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City Law Society Journal
Volume III

City Law Society Journal

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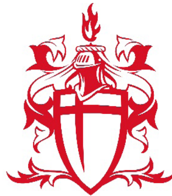

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EDITOR'S NOTE

It is our honour to present you with the third volume of the City Law Society Journal.

The Journal was founded in 2015 with the intention of inspiring and facilitating legal study, discourse and debate amongst students, academics and practitioners. The passing of time offers the opportunity for reflection; the Journal has now served the time of an undergraduate law student. This volume's editorial board took the reins as newcomers; we inherited a project from those who had guided it previously and took to shaping it in our own image.

We could not have been a better team. We worked steadily, committing ourselves to the fluidity of weekly meetings in the first term of university. Slowly, a smorgasbord of ideas began to coagulate, congealing into a coherent vision for a well-respected, student-led academic journal of legal scholarship. The Journal's newly written submission guidelines, adoption of OSCOLA, use of the Cambridge Redbook, and the introduction of a rigorous process of peer-review with academic oversight, are a testament to the conscientious hard work of the Editorial Board. Special thanks must also be given to Professor Carl Stychin, Dr. David Seymour, Carole Leggett, Harmit Soora, Saralyn Burton, and the university's website team - the continued support of these individuals has been invaluable.

Institutions matter and largely our efforts have been to create an apparatus and network which will sustain the Journal in future years. Initially, this began with an internal constitution of role descriptions and methods for best practice, accompanied by a mission statement which promoted a culture of collectivism. It is my privilege to further highlight this year's accomplishments on behalf of the Editorial Board.

The Journal's Senior Editors, Animaa Gungaama and Emma Lo Re, began forming an alumni network to pool experience and insight, meeting for up to three hours at a time, to contact previous editors and initiate a number of patrons who could assist with financial and organisational support in coming years.

In managing the peer-review process, Shabana Elshazly has been instrumental, devoting much of her time to maintaining contact with writers and the academic advisory board. Without the completion of these daily tasks, the smooth running of the Journal this year would have been much harder. In assisting the Managing and Senior Board of the Journal, she has been indispensable.

Sophia Demetriou-Jones has been an exceptional Publishing Editor, assisting us in choosing a printer and designer for the Journal, ensuring that the project conformed to the required constraints and conventions; juggling these tasks alongside a dissertation is no easy feat.

The efforts of Rinnah Anosike have been appreciated in creating the Journal's Honorary Board, a group of well-known, respected and influential individuals who can support the Journal and promote it amongst their peers. Rabiya Khawaja, Louise Aquino, Henk Soede and Piers Digby all deserve mention for being outstanding editors.

The powers afforded to the Journal's Editor-in-chief are very clear-cut; the role is one of a decision-maker and is inherently dictatorial. However, no successful team project can be run without an approachable leader in an environment where participation is encouraged and decision-making is taken following constructive and thoughtful dialogue. If there is anything that is taken away from our tenure this year, we hope it is that we have succeeded in stressing that every role on the Editorial Board is collectively crucial. The Journal's mission statement stresses that students are primarily at university to obtain a degree and the editorial board will always afford respect and understanding to one another acting in a manner conducive to a healthy working environment. It has been a pleasure to serve as your Editor-in-chief this year and we wish the Journal continued success.

Syed Shabbir Haider Naqvi-Bokhari

Editor-in-chief
City Law Society Journal

FOREWORD

I am delighted to have been invited to write a forward to the third edition of the annual City Law Society Journal. This is a remarkable publication produced by law students with content provided by law students from across the whole diet of our Law School's courses.

All Law Schools should have student-led law journals that focus not just on features of doctrinal, black letter law but which engage with the ever-changing, socio-economic and political drivers for new law and for the change and reform of existing laws. The City Law Society Journal provides a forum for students to critically analyse and debate, to showcase their independent research and their thoughts on such matters. The most prestigious law journals, the Harvard Law Review, the Cambridge Law Journal and the like, are dominated by the writings of ambitious academics and the "great and good" of academia and occasionally by prominent members of the legal profession. Rarely, if ever, would a law student's writing appear in such publications. The City Law Society Journal, however, provides the opportunity that otherwise would not exist for students to critically debate legal and topical issues. The daily media brings to light material that warrants scrutiny through a legal lens – the Grenfell fire, the collapse of Carillion, the Supreme Court ruling in the Worboys case, the genocide taking place in Syria and, of course, the multifarious issues raised by Brexit in relation to many aspects of our current law. Contributing to the City Law Society Journal is an opportunity I would strongly encourage all law students to take up. It provides a chance to hone research, analytical and forensic skills. It also allows contributors to highlight their contribution in their curriculum vitae giving them a competitive advantage over their non-contributor colleagues. The Law School does already provide credit bearing, writing opportunities (in the form of dissertation writing) but the School needs to do more to encourage and foster legal writing. More credit bearing opportunities might provide a way of doing that.

