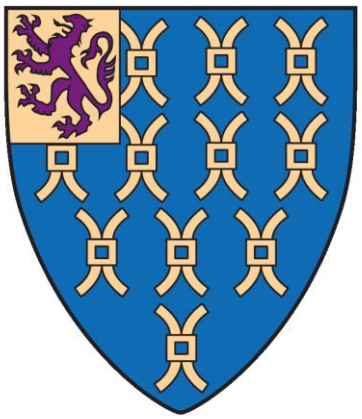
Lincoln's Inn Student Law Journal



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Introduction

Over the past year, I have experienced what it is that makes Lincoln's Inn an inspiring place to be a student. My proposal to establish a student law journal has been embraced with energy and enthusiasm by the Education Department, especially Charlie Taylor and Clara Shepherd. We are also grateful to Edward Cousins, Anthony Dinkin QC, Amelia Highnam, Linda Turnbull and Julie Whitby for devoting their time (and Christmas holidays) to work on the Journal and to ensure the article selection process was rigorous, transparent and consistent.

Our aims in establishing this Journal are three-fold. We consider its primary purpose as being to give outstanding legal articles written by students the wider audience they deserve. The Journal's second main aim is to give students the opportunity to be involved in its production, bringing them experience of both the academic and entrepreneurial roles involved. Such involvement will undoubtedly assist during the course of scholarship and pupillage interviews, when the student is asked to demonstrate competencies such as communication and persuasion.

The third main aim is broader: the Journal will add to the vibrant intellectual life of Lincoln's Inn. This is a place where originality and innovation are highly prized and rewarded, and where the shared pursuit, development and dissemination of ideas remains fundamental to the Inn's objectives.

I hope that the authors who have published in this issue will go on to develop rewarding careers and will continue to contribute to the community that underlies this publication.

Maya Chilaeva
Editor

Foreword

It is with great pleasure that I am writing this Foreword to the newly launched Lincoln's Inn Law Journal. The Panel appointed for the purpose of sifting and ultimately deciding on which scripts should be selected for inclusion in the publication had a difficult task to perform owing to the very high quality of the scripts received. The Panel received twenty-four scripts from which eleven were selected for publication in the Journal. The five top-scoring scripts were shortlisted for the prize and one was selected as the winner. The breadth and diversity of the subject matter which ranged from the law relating to driverless cars, to the case for the legislation of marijuana, and whether the law on nervous shock should be codified, is a tribute to the depth of interest and learning of the students concerned.

What distinguishes the Lincoln's Inn Law Journal from other contenders in the field is that it is a student-led initiative which has been embraced and supported by Lincoln's Inn. Indeed, as a reflection of the student involvement in this project is that this Foreword is followed by an Introduction written by Maya Chilaeva, who is one of the Lincoln's Inn students whose enthusiasm inspired and then initiated this project in the first place. I endorse the purpose and goal of the Journal as set out in Maya's Introduction.

In essence, it is clear that there is an optimistic future for this publication, and I have no doubt that this is the first of many future editions.

Edward Cousins
Chairman of the selection panel

Contents

Hacktivism: Civil Disobedience 2.0

Minahil Tariq

With information and data having supplanted old-style technology as the defining elements of our times, the internet has emerged both as the playground where we meet and greet as well as the battleground where we take on our opponents. As mass reliance on information systems increases, so does the incentive for certain elements to exploit these systems' weaknesses. The internet has become an increasingly vital tool of commerce, government and everyday life[1]. Consequently, lawmakers and governments have attempted to protect themselves through ever-increasing regulations governing cyberspace with a corresponding ever-increasing list of activities dubbed 'cybercrime'. This paper highlights the links between 'Hacktivism' and Electronic Civil Disobedience, arguing that 'activism is not limited to real world demonstrations and protests; rather, it can increasingly take place, in whole or in part, online'[2]. The law must recognise the different forms of electronic civil disobedience and approach hacktivism open-mindedly rather than lumping together all forms of disruptive cyberspace activity as 'cybercrime'. It is argued that not all forms of hacktivism should be afforded protection simply because they are politically motivated but that the law must draw a line and allow for some form of protected speech and actions online.

Hacktivism is defined as the usage of computers, and computer networks, to express social protest, or to promote a political ideology[3]. This term was introduced in 1996 by a hacker named Omega, a member of the infamous group the 'Cult of the Dead Cow'[4]. More recently the hacktivist group 'Anonymous' has come under the spotlight in wake of their attacks on major companies such as PayPal, Visa and Mastercard for withdrawing support to WikiLeaks[5].The hacktivists attack IT infrastructures with legal and illegal tools, such as denial-of-service attacks, information theft, site defacement, and other methods of digital sabotage[6]. In most jurisdictions, an attack on or infiltration of an information system is treated as a criminal offence.[7] In spite of the criminality attached to such conduct, we have seen the emergence of this new form of political activism and civil disobedience as part of the development of electronic civil disobedience (ECD).

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[1] Andrew Calabrese, 'Virtual Nonviolence? Civil Disobedience And Political Violence In The Information Age' (2004) 6 326, 333.
[2] George O'Malley, 'Hacktivism: Cyber Activism or Cyber Crime.' (2013) 16 Trinity CL Rev 137, 138.
[3] 'The Hacktivism Phenomenon - The Malta Independent' (Independent.com.mt, 2012) <http://www.independent.com.mt/articles/2012-06-03/newspaper-opinions/The-Hacktivism-phenomenon-311029> accessed 22 November 2018.
[4] 'Hacktivism 101: A Brief History And Timeline Of Notable Incidents - Security News - Trend Micro GB' (Trendmicro.com, 2015) <https://www.trendmicro.com/vinfo/gb/security/news/cyber-attacks/hacktivism-101-a-brief-history-of-notable-incidents> accessed 22 November 2018.
[5] Ibid.
[6] Noah CN Hampson , Hacktivism: A New Breed of Protest in a Networked World, (2012) 35 B.C. Int'l & Comp. L. Rev. 511, 513.
[7] Computer Fraud and Abuse Act 1986 (CFAA), Computer Misuse Act 1990 (CMA), Directive 2013/40/EU, Council of Europe, 'Convention on Cybercrime' (ETS No. 185, Budapest 2001).

Civil disobedience (CD) is defined as non-violent forms of resistance to protest an injustice by breaking the law directly or indirectly[8]. Historic acts of CD include protests by Gandhi, Martin Luther King Jr. and Rosa Parks. Traditionally, cases of CD have witnessed high acquittal rates or light sentences[9]. CD is treated as a philosophical or political action, not a legal right and is therefore subject to penalty[10]. These activists are usually charged with disorderly conduct, trespass or resisting arrest, and occasionally more serious crimes. Although CD is not a legal right, most judges and courts have not pursued criminal sanctions against civil dissidents[11]. Calabrese states that by 'granting special status to those who deliberately break a law in order to provoke a discussion about questions of justice, we have recognized civil disobedience as a special form of speech or expression.'[12]

Traditional civil disobedience has evolved into electronic civil disobedience with certain methods frequently-used by hacktivist protest groups. ECD, Denial of Service (DoS) and Distributed Denial of Service (DDoS) attacks have been equated to forms of protest such as sit-ins[13]. These methods cause disruption by crashing websites through very large number of requests for information sent to the website servers in a short period of time. This can cause the website to go offline for long periods and restricts access for other users for hours – a virtual sit-in. Moreover, site defacements are used to replace or alter web page content, often displaying images and messages relating to the political movement or agenda they are trying to bring attention to[14].

As the law currently stands, it is a criminal offence to attack an information system. The UK[15], USA[16] and EU's legislation[17] and the Convention on Cybercrime[18] are all designed to tackle cybercrime but their definition of cybercrime includes activities of hacktivists. Karagiannopoulos has pointed out that the 'increasingly broadening cybercrime legislation in conjunction with its highly punitive character reduce any opportunity for generating responses towards hacktivists that would reflect a balanced assessment between the potential positive and negative aspects of such activities'[19]. The current laws do not allow for distinctions to be drawn between 'cyber criminals' based on their motives and intentions i.e., whether they are acting for material gain or merely registering a protest. DDoS attacks, site defacements and redirections, and information

[8] Vasileios Karagiannopoulos , Living With Hacktivism (1st edn, Palgrave Macmillan 2018), 48.
[9] Abby Goodrum ,Mark Manion , "The Ethics of Hacktivism."(2000) Journal of Information Ethics, vol. 9, no. 2, , pp. 51-59,55.
[10] Ibid.
[11] Ibid.
[12] Andrew Calabrese, 'Virtual Nonviolence? Civil Disobedience And Political Violence In The Information Age' (2004) 6 326, 327.
[13] Vasileios Karagiannopoulos , Living With Hacktivism (1st edn, Palgrave Macmillan 2018), 18.
[14] Ibid.
[15] Computer Misuse Act 1990.
[16] Computer Fraud and Abuse Act 1986.
[17] Directive 2013/40/EU of the European Parliament and of the Council of 12 August 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA, [2013] OJ L218.
[18] Council of Europe, 'Convention on Cybercrime' (ETS No. 185, Budapest, 2001).
[19] Vasileios Karagiannopoulos , Living With Hacktivism (1st edn, Palgrave Macmillan 2018), 109.

theft – all of which are methods hacktivist employ – are criminal offences with many attracting hefty penalties and sentences.

Electronic Civil Disobedience is protected only to the extent that your right to free speech and freedom of opinion are preserved through publications of journals, blogs, campaigns, and social media posts but not when you express such views through forms of hacktivism.

Although not being recognized by the law as a legitimate form of protest at this time, there are inherent similarities in some forms of attacks chosen by hacktivists and our commonly accepted idea of civil disobedience. As a significant aspect of our social and economic lives move from the material world to the virtual world of internet, it is only logical that manner and 'venue' of our protests would similarly shift into cyberspace.

Hampson recognizes the similarities between accepted forms of civil disobedience and acts of hacktivism that are vilified as cyber terrorism[20]. He states that forms of hacktivism that are 'primarily expressive, that do not involve obtaining or exploiting illegal access to computers or networks for commercial advantage or financial gain, and that cause little or no permanent damage, should receive at least some protection as a legitimate form of protest'[21]. He further argues that a distinction must be made between more harmful forms of hacktivism that are rightfully prohibited and those that are simply expressive[22]. Just because hacktivists are seen as a nuisance, or a frustrating inconvenience, is no reason to deny them the tolerance that we afford to traditional acts of civil disobedience[23]. The electronic protestors that firmly follow the rule of non-violent resistance must garner the protection of the law and should not be prosecuted harshly. The law should and must make exceptions for certain cases of hacktivism activity and recognize them as legitimate forms of protest.

Hampson draws a distinction between hacktivist conduct and their message and argues for affording protection to the 'forms of expression' rather than hacktivist 'actions'[24]. A German court has acknowledged the expressive nature of certain DDoS attacks as acts of protest[25] but there has been little to no progress since. Hampson argues that there are forms of hacktivism that take place with 'a view to expressing some message, but the means involved forfeit any claim for protection'[26]. Thus, there may be cases where the act is committed as a political action rather than

[20] Noah CN Hampson , Hacktivism: A New Breed of Protest in a Networked World, (2012) 35 B.C. Int'l & Comp. L. Rev. 511, 531.
[21] Ibid.
[22] Ibid, 532.
[23] Ibid.
[24] Ibid, 536.
[25] 'Hacktivism To Balaclava Punk: Protest Must Be Protected In All Its Forms' (HuffPost UK, 2015) <https://www.huffingtonpost.co.uk/thomas-hughes/right-to-protest_b_7620410.html?utm_hp_ref=uk-civil-disobedience> accessed 22 November 2018.
[26] Noah CN Hampson , Hacktivism: A New Breed of Protest in a Networked World, (2012) 35 B.C. Int'l & Comp. L. Rev. 511, 538.

for personal profit, however the 'unambiguously criminal'[27] nature of such methods may not afford them any protection against being prosecuted. Hacktivism should primarily be about nonviolent forms of communication that have a message or political agenda. Such methods should be easily and clearly distinguishable from the out-rightly-criminal activity that involves the threat of physical harm such as sabotage and malicious software attacks. This criminal activity usually leads to information theft and significant monetary loss, often for personal profit rather than a political agenda.

Certainly, if hacktivists want special treatment and lower sentences by submitting defences of moral justifications for the greater good, then they must conform more closely to what the law and society recognize as traditional CD[28]. Anonymity, not a part of the traditional CD, plays a huge role in the fear of the general public, governments and corporations towards the actions of hacktivists[29]. Edyvane and Kulenovic identify that the two essential elements of civil disobedience are its 'public character' and the 'willingness of those involved to be arrested and prosecuted'[30]. They argue that our understanding of CD as 'a morally justified act of law-breaking' is because of the public nature of acts of CD and the willingness of those involved to suffer the legal consequences[31]. This echoes the traditional notion of CD put forward by Martin Luther King Jr. in his address from his jail cell in Birmingham: 'One who breaks an unjust law must do so…with a willingness to accept the penalty….who willingly accepts the penalty of imprisonment in order to arouse the conscience of the community over its injustice, is in reality expressing the highest respect for law.'[32]

Cohan argues that 'accepting legal consequences shows that the civil disobedient seeks to better society within the parameters of the social contract, to be persuasive, and to behave ethically.'[33] Hacktivists do not conform with these traditional elements and often carry out their attacks publicly but shrouded under a veil of anonymity. However, simultaneously we must acknowledge that many hacktivists may preserve their anonymity in fear of the current harsh laws that exist to prosecute them. If the law were to make necessary distinctions then that may encourage hacktivists to publicly come forward and accept the consequences of their actions[34].

Delmas attempts to define five clusters within a matrix of electronic resistance by differentiating between different forms of hacktivist activities[35]. She argues that Hacktivism does not fit into any defined definition of civil disobedience as either the definition is too narrow, excluding acts that

[27] Ibid.
[28] Derek Edyvane, Enes Kulenovic, 'Disruptive Disobedience' (2017) 79 The Journal of Politics.
[29] Joshua Adams, 'Decriminalizing Hacktivism: Finding Space For Free Speech Protests On The Internet' (2014).
[30] Derek Edyvane, Enes Kulenovic, 'Disruptive Disobedience' (2017) 79 The Journal of Politics, 1360.
[31] Ibid.
[32] 'Letter From Birmingham Jail' (1963) <https://web.cn.edu/kwheeler/documents/Letter_Birmingham_Jail.pdf> accessed 22 November 2018.
[33] John Alan Cohan, Civil Disobedience and the Necessity Defense, (2007) 6 Pierce L. Rev. 111, 119.
[34] Vasileios Karagiannopoulos , Living With Hacktivism (1st edn, Palgrave Macmillan 2018).
[35] Candice Delmas, 'Is Hacktivism The New Civil Disobedience?' (2018) 69 Raisons politiques.

should be protected, or alternatively too wide and then includes acts of cyberterrorism which is contrary to its purpose. Her attempt to resolve this issue is to define hacktivism in a different way rather than trying to equate it to civil disobedience. However, Delmas recognizes that some key forms of hacktivism can be viewed through the civil disobedience lens in an electronic space. Her argument inherently accepts that there is a matter of discerning between acts undertaken with the intention to cause some social or political change rather than those that are undertaken with intent to harm, or simply to mock[36].

It is yet another case of technology outpacing the developments in law. We have had at least 3000 years to determine what physical behaviours constitute socially and morally acceptable dissent in a democratic society and which therefore must be treated leniently under law. Hacktivism, on the other hand, is less than 30 years old. It may be that we are trying to tackle a phenomenon which is highly technical with laws based on assumptions about privacy and ownership emanating from a world of bricks and mortar.

Given the current legal state in most jurisdictions, it is unlikely that the law will allow for complete immunity for hacktivists in the near future. However, the law may be reformed to allow for motive and intention behind an attack to be used as mitigating factors which in turn may lead to acquittals or at least reduced sentences. In addition, defences such as the political necessity defence should be allowed more commonly in front of juries[37]. Cohan has claimed that a 'necessity' defence 'allows the airing of views by those in most need of a hearing'[38]. This defence has been successfully argued by climate change activists in both the USA and UK[39]. By allowing such defences to be more commonly heard by juries, the legal system and judiciary will allow a distinction to be drawn automatically between those that can prove they committed a criminal attack on an information system simply as a political act rather than with criminal and profiteering intentions[40].

Lawmakers are understandably worried that ordinary criminals may profit from any concessions offered to more noble hacktivists. The law does struggle with determining the mens rea of a criminal, especially in the anonymous realm of the internet. Regardless of these risks, we cannot deny that Hacktivists behaviour can and does conform to the readily accepted notion of CD in restricted cases[41]. It is absurd then that we allow and even admire physical protesters engaged in

[36] Ibid.
[37] Ibid, 154.
[38] John Alan Cohan, Civil Disobedience and the Necessity Defense, (2007) 6 Pierce L. Rev. 111, 173.
[39] John Vidal, 'Not Guilty: The Greenpeace Activists Who Used Climate Change As A Legal Defence' (the Guardian, 2008) <https://www.theguardian.com/environment/2008/sep/11/activists.kingsnorthclimatecamp> accessed 22 November 2018; Julia Wong, 'A Crime Justified By Climate Change? Activists Caught In Legal Showdown' (the Guardian, 2016) <https://www.theguardian.com/environment/2016/jan/14/climate-change-activists-trial-washington> accessed 22 November 2018.
[40] Vasileios Karagiannopoulos , Living With Hacktivism (1st edn, Palgrave Macmillan 2018), 155.
[41] Joshua Adams, 'Decriminalizing Hacktivism: Finding Space For Free Speech Protests On The Internet' (2014).

acts of CD but impose a blanket criminality on similarly motivated forms of non-violent resistance in cyberspace.

Many of the freedoms and behaviours we take for granted today attracted criminal sanctions in the recent past. Laws of the future will treat traditional civil disobedience at par with electronic civil disobedience. Both break the law but do so as a form of protest and to draw attention to a particular social or political issue. We must begin to take the 'motive and intent' into account when prosecuting hacktivists. Those practicing nonviolent resistance through hacktivism deserve leniency and protection. As a journalist put it aptly: 'the current draconian censorship rules criminalise dissent in this medium. Without reform, when the time comes for a new generation to take the reins, we may find all too many behind bars'[42].

[42] James Ball, 'By Criminalising Online Dissent We Put Democracy In Peril | James Ball' (the Guardian, 2011) <https://www.theguardian.com/commentisfree/2011/aug/01/online-dissent-democracy-hacking> accessed 22 November 2018.

Implied Trusts and the Conscionability Conundrum – Are They Truly Based on Conscience?

Alice Flett

In addressing whether implied trusts are truly based on conscience, this essay divides into four parts. Firstly, what is meant by conscience will be assessed to contextualize the question. Following this, the implied resulting trust and its relationship with conscience will be explored, looking specifically at the presumed resulting trust. Next, the implied constructive trust will be explored and whether its various sub-groups, the common intention constructive trust and the Pallant v Morgan constructive trust, are based on conscience and if so, whether they are more so than the resulting trust. Finally, constructive trusts being recognised as remedies for various equitable wrongs including proprietary estoppel will be considered in light of the notion of conscience. Ultimately, this essay will show that while implied trusts are based on the idea of conscience, it cannot be said that the basis of *all* trusts is conscience absolutely as certain trusts uphold the concept more so than others.

The courts will find an implied trust exists (resulting or constructive) to protect people from situations where it would be unconscionable to deny someone their money, property or land. What is meant by conscience has remained largely absent from judicial discourse[1] which Turner rightly considers as 'curious'[2] given its importance to the construction of equity. However, modern case law shows an objective interpretation of conscience being adopted, similar to its origins in scholastic theology and medieval canon law,[3] assessing conscience against broad standards of morality and fairness[4] rather than strict legal rules. How this interpretation of conscience subsequently applies to the implied presumed resulting trust will now be explored.

According to Lord Browne-Wilkinson, it is equity that affects the conscience of the legal owner.[5] Their conscience is affected under the presumed resulting trust when a non-legal owner makes a financial contribution to the purchase price, making them a beneficiary.[6] Where another person makes a financial contribution to the purchase price, equity deems it unconscionable for the legal owner to then deny that person a beneficial interest in the property. Therefore, the property will 'jump back'[7] to the non-legal owner on resulting trust,[8] either by the legal owner 'buying them out' or if the property is subsequently sold.

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[1] Alistair Hudson, *Equity and Trusts* (9th edn, Routledge 2016) 1092.
[2] David Turner, 'Relief Against Forfeiture of a Proprietary Interest: When Will Equity Come to the Rescue?' (2004) 23 U.Q.L.J. 464, 473.
[3] Richard Hedlund, 'The Theological Foundations of Equity's Conscience' (2015) 4(1) O.J.L.R. 119, 120.
[4] ibid 119.
[5] *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] A.C. 669, 705.
[6] *Halsbury's Laws* (5th edn, 2013) vol 98, para 11.
[7] Sarah Worthington, *Equity* (2nd edn, Oxford University Press 2006) 71.
[8] *Vandervell v Inland Revenue Commissioners* [1967] 2 A.C. 291.

The law presumes a contribution to the property's initial purchase price from a non-legal owner was an investment rather than an out-and-out gift[9] for the legal owner who has provided no consideration in receipt of the transfer. This seemingly pessimistic presumption (reflecting the maxim that equity is cynical[10]), shows that the law presumes people do not act altruistically and rather they act expecting to get something in return.[11] Following a relationship breakdown, it would be easy for the legal owner to force the non-legal owner out of the property and keep all financial contributions[12] and therefore the court being suspicious of monetary gifts, protects the more vulnerable party[13] from losing their money easily. This approach shows conscience *does* form the basis of the presumed resulting trust as equity affects the conscience of the legal owner to protect the non-legal owner from being left without their money after being denied a beneficial interest in the property.

The presumed resulting trust being based on conscience is further illustrated by the option for the non-legal owner to rebut the presumption of an investment and rather, if they choose, they can give a monetary gift to the legal owner by simply asserting this. Lord Chancellor Baron Eyre explained this in *Dyer v Dyer*[14] stating that a *"…resulting trust may be rebutted by circumstances in evidence."*[15] This means that the legal title is not held on resulting trust back to the person who provided the purchase money by simply saying it was a gift. From this, it is clear that the presumed resulting trust is based on conscience as the intention of the non-legal owner is given affect to, either by (correctly) presuming the settlor wanted a beneficial interest in the property or by allowing the settlor to disclaim an interest by saying the contribution was a gift; also allowing the legal owner to distribute his property how he wishes.

Similarly, the contrary presumption of advancement, prevents beneficial interests in property being ascertained when dealing with certain classes of people and rather, such transfer of money will be presumed a gift and not an investment. The presumption of advancement applies only to a father-child relationship,[16] a husband-wife relationship and to persons standing *in loco parentis.*[17] Under this presumption, the legal owner's conscience is presumed *not* to be affected unless there is proof that it should be. This approach promotes conscionability by encouraging behaviour based on moral and social expectations that through good conscience, parents should support their children and spouses should support each other and not be motivated by acquiring beneficial interests in each other's property.

