexibility ends there. In the family home, evidence of informal agreements and discussions are unlikely.[13] Further, Sloan argues that *Rosset* "clearly prejudiced those legal non-owning cohabitants who could not point to express discussions and had made only indirect financial or purely domestic contributions".[14] So, when the issue of cohabitation disputes in the family home came before the House of Lords and Supreme Court, opportunities to set out a modern approach to the CICT arose.

Stack and *Jones*

Stack upheaved the law. A holistic approach to inferring common intentions was introduced, and the concept of imputation was brought to the fore. *Stack* was a much need and ground-breaking authority.[15] Yet, the holistic approach lacked explanation and caused uncertainty over application, and the unclear role of imputation confused matters greatly.[16] Another Supreme Court decision was needed. Unfortunately, much of the energy in *Jones* was dedicated to "putting out the fires" from *Stack*.[17] Resultantly, *Stack* and *Jones* created as many, if not more, questions than they answered.[18] Furthermore, *Stack* and *Jones* are joint name cases, and accordingly, apply only obiter to sole name cases. The fallout is a mismatch of cases with differing interpretations of the core issues: the application of the holistic approach, and the role of imputation.

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[10] Rosset (n5) 132-133

[11] ibid 133

[12] Abbott v Abbott [2007] UKPC 53; [2007] 7 WLUK 765

[13] Hilary Blehler, 'The scope of common intention constructive trusts: where to draw the line?' (2018) 32 Tru. L. I. (2) 63, 70

[14] Brian Sloan, 'Keeping up with the Jones case: establishing constructive trusts in 'sole legal owner' scenarios' (2015) 35 L.S. 2 226, 229

[15] Terence Etherton, 'A New Model for Equity and Unjust Enrichment' (2008) Camb. L. J. 67(2) 265, 287

[16] John Mee, 'Jones v Kernott: inferring and imputing in Essex' (2012) Conv. 2 167, 175

[17] ibid 174

[18] Bevan (n4) 660

The Holistic Approach

In *Stack*, Lady Hale set out a non-exhaustive list of factors which can be used to infer a common intention. In a departure from the confines of *Rosset*, these factors include: why the property was acquired, who bore the responsibility for children, and household expenditure.[19] This approach was approved in *Jones*, and theoretically, it applies at both stages of the test. The holistic approach is a more modern approach to determining intentions. It accounts for the realities of 21st century families and cohabitation. Lady Hale's list of factors points to the law moving away from the confines of *Rosset*, and toward a fairer resolution of cohabitation disputes.

However, uncertainty shrouds the holistic approach. Sloan conducted a survey of High Court and Court of Appeal sole name cases post-*Jones*. Save for four exceptional cases, the approach in each case was consistent with the *Rosset* categories.[20] Furthermore, Bevan has criticised the judiciary for causing confusion around the extent to which the holistic approach allows the courts alter parties' express intentions.[21] Even where the holistic approach is applied, Sloan argues its application at the acquisition stage creates uncertainty.[22] Questions over the weighting of the factors and limited or universal application remain unanswered. Thus, the application of the holistic approach is an uncertain one.

Inferring and Imputing

It is common ground that common intentions can be inferred where there is no direct evidence of intention. In joint name cases, the courts are consistent in the use of inference at both stages of the test. In sole name cases, the courts are still unwilling to infer intention at the acquisition stage. Whilst unsatisfactory, this is relatively consistent. In contrast, the role of imputation is not settled. Per Lady Hale and Lord Walker, imputation is the court determining the parties' "intentions as reasonable and just people would have been had they thought about it at the time".[23] It is not a suitable concept for property and trusts law. It invents intentions parties never had, expressly or impliedly. It puts cohabitees in an unknown position. It prevents practitioners from advising with any certainty what those imputed intentions may be. Despite this, imputation is permissible at the quantification stage. However, Lord Collins emphatically observed imputation is not permissible at the acquisition stage,[24] and Lord Neuberger has warned of the dangers of

[19] Stack (n6) [69]
[20] Sloan (n14)
[21] Bevan (n4) 660
[22] ibid 234
[23] Jones (n14) [47]
[24] ibid [64]

imputation.[25] Other leading authorities have also eschewed imputation at the acquisition stage post-*Jones*.[26]

Nevertheless, the position is not settled. Academics, such as Mee and Pawlowski, argue comments in *Jones* left the door open for imputation at the acquisition stage.[27] Prominently, Lord Wilson – following enthusiastic approval of imputation at the quantification stage – remarked imputation at the acquisition stage would "merit careful thought".[28] Furthermore, Lady Hale and Lord Walker observed that, in practice, inference and imputation may not be that different.[29] These remarks have ensured imputation is an uncertain concept, both in definition and application. Whilst the courts are relatively uniform in the exclusion of imputation at the acquisition stage, the door remains uneasily ajar to its future inclusion.

An Uncertain Future

Stack and *Jones* created a level of uncertainty that is wholly inconsistent with English property law. The discussion and application of the holistic approach and imputation have confused all. Sloan remarks the "upper echelons of the judiciary have (perhaps deliberately) created uncertainty" in the application of *Rosset*.[30] Given the continued application of *Rosset* in sole name cases and its inconsistency with 21st century family cohabitation, this remark carries some weight. Beyond a scholarly debate, Mills argues, in practice, the more readily the courts infer and impute the beneficial interests of a non-legal owner, the more it creates undetectable and un-overreachable rights.[31] This level of insecurity and uncertainty is not only inconsistent with property law, but with the needs of the 21st century cohabiting family. It is time for legislative reform, and the ideal place to begin such a discussion is with the law north of the border.

Cohabitation in Scotland

Scotland's statutory scheme ("the Scheme") governs the financial and proprietary fallout upon cohabitation ending. The Scheme is found in ss.25-29 Family Law (Scotland) Act 2006; for the purpose of this article, ss.25 and 28 are relevant.

s.25 defines cohabitation as two persons living together as if they were spouses or civil partners. This places the Scheme firmly in a familial context, and unlike the CICT, there is no remedy for non-domestic cohabitants. Three factors are considered in the assessment: length of cohabitation,

[25] Stack (n6)

[26] See Geary v Rankine [2012] EWCA Civ 555, CPS v Piper [2011] EWHC 3570 (Admin), and Aspden v Elvy [2012] EWHC 1387 (Ch)

[27] Mee (n16) 175, Mark Pawlowski, 'Imputing a common intention in single ownership cases' (2019) Tru. L. I. 3, 9

[28] Jones (n7) [84]

[29] ibid [34]

[30] Sloan (n14) 233

[31] Matthew Mills, 'Single name family home constructive trusts: is Lloyds Bank v Rosset still good law?' (2018) The Con. and Prop. Lawyer 4 350, 365

nature of relationship, and financial arrangements. The broad judicial discretion the Act confers has led to other factors becoming relevant, including childcare, sharing domestic chores, and emotional support.[32] These family-orientated factors are noticeably similar to the factors included in the holistic approach. This suggests that, despite other issues, the holistic approach reflects a method of inferring intentions which recognises the realities of the modern family.

Once cohabitation is established, the substantive provisions in s.28 are engaged. Simply put, the Scottish courts may award a pursuer (claimant) a capital sum of money to reflect the net economic disadvantage suffered in the interests of the defender (defendant) or relevant child(ren), or the economic burden of caring for the cohabitants' child(ren). Contributions may be non-financial or indirect, such as looking after a child or the cohabitation property. This too reflects the CICT position, at least in respect of joint name cases. However, key distinctions lie in the lack of any proprietary remedy, and the diminished – almost non-existent – role of intention.

The Scheme has its flaws. The immediate and fundamental issue was uncertainty.[33] This derived in part from the Scottish Parliament departing from proven drafters in favour its own unduly complicated construct.[34] Resultantly, there lacked any judicial guidance or overarching principles.[35] The Scheme also set a very broad judicial discretion. Given the drafting issues, this inevitably created divergence in the Scheme's application and uncertainty prevented practitioners from properly advising clients.[36] However, the Supreme Court in *Gow v Grant* brought a great deal of clarity.[37] Lord Hope clarified several areas,[38] and crucially, outlined an overriding principle of fairness.[39] There still remains huge uncertainty regarding the extent of claims under the Scheme, but the Scheme facilitates private settlement and creates more certainty than the common law it replaced.[40]

The Scheme, and resulting caselaw, embody some of the modern, family-based approaches and principles that have appeared in CICT jurisprudence. Despite the Scheme's issues, there has been positive findings by researchers as to the Scottish statutory approach to cohabitation disputes.[41]

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[32] M v I [2012] 2 WLUK 585

[33] Tom Guthrie and Hilary Hiram, 'Property and cohabitation: understanding the Family Law (Scotland) Act 2006' (2007) Edin. LR 11(2) 208, 213

[34] Elaine Sutherland, 'From 'Bidie-in' to 'Cohabitant' in Scotland: The Perils of Legislative Compromise' (2013) Int. J. L. Policy Family 27(2) 143, 153

[35] ibid 155

[36] ibid 158

[37] Gow (n9)

[38] Sutherland (n34) 159

[39] Gow (n9) [40]

[40] Wasoff et al, 'Legal Practitioners' Perspectives on the Cohabitation Provisions of the Family Law (Scotland) Act 2006: Research Report' (2010) University of Cambridge Research Paper No. 11/03, <https://ssrn.com/abstract=1736612>, 159

[41] Jo Miles, 'COHABITATION: LESSONS FOR THE SOUTH FROM NORTH OF THE BORDER?' (2012) 71 C.L.J 492

Whilst the Scheme should not simply be imported into English and Welsh law, there are valuable lessons to be learnt from the Scottish approach to cohabitation. Lady Hale, a key proponent of the Scheme, remarked extrajudicially: "the real lesson from Scotland is that a simple scheme like theirs can work."[42] However, the enquiry should not end there. The Law Commission's 2007 Report proposed a statutory scheme for resolving English and Welsh cohabitation disputes. Consideration of these proposals demonstrate the potential benefits and form a statutory scheme could have in England and Wales.

The Law Commission

In 2007, The Law Commission published its report on the financial consequences upon the breakdown of cohabitation.[43] The report outlined its proposals ("the Proposals") for an opt-out statutory scheme to govern the financial and property-related fallout upon relationship-based cohabitation ending. Despite being well received, and a positive cost-benefit analysis of the Scottish Scheme, the Proposals were not implemented.[44] Since 2007, numerous related private members bills have been introduced to Parliament; one such Bill is currently on its initial second reading.[45] All have timed out and none progressed beyond the first committee stage. The lack of government support for the current edition all but ensures it will suffer the same fate. Although the Proposals remain just that, they are worthy of consideration. Due to the decades of research into English and Welsh society and law, the Proposals provide a solid starting point for reform.

As with the Scottish Scheme, there must first be a valid cohabitation. Couples must have been living in a joint household for either a minimum period or have a child together.[46] Although no minimum period was set, it was suggested it should be between two and five years. The applicant must then have made qualifying contributions that give rise to enduring consequences on separation.[47] Again, there is no search for intentions, but under the Proposals, the court has a wide selection of remedial powers. Declarations of beneficial interests, periodical payments, and lump sum payments would all be available.

The primary issue is what qualifies as a contribution. Paying for household bills only qualify if the mortgage could not have otherwise been paid,[48] and routine domestic contributions do not qualify. Probert noted, in this respect, the Proposals are no more generous than the CICT position.[49] Further criticism is levelled at the realistic amount of evidence needed to prove

[42] Lady Hale, 'Private Family Law Reform' [2018] Fam Law 810, 816

[43] Law Commission, 'Cohabitation: The Financial Consequences of Relationship Breakdown' (July 2007) Law Com. No. 307

[44] Law Commission (n43)

[45] Cohabitation Rights Bill 2020

[46] Law Commission (n43), paras 3.13-3.31

[47] ibid para 4.30

[48] ibid, para 4.52

[49] Rebecca Probert, 'A Review of Cohabitation: The Financial Consequences of Relationship Breakdown, Law Com. No. 307' (2007) 41 Fam L.Q. 521, 529

qualifying contributions. Douglas argues that cohabitants would have to "trawl back" through years of financial documents, presuming they still existed.[50] However, a claimant under the CICT approach has to trawl back through years of documentation to find anything that may demonstrate intention. Douglas further argues the broad-brush approach suggested by the Law Commission would cause uncertainty for practitioners when calculating benefits for negotiations.[51] Conversely, it is contended the difficulty is substantially greater for practitioners advising on what intentions a court may impute, or the factors to be applied in inferring intentions.

Despite her criticism, Douglas, along with the judiciary and academics alike, assert the Proposals should be adopted.[52] They are family-centric and would provide a modern resolution that accounts for the realities of 21st century domestic cohabitation. The Proposals are not without their issues, but those issues are less troublesome than the CICT's. 14 years on, it is unlikely the Proposals in their current form will be implemented. However, they shine a light on the potential replacement for the CICT and highlight how the CICT approach fails the 2021 cohabiting family.

The Way Forward

The CICT has aspects that account for the 21st century family, in particular the holistic approach. However, *Stack* and *Jones* failed to set out a coherent set of principles or concepts to replace the categories from *Rosset*. Discussions of imputation were conflicting and confusing, the holistic approach was underdeveloped, and crucially, *Rosset* was not overruled. The CICT is a blunt instrument:[53] it produces a result, but in a messy and uncertain way. Whilst the legislative alternatives have problems, as evidenced by the Scottish Scheme, they pale in comparison to those of the current law. Cohabitation continues to increase, and attitudes toward non-married families are considerably more liberal than in 1990. In light of the CICT, the Scottish Scheme, and the Law Commission's Proposals, it is evident legislative reform is needed.

[50] Gillian Douglas et al, The Law Commission's Cohabitation Proposals: Applying Them in Practice (2008) Fam Law 351, 355

[51] ibid 356

[52] ibid 357

[53] Lewin on Trusts (20th Edn, Sweet & Maxwell 2020) para 10-057

Living in a Democracy: 'Limiting Liberties during the Covid-19 Pandemic'

Isabel Clarke

Introduction

As the United Kingdom (UK) enters the second year of Covid-19 governance, fierce debates of individualism and weak displays of compliance have become a barrier to the success of public health measures. Although the seriousness of the pandemic justified the enactment of emergency legislation; the continued extension of emergency powers must be done in a manner that is compatible with human rights law. Despite political disagreement on the best way forward, new debates have erupted across Europe over the appropriate use of vaccine passports during peak periods of Covid-19 transmission.

As hospitalisations, deaths and cases continue to fluctuate across the UK and with the recent identification of the Omicron variant, I have begun to investigate the legal limits of emergency regulation and the scope of the obligation to respect and protect fundamental rights. Centrally, this discussion attempts to question the government's ability to impose a passport scheme and whether it would be fair and just to limit the ability of the unvaccinated to interact in crowded places on a temporary basis. In determining the scope of government power, *Section 2* will briefly identify key Covid-19 legislation, expanding on recent litigation efforts. *Section 3* will follow by analysing the obligations held under the Human Rights Act 1998 (hereinafter HRA 1998). Finally, *Section 4* will apply the law and discuss the legality of a passport scheme.

Covid-19 Legislation & Domestic Challenges

The ability of the UK government to enact emergency legislation is enshrined across several documents, namely, the Public Health (Control of Disease) Act 1984 (hereinafter PHA 1984), the Coronavirus Act 2020 (hereinafter CA 2020) and the Health Protection (Coronavirus) Regulations 2020. Read collectively, the laws extended the ability of the authorities to restrict various civil liberties.

When the government interferes with fundamental rights, judicial review acts as a necessary safeguard to protect citizens against the use of arbitrary power. In the context of Covid-19, attempts have already been made to challenge the legality of the government's stay-at-home order in *R(Dolan & Ors)*, where the appellants raised three central grounds.[1] First, the appellants argued that the government did not have the power to impose the regulations. Secondly, it was argued that the regulations were contrary to public law principles and thirdly, that the regulations violated several rights protected by the HRA 1998.

In delivering the judgment, Lewis LJ concluded that the first two grounds were unarguable because the government had correctly interpreted the powers conferred under the PHA 1984. On

[1] *R(Dolan & Ors) v Secretary of State for Health & Social Care & another* [2020] EWHC 1786 (Admin).

the final ground, Lewis LJ accepted that a version of Regulation 6 could be challenged as it interfered with freedom of movement however, the complaint was dismissed because the order was not a deprivation of liberty as understood under the HRA 1998. Overall, it was held that the Secretary of State had not acted irrationally or disproportionately. On appeal, it was again held that the parliament had clearly intended the power to make the regulations through PHA 1984 and therefore, the request to be heard by the Supreme Court was denied.[2] Overall, in both cases the judiciary opted to defer to the government's will, demonstrating the constitutional separation of powers.

Human Rights Act

So far, *Section 2* identified the legal sources allowing the government to restrict civil liberties during the pandemic in addition to highlighting the judicial interpretation of those powers. Going forward, *Section 3* will expand on the State's obligation to protect fundamental rights.

As a dualist legal system, an act of parliament was required to incorporate the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (ECHR) into the domestic law of the UK through the HRA 1998. The initial construction of the ECHR and the subsequent enactment of the HRA 1998 demonstrates a noticeable shift in legal philosophy and reasoning "to introduce a culture of rights that is more communitarian than libertarian."[3] Consequently, states now inherit both positive and negative obligations when dealing with fundamental freedoms, with the former requiring the state to abstain from certain actions and the latter obliging states to adopt preventative operational measures to protect rights.

Derogations

Although the state bears the duty to protect fundamental rights, depending on the classification of the right, the state has discretion to provide different degrees of protection. For example, absolute rights, such as to be free from torture, can never be legally interfered with. Conversely, according to the European Court of Human Rights (ECtHR), qualified rights can be interfered with when three factors are met: 1) the interference was prescribed by or in accordance with the law; 2) the interference was in pursuit of a legitimate aim; and 3) the interference was necessary in a democratic society.

To satisfy the first factor, the interference must have some basis in national law, taking form in legislation or common law. The law must be clear, foreseeable, and accessible to the public, allowing the individual to adjust their behaviour and identify consequences.[4] To satisfy the second factor, the state must demonstrate they acted in pursuit of a legitimate aim. Accordingly,

[2] *Dolan and Others v Secretary of State for Health and Social Care and others* [2020] EWCA Civ 1605, §68.

[3] Murray Hunt, 'The Human Rights Act and Legal Culture: The Judiciary and the Legal Profession' (1999) 26(1) Journal of Law and Society, 89.

[4] *Lebois v Bulgaria* App no 67482/14 (ECtHR, 19 Jan 2018) §66-67.

measures made in pursuit of national security, public safety, economic wellbeing of the country, protection of health or morals or to protect the rights and freedoms of others have all been recognised as legitimate aims justifying interference.[5] The final factor, that the interference was necessary, will require that the state struck 'a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.'[6] The threshold of what is necessary will not include measures deemed "useful" or "desirable" but instead to address a "pressing social need."[7]

Future Challenges

As a highly individualistic society, the UK has long encouraged diversity in viewpoint, freedom of speech and an inherent distrust of authority, all factors that have deterred collective coordinated action to mitigate the impact of the pandemic. Nonetheless, in a democratic society that respects the right to personal autonomy, it is unsurprising that the government has not directly mandated the vaccine on every capable person. However, as the unvaccinated become a sustained minority, one cannot deny the risk that their public participation poses to the stability of the state and the freedom of others. The foreseeability of the threat brings to light an important question: if the individual is able and has refused the collective responsibility of getting vaccinated, can the state justify exclusion from major forms of public participation by way of a passport scheme?