Law journals, like children and fine wine, all mature and improve with age. The City Law Society Journal is still in its infancy but already shows potential and promise. Its founders and those who have worked hard to sustain and improve it are to be thanked and commended. The Journal now contributes to the life and profile of City Law School and to the education and betterment of its students, especially those who have contributed to its success. My academic colleagues and I congratulate everyone who participated in the production of this edition and hope that with good succession planning and the continued enthusiasm shown by the editors and contributors over the past three years, the Journal's trajectory of success will be assured.

Professor Chris Ryan
Interim Dean

City Law School, March 2018

Doctors, Parents, and The Court – Deciding Best Interests Post - Charlie Gard

Ilana Davis*

ABSTRACT

The case of Charlie Gard[1] gripped the attention of the British population during the summer of 2017. This case sparked debate on significant issues about the role of a child's parents in deciding what is in the child's best interests. The extent to which Charlie's case has changed the law regarding best interest decision-making for children will be considered, as well as the role of the doctors, parents and court in that process.

THE FACTS

At the time of the Court of Appeal hearing, Charlie was a critically ill 9-month-old baby, reliant on assisted ventilation to survive. The doctors treating Charlie identified a form of experimental treatment – nucleoside therapy – that might be able to assist in relieving Charlie's condition. However, Charlie's brain function significantly declined, leading his doctors to conclude that the treatment would no longer be effective. Believing that it was no longer in Charlie's best interests to continue to provide life-sustaining treatment, the hospital applied to the court for a declaration that it would be lawful for artificial ventilation to be withdrawn and for Charlie to only receive palliative care. The natural consequence of such would be Charlie's death. Charlie's parents opposed the hospital's application, and asked the court instead to make a declaration that it would be in Charlie's best interests to go the USA to undergo the nucleoside therapy that had been identified by Charlie's doctors.

At first instance, the court agreed with the hospital: "the only course now in Charlie's best interests is to let him slip away peacefully and not put him through more pain and suffering".[2] The Court of Appeal subsequently agreed, and the Supreme Court refused permission for further appeal.

Charlie's parents took the case to the European Court of Human Rights, arguing that "the domestic court decisions were a disproportionate interference with their parental rights".[3]

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*The author is a BPTC student at City, University of London. The author has a keen interest in family law, having previously worked for a year in this area as a paralegal prior to commencing the BPTC. This case note has been written out of personal interest in the recent judicial decisions arising out of Charlie Gard's circumstances.

1 *Yates v Great Ormond Street Hospital* [2017] EWCA Civ 410.

2 *Great Ormond Street Hospital v Yates* [2017] EWHC 972 (Fam) [128].

3 *Gard v United Kingdom* App No 39793/17 (ECHR, 3 July 2017).

The ECtHR held that there had been an interference with Article 8 European Convention on Human Rights[4] – right to family and private life – but that interference was lawful because it constituted a legitimate aim[5] and was necessary in a democratic society.[6]

It is clear to see the difficult power struggle that took place between the doctors, the parents and the court in this case. Each party had a view on what is in Charlie's best interests.

THE LAW

When a court makes a decision regarding "the upbringing of a child...the child's welfare shall be the court's paramount consideration".[7] This is known as the best interests test. Children Act 1989, section 1(3) sets out a welfare checklist which includes a list of factors that the court should consider when making such decisions. However, the issues in Charlie's case focused on the test to be applied.

When considering whether a child should be removed into care, the court can only do so "if it is satisfied that the child concerned is suffering, or is likely to suffer significant harm".[8] This is the significant harm test.

Charlie's case in the Court of Appeal rested on whether the court should apply the ordinary best interests test under section 1, or the significant harm test under section 30.

THE CASE

At first instance, Francis J decided that it was not in Charlie's best interests to continue to receive life-sustaining treatment, or to undergo nucleoside therapy.

In the Court of Appeal, Charlie's parents argued that there were two categories for child medical treatment cases. Category 1 cases are those in which "the parents who oppose the course of treatment for which the clinicians apply, do not have a viable alternative therapeutic option to put before the court".[9]

Therefore, Category 1 included "all of the previously decided and reported medical treatment cases, save and except for that of *Re King*. The legal test to be applied to such cases is the conventional, and now well settled 'best interests' test".[10] Category 2 cases are

4 ibid [110].

5 ibid [113].

6 ibid [125].

7 Children Act 1989, s1(1).

8 ibid s31(2).

9 *Yates* (n 1) [58].