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[9] ibid (Goff L) 689.
[10] Graham Virgo, *The Principles of Equity & Trusts* (2nd edn, Oxford University Press) 40.
[11] ibid 261.
[12] Richard Hedlund, 'Conscience and Unconscionability in English Equity' (PhD thesis, University of York 2016) 140.
[13] Supportive of the maxim that 'equity protects the weak and vulnerable'.
[14] (1788) 30 E.R. 42.
[15] ibid 43.
[16] Subject to recent developments of neutrality; see Lisa Sarmas, 'A Step in the Wrong Direction: The Emergence of Gender 'Neutrality' In the Equitable Presumption of Advancement' (1993) 19(3) M.U.L.R. 758.
[17] *Bennet v Bennet* (1879) 10 Ch. D 474, 477 (Jessell M.R.).

However, the presumed resulting trust has been criticised for being too restrictive and thus of limited practical use as it only applies to situations where money goes *directly* to the acquisition of property.[18] The rigidity of the presumed resulting trust has led the court to avoid using it where possible, instead showing preference to the implied constructive trust which can accommodate both purchase price contributions but also later contributions that have been made to the property. This provides the court more flexibility to decide the appropriate remedy and quantification which the arithmetic rigour of the resulting trust does not allow.[19] Therefore, although the presumed resulting trust is based on the notion of conscience to some degree, its limited application makes it a rigid tool to acquire interests in property. The implied common intention constructive trust (CICT) applying in a domestic context to single-ownership disputes and its relationship with conscience will now be evaluated.

The CICT applies when determining the allocation of proprietary interests between parties following a relationship breakdown.[20] The CICT is a remedy in its own right and applies where it would be unconscionable for the legal owner[21] to deny the claimant a beneficial interest in the property[22] after the non-legal owner justifiably believed a common intention existed between them that they were to acquire an interest, from which they acted upon to their detriment. Common intention is ascertainable expressly or impliedly from the parties' conduct from which the court can then determine the quantification (or not) of the beneficial interest. In *Stack v Dowden*[23] Lady Hale emphasised the importance of not restricting evidence of common intention to mere financial contributions and rather, "*…many more factors than financial contributions may be relevant in divining the parties' true intentions.*"[24] This wider interpretation was applied in *Graham-York v York*[25] where the claimant acquired a 25% beneficial interest in the property based on her non-financial contributions of domestic chores and terminating her employment to look after the children.

However, despite the apparent accommodating nature of the CICT and the non-exhaustive list outlined in *Stack*[26] of what may be considered as evidence of common intention going beyond mere financial contributions, it could be argued that in reality, the courts are willing to sacrifice fair outcomes in pursuit of upholding property law principles, making it questionable whether the CICT can be said to be based on conscience at all. Lord Justice Tomlinson stated in *Graham-York*[27] that "*…the court is not concerned with some form of redistributive justice…Miss Graham York is*

[18] Ross Grantham and Charles Rickett, 'Resulting Trusts: A Rather Limited Doctrine' in Stephen Goldstein (ed), *Restitution and Equity: Resulting Trusts and Equitable Compensation* (L.L.P. 2000).
[19] *Lau Siew Kim v Yeo Guan Chye Terence and Another* [2007] S.G.C.A. 54 [26].
[20] Virgo (n 10) 340.
[21] Historically in Victorian England it was the husband who would own the matrimonial home in law.
[22] Virgo (n 10) 21.
[23] [2007] 2 A.C. 432.
[24] ibid 69 (Hale L).
[25] [2015] H.L.R. 26.
[26] *Stack* (n 23).
[27] *Graham-York* (n 25).

entitled to that share which the court considers fair…in relation to the property".[28] This approach shows the law applying a utilitarian approach to implied trusts, favouring the need for consistent laws which everyone has an interest in having,[29] compared to the singular injustice for one person if failing to achieve a fair outcome. It could be argued that English law's rejection of the remedial constructive trust[30] is to blame for producing unconscionable outcomes and that such injustice will not cease unless the courts adopt more of a remedial jurisprudence based on conscience[31] which provides judges more flexibility to decide cases on what is fair rather than what is 'correct' according to legal rules. It is likely (although not guaranteed) that Miss Graham-York would have been awarded an enhanced beneficial interest in the property had the remedial constructive trust applied. Therefore it is clear that the CICT needs developing further to provide more adequate protection for cohabitants in English law.

Other jurisdictions including Australia and New Zealand, have tailor-made legislation to protect cohabitants[32] which Parliament can learn from. Parliament attempted to pass similar laws by proposing the Cohabitation Rights Bill 2016, but this was never formally implemented. Cohabitation has increased from 1.5 million in 1996 to 3.2 million in 2016,[33] showing the increased need for more adequate legislative protection for cohabitants.[34] The need is heightened by the apparent myth within society of a 'common law marriage' existing between non-married couples which many cohabiting couples wrongly believe they will be protected by.[35] Although reform was allegedly on the horizon in 2011[36] and has been offered by the Law Commission,[37] sufficient protection has yet to be afforded. Parliamentary intervention would ensure that beneficial interests can be allocated fairly but not at the expense of legal consistency. Dyson considers upholding property law rules in favour of consistency, alongside the equally desired need to recognise contemporary social norms and relationships to ensure conscionable outcomes can be achieved within the unique facts of different cases, as an awkward (arguably impossible)

[28] *Graham-York* (n 25) Tomlinson LJ 543, [22].
[29] Joseph Perksy, *The Political Economy of Progress: John Stewart Mill and Modern Radicalism* (Oxford University Press 2016) 57.
[30] *FHR European Ventures LLP v Cedar Capital Partners LLC* [2016] E.W.H.C. 359 (Ch) (Neuberger L) 251, [47]; Hilary Delany and Desmond Ryan, 'Unconscionability: A Unifying Theme in Equity' (2008) Conv. 401, 417.
[31] Sir Terence Etherton, 'Equity and Conscience' (Speech delivered at Eldon Professor's Lecture, Northumbria University, 25 October 2017) <https://www.judiciary.gov.uk/wp-content/uploads/2017/10/sir-terence-etherton-mr-etherton-lecture-20171030.pdf accessed 23 December 2017> accessed 23 November 2017, 10 [12].
[32] De Facto Relationships Act 1984 (Australia); Property (Relationships) Act 1976 (New Zealand).
[33] Office for National Statistics, 'Families and Households in the UK: 2016' (*Office for National Statistics*, 2016) <https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/families/bulletins/familiesandhouseholds/2016> 10 December 2017.
[34] Similar to the protection provided for married couples under the Matrimonial Causes Act 1973.
[35] Catherine Fairbairn, "*Common Law Marriage" and Cohabitation* (House of Commons Library Briefing Paper 03372, 2017) < http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN03372> 16 December 2017; BBC News, 'Cohabitating Couples Warned of 'Common Law Marriage' Myths' (*BBC News*, 37 November 2017) <http://www.bbc.co.uk/news/uk-42134722> accessed 17 December 2017.
[36] HC Deb 6 September 2011, vol 532, col 16WS.
[37] Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown* (Law Com No 307, 2007).

balancing act[38] which Parliament will struggle to satisfactorily achieve. How the CICT operates in a commercial context will now be assessed comparatively to a domestic context.

What will be considered as unconscionable conduct within commercial disputes, is a higher threshold to reach if the court is to allow a commercial party to acquire property through an implied trust. As business-orientated people will engage in more sophisticated transactions, they will naturally have access to enhanced resources such as lawyers and accountants which justifies a higher standard being imposed upon them as they can utilise these resources to ensure they are protected before engaging in commercial deals. Comparatively, it cannot be expected that individuals in a private context will have the same availability of resources. The nature of commercial relationships is one of competition and making profit and therefore it is not unfair to expect these parties to draft up water-tight contracts before entering into commercial agreements; especially knowing that within the commercial sector, the law expects transactional certainty and agreements to be formally articulated in writing.[39] The same expectation cannot be said to be justified for individuals in a private context to draft up formal contracts between themselves. This approach shows the law operates to facilitate boundaries for commercial activity[40] and that if commercial parties choose to take the risk of not complying with the appropriate formalities[41] and the agreement falls through, equity will not protect them. Although, the recent case of *Matchmove Ltd v Dowding*[42] could potentially be reflective of an incremental shift in the court's attitude becoming less strict towards informal commercial agreements after allowing land to be held on constructive trust for the claimant, despite not putting what was agreed during negotiations in writing. Despite case law showing an unsympathetic approach of the courts, does not mean parties in disputes which are commercial in nature will not receive *any* equitable relief and rather the Pallant v Morgan constructive trust may apply which will now be explored, assessing its relationship with conscience.

The Pallant v Morgan constructive trust[43] is a form of the CICT which arises where the parties have entered into an arrangement involving the acquisition of property by one of them, usually in pursuant of a joint business venture, but the acquiring party denies the non-acquiring party an interest in that property.[44] In this situation, the purchasing party may then be required to hold that property on constructive trust if it becomes unconscionable to deny the other party a beneficial interest in that property. The focus of the Pallant v Morgan constructive trust is to respond to a defendant's unconscionable conduct which has caused a lost opportunity to the

[38] Andrew Dyson, 'All's Fair in Love and Law: An Analysis of the Common Intention Constructive Trust' (2009) 4(2) C.S.L.R. 149, 150.
[39] Law of Property (Miscellaneous Provisions) Act 1989, s 2(1).
[40] Charles Rickett, 'Unconscionability in Commercial Law' (2005) 24(1) U.Q.L.J. 73, 74.
[41] Law of Property Act 1925, s 53(1)(c).
[42] [2017] 1 W.L.R 749.
[43] [1953] Ch. 43.
[44] Virgo (n 10) 361.

claimant in the open property market as a result of the agreement he believed existed.[45] The claimant does not have to suffer detriment and rather, the loss of an opportunity is sufficient. The court applied this approach in *Banner Homes Group plc v Luff Developments Ltd*,[46] deciding that the property be held on constructive trust as without the initial agreement that it was being purchased by one of them in pursuant of their joint business venture, the claimant may not have refrained from bidding in the property market. The agreement benefited the defendant by avoiding a 'bidding war' at the expense of the non-acquiring party and therefore makes it unconscionable for the acquiring party to obtain the full interest and the other party to acquire none.[47] This shows the Pallant v Morgan constructive trust *is* based on the notion of conscience as it prevents a defendant from unconscionably benefiting from their deceitful conduct and thus, operates to give effect to the initial common intention between the parties to share the property equally in pursuant of their joint business venture. Similarly, if a claimant has detrimentally relied on a promise, they may be awarded a remedy under the claim of proprietary estoppel (PE) which will now be explored in light of the notion of conscience.

A claim for PE arises when the legal owner of the property has made a promise to the claimant that they will acquire a proprietary interest, usually upon the death of the legal owner under inheritance,[48] from which the claimant subsequently relies on at their detriment but the defendant then fails to uphold that promise. The promise does not have to be made expressly or impliedly,[49] and rather can be made by silence or by a failure to act[50] as seen in *Thorner v Major*[51] and reaffirmed in *Suggitt v Suggitt*[52] and *Davies v Davies*[53] where although the farmers had not made any express declaration to the claimants that they would inherit the farm, the representation could be drawn from indirect statements made by the deceased which referred directly to the farm and could be inferred following conduct of working on the farm for many years free of payment.

Labelling the defendant's conduct as unconscionable requires more than mere distaste or unattractiveness[54] and rather, the question asked is 'would it be unconscionable for a legal owner to deny the claimant a beneficial interest?' If the answer is yes, equity can intervene and award relief accordingly. PE seeks to 'put right' the defendant's unconscionable conduct by acting as a 'sword,' enabling new property rights to be created[55] to confer a proprietary right upon someone

[45] Hilton Mervis and Paul Brehony, 'Certainty in Commercial Property Contracts – The Challenge of Equity Over Law' (2001) 151(7007) N.L.J. 151, 153.
[46] [2000] Ch. 372.
[47] ibid 398 [4].
[48] John Mee, 'Proprietary Estoppel and Inheritance: Enough is Enough? (2013) Conv. 280, 283.
[49] Ben McFarlane and Philip Sales, 'Promises, Detriment and Liability: Lessons for Proprietary Estoppel' (2015) 131 L.Q.R. 610, 612.
[50] Irit Samet, 'Proprietary Estoppel and Responsibility for Omissions (2015) 78(1) M.L.R. 85, 89.
[51] [2009] 1 W.L.R. 776.
[52] [2012] E.W.C.A. Civ 1140.
[53] [2016] E.W.C.A. Civ 1226.
[54] Lord Neuberger, 'The Stuffing of Minerva's Owl? Taxonomy and Taxidermy in Equity' (2008) 68 C.L.J. 537, 549.
[55] *Central London Property Trust Ltd v High Trees Ltd* [1947] K.B. 130.

who would otherwise not have it.[56] PE creates a mere equity which is satisfied by the court determining the minimum necessary to achieve a fair result[57] which could be a monetary award[58] or granting the claimant a beneficial interest in the property on constructive trust for them.[59] As the remedy exists from the date of the court order, shows PE adopting features from the remedial constructive trust model[60] despite its alleged outright rejection in English law[61] and shows that the operation of a constructive trust can depend on the exercise of judicial discretion.[62] PE can apply to both domestic and commercial disputes, although the courts are reluctant to apply PE in a commercial context for the same reasons outlined above regarding the importance of transactional certainty within commercial agreements rather than relying on informal promises.

Contrastingly, in a domestic context the courts are more prepared to apply PE when agreements fall through. However, this does not mean the court will apply PE *purely* based on what is fair or conscionable. Rather, when exercising discretion, the court must take account of legal principles including the proportionality principle to ensure that the claimant's relief is proportionate to the detriment suffered. This was seen in *Jennings v Rice*[63] where it was held that although Mrs Royal had acted unconscionably by purposefully dying intestate, knowing it would go to her children and not Jennings despite promising the property to him, giving Jennings the dwelling would not be proportionate. To decide otherwise would have meant he received a property valued at £200,000 after completing 'odd jobs' for the deceased which were not of the same value. This approach illustrates that equitable intervention is not unregulated and judges still have to abide by legal rules and tests like the principle of proportionality when doing so; reflective of the English court's conservative approach[64] by preferring greater emphasis on precedent and authority as part of the institutional constructive trust model. From this, one could argue that modern equitable jurisprudence has become a body of rules which are just as complex and rule-haunted as the common law[65], making it unfit for purpose if encroached by common law principles. Nonetheless, the constructive trust being recognised to remedy unconscionable conduct makes the notion that trusts are based on conscience more compelling.

In conclusion, four points have been made in addressing whether implied trusts are truly based on conscience. First, the definition of conscience was explored to contextualise the statement. Following this, the accuracy of the statement in question was assessed, looking at the presumed

[56] Peter Birks, 'Proprietary Remedies' in John Lowry and Loukas Mistelis (eds), *Commercial Law: Perspectives and Practice* (LexisNexis Butterworths 2006) 85.
[57] Virgo (n 10) 365.
[58] *Crabb v Arun District Council* [1976] Ch. 179, 198 (Scarman L).
[59] *Thorner* (n 51).
[60] Simon Gardner, 'The Remedial Discretion in Proprietary Estoppel: Again (2006) 112 L.Q.R. 492, 497.
[61] *FHR European Ventures LLP v Cedar Capital Partners LLC* (n 35).
[62] Graham Virgo, 'The Genetically Modified Constructive Trust' (2016) 2(2) C.J.C.C.L. 579, 591.
[63] [2003] 1 P. & C.R. 8.
[64] Tang Hang Wu, 'The Constructive Trust in Singapore: Five Persistent Puzzles' (2010) 22 S.Ac.L.J. 136, 149.
[65] Haywood Jefferson Powell, 'Cardozo's Foot: The Chancellor's Conscience and Constructive Trusts' (1993) 56(3) Law & Contemp. Probs. 7, 8.

resulting trust, concluding that it requires amendment to uphold the notion of conscience absolutely. Next, the constructive trust and its relevant sub-types including the CICT and the Pallant v Morgan constructive trust were evaluated, concluding that what ties all constructive trusts together, not just in English law[66] but across the common law world including Australia,[67] Canada[68] and Hong Kong,[69] is that they operate on the basis of conscionability, irrespective of whether they adopt a framework that is institutional, remedial or something in between. Finally, the constructive trust being available to remedy various equitable wrongs including PE was assessed, concluding that the court prefers to remedy unconscionable conduct in a domestic context rather than a commercial environment. Conclusively, this essay has shown that implied trusts *are* based on the notion of conscience more than it can be said they are not, although it cannot be said that the basis of *all* trusts is conscience categorically.

[66] *Westdeutsche Landesbank Girozentrale* (n 5); *Matchmove* (n 42).
[67] *King v Adams* [2016] N.S.W.S.C. 1798.
[68] *Soulos v Korkontzilas* [1997] 2 S.C.R. 217.
[69] *Chen Tek Yee v Chan Moon Shing* [2015] H.K.C.F.I. 723.

Technology: the New Enemy of the Human Race?
timeo Danaos et dona ferentes[1]

Kathryn Handley

Technology is undeniably useful, even invaluable, in today's society, but is it more foe than friend to the human race? Experts have argued that technology can enrich the legal sphere and eliminate barriers to justice, but these opportunities come with concurrent dangers for the fundamental values of society. This essay addresses concerns surrounding technology in the legal sphere, as well as broader issues such as the justifiability of unfettered technological progress and human rights considerations for autonomous machines. If we are to mitigate the risk that human rights will be undermined by technological progress, we must address the issue of legal responsibility. The creators of new technology should be held responsible for the detrimental consequences of their creations. To this end, there have been sound proposals that our existing ethical structures could be imbued into the development and use of new technology.[2] An effective way of securing international consensus on this matter is through 'soft law', which offers an attractive alternative to treaties by enabling States to take on commitments they might otherwise struggle to reach agreement on.[3] In order to achieve this objective, however, we must address the current conflict between the goals of human rights and the purpose of technology.

Technology in the Legal Sphere and Article 6 ECHR

The eminent Lord Sumption highlighted that Article 6 ECHR, 'the right to a fair trial', is undermined in courts across the globe by costly court proceedings, unnecessarily complex legal rules and a bias judiciary.[4] The UK government's recent White Paper, *Transforming Our Justice System*, September 2016, has proposed the idea of 'digital case management' to enable claimants and defendants to participate in court proceedings online, asserting that this will lower costs and delays within the current court process.[5] Whilst technology can replace inefficient manual mechanisms in areas such as disclosure with little controversy, there is (legitimately) greater concern surrounding the proposal that machines could replace the role of the judiciary itself. Automated decision-making entails 'large-scale collection of data by various sensors, data processing by algorithms and subsequently, automatic performance' and can allegedly improve efficiency and eliminate bias in the decision-making process.[6] Systems that use automated

[1] This Latin proverb warns us to beware of gifts that come from our enemies.
[2] Privacy International, 'Privacy and Freedom of Expression In the Age of Artificial Intelligence' (*Privacy International*, April 2018) <https://privacyinternational.org> accessed 15 November 2018
[3] Alan Boyle, 'Interaction between Hard Law and Soft Law in United Nations Law-Making', lecture at Oxford University (15 February 2018) <https://podcasts.ox.ac.uk> accessed 14 November 2018
[4] Lord Sumption,'The Right to a Court: Article 6 of the Human Rights Convention', lecture at University of Glasgow (13 November 2015) <https://supremecourt.uk> accessed 12 November 2018
[5] Ministry of Justice, *Transforming Our Justice System,* a Joint Statement by the Lord Chancellor, the Lord Chief Justice and the Senior President of Tribunals (Policy Paper, 15 September 2016) 7
[6] M. Perel & N. Elkin-Koren, 'Accountability in algorithmic copyright enforcement' [2016] 19 STAN. TECH. L. REV. 473, 485

decision-making in the realm of immigration in Canada and the US are cogent evidence that these technologies create new challenges for human rights lawyers.

A report by the University of Toronto has highlighted numerous human rights concerns with the automated decision-making system experimentally introduced in Canada in the context of immigration and refugee law.[7] In particular, accountability is inadequate. When asked to undertake judicial review, the court will normally determine whether the decision was 'reasonable' rather than whether it is correct, giving the decision-maker a wide scope of discretion.[8] As technology is beyond the remit of the expertise of most judges, they will be inclined to be even more deferential to the decisions of these automated machines than to human discretion.[9] There needs to be a new form of effective oversight that ensures the reviewability of automated decisions.

It has also been suggested that the use of algorithms for judicial rulings could eliminate human bias.[10] However, this contention was undercut by the realisation that, because *humans* collect and input the data, the systems are unavoidably imbued by human prejudices. The Correctional Offender Management Profiling for Alternative Sanctions ('COMPAS'), an algorithm introduced in some US states to assess recidivism, has been heavily criticized for its discriminatory impact, as noted by the Wisconsin Supreme Court in the case of *State v Loomis*.[11] The court recognised that a defendant's right to a fair trial was violated under this system, because she was unable to challenge the scientific validity of this test; furthermore, by taking race and gender into account, the system undermined court impartiality.[12] Computer scientists developing algorithms for legal technology will normally ask: "for what are we optimizing?"[13] Algorithms could distort future data by working towards a target rather than the underlying objective; this could be especially problematic when a system is geared towards meeting government quotas rather than addressing individual concerns. An immigration officer with the task of determining the status of asylum-seekers is often bound by legislation that protects fundamental human rights, but must also act in accordance with governmental policy that wishes to restrict the flow if immigrants into the country – which objective will the system prioritise? Furthermore, if the system screens for cases in which an application is less likely to succeed, this may ignore factors such as whether the applicant was represented, an 'exacerbate

[7] Petra Molnar and Lex Gill, 'Bots at the Gate: A Human Rights Analysis of Automated Decision-making in Canada's Immigration and Refugee System', Citizen Lab at the Munk School of Global Affairs and Public Policy (September 2018) 55-57 <https://citizenlab.ca> accessed 13 November 2018

[8] *Dunsmuir v New Brunswick* [2008] 1 S.C.R. 190 [2008] SCC 9

[9] Molnar and Gill, 53

[10] Tarleton Gillespie, 'Algorithm' in Benjamin Peters (ed.) *Digital Keywords: A Vocabulary of Information Society and Culture* (Princeton University Press 2016) 27

[11] Anthony W. Flores, Christopher T. Lowenkamp, and Kristin Bechtel, 'False Positives, False Negatives, and False Analyses: A Rejoinder to "Machine Bias: There's Software Used Across the Country to Predict Future Criminals. And it's Biased Against Blacks"' [September 2016] FPJ 80(2)

[12] *State v Loomis* [2016] 881 N.W.2d 749 [764]

[13] Christopher Bavitz and Kira Hessekiel, 'Algorithms and Justice' (*Medium*, July 2018) <https://medium.com> accessed 13 November 2018

pre-existing asymmetries of power.'[14] Close attention must be given to the methods of data collection in such systems if impartiality is to be achieved, as current systems have failed to eliminate human bias. Justice should not be jeopardised for the sake of efficiency.