Vaccine Passport Conundrum

A passport scheme would require proof of vaccination prior to entering an establishment such as, but not limited to, gyms, hospitality venues, nightclubs, indoor events, and cinemas. Currently, the UK continues to allow individuals to enter public establishments with proof of vaccination, a certificate of test or recovery, or with no regulation at all. Although the scientific community continues to advocate for the use of passport schemes, due regard must be given to the proportionate balance of the right to life (Art. 2) competing against freedom of movement (Art. 5) and privacy rights (Art. 8).

When considering the potential balance of rights, the three factors mentioned in *Section 3.1* must be applied. As demonstrated in *Section 2*, the government holds a range of powers to impose special restrictions responding 'to a serious and imminent threat to public health', satisfying the first factor of the test.[8] Additionally, the court in *R(Dolan & Ors)* has confirmed that the government correctly interpreted the scope of their powers conferred through domestic legislation. Moreover, to satisfy the second factor, the state must demonstrate that the measure was implemented in pursuit of a legitimate aim. The passport scheme has the legitimate aim

[5] *Hatton and Others v The United Kingdom* App No. 36022/97 (ECtHR, 8 July 2003) §12.

[6] *Soering v The United Kingdom* App No. 14038/88 (Council of Europe, 7 July 1989) §89.

[7] European Court of Human Rights, 'Guide on Article 8 of the European Convention on Human Rights' (31 December 2020) §28.

[8] Public Health (Control of Disease) Act 1984, s 45D (4)(a).

of maintaining public safety, economic well-being and to protect the life, health and movement of others. Finally, as the proportionality assessment requires a more detailed level of analysis, *Section 4.2* will elaborate on its components.

Proportionality

Under domestic law, it is understood that the interfering measure must address a legitimate aim, the measure is connected to the aim, and the means to achieve the aim do not go further than what is strictly necessary.[9] Therefore, to satisfy the test, public authorities must demonstrate that they have pursued the least intrusive means possible to achieve the legitimate aim.[10] Notably, the courts have been more willing to recognize the proportionality of an intrusive measure when some accommodation has been made for another right.[11] Overall, where there is an imbalance between the impact of the measure taken and the social benefit, the measure would likely be found to be disproportionate.

In the context of a passport scheme, there is a specific and legitimate aim that can be tied to imposing the measure. The aim of the measure could be justified on three grounds: 1) to limit transmission opportunities to protect the health of the unvaccinated who are at a greater risk of death; 2) to protect the personal integrity of the vaccinated; and 3) to guarantee long-term economic stability of the state. Although a direct vaccine mandate may be the most effective measure to limit transmission rates within society, such a measure would permanently interfere with personal autonomy. Conversely, a passport scheme could be implemented on a temporary and exceptional basis, responding to high rates of Covid-19 to ensure the safety of all citizens in public. Consider for example, Scotland's implementation of a passport scheme. Despite being initially weary of such measures, Secretary for Health and Social Care Humza Yousaf, now believes that the benefit of the passport scheme outweighs its concerns, offering a preferable measure compared to another lockdown.[12]

Furthermore, when assessing the proportionality of restrictive legislation, a distinction must be struck between the temporary limitation of a right versus removing the right in its entirety. A passport scheme would temporarily limit the ability of the unvaccinated to participate in aspects of Articles 8 and 5 of the ECHR. However, as reasoned by the court in *R(Dolan & Ors)*, the government's regulation of movement would not qualify as a deprivation of liberty within the meaning of the Convention protections. Additionally, it seems unlikely that the judiciary would be sympathetic to any challenges made under Article 8 premises because such grounds cannot be used to challenge personal, social, psychological, and economic suffering that arises as a

[9] *de Freitas v Permanent Secretary of Ministry of Agriculture* [1999] 1 AC 69.

[10] Tom Hickman, *Public Law after the Human Rights Act* (Bloomsbury Publishing Plc 2010), 181.

[11] Hickman (n. 10), 186.

[12] Lisa Summers, 'Covid in Scotland: Vaccine passport benefits 'outweigh concerns"(BBC, 2 September 2021), < https://www.bbc.com/news/uk-scotland-58420003>.

foreseeable consequence of individual actions. [13] Arguably the choice not to get vaccinated and the eventual limitation of freedoms would not serve as grounds to invoke Article 8 protections.

Overall, when imposing preventative operational measures, the state has the obligation to act with due diligence. The obligation can be demonstrated by drawing a parallel to the months following the first lockdown. When restrictions eased, at-risk individuals were encouraged to shield so that the economy could re-open and the healthy could regain liberties. Despite the discriminatory nature of the advice, the measure was necessary to protect the health of those at risk while equally respecting the freedoms of others.

Conclusively, given the overall obligation to protect and respect fundamental rights in a manner that does not excessively burden public resources, it seems plausible that eventually the balancing scale of rights will tip towards protecting the wider freedoms of the vaccinated. Just as certain measures were pursued to protect the at-risk minority population at the start of the pandemic, the same argument can be increasingly applied to the ably unvaccinated in our current context.

Justification

To further advance this argument, one must consider whether it is fair and just to allow the ably unvaccinated to continue to demand the full extent of their freedoms while denying liability towards fighting a common evil. While it is sustained that domestic law already provides the legal authority to impose a passport scheme, such a conclusion can also be reached through moral reasoning. According to legal philosophers such as Immanuel Kant, an individual right can remain so long as it can co-exist with the freedoms of others in accordance with universal law.[14] The takeaway is that all individuals hold the same right to liberty, which can be regulated in degrees by the state to ensure a balanced society.

Within democratic societies, it is implied that there is a minimal level of mutual civility and mutuality between citizens.[15] Humans will act in compliance with socially accepted norms, with certain instances requiring reciprocal demands. If a specific behaviour is collectively found to be wrong, there may be grounds to eliminate the conduct to protect others within society. Utilitarian thinkers such as Jeremy Bentham argued that humans should always act to maximise human good. [16] Unfortunately, strains of Utilitarian thought overestimate the individual's ability to act with moral self-restraint to achieve societal goals. To mitigate our inherent selfishness, Kant instead argues that free will could be satisfied by adopting a normative order or effective governance.[17] In this sense, the state must use coercive powers, exercised in

[13] ECHR (n. 7), §87.

[14] James Griffin, *On Human Rights* (Oxford Scholarship Online 2010), 61.

[15] Neil MacCormick, *Practical Reason in Law and Morality* (Oxford Scholarship Online 2009), 19.

[16] MacCormick (n. 14), 107.

[17] MacCormick (n. 14), 56.

restraint and under the rule of law, to guarantee the wider enjoyment of human rights that are correlative to the basic duties owed to civil society.

On 19 July 2021, Boris Johnson lifted all remaining Covid-19 restrictions in England, leaving the citizens to use their judgement and personal responsibility to manage the pandemic risks. Consequently, mask wearing became voluntary, social distancing ended, and mass events ensued. Despite the threat of a more contagious virus variant, the lack of regulation on human activity has produced drastic consequences for the public health care system. Currently, reports suggest that the NHS is approaching a "breaking point" due to the scarcity of resources which have been dedicated to treating the unvaccinated and the 5.7 million citizens currently awaiting treatment for non-Covid related health issues.[18]

Ultimately, over the past five months it has become clear that there are moral, practical and legal reasons to justify limiting civil liberties. Outside of the concern for individual health, the UK's public health infrastructure is in a fragile state which cannot be sustained simply as a side effect of individualistic and self-interested action. At this stage of the pandemic, government intervention is needed to ensure public safety, economic stability and to maintain the functioning of public healthcare.

Conclusion

To determine the scope of the government's power to limit civil liberties during the pandemic, an attempt has been made to answer the hypothetical question of whether the state can legally justify imposing a passport scheme. It has been shown that the government has a wide range of discretion to limit civil liberties compatibly with human rights law. Despite the highly individualistic nature of UK society, it was demonstrated that domestic law already offers the relevant legal justification to impose a passport scheme. When striking a balance between competing rights and interests, it was argued that the passport scheme offers a less intrusive means of achieving the legitimate aim of protecting the security of the state and reducing the risk to the freedoms of others. Given the legitimacy of the aim, the temporary nature of the legislation and the overall need to protect national security, imposing a passport scheme is a fair and just accommodation made to protect individual autonomy.

On the other hand, caution must be raised against the continuous outright acceptance of government interference with civil liberties when such interference is no longer proportionate. It is important that citizens use democratic procedures to challenge unjustness or to limit the unnecessary extension of emergency powers. Government actions can and should be challenged

[18] Andrew Gregory,'NHS is at breaking point and putting patients at high risk, bosses warn' (The Guardian, 10 November 2021) <https://www.theguardian.com/society/2021/nov/10/health-service-is-at-breaking-point-and-putting-patients-at-risk-say-nhs-leaders>

when necessary but in the context of Covid-19, certain liberties may need to be compromised when laws are intended to "meet the just requirements of general welfare in a democratic society."

Liberty limiting measures in the context of a pandemic are not made as a by-product of draconian rule, instead such regulations are made to protect the safety of the individual and the stability of the state. In my own view, regardless of the perceived fairness of a passport scheme, our pandemic response, and the ability to think of others has social and global implications that go beyond the liberties of one person or one country. Therefore, as I conclude this essay, I would like to remind the reader that a benefit and a consequence of living in a democracy includes the natural compromise "to respect the rights of others in the community with whom [they are] interdependent."[19] Nonetheless, as the UK grapples with the newly identified Omicron variant, it will be interesting to watch whether there will be any further discussion of the effectiveness of vaccine passports in light of scientific commentary.

[19] Hunt (n. 3), 89.

To what extent can law reform correct the patriarchal bias of law?

Megan Cox

Introduction

To insist that women are individuals *'will not make it so; it will obscure the need to make change so that it can be so.'* [1] The law is intrinsically patriarchal as it maintains societal systems and structures that subordinate women. The state is *'male in the feminist sense,'* so societal attitudes can be a cause as to why *'the law sees and treats women the way that men see and treat women.'*[2] Different feminists have theorised different approaches to correct the patriarchal bias of law. Some of these approaches focus on law reform as a solution to develop a *'principle of perfect equality.'*[3] Other feminists have argued that law reform is not a solution and, that the focus should be on the individual experiences of women.[4] This essay will discuss the idea that law reform alone cannot correct the patriarchal bias of law. Further, it will show that social and political attitudes towards women need to change to improve the position of women within society, allowing law reform to reflect the cultural shift.

The Gendered Nature of Law

All feminists agree that the law is inherently gendered,[5] yet feminist theorists have different perspectives on the ability of law reform to correct patriarchal bias. Liberal feminists aim for *'equality with men in political and social spheres.'*[6] As such, liberal feminists like Eisenstein argue that law is *'an authorised language of the state'* that can create equality for women.[7] This theory seems correct to an extent, where women were granted electoral equality with men in the Representation of the People (Equal Franchise) Act 1928.[8] The 1928 Act would be considered a success to liberal feminists. However, MacKinnon critiques this notion of correcting patriarchal bias by reforming laws to make women and men equal, she argues that this approach will always cause women to be striving to meet male standards.[9] An example of this is the American Supreme Court case of *Price Waterhouse v Hopkins* where the court held that the only non-discriminatory way to deny promotion to women is if the denial is on the same grounds as it

[1] Catharine MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press, 1987) 59.

[2] Catharine MacKinnon, 'Feminism, Marxism, method and the state: toward feminist jurisprudence,' (1983) 8(4) Signs: Journal of Women in Culture and Society 644.

[3] John Stuart Mill, *The Subjection of Women* (Prometheus edn, 1986) 1.

[4] Carol Smart, 'The Quest for a Feminist Jurisprudence,' in *Feminism and the Power of Law* (Routledge, 1989).

[5] Lynne Henderson, 'Law's Patriarchy,' (1991) 25(2) Law and Society Review 412.

[6] Lisa Ikemoto, 'Reproductive rights and justice: a multiple feminist theories account,' in *Research Handbook on Feminist Jurisprudence* (Edward Elgar, 2019) 253.

[7] Zillah Eisenstein, *The Female Body and the Law* (Berkeley University of California Press, 1988) 20.

[8] Representation of the People (Equal Franchise) Act 1928.

[9] Catharine MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press, 1989) 34.

would be for a man.[10] Therefore, although the aim of achieving equality between men and women through law reform might seem like it would be a successful practice, it seems likely that it would further entrench male standards into law and force women to meet these standards, rather than considering women in their own right.

Carol Smart proposes an approach to feminist jurisprudence not centred around the law. Smart argues that law reform is often *'turned to'* for solutions,[11] empowering law as a hierarchal source of knowledge.[12] However, this is problematic as to, where law acts as a higher truth, female experience is deemed inferior. Thornton agrees with Smart's arguments that our views of law are *'so constrained that a feminist jurisprudence is no more than a phantasmagorical glimmer on the horizon.'*[13] The theory is convincing, and I agree to some extent that societal norms and understandings need to shift to correct patriarchal bias. However, as Henderson notes, *'women cannot simply refuse to participate in law and legal discourse.'*[14] Therefore, my argument is that law reform can reflect the shift in societal attitudes and correct the patriarchal bias of law.

Catharine MacKinnon approaches the correction of the patriarchal bias of law from a radical feminist perspective. Radical feminism is the only feminism that does not rely on masculine constructions of femininity.[15] Radical feminists aim to change the patriarchal structures and norms that uphold and approve of masculine dominance within society.[16] MacKinnon argues that male sexual power forms male dominance that subordinates women. Hence, *'sexuality is to feminism what work is to Marxism.'*[17] MacKinnon's theory concludes that consciousness-raising can uncover true feminism and that the outcome will be that women are objects of abusive male power instead of human beings in their own right.[18] There have been critiques of consciousness-raising in that it may not be able to differentiate between the differing circumstances of race and class that women face.[19] Yet MacKinnon deems that the oppression of women is common despite class and race.[20] Therefore, where the structure of society and the law reinforces the idea of men dominating women, this has granted men the power to socially construct what it is to be a woman in light of male sexual desires. MacKinnon makes a convincing argument when considering sexual offences like rape, which is discussed in detail below, and how sexual crimes can be an act of dominance over weak and vulnerable females. However, MacKinnon's work is

[10] *Price Waterhouse v Hopkins* (1989) 490 US 228.
[11] (n 4) 89.
[12] Carol Smart, 'The Power of Law,' in *Feminism and the Power of Law* (Routledge, 1989) 7.
[13] Margaret Thornton, 'Feminist jurisprudence: illusion or reality?' (1986) 3 Australian Journal of Law and Society 5.
[14] (n 5) 435.
[15] (n 9) 117.
[16] Indira Gilbert and Vishanthie Sewpaul, 'Challenging Dominant Discourses on Abortion from a Radical Feminist Standpoint,' (2015) 30(1) Journal of Women and Social Work 83.
[17] Catherine MacKinnon, 'Feminisms, Marxism, Method, and the State: An Agenda for Theory,' (1982) 7(3) Signs: Journal of Women in Culture and Society 515.
[18] Ibid 531.
[19] Lynne Segal, *Is the Future Female?* (Virago, 1987) 61.
[20] (n 17) 521.

criticised for being a form of '*victim feminism,*'[21] as she defines women by how men treat them.[22] Yet, Allan Johnson contends that this criticism of MacKinnon's work creates an illusion that women do not suffer at the hands of men, alluding that patriarchy does not exist.[23] I argue that MacKinnon's theory is not depicting all women as victims as it shows the way that men illustrate femininity as weak and vulnerable, constructing women as the perfect victims of male sexual power. Therefore, eliminating the patriarchal norms of society is necessary for law reform to correct the patriarchal bias of law.

Sexual Violence and Women Victimhood

MacKinnon has argued that male dominance is promoted through sexual offences,[24] and that all women live in sexual objection the way that fish live in water.[25] Sexual offences are gendered crimes, as they are predominantly perpetrated against women by men.[26] Throughout history, many attempts have been made at rape law reform and correcting patriarchal bias in the law. However, Smart contends that this has only served to entrench patriarchal standards further into law.[27] The offence of rape is defined under s.1(1) of the Sexual Offences Act 2003 as to where a man *'intentionally penetrates the vagina, anus or mouth of another person (B) with his penis,'*[28] where B does not consent, and A does not reasonably believe that B consents.[29] The definition highlights that only men can commit the offence of rape. Hence, since rape has been described as *'the sheer use of a human being,'*[30] it reinforces the argument that men treat women as sexual possessions over which they maintain control.[31] Historically, the law of coverture also supported this idea, as the *'husband and wife become one person in law,'*[32] causing women to lose their sense of identity and become the property of their husbands. I will examine two areas of law reform

[21] Ratna Kapur, 'The Tragedy of Victimization Rhetoric: Resurrecting the "Native" Subject in International/Post-Colonial Feminist Legal Politics,' (2002) 15(1) Harvard Human Rights Journal 1.
[22] Martha Mahoney, 'Whiteness and Women, in Practice and Theory: A Reply to Catharine A MacKinnon,' (1993) 5 Yale Journal of Law and Feminism 217.
[23] Allan Johnson, *The Gender Knot: Unravelling our Patriarchal Legacy* (Temple University Press 3rd edn, 2014).
[24] (n 9) 138.
[25] (n 9) 149.
[26] Sharon Cowan, 'All Change or Business as Usual? Reforming the Law of Rape in Scotland,' in *Rethinking Rape Law: International and Comparative Perspectives* (Routledge, 2010) 161.
[27] (n 4) 81.
[28] Sexual Offences Act 2003, s.1(1)(a).
[29] Ibid s.1(1)(b)-(c).
[30] John Gardner and Stephen Shute, 'The wrongfulness of rape,' in *Oxford Essays in Jurisprudence* (Oxford: Clarendon Press, 2000) 193.
[31] (n 17) 531.
[32] William Blackstone, 'The Rights of Persons,' in *Commentaries on the Laws of England 442* (14th edn, 1803) 1765.

surrounding sexual offences – the removal of the marital rape exemption and modern reforms to protect victims of sexual offences.

Criminal law is an institution that aims to protect individuals and their bodily integrity. Yet historically, criminal law has approved *'sexual violence by men to women for disciplinary purposes.'*[33] The marital rape exemption made it lawful for a husband to rape his wife where she did not consent to sexual intercourse.[34] Hence, this exemption shows the patriarchal bias in law, whereby rape and associated violence is lawful to enforce gender roles in the family. It is clear that there is a patriarchal bias in law, so the question is whether law reform can correct it. The UK House of Lords in *R v R* held that *'the common law rule (of marital rape) no longer even remotely represents what is the true position of a wife in present day society.'*[35] Although this judgement removed the marital rape exemption, it suggests that law reform is dependent on social and political attitudes. As such, MacKinnon's argument that the law and state are synonymous strengthens.[36] Therefore, restructuring social and political attitudes towards women must be a priority to correct the patriarchal bias of law.[37]

The second aspect of this argument will examine how law reform to protect victims of sexual offences has failed to correct the patriarchy of law. Moreover, that law reform has entrenched male standards of femininity further into law. As has already been argued, women are victims of male sexual power in the form of sexual harassment, sexual assault or rape. MacKinnon contends that sexuality is a social construct developed by those most powerful in society.[38] The characteristics attributed to women are vulnerability, passivity and softness,[39] whilst masculine constructs are dominant, powerful, and aggressive.[40] These stereotypical characteristics of a "women" have been entrenched into the UK legal system because of law reform. S.101 of the Coroners and Justice Act 2009,[41] inserted s.22A into the Youth Justice and Criminal Evidence Act of 1999.[42] The introduction of this section makes a special provision for adult complainants in sexual offence trials in the Crown Court, enabling witnesses to have special measures put in place to maximise the quality of their evidence. One of the measures is a screen to protect the complainant from being seen in court by the accused.[43] The problematic aspect of this law

[33] Ngaire Naffine, 'Some gentle violence: marital rape immunity as contradiction in criminal law,' in *Research Handbook on Feminist Jurisprudence* (Edward Elgar, 2019) 233.
[34] *G v G* [1924] AC 349.
[35] *R v R* [1991] UKHL 12 [40].
[36] (n 2) 644.
[37] (n 9) 238.
[38] (n 9) 113, 128.
[39] (n 17) 530.
[40] Caroline Moser and Fiona Clark, Victims, *Perpetrators or Actors? Gender, Armed Conflict and Political Violence* (New York: Palgrave MacMillan, 2001).
[41] Coroners and Justice Act 2009, s.101.
[42] Youth Justice and Criminal Evidence Act 1999, s.22A.
[43] Ibid s.23.

reform is that it further entrenches patriarchal bias into law. Arguably, these measures encourage women to be afraid of dominant males enforcing the male social construction of femininity into law. Moreover, the jurors who determine the outcome of the trial *'reflect, either overtly or subconsciously, entrenched societal views of women.'*[44] Hence, where a woman may choose to be strong and give evidence face-to-face with her attacker, this could backfire on the woman who does not fit these gendered norms. Some argue that such measures can enhance women's rights by giving them a space to tell their story in the courtroom.[45] However, the women who do not rely on these measures and do not reflect the social construction of femininity will suffer because of this law reform. These women can never be the perfect victims and could suffer injustice because of this.[46] As such, the focus must be on reshaping and deconstructing social norms and ideas of sexuality as a prerequisite to law reform to correct the patriarchal bias of law.