10 ibid [57].

those in which "a viable alternative treatment option is put forward by the parents and the court is, therefore, required to choose between the two".[11] The parents argued that in Category 2 cases:

"the law affords both priority and protection to the privileged position of a parent giving or withholding consent to medical treatment for their child so that the parents preferred treatment option should only be overridden if it is established that the pursuit of that option is likely to cause the child to suffer 'significant harm'."[12]

McFarlane LJ held that he had no reason to disagree with Francis J's findings of fact at first instance which were that the nucleoside therapy was "'futile' with the prospects of success effectively being 'zero'".[13] The parents' case was premised "upon their being a viable alternative form of treatment available".[14] Therefore, McFarlane LJ held that the parents' case "does not even begin to have traction...[and] [t]here being no viable, alternative treatment, the question of whether, as a matter of law, there is a group of cases to be labelled as 'Category 2', simply and most sadly does not arise for Charlie".[15]

Regarding the correct test to be applied, McFarlane LJ stated that "'Best interests' is the established yardstick which applies to all cases and there is no justification for this court now to endorse the creation of a subset of cases based upon establishing significant harm"[16]. He continued, "It is neither necessary nor appropriate...to import such a [significant harm] test or to create a new category of case. There is no justification for it in any previously decided authority."[17]

The Court of Appeal held that the law in this area was well-established, and that it highly persuasive that there was no precedent indicating that the test to be applied was anything other than the best interests test. A reason for this could be that a significant harm test has a much higher threshold to satisfy in order to override the decision of a parent, and thus places more power in the hands of the parents.

As removing a child into care has a substantial impact upon the life of the child and the parents, it should only be used as a last resort; hence why a higher threshold of significant harm is required in such cases. However, there was no precedent to indicate that such a test should be applied in any other scenario.

The new test proposed by the parents was not accepted by the courts. Therefore, the law regarding best interests decision-making for children has not changed as a result of this case.

11 ibid [58].

12 ibid [58].

13 ibid [113].

14 ibid [113].

15 ibid [113].

16 ibid [74].

17 ibid [111].

INTERACTION BETWEEN THE PARTIES

This case has been criticised by the public, and media attention focused on who should make decisions about children; such criticisms can be summarised in the words of Francis J: "Some people may ask why the court has any function in this process, why can the parents not just make the decision for themselves?".[18] Ultimately, once the jurisdiction of the court was invoked, the final decision lay with the court.[19] Francis J was careful to emphasise "I am not saying what I would do in a given situation, but I am applying the law".[20] Though the new test proposed by the parents in the Court of Appeal is interesting, this test failed to receive any traction; the significance of Charlie's case lies in the tension that existed between the public's popular motivations to support Charlie's parents in spite of the law, and the role of the court in applying the law. Therefore, it is important to explore the role that the parties played in this case and the court's approach when balancing competing interests.

The evidence of the medical staff was significant in assisting Francis J to reach his conclusions regarding whether it was in Charlie's best interests to continue to provide him with life-sustaining treatment or permitting treatment by way of nucleoside therapy:

"…the entire highly experienced UK team, all those who provided second opinions and the consultant instructed by the parents in these proceedings share a common view that further treatment would be futile."[21]

Dr I's evidence – the medical professional willing to treat Charlie in the USA – "represent[ed] the parents' case at its highest, yet the only doctor who would contemplate administering nucleoside therapy to Charlie only considered the prospects of benefit to be unlikely or low, albeit not zero, with a small or vanishingly small chance of meaningful brain recovery".[22] Had the medical evidence not weighed so heavily against the parents, this case may have been decided differently. The judges emphasised how caring Charlie's parents were. At first instance, Francis J also spoke highly of Charlie's parents:

"Charlie's parents have clearly dedicated their lives to him from the moment he was born…No one could have done more to support Charlie than these parents have since the day he was born and I have already paid tribute to them for their love and care and for the dignified way in which they dealt with these proceedings, which I described in court earlier this week as what must be like a 'living hell' for them."[23]

18 *Yates* (n 2) [11]

19 *Re J (A Minor) (Wardship: Medical Treatment)* [1991] Fam 33, [41].

20 *Yates* (n 2) [12]

21 ibid [93].

22 *Yates* (n 1) [26].

23 *Yates* (n 2) [47].

Upon appeal, McFarlane LJ echoed Francis J and said:

"Charlie has the benefit of having two most loving parents who are united in their desire to do all they can to preserve the life of their cherished child…and…regain for him something of the life that they, in common with all loving parents, had hoped for their offspring."[24]

The parents' role in these proceedings, though diminished, was not extinguished. McFarlane LJ was careful and clear in explaining:

"When thoughtful, caring, and responsible parents are putting forward a viable option for the care of their child, the court will look keenly at that option…The court evaluates the nitty-gritty detail of each option from the child's perspective. It does not prefer any particular option because it is put forward by a parent or by a local authority."[25]

McFarlane LJ continued to explain that "if one option is favoured by a parent, that may give it weight...[but] in the end it is the judge who has to choose the best course for a child"[26]. Despite the image presented by the media, this was not a case of a power-struggle in which the parents are ousted as decision-makers for their children. The views of a parent remain a material factor when deciding best interests, but the decision must ultimately be reached independently by the court applying the best interests test under Children Act 1989, section 1(1).