Technological Challenges for Human Rights outside the Legal Realm

A question that inevitably arises in the use of legal technology is: who should be responsible for errors, if lawyers (and even judges) are to delegate their roles to technology? This is a broader query that extends to the use of technology in all areas of society. For example, should a doctor supervising a robot conducting heart surgery be held liable when the surgery goes wrong?[15] A possible solution is to consign liability to the machine itself. Asaro theorises that we could apply legal responsibility to autonomous machines, such as robots, by emulating existing legal principles such as corporate liability.[16] The Saudi Arabian government recently went one step further and gifted the robot 'Sophia' with citizenship.[17] Coeckelbergh argues, however, the only way to be consistent with our ethical standards is to endow sufficiently autonomous robots with 'human' rights.[18] The human race has in the past created a hierarchy of entitlements that denied large groups in society human status – are we about to thoughtlessly refuse such values to a new species that is as sentient, autonomous and intelligent as us? This debate, however, neglects to address the dangers posed by the absence of legal responsibility on the part of the technical experts who create these machines. Corporate liability has become a shield for those who have made bad decisions in positions of power and courts have limited power to destabilise this device.[19] A shield against the law could be even more detrimental in the realm of technology; Human Rights Watch has highlighted the lack of accountability of machines that could destroy targets without human intervention.[20] The 'product liability' approach, favoured by the EU is more suited to regulate the realm of new technology; if properly adopted, it could prevent technological inventions with the potential to violate human rights from being created in the first place. [21] Researchers and computer scientists are likely to argue that such an approach will obstruct innovation. In response, human rights lawyers should ask them to consider whether the pursuit of innovation at the expense of fundamental values is really a legitimate or worthwhile goal. Such aspirations are at odds with the objectives of a legal system dedicated to the protection of human rights.

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[14] Molnar and Gill, 55

[15] Anonymous, 'Newcastle robot surgery inquest: Risk of further deaths' (BBC News Online, 8 November 2018) <https://www.bbc.co.uk> accessed 13 November 2018

[16] Peter Asaro, 'Robots and Responsibility from a Legal Perspective' (*Proceedings of the IEEE* 14 May 2007) <https://peterasaro.org> accessed 10 November 2018

[17] Rozina Sini, 'Does Saudi Arabian robot citizen have more rights than women?' (BBC News Online, 26 October 2017) <https://www.bbc.co.uk> accessed 12 November 2018

[18] Mark Coeckelbergh,'Robot rights? Towards a social-relational justification of moral consideration' (2010) Technology in Society 12(3) 209, 213

[19] Angelo Capuano, 'The Realist's Guide to Piercing the Corporate Veil' (2009) Australian Journal of Corporate Law 23(1) 56, 64

[20] Bonnie Docherty, 'Mind the Gap: The Lack of Accountability for Killer Robots' *(Human Rights Watch*, 9 April 2015) <https://www.hrw.org> accessed 11 November 2018

[21] European Commission, 'A European Approach on Artificial Intelligence' (Policy Paper, 31 May 2018) <https://ec.europa.eu> accessed 9 November 2018

Mitigation

The risks posed by technology for human rights should be addressed at both national and international levels. Any legal system purporting to endorse human rights must be able to effectively apportion liability. For legal and medical technology, the experts developing the systems should be liable for their actions in the same way as medical and legal experts. A holistic oversight mechanism that incorporates social responsibility should be introduced to ensure that technology experts are accredited. At the national level, legal responsibility should be imposed on technological experts at the point where the products are being created and developed; for example, there could be a duty to check for discriminatory data before inserting it into the systems. Furthermore, human rights considerations should be a fundamental part of the educational stages of computer science and technological development. General principles for the development and use of technology in society as a whole could be consolidated on an international level by 'soft law' legislation, which is particularly effective at coping with codification in areas of progressive development. [22] International rules will provide guidelines for legislation that should be implemented at national level. There are already several bodies of international standards for the use of artificial intelligence.[23] These could be extended to encompass standards of technological research and all new forms of innovation that may impact human rights. In the area of explorative technological research, technology should take inspiration from Environmental Law and adopt the 'precautionary principle', which holds that unknown future consequences either should or should not be sufficient to deter you from taking action, depending on the level of risk.[24] Lawyers, states and technological experts must work together to bring the priorities of humanity in line with those of technological progress.

Conclusion

This essay has outlined the risks associated with technology that will pose challenges for human rights lawyers. However, technology could also assist in making justice more accessible, efficient and impartial. The correct combination of humans and technology can surpass the efficacy of either on a stand-alone basis. To ensure technology continues to progress without harming fundamental values, we should look to the human rights system itself, which has succeeded in uniting law and humanity by offering legal protection to the fundamental principles of civilisation. Recognising the value of human rights entails ensuring effective accountability. Industries are being incrementally colonised by technological innovations and there should be some continuity in the liability. The opportunities afforded by technology can only reach their full potential, if human rights lawyers must facilitate a connection between the law, technology and humanity. We need an international consensus that prioritises the protection of human rights within the goals of technological progress. Technology must not be the enemy of humanity.

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[22] Boyle (2018)

[23] European Parliament and Council Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data [2016] OLJ 911/4.5

[24] The precautionary principle was adopted on an international scale in the World Charter for Nature by UN General Assembly 1982.

Charities and the Equality Act 2010

Jared Holmes

It is crucial to ensure that any legal and/or regulatory framework is understood by as many people as possible. It could be argued that charity law is already complex enough, with ongoing debates surrounding public benefit and Parliament making no effort to provide us with a statutory definition, but it gets worse. Charities in the UK have an additional layer of regulation. They must also comply with other areas of law which overlap and may affect their practice. Due to the diverse nature of charities, this outside regulation can have a vastly different effect from charity to charity. This essay will discuss the effects of the complexities and clashes surrounding the Equality Act 2010 (Equality Act), the Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014 (Lobbying Act 2014) and the political purposes rule, then go on to suggest possible reforms.

Implications of the Equality Act 2010 – S.193

It is not uncommon for a charity to restrict its services to a particular kind of beneficiary. Under old equality law charities benefitted from being able to do this, providing that their charitable objects explicitly allowed for it. The Equality Act significantly tightened this exemption. Now, if a charity wants to restrict its beneficiaries to a group that share a protected characteristic (for example race, sex, or disability, among others), it must not only provide for this in its charitable instrument,[1] but the restriction must also be a 'proportionate means of achieving a legitimate aim',[2] or be 'for the purpose of preventing or compensating for a disadvantage linked to the protected characteristic'.[3] These additions have made it a very complex and confused area and rather difficult for charities to engage with. Bearing in mind that charity trustees are not generally well versed in the law, expecting them to understand what a 'proportionate means of achieving a legitimate aim' is, seems rather ridiculous. The Charity Commission guidance[4] does not give much of an explanation, it defines 'proportionate' as 'fair, balanced and reasonable' and flips the tests so 'Part B', compensating for a disadvantage is 'Part A' within the guidance. Debra Morris states that this therefore suggests that 'Part B' is likely to be the more common route for charities to take when attempting to justify beneficiary restrictions.[5] Perhaps this is due to the complexities associated with the first part of the test.

The Equality Act 2010 causes problems for all charities, but some are more equipped to deal with such issues. Some charities are run professionally, almost like a business, but it is not uncommon for a charity to operate from a volunteers' living room. The law is particularly

[1] Equality Act 2010, S.193(1)(a)
[2] Ibid, S.193(2)(a)
[3] Ibid, S.193(2)(b)
[4] Charity Commission, *Equality Act guidance for charities*, August 2011
[5] Debra Morris, 'Charities and the Modern Equality Framework: Heading for a Collision?' (2012) 65 CLP 295-331

unsatisfactory for this kind of charity. The larger charities can afford legal advice to ensure they stay in line with the Equality Act, the same isn't true for smaller charities. They are forced to base their understanding on guidance documents and hope their actions are lawful. This may well discourage some smaller charities from continuing their services. Is that fair? The *Catholic Care* case below is an illustration of the high threshold for charities that wish to 'discriminate'.[6]

Catholic Care, an adoption services provider, applied to the Charity Commission to alter their charitable objects to restrict their services to heterosexual couples only. The Commission initially refused, but after several appeals, it was finally held by the Upper Tribunal that although they may have had a legitimate aim, restricting benefit to only heterosexual couples was not a proportionate means of achieving it.[7] There must be particularly weighty reasons to justify discrimination based upon sexual orientation.[8] This illustrates the difficult situations of competing rights between the protected characteristics. There is a clear clash here between charity law and the Equality framework.[9] This has left some religious charities feeling as though they are at the bottom of the pile of protected characteristics. There is obvious uncertainty, quite what weight should be given to competing interests certainly needs to be clarified and this remains the task of the judges. Better guidance is key. Some writers argue that the bar has been set too high for charities.[10] It must be said, that in a sector where public trust is key, it is difficult to understand how that would be maintained if the Commission had allowed *Catholic Care* to discriminate in the way in which they wished to. But on the other hand, whilst the actions of *Catholic Care* were discriminatory, it cannot be said that they were not providing a much needed service. Perhaps a little more flexibility from *Catholic Care* was required.

We have to be thankful for the doctrine of cy-pres in times like this. Issues can arise when donors have their own legitimately held private discriminations. Perhaps they want to assist people with whom they share a protected characteristic. This can become a problem if it is a 'discriminatory donation'. The charity may apply to use the doctrine of cy-pres to alter the class of beneficiaries. However, care must be taken to avoid a wide application of cy-pres as it is likely to discourage donations. The more freedom offered to donors, the more likely they are going to donate, this is great for the sector and relieves a burden from the state. But there is also significant public interest in not allowing charities to discriminate.[11]

The Equality Act requires a charity to explicitly state its restrictions in its charitable objects. This means issues can arise when a charity of general objects wishes to focus its attention on a particular group for a short period of time, for example during a focussed campaign. However, it

[6] Debra Morris, 'Charities and the Modern Equality Framework: Heading for a Collision?' (2012) 65 CLP 295-331
[7] *Catholic Care (Diocese of Leeds) v Charity Commission* [2012] UKUT 395 (TCC)
[8] Ibid
[9] Equality Act 2010, S.149, S.193
[10] Daniel Lombard, 'When can you discriminate?' (*Third Sector*, 26th February 2013) <https://www.thirdsector.co.uk/when-discriminate/governance/article/1172111> accessed 10th May 2018
[11] Debra Morris, 'Charities and the Modern Equality Framework: Heading for a Collision?' (2012) 65 CLP 295-331

is very unlikely that a charity would be punished for this, but again adds to the uncertainty surrounding the Act. In a study conducted by the University Liverpool Charity Law and Policy Unit,[12] they found a large gap between knowledge and understanding. Charities knew of the Equality Act, but were unaware of what it meant for charities with restricted objects. This has most impact on smaller charities. Improved guidance might be a good place to start.

Implications of the Political Purposes Doctrine and the Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014 (Lobbying Act)

It has long since been established that charities cannot pursue solely political purposes,[13] however, a charity can partake in political activity in support of, its main charitable purpose.[14] This may sound simple, but in practice the distinction can be difficult to draw. The lack of clarity in this area of the law causes difficulties both for organisations already registered as charities and for those seeking charitable status.[15] It is not clear what the future of the political purposes doctrine will be, but Australia[16] and New Zealand[17] already replaced their blanket ban with a much narrower approach, only banning party political activity. It is hoped the UK will join this movement.

The *Human Dignity Trust* case demonstrates the unsatisfactory nature of the legal and regulatory framework. The advancement of Human Rights was recognised as a charitable purpose in the Charities Act 2006.[18] The *Human Dignity Trust* based their charitable objects on those suggested by the Commission,[19] but were told that their purpose was a political one. This type of 'back-tracking' from the Commission makes it increasingly difficult for charities to understand their position. After a successful appeal[20] the *Human Dignity Trust* were registered as a charity on the basis that they were not seeking to procure changes to the law, but were in fact enforcing current law, 'superior rights enforcement'. Although the Tribunal stated that they were not setting a precedent, it is clear there may now be a possibility for charities to claim they are 'superior rights enforcement' charities. But again, legal advice will likely need to be sought, perhaps excluding those smaller charities once again – and wasting the money of those that can afford the advice.

The overlapping legal framework of the Lobbying Act, the political purposes rule and the importance of maintaining trust in the sector is backing charities into a corner. The harsh restrictions imposed by the Lobbying Act stop charities from spending certain amounts of

[12] Debra Morris, Anne Morris and Jennifer Sigafoos, 'The Impact of the Equality Act 2010 on Charities' (2013) Charity Law and Policy Unit UoL
[13] *Bowman v Secular Society Ltd* [1917] AC 406
[14] National Anti-Vivisection Society v Inland Revenue Commissioners [1948] AC 31
[15] Hilary Biehler, 'The political purposes exception: Is there a future for a doctrine built on foundations of sand?' [2015] Trust Law International, 97-113
[16] *Commissioner for Taxation v Aid/Watch Inc* [2010] HCA 42 (HC (Aus))
[17] *Greenpeace of New Zealand Inc, Re* [2014] NZSC 105 (Sup Ct (NZ))
[18] Now Charities Act 2011, S.3(1)(h)
[19] Charity Commission (RR12), *The Promotion of Human Rights* (January 2005)
[20] *Human Dignity Trust v Charity Commission* [2014] FTTT 0013 B(GRC)

money on 'controlled expenditure', defined as money spent on activity that could reasonably be regarded as intended to influence voters for or against a political party or actors.[21] The issue is, the charities intention could be something completely different, it is not uncommon for a charities campaigns to appear in line with that of a political party. The Act provides the ability to register with the Electoral Commission as third party campaigners. But how can a charity register with the Electoral Commission when this would clearly make it look like they were supporting party politics, something that is in breach of charity law. The Oxfam 'scandal' illustrates the difficulties that charities can face when they accidentally appear to be involving themselves in party politics.[22] The Charity Commission stated Oxfam should ensure written authorisation is given to tweets or instant messages. Debra Morris argues that "it is unworkable to suggest that every single 140-character tweet has written authorisation". This presents communication challenges for the charitable sector in the 21st century.[23] Cases like this scare charities, who can perceive restrictions that are not there and so called 'self-censor'. Smaller charities are forced to take greater care in order to ensure compliance as they do not have the resources of Oxfam[24], who still managed to fall foul of the law.

Only 17 charities were caught out by the new tightened restrictions that the Lobbying Act imposes on the run up to the 2015 general election.[25] At first glance, one might conclude that the new law was well understood. But on second thoughts, could this not be down to charities not understanding their legal position and as a result, restricting their pre-election activities for fear of breaking the law? Under charity law charities are perfectly entitled to, and often do, express their support for certain political parties' policies. This is lawful if it furthers their charitable purpose. However, under the Lobbying Act, this activity could be reasonably regarded as intended to influence voters. It would therefore be restricted for as long as a year before the election.[26] This 'gagging' effect means that charities must hide in a corner with no voice. Surely that wouldn't bode well with their supporters? This Act intrudes upon the way that charities work. These restrictive developments have sent a strong signal that charities may only challenge government policy at their own peril.[27]

A report by the Harries Commission[28] confirmed that it was difficult for charities to know what was and was not regulated activity. A mess to say the least. Morris argues that it would be a huge

[21] Political Parties Act 1998, S.85
[22] Charity Commission, *Operational Compliance Report: Oxfam* (Registration Number: 202918) (2014)
[23] Debra Morris, 'Legal Limits on Political Campaigning by Charities: Drawing the Line' [2016] 7(1) Voluntary Sector Review 109-115
[24] Ibid
[25] Charity Commission, *Campaigning and political issues arising on the run up to the 2015 General Election,* London: Charity Commission
[26] Lobbying Act 2014, S.46
[27] Debra Morris, 'Charites and Political Activity in England and Wales?: Mixed Messages' [2015/16] 18 C.L. & P.R 109-131
[28] Commission on Civil Society and Democratic Engagement, *Non-party campaigning ahead of the elections: Consultation and recommendations relating to Part 2 of the Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Bill,* London: Commission on Civil Society and Democratic Engagement

blow to civil society if charities were to stop speaking up due to a lack of understanding. Closer guidance from the Electoral Commission would be beneficial.[29] In a review of the Lobbying Act,[30] Lord Hodgson made a series of recommendations to make the Act less confusing and burdensome. These included reducing the regulated period from one year, down to four months before an election. Lord Hodgson also suggested a reduction of the scope of the Act, meaning only activity intended to influence voters, and not activity that could 'reasonably be regarded to influence voters', would be in violation of the Act. This is a much-needed improvement to a very complex area and would provide some of the clarity charities need to regain their voice. Sadly, the Cabinet have announced they will not be enacting these reforms. This is an area of law that is going to continue troubling the charitable sector until amendments are made.

Conclusion

It is not clear whether the Charity Commission is the 'best man for the job' when it comes to policing charities' compliance with the tightened restrictions of the Equality Act 2010. It has extremely low resources after recent budget cuts. Perhaps for the sake of the Charity Commission and the smaller charities who struggle to understand the complexities of the sector, it may be best to think about possible changes by way of a reformed public benefit test to encompass equality law too. There is a strong argument to say that a cause would not be in the public benefit if it was discriminatory. The morals behind the Equality Act are to be followed, but the gap between knowledge and understanding must be closed. Some charities simply do not know where they stand. It is recommended that the UK follow Australia and New Zealand and perhaps enact a narrower political purposes rule and accept that a society well educated on politics is good for democracy, providing direct support is not offered to parties or actors. Something must be done about the 'chilling effect' of the Lobbying Act on charities. It is bitterly disappointing that Parliament failed to act on the recommendations of the Lord Hodgson. Action needs to be taken to allow the charitable sector to regain its voice on the run up to elections. The law is too complex for charities to engage with, a waste of resources for those who seek legal advice to engage and far too intrusive on the charitable sector, regardless. The Equality Act may be grounded with decent morality, the same cannot be said of the Lobbying Act. The key to a healthy sector is simplicity and understanding.

[29] (*no 25*)

[30] Lord Hodgson, 'Third Party Election Campaigning – Getting the Balance Right: Review of the operation of the third party campaigning rules at the 2015 General Election' (March 2016)

"The establishment of a system of international criminal justice has been an ambitious, revolutionary project. As in any revolution, hopes have been high, probably too high… Time has come for more modest, more realistic expectations".

E. Jessberger and J. Geneuss, "Down the Drain or Down to Earth? International Criminal Justice under Pressure" (2013) 11(3) *JICJ* 501, 503.

Arjona Hoxha

Introduction

International criminal justice has made giant leaps in a short amount of time that has changed the face of international criminal justice drastically. The emergence of an international system of criminal justice, seen through the ratification of the Rome Statute that created the International Criminal Court has been a revolutionary step in ensuring that human rights violations do not go unpunished.[1] The ICC has contributed significantly to the stage of international criminal justice, however its aspirations have proved difficult to achieve.

The main hurdle to international criminal justice is the over-abundance of goals, such as the conflicting aims to ensure peace and justice, political tensions with Africa and the increasing lack of funding and timely trials that force the ICC to be selective. These hurdles are the result of high expectations that the Court received in the early 'honeymoon phase' of international law and should be addressed before pursuing the aspirations set out in the preamble to the Rome Statute.[2] Enthusiasm for the ICC has screeched to a halt, and the ICC must attempt to focus on its glaring, short-term failures before continuing to pursue their sky-high ambitions, mainly through the involvement and cooperation of states to implement the aims of international criminal justice.

Too many aims for the International Criminal Court?

The establishment of a system of international criminal justice was a revolutionary feat, accompanied by ambitious aims- arguably too ambitious. Alongside the objectives to strengthen national capacities for law enforcement, providing retribution of human rights violations, deterring international actors from acting contrary to international criminal law, and incapacitating those who do not, the ICC also attempts to bring peace and justice, amongst other aims stated in the preamble to the Rome Statute.[3] The issue with the overabundance of aims, however, is that the unkept promises will often lead to a sense of disenchantment and

[1] The International Criminal Court will hereafter be referred to as the ICC.

[2] UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, ISBN No. 92-9227-227-6, available at: <http://www.refworld.org/docid/3ae6b3a84.html> accessed April 2018.

[3] M Damaška, 'What is the Point of International Criminal Justice?' (2008) 83 Chicago-Kent Law Review 329.

disappointment when the International Criminal Court fail to follow through with their hopes of bringing peace and justice. International criminal courts do not, after all, have unlimited resources and power at their disposition, and should arguably act accordingly by downsizing and restructuring the aims of achieving peace and security, giving victims a platform, and aiming to put together an accurate historical account of the context of international crimes.[4]

The focus on peace and justice is of particular concern as the two are sometimes contradictory, as seen with the reluctance of the African Union to cooperate with arrest warrants of political leaders involved in crucial peace proceedings.[5] It is possible to have peace without justice being carried out, as seen in Mozambique and Namibia where trials were not necessary for reconciliation.[6] For now, international courts should aim to pursue international criminal justice, and compel states to abide by the same rules. The work that the ICC does can help create a long-term deterrence to atrocities that are committed by people in power, as long as it has the necessary support from states and a worldwide belief in the ICC's legitimacy.[7] Issues will arise when international justice bears no significant weight or is not considered legitimate, which may encourage inertia in states in implementing international criminal law.[8] It is important to build up a culture of accountability, which will contribute to the healing process after atrocities have occurred, however it is perhaps too aspirational and overburdening to the overall aims of the ICC.[9]

Norm Projection as an aspiration of international criminal justice

The International Criminal Court and the general direction of international criminal justice have begun to instill the values and norms of international criminal justice, towards a global rule of law. Whilst international criminal justice cannot yet be a globalised, it has been considerably successful in norm projection- that is, encouraging countries to adopt international standards for criminal justice.[10] Progress would be better measured by the extent to which the Court's commitments to redress for atrocities have been adopted globally, and the extent to which international criminal justice is being used.[11] The Court is an important, expressive tool for norm projection, since it is exemplary of what values must be instilled and how justice should be carried out on a global scale. Norm projection is an aim of international criminal law, and arguably one that should not be scaled down.

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[4] ibid.

[5] Catherine Gegout 'The International Criminal Court: Limits, potential and conditions for the promotion of justice and peace' (2013) 34 Third World Quarterly 800.

[6] D Curtis, 'The contested politics of peace building in Africa', in D Curtis & G Dzinesa (eds), '*Peace building, Power and Politics in Africa*' (Ohio University Press, 2012), p 1–28.

[7] Gegout (n 5).

[8] William A. Schabas 'The Banality of International Justice' (2013) 11 JICJ 545.

[9] Payam Akhavan 'The Rise, and Fall, and Rise, of International Justice' (2013) 11 JICJ 527.