Women's Reproductive Power

Liberal feminists were the leaders of the legal advocacy movement for women's reproductive rights.[47] They argue that law reform will grant women autonomy over their reproductive rights that will achieve gender equality.[48] Therefore, the freedom to decide whether to use contraception or have an abortion is reproductive liberty. On the other hand, for radical feminists, these rights and decisions are *'within the structural constraints on women's lives and raising the relationship between socioeconomic freedom and women's reproductive health choices.'*[49] Although radical feminists agree that law reform can give women reproductive rights, the radical feminist perspective also focuses on shifting societal expectations of women as child-bearers to help remove the patriarchal bias of law. There are numerous ways that states have restricted fertility and pregnancy rights.[50] In the early and mid-twentieth century, abortion bans were justified as a method to prevent extramarital sex.[51] Hence Ikemoto contends that this enabled society to control women and ensure *'sexual morality.'*[52] This links back to the patriarchal construction of femininity as vulnerability, innocence and purity, so the abortion ban entrenched the male social construction of femininity into law. Furthermore, biologically women are child-bearers. Historically, a wife's role was to give her husband children to continue their bloodline.

[44] Kimberley Dayton, 'Feminist Theory and Criminal Justice: An Overview,' in *Feminist Jurisprudence, Women and the Law: Critical Essays, Research Agenda, and Bibliography* (Fred Rothman, 1999) 297.

[45] Louise Chappell, *The Politics of Gender Justice at the International Criminal Court* (Oxford University Press, 2016).

[46] Susan Estrich, 'The Definition of Rape: The Common Law Tradition,' in *Sourcebook on Feminist Jurisprudence* (London: Cavendish Publishing, 1997)

[47] Suzanne Staggenborg, *The Pro-Choice Movement: Organization and Activism in the Abortion Conflict* (Oxford University Press, 1991).

[48] Rosalind Petchesky, *Abortion and Woman's Choice: The State, Sexuality and Reproductive Freedom* (Northeastern University Press, 1991).

[49] (n 1) 83.

[50] (n 6) 249.

[51] *Griswold v Connecticut* (1965) 381 US 479.

[52] (n 6) 252.

Therefore, the abortion ban ensured that women fulfilled these wifely duties. As such, historically, reproduction was a *'major axis of patriarchy.'*[53] Women were previously denied jobs because of the risk that it could cause to a *'future or existing foetus.'*[54] Therefore, there has been a battle to give women the right over their bodies and use law reform to correct the patriarchal bias of law.[55]

To some extent, law reform has enabled a correction of the patriarchal bias of law. In England and Wales, the Abortion Act 1967 made abortion legal,[56] whilst the introduction of the National Health Service (Family Planning) Act 1967 made contraception available through the NHS to all women, not just those whose health was at risk from pregnancy.[57] Hence, in England, law reform enabled women to have rights over their bodies. However, this does not mean that the same laws apply internationally. Although abortion was made legal in England and Wales in 1967, abortion was not made legal in Ireland until 2018, when the Health (Regulation of Termination of Pregnancy) Act 2018 came into force.[58] One reason behind the delay in Ireland granting women the right to abortion is the religious arguments against abortion, with Ireland being a catholic country. Therefore, religious views can be a barrier to law reform. Hence a narrative theory approach is required to correct the patriarchal bias of law. Under a narrative theory, legal reform occurs where there is a shift in the societal narrative.[59] Hence law reform is not a universal solution to correct patriarchal bias. I argue this because focusing on abortion law in the UK, for example, detracts focus from other racial and cultural issues of women's reproductive rights like sterilisation or welfare rules that make childbearing a punishable offence.[60] Therefore, although law reform can correct patriarchal bias in some countries, this law reform reflects shifting cultural attitudes. Overall, to correct patriarchal bias, the focus needs to be placed on differing cultural and racial attitudes towards women, correcting patriarchal bias relating to all aspects of women's reproductive rights, not just abortion.[61]

Conclusion

In conclusion, law reform can correct aspects of the law that reflect patriarchal bias by giving women the right to abortion, contraception or removing the marital rape exemption. However, this essay aimed to show that law reform alone will be unsuccessful at correcting the patriarchal bias of law. The successes of law reform are often because the law reflects social and political attitudes towards women. Overall, law reform can correct the patriarchal bias of law. However,

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[53] (n 6) 251.

[54] *UAW v Johnson Controls* (1991) 499 US 187 [211].

[55] Rickie Solinger, *Abortion Wars: A Half Century of Struggle* (University of California Press, 1998).

[56] Abortion Act 1967.

[57] National Health Service (Family Planning) Act 1967.

[58] Health (Regulation of Termination of Pregnancy) Act 2018.

[59] Jacques Derrida and Avital Ronnell, 'The Law of Genre,' (1980) 7(1) Critical Inquiry 55.

[60] (n 6) 249.

[61] Lisa Ikemoto, 'The Code of Perfect Pregnancy: At the Intersection of the Ideology of Motherhood, the Practice of Defaulting to Science, and the Interventionist Mindset of Law,' (1992) 53 Ohio State Law Journal.

our attitudes regarding women must shift to reflect equality within society, enabling the reformation of legal rules to reflect this.

The Elusive Quincecare Duty

Joy Edogbanya

Litigation concerning the Quincecare duty has increased recently, shedding more light on the importance and applicability of the duty. This paper will explore the scope of the Quincecare duty and how recent cases have developed the law in this area. This paper will also evaluate the implications of this development for banks, FinTechs, and customers, to demonstrate that the law as it stands is unclear and inadequate in apprising parties of their rights and liabilities under the duty. Finally, this paper will recommend the use of a market approach to bring more clarity into this area.

The Quincecare duty was first described in *Barclays Bank plc v Quincecare Ltd* as an obligation on a bank to refrain from making a payment despite an instruction on behalf of the customer to pay, where the bank has reasonable grounds for believing that the payment is part of a scheme to defraud the customer.[1] This type of fraud is typically perpetrated by trusted agents of the customer who are authorised to withdraw money from the customer's account.[2]

In *Barclays*, Steyn J held that the Quincecare duty was an implied term of the contract between a bank and its customer that the bank should use reasonable care and skill in executing the customer's orders.[3] This is because when acting on payment instructions, the bank acts as the customer's agent,[4] and there is no logical or sensible reason why bankers should be immune from using reasonable care and skill in the exercise of their duties when acting as agents.[5] This is congruent with the duty of reasonable care and skill implied by section 13 of the Supply of Goods and Services Act 1982.[6]

While the court recognises the danger of fraud on customers, it is also aware that failure or delay in obeying payment instructions may expose banks to liability for consequential losses resulting from that failure or delay. Thus, the court strives to strike a balance between protecting customers from fraud and imposing an onerous burden on banks. Hence, under this duty, the court does not expect banks to carry out full investigations into payment instructions.[7]

[1] Barclays Bank Plc v Quincecare Ltd [1992] 4 All ER 363.

[2] Singularis Holdings Ltd (In Liquidation) v Daiwa Capital Markets Europe Ltd [2019] UKSC 50 [35].

[3] Barclays (n1) 376.

[4] Ibid.

[5] Ibid.

[6] Singularis (n 2) [1].

[7] Barclays (n 1) 376.

Therefore, the Quincecare duty is triggered when a bank is 'put on inquiry'.[8] 'Put on inquiry' means that the bank has reasonable grounds (although not necessarily proof) for believing that a payment order is an attempt to misappropriate the customer's funds.[9] There are no set guidelines on when banks will be considered to be put on inquiry, and the court is hesitant to lay down any such rules.[10] Hence, it is generally acknowledged that whether or when a bank is put on inquiry will depend on the facts of the case.[11]

When the duty is triggered, the standard expected of the bank is that of a prudent banker put on inquiry.[12] There is, however, no guidance on how a prudent banker would act. In *Barclays*, the Quincecare duty was perceived as a negative duty on the banker to not comply with the payment instruction. However, in *Federal Republic of Nigeria v JP Chase Morgan*, it was held that this duty requires something more than a negative duty on the banker.[13] As "something more" was not expanded upon by the court, the standard of the prudent banker remains unclear.

A REVIEW OF THE RECENT CASE LAW

The following are discussed below:

- Singularis Holdings Ltd (In Liquidation) v Daiwa Capital Markets Europe Ltd [2019] UKSC 50 ("Singularis")
- JP Morgan Chase Bank NA v The Federal Republic of Nigeria [2019] EWCA Civ 1641 ("JP Morgan")
- Hamblin and another v World First and another [2020] EWHC 2383 (Comm) ("Hamblin")
- Philipp v Barclays Bank UK Plc [2021] EWHC 10 (Comm) ("Philipp")

Singularis

Singularis was a company set up to manage the personal assets of Mr Maan Al Sanea, who was its sole shareholder, a director, chairman, president, and treasurer. Mr Al Sanea also owned an influential business group called the Saad Group. Daiwa was holding money for Singularis.
On the instructions of Mr Al Sanea, over the course of a month, Daiwa paid out huge sums of money to bank accounts in the names of three other companies within the Saad group rather than a bank account of Singularis. While Daiwa made some inquiries regarding the purposes of some instructions, it failed to act upon the obvious signs that the purposes given by Mr Al Sanea were a sham.

The court held that any reasonable banker would have realised that there were many obvious, even glaring signs that Mr Al Sanea was committing a fraud on the company as he was clearly

[8] Ibid.
[9] Ibid 363.
[10] Lipkin Gorman v Karpnale Ltd [1989] 1 WLR 1340, 1356.
[11] Ibid.
[12] Barclays (n 1) 363.
[13] [2019] EWCA Civ 1641 [21].

using the funds for his own purposes and not for Singularis' benefit.[14] Further, the court held that directors' actions cannot be attributed to the company because such attribution would "denude the duty of any value in cases where it is most needed".[15] This was the first case where the bank was found liable.

JP Morgan

This was an appeal of a summary judgment decision. JP Morgan held a depository account for the Federal Republic of Nigeria (FRN). JP Morgan argued that the terms of the Depository Agreement between the parties excluded the Quincecare duty.
The court emphasised that the Quincecare duty is implied into the contract between a bank and the customer,[16] and that parties can only exclude the duty through clear words.[17] If unexcluded, however, the bank's duty is "something more" than a negative duty.[18]

Hamblin

Hamblin was an application for summary judgment and/or strike out by the Defendants. The company, Moorwand NL Ltd, came under the control of fraudulent individuals who used it as a vehicle of fraud. The company had no registered directors, and the claimants were persuaded to transfer sums of money to the company through an account which was held with World First Ltd, a Payment Service Provider (PSP).
The court held that it is difficult to see how the absence of registered directors could not have been ascertained by reasonable enquiry,[19] and that the absence of registered directors does not preclude a claim for breach of Quincecare duty.[20] This case is interesting because it extends the scope of the Quincecare duty to PSPs.

Philipp

The claimant, a natural person, was persuaded by fraudsters to make two Authorised Push Payments (APP) from her bank account. She claimed that the bank failed to exercise reasonable care and skill pursuant to the Quincecare duty in obeying her payment order.

The court held that banks' primary duty is to act on payment instructions.[21] The court also held that where the customer is a natural person, the customer's instructions are not just apparent, but should be taken by the bank to be real and genuine.[22] Also, the fact that the payment instruction

[14] Singularis Holdings Ltd (In Liquidation) v Daiwa Capital Markets Europe Ltd [2017] Bus Lr 1386 [192].
[15] Singularis (n 2) [35].
[16] JP Morgan (n13) [12].
[17] Ibid [71].
[18] Ibid [21].
[19] Ibid [16].
[20] [2020] EWHC 2383 (Comm) [37].
[21] [2021] EWHC 10 (Comm) [117].
[22] Ibid [164].

was induced by deceit does not make the instruction any less genuine concerning the intended destination.[23] Further, imposing an obligation to second-guess the customer's instructions would place an onerous and commercially unrealistic obligation on banks.[24] Thus, APP fraud does not come within the scope of the Quincecare duty.

IMPLICATIONS OF THESE DECISIONS

It is important to note that three of the cases above are summary judgment and/or strike out applications.[25] Although they are subject to their decisions at trial, they contribute to the development and current body of law in this area.
The analysis here will be divided into three categories: traditional banks, FinTechs, and customers.

Traditional Banks

It should be noted that despite the broadening of the Quincecare duty in *JP Morgan* and *Hamblin* as discussed above, so far, there has been no corresponding increase in finding banks liable for breach of the duty. Further, in *JP Morgan*, the court expressed the possibility of excluding the Quincecare duty altogether through clear words.
As acknowledged in *Barclays*, not all cases will be clear cut.[26] However, case law shows that banks have to meet a high threshold before they are found liable. This is demonstrated by the fact that in *Singularis*, the only case where a bank was found liable, the trial judge described the breach as "glaring" and "obvious",[27] and the Supreme Court held this finding of the trial judge to be incontrovertible.[28] This, therefore, begs the question of whether short of this glaring and obvious breach, a claim for breach of the Quincecare duty is unlikely to succeed. If this is the de facto standard, it is a very high threshold, and claimants may find it challenging to succeed under this regime.

Thus, these decisions appear to show that the balance is tilted in favour of the banks as the courts appear to be hesitant in finding banks liable. This win, however, is only partial because banks still do not have clarity on when exactly they are put on inquiry or what is fully expected of them when put on inquiry. This uncertainty makes this area of law a landmine for banks to navigate.

FinTechs

FinTech is the intersection of finance and technology, and describes the innovative way technology has developed to cater to financial services.[29] The FinTech industry is designed to

[23] Ibid.
[24] Ibid [171].
[25] JP Morgan [2019] EWCA Civ 1641; Hamblin [2020] EWHC 2383 (Comm); and Philipp [2021] EWHC 10 (Comm).
[26] Barclays (n1) [376].
[27] Singularis (n14) [192].
[28] Singularis (n2) [12].
[29] Lerong Lu, 'Financial Technology and Challenger Banks in the UK: Gap Fillers or Real Challengers?' (2017) JIBLR 32(7) 273, 274.

disrupt the traditional banking industry, and it offers a range of services, including banking, online lending, payment, wealth management, insurance and virtual currency.[30]
FinTech services are used by individuals and businesses alike,[31] potentially bringing them under the Quincecare duty, especially following the decision in *Hamblin*.[32] Absent any guidance on this area, they may be in even more uncertain waters than traditional banks, opening them to liability, which is undesirable. Thus, there is an increased need for clarity in this area.

Claimants

It is undisputed that the Quincecare duty is an available recourse for corporate claimants.[33] However, the court has clarified that this duty is owed to the corporate entity as a legal person, not its shareholders,[34] directors,[35] or creditors.[36] This is a win for claimants because it means that the companies' claims under the Quincecare duty are unlikely to be barred by actions of their agents.

On the other hand, absent any third-party intervention, the Quincecare duty is unlikely to be implied into contracts between banks and natural persons.[37] This is because in addition to the points made under the analysis of *Philipp* above, the Quincecare duty does not contain anything about a bank protecting customers from their own decisions.[38] Thus, unless in exceptional circumstances, natural persons are unlikely to find redress under the Quincecare duty.

In any event, the success rate for claimants is low, and it remains to be seen if this will change. Thus, the current application of the Quincecare duty encourages claimants to plead the duty as a last resort.

THE CASE FOR REFORM

The persisting uncertainty in this area makes it ripe for litigation, generating disruption and expenses for the parties. Therefore, it is in the interest of all parties, as well as commercial reality, to know and understand the true scope of the Quincecare duty.

As demonstrated above, the court is hesitant to impose any guidelines in this area. However, absent any form of guidance, banks and customers will be navigating this duty in the blind.

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[30] Ibid.
[31] PWC, 'Customers in The Spotlight: How FinTech Is Reshaping Banking' (PWC, 2017) 276 <https://www.pwc.com/gx/en/industries/financial-services/publications/FinTech-is-reshaping-banking.html> accessed 15 November 2021.
[32] Hamblin (n18).
[33] Singularis (n2) [35].
[34] Ibid.
[35] Hamblin (n18) [38].
[36] Stanford International Bank Ltd v HSBC Bank Plc [2020] EWHC 2232 (Ch)).
[37] Philipp (n20) [180].
[38] Ibid [161].

Although the recent increase in litigation in this area has admittedly helped to outline the scope and application of the duty, this piecemeal approach by the court is not favourable because it is expensive and commercially unattractive.

It is expensive

As there is no set guide in this area, the law on Quincecare duty is developed by bringing cases forward. It is arguable that as this duty arises in the common law, it is natural for the duty to be developed in this way. However, this is not necessarily the right approach. There have been duties arising in common law that have been expanded upon and given structured rules in the cases that they were developed in, such as the elaborate three stage test in *Caparo Industries Plc v Dickman*.[39]

Hence, while it is agreed that case law develops the law, this argument does not hold here because currently, there is only the outline of a rule in the Quincecare duty. As such, parties are constantly trying to work out whether their claims fall inside or outside the outline. This creates a need to litigate every arising issue, which is very costly for the parties, and diverts the court's resources.

Commercially unattractive

Barclays was decided in 1992, and it has taken almost thirty years to reach the development that the law on Quincecare duty has reached now, which is still uncertain in many regards. Banking and financial services are constantly evolving, and fraud in this sector increases yearly.[40] This means that the law on the Quincecare duty is not developing fast enough to meet the developments in the banking industry and/or fraud schemes. Consequently, the complexity of these evolutions may make it more challenging to identify when a bank has breached their duties or what is expected of banks, except in glaring cases like *Singularis*, which is inadequate. It, therefore, follows that parties will not be fully aware of their potential liabilities until after the fact. As seen in *JP Morgan*, this is bad for commercial certainty.

PROPOSAL FOR CHANGE

I recommend a market-based approach to this duty. Under this approach, the regulatory authorities like the FCA can develop guidelines to help banks identify fraud schemes, factors to put banks on inquiry regarding these schemes, and how to navigate their duties when put on inquiry. The regulators are best placed to provide this guidance because they are up to date on the services offered by banks and the fraud schemes facing those services. As they have a clear view of the issues before them and the manners in which they present, they are adequate to advise the banks on what actions to take.

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[39] [1990] 2 AC 605.

[40] UK Finance, '2021 Half Year Fraud Update' (UK Finance, 2021) 1 <https://www.ukfinance.org.uk/system/files/Half-year-fraud-update-2021-FINAL.pdf> accessed 16 November 2021.