CONCLUSION

Many could sympathise with the trauma and frustration that the parents felt. However, when a dispute arises as to what is in a child's best interests, it remains the court's responsibility to independently assess the evidence and reach a decision as to the best interests of the child. A parent's role in raising their child is not extinguished but neither will the court look at the parent's view with any particular favour as is required by the significant harm test. The court will look at all the circumstances of the case, including the evidence provided by the parents and doctors, in deciding what is in a child's best interests. It is a holistic process, in which all parties play a key role. The Court of Appeal rejected the arguments proposed by the parents that a new test should be applied for cases where a viable, alternative treatment exists. Therefore, the law regarding best interests decision-making remains as it ever was: the welfare of the child is paramount.

24 *Yates* (n 1) [2].

25 ibid [95].

26 ibid [96].

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'Snus You Lose'

Matthew Manso de Zuniga*

ABSTRACT

A key point of contention in the Swedish application to accede to the EU in 1995 was an exemption from the EU ban on snus, a smokeless tobacco product sold in pouches and placed under the upper lip. This was a point of cultural importance. Across the Union, snus is still banned, despite similar products such as chewing tobacco and nasal snuff remaining outside the prohibition, let alone cigarettes. This discrepancy in the law has been an ongoing battle including in the UK, where an application from the High Court to the European Court of Justice was lodged in 2004. The case is still ongoing with an application for judicial review having been sought in 2016. The article will focus on why this product in particular has happened to be banned, whether it should be treated differently to other tobacco products, and the landscape of tobacco legislation in the UK more widely.

'SNUS YOU LOSE'

"Joan, how on earth would Big Tobacco profit off of the loss of this young man? Now, I hate to think in such callous terms, but, if anything, we'd be losing a customer. It's not only our hope, it's in our best interest to keep Robin alive and smoking."

Nick Naylor, the wily tobacco lobbyist in Jason Reitman's *'Thank You for Smoking'* would seem to agree here with the European Union. The two principles at loggerheads, free enterprise and public health, have progressively rebalanced around the world from the former to latter, specifically since the publication of the Royal College of Physicians report on Smoking and Health in 1962. Inside the EU however, one tobacco product remains banned - snus, a smokeless pouch not unlike a small teabag placed under the upper lip. The country with the world's largest per capita usage of snus, Sweden, only agreed to join the EU if it was exempted from the prohibition. One short paragraph in the Treaty of Accession of Austria, Finland and Sweden, at page 341 provides the exception: *"The prohibition* […] *concerning the placing on the market of* [snus] *shall not apply in Sweden"*.[1]

*The author is a GDL student at City, University of London.

1 Treaty 94/C241/07 of 29 August 1994 concerning the accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden to the European Union [1994] OJ C241/9

Why is an exception necessary? You could cut this either way - why the inconsistency or; why is snus banned in the first place? The answer to the latter starts in 1986, when the European Communities published a 'programme of action' against cancer, enumerating various ways they planned to limit the disease *"such as rules on advertising, rules on labelling, tax legislation, sponsorship, enforcement of no-smoking rules, extension of no-smoking areas"*.[2] Acting on this, a directive was drawn up in 1989 mandating health warnings on cigarette packets.[3] The UK had been placing warnings on packs since 1971, but the Directive brought other Member States into line with standards such as minimum warning sizes and bold lettering.

In 1992, an amending directive was passed, almost exclusively for the purpose of banning tobacco for oral use *"except those intended to be smoked or chewed* [...] *particularly those presented in sachet portions or porous sachets"*.[4] The reasoning centred on the idea that this was a new product to the Union as it was then constituted, and one which it stated was very attractive to young people. It may have been too late to close the door on cigarettes, cigars, chewing tobacco and snuff - but the EU could at least ensure that the door was never opened for snus. The snus ban remains in place today, with the latest revision of tobacco rules in a 2014 directive stating that regulation of snus should, *"in accordance with the principle of subsidiarity, remain with Sweden"*.[5] It goes on to restate the addictive qualities and adverse health effects as grounds for the ban.