[10] David Luban 'After the honeymoon: reflections on the current state of international criminal justice' (2013) 11 JICJ 505.

[11] Diane Orentlicher 'Owning Justice and Reckoning with its Complexity' (2013) 11 JICJ 517 (2013).

Political violence against citizens should be treated as what it is- a crime. Often, state violence will purport itself to be 'sacred violence' which serves an important and legitimate purpose. [12] Global engagement with international criminal law and states would transform perceptions of grave human rights violations.[13] It is encouraging that countries are increasingly making the effort to ensure justice for these human rights violations such as the arrest of Pinochet, suggesting that the international criminal justice system is heading towards the right direction.[14] Norm projection is not necessarily as dramatic and sensational as trials of international criminals, however it is arguably a more important, long-term contribution to the field of international criminal law.[15] This ambition should therefore be pursued; however there is a danger that under-enforcement of international criminal justice will fail to promote the norms that have been spread so far and reverse the progress that has been made.[16].

Political Tensions

The International Criminal Court is a success in itself as a permanent court to address international crimes. Since the Court is an independent body, it carries a certain amount of political power, but in the face of state pressure, the international courts are virtually powerless.[17] As seen, the ICC is reliant on state cooperation for investigations and proceedings, and enforcement of international criminal law. State sovereignty has been respected through the complementarity principles, and overall, international criminal law is being pushed towards enforcement in domestic courts. The issues arise, however, where there are political tensions, and states refuse to cooperate. Despite the power of the Court, achieved in a short amount of time, it cannot leapfrog politics, which hinders long-term progress. The ICC statute is not universally ratified, which is a considerable limitation of the progression of international criminal justice, since not all states will necessarily cooperate with the ICC. Out of the five permanent members of the United Nations Security Council, only two are state parties to the Rome Statute, although the Security Council has a considerable amount of power regarding matters of international criminal justice.[18] Additionally, there is the absence of ratification from the USA, arguing that the ICC could indict US soldiers for war crimes, which contributes to the ICC's struggle to prove legitimacy.[19] Institutions such as the ICC are heavily reliant on state approval and membership in order to prove their legitimacy, and further their aims of peace and security.[20]

[12] E W Kahn, '*Sacred Violence: Torture, Terror, and Sovereignty*' (University of Michigan Press, 2008).
[13] Luban, (n 10).
[14] Orentlicher (n 11).
[15] Akhavan (n 9)
[16] Luban (n 10).
[17] Gegout (n 5)
[18] Schabas (n 8).
[19] Gegout (n 5).
[20] K P Coleman, 'International Organisations and Peace Enforcement: The Politics of International Legitimacy' (Cambridge University Press, 2007), p 283.

The expectation that the statute would be ratified and accepted so readily after only a few years in existence was perhaps too ambitious, and should focus on improving the relationship with states, in order to get the ICC ratified further. Without legitimacy and state respect, the ICC remains to be at the mercy of state power. This legitimacy can stem from the statute being ratified by most states, in particular, the permanent five members of the Security Council, and for people in different political systems to accept the legitimacy of the ICC.[21] Previous examples of political difficulties and tensions with the ICC include the situation in Darfur, where ICC investigators could not obtain visas to carry out investigations, and were left to conduct interviews from refugee camps in Chad.[22]

The trade-off between peace and justice is a particularly concerning source of political tension. Since the ICC aims to be an independent, impartial tribunal, it seeks to serve justice where it can. However, sometimes justice is not the best route in the pursuit of peace. This explains why the aims of securing peace and justice are sometimes contradictory. The political tensions that the ICC cannot currently overcome are exemplified in the North Eastern Congo situation referred to the ICC in 2003 by the Democratic Republic of Congo. The arrest warrants for Bosco Ntaganda remained unheeded for around ten years, until he gave himself over to the ICC in 2013, after being publicly seen alongside the Congolese minister of interior and senior Congolese military officers. This is an example of the political power states have, and can withhold from the ICC. It was evident that the belief that peace would be achieved with Ntaganda being free, rather than justice being served by the ICC.[23] Nonetheless, the ICC is a court of justice and should abandon its aims of simultaneously ensuring peace and justice, rather, focusing on providing justice for victims of international crimes. The ICC Prosecutor Luis Moreno-Ocampo pursued the Bashir indictment despite the surrounding political pressure not to and the lack of cooperation.[24] Crumbling in the face of political pressure would go against the fundamental duty of any court. It was not for the ICC to decide whether peace was being disrupted, but it was their duty to serve justice where it is required, without political pressure affecting their judgment.[25] Political tensions and pressure can affect ICC investigations and proceedings, therefore this closing chasm in international criminal justice is of utmost importance. The high expectations of the ICC cannot leapfrog politics and therefore should be scaled down to first work on the limitations of political pressure and tensions. As aptly noted by Judge Cangado Trinidade in the case of *Germany v Italy*, what jeopardies the international legal order is the cover-up of international crimes, alongside the impunity of perpetrators, and not the victim's search for justice.[26]

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[21] I L Claude, 'Collective legitimation as a function of the United Nations', (1966) 20 International Organization 367.
[22] ibid.
[23] 'Kabila's position on the arrest of Ntaganda "has not changed"' (Congo Planet, 13 April 2012) <http://www.congoplanet.com/news/1965/joseph-kabila-position-on-bosco-ntaganda-arrest-has-not-changed.jsp> accessed April 2018.
[24] Luban, (n 10)
[25] ibid.
[26] *Germany v Italy*, Judgment, ICGJ 434 (ICJ 2012), 3rd February 2012, dissenting opinion of Judge Cangado Trinidade, para 305.

The International Criminal Court's relationship with the African Union

One of the greatest issues with political tensions with the ICC is the withdrawal of the African Union from the ICC. Initially, many African countries were enthusiastic about the emergence of an egalitarian court, and many of the initial situations in Africa were self-referred.[27] This was an encouraging sign that the international legal order was being implemented and the Court was being viewed as a revolutionary structure with the potential to provide international justice and peace.[28] However, there has been considerable controversy since out of the 11 situations under investigation by the Court, 10 are African, which has given rise to beliefs that the Court is focusing primarily on Africa.[29] Whilst the Court has conducted preliminary investigations in other countries such as Honduras, Colombia, South Korea, Georgia and Gaza, African states remain to be the main focus of the ICC's work, which has contributed to the increased sense of disenchantment from African states.[30] In particular, universal jurisdiction is seen as being abused by Western states, and whilst these tensions have not led to a complete abandonment of universal jurisdiction, they highlight that boundaries must be clearly defined, so as prevent the use of the ICC as a political tool, and stop international criminal justice being sidelined for hegemonic purposes.[31]

The relationship between the African Union and the ICC must be repaired in order to ensure cooperation with investigations and arrest warrants. The establishment of a permanent court and efforts towards international criminal justice has been revolutionary, but now the ICC must strive to repair relations with the African Union left in disarray as a result of implementation flaws.

In July 2008, the Prosecutor announced the ICC's intention to prosecute the President of Sudan, Omar al Bashir, for genocide, but was met with reluctance from African leaders who were concerned that this would disrupt the ongoing peace process.[32] The case was referred by the UN Security Council, giving the Court jurisdiction to issue the arrest warrant and open up an investigation; however, implementation proved to be a major hurdle.[33] The African Union, in response, called for member states to not cooperate with the ICC.[34] However, it must be noted that, whilst this declaration was made and non-cooperation was encouraged strongly by the African Union, not all African states have followed non-cooperation calls, which suggests, that whilst there are tensions in Africa, they is not continent-wide opposition. For example, the ICC has had success in securing custody, and an indictment of the former Ivoirian leader Gbabho,

[27] Schabas (n 8)
[28] Gegout (n 5)
[29] International Criminal Court 'Situations Under Investigation' <https://www.icc-cpi.int/pages/situation.aspx> accessed December 2018.
[30] Gegout (n 5)
[31] Orentlicher (n 11)
[32] Schabas (n 8)
[33] United Nations Security Council Resolution 1593 (2005).
[34] Assembly of the AU. Assembly/AU/Dec.296 (XV), Kampala, 27 July 2010, para 5, 8, 9.

suggesting that there may be room for African approval and cooperation yet.[35] Nonetheless, Burundi leaving the ICC has triggered more African states, such as Kenya, to consider leaving the ICC, which undoubtedly would affect international justice.[36] What is clear is that the high expectations from an egalitarian Court allegedly free from political influence, have been the subject of political tensions, particularly in Africa. This, in part, must be remedied by focusing on pursuing justice, free from political concerns about peace, and opening up the possibility of investigations outside of Africa.[37] Whilst justice should not be compromised by appeasing the African Union's sense of being unfairly focused upon, the ICC must work on relations and fairness in selecting cases to investigate.

Lack of resources and selectivity

At the root of the selectivity of mainly African states lies the lack of resources and funding that the Court struggles to overcome. International proceedings are costly, and without sufficient funding, the Court has to be selective with cases, which Diane Orentlicher has aptly noted makes the selection of situations a 'political minefield'.[38] Ideally, there would be no need to select one situation over another, but unfortunately, the ICC cannot handle the demands being placed on it. The theory behind the selection process of the ICC has raised concerns; as seen, the majority of investigations and indictments have been on African states. It is appearing as if the ICC is failing to investigate powerful states, as seen through the failure to conduct investigations on Israel's Operation Cast Lead on Palestinian citizens during 2008 to 2009, the reasons for which can be considered technical and unconvincing.[39] Why, after all, were widely publicized and documented atrocities that resulted in the death of 1400 Palestinians, 850 of which were civilians, not being investigated?[40] On the other hand, the ICC has no qualms about investigating disordered civil unrest in Kenya as opposed to disciplined military force with sophisticated weaponry against civilians by Israel.[41] Naturally, the process of selectivity is a difficult one, and the high aims of the Court to pursue proceedings have been hindered by the lack of power in the face of political pressure.

Conclusion

International criminal justice has had successes far beyond what was imagined in its early stages. A permanent court was a revolutionary development, which provided a platform for victims of atrocities and an impartial, independent body to pursue cases and conduct investigations.

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[35] Ivory Coast ex-President Laurent Gbagbo at ICC court, (BBC News, 19 February 2013) <http://www.bbc.co.uk/news/world-africa-21508474> accessed April 2018.

[36] 'Burundi becomes first nation to leave international criminal court' (The Guardian, 28th October 2017)<https://www.theguardian.com/law/2017/oct/28/burundi-becomes-first-nation-to-leave-international-criminal-court> accessed April 2018.

[37] John Dugard, 'Palestine and the International Criminal Court: Institutional Failure, or Bias?' (2013) 11 JICJ 536.

[38] Orentlicher (n 11)

[39] Schabas (n 8) and Robert Cryer, Hakan Friman, Daryl Robinson, Elizabeth Wilmhurst 'An introduction to International Criminal Law and Procedure' (3rd Edition, 2014, Cambridge University Press) page 587

[40] John Dugard, 'Palestine and the International Criminal Court: Institutional Failure, or Bias?' 11 J Intl Crim Justice 536 (2013).

[41] ibid.

However, the achievements of the ICC have led to high expectations that it struggles to fulfill, leading to disappointment when expectations are not being met. The ICC has had successes in norm projection and creating a globalised set of morals and norms that are being increasingly accepted and used by states. However, there are some hurdles that have to be overcome in order to continue ending impunity of international criminals. The ICC must work on improving relations with states since political tensions, particularly with the African Union. This is important since the goals of the ICC and potential development are limited by political pressure- which overall can affect the perceived legitimacy of the Court. Therefore, it is important that some goals are scaled back and greater efforts are placed into ensuring fairness, particularly when selecting cases, as well as ensuring that the ICC is remains impartial and focused on providing justice to victims of atrocities that have gone unheeded for too long.

Spare the Rod, Spare the Child: The Law on Corporal Punishment

Fatima Laher

The United Nations Convention on the Rights of the Child[1] have defined corporal punishment as 'any punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light.' Currently, the law in the United Kingdom permits the use of corporal punishment on children in the family home, through the defence of reasonable chastisement. This has been criticised by the UNCRC, NSPCC, The Children's Rights Alliance, the UN Human Rights Committee, the United Kingdom's Children Commissioner and The Global Initiative to End All Corporal Punishment, who have consistently called on the United Kingdom to formally put an end to the defence. The defence of reasonable chastisement contravenes with Article 37 of the UNCRC,[2] which prohibits cruel and degrading treatment and punishment of children and Article 3 of the ECHR,[3] freedom from inhumane and degrading treatment.

The author of this essay will outline the reasons for a complete ban on corporal punishment of children, whilst critically discussing the current law. First, the evolution of the defence of reasonable chastisement will be examined whilst analysing its conformity with international law and it will be assessed whether the current law provides adequate protection to a child's human rights. This will lead the author to consider the impact of the ECHR judgments and assess the obligations that have been imposed upon the state. The author will argue that the position in the United Kingdom is increasingly at odds with other nations, such as Sweden, the first country to prohibit corporal punishment. This will accommodate the author in concluding that although a complete ban should be enforced, parents should not be criminalised.

The underlying concern addressed by many academics is the fine line between physical abuse and corporal punishment, with Claire describing this as a 'veil for abuse.'[4] There is a high risk that subtle forms of corporal punishment can occasionally result in an overlap with physical abuse. Alternatively, it may be seen as a 'precursor' to child abuse, with mild punishment escalating into abusive encounters. For example, the House of Commons Health Committee

[1] The United Nations Convention on the Rights of the Child, referred to as the UNCRC henceforth.
[2] Article 37 of the United Nations Convention on the Rights of the Child. State Parties shall ensure that: (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age.
[3] Article 3 of the European Court of Human Rights: No one shall be subjected to torture or to inhuman or degrading treatment or punishment.
[4] Claire Fraser, Towards the abolition of corporal punishment and a partnership with our children, UCL Jurisprudence Review, 2003.

have noted that 'what happened to Victoria Climbie involved the apparent escalation of discipline and punishment.'[5]

The current law in the United Kingdom authorises the parental use of corporal punishment on children for the purposes of correcting or punishing a child, within the limits of the defence of reasonable chastisement. Reasonable chastisement is not defined by statute, but S58 of the Children Act[6] restricts the defence to a 'common assault,' which Hinchcliff describes as 'naive, totally impractical and frankly dangerous.'[7] Whether the punishment exceeds the limits under S58 CA will depend on the circumstances of each case and the court must consider the key factors, such as the age of the child and the nature of the smack. Therefore, to determine the reasonableness of the punishment, an objective basis is used, which may cause issues when interpreting the punishment. There are strict guidelines covering the use of corporal punishment and it cannot be relied upon if it amounts to an actual bodily harm under S47 of the Offences Against the Persons Act;[8] grievous bodily harm and wounding under S18[9] and S20[10] of the Offences Against the Persons Act, or Child Cruelty, under S1 Children and Young Persons Act,[11] which can lead to a criminal offence.

Sir Roger Singleton provided an explanation for the government's reluctance to impose a complete ban, by emphasising on parental rights. He believed that parents know what is best for their child and the right to discipline a child is a fundamental 'parental right benefiting both the parent and the child when exercised appropriately.'[12] However, the author believes that a parent can provide guidance for the child in less harmful ways, using appropriate mechanisms such as educating and speaking to the child.

In R v Hopley,[13] a headmaster abused the permission, which was given to him by the father of a 13-year old boy, by beating him severely with a large stick, resulting in his death. The jury acquitted the headmaster after being addressed by the trial judge that the defence of reasonable chastisement would operate if the method of discipline used, was 'reasonable and proportionate.' However, the ECHR held that the claimant's suffering met the threshold of severity under Article 3 of the ECHR[14] and that the United Kingdom was responsible for the treatment by virtue of Article 1 of the Convention.[15] This was because an 'adequate and effective deterrent of

[5] Rhona K.M Smith, 'Hands-off parenting?' – towards a reform of the defence of reasonable chastisement in the UK, Child and Family Law Quarterly [2004] CFLQ 261 SEPTEMBER 2004
[6] Section 58 of the Children Act 2004
[7] David Hinchcliff, MP, Hansard Vol.424, Col 1040.
[8] Section 47 of the Offences Against the Persons Act 1861
[9] Section 18 of the Offences Against the Persons Act 1861
[10] Section 20 of the Offences Against the Persons Act 1861
[11] Section 1 of the Children and Young Persons Act 1933
[12] A. M. Kirkpatarick, Corporal Punishment, 34 Fed. Probation 41 (1970) 17 Chitty's L.J. 155 (1969)
[13] R v Hopley (1860) 2 F&F 202, [1860] EWCC J42
[14] Article 3 of the European Court of Human Rights
[15] Article 1 of the European Court of Human Rights: The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms de ned in Section I of this Convention.

criminal law was required to protect vulnerable children,'[16] which the defence of reasonable chastisement did not provide. Cockburner LJ made it clear that corporal punishment must be moderate and reasonable when correcting what was evil in the child.

Notwithstanding such criticisms, the government proved resilient and sought to retain some version of this defence, by publishing a consultation paper,[17] which noted the key requirements that needed to be considered, such as: the applicant's age, the instrument used, the frequency of the punishment and the physical or mental suffering of the applicant.

Following this, a negative reaction among family lawyers was received, who were unable to justify any reasoning in the defence. Another essential point is that the government had not acknowledged the success of the abolition in Sweden, where the prohibition granted children the 'fundamental human right to be free of physical violence both at home and in the school.'[18] The main aim of the reform was to ensure that the public attitudes against corporal punishment were altered rather than criminalising parents. The statistics demonstrate that since the ban was put into effect, 'ninety-nine percent of the Swedish population were familiar with the reform, due to the government's intensive effort to educate the public.'[19] As a result, child abuse rates in Sweden have 'declined since the ban went into effect.'[20] Similarly, 52 countries have imposed a comprehensive prohibition on physical chastisement against children, such as Finland, Denmark, Norway and most recently Scotland. Therefore, it provides reasoning why the United Kingdom should follow suit. However, the situation in the United States of America is akin to the United Kingdom. The law in the United States permits parental corporal punishment as long as 'the sole purpose is to promote the welfare of the minor and the force is not excessive.'[21]

The principle catalyst for the present change was addressed by the pivotal case of A v United Kingdom,[22] where a stepfather had beaten a nine-year old boy with a garden cane. He invoked the defence of reasonable chastisement and he was subsequently acquitted by the jury. The child brought his claim to the ECHR and he relied on three grounds: the state had failed to protect him from inhuman and degrading treatment by his step-father in violation of his rights under Article 3 of the ECHR;[23] that the failure to protect him was in breach of his right to physical integrity guaranteed by Article 8 of the ECHR[24] and that the domestic law on assault discriminated against children.

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[16] A.M, Kirkpatrick,"Corporal Punishment ," Criminal Law Quarterly 10, no. 3 (May 1968): 320-328

[17] Working together to safeguard children: a guide to interagency working to safeguard and promote the welfare of children (DCSF), The Progress Report

[18] Angela Bartman, Spare the Rod and Spoil the Child - Corporal Punishment in Schools around the World, 13 Ind. Int'l & Comp. L. Rev. 283 (2002)

[19] Deana Pollard, "Banning Child Corporal Punishment," Tulane Law Review 77, no. 3 (February 2003): 575-658

[20] Michael Freeman, What's right with rights for children, International Journal of Law in Context 2006

[21] Benjamin Shmueli, Corporal Punishment in the Educational System versus Corporal Punishment by Parents: A Comparative View, 73 Law & Contemp. Probs. 281 (2010)

[22] A v United Kingdom; [1998] 3 FCR 597

[23] Article 3 of the European Court of Human Rights

[24] Article 8 of the European Court of Human Rights

Undoubtedly, the ECHR found that hitting a nine-year old child with a garden cane on more than one occasion and with sufficient force to leave bruises was sufficient to reach the level of severity prohibited by Article 3 of the ECHR.[25] In light of the circumstances of the case, the defence of reasonable chastisement did not provide adequate protection to the child. It violated his rights under the ECHR due to the punishment, which was imposed on him.

The United Kingdom was then left with two distinct options. The first was to define more clearly the scope of the existing defence and the second was to follow the example of 'eight other European countries'[26] and to prohibit all forms of corporal punishment against children. By removing the defence, this would have reduced the issues of interpretation by a parent when considering whether the application of physical force exceeds the limit. The parent would not have to determine 'how hard the child should be hit, on which part of the body, for how long, how often and ascertain the age of the child.' This would in turn, increase the number of 'secure convictions in the case of serious violence against children.'[27]

As a result, a court must take into account the guidance issued in A v United Kingdom [28] when considering a case, which involves the reasonable chastisement as a defence. The government have placed the power in the hands of the judiciary to determine 'where the boundaries of reasonable and unreasonable punishment lie in accordance with the European Court guidance.'[29] In addition, specific guidance was issued, which noted the key factors that needed to be ascertained, such as: the nature and the context of the treatment, the duration, the mental and physical effects in relation to the age and personal characteristics of the victim and the reasons given by the defendant for administrating the punishment. There are numerous difficulties, which become apparent from this criteria, such as where to draw the line between 'permissible physical chastisement and inhuman or degrading treatment or punishment.'[30] To combat this, Roger proposes that the judge should direct the jury on the 'basis of facts,'[31] 'rather than the reasonableness of the treatment.'[32] This is based on the belief that it would not be 'appropriate for others to assess the reasonableness of what the chastiser did.'[33] The public at large is more

[25] ibid.
[26] Andrew Bainham, Corporal Punishment of Children: A Caning for the United Kingdom, Cambridge Law Journal, The Cambridge Law Journal, 58 [1999], pp 291–293, 1 JULY 1999,,
[27] Rhona K.M. Smith, 'Hands-off parenting?' – towards a reform of the defence of reasonable chastisement in the UK, Child and Family Law Quarterly [2004] CFLQ 261 SEPTEMBER 2004
[28] A v United Kingdom; [1998] 3 FCR 597
[29] Jill M Black, A Practical Approach To Family Law (Oxford University Press 2015).
[30] Human rights - Article 3 - difference between "inhuman and degrading treatment" and "reasonable chastisement", Criminal Law Review, 1998, Case Comment
[31] Rhona K.M. Smith, 'Hands-off parenting?' – towards a reform of the defence of reasonable chastisement in the UK, Child and Family Law Quarterly [2004] CFLQ 261 SEPTEMBER 2004
[32] ibid.
[33] Criminal Law Review, 2002, A criminal lawyer's response to chastisement in the European Court of Human Rights, Jonathan Rogers

likely to find the motive of the chastising parent to be of fundamental importance and they may be persuaded by their preference of disciplining a child.