An argument against this recommendation is that if certain scenarios are recurring, then the court can easily clarify those scenarios through litigation. Similarly, it can also be argued that if the scenarios are vastly different, then the guidelines would be of limited use. Finally, it could also be argued that it is for the court to determine whether there has been a breach of the Quincecare duty, not regulators or any other expert.

These arguments are unconvincing for three main reasons. Firstly, as is demonstrated in the snapshots of recent cases above, the cases in this area are very different. Hence, the first argument is invalid. In any event, litigation requires considerable amounts of time and resources. This means that the parties involved, as well as the wider industry and potential claimants would remain in uncertainty until the resolution of the case, which is an undesirable situation.

Secondly, it is generally impossible to prepare for every scenario, and neither statutes, case law nor any other form of guidance has ever claimed to provide for every situation that may arise in that area. Regardless, they still provide guidance, even in novel cases. Any guidance will be very helpful to banks as it would take a lot of uncertainty from the current status, and encourage parties to negotiate the extent of the duty as it arises in their contracts.

Finally, in *Philipp*, the court stated that evidence as to banking practices should not encroach upon the court's identification of the relevant legal duty owed by a bank.[41] Although any guidance provided by regulators may serve as this evidence of best practices, it will not infringe on the court's jurisdiction to determine the scope and application of the Quincecare duty. This is because it would just be basic guidance for the banks to follow, and it would still be for the court to determine whether the bank has breached its duty in the instant case. This is harmonious with other FCA guides, such as the FCA's Financial Crime Guide: A firm's guide to countering financial crime risks (FCG).[42] Therefore, guidelines set by regulators will not be problematic for the court's jurisdiction.

Conclusion

There is a lot of uncertainty concerning the Quincecare duty, and it would take some more cases to bring the much-needed clarity and guidance that banks and their customers need. This is very likely to take time and resources. To bring some clarity, regulators can outline procedures for banks to follow when put under inquiry in certain scenarios. In the meantime, banks can clarify the scope of their duties, which following *JP Morgan*, is very likely to be carefully drafted to exclude liability for breach of the Quincecare duty, ultimately leaving claimants with even more limited avenues for redress.

[41] Philipp (n20) [145].

[42] FCA, 'FCA's Financial Crime Guide: A Firm's Guide to Countering Financial Crime Risks (FCG)' (2021) <https://www.handbook.fca.org.uk/handbook/FCG.pdf> accessed 16 November 2021.

The Nationality and Borders Bill: A Critical Analysis

Guy Lockwood

The system is broken. We stand by our moral and legal obligations to help innocent people fleeing cruelty from around the world. But the system must be a fair one [...] Alongside the bill, we are also taking forward an ambitious transformation programme of secondary legislation, rules changes and operational reforms in the coming year. Together, these reforms will create the fair but firm system the public expects – and which the government will deliver.[1]

Nationality and Borders Bill: factsheet (published 6 July 2021).

[The] UNHCR must regretfully reiterate its considered view that the Bill is fundamentally at odds with the Government's avowed commitment to upholding the United Kingdom's international obligations under the Refugee Convention and with the country's long-standing role as a global champion for the refugee cause.[2]

UNHCR Observations on the Nationality and Borders Bill, Bill 141, 2021-22, October 2021

At the time of the present paper, the Nationality and Borders Bill ("the Bill")[3] – deriving from the Government's 'New Plan for Immigration' ("the Plan")[4] presented to Parliament earlier this year – has reached its report stage in the House of Commons.

Both public and political discourse of the last decade have been dominated by the issues posed by the contemporary mass migration crisis. It is, indeed, almost fitting that the Bill – 'the most comprehensive reform [of the UK asylum system] in decades'[5] – reaches its final stages in Parliament a decade since the Arab Spring, from which a refugee crisis sprung, and the political and legal landscape of European states changed indefinitely.

'Immigration' has subsequently formed a significant part of governing policies across Europe, and fuelled Eurosceptic movements across the continent.[6] Within the UK, mass immigration was the

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[1] The Home Office, 'Policy paper: Nationality and Borders Bill: factsheet' <https://www.gov.uk/government/publications/the-nationality-and-borders-bill-factsheet/nationality-and-borders-bill-factsheet> accessed 5 December 2021.

[2] UNHCR, 'UNHCR Observations on the Nationality and Borders Bill, Bill 141, 2021-22 <https://www.unhcr.org/uk/615ff04d4.pdf> accessed 4 December 2021.

[3] Bill 141, 2021-22, available at: https://bills.parliament.uk/bills/3023/publications.

[4] New Plan for Immigration, available at: https://www.gov.uk/government/consultations/new-plan-for-immigration.

[5] The Home Office, ibid.

[6] See Daniel Stockhemer, Arne Niemann, Doris Unger, Johanna Speyer, 'The "Refugee Crisis," Immigration Attitudes, and Euroscepticism (2019), *International Migration Review* <https://journals.sagepub.com/doi/abs/10.1177/0197918319879926?journalCode=mrxa> accessed 5 December 2021.

driving campaign message behind the Vote Leave campaign,[7] and is determined by many as the most significant factor in the subsequent referendum result to leave the European Union ("EU") in 2016.[8] On the continent, the EU-Turkey Refugee Deal (2016)[9] represented a landmark agreement in international immigration policy: if not through appeasement, through necessity.

The present paper seeks to introduce and review the significant legal factors that surround the Bill and its implementation. The Bill – in its genesis, conceptualization, and ultimate enforcement – demonstrates a now-familiar tension between domestic and international law. Whilst a comprehensive scrutiny of the Bill would be beyond the scope of the present paper, there are several significant factors that can be analysed. First presented is a summary of asylum and refugee resettlement, and the UK's most significant recent immigration policy work. Having done so, the paper shifts focus to the contents of the Bill itself, and its compatibility with UN treatises and human rights law.

Asylum and refugee resettlement, and the UK – a brief note

There are about 34.4 million refugees globally today, and over 39 million if to be included are Palestinian refugees in the Middle East.[10] More than 85% live in 'lower or middle income' countries, and 73% are hosted by States which neighbour their countries of origin. Within the UK itself, an estimated 388,000 foreign-born people living in the UK – as of 2019 – originally came to the UK to seek asylum: this made up 5% of the UK's foreign-born population in 2019 of 9.48 million, and 0.6% of the UK's total 2019 resident population of around 67 million. Of those having found asylum, 56% had lived in the UK for sixteen years or more.[11] When compared against other EU member states, in 2020 the UK ranked seventh in the absolute number of people to whom it gave protection, including resettled refugees.[12]

[7] Mary Bulman, 'Brexit: People voted to leave EU because they feared immigration, major survey finds' (*The Independent*, 28 June 2017) < https://www.independent.co.uk/news/uk/home-news/brexit-latest-news-leave-eu-immigration-main-reason-european-union-survey-a7811651.html> accessed 4 December 2021.

[8] See Anchal Vohra, 'The Arab Spring Changed Everything – in Europe' (*Foreign Policy*, 24 December 2020) < https://foreignpolicy.com/2020/12/24/the-arab-spring-changed-everything-in-europe> accessed 4 December 2021.

[9] See Kyilah Terry, 'The EU-Turkey Deal, Five Years On: A Frayed and Controversial but Enduring Blueprint' (*The Online Journal of the Migration Policy Institute*, 8 April 2021) < https://www.migrationpolicy.org/article/eu-turkey-deal-five-years-on> accessed 6 December 2021.

[10] UNHCR, 'UNHCR Observations on the Nationality and Borders Bill, Bill 141, 2021-22.

[11] Peter William Walsh, 'Asylum and refugee resettlement in the UK' < https://migrationobservatory.ox.ac.uk/resources/briefings/migration-to-the-uk-asylum/> accessed 5 December 2021.

[12] 'Dealing first with the regular in-country asylum process, in 2020, Germany granted asylum or another form of protection to around 62,000 people (at initial decision, excluding appeals) – more than any other EU country, and equivalent to 29% of all people offered asylum-related protection in the EU that year (UK excluded). The UK ranked seventh, offering asylum-related protection to around 9,000 people at initial decision. When adjusting for population size, the UK ranks 19th among the EU, having granted protection in 2020 to 0.1 asylum seekers per 1,000 of its resident population of 67 million'. See: ibid.

Dramatic changes in the number of people seeking asylum in Europe are driven, in large, by geopolitical events. Asylum seekers flee countries embroiled in conflict: the majority in Europe have fled, or continue to flee, well-documented political and military oppression, and human rights abuse.[13] It is these 'push' factors that are the ultimate motivation for migration, and served as the pretence for the European migrant crisis culminating in 2015, wherein 1.3 million people requested asylum in Europe.[14]

Further research has been developed regarding the exact means by which refugees find themselves at their end destinations. Put otherwise, the 'pull' factors surrounding mass migration are often cited to explain patterns of asylum applications, and the differential application rates across the continent.[15] As is well-noted, two assumptions underpin the contemporary understanding of the 'decision making of asylum seekers': that i) most asylum seekers 'are in reality economic migrants who make choices about where to seek asylum based on opportunities for employment and access to welfare benefits'; and ii) that asylum seekers have 'a sufficiently detailed knowledge about the asylum systems of European countries and the rights to work and welfare to make rational and informed choices about destinations'.[16] Both claims are disproved,[17] and are returned to later in the present discussion in criticism of the Bill.

The UK is a signatory to the UN 1951 Refugee Convention as well as the 1967 Protocol (together, "the Refugee Convention"). It has a subsequent responsibility to offer protection to people who seek asylum who fall under the legal definition of a 'refugee', and moreover not to return (or refoule) any displaced person to places where they would otherwise face persecution.[18] The issue of immigration itself has been a constant in political policy across both major political parties in the UK – the Conservative Party, the Labour Party – since the 1990s, founded on concerns about the high number of asylum applications compared to the mid-1980s.[19] Major legislation includes the Nationality, Immigration and Asylum Act (2002),[20] making provisions about international projects connected with migration, but notably found by the European Court to have breached Article 3 of the European Convention on Human Rights concerning support to asylum seekers.[21] More recent policy decisions include the 'hostile environment policy' belonging to the Immigration Act 2016:[22] a set of administrative and legislative measures designed to make staying

[13] Crawley, Heaven, 'Chance or Choice? Understanding why asylum seekers come to the UK' (2010), *Refugee Council* < https://www.refugeecouncil.org.uk/wp-content/uploads/2010/04/Chance-or-choice-2010.pdf> accessed 4 December 2021.

[14] Ibid.

[15] Ibid.

[16] Ibid.

[17] Ibid.

[18] See 31., UNHCR, 'UNHCR Observations on the Nationality and Borders Bill, Bill 141, 2021-22.

[19] Liza Schuster, 'A comparative analysis of the asylum policy of seven European governments', *European Journal of Migration and Law* 6, 47-65.

[20] Nationality, Immigration and Asylum Act 2002

[21] Ibid.

[22] Immigration Act 2016.

in the UK as difficult as possible for persons without leave to remain, in the hope that they may 'voluntarily leave'. A critical report from the Equality and Human Rights Commission ("EHRC") found the Home Office to have broken equalities law in 2020.[23]

The Bill

The Bill put forward is a descendant of the Plan first presented to Parliament by the Secretary of State for the Home Department, in March 2021. The Home Secretary – Priti Patel MP – has put forward the Bill 'to regain sovereignty', wherein 'immigration and asylum policy' has been made 'a priority'.[24] The Plan purports to offer 'clear controls on legal immigration', and seeks to address 'the challenge of illegal immigration'. This system is described as 'collapsing under the pressures of what are in effect parallel illegal routes to asylum, facilitated by criminals smuggling people into the UK'.[25] The 'three major objectives' of the Plan are:

> 1. Firstly, to increase the fairness and efficacy of our system so that we can better protect and support those in genuine need of asylum;
> 2. Secondly, to deter illegal entry into the UK, thereby breaking the business model of people smuggling networks and protecting the lives of those they endanger;
> 3. Thirdly, to remove more easily from the UK those with no right to be here.[26]

The Bill in question seeks to bring the three above objectives into legal effect. Making the system 'fairer and more effective' includes the introduction of temporary protection status, aid with integration, and a reform of nationality law to make it 'fairer and address historic anomalies'.[27] Deterring illegal entry, on the other hand, is bolstered by raising the penalty for illegal entry from six months to four years, and providing additional powers to Border Force. Removing from the UK those who have 'no right to be here' is addressed by introduced visa penalties, expedited processes – including detention – for rapid removal, and inadmissibility of those who 'come here from a country where they could have claimed asylum'.[28]

Scrutiny of the Bill

The above 'three main objectives' of the Bill have received much criticism. It is submitted that that the Bill is incompatible with the obligations the UK has under the Refugee Convention, 'including', according to Amnesty International UK, 'by measures to introduce a unilateral

[23] Amelia Gentleman, 'Home Office broke equalities law with hostile environment measures' (*The Guardian*, 25 November 2020) < https://www.theguardian.com/uk-news/2020/nov/25/home-office-broke-equalities-law-with-hostile-environment-measures> accessed 4 December 2021.

[24] New Plan for Immigration. Available at: ibid.

[25] Ibid.

[26] Ibid., 3.

[27] Bill 141, 2021-22, available at: https://bills.parliament.uk/bills/3023/publications.

[28] Bill 141, 2021-22, available at: ibid.

interpretation of an internationally agreed legal commitment on protecting refugees'.[29] For ease of clarity, the main rebuttals are detailed in response to each of the 'three main objectives' outlined above.

1. 'Firstly, to increase the fairness and efficacy of our system so that we can better protect and support those in genuine need of asylum'.

Asylum procedures in the UK are slow, opaque and under-resourced: this is recognized by the Bill, which notes that 'as of May 2020, 32% of asylum, appeals lodged in 2019 and 9% of appeals lodged in 2018 did not have a known outcome'.[30] The suggested solution towards increased efficacy is to 'introduce a new and expanded "one-stop" process to ensure that asylum, human rights claims, and any other protection matters are made and considered together, ahead of any appeal hearing'.[31] This is, as one significant factor, largely supported: the First-tier Tribunal introduced fundamental procedural reforms last year which has led to a significant increase in the number of asylum appeals resolved without further hearing.[32]

The degree of 'fairness' within the proposed Bill is, however, more greatly scrutinized. The Bill claims – and in doing so, reflects a trope found in public and political discourse – that 'people should claim asylum in the first safe country the arrive in',[33] and that asylum seekers are, themselves, often guilty of 'asylum shopping'. On the one hand unfounded (no 'first safe country' principle can be found in the Refugee Convention, and there is no such requirement under international law) and on the other impractical (if refugees were to remain in the first safe country they encountered, the international system would collapse), most countries which refugees pass through already hold greater numbers of refugees and asylum seekers per population than the UK does.[34]

As a method of externalising the UK's obligations towards refugees, the provisions of 'inadmissibility' within the Bill would deny access to asylum procedures in the UK to those seeking them with any one of five different types of 'connection' to a 'safe third State'; it is noted too, that such a possibility of transfer to third countries appears in a separate clause of the Bill, and is not confined to those whose claims have been found inadmissible.[35] As the UNHCR notes, one the one hand such a principle would not only impact the refugees concerned and fellow host States, but place 'disproportionate responsibility on "first" safe countries both in Europe and further

[29] Amnesty International UK, 'Nationality and Borders Bill: the truth behind the claims' < https://www.amnesty.org.uk/nationality-borders-bill-truth-behind-claims> accessed 5 December 2021.

[30] Bill 141, 2021-22.

[31] Ibid.

[32] UNHCR, 'UNHCR Observations on the Nationality and Borders Bill, Bill 141, 2021-22', 44.

[33] Bill 141, 2021-22.

[34] UNHCR, 'UNHCR Observations on the Nationality and Borders Bill, Bill 141, 2021-22', 5.

[35] Ibid., 29.

afield, and threaten the capacity and willingness of those countries to provide protection and long-term solutions'.[36]

2. Secondly, to deter illegal entry into the UK, thereby breaking the business model of people smuggling networks and protecting the lives of those they endanger

In seeking to 'deter illegal entry into the UK', the Bill imports the higher standard of proof used in civil litigation into refugee determination process, creates accelerated appeal procedures for reasons unrelated to the merits of the claim, and directs the 'decision makers' (here, including judges) to consider giving 'minimal weight' to evidence.[37] In addition to this, such judges are encouraged to 'make adverse credibility findings under circumstances that carry a real risk of unfairness, and lowering the standard for when a crime would be considered serious enough to justify removing a recognised refugee even where doing so would put them at risk of persecution'.[38]

The Bill, to its own detriment, neglects the significance of agents, and the opposite effect the Bill will have on the 'business' without the creation of safe routes in return, which is absent; the Bill, instead, places emphasis on the punishment of asylum seekers themselves. There is a universal consensus that increasing restrictions on migration to Europe lead to little choice in arriving illegally, and that such restrictions have led to what has been described as a 'migration industry' of agents 'upon whom asylum seekers must rely in order to secure access to protection'.[39] As Amnesty International UK have noted elsewhere, such restrictions will 'only increase the reliance of people [...] upon the gangs that remain the sole source of any prospect that people may have to ultimately escape their situations of insecurity, exploitation and deprivation'.[40]

3. Thirdly, to remove more easily from the UK those with no right to be here.'

The Bill recognises that 'known illegal entry in 2020 was around 16,000 people', and that as a result, 'there are now over 10,000 Foreign National Offenders circulating on the streets, posing a risk to the public'.[41] In this respect, the Government has described the Bill as 'aligned with' and 'consistent with' Article 31(1) of the Refugee Convention.[42]

Article 31(1) of the Refugee Convention prohibits the penalization of refugees for their unlawful entry or presence if they arrive in the territory in question from another where their life, or freedom, was threatened, and presented themselves to authorities without delay, and good cause for their unlawful entry or presence.[43] The UNHCR note that the Bill is inconsistent with this Article in multiple ways: penalizing 'Group 2' refugees for their perceived failure to claim asylum elsewhere or promptly, even if they entered the UK lawfully; would empower the Secretary of

[36] Ibid., 5.
[37] Ibid., 42.
[38] Ibid.
[39] See Crawley, 'Chance or Choice?', 42.
[40] Amnesty International UK, 'Nationality and Borders Bill: the truth behind the claims'.
[41] Bill 141, 2021-22.
[42] Ibid.
[43] UNHCR, 'UNHCR Observations on the Nationality and Borders Bill, Bill 141, 2021-22'. 23.

State to impose a penalty on Group 2 refugees that would be inconsistent with international human rights law, namely their right to family unity [Clause 10(5)(d) and Clause 10(6)(a); and creating a new offence of 'arriving' in the UK without a visa (where one is required) [Clause 37], to which there would be no defence based on Article 31(1).[44]

Concluding remarks

Ultimately the Bill in question faces numerous, justified challenges regarding both the human rights of those seeking asylum, and considerable difficulties in justifying the lengths it takes to reform the asylum system within the UK as a whole. In attempting to increase the 'efficacy' and 'fairness' of the asylum system within the UK, the means and arrival of the asylum-seekers are unjustly put forward, as is the externalization of asylum. The discouragement of illegal entry to the UK, too, falls flat as inconsiderate of the resulting implications this will have on the asylum-seekers themselves, and the unfair removal of those already in the UK breaks the Refugee Convention that the UK is a signatory and has an obligation to fulfil.

[44] Ibid., 25.