There is clearly a pure intention behind the 1992 directive. However, the embargo and subsequent concession to Sweden highlight a glaring inconsistency in the treatment of EU law towards this one narrow product type. It also serves as an example of where the EU has valued pragmatism over principle, a modus operandi that has kept the structure functioning since its inception. If the argument is to prevent alternative tobacco categories from gaining popularity, why not ban all tobacco products with a user base below a minimum level and push users towards a few main groups? Anti-tobacco measures could then be focused rather than fighting on multiple fronts. The number of snuff users in the UK for example is insignificant in both relative and absolute terms. As a side note, despite smoking in the House of Commons chamber having been banned since 1693, snuff is still provided free of charge to MPs and permanently kept in the Principal Doorkeeper's seat at the threshold to the chamber. Some might consider it a metaphor for the UK government's commitment to the cause. The reason snus is interesting is much broader than trivia about Swedish accession.

2 Resolution 86/C184/05 of 7 July 1986 on a programme of action of the European Communities against cancer [1986] OJ C184/19

3 Directive 89/622/EEC of 13 November 1989 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the labelling of tobacco products [1989] OJ L359/1

4 Directive 92/41/EEC of 15 May 1992 amending Directive 89/622/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning the labelling of tobacco products [1992] OJ l158/30

5 Directive 2014/40/EU of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC [2014] OJ L127/1

It represents a potential turning point in the fight against tobacco related diseases. For many years the orthodox school of thought has been 'quit or die'. Reduce tobacco users and you reduce the rates of cancer, heart disease, lung disease and a hundred other medical problems. The issue is of course that the nicotine in tobacco products is infamously addictive and the decision to give up is often too difficult for users to make or commit to successfully. This is the abstinence-only method, and while it has had considerable success in reducing the total number of users, across Europe about 18% of adults still smoke and are plagued with tobacco-related health concerns.[6]

The alternative is what the US Food and Drug Administration (FDA) in a press announcement in July 2017 coined a 'continuum of risk'.[7] The idea is that by encouraging alternative, less harmful tobacco categories to permeate the market, some users might be inclined to switch to products that will deliver the same nicotine hit as cigarettes with a reduced impact on their long-term health. This shouldn't be revolutionary; it's already the thinking behind nicotine replacement gums and patches in the 'quit or die' orthodoxy, acting as a transitionary stage. The continuum extends this to those who cannot or will not quit. Two facts are especially pertinent: firstly, the current understanding is that nicotine itself while highly addictive is not particularly harmful. Rather, carcinogenic nitrosamines are created when cigarettes are combusted. Considering this, a broad outline of the categories that form the continuum looks something like the following (from most harmful to least):

1. Cigarettes – tobacco burns at 800˚C to 900˚C
2. 'Heat not burn' products – 300˚C to 350˚C

    This is a new product category gaining significant market share in Japan. It is estimated that it will account for 25% of Japan's tobacco market by 2020.[8]

3. Snuff
4. Snus
5. E-cigarettes / vaping – 200˚C to 250˚C
6. Nicotine free vaping
7. Abstinence

6 Eurostat European Health Interview Survey (EHIS) 2014. Daily smokers of cigarettes by sex, age and educational attainment level

7 FDA press release (28 July 2017) FDA announces comprehensive regulatory plan to shift trajectory of tobacco-related disease, death

8 Leo Lewis, 'Japan Tobacco loses ground to rivals in next-generation vaping' Financial Times (Tokyo, 2 August 2017)

Secondly, the levels of tobacco users are relatively constant across political boundaries. This is where Sweden becomes relevant. Despite the lowest percentage of daily cigarette users in the EU (8.7% from the latest statistics in 2014),[9] this figure is compensated by the number of snus users (11% using daily).[10] As the health risks of snus are lower due to the tobacco not being burnt, Sweden has unusually low rates of lung cancer; in fact the third lowest in the EU and the lowest rates among men at 42 per 100,000.[11] This challenges the European approach of treating snus and similar products as a gateway to cigarettes. In fact, the opposite is true: it might be effective in reducing tobacco related diseases. While this fight would be rewarding to certain companies in pecuniary terms, in moral terms this is the frontier of the arguments about the future of the tobacco industry. Perhaps it is time for the dogmatic approach to tobacco laws to be overhauled. Revoking the ban on snus and encouraging alternative tobacco products, although counter-intuitive, appears to be a win-win: for public health, for tobacco companies who get to sell new products, and for increasing consistency in the principles of the EU by upholding the idea of free markets.