In R v H,[34] a father beat his son with a belt because he refused to write his name when he was requested to do so. The author believes that two inferences could be made from this. Firstly, the father may have inflicted physical force on his son to correct his misconduct in order to 'inspire him to greater things.'[35] Alternatively, he may have experienced the anger if the child was not doing as he was told and through the use of corporal punishment, he would gain the respect, which he 'could not gain by ordinary means.'[36] Therefore, the motive of the parent is essential to determine whether the corporal punishment was appropriate. The judge ruled that the 'correct course to adopt was to expand the jury direction to reflect the factors identified in A v United Kingdom.'[37]

It is important to note however, that this could amount to complications, as the members of the jury are not judicially trained, so they are unable to reach a balanced, evaluative judgment because they are so strongly influenced by their 'personal experiences and philosophical convictions.'[38] Consequently, the author concludes that in cases where the defence of reasonable chastisement is invoked; question of law should be used to evaluate the defendant's conduct. The judge should look no further than the jurisprudence of the European Convention of Human Rights, leaving the jury to have 'no function in deciding whether or not the parent acted reasonably.'[39]

The fundamental advantage of imposing a prohibition on the use of corporal punishment in the family home is to ensure that the rights of children are recognised and upheld by protecting them from abuse. It is to ensure that they are treated with 'equality and as autonomous beings.'[40] In addition, the right of a child is promoted by virtue of S1 (1) of the Children Act,[41] which recognises that the welfare of the child must be the paramount consideration of the court when determining any issues, which relate to a child's upbringing. This principle is widely supported by many academics such as Reece, who stresses that 'children are necessarily vulnerable and dependent so they must be protected from harm.'[42]

[34] R v H (Assault of a Child: Reasonable Chastisement) [2001] EWCA Crim 1024
[35] July Lancet, They call it a smack', 2000, Business Source Complete, EBSCOhost, viewed 8 December 2017
[36] R, Khol 2000, 'HOW ABOUT CORPORAL PUNISHMENT FOR ADULTS?', Machine Design, 72, 16, p. 14, Business Source Complete
[37] R v H (Assault of a Child: Reasonable Chastisement) [2001] EWCA Crim 1024
[38] Gwyn Morgan, New Law Journal, 151 NLJ 1752. 30 NOVEMBER 2001, Addressing the smacking question
[39] Criminal Law Review, 2002, A criminal lawyer's response to chastisement in the European Court of Human Rights, Jonathan Rogers
[40] Michael D. A. Freeman, Taking Children's Rights More Seriously, 6 Int'l J.L. & Fam. 52 (1992) :
[41] S1(1) of the Children Act 1989
[42] H. Reece, ' The paramountcy principle: consensus or construct?' (1996) 49 current legal problems 267-8 /

Children are inherently vulnerable to abuse as they are under the control of their parents thus being in a 'weaker legal position.'[43] Furthermore, the United Kingdom is relying on a precedent from a time when 'slavery, marital rape and domestic violence'[44] was permitted. Likewise, as John Finnie states, 'it is presently legal to assault a child in circumstances in which one could be prosecuted for doing the same thing to an adult.'[45] By removing the defence, it would place the child in the 'same position as adults and pets in respect of the law.'[46] Additionally, Maggie Atkinson, the Children's Commissioner for England provides support for a prohibition by stating that 'physical punishment of children is the only physical assault tolerated under the law of the United Kingdom.' The author agrees with this statement, as it is wrong that 'children remain the one group in society that can be hit with impunity.'[47] It does not comply with a child's right to privacy in a free society as their human dignity and respect is abused. In a society that 'purports to value human life and human rights, this should be unacceptable.' [48]

Another essential point is the statistics shown by the Global Initiative to End All Corporal Punishment of Children, which highlights that 'only 10% of the world's children are fully protected from physical punishment.'[49] Although, this can be compared with a NSPCC survey from 1998 and one in 2009, which demonstrated that the use of physical punishment had decreased from 61% to 43%. By analysing these statistics, it is evident that there is inadequate protection in place for the most vulnerable individuals in society. Despite the decrease, which has occurred from 61% to 43%, this represents a large proportion of the United Kingdom's population who do not condemn this practice. Even though children are achieving 'far greater prominence in human rights law in recent years,'[50] they are not afforded their basic right to enjoy 'dignity and to not be harmed bodily or emotionally.'[51] The United Kingdom law does not conform with the UNCRC and it conflicts with the 'policy and recommendations by the United Nations and the Council of Europe.'[52]

[43] Rhona K.M Smith, 'Hands-off parenting?' – towards a reform of the defence of reasonable chastisement in the UK, Child and Family Law Quarterly [2004] CFLQ 261 SEPTEMBER 2004
[44] Cynthia Godsoe, Redefining Parental Rights: The Case of Corporal Punishment, 32 Const. Comment. 281 (2017) :
[45] The smack of justice? Family Law Journal [2017] Fam Law 769 JULY 2017
[46] Dr. Raymond Arthur, Family Law Journal [2014] Fam Law 537 APRIL 2014/ Banning the physical punishment of children in the UK: a human rights imperative for children
[47] Claire Fraser, Towards the abolition of corporal punishment and a partnership with our children, UCL Jurisprudence Review, 2003
[48] Cindy S. Moelis, Banning Corporal Punishment: A Crucial Step toward Preventing Child Abuse, 9 Child. Legal Rts. J. 2 (1988)
[49] Global Initiative to End All Corporal Punishment of Children Statistics
[50] Geraldine Van Bueren: European Human Rights Law Review, 1996, Protecting children's rights in Europe - a test case strategy
[51] Benjamin Shmueli, Corporal Punishment in the Educational System versus Corporal Punishment by Parents: A Comparative View, 73 Law & Contemp. Probs. 281 (2010)
[52] Children (Equal Protection from Assault) (Scotland) Bill – Consultation, John Finnie A consultation by John Finnie MSP

Such reform would ensure that the law is clear, simple and workable so that 'parents know where they stand.'[53] It would help to 'create an environment in which children are reared free from violence and it would ensure that the law of the United Kingdom fully complies with international law obligations.'[54] This would ensure that parents do not have to determine what degree of force should be used, which may be prejudicial and discriminatory, as 'different children bruise in different ways.'[55] In addition to this, further issues are caused as 'black children might be more at risk of not receiving the protection they require because a 'mark might not show up as easily as on a white child.'[56] In the same way, 'mild to moderate punishment can still cause serious physical injuries to young children.'[57]

Moreover, Straus contends that it 'conveys to the child perspectives on violence that become an 'integral part of his or her personality'[58] to the extent that society tells the children that using violence has a legitimate role. Children are more likely to adopt 'physical force'[59] as a means of resolving their disputes with others. It undermines the image of a parent as an 'example of reasoned behaviour and creative problem solving.'[60] Further, it is associated with significant increases in physical abuse, long-term antisocial behaviour and later as an adult, the 'abuse of a partner or a child,'[61] thus continuing the 'legacy of child abuse.'[62]

Additionally, it is believed that a child may interpret the corporal punishment in a 'sexual way, even if the adult has no sexual intent.'[63] The child may become 'confused as to where the violence stands with regard to sex,'[64] thus causing further issues when determining sexual abuse. The Law Commission in its consultation paper, Consent and Offences Against the Person, provides evidence of this; 'A respondent who was a practicing sado-masochist commented that from a sado-masochistic perspective, the caning of children can only be regarded as rape'.[65]

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[53] Dr. Raymond Arthur, Family Law Journal [2014] Fam Law 537 APRIL 2014/ Banning the physical punishment of children in the UK: a human rights imperative for children
[54] Deana Pollard , "Banning Child Corporal Punishment," Tulane Law Review 77, no. 3 (February 2003)
[55] Mary Kate Kearney, Substantive Due Process and Parental Corporal Punishment: Democracy and the Excluded Child, 32 San Diego L. Rev. 1 (1995)
[56] Chris Barton, Hitting Your Children: Common Assault or Common Sense? Family Law Journal [2008] Fam Law 64 JANUARY 2008
[57] Taylor & Maurer 1985
[58] Kandice K. Johnson, Crime or Punishment: The Parental Corporal Punishment Defense - Reasonable and Necessary, or Excused Abuse, 1998 U. Ill. L. Rev. 413 (1998)
[59] David Orentlicher, Spanking and other Corporal Punishment of Children by Parents: Overvaluing Pain, Undervaluing Children, 35 Hous. L. Rev. 147 (1998)
[60] Benjamin Shmueli, Corporal Punishment in the Educational System versus Corporal Punishment by Parents: A Comparative View, 73 Law & Contemp. Probs. 281 (2010)
[61] Jane Fortin, Child and Family Law Quarterly [2001] CFLQ 243 OCTOBER 2001, Children's rights and the use of physical force
[62] Deana Pollard, "Banning Child Corporal Punishment," Tulane Law Review 77, no. 3(February 2003): 575-658
[63] Chris Barton 'Punishing Children & Pleasuring Adults: One, Both or Neither?
[64] Claire Fraser, Towards the abolition of corporal punishment and a partnership with our children, UCL Jurisprudence Review, 2003
[65] B, Bix, Assault, Sado-Masochism and Consent, 1993

The motive of the parent is fundamental as the punishment can illustrate a lack of self-restraint. However, subsequent issues may arise if there is an intermission between the incident and the punishment imposed on the child. On the other hand, if a parent reacts immediately towards a misconduct, this could be through rage, 'wounded pride or even in embarrassment'[66] but with no 'genuine disciplinary motive.'[67] It may be viewed from the perspective of the defence of duress, which requires a necessary compulsion to act. This temporary loss of control may provide a beneficial gap in the legislation for parents who may argue that they had not intended to cause harm to the child.

To conclude, the current law is in need of a reform to mirror the public attitudes and societal changes, which have evolved in recent years. A child has the right to not be assaulted, but 'the defence of lawful chastisement is an exception to that right.'[68] Similarly, corporal punishment is viewed from the perspective of the parents and as an 'issue of parental rights rather than as an issue of children's rights.'[69] This reflects our society's 'undervaluation of children and its overvaluation of pain.'[70] A complete ban would reduce issues of 'enforcement, definition and demarcation'[71] and it would be a significant step forward in the effort to value children and pain more appropriately.

The government should now seek to address parents with other forms of positive parenting strategies. Parents should not be criminalised and instead a civil penalty should be imposed, which will create an effective balance between children and parental rights, whilst conforming to the UNCRC. Whether corporal punishment will be prohibited completely and brought into line with international human rights, remains to be seen but at the moment there are no propositions to do so. To bring rights home for children, 'lawyers should now strive to meet that challenge.'[72]

[66] Jonathan Rogers Criminal Law Review, 2002, A criminal lawyer's response to chastisement in the European Court of Human Rights
[67] Adriana Opromolla, Children's rights under Articles 3 and 8 of the European Convention: recent case law, European Law Review, 2001
[68] Elaie E. Sutherland, Listening to the child's voice in the family setting: from aspiration to reality, Child and Family Law Quarterly[2014] CFLQ 152, JUNE 2014
[69] David Orentlicher, Spanking and other Corporal Punishment of Children by Parents: Overvaluing Pain, Undervaluing Children, 35 Hous. L. Rev. 147 (1998)
[70] Whipping, Smacking and Loving – the Politics of Parental Hitting, Family Law Journal, [2005] Fam Law 3
[71] Van Bueren, G, Opening Pandora's Box: Protecting Children against Torture or Cruel, Inhuman and Degrading Treatment or Punishment, 17 Law & Pol'y 377 (1995)
[72] Alistair Macdonald, barrister, St Philips Chambers, Birmingham, bringing rights home for children: arguing the UNCRC, family law journal, [2009] Fam law 1073, November 2009.

Privilege in light of SFO v ENRC[1]

Jemima Lovatt

The current position on legal privilege

Legal privilege is the common law right to consult legal advisors without fear of the communication being revealed. The principle, once established, is absolute[2]. There is an important public policy justification for this: an individual is likely to tell only half the truth if he is not able to consult his lawyer in full confidence. Ultimately consultations with lawyers should take place in a manner which favours full and uninhibited disclosure[3]. Thus, legal privilege facilitates free and unfettered discourse between client and lawyer. This fundamentally underpins the administration of justice.

Legal professional privilege falls into two categories: litigation privilege and legal advice privilege. Litigation privilege is that which attaches to communications in connection with, and in contemplation of, adversarial legal proceedings. It can extend to some communications with third parties. Legal advice privilege attaches to communications between a professional legal advisor, acting as such, and the client. The main difference is that litigation privilege is restricted to communications regarding litigation whereas legal advice privilege is not subject to this restriction[4].

The case of *ENRC v SFO*[5] arose in a commercial context. Legal advice privilege in the corporate world applies where a lawyer is retained by a corporate body and an officer/employee/agent of the corporate body communicates with that lawyer, in confidential circumstances, in order for the corporate body to obtain legal advice and the officer/employee/agent is authorised to make such communications.

Litigation privilege, applies when adversarial litigation is either in progress or reasonably anticipated by a corporate body, and a lawyer on behalf of the corporate client communicates with officers or agents of the company or third parties for the dominant purpose of obtaining information or advice in connection with the actual or reasonably anticipated litigation

In the 1990s, the case of *R v Derby Magistrates' Court ex part B*[6] set the precedent for dealing with legal professional privilege. In this criminal case, the issue focused on witness orders and it was held that such orders were not to be used to breach solicitor and client professional privilege. Therefore, legal professional privilege may protect all papers and is of overriding importance; the judgment took a principled approach. Lord Nicholls of Birkenhead evaluated the potential

[1] *[2018] EWCA Civ 2006.*
[2] *R. v Derby Magistrates' Court ex p B [1995] UKHL 18.*
[3] *Campbell v UK [1993] ECHR 41.*
[4] s10(1)(a) and (b) PACE Act 1984.
[5] *[2018] EWCA Civ 2006.*
[6] *[1995] UKHL 18.*

tension between legal professional privilege and the public interest in full disclosure to the court. He said that all relevant material should be available to the court but he rejected the notion of a balancing exercise in respect of legal professional privilege.

However, in the early 2000s, the *Three Rivers* litigation changed this approach. Contextually, the cases are different because the *Three Rivers* litigation arose from commercial litigation whereas the *Derby Magistrates' Court* case was a murder case. *Three Rivers* concerned the Bank of England's supervision of the Bank of Credit and Commerce International which had collapsed in 1991. The Bingham Inquiry Unit was an internal body consisting of three Bank officials and was set up to manage communications between the Bank and the Inquiry. In *Three Rivers*, the disclosure of these communications was sought by creditors and liquidators in their claims relating to the collapse of BCCI. The court had to determine the scope of legal advice privilege and whether these communications were disclosable.

Three Rivers (No 5)[7] was heard before the Court of Appeal and the following extract from the judgment provides a helpful summary of the two arguments submitted:

> *"5 … Mr Pollock submitted that it was only communications between solicitor and client, and evidence of the content of such communications, that were privileged. Preparatory materials obtained before such communications, even if prepared for the dominant purpose of being shown to a client's solicitor, even if prepared at the solicitor's request and even if subsequently sent to the solicitor, did not come within the privilege."*
>
> *"6 Mr Stadlen, for the Bank, submitted that, as a matter of general principle, any document prepared with the dominant purpose of obtaining the solicitor's advice upon it came within the ambit of the privilege, whether or not it was actually communicated to the solicitor … This general principle was subject to the exception that documents sent to or by an independent third party (even if created with the dominant purpose of obtaining a solicitor's advice) would not be covered by legal advice privilege".*[8]

The Court of Appeal accepted Mr Pollock's submission and held that the only documents for which legal professional privilege could be claimed were communications between the BIU and their solicitors, Freshfields, in seeking or giving legal advice. The BIU, and no one else, was to be treated as the client for privilege purposes.

In essence, *Three Rivers (No 5)*[9] is authority for three principles:

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[7] *[2003] EWHC 2565 (Comm).*

[8] *Three Rivers District Council & Ors v The Governor and Company of the Bank of England [2003] EWCA Civ 474, at paragraphs 5 and 6.*

[9] *[2003] EWHC 2565 (Comm).*

1. Communications between a corporate body and third parties could not attract legal advice privilege.
2. Communications within the Bank between the BIU and other members of the Bank could not attract legal advice privilege.
3. Communications between Freshfields and members of the Bank other than the BIU could not attract legal advice privilege.

The second principle raised the most controversary as it created a very narrow definition of the client. The third principle created confusion but in essence it flowed from the second principle and established that if the lawyers communicated with someone within the business who was not the 'client' then those communications would not be privileged.

The *Three Rivers* Litigation progressed to the House of Lords. The issue at play in *Three Rivers (No 6)*[10] was whether the communications between the Bank, Freshfields and counsel relating to the content and preparation of the so-called 'overarching statement', submitted on behalf of the Bank to the Bingham Inquiry, qualified for legal professional privilege?

The House of Lords held that communications between parties or their solicitors and third parties for the purpose of obtaining information or advice in connection with existing or contemplated litigation are privileged, but only when: a) litigation is in progress or in contemplation; b) the communications were made for the sole or dominant purpose of conducting that litigation; and c) the litigation is adversarial, not investigative or inquisitorial.

On the first limb, litigation not yet commenced must be reasonably in prospect, not necessarily greater than a 50% chance but it must be more than a mere possibility[11]. A fear of prosecution as a worst-case scenario is not enough[12]. On the second limb, the burden of proof is on the party claiming privilege. The evidence must be specific enough to show analysis of the purpose for which the documents were created and should refer to such contemporary material as is possible without disclosing the privileged material[13]. Where the document was created for a dual-purpose, as was the issue in *Waugh v British Railways Board*[14], the litigation purpose must be the dominant or most immediate purpose.

Therefore, in *Three Rivers (No 6)*[15] the Supreme Court overruled the second and third principles of *Three Rivers (No 5)*[16] but did not decide upon the first principle, on the narrow definition of client, because it was not necessary to decide them in order to reach a judgment on substantive issues in dispute.

[10] *[2004] UKHL48.*
[11] *United States of America v Philip Morris*
[12] *SFO v ENRC*
[13] *Rawlinson and Hunter Trustees SA v Akers*
[14] *[1979] UKH.*
[15] *[2004] UKHL48.*
[16] *[2003] EWHC 2565 (Comm).*

Practical implications for practitioners and other common law jurisdictions

The practitioner is faced with the challenge of balancing the duty to one's client against the public interest, and with little judicial guidance. This has caused much confusion as reflected in two recent and inconsistent cases. Both cases applied the rules for litigation privilege set out in *Three Rivers (No 5)*[17] but with contrasting results. The first, *R (for and on behalf of the Health and Safety Executive) v Paul Jukes*[18], saw the Court of Appeal (Criminal Division) decide that litigation privilege does not apply to a statement an employee makes to his employer's solicitors as part of their investigation into a death in the workplace. By contrast, in *Bilta (UK) Ltd (in Liquidation) & Ors v Royal Bank of Scotland and Mercuria Energy Europe Trading Limited*[19], the court upheld a claim to litigation privilege over documents (including interview transcripts) created as part of an internal investigation undertaken due to an adverse tax assessment by HMRC.

The difficulty created by the *Three Rivers* litigation is reflected in the response by other common law jurisdictions who have largely tried to avoid it.

In Hong Kong, the case of *Citic Pacific Limited v Secretary for Justice and Commissioner of Policy*[20] adopted the narrow definition of client. This was overruled on appeal on the grounds of the fundamental right to obtain confidential legal advice[21]. The Hong Kong Court of Appeal addressed the need for full information gathering in order to provide proper legal advice; the commercial reality that many people and departments within a business may be involved in writing instructions to lawyers; and the potential for arbitrary outcomes from the narrow definition. The court adopted a dominant purpose test which states that legal advice privilege protects all internal confidential communications produced or brought into existence for the dominant purpose of obtaining legal advice. The judgment was welcomed because it gave clarity and guidance on how to approach privilege.

In the US, the case of *Upjohn v USA*[22] went before the Supreme Court where it was decided that, for the purposes of attorney-client privilege, the 'client' is in fact a far wider concept than only those who control a company, thus benefiting all employees.

In Canada, the case of *Reis v CIBC Mortgages Inc*[23] addressed whether investigation-related interview notes produced by an employee at the bequest of an in-house lawyer, that were used to assist said counsel in responding to an application made by the plaintiff in the substantive case, were subject to legal privilege. The judge found that they were subject to both types of legal

[17] Ibid.
[18] *[2018] EWCA Crim176*
[19] *[2017] EWCH 3535 (Ch)*
[20] *[2015] HKEC 1263.*
[21] Article 35 of the Basic Law.
[22] *(1981) 449 US 383.*
[23] *2011 ONSC 2309 (CanLII).*

privilege. Relevant factual information contained in the investigation notes was still discoverable, but the perspectives and opinions of the author were not.

In Australia, the case of *Pratt Holdings v Commissioner of Taxation*[24] saw the Commissioner claim access to documents held by PwC in relation to its former client Pratt Holdings Pty Ltd. Relying on the Evidence Act 1995 s117, which expressly defines 'client' so as to include an employer or agent of a client, it was held that the third-party communications did attract legal advice privilege.

The background to *ENRC v SFO*[25]

SFO v ENRC[26]:

In December 2010, ENRC received an email from an apparent whistleblower containing allegations of bribery and financial wrongdoing in relation to its Kazakh subsidiary. ENRC instructed lawyers to carry out an internal fact-finding investigation.

In 2011, the SFO contacted ENRC, drew its attention to the SFO's self-reporting guidelines and suggested a meeting. There followed a lengthy period of dialogue between ENRC and the SFO, including a series of meetings in which ENRC updated the SFO on the progress of its internal investigation.

The SFO announced that it was commencing a criminal investigation in April 2013.

As part of its investigation, the SFO sought to compel ENRC to produce a range of documents. The SFO's powers of compulsion do not extend to documents which ENRC would be entitled to refuse to disclose on grounds of legal privilege in proceedings in the English High Court.

ENRC claimed the following privilege: litigation privilege and legal advice privilege for the Interview Notes; litigation privilege for the Accountants' Reports; litigation privilege and legal advice privilege for the Factual Updates; and legal advice privilege for the Communications with a Legally Qualified Businessman.

The judgment of the High Court held that none of the privilege claims were successful except for the Factual Updates which attracted legal advice privilege only.

ENRC appealed the decision to the Court of Appeal. The appeal was heard by Sir Brian Leveson, President of the Queen's Bench Division, Sir Geoffrey Vos, Chancellor of the High Court and Lord Justice McCombe in July 2018.

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[24] *[2003] FCA 6.*
[25] *[2018] EWCA Civ 2006.*
[26] *[2017] EWHC 1017 (QB)*

The Law Society's intervention on the issue of privilege

The Law Society of England and Wales intervened in this case, firstly, because the Society is the professional body for 170,000 solicitors[27] all of whom will be affected by developments in legal privilege and because of the substantial public interest in upholding human rights and ensuring the rule of law.

The intervention made by the Law Society was three-fold. Firstly, legal professional privilege is not only a right in itself but also underpins other important rights such as access to justice and fair trial rights afforded to every citizen. It is essential that a client can speak freely with their lawyer in order to ensure accurate advice is given. To be at risk of self-incrimination, would put the client in an untenable position. Not only is it important that the right to legal professional privilege exists, but there must be confidence in the law to protect the confidentiality of privileged communications. It is essential that, in the court's handling of the point on privilege, there is clarity and confidence in the judgment.