The personification of legal philosophies in Shakespeare's *Measure for Measure*: a foundational jurisprudential text

Jayne E. Milburn

The most famous dichotomy in legal theory is the jurisprudential debate surrounding legal positivism and legal moralism, and it lies at the heart of *Measure for Measure*. The characters within *Measure for Measure* are consciously written to embody different perspectives on justice. This thesis will explore how Shakespeare personifies judicial philosophies through Duke Vincentio, Angelo, and Isabella, enabling him to communicate specific concerns surrounding magistracy and theories of judging in the 17th Century. When we examine this with an appreciation for Weisberg's 'poethics', it is clear that – through pathos – Shakespeare's characters arouse empathy and compassion in the reader.[1] Ultimately, *Measure for Measure* rebukes a positivist application of the law, with Shakespeare manipulating the plotline to illustrate how the law consistently engages ethical and moral questions. *Measure for Measure* continues to resonate today, with legal scholars reflecting on the text to help reason why judicial independence and the ability to dispense mercy are integral features of a functioning legal system.[2]

Measure for Measure was Shakespeare's response to the unsettling dynastic switch and accession of James I to the English throne. Weisberg's 'poethics' recognises that literature has an innate poetic power; it is able to sensitise legal scholars and make them more empathetic to moral dilemma and this can be transposed to explain the very objective behind 'mirror literature' at the time of James I.[3][4] An example of didactic mirror literature, *Measure for Measure* was written primarily to prompt reflection of the King's magistracy, as it broached the social anxiety felt throughout the commonwealth regarding theories of judging under the new monarch. Although the Royal Proclamation of May 1559 had prohibited plays from dealing with 'matters of religion or of the governance of the estate of the common weale', the topical allusions to London in *Measure for Measure* seem unequivocal.[5] The play was a bold and a direct response to the personal reflections of James I in his title *Basilikon Doron*, a previously private treatise on government which was revised and published upon his accession.[6] Allusions to James I himself are apparent from the outset of the play in the character of Duke Vincentio, who confesses to having been too permissive in his duty to administer the law.[7] Vienna has 'strict statues', but through lack of enforcement

[1] Ian Ward, *Review: From Literature to Ethics: The Strategies and Ambitions of Law and Literature*, Oxford Journal of Legal Studies, Vol. 14, No. 3 (Autumn 1994), 389-400.

[2] Lady Arden, *Denning Society Annual Lecture*, (Lincoln's Inn, Wednesday 25th November 2020).

[3] Ward (n1), 389-400.

[4] See, George Whetstone, *A Mirror for Magistrates* (London, 1576).

[5] The Royal Proclamation of May 1559.

[6] James I, *Basilikon Doron*, (Edinburgh, 1599).

[7] William Shakespeare, *Measure for Measure*, NCV updated version (Cambridge University Press, 2006), (1.3, 22).

'liberty plucks justice by the nose'.[8] The theories of judging which Shakespeare sought to impress upon James I were the exercise of judgment, the temperance of equity and the dispensing of mercy. Influenced by the tactics both of the Emperor Severus and James I's own covert visit to the commercial exchange in London, Shakespeare has the Duke leave the city to observe his commonwealth in disguise.[9][10] While learning about his commonwealth, Shakespeare 'entangles the Duke in practical and personal difficulties, requiring moral choices and personal commitments which a ducal role allows one to evade.'[11] The two characters most important to the Duke's personal development as a magistrate are Angelo and Isabella.

Angelo: The Hypocrisy in Legal Positivism

In the Duke's absence Angelo is expressly conferred the power to enforce the law 'as to your soul seems good'.[12] Albeit, it becomes quickly apparent that juxtaposed against the Duke, Angelo corruptly enforces the 'strict statutes' without exercising any judgment.[13] Rather than support the notion that the validity of law can be determined using 'command theory', (which is to say that the law is determinate if properly commanded and intelligible), Shakespeare insinuates throughout *Measure for Measure* that the law consistently engages ethical and moral questions; opposing the positivist idea that law and morality are separate entities.[14] According to the law, Claudio is found to have committed the capital offence of fornication, despite there being a common law convention that it would be overlooked where there was an engagement to be married.[15] In opening Act 2, Scene 1, Angelo makes a positivist statement. He emphasises that statute will fail to have deterrent effect if it is not enforced since 'custom [would] make it / Their perch and not their terror.'[16] Escalus attempts to temper Angelo's application of the law, saying 'Let us be keen, and rather cut a little / Than fall and bruise to death', alluding to the fact that Angelo may be far from virtuous himself. [17]

At the start of the play Angelo appears to embody Puritan ideals, similar to those of the pamphleteer Stubbes who vocally contested lax magistracy.[18] Stubbes was the target of retaliations by Nashe, who claimed extremist Puritans critique 'every corner of the commonwealth, correcting

[8] ibid, (1.3.20, 27-29).

[9] Thomas Elyot, *The Image of Governance and Other Dialogues of Counsel* (1533-1541), ed David R. Carlson (Modern Humanities Research Association, 2018).

[10] Paul Raffield, *Shakespeare's Imaginary Constitution: Late Elizabethan Politics and The Theatre of Law*, (Hart, 2010), 195.

[11] Shakespeare (n7), *Introduction*, 38.

[12] ibid, (1.1.66).

[13] ibid, (1.3.20).

[14] John Austin, *The Province of Jurisprudence Determined*, (Cambridge University Press, 2009).

[15] Raffield (n10), 204.

[16] Shakespeare (n7), (2.1, 3-4).

[17] ibid, (2.1, 5-6).

[18] Phillip Stubbes, *The Anatomie of Abuses,* (London: W. Pickering, 1583).

the sinne in others, wherewith they are corrupted themselves'.[19] Despite his own writings being banned by official decree, Nashe's perspective was re-emphasised by Shakespeare who highlighted throughout *Measure for Measure* Angelo's own hypocrisy.[20] Shakespeare clearly didn't want for Nashe's observation to be silenced, and adds weight to the Puritan's hypocrisy through normative determinism; Angelo's name associating him to the 'fallen angel' being a constant reminder for the reader.

Despite Escalus' counsel, Angelo does not engage judgment but in his devotion to duty orders the execution of Claudio. Shakespeare writes proleptically, revealing that Angelo too will fall victim to the same desire, in a key passage which highlights the injustice of the current legal system resulting from a formalistic approach to enforcing the law. It is emphasised by rhyming couplets and intended by Shakespeare to provoke reflection. It is voiced by Escalus: 'Well, heaven forgive him, and forgive us all. / Some rise by sin and some by virtue fall, / Some run from breaks of ice and answer none, / And some condemnèd for a fault alone.'[21] Shakespeare teaches the reader that it would be wrong to strictly enforce the law without exercising judgment – introducing them to the concept of equity. This notion was strengthened during the Renaissance when the writings of Aristotle were re-visited. Aristotle defined equity as 'a rectification of law where law is defective because of its generality', saying 'now we observe that everybody means by Justice that moral disposition which renders men apt to do just things'. And so, this teaches the reader they must look to Claudio's intention, not just his act.[22][23]

Claudio asks his sister Isabella to plead on his behalf, however Angelo is tyrannical and exploits his position to importune Isabella into sacrificing her virginity in exchange for her brother's life. He responds, 'it is the law not I who condemn your brother.'[24] Angelo 'scarce confess that his blood flows', and although we witness his own internal torment regarding his lust for Isabella through the mode of soliloquy, this does not make him reconsider Claudio's sentence, illustrating the 'menace of judicial integrity and impartiality without compassion and connection.'[25][26] Poethically, this is interesting. Angelo, who can only see the law in its objective context, is less empathetic to Claudio compared to the reader who can, by virtue of poetic communication, appreciate the human nature and intention behind the offence he committed.

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[19] Shakespeare (n7), *Introduction*, 3-4; Thomas Nash, *The Anatomy of Absurditie* (London: Thomas Hackett, 1589). <https://onlinebooks.library.upenn.edu/webbin/book/lookupid?key=olbp32593> accessed 09-11-2021, 21

[20] Shakespeare (n7), *Introduction*, 5.

[21] ibid, (2.1, 37-40).

[22] Kieran Dolin, *A Critical Introduction to Law and Literature* (Cambridge University Press 2007), 20; Aristotle, *Nicomachean Ethics: Book V*.

[23] Aristotle, (n22), 1.[3].

[24] Shakespeare (n7), (2.2, 83).

[25] ibid, (1.3.53).

[26] Paul Raffield and Gary Watt, *Shakespeare and the Law*, (London: Bloomsbury Publishing 2008), Erica Rackley, *Judging Isabella*, 74.

Isabella: Appealing to Christian Mercy

The title *Measure for Measure* alludes to the religious sentiment 'For in the same way you judge others, you will be judged, and with the same measure you use, it will be measured against you' (Matthew 7.1-2).[27] At the time of publication, the law was enacted in coherence with the theories of justice and equity within Christian theology. It is the character of Isabella who embodies the Christian doctrine at the time *Measure for Measure* was written, an early version of legal moralism. Through normative determinism the reader is shown the extent of Isabella's virtue. The word 'Bella' relating to her attractive beauty, but also the sense that she is 'fair' in justice and mercy. Isabella has pious beliefs; she believes that she will encounter purgatory if she sleeps with Angelo in exchange for her brother's life. This is the apotheosis of Isabella; in elevating her to a somewhat divine status Shakespeare is able to communicate another layer of morality.

In Act 2, Scene 2 which contains Isabella's main plea, she impresses upon Angelo Claudio's point of view, claiming that had it been the other way around Claudio would have shown mercy where Angelo has not.[28] In line with the philosophy Isabella embodies, she beseeches Angelo by appealing to the Christian doctrine of mercy. This is a clear moment where Shakespeare juxtaposes the mercy of the new law against the positivism of the old testament. This is de-stabilising but is a purposeful move by Shakespeare to demonstrate how fallible the magistrate's current application of justice is. Isabella responds to Angelo's bribe by saying 'it is excellent / To have a giant's strength, but tyrannous / To use it like a giant'.[29] Isabella is arguably the raisonneur for Shakespeare's own judicial statement when she teaches Angelo that he has discretion at his disposal. 'The power to grant mercy is not in the party's gift but is an aspect of judicial power.'[30] Lady Arden astutely suggests that 'the key concept in *Measure for Measure* is what has become to be known as judicial independence, which was starting to emerge in the writings and judgments of Cooke when Shakespeare was writing his plays.'[31]

Duke Vincentio: A Reformed Ruler and 'Measured' Approach to Justice

Upon the Duke's return to the city he is still in a quandary of how to handle Claudio's offence and has to be tutored by Isabella, who reminds him that as magistrate he has the prerogative duty to ensure equity to mitigate the rigours of the law. Ultimately, Shakespeare has the Duke communicate that a moral compass is more virtuous than an unyielding adherence to statute. He does this through letting Claudio off of his offence because he was truthful about his sinful act.

The Duke had the divine right of Kings – 'a political and religious doctrine of royal absolutism. It asserts that a monarch is subject to no earthly authority, deriving his right to rule directly from

[27] The Holy Bible, *NIV* (Biblica 2011), *Matthew* (7.1-2).

[28] Shakespeare (n7), *Introduction*, 35 (2.2.65-7).

[29] ibid, (2.2, 110-112).

[30] Arden, (n2).

[31] ibid.

the will of God."[32] It is apposite to note that while he was observing the commonwealth the Duke was disguised as a monk: a metaphor for God's omniscience, as he continued to guide the other characters. However, the fall of Angelo taught the Duke that 'absolute power corrupts absolutely.'[33] 'Shakespeare shows the Duke – himself an absolute ruler – once stripped of his power, driven to the most frantic ingenuity in attempting to frustrate the absolute ruler's tyranny.'[34] Thus, the Duke returns to Vienna a reformed ruler. This is a clear Shakespearean rebellion against the absolute monarchy advocated by James I.

Shakespeare was influenced by the renowned constitutional theorist, Hooker, on what constituted ideal governance, and the use of his theories within *Measure for Measure* suggest that there is some veracity behind the claim that Hooker's statements amount to an early expression of the rule of law principle.[35] Shakespeare recognises that Angelo has to be punished. The Duke says, 'the very mercy of the law cries out most audible, [...] An Angelo for Claudio, death for death'. Resolving that 'He dies for Claudio's death'.[36] This catalectic line leads the audience to feel as though the Duke's decision is final, and not to be rejected. But again, Isabella (read: morality) steps in when she pleads on behalf of Marianna for mercy to be shown toward Angelo. "Justice o royal Duke [...] / Justice, justice, justice, justice".[37] This resonates with the Duke, and the legal resolution of the play sees the Duke use his own judicial discretion.

Shakespeare is espousing a development of the law and has shown this through the failure of strict statues; the evolution of Christian mercy, and through to the notion that judgment can be exercised to develop the law equitably in individual cases. [38] The latter is what equates to true justice. Judges 'must be above corruption, disinterested in the issue to be determined, and they must use judgment when exercising their judicial power.'[39] Shakespeare wrote not just about the "law" but 'about different forms of law, the most effective of which is that exercised by the Duke'.[40] The Duke delivers a more measured approach to justice, half way between the ideologies of Angelo and Isabella, conjuring up a picture of the scales of justice. It is clear the reason why Shakespeare wrote about law in *Measure for Measure* was to re-emphasise the Aristotelian idea that temperance is integral to good governance, and that James I should look to Elizabeth, the previous ruler, as a mirror of good adjudication.[41]

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[32] The New World Encyclopaedia, <https://www.newworldencyclopedia.org/entry/Divine_Right_of_Kings> accessed 09-11-2021.

[33] eds. J. N. Figgis and R. V. Laurence, *Historical Essays and Studies*, (London: Macmillan, 1907) Sir John Dalberg-Acton, *Letter to Bishops Mandell Creighton*, (April 5th 1998).

[34] Shakespeare (n7), *Introduction*, 42.

[35] Richard Hooker, *Of the Lawes of Ecclesiastical Politie* (London: William Stansbye, 1622).

[36] Shakespeare (n7), (5.1.435).

[37] ibid, (5.1, 20, 25).

[38] Arden, (n2).

[39] ibid.

[40] Raffield (n10), 190.

[41] Hooker, (n35)

'Literature, it is said, sheds light on law's gaps, rhetoric, and moral stance.'[42] *Measure for Measure* helped to broaden the discourse surrounding the obligations of those who administer justice, and theories of judging. Poethical jurisprudence distinguishes the concept of natural law from ethics; it does not believe that either are founded on a theology, which was the consensus when *Measure for Measure* was written. Instead, ethics can be reconceptualised as an appreciation of how others feel, and this can be achieved through poetic communication. Therefore, Shakespeare's exploration into the exercise of judgment will continue to resonate for as long as there remains a dichotomy between legal positivism and legal moralism. 'Like law, [literature] makes use of a canon of great works and an evolving concept of tradition, in which texts from the past are consulted for illumination of the present'.[43] Some critics even go so far as to say that 'in the twentieth century [onward], Shakespeare doesn't mean, *we* mean *by* Shakespeare.'[44] Textual indeterminacy means that, as legal scholars, we largely interpret in the context of the present-day, reflecting on texts such as *Measure for Measure* to help reason why we have developed and retained concepts such as judicial independence.[45] One concept that is clearly different is our ability to dispense mercy in a way which is now distinct from religious theology having become its own secular legal concept, as propounded by Hooker.[46] It is for reasons such as these that make this canonical work a foundational jurisprudential text.

[42] Jane Baron, *Law, Literature and the Problems of Interdisciplinarity*, The Yale Law Review Vol. 108, No. 5 (March 1999), 1060.

[43] Dolin, (n22), 20.

[44] Terence Hawkes, *Meaning by Shakespeare*, (Routledge, 1992), *Abstract.*

[45] Arden, (n2).

[46] Raffield, (n10), 212; Hooker, (n35), 184, Bk V.I.

Should the 'Hybrid Order' under Section 45A of the Mental Health Act 1983 be abolished?

Jessica Mortimer

The 'hybrid order' under S.45A of the Mental Health Act 1983 enables higher courts to direct psychiatric hospital admission for offenders (facing sentence for an offence not fixed by law), while still imposing a prison sentence.[1] If the available treatment in hospital is later deemed unsuccessful, or the individual's mental health improves to the point where hospital treatment is no longer required, then that person may be transferred to prison to serve the remainder of their sentence. Clinical and ethical concerns have typically limited its use; however, following guidance in *R v Vowles* [2015] EWCA Crim 45, *R v Edwards* [2018] EWCA Crim 595 and the Sentencing Guidelines 2020 emphasising the importance of a "penal element" in sentencing, judges have come under increased pressure to issue hybrid orders.[2]

This essay will argue that the s.45A 'hybrid order' is problematic and should be abolished.[3] Firstly, the history of the hybrid order will be analysed, delineating its transformation from a disposal option where uncertain treatability was the abiding concern, into its current form, where public protection and legal culpability are the principal justifications for its use. These two justifications for the hybrid order will then be critically interrogated. Finally, the proposition of retaining the hybrid order specifically for use in cases involving personality disordered offenders will be considered, and shown to be misguided.

The origins of the hybrid order lie in the Reed Working Group Report 1994.[4] The Working Group recommended the hybrid order for offenders with psychopathic disorder thought to be of uncertain treatability. They envisaged this would encourage psychiatrists to have a 'therapeutic go' with offenders with psychopathic disorder, in the knowledge that, should they fail to respond

[1] Mental Health Act 1983, s.45A(1)

[2] W. Beech, CM. Marshall, T. Exworthy, J. Peay, and NJ. Blackwood, 'Forty-five revolutions per minute: a qualitative study of Hybrid Order use in forensic psychiatric practice', (2019) 30 The Journal of Forensic Psychiatry & Psychology 429, 442

[3] Royal College of Psychiatrists, *Review of the Mental Health Act 1983: The Royal College of Psychiatrists' submission of evidence* (2018) 38

[4] Enys Delmage, Tim Exworthy, Nigel Blackwood, 'The 'Hybrid Order': origins and usage' (2015) 26 The Journal of Forensic Psychiatry & Psychology 325, 327

to treatment, they could be transferred to prison.[5] In 1996, a substantially altered version of the proposal became the subject of a government discussion paper.[6] The government explained that a new order was needed to give courts greater flexibility in cases where treatment will not "address the risk to the public", or where "a punitive element in the disposal is required to reflect the offender's whole or partial culpability".[7] Uncertain treatability was no longer the underlying rationale. Despite widespread condemnation from psychiatrists,[8] the hybrid order as described in the discussion paper was introduced by the Crime (Sentences) Act 1997.[9] Given the subsequent removal of the treatability clause in the Mental Health Act by its 2007 amendment, and its expansion to cover all mentally disordered offenders, the hybrid order no longer has any semblance to the proposal in the Reed Report.[10]

To understand this shift in the purpose of the hybrid order, it is important to appreciate the political climate that it was born into. There had been a number of homicides involving mentally ill offenders who went on to reoffend after release from hospital.[11] This gave rise to widespread concerns about dangerous mentally disordered offenders, and public protection was high on the political agenda – even though, after extensive enquiry, the incidents were largely considered to be unpredictable and unpreventable.[12] Therefore, the hybrid order was introduced not on the basis of reasoned research, but as a reaction to a handful of cases involving former psychiatric patients.[13] A sentencing disposal which was recommended to increase therapeutic endeavours with psychopathic offenders, was instead used by the government as a tool in its 'law and order' drive. This already raises questions about whether it deserves a continued role in our legal system.