While the tide may take time to turn on policy motivations, there have been efforts to challenge the ban in the courts. In 2004, a case between Swedish Match (a snus manufacturer) and the Secretary of State for Health was referred by the High Court to a Grand Chamber of the European Court of Justice.[12] It challenged the ban primarily on three grounds:

- Infringement of the principle of non-discrimination
- Infringement of the principle of proportionality
- Infringement of the fundamental right to property

The first objection failed on the grounds that although snus is a very similar product to chewing tobacco, it is not the same because it was *"new to the markets of the Member States"*. There was concern in a number of other paragraphs that could be read into this, declaring that harmonisation of tobacco rules must have a high regard for human health. This does not reflect the current scientific understanding of the risks, and could be attributable to the state of knowledge in 2004. The Court at another point was incorrect on the risks of nicotine when it said that it *"causes addiction and* [its] *toxicity is not disputed"*. Although unquestionably addictive, the second phrase is untrue. The second failed on the grounds that prohibition was *"the only measure that appeared*

9 Eurostat European Health Interview Survey (EHIS) 2014. Daily smokers of cigarettes by sex, age and educational attainment level

10 Public Health Agency of Sweden. The National Survey of Public Health (2016)

11 Eurostat European Health Interview Survey (EHIS) 2014. Causes of death: malignant neoplasms of trachea, bronchus and lung, residents

12 C-210/03 R (on the application of Swedish Match AB and another) v Secretary of State for Health [2004] ECR I-11893

appropriate to cope with the real danger that those new products would be used by young people, thus leading to nicotine addiction, with those products causing cancer of the mouth in particular." A highly subjective dismissal, again reveals the seemingly arbitrary inconsistency of European tobacco policy, with no ostensible resolution to this exception to regulatory harmonisation.

The last failed because the right to property was deemed to be a principle and not a right in EU law. The judgement went on state that no one *"can claim a right to property in a market share"*, and that in any case *"market share constitutes only a momentary economic position exposed to the risks of changing circumstances"*, including the whims of EU law. This reasoning is quite indisputable; manufacturers of all products must comply with new regulations when they are passed. Claiming damages for any regulation that damaged business would not be either possible or desirable. In any case, this is not strictly what the right to property protects against because regulations, even if they do cause loss of property, are not arbitrary.

In 2016 the Secretary of State for Health was again challenged by Swedish Match[13] and also New Nicotine Alliance, *"a registered charity with the objective of promoting public health by means of 'tobacco harm reduction'"* - precisely the continuum of risk argument as an organisation. The submission pointed out the limited risks of snus against smoking, inter alia that snus does not create second hand smoke, which has contributed to Sweden's low incidence of tobacco related diseases. The parties again objected on grounds of the principle of proportionality (in light of the earlier decision of the ECJ) by delineating the continuum argument (i.e. the public health benefits of overturning the ban) and claimed a 'right to access less harmful products'. The High Court accepted a referral to the ECJ, with a ruling expected 'in the first half of 2018 at the earliest'. The case continues.

13 R (on the application of Swedish Match AB) v Secretary of State for Health [2016] EWHC (QB) co/3471/2016

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Asteroid Mining and The Legal Issues Surrounding The Area

Can David Benun*

ABSTRACT

Following the global effort to convert to an emission free planet earth and the vast amount of available resources in our asteroid belt, Asteroid mining has become a real possibility for the near future. Several companies have already begun prototype researches and plans to mine the near earth asteroid belt. However; there are legal issues concerning this area over the rights to Land and the interest in the land and the market arrangements on the sale of these extraterrestrial resources. I would like to go ahead and investigate the legal issues surrounding this subject and combine it with a narrative of the trend of global technology and the future. In my article I will mainly focus on asteroid mining and the legal-political issues surrounding this area and include my opinions on the area and other relevant political or legal areas affecting this area.

ASTEROID MINING AND THE LEGAL ISSUES SURROUNDING THE AREA

A long time ago… In a galaxy not so far away… German astronomer Johannes Kepler hypothesized a 'missing' planet between the orbits of Mars and Jupiter, the 4th and 5th planets of our 6 planet conception of the Solar System back in the 16th Century. The reasoning behind this prediction was the fact that the distance between the orbits of Mars and Jupiter is so much greater than the distance between the orbits of every other neighbouring planet we could observe back then. The distances between orbits rose as the distance from the sun grew, however, the distance between the orbits of Mars and Jupiter was double that of the expected natural pattern and then went back to the natural pattern immediately afterwards, between the orbits of Jupiter and Saturn . The mathematical peculiarity in the orbital distance pattern caused by the extravagant distance between Mars and Jupiter raised all types of suspicion and questions. Almost 150 years after the assertion of Kepler regarding the abnormality in orbital distances, Johann Titius formed a mathematical theorem based on the semi-major axes of the elliptical nature of planetary orbits; Stating that each planet would be twice as far from the Sun as the planet before itself[1]. Titius' idea stemmed from

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1 *Editors of Encyclopaedia Brittanica, 'Bode's Law' Astronomy*

a simple assumption of a geometric sequence regarding the observed positions planets and their orbital distance patterns and lead him to to form the hypothesis of the 'missing planet'. Athough the theory coined as the "Titius-Bode Law" was later discredited with the discovery of Neptune and its pattern disruptive distance to the Sun, it did provide an incentive for astronomers of the time to gaze upon our Solar System to figure out the peculiarity of the distance between Mars and Jupiter which violated the Titius-Bode Law.