Secondly, there is no principle for distinguishing between employees who are authorised to instruct the company's lawyers, and those employees who are authorised to provide factual information to the company's lawyers. The lawyers have been instructed by the company to provide legal advice and, in order to do that, they need to communicate with the company's employees. Thus, the Society argued that legal advice privilege must apply to these communications. Otherwise, the employees will not speak frankly which will undermine the legal advice given and, in some cases, the employees are being asked to decide between their own interests and those of their employer.

Thirdly, the 'reasonable contemplation' test applied for litigation privilege should not be watered down. The test should not be uncertain, unpredictable or excessively high. The test should simply be: was the person reasonable in requesting legal assistance in order to prepare for contemplated criminal litigation. For the test to be contingent on a party's belief in their guilty is fundamentally wrong. Finally, on this point, it is arguable that fact finding by a lawyer is all for the purpose of preparing for anticipated litigation since the provision of a complete factual account is a necessary component of placing the lawyer in a position to providing thorough and professional service.

The Court of Appeal's finding

The Court addressed the parameters of legal advice privilege, citing *Regina v Central Criminal Court ex parte Francis & Francis*[28] where the House of Lords approved the principle that statutory definitions of legal professional privilege accurately reflect the common law.

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[27] It is an approved regulatory for the purposes of the Legal Services Act 2007 but instructs counsel in its capacity as the solicitors' representative body, exercising the functions referred to it at section 27 (2) of the Legal Servicers Act 2007.

[28] *[1989] 1 AC 346*

Ultimately the Court identified litigation privilege to the central issue in the case. It ruled that the Interview Notes, the Accountants' Records and the Communications with a Legally Qualified Businessman were covered by litigation privilege.

Thus, it allowed the appeal against the ruling that none of the documents had been created before criminal legal proceedings were reasonably in contemplation. In addition, the Court did not accept the alignment of reasonable contemplation of litigation with a prosecutor's decision that it had sufficient evidence to prosecute. Finally, on litigation privilege, the Court held that where a prosecuting authority indicates to a company that there is the prospect of a criminal prosecution and the company instructs lawyers in response, the dominant purpose test could be satisfied.

On legal advice privilege, the Court said that advice given with the dominant purpose of avoiding legal proceedings or with a view to settlement is equally protected by litigation privilege as that given for the purpose of defending such claims. This decision has been welcomed by the legal profession and commercial world. The judgment confirms that corporations are encouraged to conduct internal investigations, which are seen as being in the public interest, but with the reassurance that documents produced from such investigations will be protected from disclosure. A culture of self-reporting and investigating encourages an effective system of corporate governance that ultimately benefits society as a whole. It is a relief that the fundamental principle of client-lawyer consultations and advice being privileged has been upheld in this judgment.

The Court of Appeal refused the opportunity to address the uncertainty as to what *Three Rivers (No 5*[29]*)* stands for because it decided the matter on the basis of litigation privilege. In obiter, the judgment concludes that, had it addressed the issue, it would have felt bound to follow the principle established in Three Rivers (No 5[30]), namely the narrow definition of 'client'. However, it saw weight in the Law Society's arguments for departing from the narrow definition of 'client' and went as far as to say that, on these facts, the narrow definition would have been wrong because it does not reflect the modern reality of litigation conducted by many people and teams across a global corporation. Consequently, the judgment invites the Supreme Court to come to a decision on the issue of *Three Rivers (No 5*[31]*).*

[29] *[2003] EWHC 2565 (Comm).*
[30] Ibid.
[31] Ibid.

Religion in the Balance: Constitutionalism, Autonomy and Identity in the CJEU

Joseph Mahon

Introduction

This essay argues that the European Union (EU) has generally succeeded in its balanced approach to religious issues, but that, until recently, its stance has not been properly tested. Proceeding fairly over the coming decades will require a nuanced recognition of the questions different *types* of cases raise.

The first section outlines the EU's approach to religion. Focusing on the three ingredients that characterise that balance—constitutionalism, humanism and identity—it illustrates the precariousness of that position. It concludes, highlighting an implication of this approach: the privileging of 'insider' religions. Section two shows how this balance works in practice, applied to two types of cases: discrimination cases and cultural exemption cases. In discrimination cases, through an examination of *Achbita v G4S*,[1] the balance is shown to be unjust – a residue of Europe's non-expressive religious heritage. Cultural exemption cases, however, are given credit – the maintenance of cultural identity as a positive, not a negative, factor. The conclusion proposes an approach that could positively amend the balance in view of an increasingly diverse Europe.

Religion in the EU: Constitutionalism, Balance and Identity

The EU's governance of religion is both bottom-up and top-down. Bottom-up, religious perspectives can justify individual exemptions from legal duties. Top-down, religious influence is accommodated at the state level via the EU's broader public morality. In this way, the EU embraces both "divergent Member State moralities as well as a common European element."[2] This common element is crucial: without the mutual trust of its members, the EU's position as a rights-based Union would be untenable. So, while the EU recognises religion as a key limb of liberal democracy, it must define boundaries for those religions. The common European element, therefore, plays both a restricting and facilitating role in the EU's governance of religion: restricting, because it requires religiously-influenced domestic decisions to adhere to values such as the rule of law, pluralism and human rights; facilitating, because it allows their own decision-making in the first place.[3] Yet, the EU also values religion, in and of itself. The Lisbon Treaty, for example, draws 'inspiration from the cultural, religious and humanist inheritance of Europe' and, separately, recognises the 'specific contribution' of churches to Europe.[4] The EU Charter of Fundamental Rights ('EU Charter') is 'conscious of its spiritual and

[1] C-157/15, *Achbita & Anor v G4S Secure Solutions NV* [2017] CJEU

[2] Ronan McCrea, 'The Recognition of Religion within the Constitutional and Political Order of the European Union', LEQS Paper No. 10/2009, p.2

[3] McCrea, 2009, p.2.

[4] Lisbon Treaty, Preamble and S.16.3.c respectively.

moral heritage', providing, in Article 22, that the Union must respect 'religious diversity'.[5] The EU, therefore, recognising the place of religion in its constitution and those of its Member States, "synthesizes a common framework" that can respect Member State autonomy while balancing that with a core body of values true to the Union.[6]

The balance it strikes, for McCrea, lies between the Christian heritage of Europe and a humanist tradition that prioritises personal autonomy. Only those religious goals that are compatible with this balance will be permitted.[7] This is most visible in the preamble to the Lisbon Treaty and its threefold reference to culture, religion and humanism. It acknowledges the religious element of the EU's constitutional values, but restrains that by reference to cultural and humanist influences, both of which have acted to reduce religion's influence over European public life.[8] This balance is so vital because it facilitates the Union's treatment of religion as a form of both individual and collective *identity*. With humanism at the centre of the triad, MSs are permitted a certain amount of divergence in religion, so long as that divergence does not encroach on the fundamental principle of autonomy. Any approach to religion that fails to protect autonomy and identity will be forbidden. In practice, the conceptualization of religion as identity can pose problems in the clash of rights: promoting "collective religious identity through the promotion of communal norms can be inconsistent with the freedom of individuals to develop their own identity in contravention of such norms."[9] Yet, in cases such as those, the humanist commitment to personal autonomy, critical of the advancement of religious norms, ought to hold sway.

One implication of the EU's privileging of autonomy and humanism is its direct and unambiguous link to the Christian tradition. In Protestantism, for example, the individual is saved not through external dedication or group commitment, but through faith, grace and scripture.[10] True salvation comes through personal autonomy: "that inner worship of the heart which God demands."[11] And, just as secularism rigidly separates public and private, restraining religion by "thickly cultural notions of citizenship,"[12] Protestantism is both personal and non-expressive. This unspoken marriage between the EU's conception of religion and the forms of religion that have dominated Europe since the 1500s is highly problematic. It promotes ideas of inheritance that can elevate 'insider' faiths at the expense of 'outsider' faiths. It facilitates "the predominantly Christian, cultural role of religion in influencing the law."[13] And, it can exclude those religions not characterised by that same balance – those less prepared to relinquish

[5] For in-depth coverage of the EU's relationship to religion, see Norman Doe, 'Towards a 'Common Law' on Religion in the European Union', *Religion, State & Society*, Vol 37, 2009, pp.147-166.
[6] Ronan McCrea, *Religion and the Public Order of the European Union* (OUP, 2010) p.3
[7] McCrea, 2009, p.3
[8] See Charles Taylor, *A Secular Age*, (Harvard University Press, 2007). For Weigel, the failure specifically to reference Christianity has been described as a refusal to recognise Europe's constitutional story (See, George Weigel, *The Cube and the Cathedral: Europe, America and Politics without God* (New York, Basic Books, 2005), p.70).
[9] See, eg. K Dalacoura, *Islam, Liberalism and Human Rights: Implications for International Relations* (London: IB Tauris, 1998).)
[10] Kirstie McClure, "Difference, Diversity and the Limits of Toleration," *Political Theory 18*, no. 3 (August 1990) p.368
[11] John Locke, *Two Tracts on Government*, (Philip Abrams (Ed.), Cambridge University Press, 1967) p.214
[12] Cecile Laborde, *Liberalism's Religion* (Harvard University Press, 2017) Note 75, p.255
[13] McCrea, 2010, p.254

political influence, for example, or those whose demands run counter to Western conceptions of fundamental rights: religions, in other words, that lack historical roots in Europe, or that are unable or unwilling to morph themselves to the prevailing European model.

Discrimination and Exemptions

Discrimination

Discrimination is prohibited by EU law in and of itself through primary instruments such as Directive 2000/78 (the 'Framework Directive'). Yet, it also serves wider functions. It can recognise that certain groups face structural disadvantages, for example, and has been described as a 'basic principle' that should be incorporated at every level to promote social cohesion.[14] Religion, as a protected characteristic, comes under this umbrella.

It was in the discrimination context that *Achbita v G4S* was decided by the CJEU in 2017. *Achbita* concerned a neutrality rule that prohibited employees from wearing visible signs of political, philosophical or religious affiliation. When Achbita herself was prohibited by G4S from wearing her headscarf, the Court had to consider whether that amounted to *direct* discrimination. They found against Achbita. Following the Opinion of Advocate General Kokott, Achbita's wearing of the headscarf was characterised as a choice: "a mode of conduct based on a subjective decision or conviction."[15] It was not a question of identity. Thus, distinguished from characteristics one is born with—gender, race, age—Achbita had suffered no less favourable treatment than someone required to remove, for example, a political badge.

Achbita thus departed the Court's depiction of religion as identity. It was a questionable decision for various reasons. According to common sense, it impacts some religions, such as Islam, more than others, such as Christianity. It makes the headscarf harder to protect in law. And, it grants states a 'measure of discretion' in applying the proportionality test, seemingly demoting religious discrimination below other protected characteristics such as race.[16] It appears inconceivable that this discretion would be granted were race the concern. For Davies, G4S' neutrality policy was not an alignment with *no* beliefs or causes, but a desire to retain those customers harbouring religious prejudices. While the company may genuinely have lost customers, as a matter of law, the prejudice of those customers must not serve as legal justification for discrimination. Pandering to this prejudice "hollows out the very prohibition on discrimination" and is "incompatible with the idea of religious equality."[17]

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[14] Doe, 2009, p.154

[15] Opinion of Attorney General Kokott, para. 45.

[16] Erica Howard, 'Islamic headscarves and the CJEU: *Achbita* and *Bougnaoui*', *Maastricht Journal of European and Comparative Law* 2017, Vol. 24(3) p.361

[17] Gareth Davies, 'Achbita V G4s: Religious Equality Squeezed Between Profit and Prejudice', European Law Blog, 6 April 2017. Online resource <https://europeanlawblog.eu/2017/04/06/achbita-v-g4s-religious-equality-squeezed-between-profit-and-prejudice/>

There is a final point made by Spaventa.[18] The Framework Directive is a minimum harmonisation directive; it is only intended to set minimum standards of equality. States can, if they wish, implement further protections at the national level. Achbita, on this reading, may be unproblematic. States can legislate to improve employee protection if they wish. To this extent, the ruling can be commended: it is not imposing, it allows for state discretion, and it may even pave the way for positive social development in certain circles. The problem, for Spaventa, is the Court's framing of G4S' policy under Article 16 EU Charter – the freedom to conduct a business. Doing so, the Court may have developed an employer's right to limit an employee's right not to be discriminated against.[19] If this is correct, this is a standard that employers could utilise *against* any state attempts to legislate for greater employee protections. Against the grain of anti-discrimination law, and against the primary objective of minimum harmonization directives, the Court may have curtailed the upward discretion of its Member States.

The decision was deferential, framed, by reference to Art. 16 EU Charter, within the Court's institutional competence – economics, not religion. Given the multiple implications a headscarf can have, not only in religious freedom, but in subordination, gender equality and pluralism, it may have been the correct decision.[20] And yet, it is hard to avoid the conclusion that the CJEU depicted Achbita's religion as a choice because it *could* depict her religion as a choice: the externality of Achbita's headscarf, its conflict with the strict laïcité of the French state, facilitated it. That it is hard to depict Christian religious expression as a choice—because there are so few examples of outwardly visible Christian expression, and because those few that do exist (a crucifix necklace, for example[21]) are unlikely to clash with a European State's constitutional heritage—is a privilege that 'insider' Christianity has been bestowed with. *Achbita* thus appears as a clear example of the EU's religious-constitutional balance falling in favour of insider faiths. The individuality of this discrimination claim—and indeed of most discrimination claims—ought to have triggered the humanist protections of the EU's religious order, and so prevented its prevailing Christian heritage from holding sway. That it did not is an indictment of that balance.

Public Participation and Exemptions

The isolation of national cultures from market forces can similarly prioritise 'insider' faiths. The greater the influence on public life, culture and morality, the greater the opportunity to shape the EU's religious order – through public policy derogations, for example. The effects of this are worsened, McCrea maintains, first by a lazy assumption on the part of the EU that insider religions readily accept limitations on their political influence, and second by a consequent failure to put insider faiths to proof in this regard.[22] The increasing ubiquity within Europe of

[18] Eleanor Spaventa, 'What is the point of minimum harmonisation?' *EU Law Analysis,* 21 March 2017. Online resource <http://eulawanalysis.blogspot.co.uk/2017/03/what-is-point-of-minimum-harmonization.html>

[19] Spaventa, 2017. See also Davies, 2017.

[20] Camil Ungureanu, 'Introduction' to Lorenzo Zucca and Camil Ungureanu (eds), *Law, State and Religion in the New Europe* (CUP, 2012) p.6

[21] In the ECtHR context, see *Eweida & Ors. v United Kingdom*, Apps. 48420/10, 59842/10, 51671/10 and 36516/10.

[22] McCrea, Religion and the Public Order of the European Union, p.162

religions, such as Islam, who have not been shaped by the same liberal-secular frameworks as Christianity compounds matters.

Addressing this, the EU is faced with two options: first, a 'levelling up' – religions gain increasing influence over politics, so affording outsider faiths a comparable role to insider ones; second, a 'levelling down' – the influence of insider faiths over law and politics is diminished, so affording equal influence to all religions. The levelling up is dangerous for theocratic reasons. The levelling down leads to tighter restrictions on MSs and fewer derogations on cultural grounds – not only an approach unlikely to find favour among voters, but one which would deny links to cultural identity and a shared past.[23] Faced with this decision, McCrea opts for neither. It is inevitable that some religious traditions will hold greater influence than others.[24] While it may carry the cost of inequality between religions, that cost is the inevitable result of Christianity's historical influence in Europe.[25] It is a 'constitutional tolerance'[26] model, recognising the institutional restraints and constitutional competencies of the Union. In line with the balance outlined above, it allows for "shared values but does not seek to supplant the national identities of Member States."[27]

McCrea's support for cultural heritage is echoed in Tsivolas' religiously-imbued account. Religious cultural heritage, he proposes, is not only powerful politically, but *sacred*, gleaming large portions of its worthiness from its religious significance. It is so valuable, in fact, that it imposes a duty of care across Europe to protect and even reclaim this heritage as "invaluable European *cultural capital*."[28] (His emphasis) To preserve this sacred heritage, he calls for the mobilisation of religious communities. And, to foster it, *positive* neutrality from the state: an *indifferent* neutrality will not suffice.[29] The state must welcome a diversity of cultural goods and protect them as elements of a common European heritage.

Tsivolas' approach, while clearly inspired, is unrealistic. The EU, as an economic entity without religious competence, will not—nor should it—designate what is and is not sacred. Defining religion as identity, it correctly outsources that decision to religious groups. If Tsivolas is followed, with cultural heritage increasingly vaunted as religious, it is hard to envisage minority religions maintaining any reasonable voice in the public sphere. His approach puts religion first, dialogue later. But the EU, as a community of values committed to pluralism, must promote dialogue and diversity as its priority. His positive neutrality approach is also backward-looking. Like McCrea, he valorises cultural heritage; unlike McCrea, he takes active steps to reclaim it.

[23] Ibid. p.263
[24] Ibid.
[25] Ibid. p.268-9
[26] JHH Weiler, The Constitution of Europe (Cambridge University Press, 1999)
[27] McCrea, 2010, pp.269
[28] Theodosios Tsivolas, *Law and Religious Cultural Heritage in Europe* (Springer International Publishing Switzerland, 2014) p. 177
[29] Ibid. pp.178-9

McCrea's is a humbler approach, recognising the difficulty of the decision and need to look forward, tentatively, as Europe diversifies.

Camil Ungureanu, lastly, sees two models: assimilationist and multicultural. The French model is assimilationist. Top-down, it attempts to define away conflicts by imposing a public arena devoid of religion and its differences. There is a "non-negotiable primacy of republican–national values over any other values."[30] With no room for dissent or exception, however, it could not reasonably work in the EU. The multicultural model, by contrast, aims for 'safe spaces' where anyone can practice their values. It recognises plurality, but has, for Ungureanu, proven over-optimistic as to the avoidance of segregation and the aim of reconciliation.[31] Like McCrea's levelling up or down, neither is a good option. "Rights and values," she maintains. "Pluralism and identity, justice and efficacy, autonomy and tradition, integration and toleration cannot always be balanced without the loss and sacrifice of something valuable."[32] In the public sphere, that analysis holds the key. Where there are no good options, and where the diversification of Europe is a new phenomenon, the value of cultural heritage must be maintained. Diversity must be positively welcomed but not—yet—at the expense of national culture.

Conclusion

This essay first outlined the EU's approach to religion. Simultaneously facilitating state divergence from community norms and ensuring that divergence is limited by common European boundaries, it legitimises the EU's claim to be a rights-based Union. Yet, its impact has been the privileging of insider faiths – predominantly Christianity. It is a precarious balance, caught in the tension between European cultural heritage and a humanist tradition that prioritises individual autonomy. Individual discrimination cases gravitate to the latter of these priorities: individual autonomy. Yet, through *Achbita*, it was illustrated that the historical externality of 'outsider' religions renders them vulnerable. They do not benefit from the balance in the same way that 'insider' faiths do. As the externality of faiths such as Islam appears less and less reflective of an increasingly diversified Europe, this is a failure on the part of the EU. Cultural exemption cases fall to the former priority: cultural heritage. While acknowledging the inequality of religious influences in MSs, it was emphasised that neither 'levelling-up' nor 'levelling-down' is a good option. Forward-looking cultural heritage ought to hold sway.

The starting point for Zucca's 'inclusive secularism' is a European malaise: "the inability of the secular state to cope with diversity". Contemporary Europe, he argues, is characterised by religious heterogeneity.[33] This is the challenge that faces the EU. No longer about the interaction between one state and that state's religion, it now concerns "the relationship between plural religions among themselves and between various political entities ranging from the national to

[30] Camil Ungureanu, 2012, p.4
[31] Ibid. p.5
[32] Ibid. p.6
[33] Zucca, A Secular Europe: Law and Religion in the European Constitutional Landscape (Oxford, 2012) p.xx

the supranational and international."[34] This is the basis on which the European law on religion must proceed. It must be prepared to retain the cultural heritage of Europe, positive as that is to identity; but must be prepared to lead the way in cases, such as discrimination, where individual autonomy is front and centre.

[34] Ibid. p. Xxiv-xxv

Vertical Agreements, ATP, and Minimum RPM – Revisiting one of EU Competition Law's Oldest Fallacies

Shehan Parimalam

"[T]he most enlightened judicial policy is to let people manage their own business in their own way, unless the ground for interference is very clear".[1] This quote still holds true today, especially in light of the strained relationship between competition law and vertical agreements, ever since the latter's recognition under such rules more than 50 years ago.[2] Spurred by considerable legal and economic development, the necessity of watertight restrictions against absolute territorial protection ("ATP") and minimum retail price maintenance ("RPM") within the EU needs reappraisal. The following exposition shall discuss the *status quo* in relation to vertical agreements, highlight three key negative and positive effects of ATP and minimum RPM, and advance a case calling for the assuagement of such restraints under EU competition law.

The *Status Quo*

ATP refers to 'market partitioning by territory…[as] the result of direct obligations, such as the obligation not to sell to…customers in certain territories…[as well as] indirect measures [to the same effect].'[3] Minimum RPM refers to 'the establishment of a fixed or minimum resale price or a fixed or minimum price level to be obtained by the buyer.'[4]

Article 101(1) of the Treaty on the Functioning of the European Union ("TFEU") provides that agreements between undertakings capable of affecting trade between Member States, having as either their object or effect the prevention, restriction or distortion of competition within the internal market, are prohibited.[5] In particular, agreements containing ATP and/or minimum RPM are expressly prohibited.[6] While vertical agreements fall within this provision,[7] the European Court of Justice ("ECJ") noted that particular agreements such as exclusive distribution agreements ("ED")[8] and selective distribution agreements ("SD")[9] would be permissible. EDs are permissible insofar as they do not contain clauses that may lead to the partitioning of the internal market.[10] SDs are permissible if: (i) the nature of the products in question necessitate the use of an SD; (ii) retailers are chosen on the basis of objective criteria of a qualitative nature, applied

[1] *Dr Miles Medical Co v John D Park & Sons Co* 220 US 373 (1911), 411 (Mr Justice Holmes)
[2] US, see: *White Motor Co v United States* 372 US 253 (1963). EU, see: Case 56/64 *Consten SaRL and Grundig GmbH v Commission ("Consten and Grundig")* [1966] ECR 299
[3] Commission Guidelines on Vertical Restraints [2010] OJ C 130/1, § 50, page C 130/12
[4] *ibid.,* § 48, page C 130/12
[5] Consolidated Version of the Treaty on the Functioning of the European Union ("TFEU") [2012] OJ C 326/47, Article 101(1), page C 326/88
[6] *ibid.,* Articles 101(1)(a) and 101(1)(c), page C 326/88
[7] *Consten and Grundig*, (n 2), 339
[8] Case 56/65 *Société Technique Minière (L.T.M.) v Maschinenbau Ulm GmbH (M.B.U.) ("STM")* [1966] ECR 235
[9] Case 26/76 *Metro SB-Großmärkte GmbH & Co KG v Commission ("Metro I")* [1977] ECR 1875
[10] *STM*, (n 8), 249

uniformly and in a non-discriminatory manner; and (iii) the application of such criteria is proportionate to the result sought.[11]

Further, since the introduction of the revised Block Exemption Regulations ("BERs"),[12] SDs might be permissible even when retailers are chosen on the basis of quantitative criteria, and where the nature of the products in question do not necessitate the use of such a system, as long as the market shares of both the supplier and distributor do not exceed 30% of their relevant markets respectively.[13] However, it is still the case that ATP and minimum RPM remain prohibited.[14] Any agreement failing to benefit from the 'safe harbours' created by the BERs or contrary to Article 101(1) TFEU would have to be justified, on the basis of the cumulative criteria[15] of the general exemption contained under Article 101(3) TFEU.[16]

Harmful Effects of ATP and Minimum RPM

One of the main objectives of the EU is the harmonisation of the internal market.[17] As such, any vertical restraint capable of partitioning the internal market on national territorial lines is looked upon with great disdain.[18] Indeed, this is a particularly important distinction between EU competition law and US antitrust law; even pro-competitive restraints may be regarded as anti-competitive merely because they are perceived as detrimental to harmonisation.[19] With such a consideration at the forefront, it is unsurprising that ATP is viewed as anti-competitive.