A key idea underpinning s.45A is the need to protect the public. The Court of Appeal in *Vowles* was unequivocal that release from prison on a s.45A order is preferable to release from a s.37/41 hospital order in terms of public protection.[14] Release from prison depends on the Parole Board being satisfied that the defendant is no longer a danger to the public and is not at risk of relapsing

[5] Nigel Eastman and Jill Peay, 'Sentencing psychopaths: is the "hospital and limitation direction" an ill-considered hybrid?' (1998) 1998 Criminal law review 93, 96

[6] Home Office, *Mentally Disordered Offenders – Sentencing and Discharge Arrangements; a discussion paper on a proposed new power for the courts* (1996)

[7] Ibid

[8] Derek Chiswick, 'Sentencing mentally disordered offenders', (1996) 313 British Medical Journal 1497; Nigel Eastman, 'Hybrid orders: an analysis of their likely effects on sentencing practice and on forensic psychiatric practice and services', 7 Journal of Forensic Psychiatry 481

[9] Crime (Sentences) Act 1997, s.46

[10] Enys Delmage, Tim Exworthy, Nigel Blackwood, 'The 'Hybrid Order': origins and usage' (2015) 26 The Journal of Forensic Psychiatry & Psychology 325, 329

[11] Ibid 327

[12] Ibid

[13] Eastman and Peay, (n 5) 105

[14] *R v Vowles* [2015] EWCA Crim 45 [48]

into dangerous crime.[15] The released individual is made subject to recall in the public interest should they reoffend. This was contrasted with the perceived greater dangers arising from a hospital order, where release is dependent upon the First Tier Tribunal being satisfied that the patient is no longer suffering from a mental disorder of a nature or degree which makes it appropriate for continued detention, or that it is necessary for the protection of others that the patient continues to receive treatment. Recall to hospital is available only if the patient's mental condition deteriorates.[16] Following *Vowles*, the optimal regime after release was considered again in *Ahmed*.[17] In *Ahmed*, the Court of Appeal held that public protection was better secured by the regime under a s.37/41 hospital order than under the life licence regime. The system of monitoring under the life licence regime was held to be "much less close and much less frequent" and did not provide the same "expert supervision" as the release regime from the s.37/41 hospital order.[18] However, *Edwards* subsequently held that public safety was not necessarily better secured by the conditional release regime under s.37/41 in comparison to that of an offender on licence from s.45A.[19] The judiciary seems adamant that there are circumstances where a s.45A order would enhance public protection over a s.37/41 hospital order. Although, following further evidence on the optimal release regime given in the recent cases of *Rendell*[20] and *Nelson*,[21] it is difficult to see how this position can be sustained.

In *Rendell,* the Court of Appeal heard evidence from Dr Lally, a psychiatrist who had also previously sat on the Parole Board for 12 years.[22] In Dr Lally's experience, in around 90% of cases where the First-Tier Tribunal considered that offender was no longer a risk due to his mental health condition, the Parole Board agreed that the criteria for that offender's release was met.[23] This contradicts the statement in *Vowles* that the First Tier Tribunal takes a much narrower view of the risks to the public than the Parole Board.[24] Dr Lally also explained that the Mental Health Tribunal can impose more robust conditions on the offender's release than the Parole Board, such as a requirement to take their anti-psychotic medication and to abstain from illegal drugs and alcohol.[25] In *Nelson,* Dr Cummings pointed out while a discharged patient can be recalled to hospital in the event of a subtle deterioration in their mental state, such an intervention can only be instigated by a probation officer in the event of the commission of further offences, by which

[15] Ibid
[16] Ibid
[17] *R v Ahmed* [2016] EWCA Crim 670
[18] Ibid [32]
[19] *R v Edwards* [2018] EWCA Crim 595 [34]
[20] *R v Rendell* [2019] EWCA Crim 621; [2020] MHLR 60
[21] *R v Nelson* [2020] EWCA Crim 1615
[22] *Rendell* (n 20) [47]
[23] Ibid
[24] *Vowles* (n 14) [21]
[25] *Rendell* (n 20) [54]

point serious damage may have been caused to the public.[26] Furthermore, the scientific evidence demonstrates that hospital orders are associated with reduced reoffending rates on ultimate release into the community as compared with release from prison.[27] This evidence is notably missing in the guidance in *Vowles* and *Edwards*. It is a "judicial shibboleth" that the Parole Board and probation supervision protect the public to a greater extent.[28] S.45A cannot therefore be justified in terms of protection to the public.

Another justification for S.45A is the need for a penal element to reflect the offender's whole or partial culpability. In *Vowles*, the Court of Appeal stressed that "sound reasons" must be provided for departing from the "usual course" of imposing a sentence with a penal element.[29] Although *Edwards* clarified that *Vowles* "did not provide a default setting of imprisonment",[30] it affirmed the importance of the penal element in a sentence, insisting that "the fact that an offender would not have committed the offence but for their mental illness does not necessarily relieve them of all responsibility for their actions".[31] However, the assessment of legal culpability in the context of mentally disordered offenders can be problematic. While legal responsibility is a binary concept that determines if a defendant is guilty or not guilty, legal culpability measures the extent to which a defendant who is found guilty is *blameworthy* for their actions and determines the nature and extent of the punishment/disposal that should follow.[32] While courts have extensive experience assessing culpability in mentally ordered offenders, this approach does not translate easily to mentally disordered offenders. Freckleton and List have previously highlighted the importance of psychiatric opinion to assist the courts in assessing culpability, to warn them of the risks of drawing inaccurate inferences from the behaviour of the mentally disordered.[33] Contrarily, in *Vowles,* the Court of Appeal advocated scepticism towards psychiatric evidence in culpability assessments, directing courts to "carefully consider all the evidence in each case and not… feel circumscribed by the psychiatric opinions".[34] It may be that psychiatrists prefer their role in the assessment of culpability to be marginal, since involvement in decisions about punishment contravenes their ethics as medical professionals.[35] However, partial culpability is a dangerously

[26] *Nelson* (n 21) [38]

[27] Fazel, Fiminska, Cocks and Coid, 'Patient outcomes following discharge from secure psychiatric hospitals: systematic review and meta-analysis', (2016) 208 British Journal of Psychiatry 17

[28] W. Beech, CM. Marshall, T. Exworthy, J. Peay, and NJ. Blackwood, 'Forty-five revolutions per minute: a qualitative study of Hybrid Order use in forensic psychiatric practice', (2019) 30 The Journal of Forensic Psychiatry & Psychology 429

[29] *Vowles* (n 14) [51]

[30] *Edwards* (n 19) [12]

[31] Ibid [34]

[32] Jill Peay, 'Responsibility, culpability and the sentencing of mentally disordered offenders: objectives in conflict' (2016) 3 Criminal Law Review 152, 154

[33] Ian Freckleton and David List, 'Asperger's disorder, criminal responsibility and criminal culpability' (2009) 16 Psychiatry, Psychology and Law 14, 20

[34] *Vowles* (n 14) [51]

[35] Peay, (n 32)

fluid concept. Without a requirement to carefully consider the psychiatric evidence, it can be used to justify overly punitive approaches to sentencing mentally disordered offenders.[36]

While the Court of Appeal in *Edwards* acknowledged that assessing culpability in an offender with mental health problems "may present a Judge with a difficult task",[37] they insisted it was necessary to consider a penal element to comply with the purposes of sentencing in s.142 of the Criminal Justice Act (CJA) 2003. These are: the punishment of offenders, the reduction of crime (including by deterrence), the reform and rehabilitation of offenders, the protection of the public, and, the making of reparation by offenders to persons affected by their offences.[38] The judgment in *Edwards* appears to have misinterpreted the CJA 2003, since the s.142 sentencing purposes do not apply when dealing with offenders under part 3 of the MHA 1983.[39] Although, even if they did apply, it may be argued that imposing a prison sentence on a mentally disordered offender *undermines* the legitimate purposes of sentencing.

The legitimacy of imprisonment as a form of punishment depends on its interference solely with the offender's right to liberty;[40] however, for mentally disordered offenders, imprisonment may amount to a far more serious infringement on their human rights. Prisons do not have the resources to treat mental illness, which may impact on a mentally disordered offender's right to healthcare.[41] For mentally disordered offenders at risk of suicide, inadequate medical monitoring and treatment in prison can violate Article 3 of the ECHR.[42] As Article 3 is an absolute right, no derogation is permitted.[43] Although prisoners can be transferred to hospital under s.47, on average prisoners wait 100 days to be transferred, and serious harm can occur in this time.[44] Both *Edwards* and *Vowles* failed to acknowledge the risks posed by imprisonment to mentally disordered offenders and how this might negate its legitimacy as a form of punishment. There seems to be an assumption that once an offender has been treated in hospital, they are safe to be punished in the 'usual' way. This is manifestly untrue. The prison environment creates the ideal set of conditions for deterioration of mental health or relapse, hence suicide rates in prison are at record heights.[45]

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[36] Ibid

[37] *Edwards* (n 19) [14]

[38] Criminal Justice Act 2003, s.142

[39] Criminal Justice Act 2003, s.142(2)(d)

[40] United Nations Office on Drugs and Crime, 'Why promote prison reform?' < Prison Reform and Alternatives to Imprisonment (unodc.org) > accessed December 2020

[41] Tim Exworthy, Chiara Samele, Norman Urquia, Andrew Forrester, 'Asserting prisoners' right to health: progressing beyond equivalence' (2012) 63 Psychiatric services 270

[42] Ailbhe O'Loughlin, 'Sentencing Mentally Disordered Offenders in England and Wales: Towards a Rights-Based Approach' (2021) 2 Criminal Law Review 98

[43] Ibid

[44] ibid

[45] Ministry of Justice, *Safety in Custody Statistics, England and Wales: Deaths in Prison Custody to March 2020 Assaults and Self-harm to December 2019* (Ministry of Justice 2020), 1

With respect to the other purposes of sentencing, this essay has already highlighted the superiority of the release regime from a s.37/41 hospital order in terms of deterrence and public protection. A s.37/41 hospital order is also preferable in terms of rehabilitation, especially since, if an offender was transferred to prison and then relapsed, they would be less able to engage in the rehabilitative programmes in prison.[46] Some may argue that a prison sentence is a better way of making reparation to persons affected by the offences. However, research has shown that people tend to have a more understanding approach to sentencing offenders once more is known about their mental state and about the efficacy of interventions made in the name of punishment.[47] Therefore, even if the purposes of sentencing under s.142 of the CJA 2003 did apply to mentally disordered offenders (as the judgement in *Edwards* presumed them to), it is arguable that they weigh *against* the use of the hybrid order.

The final justification for S.45A comes from a recent study examining the attitudes of forensic psychiatrists towards the hybrid order.[48] The psychiatrists in the study thought that the s.37/41 hospital order is the most appropriate disposal option in most cases involving mentally disordered offenders; however, they felt that S.45A has a potentially useful role specifically for personality disordered offenders. This was due to the perceived uncertainty about the therapeutic gains that can be made with personality disordered patients in hospital. This rationale for the hybrid order closely resembles that which was put forward in the Reed Report, but for offenders with all types of personality disorder. However, since the Reed Report, the s.38 Interim Hospital Order has been extended from six months to twelve months.[49] This makes it difficult to justify the use of the hybrid order on the basis of 'uncertain treatability', since s.38 now provides a sufficient time period to assess the treatability of an offender before sentencing. Furthermore, O'Loughlin has argued that the conception of personality disordered offenders being potentially amenable to treatment has allowed greater numbers of 'difficult' prisoners and patients to be drawn into mainstream control strategies.[50] Interventions tailored to their needs are provided, but for those who are unable or who refuse to engage with efforts at their rehabilitation, further coercive methods of preventative detention remain available.[51] There is a danger of the hybrid order being used as another cog in this 'circuit of security'[52], allowing personality disordered offenders to be

[46]Jill Peay, *Imprisoning the Mentally Disordered: A Manifest Injustice?* (London School of Economics and Political Science 2014) [14]

[47] Roberts, Hough, Jacobsen and Moon 'Public Attitudes to Sentencing Purposes and Sentencing Factors: an Empirical Analysis' (2009) Criminal Law Review 771-782

[48]Beech, Marshall, Exworthy, Peay and Blackwood, 'Forty-five revolutions per minute: a qualitative study of Hybrid Order use in forensic psychiatric practice' (2019) 30 The Journal of Forensic Psychiatry & Psychology 429

[49] Crime (Sentences) Act 1997, s.49 (1)

[50] Ailbhe O'Loughlin, 'De-constructing risk, therapeutic needs and the dangerous personality disordered subject' (2019) 21 Punishment & Society 616

[51] ibid

[52] Ibid, quoting Nathaniel Rose, 'Government and control' (2000) 40 British Journal of Criminology 321

treated in hospital, but always ensuring that the prospect of a prison sentence remains open if they fail to respond to treatment.

In conclusion, this essay has examined the justifications for S.45A and shown them to be flawed. Firstly, the idea that S.45A enhances public protection is misguided; in reality, reoffending rates are lower after release from hospital compared to release from prison. Secondly, the fixation on the need for a penal element in sentencing loses sight of the long-standing policy that mentally ill offenders should be diverted away from the criminal justice system. A prison sentence poses exceptional risks to mentally disordered offenders, including a possible violation of their human rights. Finally, S.45A should not be retained specifically for personality disordered offenders of uncertain treatability, as s.38 provides sufficient time to assess the treatability of such offenders before sentencing. There is also a danger that such a policy would be used as another mechanism for preventatively detaining people with personality disorders for as long as possible. Overall, the continued role of the hybrid order in our legal system cannot be justified. Consequently, it should be abolished.

Comparative Constitutional Law: "Electoral Management Bodies should be granted formal constitutional status." Do you agree?

Gabriel Neophytou

According to Trebilcock and Chitalkar, electoral institutions can be studied in a "largely objective manner", making comparative analysis on electoral management bodies (EMBs) "promising".[1] While this may be true, reaching a conclusion to our question on the grant of formal constitutional status will be difficult using an exclusively empirical approach. In many of the quantitative studies analysing EMBs, comprehensive analysis of each country's unique constitutional structure is unfeasible and specific discussion on constitutional status tends to be avoided all-together. Resolving our question might therefore only be achieved through a combined approach involving theoretical, qualitative and empirical analysis.

This essay will consist of three main sections. Section I will outline the role of EMBs, before exploring what granting formal constitutional status might achieve in theory. Section II will explore the question of *how* an EMB might be constitutionalised – and whether there are any principles which drafters should consider when undertaking such a process. Section III will explore the difficulties faced in answering this question uniformly, before arguing that electoral regulation is a process within which EMBs might play an essential but impermanent part. Overall, this commentary will contend that much can be gained from granting formal constitutional status to EMBs but – as with all comparative work – context is critically important; there can be no "one size fits all" approach to designing constitutional electoral institutions.

I

This section, looking first at the role of EMBs and then at the theoretical effects of constitutional entrenchment, begins with a basic premise: elections are a *sine qua non* of effective democracy. The Council of Freely-Elected Heads of Government has stated that "[d]emocracy should be more than a free and fair election, but cannot be less" – a useful articulation of the "bedrock" status of the electoral process.[2] Given this importance, states have increasingly resorted to establishing EMBs for the protective role they supposedly play as "guardians" of electoral systems.[3] Broadly speaking, there are three types of EMB: independent, governmental and mixed. This essay will mainly focus on independent EMBs: institutionally separate bodies created specifically to regulate or manage

[1] Michael Trebilcock, Poorvi Chitalka, 'From Nominal To Substantive Democracy' (2009) 2 Law and Development Review, 192, 193.

[2] Council, Council of Freely-Elected Heads of Government (1996) 22.

[3] Pippa Norris, *Election Watchdogs: Transparency, Accountability and Integrity* (2017) OUP.

elections. Governmental EMBs will usually be located within, and be fully accountable to, a government department. Such EMBs will implement executive policy rather than making decisions themselves. As of 2014, 19% of the world's EMBs can be categorised as governmental, with 61% of these governmental EMBs being located in Western Europe and North America (WENA).[4] This latter statistic is important and we will return to it in the final section of this essay.

Regarding its protective role, EMBs can be vested with various competences ranging from vote counting and voter and candidate registration, to more complex powers including boundary delineation and post-election dispute adjudication.[5] Certainly, given the range of threats facing electoral systems, delegating all election-related matters to a body specifically designed to deal with such matters is an intuitively attractive option. As will be seen, however, the mere establishment of an EMB is not a panacea for all electoral problems: there is no guarantee that such a body will remedy existing deficiencies, nor protect against future electoral impropriety. Constitutional entrenchment, this commentary argues, would help to protect the integral requirement that an EMB be free from external control and manipulation. EMBs that are *de facto* independent and impartial (i.e. able to exercise their functions without partisan or external influence or "capture", in practice as opposed to in law, as postulated by Van Ham and Garnett) are more likely to exercise their functions effectively – thereby strengthening electoral integrity.[6]

Before looking at how *de facto* EMB independence and impartiality might practically be achieved, it is first important to analyse the theoretical case for constitutional entrenchment. While an independent EMB is institutionally separate from the executive and supposedly autonomous in exercising its functions, there is no guarantee that the body will be free from partisan interference. The work of Ackerman usefully articulates this point.[7] Critical of the paradigm tripartite model of government and its inability to protect democracy, Ackerman proposes that a so-called 'integrity branch", "armed with powers and incentives to engage in ongoing oversight … should be a top priority for the drafters of modern constitutions".[8] Distinct from bodies established and delineated through the ordinary passing of statute, and in line with the work of Ackerman, EMBs with formal constitutional status would be created as a "fourth branch" of government (adding to the traditional tripartite structure of the executive, legislature and judiciary). Indeed, such an approach has been taken in various jurisdictions including India, Indonesia and South Africa.

[4] Carolien Van Ham, Steffan Lindberg, 'When Guardians Matter Most' (2015) 30 Irish Political Studies, 454, 457.
[5] Jørgen Elklit, 'Judging Elections and Election Management Quality By Process' (2005) 41 Representation, 189, 195.
[6] Carolien Van Ham, Holly Garnett, 'Building Impartial Electoral Management?", (2019) 40 International Political Science Review, 313, 315.
[7] Bruce Ackerman, 'New Separation of Powers' (2000) HLR, 633.
[8] *Ibid* 691.

Granting an EMB formal constitutional status might serve a dual purpose, which will henceforth be referred to as the two-part theoretical argument for constitutionalisation. Firstly, entrenchment would elevate EMBs to the same level of constitutional authority as the other branches of government: giving the appearance of enhanced integrity to the public, political elites and other stakeholders in the electoral process. The storming of the US Capitol in response to a presidential election not seen as being "fair" (irrespective of the legitimacy of such claims), is a contemporary example of the importance of perceived integrity and "produc[ing] outcomes losers can live with".[9] Secondly, constitutionalisation would theoretically put the regulation and administration of elections beyond the reach of those seeking to manipulate EMBs, with such manipulation being prevented by the legislative supermajority usually required to amend constitutional provisions. In the same way that Ackerman doubts elected politicians can "get serious" about corruption (thus necessitating an "integrity branch"), similar scepticism should exist about the extent to which politicians can maintain impartiality in relation to a process which determines their continued political existence.[10] Formal constitutional status would theoretically protect against electoral manipulation, thereby ensuring the essential principle that "elected representatives would actually be accountable to the people".[11]

II

Having articulated the theoretical argument for granting EMBs formal constitutional status, this section will offer practical analysis of the issue. The theoretical argument outlined above is useful as both an analytical framework and a point of reference, but it cannot be applied *a priori*. Such an approach would ignore the many practical considerations required for a more comprehensive response favouring the grant of formal constitutional status. This section will therefore attempt to establish some overarching principles which drafters should always consider when deciding *how* an EMB might be structured within a constitution.

The first and most important principle is EMB independence. Both parts of our theoretical argument can be employed to illustrate this point. We have already established that granting an EMB formal constitutional status and incorporating it as (or within) a "fourth branch" of government should – in and of itself – facilitate independence in an institutional sense. Practically, to ensure that this separation is unequivocal, an approach similar to that in the Costa Rican Constitution – empowering the Supreme Electoral Tribunal "with the rank and independence of the Powers of the State" – is recommended.

[9] Mark Tushnet, 'Institutions Protecting Democracy' (2018) 12 Law & Ethics of Human Rights, 181-202, 191.

[10] Ackerman (n 7) 691.

[11] Michael Pal, 'Electoral Management Bodies as a Fourth Branch of Government', (2016) 21 Rev. Const. Stud, 85, 95.