Through time Ceres, Pallas, Juno, Vesta and Astraea and many more celestial objects which would later be classified as Asteroids, literally meaning "star-like[2]" in Greek, were discovered in the region between the orbits of Mars and Jupiter where the so-called 'missing planet' would have stood if the Titius-Bode Law were accurate and mathematically sufficient.

The modern theory[3] explaining the existence of the "Asteroid Belt" and the fallacy of the missing planet between Jupiter and Mars is the extreme gravitational force of Jupiter. The gargantuan gravitational field strength of Jupiter, the largest planet of the Solar System, disrupted the natural course of planet formation and prevented the amalgamation of smaller particles in outer space close to its gravitational field into bigger particles and eventually a planetesimal. The total mass of the asteroid belt today does not suffice the amount of mass required to be classified as a planet but it is very likely that an entity large enough to be significant would have formed if it weren't for Jupiter's gravitational field. The hypothetical missing planet between Mars and Jupiter never went missing, it just didn't form at all and the particles which could've formed a larger celestial body 'ceteris paribus' are still floating around in the zone between the radii of the two planets. This group of bodies ranging from 950 km in diameter to bits of space dust are referred to as the Asteroid belt or the Main Belt. Most of the asteroids within our solar system are found here but there are also quite a few asteroids near our home planet called Near-Earth Asteroids and a significant amount in Jupiter's orbit which are referred to as Trojans.

Nowadays, we have a wider understanding of Asteroids and their properties. We have categorised Asteroids into different groups such as C,S,M-type[4] Asteroids based on their elemental properties such as metallic, carbonaceous and silicate based. Near-Earth Asteroids with rich metal and H2O content have been observed, yielding great prospect in putting those resources to use to fuel our terrestrial economy and further expand humanity into The Solar System and the depths of Outer Space.

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2 *Rose Eleveth, 'Where Did The Word "Asteroid" Really Come From ?' [2013] Smithsonian Online Magazine-Smartnews*

3 *Hooper, Nina "How Asteroid Mining can allow us to travel to space" TEDxHarvardCollege, December 2nd 2015, Melbourne, Australia.*

4 *Nancy Atkinson, 'What are Asteroids Made of ?' [2015] Universe Today*

Asteroid mining is the concept of capturing an asteroid and mining the resources such as water, metals and other elements found on it. Currently, governments and private companies are working together to make asteroid mining a reality. Planetary Resources[5], a trail blazing company in the field explains the vision of asteroid mining as fueling human expansion into the final frontier-Outer Space. Asteroids are not difficult to mine. They never formed a planet, hence, none of them have a core neither are the precious metals and other elements found deep below the surface, but rather on or immediately below it, which makes the mining process easier due to the less effort required to drill. Also, zero-gravity makes mining easier in terms of moving the extracted resources off of the asteroid and transporting them to designated vessels. Necessary technology to mine asteroids however is not complete at this date but is rapidly being perfected and in the very near future mining is likely to begin. The methodology of mining asteroids is mostly validated and viewed as feasible, encouraging private and governmental entities to invest in the research and development stage. Turning the theory into practise in Asteroid mining is rapidly approaching on the horizon.

A topic of recent conversation on the asteroid mining is an Asteroid spotted by NASA: Psyche-16. Psyche-16 is estimated to contain USD 10,000 Quadrillion worth of iron ore[6] at the current market price, which itself is 1,000 times greater than the global economy itself. The value of the resources on this single asteroid displays the vast amount of resources waiting to be put to use and the potential that lies within the field of asteroid mining. Mining asteroids for resources and fueling industries on earth could lead to an unprecedented exponential advancement in our technology and economical growth.

Furthermore, Asteroids could immensely accelerate our space travel distances. Today, in order to exit the Earths gravitational field and atmosphere, we spend a great deal of fuel, whereas once the gravity of earth is out of the equation, the same amount of fuel used just to penetrate out of the gravity of earth is capable of taking us as far as Mars. Also, when launching into space, we have to take all the necessary fuel from earth to complete the entire trip. If we could get to a stage where we could refill our spacecraft in space, it would be an unprecedented leap further in terms of distances covered in space travel. Asteroid resources mined and processed in space can feasibly be used as rocket fuel and allow us to set up orbital "gas stations" for our space vessels, radically simplifying launches from earth and exponentially boost the distances we cover in outer space.