Market foreclosure is another concern.[20] Foreclosure at the manufacturers' level may harm consumers through raising wholesale prices, limiting the choice of products available to consumers, lowering their quality, and/or reducing the level of product innovation. At the distributors' level, such foreclosure may raise retail prices, limit the choice of price/service combinations and distribution formats, lower the availability and quality of retail services, and/or reduce the level of innovation of distribution.[21]

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[11] Case 31/80 *L'Oréal NV and L'Oréal SA v PVBA 'Die Nieuwe AMCK' ("L'Oréal")* [1980] ECR 3775, [15]; Case T-19/92 *Leclerc v Commission ("Leclerc")* [1996] ECR II-1851, [112]

[12] Regulation 330/2010 [2010] OJ L 102/1

[13] *ibid.,* Article 3, page L 102/4. See also: G Monti, "Restraints on Selective Distribution Agreements" (2013) 36 *World Competition* 489, 493

[14] Regulation 33/2010, (n 12), Articles 4(a) & 4(b), page L 102/5. Article 4(b) contains limited derogations from the restriction on ATP

[15] Case T-185/00 *Métropole télévision SA (M6) and Others v Commission ("Métropole télévision")* [2002] ECR II-3805, [86]

[16] Vertical Guidelines, (n 3), § 110, page C 130/25; TFEU, (n 5), Article 101(3), pages C 326/88 – C 326/89

[17] Consolidated Version of the Treaty on European Union ("TEU") [2012] OJ C 326/13, Article 3(3), page C 326/17; Case 6/72 *Europemballage Corporation and Continental Can Company Inc v Commission ("Continental Can")* [1973] ECR 215, [24]

[18] *Consten and Grundig*, (n 2), 340. See also: Vertical Guidelines, (n 3), § 7, page C 130/4

[19] L Gyselen, "Vertical Restraints in the Distribution Process: Strengths and Weaknesses of the Free Rider Rationale under EEC Competition Law" (1984) *Common Market LR* 647, 660; Monti, (n 13), 495

[20] Vertical Guidelines, (n 3), § 100, page C 130/22

[21] *ibid.,* § 101, page C 130/22

Finally, the ECJ has noted that price competition is so important that it may never be restricted,[22] with the Commission noting further that vertical price restrictions are presumed to restrict competition, thus falling within the scope of Article 101(1) TFEU, and would be highly unlikely to be justified under Article 101(3) TFEU.[23] The Commission also observes that minimum RPM may, *inter alia*, facilitate collusion between manufacturers by increasing transparency on the market, facilitate collusion between distributors by eliminating intra-brand price competition (competition between different distributors carrying the same brand), soften both inter-brand competition (competition between different brands) and intra-brand competition, and have the immediate effect of increasing price.[24] Additionally, the Commission also expresses the concern that maximum RPM, which is permitted, may be considered as a focal point for distributors to set a minimum fixed sales price.[25]

Positive Effects of ATP and Minimum RPM

While ATP and minimum RPM have significant anti-competitive effects, they can have significant pro-competitive effects as well.[26] Of particular relevance is the combatting of free-riders; if a distributor were to expend costs towards the marketing of a product, and consumers were to learn about that product through those means, yet go on to purchase the product from a discounter i.e. a free-rider, the incentive for the distributor to continue with the sales of the product would be greatly diminished. This in turn would lead to a loss of profit for the manufacturer. By imposing vertical restraints such as ATP and minimum RPM, this problem may be alleviated.[27] This effect has been recognised by both the Commission,[28] as well as the US Supreme Court, in a series of cases[29] holding that both price and non-price vertical restraints cannot be regarded as *per se* illegal for the purposes of the Sherman Act.[30]

The Commission also recognises that either in the case where substantial investments are required by a distributor to start up and/or develop a new market, or in the case of the genuine testing of a new product, ATP may be permissible, for a maximum period of two years or for as long as necessary respectively.[31] A similar argument has been raised by Monti; ATP may be a means to promote competition in new markets, especially in the case where a distributor were to expend

[22] *Metro I*, (n 9), [21]
[23] Vertical Guidelines, (n 3), § 223, page C 130/45
[24] *ibid.*, § 224, page C 130/45
[25] *ibid.*, § 226, page C 130/46. See also: Regulation 33/2010, (n 8), Article 4(a), page L 102/5
[26] EC Haziroglu and S Gökatalay, "Minimum Resale Price Maintenance in the EU in the Aftermath of the US *Leegin* Decision" (2016) 42 *European Journal of Law and Economics* 45, 56
[27] L Telser, "Why should Manufacturers want Fair Trade?" (1960) 3 *Journal of Law and Economics* 86. See also Case C-230/16 *Coty Germany GmbH v Parfümerie Akzente GmbH ("Coty")* EU:C:2017:603 [102] (Opinion of Advocate General Wahl)
[28] Vertical Guidelines, (n 3), § 107(a), page C 130/23
[29] See: *Continental TV Inc v GTE Sylvania Inc* 433 US 36 (1977), 55; *State Oil Co v Khan* 522 US 3 (1997), 11, 12, 16; *Leegin Creative Leather Products Inc v PSKS Inc* 551 US 887 (2007), 890
[30] Act of July 2 1890, Sherman Anti-trust Act, § 1
[31] Vertical Guidelines, (n 3), §§ 61 & 62, page C 130/16

significant costs in the relevant market, only to have those costs sunk by the presence of free-riders.[32]

Lastly, from an economic point of view, the imposition of minimum RPM by manufacturers would permit the raising of their distributors' retail margin, thereby increasing the latter's incentive to provide more information or service relating to their products, thus enhancing consumer welfare.[33] Further, by eliminating price competition between retailers carrying products of the same manufacturer, as well as widening the retail margin over wholesale prices, retailers would find it attractive to carry more products.[34] This in turn would lead to increased inter-brand competition, resulting in manufacturers competing to provide more attractive deals for both distributors and consumers.[35]

The Case for Assuagement

Two preliminary points must be addressed. Firstly, as regards the purpose of competition law, the ECJ notes that Article 101(1) TFEU is designed not only to protect the interests of competitors or consumers, but also the structure of the market and thus, competition itself.[36] Similarly, Glynn and Easterbrook contend that the proper purpose of competition law is to protect competition, not competitors.[37] Unfortunately, this phrase cannot be regarded as a term of art; the approach towards 'protecting competition' ought to properly be regarded as being strictly limited to prohibiting acts that *reduce consumer welfare*, whilst being careful to not interfere with commercial acts that merely *fail to increase consumer welfare*.[38]

Secondly, the three main arguments advanced above against and for ATP and minimum RPM must be summarised. Such restrictions are anti-competitive since they: (i) partition the internal market; (ii) foreclose the market at both the inter-brand and intra-brand level; and (iii) restrict price competition. They are pro-competitive since they: (i) deal with the free-rider issue; (ii) facilitate entry/expansion into new markets; and (iii) conceivably enhance consumer welfare.

Harmonisation of the internal market plays an integral part in EU competition law, with ATP being restricted for this very reason. However, in line with the view expressed by Monti,[39] by failing to appreciate the full extent of the pro-competitive effects of combatting free-riders,[40] the ECJ in fact contributes to further segregation of the internal market. Whilst it is now

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[32] G Monti, "Article 81 EC and Public Policy" (2002) 39 *Common Market LR* 1057, 1065

[33] MK Perry and D Besanko, "Resale Price Maintenance and Manufacturer Competition for Exclusive Dealerships" (1991) 39 *Journal of Industrial Economics* 517, 518

[34] *ibid*., 520

[35] FH Easterbrook, "Vertical Arrangements and the Rule of Reason" (1984) 53 *Antitrust LJ* 135, 146 – 147. See also: RH Bork, "The Rule of Reason and the *per se* Concept: Price Fixing and Market Division" (1966) 75 *Yale LJ* 373

[36] Case C-8/08 *T-Mobile Netherlands BV and Others v Commission ("T-Mobile")* [2009] ECR I-4529

[37] EF Glynn, "Distribution Under EEC Law" (1990) 59 *Antitrust LJ* 473, 475 – 476; Easterbrook, (n 34), 152

[38] Monti, (n 13), 505; Monti, (n 32), 1059; Easterbrook, (n 35), 152

[39] Monti, (n 13), 495

[40] See the (lack of) analysis by the ECJ in, for example: *Consten and Grundig*, (n 2), 343; *STM*, (n 8), 249; *Metro I*, (n 9), [20]; *L'Oréal*, (n 11), [18]

uncontroversial to contend that ATP may promote entry into new/developing markets, it cannot be asserted that the initial *prevention* of free-riders will translate to their ultimate demise. After the two-year transition period, there is nothing prohibiting free-riders from capitalising on the *future sales* of a manufacturer's products, at the expense of contractual distributors. This might force manufacturers to either integrate vertically, or stop selling their products in the specified territory altogether,[41] leading to the unhappy consequence of reducing intra-brand competition[42] and/or reducing consumer choice,[43] both instances being contrary to the concept of market integration. Further, it is untenable that any undertaking lacking substantial market power would ever be able to 're-establish private barriers between Member States';[44] it is simply not possible for them to act independently of normal competition rules.[45]

On the issue of market foreclosure, it ought to rightly be considered under Article 102 TFEU, which deals with abuses of undertakings holding a dominant market position.[46] This is preferable since, as noted above, an undertaking lacking substantial market power will be highly unlikely to have a significant impact on the market;[47] the proper question ought to be *how* the foreclosure came about, not whether it arose as a result of a vertical restraint. Furthermore, this objection is based on an incomplete theory of harm; an increase in the price of one product will not deprive consumers of choice between other competing products,[48] and it ought not to be regarded as proper for competition law to concern itself with ensuring that *all* consumers may purchase *every* product.[49] While it could be argued that this *prima facie* shows that an agreement is anti-competitive, it is merely an inherent feature of how markets operate. Businesspeople employ commercial justifications when making decisions in the ordinary course of business. If they employ a strategy negatively impacting their target consumers, in the absence of substantial market power, those consumers will penalise them with a loss of sales, *increasing* inter-brand competition.[50]

As regards the lack of price competition, *all* forms of vertical restraints have an effect on price; manufacturers cannot coerce distributors to offer more without first increasing those distributors' profit margin.[51] In consequence, the ECJ's obsession with emphasising price competition seems unwarranted; if all vertical restraints have some effect on price competition, there is no real reason for blacklisting minimum RPM. As with market foreclosure, another incomplete theory of harm, based on the pursuit of excessive consumer welfare, seems to have been developed; it cannot be

[41] Monti, (n 32), 1065
[42] Easterbrook, (n 35), 152
[43] Easterbrook, (n 35), 152
[44] Monti, (n 13), 495
[45] The ECJ itself recognises this truism: Case 27/76 *United Brands v Commission ("UBC")* [1978] ECR 207, [65]; Case 85/76 *Hoffmann La-Roche & Co AG v Commission ("Hoffmann La-Roche")* [1979] ECR 461, [38]
[46] Monti, (n 13), 496. See also TFEU, (n 5), Article 102, page C 326/89
[47] Haziroglu and Gökatalay, (n 26), 56
[48] Monti, (n 13), 495
[49] *ibid.*, Easterbrook, (n 35), 141
[50] Easterbrook, (n 35), 151 – 152, 159 – 161; Haziroglu and Gökatalay, (n 26), 57
[51] Easterbrook, (n 35), 156

said that anti-competitive harm will *always* entail through the adoption of minimum RPM.[52] Furthermore, it is not the role of the ECJ to substitute its own view on what might be the best commercial strategy for a manufacturer to employ in the absence of any clearly defined anti-competitive harm.[53] While particular care must be observed when noting the specific composition of consumers within any given market,[54] competition law must be cautious to neither disregard the power of market forces nor underestimate the value that manufacturers lacking substantial market power place on consumers' actions; no manufacturer would employ vertical restraints with a view of hindering competition *per se*.[55]

Lastly, as an ancillary point, the jurisprudence of the ECJ implies that it employs Article 101(1) TFEU as a mechanism for enforcing broader Treaty objectives[56] at the expense of manufacturers, distributors, and ultimately, consumers. In the recent *Pierre Fabre* case,[57] the ECJ seemed to confuse the application of Article 101(1) TFEU with the application of Articles 28 – 30 TFEU and Articles 34 – 36 TFEU. The result was an inappropriate extension of Article 101(1) TFEU;[58] EU competition law must not be conflated with other areas of EU law.

Conclusion

Article 101(1) TFEU draws a distinction between restraints by object, which are prohibited due to the fact that substantively, they have a sufficiently deleterious impact on competition, thus requiring no further analysis of their effects,[59] and restraints by effect, where an analysis of the actual effects of an agreement on competition reveals it to be anti-competitive.[60] This, when coupled with the rejection of a US styled 'rule of reason' analysis under Article 101(1) TFEU,[61] betrays an incomplete appreciation of the true nature of ATP and minimum RPM by the ECJ. In consequence, armed with this incomplete appreciation, the ECJ seems to have inadvertently foreclosed itself from the changing economic appraisal of such restraints,[62] leading to this author's submission that it is unjustified for ATP and minimum RPM to be regarded as hardcore object restraints in vertical agreements henceforth under EU competition law.

[52] *Leegin*, (n 29), 894; Easterbrook, (n 35), 145
[53] Monti, (n 13), 504 – 507
[54] WS Comanor, "Vertical Price-Fixing, Vertical Market Restrictions, and the New Antitrust Policy" (1984 – 1985) 98 *Harvard LR* 983, 990 – 999
[55] Easterbrook, (n 35), 156
[56] For example: *Consten and Grundig*, (n 2), 341 – 342; and criticism of that case in Monti, (n 31), 1062, 1065
[57] Case C-439/09 *Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la concurrence ("Pierre Fabre")* [2011] ECR I-9419
[58] Monti, (n 13), 501 – 502
[59] Case C-67/13P, *Groupement des Cartes Bancaires v Commission ("CB")* EU:C:2014:2204, [49] – [51]
[60] *STM*, (n 8), 249
[61] Case T-112/99 *Métropole Télévision (M6) v Commission ("M6")* [2001] ECR II-2459, [76] – [77]
[62] See generally: Monti, (n 32)

Creditors, it's payback time: rectifying the approach taken under section 15 of the Trusts of Land and Appointment of Trustees Act 1996

Hena Patel

Introduction

It has been over two decades since the enactment of the Trusts of Land and Appointment of Trustees Act 1996 (TLATA), and while it has heralded noticeable changes, its successes in certain areas – particularly in cases concerning the sale of a family home – have been incremental at best. The risk of family home destabilisation has been particularly high in cases where a mortgagee either has brought an application for sale under TLATA despite losing priority[1], or has bypassed TLATA through suing for bankruptcy and bringing an application for sale under the Insolvency Act 1986. This essay will explore how the courts have limited the role of section 15 of TLATA in these cases and will propose two key steps to rectify this.

The current law

Under the current law, those with a proprietary interest in the co-owned property may make an application for sale under section 14 of TLATA.[2] In determining whether the court should exercise its powers under section 14, the court must give regard to the factors listed in section 15, save in cases of bankruptcy where the Insolvency Act 1986 applies.

Prior to the enactment of TLATA, sale applications were governed by section 30 of the Law of Property Act 1925. While this section gave the courts a discretion to refuse applications, there was an unparalleled bias towards ordering sale[3]. This practice was influenced by two factors: the problems associated with keeping a creditor waiting without payment, and an outdated understanding of land ownership. Historically, property was held under a Trust for Sale, where the trustee was required to sell the land and relay the profits to the beneficiary. The beneficiary's interest was not in the land *per se*, but in how much income the land could produce.

However, society has moved on. The Law Commission has recognised that one's interest in a home can no longer be viewed solely in financial terms, and has endeavoured to protect one's 'use value'.[4]

[1] The fact that the mortgagee is without priority is significant. If mortgagees had priority, they would not need to bring an application under section 14 of TLATA, but would have an alternative means to order sale, for example under section 101 Law of Property Act 1925. See, for example, Dixon, 'To sell or not to sell: that is the question: the irony of the Trusts of Land and Appointment of Trustees Act 1996' (2011) 70 CLJ 579, 591.

[2] Section 14 may also be used to determine the share of the beneficial interest held by the parties per Oxley v. Hiscock [2005] Fam. 211, or settle disputes concerning the trustee's functions.

[3] This is seen in cases like *Barclays Bank v Hendricks* where Laddie J reasserted that whether the application is made by a trustee in bankruptcy or a creditor, there should be a presumption in favour of sale save in exceptional circumstances see [1996] 1 FLR 258 at 262.

[4] Law Commission, Trusts of Land (Law Com No.181) at [3.2].

It has done so by providing a right to occupy,[5] by abolishing the Trust for Sale[6], and by providing the court with a wider discretion to consider a range of factors. Section 15 of TLATA, which contains a non-exhaustive list, was intended to 'indicate some of the more important factors to which the court should have regard'.[7] These include: the intentions of the persons who created the trust, the purpose of the trust, the interests of minors occupying the property, and the interest of any secured creditors.[8] While the factors are not necessarily equal in importance[9]; there is a clear emphasis that the purpose of land ownership has changed.

It is however important to note that while there is no presumption in favour for sale under TLATA, the process is different for trustees in bankruptcy. If a trustee in bankruptcy brings a claim under section 14 of TLATA, the court will not be directed to consider the factors in section 15, but to section 335A of the Insolvency Act 1986. Section 335A encourages the court to consider all the relevant circumstances,[10] however, after one year of having the bankrupt's estate vested in the trustee of bankruptcy, there will be a statutory presumption in favour for sale, save in exceptional circumstances.

The case for reform

While the hopes for TLATA were grounded in good intentions, it has not achieved its aims. Dixon and Probert highlight several ways in which the courts have bypassed the potential strength of section 15 in order to give priority to the interests of the mortgagee: first by placing utmost significance on the interest of the creditor;[11] second by failing to question *why* the applicant has requested sale under section 14 of TLATA and not through other means;[12] third by encouraging the creditor to sue on a personal covenant to pay, effectively bankrupting the mortgagor and enabling the trustee in bankruptcy to bring an application for sale;[13] and fourth by taking a restrictive approach towards the interpretation of section 15.[14]

The interests of the creditor are only one of the factors in section 15, yet this factor has received unparalleled significance as evident from judicial reasoning. In *Bank of Ireland v Bell,* a case concerning a divorcee whose husband forged her signature on mortgage documents relating to their home, the Court of Appeal emphasised that the interests of a creditor ought to be a 'powerful

[5] Trusts of Land and Appointment of Trustees Act 1996 section 12.
[6] Ibid at page 77.
[7] (n1) at [12.10].
[8] Trusts of Land and Appointment of Trustees Act 1996, s15.
[9] Neuerger J emphasised that 'it is a matter for the court as to what weight to give to each factor in a particular case' see Mortgage Corporation v Shaire [2001] Ch 743 (ChD), 760 (Neuberger J).
[10] Insolvency Act 1986, s 335A(1)(c).
[11] Probert, Creditors and section 15 of the Trusts of Land and Appointment of Trustees Act 1996: first among equals? [2002] 66 Conv 61, 63.
[12] Dixon, 'To sell or not to sell' (n 2) 590.
[13] Pawlowski, Insolvency - Ordering the Sale of the Family Home [2007] 71 Conv 78, 71; see Alliance and Leicester plc v. Slayford [2001] C.P. Rep. 52 (CA) [28] (Peter Gibson LJ).
[14] Probert (n 11) 63.

consideration'.[15] Peter Gibson LJ further stressed that refusing sale would condemn the bank to 'go on waiting for its money with no prospect of recovery…and with the debt increasing all the time, that debt already exceeding what could be realised on a sale…[which would be] very unfair to the bank.'[16] Similarly, in *First National Bank v Achampong*[17], a case where a legal charge was procured by undue influence, the Court of Appeal granted an application for sale, despite it depriving the respondent, her two children (one of whom is a person under a mental disability) and her three grandchildren of their family home. Blackburne J, citing *Bell*, held that:

> Prominent among the considerations which lead to that conclusion is that, unless an order for sale is made, the bank will be kept waiting indefinitely for any payment out of what is, for all practical purposes, its own share of the property.[18]

It is evident from the case law that judges often place 'prominent' weight on the interests of the creditors, or hold these interests as being a 'powerful consideration,' despite there being no statutory authorisation for such prominence.