As for the second part of the theoretical argument, there are two additional elements which this commentary sees as necessary to place beyond the reach of legislative forces to enable EMB independence. The first relates to finance. According to Trebilcock and Chitalkar, financial autonomy is "indispensable to [EMB] independence".[12] It is difficult to argue with this statement; if not adequately resourced, and without control of its own funds, an EMB will be unable to carry out its functions. The second involves EMB members: specifically, issues of appointment process and tenure length. South Africa's multi-institutional approach is preferable in addressing these issues. Its "fourth branch" is not limited to electoral administration; the Constitution instead mandates that various institutions are tasked with "supporting constitutional democracy".[13] The EMB's budget is approved and audited by several constitutional bodies and – as such – decisions are made subject to appropriate checks and balances. A similar multi-institutional (constitutional) approach should be taken in respect of all "administrative" matters with each branch of government playing a role in the process – thereby ensuring that power is not concentrated in one area.

A related point here is the issue of drafting certainty. The above details relating to personnel, small and precise as they are, can significantly impact the level of independence and autonomy that an EMB experiences in practice. To optimise and ensure *de facto* EMB independence, constitutionalised provisions should be drafted with sufficient certainty so as to avoid misinterpretation. As Pal points out, in the Indian and South African EMBs – constitutionally entrenched in particularly broad terms – the "legal specifics of the general language stand to be determined, particularly by the courts".[14] While there is a *prima facie* expectation that the judiciary will be free from improper influence, having already taken the step of granting formal constitutional status, it would seem insufficient to leave important details to external interpretation. This might be difficult in practice, as designers are unlikely to have anticipated all areas of election administration that deserve protection. Subject to this qualification, however, designers should endeavour to include as much detail as possible when entrenching EMBs.

Accountability is inextricably linked with independence. EMBs can be vested with wide-ranging powers, the exercise of which may have a significant impact on the workings of a democratic system. Tushnet expresses concerns about constitutionally entrenched bodies going unchecked and warns of dominating institutions who "do too much".[15] Fostering a culture of EMB transparency might help to ensure accountability. It is important that decisions, processes and data, for example, are freely available for the public and the other branches of government to scrutinise and ensure that the EMB is effectively performing its constitutional role. A study undertaken by Garnett found a significant

[12] Trebilcock (n 1) 204.

[13] Tushnet (n 9) 183.

[14] Pal (n 11) 98.

[15] Tushnet (n 9) 197.

positive relationship between EMB independence and transparency; the author draws the conclusion that more independent EMBs have greater freedom to provide information to the public.[16] This might be looking at the issue in the wrong way. Perhaps the primary reason for the positive relationship outlined above is that increased independence *necessitates* transparency: members of a more transparent body recognise that openness about the EMB's workings – and how this links to perceived integrity – is a necessary trade-off to maintain its independence from other stakeholders.

Finally, when granting an EMB formal constitutional status, framers should look to ensure that the principle of impartiality is maintained within the body. Clearly, codifying an abstract concept like impartiality might present difficulties. However, there are measures which can be taken to help protect against partisanship. Issues faced by Indonesia's constitutionally entrenched EMB (KPU) illustrates this point. Established in 1999 – with just three months to organise an election based on a new set of laws – the KPU was beset with problems from its early operation, most notably due to its "unwieldy" composition.[17] With each of the 48 parties contesting the election having representation on the KPU, in addition to five members representing the government, party representatives used their positions for partisan advantage: compromising the efficacy of the body.[18] Responding to these difficulties, amendments to the 1999 legislation were passed the following year which, *inter alia*, prohibited service on the KPU for members of political parties or those with political positions within the civil service.[19] This is the preferable approach in respect of EMB composition. EMBs must, to the furthest extent possible, be non-partisan so as not to stymie the functioning of what ultimately should be a neutral institution.

III

This final section seeks to outline the importance of the statement "no one size fits all" when undertaking comparative constitutional analysis. There are many benefits to constitutionally entrenching an EMB, but the analytical framework and principles established above will not apply in all jurisdictions, at least not without adaptation. For example, when addressing the principle of EMB impartiality in the constitution, we concluded that drafters should work to ensure that appointed members are non-partisan and that their functions are exercised in a politically neutral way. This approach might not be appropriate, however, in a newly-established democracy transitioning from a one-party authoritarian regime. Here, the legitimacy of the EMB – as perceived by the public and political elites – might be strengthened by the presence of representatives from multiple political parties. Context is integral when making these decisions.

[16] Holly Garnett, 'Election Management' in Norris (n 3) 123, 124.

[17] Dwight King, 'The 1999 Electoral Reforms in Indonesia' (2000) 28 Asian Journal of Social Science, 89, 95.

[18] Trebilcock (n 1) 207.

[19] *Ibid*, 207.

When considering the grant of formal constitutional status, we must also appreciate that different countries will have different needs in relation to electoral regulation. For example, the benefits postulated in our theoretical argument for constitutionalisation – especially the protective role – will be required to varying degrees depending on jurisdiction. Van Ham and Lindberg have found that, in contexts of low democracy index and low quality of government (QoG) (QoG conceived by Rothstein and Teorell as "the impartiality of institutions that exercise government authority"), institutional design has a positive impact on election integrity because *de facto* independent EMBs have stronger *de facto* autonomy to effectively administer and monitor elections.[20] Put another way, constitutionalised EMBs tend to be better insulated from attempts at manipulation and are resultantly able to function more effectively.

There is a related point here. Pal states that constitutional entrenchment is the "*first step* towards reducing partisan interference with election administration".[21] The inference this commentary draws from "first step", is that electoral regulation is a process in which granting formal constitutional status – and the protective role this plays against interference – is the rational starting point for drafters concerned about electoral impropriety. Pal, however, does not elaborate on this process nor on any prospective final "destination". The statistic mentioned in Section I relating to the high proportion of governmental EMBs in WENA is relevant here. If we are to conceive electoral regulation as a process in which constitutional entrenchment is the "first step", this commentary would argue that the position in parts of WENA is a later-stage snapshot – albeit not the final "destination" – of such a process.

Van Hamm and Lindberg's study found that in contexts of high democracy index and high QoG, the institutional design of an EMB has limited impact on election integrity due to the high-functioning and professional bureaucracies tasked with managing elections.[22] As stated above, EMB independence has the most positive impact on electoral integrity in "not free" or "transitional" democracies. Here, granting formal constitutional status can help to better protect the independence and autonomy of the EMB: ultimately providing the stability needed to navigate the challenges faced in such contexts. Ideally, a protected EMB will help to ensure the legitimacy of future elections which will foster a culture of effective electoral governance. Of course, we must be careful to reemphasise that the position in WENA is not the normative final "destination" of the electoral regulation process. This simplistic and Westerncentric conclusion ignores the work still necessary, worldwide, to reach (and

[20] Lindberg (n 4) 468;
Bo Rothstein, Jan Teorell, 'What Is Quality of Government? A Theory of Impartial Government Institutions', (2008) 21 *Governance*, 165, 165.
[21] Pal (n 11) 99 (emphasis added).
[22] Lindberg (n 4) 468.

maintain) an optimal level of electoral integrity and fairness. That said, we find ourselves at a paradoxical conclusion: in many jurisdictions, EMBs should be granted formal constitutional status to begin a process towards an outcome where constitutional entrenchment is no longer necessary.

Conclusion

This essay evaluates the case for granting formal constitutional status to EMBs. What should be clear is that this is not a simple question of "yes or no" as to constitutionalisation. Context is critically important: the level of democracy, the culture of bureaucratic impartiality, the proposed purpose of the body, etc., are all potentially relevant to drafters determining whether to grant an EMB formal constitutional status. EMB entrenchment has many potential benefits, but these benefits will not be felt equally in all jurisdictions. For a transitional democracy or one emerging from authoritarianism, the constitutional entrenchment of an EMB can help to provide the protection and stability needed to administer legitimate elections. For others, this benefit of an EMB with formal constitutional status will be unnecessary.

We also concluded that the theoretical protection offered by constitutional entrenchment, and the positive impact of this protection on an EMB's *de facto* independence, might – over time – produce a strong culture of impartiality and electoral propriety. Viewing electoral regulation as a process, the corollary is that a country may eventually reach a stage where elections can be managed and supervised without a "fourth branch" constitutional body. Instead, an independent statutorily-created institution or the impartial bureaucracy of a governmental department might capably carry out electoral regulation: negating the need for formal constitutional status. Certainly, such a finding would put us at odds with the work of Ackerman who, we recall, viewed the traditional separation of powers model as insufficient to protect democracy in modern states. This argument has considerable merit, especially given the unrelenting development of new methods to undermine elections in contemporary society. As with the decision to grant an EMB formal constitutional status as a "first step", a country's decision to reverse this process – thereby "removing the stabilisers" – will require an introspective evaluation of existing democratic strength and institutional impartiality versus the perceived threats that exist in relation to the electoral process.

Common Sense: how English common land differs from Roman ager publicus and why we should celebrate the status quo.

Matthew Pugh

Abstract

Many English people live not far from a common or a village green. They might walk their dog on the former or play cricket on the latter every Sunday. Even those who do not frequent them will know that commons exist and are open to all for recreation. They might also have a rough sense that the common must be different from its more numerous sibling, the park, and that perhaps the difference lies somewhere in the bowels of English history. Perhaps, they might posit, the common is an area of land which has no single identifiable owner and which is consequently owned jointly by the whole citizenry.

They would be correct in all but the last assumption. As is made clear to students of the English law at an early stage, it is impossible for land to lack an identifiable owner. That does not mean, though, that the assumption that it may would be unreasonable. After all the concept of common, or at least public, ownership of land is not unheard of in history, most relevantly for a nation once occupied by Rome in the concept of *ager publicus*.

This essay arises out of its author's own incorrect assumption, upon first encountering the concept of *ager publicus* while studying agrarian policy in the late Roman Republic, that there must be some ancestral link between it and modern English commons. Once it is understood, though, that the two systems are aetiologically distinct and fundamentally different in character, the most obvious question to ask is which is better. This essay will none the less not try to answer that question directly. Indeed any attempt to do so would be to display an unsophisticated approach to history and law, since neither modern English commons nor even their forerunners were intended to serve the same purposes as late-Republican *ager publicus*. Instead, the purpose of this essay will be to praise two aspects of the English system of common and public land. The first is the way commons have adapted from serving an essentially agricultural purpose to a recreational one as time as passed, the population grown and society changed. The second is the emergence, deliberate or otherwise, in the past century or so of a system of state-backed social housing which has mirrored closely in rationale and results – mostly for the better – Roman *ager publicus*.

Roman *ager publicus*

Ager publicus, literally 'public field', was the land which Rome won as she expanded her bounds throughout the Italian peninsula during the early centuries of the Republic. It could be put to one of two uses. On the one hand it could be used to set up colonies, often peopled with veterans of the army. More interestingly for present purposes, it could on the other be distributed to Roman citizen *possessores* to cultivate, sometimes by sale but more often in return for rent. It is

difficult to pinpoint its precise origins but we have a *terminus ante quem* in the form of the Licinio-Sextian laws of 367 BC which placed a limit on the amount of *ager publicus* any citizen could possess: 500 *iugera*, roughly 350 acres.[1] It is clear that the disposition of *ager publicus* was a political hot potato for many centuries, and matters famously came to a head in 133 BC when the plebeian tribune Tiberius Gracchus attempted to crack down on wealthy tenants holding more than their permitted acreage and distribute the excess land confiscated to the poor.

Though this is far from the only significant moment in the contentious history of Roman agrarian policy – which flared up again during Cicero's consulship of 63 BC – the uproar caused by Ti. Gracchus does neatly encapsulate the role *ager publicus* was seen to play in Roman society. Evidently *ager publicus* was seen as a tool for the assistance of the needy. Those without sufficient land to farm could be provided with some either as freehold or for an affordable rent. As a corollary, those who were seen as undeserving of any *ager publicus* or as holding too much were the objects of public resentment, especially if it was felt that they were displacing the rightful inhabitants of the land by manning their enormous farms, called *latifundia* to reflect their sprawling extent, with imported slaves. Not to say that the state did not derive a benefit from allotting *ager publicus* to a large number of the needy in accordance with the Licinio-Sextian laws; since the Roman army recruited only from those holding a certain amount of land, it made sense to facilitate the division of the countryside into smallholdings for free citizens who would otherwise have been squeezed off the land entirely and into the cities and towns.

The essential point from our perspective is that *ager publicus* was land which was commonly owned by all citizens – insofar as the Roman state was, nominally at least, a republic – but portioned out into the possession of identifiable individuals.

Origins of English commons

As with Roman *ager publicus*, the English commons unsurprisingly emerged from and are closely linked with agricultural practices. Tracing the direct ancestors of most of today's urban and lowland commons imposes the convenient starting point of the Norman Conquest, after which William I formalised a system under which feudal lords owned the freehold of their manors and let out portions to tenant farmers.[2] We need not burden ourselves with the details of the different types of landholding that tenants and villains could have, for by definition these are not the parts of the manor which concern us. Rather it was those parts of the manor which remained untenanted which formed the basis of common land as we know it.[3] It was over this spare – or 'waste' – land of the manor that tenants of the manor had rights in common. Indeed, there in a nutshell is the difference between English commons, which are shared rights – or more precisely

[1] ADE Lewis, 'ager publicus', *Oxford Classical Dictionary* (5th edn, 2012) 38.

[2] Navjit Ubhi and Barry Denyer-Green, *Law of Commons and of Town and Village Greens* (Jordans 2004) 18.

[3] ibid 36.

profits à prendre – in someone else's land, and Roman *ager publicus*, which as we have seen was public land which was divided up between individual possessors.

Prior to the Norman Conquest, England also had large amounts of land that was common in the sense that it lay between settlements and so was both untamed and unclaimed – what a *Royal Commission on Report on Common Lands* called the 'wild wastes'. It is important to highlight that these lands too were very different from Roman *ager publicus*. In England, these waste lands were truly unclaimed either by individuals or the state in any of its forms. No one who went there to graze his flocks, hunt, fish or gather firewood saw himself as making a claim of ownership. Perhaps the best modern parallel is to fishing in international waters or even – putatively – mining for minerals on extra-terrestrial bodies. These lands were common in that they were owned by no one, rather than by everyone. The Conquest did not altogether do away with such areas, although it and the expansion of the population in the first few centuries that followed did see the shrinkage of these waste lands, as is imaginable.[4] Henceforth less attention will be paid to these commons, whose fairly direct descendants can still be observed today in northern England, than to their urban siblings, since it is in the latter that the common law has effected a complete transformation, aided only very recently by statute.

Transformation of English commons

Aside from the fact that the lowland and urban commons have in recent centuries come to serve recreational rather than agricultural purposes, the most profound change they have undergone has been their disjunction from the old manorial system. Back when the links between commons and the waste land of the manor were strong, rights over the commons were shared only between tenants of that particular manor, town or borough.[5] Plainly that is not the case in modern England, where a resident of Esher is not going to be sued in trespass for walking his dog on Wimbledon Common, nor *vice versa*. How, then, did that transformation come about?

In one sense and through one strand of case law, the old system of rights common to locals is unextinguished. Cases such as *Re Ellenborough Park*[6] demonstrate that in some circumstances owners of properties adjacent or near to commons can be considered to own easements of recreation in those commons. More important however are the customary rights of access enjoyed by people at large, as typified and mused upon by Lord Denning in the case of *New Windsor Corporation v Mellor*.[7] As Denning observes, the origins of such rights are often shrouded in the mists of time, but it is his comments on the applicability and enforceability of those rights which are most puzzling. For example, he is not wrong to state that 'the villagers have an undoubted right to play games on their green', but is it only the villagers who have such a right? Likewise, if

[4] ibid 18.

[5] Navjit Ubhi and Barry Denyer-Green, *Law of Commons and of Town and Village Greens* (Jordans 2004) 17.

[6] [1956] 1 Ch 131 (CA); see also Barry and Denyer-Green 134.

[7] [1975] 1 Ch 380.

'any one of the inhabitants may sue to enforce the right of all', may not a visitor, if he is meant to be allowed to play games on the green, also sue to enforce his right?[8] An answer to the latter question eludes this author – it is after all the sort of question which looks likely to remain hypothetical. The former, however, was addressed only two decades ago in *Sunningwell*,[9] a case about what constituted a village green for the purposes of registration. In that case, it was asked whether a customary right such as would validate a claim to the status of Class c village green need be exercisable only by members of an identifiable local community. As Lord Hoffman stated very clearly, in that instance it was 'sufficient that the land is used predominantly by inhabitants of the village'.[10] This case then, even though strictly speaking concerned only with Class c village greens under s 22 (1) of the Commons Registration Act 1965, is still illustrative of the benevolent contradiction at the heart of the modern English understanding of commons: rights of common are still tied up with what is customary, which for the avoidance of vagueness requires evidence of use by an identifiable local community, but once recognised are exercisable by the entire citizenry – and, for that matter, visiting foreigners.[11]

The transformation of English commons from agricultural necessity to recreational amenity is completed by the Countryside Rights of Way Act 2000, section 2 (1) of which, broadly speaking, gives the public pedestrian access to all 'Access Land', which includes most common land registered under the Commons Registration Act 1965. While the 2000 Act does not attempt to turn back time to the Dark Ages and declare either of these categories to be common in the sense of being without an owner once again, it does at least embody the law's recognition of the fact that the rights most members of the public hope to enjoy in the commons – going for a walk or a picnic – are far less consequential to the land than those *profits à prendre* – of pasture, turbary, piscary or pannage[12] – that their Saxon and Norman forbears might have hoped for. In consequence, there is no longer a practical reason for limiting rights of common to those local to the land in question.

English local authority housing

A final aspect of the way land is used in modern England that ought briefly to be considered is local authority housing. The point is simple: political developments over roughly the last century, and in particular since World War II, have closely mirrored the aim of the Roman system of *ager publicus*. Without going too much into the details of what is unmistakable more of a political than a legal matter, the decision has been taken for the state to let houses to the poor to make sure they can afford to live somewhere. Of course, social housing is not the same as the state owning whole farms, but that is because modern English society, unlike Republican Roman, is not primarily agrarian.

[8] ibid 386F.

[9] *R v Oxfordshire County Council, ex parte Sunningwell Parish Council* [1999] UKHL 28, [2000] 1 AC 335.

[10] ibid 358B.

[11] Ubhi and Denyer-Green 136.

[12] ibid 40-47.

Parallels to the Roman system can even be drawn from some of the particulars and political debates that have raged around social housing. Margaret Thatcher's 'Right to Buy' scheme can be compared to the Roman option of selling off *ager publicus* and turning it into privately held land like any other. The same questions about this depleting the stock still in public ownership were raised in the 1980s as in the second century BC. Similarly, in England too there have been high-profile examples of fraud or officialdom's blind eyes allowing people to possess more than their fair allocation of local authority housing or continuing to lease a local authority property when they could afford to go private – the late Bob Crow springs to mind – and so drawing ire for squeezing out those in greater need, just as the owners of the *latifundia* once did.

Conclusion

In purely legal terms, the critic might reasonably complain that this essay has broken very little new ground; rather it has merely pointed out little more than the obvious differences between Roman *ager publicus* and the areas of land we in modern-day England call 'commons'. That said, the very exercise of placing the two systems side-by-side for comparison is a revealing one, and it will do well to take note of the observations which present themselves.

Ager publicus in its Republican form as considered in this essay, unlike the English commons, was never forced to adapt itself from an agrarian to an urbanised society. It started out as and remained a tool for a hybrid of agrarian and social policy. Moreover, it was a tool which the Roman state acquired by virtue of its continual expansion throughout the Italian peninsula and into Gaul. The question, 'what to do with the *ager publicus*?' was always quite a nice one to ask as it was generally about land which was, in loose terms, going spare. Debate about it was always in abstract terms; how should the state portion it up, and to whom?