The second way in which the strength of section 15 has been diluted is through the court's lack of questioning as to why the mortgagee has brought a claim under section 14 of TLATA, and not through other means. Dixon stresses that a mortgagee who brings an application under section 14 does so because their security over the property is defective in terms of its priority: either the mortgagee has failed to enquire about any interests attached to the property – and ergo loses its priority by virtue of an overriding interest per section 30(2)(a)(ii) of the Land Registration Act 2002; or the legal charge is void as the co-owner's consent was obtained by fraud or undue influence. Following *Royal Bank of Scotland PLC v Etridge*[19], if the mortgagee had some notice of impropriety and failed to take reasonable steps, constructive knowledge of that impropriety would be imputed to them and they may not be permitted to enforce their legal charge.[20] While this was explicitly discussed in Achampong,[21] the bank's lack of inquiry played no role when the Court exercised its discretion under section 15. If the mortgagee has lost their priority because of their professional incompetence or because they have failed to execute their duty under *Etridge*, their interest should not be given priority under TLATA unless there are powerful reasons to do so.[22]

The third way in which the potency of section 15 is bypassed is through the ability of the creditor to sue a mortgagor on a personal covenant to pay. Pawlowski explains that by suing on a personal covenant, the creditor would effectively bankrupt the mortgagor and would become an unsecured

[15] [2001] 2 FLR 809 (CA) [31] (Peter Gibson LJ).
[16] ibid.
[17] [2003] EWCA Civ 487 (CA).
[18] ibid [65] (Blackburne J).
[19] (No 2) [2002] 2 AC 773 (HL).
[20] Ibid [48] (Lord Nicholls), [147] (Lord Scott).
[21] Achampong (n 17) [21-52] (Blackburne J).
[22] Dixon (n 2) 594.

creditor under a claim for sale made by a trustee in bankruptcy.[23] Not only has this been judicially endorsed by the Court of Appeal in *Slayford*,[24] this method is more likely to result in the sale of the property. In *Re Citro*, the debtor was declared bankrupt and an order for the sale was made; while the trial judge delayed the sale for four years due to the ill health of the wife and the disruption sale would cause to the children's education, the Court of Appeal stressed that 'where a spouse has become bankrupt… the voice of the creditors would usually prevail over the voice of the other spouse and a sale of the property ordered'.[25] The presumption in favour of sale in cases of bankruptcy, and the ability to bypass the *Etridge* consequences suggest that section 15 will never truly be effective on its own. By giving legal recognition to the other means through which a mortgagee can order the sale, the courts are providing greater protection to creditors than the equitable co-owners.

The final way in which the courts have hindered the effectiveness of section 15 is by interpreting it too restrictively, either by placing little emphasis on the factors that would benefit the equitable co-owner, or by failing to consider other factors that may also be helpful. The factor of 'the intentions of the persons who created the trust' and 'the interests of minors occupying the property' is given little weight, as reflected in the case law. In *Bell*, Gibson LJ stated that the purpose of providing a family home 'ceased to be operative once Mr Bell left the property'[26] and that the interest of their child (approaching 18) 'should only have been a very slight consideration.'[27] This restrictive approach is mirrored in *Achampong*, where the Court of Appeal held that the separation of the couple meant that the property can no longer serve as a 'matrimonial home', and given that most of their children had reached adulthood, little if any weight should be attached to the purpose of the house as a 'family home'.[28]

Furthermore, the courts have criticised the argument that the bank's delay in bringing an application for sale was a relevant factor. In *Bell*, the Court of Appeal held that 'it hardly lies in Mrs Bell's mouth to complain' of the bank's delay in bringing the proceedings 'given that she has had the benefit of continuing to occupy the property without paying any interest to the bank.'[29] This was also reflected in *Achampong*, where Blackburne J held that the trial judge 'wrongly attached weight to the bank's delay in pursuing these proceedings.'[30] While the co-owner does

[23] Pawlowski (n 13) 71.
[24] "there is no abuse of process in a mortgagee, who has been met with a successful O'Brien type defence taken by the wife of the mortgagor, merely choosing to pursue his remedies against the mortgagor by suing on the personal covenant with a view to bankrupting him, even though this may lead to an application by the trustee in bankruptcy for the sale of the property in which the wife has an equitable interest." Slayford (n 13) [28] (Peter Gibson LJ).
[25] The court would only delay sale in exceptional circumstances and "it is not uncommon for a wife with young children to be faced with eviction in circumstances where the realisation of her beneficial interest will not produce enough to buy a comparable home in the same neighbourhood, or indeed elsewhere…Such circumstances, while engendering a natural sympathy in all who hear of them, cannot be described as exceptional."; Re Citro [1991] Ch 142 (CA) at 157 (Nourse LJ).
[26] Bell (n 15) [27] (Peter Gibson LJ).
[27] ibid [28] (Peter Gibson LJ).
[28] Achampong (n 17) [65] (Blackburne J).
[29] Bell (n 15) [32] (Peter Gibson LJ).
[30] Achampong (n 17) [64] (Blackburne J).

receive the benefit of occupation, the fact that the bank has carelessly delayed the proceedings, perhaps to strengthen its financial case, ought not to go unrecognised. The courts have downplayed the importance of factors listen in section 15, and have deemed certain factors – which may actually benefit the equitable co-owner's position – as irrelevant considerations. TLATA may have set the foundation for a progressive change in respect of applications for sale; however, its impact is evidently limited by a judicial preference towards creditors.

The proposal for reform

There is a two step proposal that the courts should adopt. First, stop prioritising the interests of the creditor in an application for sale, and second consider delaying sale in order to explore whether the equitable co-owner could finance the mortgagor's debts, like the approach taken in *Shaire*. While this could be achieved through parliament legislating to give the courts more power, a better option would be to utilise the existing powers under section 36 of the Administration of Justice Act 1970, and attach relevant conditions.

Pawlowski and Brown rightfully claim that the courts should at least delay sale in order to 'allow the equitable co-owner to buy out their improvident partner, obtain refinancing or even put forward an alternative financial plan'.[31] In *Shaire*[32], Mrs Shaire held 75% of the beneficial interest in the property. Her partner forged her signature when applying for a mortgage, and consequently the mortgagee's charge only took effect against his 25% interest in the property. When the mortgagee applied for sale, Neuberger J, noting that TLATA had changed the law, was attracted by the proposal that the bank's remaining interest in the property could be converted into a loan. Only if Mrs Shaire was unable to meet the repayments, would sale be ordered. Although this decision was unique, as '[the creditor was] ultimately in the business of lending money on property in return for being paid interest'[33], it does not mean that this cannot be adopted in other situations.

The *Shaire*-type solution can be introduced to other cases under section 36 of the Administration of Justice Act 1970. This section empowers the court to adjourn or suspend any orders for possession, if it is likely that the borrower would repay any sum within a reasonable period.[34] The courts have used this power to reschedule the repayment of mortgage arrears in respect of joint-mortgagors, and have 'delayed possession in order to determine whether the parties have any prospect of repaying the arrears within a reasonable period.'[35] It is unclear why this approach has not been extrapolated in applications for sale under TLATA, as it would be more beneficial for the equitable co-owner to have alternative options to sale.

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[31] Pawlowski & Brown, 'Orders for sale: the creditor and the family home: part 2.' [2012] 42 Family Law 180, 183.

[32] Shaire (n 9).

[33] ibid at 764.

[34] Administration of Justice Act 1970 s 36(1), (2); Halsbury's Laws (5th edn,2015) vol 84, para 508.

[35] Pawlowski and Brown (n 36) 183; see also: Cheltenham and Gloucester Building Society plc v Norgan [1996] 1 All ER 449; and Administration of Justice 1970, s 36(2)(a).

If the court were to delay sale under these proposals, then conditions ought to be attached in order to truly protect the equitable co-owner. The conditions should prevent the mortgagee's ability to sue on a personal covenant until the co-owner confirms whether they could arrange to a financing plan. Furthermore, if it is not possible for the co-owner to repay, the courts should delay sale until the occupying minors in the family home have completed their examinations. Although the bank's debts would continue to increase during this period, equitable accounting[36] may be called on to readjust this benefit when sale is eventually ordered.

The proposed reform would therefore utilise section 36 and the conditions to delay sale in order to find alternative means of financing the mortgagor's debts, thus helping to accommodate the financial interests of the creditor and the possessory needs of the equitable co-owner.

Conclusion

With these proposals, the law would adequately protect one's use value in a home: instead of taking a restrictive view of the factors under section 15, the courts could consider a whole range of factors that are beneficial to both parties; instead of instantly being able to bankrupt an equitable owner to recover money from the sale of their property, mortgagees would be forced to wait until the condition imposed expires; instead of prioritising the interests of the creditors, the courts would be forced to consider alternative solutions which would benefit the equitable owner. While simple, these proposals would be extremely effective in ensuring that TLATA fulfils its aim.

[36] Although Lady Hale states that TLATA has replaced the old rules of equitable accounting in *Stack v Dowden* [2007] UKHL 17 (HL) [94], her comment could, as Bright suggest, be limited to cases where there has been a restriction or exclusion on the right to occupy and should be confined to cases which fall within s.13(6). Furthermore, given that French v Barcham [2008] EWHC 1505 has applied rules of equitable accounting in cases of bankruptcy, it may be possible to continue its application where equity demands it; see Bright, 'Occupation rents and TLATA: From Property to Welfare?' [2009] Conv 378.

A Brief Inquiry

Stephanie Snowdon

This essay will consider the effectiveness of public inquiries established under the Inquiries Act 2005 (hereinafter known as 'the Act') before going on to consider the need for reform.

Inquiries into matters of major public concern are an integral feature of the governance of this country. They aim to establish disputed facts, determine accountability, restore public confidence, make recommendations for preventing recurrence of events and take forward public policy. The tradition of the public inquiry has been described as a pivotal part of public life in Britain, and a major instrument of accountability[1]. In 1996, the Council on Tribunals provided advice to the Lord Chancellor that:

> "It is wholly impracticable to attempt to devise a single set of model rules or guidance that will provide for the constitution, procedure and powers of every inquiry."[2]

Until the passage of the Act, inquiries had a wide variety of different statutory bases. The Act replaced them with a single system for the setting up and conduct of public inquiries with the discretionary powers necessary for the flexibility of initiating inquiries, placed entirely in the hands of the minister.

This essay will begin by looking closely at how effective the work of inquiries is in delivering accountability. It will then be argued that inquiries held under the Act are not fit for purpose as they often lack independence and fail to provide answerability. Recommendations will then be made for a much-needed overhaul of the system before finally ending with a look at how such recommendations may be applied to current and future inquiries.

Effectiveness of Inquiries

There is currently a lack of independence in the work of inquiries, manifested by the fact that a minister is able to initiate, run and set the terms of, appoint the panel and/or chairperson, terminate the panel and/or chairperson, restrict evidence, restrict publication and terminate inquiries.[3] There have long been criticisms of the Act due to this lack of transparency and potential for a minister whose department is under investigation, to have overall control.[4]

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[1] Public Administration Select Committee, *Government by Inquiry* (HC 2004-05, 51-I) para 2.
[2] Select Committee on the Inquiries Act 2005, *The Inquiries Act 2005: post-legislative scrutiny* (HL 2014, 143) para 1.
[3] Inquiries Act 2005, ss 1-12.
[4] Peter Watkin Jones & Nicholas Griffin QC, 'Public Inquiries: Getting at the Truth' *Law Gazette* (22 June 2015) <https://www.lawgazette.co.uk/practice-points/public-inquiries-getting-at-the-truth/5049449.article> accessed 16 November 2018.

The terms of reference of an inquiry are often incredibly narrow and focus on identifying the cause and preventing recurrence of events, meanwhile those to whom the cause could and should be attributable to remain unscathed. The outcome of inquiries is that they may make recommendations, they do not, however, have to be followed. A further criticism of the process is that it can take so long to get to the truth that if and when it is finally unveiled, a sense of justice for those who have been truly affected may never be achieved.

An example of an inquiry with too narrow a terms of reference, that failed to identify individuals' culpability and took too long to arrive at any sense of justice, can be found following the Hillsborough disaster.

The Hillsborough Inquiries

The initial Hillsborough inquiries highlight the flaws mentioned above and were wholly inadequate with those responsible avoiding accountability. The disaster occurred in May 1989, with the first inquiry, the Taylor Inquiry, taking place in 1990. The outcome was the recommendation, which was in fact implemented, for the removal of fences around pitches and a new no standing policy at football grounds. This result was viewed in many quarters as a success, however, the remit of the inquiry was unquestionably narrow in that it only looked at what the disaster revealed about how football stadia were set up, in order to ensure that similar events would not happen again in the future. This was not satisfactory for the families of the victims as it did not focus on the central issue of failures by public authorities and accountability of those at fault.[5]

By the time the outcome of the Hillsborough Inquest came, the victims, victims' families and the city of Liverpool had suffered significant harm as a result of media coverage and it was more important than ever to find accountability for those responsible. This still did not happen. The inquest found that the deaths were accidental and it has subsequently become apparent that vast evidence was covered up and a number of key witnesses provided false testimony.[6]

In the following years, the government refused to initiate a further inquiry until the Hillsborough Independent Panel was set up in 2012. The panel was made up of academics, politicians and church figures and undertook far more of an investigatory role than the previous inquiries.[7] The work of the independent panel was greatly effective and, along with the final inquest, brought the answerability that the victims' families deserved. The Panel provided an example of an effective, independent method of inquiry that provided a voice and representation to those involved. The inquiry was shifted from the political realm to the administrative branch. This did, however, only come about due to persistent public campaigning and is possibly more an example of how such pressure influenced this particular set

[5] Hillsborough Independent Panel, 'The Report of the Hillsborough Independent Panel' (2012) HC 581, pp. 7-11.
[6] *Ibid* p.281.
[7] *Ibid* pp.1-2.

of events rather than being a positive reflection of how the inquiry process is fluid and evolutionary in nature.

Whilst the evolving methods above may show that inquiries are changing and heading in the right direction, there is no consistency or uniformity in terms of the set up and regulation of inquiries and so the next investigation into a disaster may choose to not look to examples of past best practice[8], such as the Independent Panel, and instead will result in a return to the political effort that avoids the real questions. This is now seemingly happening with the Grenfell Inquiry, which will be discussed further on in the essay.

Proposed Reform

It is clear that the work of inquiries has proven ineffective in holding public officials accountable and thus not fulfilling their role in restoring the public's confidence in the system. Whilst some progress has been made, as can be seen with the Hillsborough Independent Panel, if inquiries are to be effective going forward, several important changes need to be made. The Panel was independent, provided answerability and held those responsible accountable. It has provided a great example of how the work of inquiries can be used effectively and also introduced two ideas for reform which would help to continue this process and lead towards achieving both independence and accountability.

The first proposal for reform is the Public Advocate Bill[9]. The Bill proposes a publicly-funded advocate to provide advice to, and act as data controller for, representatives of the deceased after major incidents. This is a positive step which focuses on disasters with large scale death/injuries and should avoid a similar situation to that which occurred with the first two inquiries into the Hillsborough disaster. A possible negative could be that its remit may avoid issues not classed as 'large scale' or injurious, however, its purpose – to avoid the lack of transparency experienced by the victims and families following the Hillsborough disaster – can only be positive.

There has been a degree of opposition to the role of the Public Advocate by some.[10] The main premise for the opposition being that the Act already allows for the chairman of an inquiry to act as data controller to those concerned. This ignores the issue of the lack of independence that exists in the role of the chairman, who acts under the control of the minister.

The second recommendation from the Panel is the 'Hillsborough Law'.[11] This codifies the public law duty of public authorities and public servants to tell the truth, both generally and in relation to the information provided (or not so) in inquiries. Following the Hillsborough

[8]Rt Hon Peter Riddle CBE, 'The Role of Public Inquiries', *Institute for Government* (26 July 2016) <https://www.instituteforgovernment.org.uk/blog/role-public-inquiries> accessed 19 November 2018.

[9] Public Advocate Bill (HL Bill 22).

[10] HL Public Advocate Bill Deb 29 January 2016, vol. 768, cols 1530-1531.

[11] Public Authority (Accountability) Bill (HC Bill 163).

disaster, there were well-founded calls for a "duty of candour" and for public officials to be duty bound not to mislead the public or the media.[12] This is necessary to ensure officials are held legally accountable for their actions. Determining civil or criminal liability is an issue for the courts – so many findings of culpability escape justice, the passing of the Hillsborough Law would bring the findings of inquiries back to the courts.

The above proposals are undoubtedly a positive step in improving the inquiry process, but further improvements are possible and will be reflected in the following recommendations.

Further Recommendations for Reform

As discussed above, there has been some attempt to introduce supplementary legislation to assist the work of inquiries, namely in the proposal for a Public Advocate Bill and the Public Authority (Accountability) Bill, which will no doubt add a layer of further accountability to the process. It seems futile, however, to create complementary legislation to assist an inadequate Act, wherein the problem remains that a minister is at the helm of the inquiry. Therefore, it will first be argued that amendments to the Act are necessary in order to make the aforementioned proposed Bills most effective in increasing public confidence. It will then be argued that further independent investigatory powers are necessary in order to capture the instances of maladministration that might be missed by the parameters of the terms of reference of an inquiry.

i) Alterations to the Act

There were thirty-three recommendations made by the House of Lords Select Committee within their 2014 post-legislative scrutiny paper.[13] Alarmingly, only one of these recommendations, the requirement for a minister to notify Parliament of an intention to terminate the appointment of a chair[14], has been adopted.

There were a number of other key recommendations that have not been implemented with the justification being that the government wish to retain the flexibility and control of the current position.[15] This is a worrying position in that the current major flaws in the system which cause great concern in terms of public trust, appear to have been protected thus allowing potential breach of processes to remain.

The main proposal moving forward will be to restore the power to both Houses to initiate an inquiry, appoint the panel and chairman, and any terminations thereafter. Then, following the lead in proposals from the Committee, the chairman should be in control of

[12] Owen Bowcott, 'Hillsborough Law launched to ensure officials act with 'candour'', *The Guardian* (08 September 2016) <https://www.theguardian.com/football/2016/sep/08/hillsborough-law-launched-to-ensure-officials-act-with-candour> accessed 21 November 2018.
[13] *Ibid* at 2, HL 2014 143.
[14] Inquiries Act 2005, s.12.
[15] Athelstane Aamodt, 'In the Public Interest' (July 2017) 167 NLJ 7753 p.22.

publishing/restricting information that comes to light during the process. There have been further calls for greater power to be given to the chairman in inquiries and also for interested parties such as victims, to have the opportunity to make representations regarding the terms of reference.[16]

ii) Engagement of Watchdogs

Whilst the recent proposal of the Public Advocate Bill brings us a step closer to independence and transparency within the inquiries process, it does not go far enough. The focus on large scale disasters/loss of life may result in the benefit that comes from its independence not being stretched out to incidents of a lesser scale but still with a great impact on public trust.

Therefore, this essay proposes for the engagement of relevant watchdogs, such as the Parliamentary and Health Service Ombudsman (PHSO), Local Government Ombudsman (LGO), the Office of the Parliamentary Commissioner for Standards and the Police Commissioner, to perform their own investigations alongside inquiries where there may be causal links to maladministration. The work of watchdogs, such as the PHSO, has continuously shown to provide an effective bridge between the individual and public authorities. Their independence promotes trust in the public and they are seen as the peoples' defender.[17]

In practice, the watchdogs will automatically come into force when an inquiry is established by the Houses and there is the potential for a causal link to maladministration carried out by public authorities and/or servants; this is to be ultimately decided by the relevant watchdog. In situations where there may be a reluctance to setup an inquiry for fears of it exposing misconduct within the executive, the Public Advocate will have the power to initiate its own inquiry under the 50% +1 rule[18]. In these cases, the watchdog will act alongside the Public Advocate thus ensuring the availability of inquiries into inter-governmental issues and, in turn, increasing the public's confidence in the electorate.

The watchdogs will use their strong powers of investigation and will be provided with access to all material available to the inquiry panel. Upon completion of the investigation, the final reports of the watchdog and inquiry will be presented to Parliament, the public and, where relevant, to the Crown Prosecution Service. This will allow for an additional layer of independence and accountability to a process that has a lack of such at its forefront.

Looking to the Future

The proposals listed will increase public confidence in the following ways:

- The work of the Public Advocate will ensure independence as well as managing expectations and providing a voice for the individual.

[16] *Ibid* at 2, HL 2014 143.

[17] Richard Kirkham, 'The Parliamentary Ombudsman: withstanding the test of time', (2007) HC 421, p.5.

[18] Public Advocate Bill (HL Bill 22) ss.(2)(4).

- The Hillsborough Law provides accountability for the (in)action of those concerned thus restoring the faith of the public in the system as well as acting as a deterrent for future behavior.
- Restoring the power to both Houses takes the control away from the individual and creates a balance.
- The engagement of relevant watchdogs allows inquiries to maintain their focus, usually into the cause and prevention of an incident. Meanwhile, the watchdog will provide an investigation into those issues which have been shown to be the overriding concern of the public, i.e. failures in public office. Overall, it offers another layer of independence.

The terms of reference of the inquiry into the Grenfell Tower disaster in 2017 will not focus on political accountability[19], an issue that is central to the survivors' need for achieving justice, and so seems to be mirroring the beginning of the Hillsborough investigations. As a result, many are calling for an inquest to be held instead of an inquiry to ensure the process is independent from government interference.[20]

The Hillsborough disaster's victims and their families had a right to answers and accountability, however, what they endured was over a quarter of a century of unnecessary suffering due to an inadequate inquiry system and lack of appropriate measures. Those affected by the Grenfell Tower disaster are at the beginning of their journey to justice, however, unless changes are made to the inquiry process, it is possible that they will have to endure a prolonged extension of trauma before they feel any sense of accountability is achieved.

Now seems as appropriate a time as any to make the much needed improvements to the inquiry process. Beginning with the commonsensical approach of looking to past, similar inquiries to see what lessons can be learned for the present and future, one may identify similarities in the outcry of the public in the wake of both the Hillsborough and Grenfell disasters. That is, of course, that their concerns are not being addressed.

Whilst too wide a terms of reference may weaken an inquiry's potential to provide answerability, it is not acceptable to ignore questions of political accountability simply because it is not in the chairperson's remit to consider them. Instead, following the recommendations within this essay would allow the engagement of the LGO to ensure any maladministration is considered.

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[19] Sir Martin Moore-Bick, 'Terms of Reference for the Grenfell Tower Inquiry' (10 August 2017) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/637908/Letter_Grenfell_Tower_Inquiry.pdf> accessed 24 November 2018.

[20] Jon Sharman, 'Grenfell Tower fire: calls for inquest instead of public inquiry', *Independent* (16 June 2017) < http://www.independent.co.uk/news/uk/home-news/grenfell-tower-fire-inquest-public-inquiry-theresa-may-government-hide-deaths-kensington-london-a7792891.html> accessed 24 November 2018.

Further reform, such as the implementation of the Public Advocate, would allow those affected access to the data uncovered by the inquiry as well as much needed representation throughout the process. Altering the Act to restore creationary powers to both Houses would allow for the reduction of fears of governmental interference by limiting the arbitrary role of the minister in the process. Finally, passing the Hillsborough Law would allow for accountability before the courts without the need for the survivors and families to campaign in order for justice to be delivered.

Conclusion

Inquiries as they currently exist are not fit for function. As has been seen, the work of previous inquiries has failed to instill confidence into the public and has shown repeated failures to hold both those responsible for disasters, and those who have inadequately investigated them, to account. Therefore, to describe inquiries as a major instrument in achieving accountability is entirely inaccurate.

The trauma that followed the Hillsborough disaster has allowed for an insight into how an alternative, more independent, method of inquiry can prove effective. Should the proposals suggested by the Hillsborough Independent Panel be implemented, there will be evidence that the process is heading in the right direction. The further recommendations allow the work of inquiries to shift further away from the political constitution and into a balanced middle-ground involving the added layer of independence via the administrative branch.

Without significant change, the work of inquiries will continue to fail to uncover and avoid corruption, deter malfeasance and fail to provide a form of accountability that the public can rely on.