The story of the English commons, by contrast, is about the development of common rights in other people's land. Those rights were initially of the sort useful for agriculture but have morphed by the slow evolution of custom into rights of an inherently recreational nature, affirmed in the first instance by the common law and more recently by statute. They have also gone from being limited to the residents of one particular locality to being functionally universal. Entirely separately, English politics have provided a solution to the problem of affordable housing which resembles remarkably closely – albeit with concessions to the differences of time and society – the Gracchan ideal of *ager publicus*.

When all this is taken into account, it is right to conclude that we are profoundly lucky with the way things have turned out in England; we have the best of both worlds. Under the Roman Republic, *ager publicus* was in reality never anything more than a transient state which any given portion of land occupied between its capturing from an enemy and its being divided up into some

form private landholdings. In England, on the other hand, the story of common land has had very little to do with territorial expansion. Even during the years when there was an expanding overseas empire the commons in England survived and, thanks to their deep roots in the common law and the statutory protection they have received in the past sixty or so years, they seem likely to do so for the foreseeable future.

Reforming 'Worker' Status For the Digital Platform Economy

Benn Sheridan

Introduction

The rise of the digital platform economy, exemplified in the UK by the ubiquity of Uber and Deliveroo, has accelerated the "vertical disintegration" of the labour market.[1] A growing number – nearly 10% of the workforce – earn money each week using a digital platform.[2] The result is that it is no longer 'atypical' for work and worker to be brought together through a digital base.[3] My subject is the problem that this creates for the statutory definition of 'worker' – the legal status into which some, but not all, of those who earn money via digital platforms fall. Today, online apps match users with a range of services traditionally carried out by independent contractors: from audio transcription to courier services, to plumbing.[4] At the same time, traditional employment models have been upended by the pandemic-driven shift to remote working. Put another way, the dividing line between the remote-working time-service employee, who logs onto a Teams call at 9am, but is free to do her laundry at 10am, and the task-service independent contractor, who logs onto her third-party courier platform for an hour or two at the same time, is increasingly blurred. Both groups face a labour market in which, as Jeremias Adams-Prassl notes, responsibility for hiring, firing and managing is "diffused" by technology that not only communicates decisions between parties, but supplies critical information on which decisions are based.[5] For those within the employee/worker safety net, platform-working is a boon – no rush hour and most of the benefits of a task-service contract, with none of its detriments. For those without, the global platform economy suppresses incomes, and reinforces harmful management practices.[6]

In this essay, I suggest that the statutory division in English employment law between employee, worker, and independent contractor cannot keep up with the convergent trends of technological

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[1] See further, H Collins, 'Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws', OJLS Vol. 10, No. 3 (1990).

[2] Between 2016 and 2019, the number of people working for online platforms at least once a week doubled from 4.7% of the adult population to 9.6%: 'Platform Work in the UK 2016-2019', *Foundation for European Progressive Studies* available at https://www.feps-europe.eu/attachments/publications/platform%20work%20in%20the%20uk%202016-2019%20v3-converted.pdf accessed 07/10/2021.

[3] S Fredman, D du Toit, 'One small step towards decent work: Uber v Aslam in the Court of Appeal' Industrial Law Journal, Vol. 48 (2019), p. 260.

[4] 'Platform companies have to learn to share', *The Financial Times* available at https://www.ft.com/content/0caed8aa-a208-11e8-85da-eeb7a9ce36e4 accessed 06/12/2021.

[5] 'What if your boss was an algorithm? Economic Incentives, Legal Challenges, and the Rise of Artificial Intelligence at Work' Jeremias Adams-Prassl [2019] 41(1) *Comparative Labor Law & Policy Journal* 123, p. 19

[6] Sandra Fredman, Darcy du Toit, Mark Graham, Kelle Howson, Richard Heeks, Jean-Paul van Belle, Paul Mungai & Abigail Osiki (2020) 'Thinking Out of the Box: Fair Work for Platform Workers', King's Law Journal, 31:2, 236-249

monitoring and platform work; recent judicial efforts to bridge the gap – while admirable – do not go far enough.[7] One solution is legislative reform: Parliament could enact legislation providing that a party who provides work or services via a digital platform should presumptively be a worker, unless that platform can show that the party provides services voluntarily or as an independent contractor. Further, I suggest that the test for independent contractor status in this field should be the negotiating power of the party doing the work. This proposal builds on Bob Hepple's argument that we focus on "relationships" of work or employment, not contracts.[8]

My essay has two sections. First, I outline the current law on workers, and the inherent uncertainty that arises from its application to the digital platform economy; I identify three problems – (a) the potential incoherence of the patchwork statutory definitions of 'worker'; (b) digital platforms' technological advantages; (c) the constraints of the statutory language of the definition(s) of 'worker'. Second, I set out my proposal's advantages.

I. The Current Law

The employee, independent contractor, and worker, may be defined as follows. The employee: A contracts with B under a contract of employment; A (the employee) receives statutory protections. Whether theirs is a contract "of employment" turns on common law tests of control, integration, and mutuality of obligation.[9] The independent contractor: A contracts with B at arm's length; A falls outside the scope of those protections. The worker: A receives limited protections in return for contracting under

> "any *other* contract … whereby the individual undertakes to do or perform personally any work or services for another party to the contract [i.e. C] whose status is *not* by virtue of the contract that of a client or customer [i.e. B]of any profession or business undertaking carried on by the individual [emphasis added]."[10]

To be classified as a worker is to be defined in the negative. The conventional statutory definition refers to anyone not identifiably an employee, and not identifiably an independent contractor. This pushes the courts to take a creative approach in defining who falls within its ambit.[11] The current approach is set out in *Uber*: to be a 'worker' under the ERA supposes three things: (1) the first party performs work or services "for [the] other party"; (2) the first party undertakes to do the work "personally"; (3) the other party is not a "client or customer". The issue in *Uber* was the first criterion, whether claimant drivers entered into contracts to perform work or services "*for*"

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[7] *Uber BV v Aslam* [2021] UKSC 5 (*Uber*)

[8] B Hepple, 'Restructuring Employment Rights' (1986) 15 *ILJ* 69.

[9] *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497; *Nethermere (St Neots) Ltd v Gardiner & another* [1984] ICR 612

[10] ERA 230(3)(b). The other statutory definitions use very similar wording, so I do not repeat them here – though they are to be understood as similar in meaning, but conceptually separate.

[11] Admittedly, Parliament leaves it to the courts to determine employee status, too. The difference, I submit, is that, first, the tests for employment are longstanding enough to be applied with some certainty, and, second, while it is appropriate that employee status – with its gold-standard statutory protection – should be contingent on close judicial factual analysis, the same scrutiny should not be required of limited worker rights.

the other party (Uber), or solely under contracts made with customers through Uber's "agency". On the basis of the drivers' inability to vary routes, penalties for rejecting of rides, and drivers' app-determined fees, Lord Leggatt held that the claimants were in business on Uber's account, and *were* workers.

A – Potential Incoherence

The *Uber* appellate decisions have been taken to mark an inflection point in legal treatment of workers in the platform economy.[12] Elsewhere, however, the courts are unsympathetic. In *Deliveroo* (judgment handed down after *Uber*), Underhill LJ (who delivered a dissent in *Uber* in the Court of Appeal), declined to revisit the arbitral decision that Deliveroo riders were independent contractors, or to accept that this infringed on riders' Article 11 collective action rights. The result is uncomfortable: caselaw now suggests that bike couriers who deliver parcels are workers, but ones delivering takeaway food are not.[13]

The feature distinguishing *Deliveroo* from *Uber* and *Citysprint* (the cycle courier parcel delivery case) is Underhill LJ's application of the second criterion, 'personal performance'. Underhill LJ held that Deliveroo riders may substitute third parties (via substitution clauses) – therefore they fall outside the TULRCA definition of worker. However, viewing *Uber* and *Deliveroo* in parallel, the decision that Deliveroo riders are independent contractors under the TULRCA does not exclude the possibility that a differently-constituted court may hold them to be workers under the ERA. As Adams-Prassl has pointed out, employment statutes use the same language to define 'worker' – but each definition may be treated as conceptually independent.[14] If a Deliveroo rider brought a claim under the NMWA and ERA arguing entitlement to minimum wage and holiday pay, a tribunal – reaching its own, different, factual conclusion on the reality of the substitution clause – might follow *Uber*, and hold that the takeaway courier *is* a worker under these statutes. (This is not a remote prospect; in *Autoclenz*, a substitution clause was rejected as not "reflect[ing] what was actually agreed".)[15] This would make the law incoherent: a Deliveroo courier is a "worker" for the purposes of some statutory rights (under ERA), but not others (under TULRCA).

B – Technological Advantages

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[12] S Fredman, D du Toit, 'One small step towards decent work: Uber v Aslam in the Court of Appeal' *Industrial Law Journal*, Vol. 48 (2019)

[13] See: *Dewhurst v Citysprint UK Ltd* [2017] 1 WLUK 16; *R (on the application of the IWGB) v CAC and Roofoods Ltd t/a Deliveroo* [2021] EWCA Civ 952.

[14] This point has been made before by Adams-Prassl. In 'Pimlico Plumbers, Uber Drivers, Cycle Couriers, and Court Translators: Who is a Worker?' (2017) SSRN Online: http://ssrn.com/abstract=2948712 accessed 07/10/2021). He cast doubt on Underhill LJ's suggestion that the reference to a "contract personally to do work" in the EqA is synonymous with 'worker contract' in the ERA sense in *Pimlico Plumbers Ltd v Smith* [2017] I.C.R. 657 at [123], contending instead that the Supreme Court authority for Underhill LJ's argument, *Clyde & Co LLP v Bates van Winkelhof* [2014] UKSC 32, frames the EqA definition in broader terms than other decisions made under the ERA – with the result that worker status under the EqA applies, in theory, to a wider group than the ERA.

[15] *Autoclenz Ltd v Belcher* [2011] UKSC 41 at [17]

The problem with worker status runs deeper than the conceptual clumsiness of having Deliveroo riders half-in, half-out, of statutory definitions (after all, just because the law is – or has the potential to be – inconsistent, that does not mean it ought to be changed). Those in the uncertain position that bike couriers, lap dancers, car valeters, and plumbers have found themselves through working in the platform economy should be afforded protection, including rights to collective action, because the apportionment of risk between them and platform operators is increasingly uneven.[16]

The practice of companies contracting out processes that might otherwise be done by employees to companies or independent contractors (ridding them of the administrative burden of PAYE, and statutory obligations like sick pay, or maternity pay) is not new. Collins describes its prevalence in Thatcherite Britain; Bob Hepple notes that Victorian caselaw shows industrialists constructing arms-length relationships between them and factory outworkers – challenging the narrative of that period as a golden-age for the normative employer-employee relationship.[17] What makes our situation different from previous centuries is the confluence of companies' ambition to minimise their legal obligations towards those carrying out economic activity in which they have an interest, and the technological advantage they possess in achieving that ambition.

What does this technological advantage look like? Adams-Prassl argues that people analytics – storage and algorithmic analysis of worker/contractor data – not only "fissures" the workplace in the sense that Collins identifies (where complex legal mechanism camouflage workers' legal status), it changes the nature of that workplace.[18] (Adams-Prassl focuses on conventional employment, but the points hold true for my study.) The employer has higher levels of control over her employee's performance than ever before: she may monitor task-completion by recording keystroke data or GPS location; she may outsource decision-making to other parties, or even an algorithm.

This raises legal issues for employers – for example, the possibility that corrupt data will lead to algorithms making accidentally discriminatory decisions.[19] Adams-Prassl's proposed solution is that "existing legal mechanisms" be adapted to cope.[20] This may suffice for employees, whose access to statutory protection is already guaranteed – but what about platform users whose access to such protection is predicated on the further hurdle of obtaining worker status? Adams-Prassl's analysis shows that the baseline level of control (both active and automated) that companies exercise over workers and independent contractors has risen starkly, and will continue to do so. In areas like collective action, platform users are in especial need of statutory protection: the systems that give platform operators control, like rating systems and individuated monitoring,

[16] See, respectively, *Citysprint* and *Deliveroo; Stringfellow Restaurants Ltd v Quashie* [2012] EWCA Civ 1735; *Autoclenz;* and *Pimlico Plumbers Ltd and another v Smith* [2018] UKSC 29

[17] Collins (1990); Hepple (1986)

[18] Adams-Prassl (2019), p. 19

[19] See further, J Atkinson, 'Automated management and liability for digital discrimination under the Equality Act 2010', UK Labour Law Blog, 10 September 2020, available at https://uklabourlawblog.com accessed 11/10/2021

[20] Adams-Prassl (2019), p. 21

put platform users into competition with one another – inhibiting the impetus to collectivise. A similar phenomenon has been observed in the construction industry: the convention that builders are self-employed has led to historically weak unionisation.[21] However, if statutory protection were there presumptively, these systems could, as Adams-Prassl notes, become a *source* of collective bargaining power: couriers could collectively challenge factors affecting ratings, for example.[22] As it stands, however, Deliveroo and other takeaway couriers have no collective bargaining rights, at all.[23]

I submit that the baseline level of platform users' rights must rise in conjunction with platform operators' level of control. The best way to do this is through legislation not common law evolution because, first, the speed with which platform-working has spread through the labour market means that there is no time for slow-burn common law evolution; and, second, because the statutory language imposes limits that may only be undone by the legislature.

C – The Statutory Limits

Following *Uber*, any platform user over whom algorithmic control is exercised by a digital platform probably satisfies the first *Uber* limb, that the user perform work or services "for" the platform; the third limb, that the platform not be a client or customer, is also satisfied – for obvious reasons. However, the second limb, whether the user undertakes to do work "personally", imposes a problematic limitation. Why should substitution clauses, *even if* acted upon, exclude parties from statutory protections? Take a situation where a substitution clause is acted on by three Deliveroo riders – A (the named party), B and C – who share one Deliveroo account on an informal rota to improve delivery speeds. The statutes and *Uber* suggest that the trio would, on the basis of the substitution, be independent contractors.

The gap in protection extends in two directions: first, statutes provide that A, who does not perform "personally" can only be an independent contractor; second, riders B and C do not benefit from protections as third parties. Steven Anderman has noted that the courts often overemphasise a "'contractual' test" in employment contexts.[24] I submit, further, that, for workers, the statute itself overemphasises a contractual test: from the point of view of who should rightly benefit from protections against sub-minimum wage payments, discrimination, and working time, there is no meaningful difference between three riders using one Deliveroo account, and three riders using three separate accounts. (They may do work more regularly than e.g. an Uber driver – already a worker -- who has used her account three times in the last year, for example.)

[21] Antony Seely, 'Self-employment in the construction industry', *HC Briefing Paper* no. 196, 23 August 2019 available at https://researchbriefings.files.parliament.uk/documents/SN00196/SN00196.pdf accessed 03/10/2021

[22] J Prassl, 'Collective voice in the gig economy: challenges, opportunities, solutions,' UK Labour Law Blog, 22 October 2018, available at https://uklabourlawblog.com/2018/10/22/collective-voice-in-the-gig-economy-challenges-opportunities-solutions-jeremias-prassl/ accessed 10/10/2021

[23] *Deliveroo*

[24] S Anderman, 'The Interpretation of Protective Employment Statutes and Contracts of Employment', ILJ, vol. 29, p. 233.

The better description of the position in which these riders find themselves is a *relationship* with the platform; the law should (in the digital platform economy sphere) afford those in that relationship statutory protection.

II. Advantages of the Instant Proposal

One context for my proposal is the much-criticised Taylor Review's Report on 'Modern Working Practices'.[25] That report addressed worker status, drawing three conclusions: first – for reasons of "clarity", workers should be renamed 'dependent contractors'; second – the status of 'dependent contractors' should not turn on personal performance; third – the key test is control, as determined by the courts.

There is no irony in the Report's claim that the legal status of workers would be clarified by, first, redefining it with technical jargon, and, second, making it contingent on a common law test they previously criticise. While the Report's authors rightly suggest that the statutory emphasis on work done "personally" is overdone, they do not suggest how the law might be changed to redress this. The report is also contradictory: there must be no "one-sided flexibility", but if an "individual … decide[s]" to work in the gig economy as an independent contractor, society should support that choice.[26] Its overarching theme, as Alan Bogg and others argue, is a "neoliberal" emphasis on "individual choice".[27] The implication is that, if a user signs up for a platform having been informed that she will receive no statutory rights, and no guarantee of work, then so be it.

The Review's reform philosophy of "informed choices" misunderstands the problem with worker status that my proposal addresses, namely that the important choice that an individual makes is not *whether* she should work for a platform, but choice over *how* she works: if this is seriously limited, then the law should step in to provide statutory protection. I suggest that the clearest test for determining whether the *how* choice is compromised is her payment negotiating position: there is a presumption of statutory protection unless the individual providing work/services can choose her payment terms (how much and in what way she is paid). If so, then she has sufficient meaningful control over her working relationship to be classified as an independent contractor; if not, she is a worker.

It might be thought that this imposes a heavy burden on the other party. This is not so. First, the protections provided by statutes, *viz.* a floor on payment, a ceiling on working time, and access to protection from discrimination, represent the minimum that digital platform operators should provide to couriers and drivers; the burden is intuitively reasonable. Second, one powerful counter-argument, that extending worker status to flexi-working couriers or drivers would force platforms to pay out at times when riders and drivers are logged in but not working (and that this is an unacceptable business risk) holds no water: there is nothing to stop a platform from limiting

[25] K Bales, A Bogg, and T Novitz, '"Voice" and "Choice" in Modern Working Practices: Problems with the Taylor Review. *ILJ,* 47(1), 46-75, (Problems With The Taylor Review)

[26] The Taylor Review, pp. 13-16

[27] Problems With The Taylor Review, p. 51

the number of workers able to use the platform depending on demand levels. Third, my proposed 'negotiating position' test is certain. Either a Deliveroo rider can set her own fee, or she cannot. This would be a factual test: if the courier can choose her fee in theory, but must pay higher proportions of earnings to the platform if she deviates from a 'preferred rate', for example, then she remains a worker.

The test also gets to the heart of the problem with classifying platform users as independent contractors: at the moment, couriers, drivers, and other platform users have no bargaining power. It is this absence that makes the platform operator and user's relationship uneven. The point is not that couriers *would* necessarily charge more than they do now, but that if the choice lay with them, then they could reasonably be called independent contractors, because they have control over the most fundamental aspect of the relationship – the price paid for the services rendered.

Conclusion

Should the economic cost of providing statutory protections to a wider class of workers outweigh its individual benefits, then we might conclude that we are better off with the devil we know. But it is some devil. The week after *Deliveroo*, Roofood Ltd's share-price climbed 15%, its highest period of share-price growth since its IPO in March. One explanation in the financial press was that the court had decided that Deliveroo riders were not "employees" but "self-employed".[28] The share-price increase and its press coverage demonstrate two things. First, the incentive that Deliveroo management has to maximise the company's share-price seemingly by minimising statutory liabilities; second, and more insidiously, the rhetorical force of the conventional dichotomy between employee and independent contractor. My proposal is a response to these issues: I would make it harder for digital platform operators like Deliveroo to avoid a minimum of statutory obligations, and, more importantly, I would chip away at the traditional employee - independent contractor dichotomy, replacing it with an expectation that anyone doing work or providing services for anyone else via a digital platform, and without bargaining power, should presumptively have rights in return.

[28] See, for instance, A Arrieche, 'Deliveroo Share Price Up 15%: Time to Buy Deliveroo Shares?', *Economy Watch*, 2021, available at https://www.economywatch.com/news/deliveroo-share-price-up-15-time-to-buy-roo-stock accessed 11/10/2021