5 *https://www.planetaryresources.com/company/team/*

6 *Adam Minter, 'Asteroid Mining Has a New Champion' [2017] Bloomberg View*

The concept of asteroid mining and the benefits do come intact with legal uncertainties and unanswered questions. The piece of international treaty of paramount importance governing such activities is the "Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies", commonly known as the "Outer Space Treaty 1967". Article 2 of the Outer Space Treaty rejects any sort of sovereignty, appropriation and exclusive rights of ownership of any celestial body. The treaty passed the UN General Assembly and was ratified by The U.S, The then Soviet Russia and the U.K., whom are still signatories of the treaty alongside more than 100 countries. Another legislation concerning the subject of extracting resources from celestial objects is the "SPACE Act 2015", passed by the U.S. Congress and signed by President Obama late 2015. The SPACE Act allows private U.S. citizens and companies to explore and exploit space resources such as water and minerals and exercise ownership over those extracted resources. Moreover, the act claims to comply with the Outer Space Treaty by stating that no assertion of exclusive rights over any celestial body by the U.S. is allowed through the act and that the only appropriation asserted is over the extracted material. The Luxembourg Chamber of Deputies, in an effort to be pioneers of the sector, has also passed a similar bill[7] to the SPACE Act in their chamber of deputies, granting private companies and individuals ownership rights over extracted resources as well. These pieces of legislation have been criticised in the U.N. Committee on the peaceful uses of Outer Space, but both Acts are still valid law in the U.S. and Luxembourg respectively.

The Outer Space Treaty rejects any appropriation over any celestial body by anyone, which could be interpreted in a way which prohibits asteroid mining. Since asteroids are celestial bodies, extracting resources from asteroids for commercial purposes could be seen as declaring ownership over a portion of a celestial body, hence any government that is a party to the Outer Space treaty can argue that the resources are owned illegally.

On the other hand, both the SPACE Act and the Luxembourg Bill grant rights of ownership to the miners after the extraction of the resources from the celestial body. Through this procedure, it can be easily said that no sovereignty over the celestial body is imposed and the celestial body remains without ownership rights seized by anyone. The Outer Space treaty can not reject the fact that the celestial body is still out there without its rights of ownership secured explicitly by anyone in absolute after the process of mining. Extracting resources from a territory is not equivalent to declaring ownership of that territory as a whole. The Outer Space Treaty, which approves of the peaceful use and exploration of space,

7 *OFFICIAL GAZETTE OF THE GRAND DUCHY OF LUXEMBOURG], No. 674 (July 28, 2017), LEGILUX; Draft Law on the Exploration and Use of Space Resources*

must not reject mined resources from asteroids - and has not done so. The U.S. has brought back samples of rocks from the Moon and other Celestial Bodies, designated them as U.S. property and even traded those acquired resources with the USSR and The Outer Space Treaty did not stop them from doing so. Precedent suggests that the Outer Space Treaty is unlikely to interfere with the SPACE Act. Also, the SPACE Act is drafted to adhere to the Outer Space Treaty criteria in its careful choice of words.

Furthermore, the Europe based "International Institute of Space Law" has issued a position paper[8] acknowledging Title 4 of the SPACE Act 2015, permitting the use of potential space resources. An analogy that backs up the claim for the mining of extraterrestrial resources would be Maritime Law. In high seas, out of the boundaries of "Exclusive Economical Zones" which are 200 Nautical Miles beyond acknowledged shores, freedom to fish is granted to every individual and company without any restrictions. Consequently, these waters, which are not exclusive to anyone in particular are in fact open for commercial fishing to any and all parties that are willing and able of fishing those neutral waters. This does not assert any appropriation over that nautical territory to any nation or private entity and everyone who can fish those waters is more than welcome to do so under international law. Outer Space can also be regarded similar to Terra Nullius[9] international waters in this aspect, therefore, it would be logical to grant freedom to every party capable of mining Asteroids under international guidelines.

The birth motive of the Outer Space Treaty was to prevent the participant nations of the Space Race of the mid-20th Century from ascertaining sovereignty over the Moon or other celestial bodies and weaponizing them. The fear which lead to the birth of the treaty was the fear of a Cold War party having a nuclear warhead orbiting planet earth. The major concern at the time was achieving peace and no thought whatsoever had been cast into the monetizing and economic use of resources found abundant in space and scarcely on earth. The prospect of industrializing outer space for economical benefits, alongside outsourcing a great load of heavy industry from earth to space which would lead to a much cleaner and prosperous home planet was nowhere to be seen or even to be imagined back in the 60's, but is a glaring reality today. The treaty is currently like a schackle over the potential Outer Space industry, but it is unlikely to remain that way because humanity will keep moving forward and developing, the same way it has throughout its entire existence. Global technological advancement could be metaphorised as a Great White Shark, swimming only forward. The Outer Space Treaty was not even designed to regulate Asteroid Mining, so why

8 International Institute of space law, *Position Paper on Space Resource Mining (IISL 2015)*

9 Osmanczyk Edmund Jan, *Encyclopaedia of the United Nations and International Agreements (4 Volume Set)* (1 edn,) 1917

should it? The law must serve the needs of the people and not the other way around. Lets assume for a second that the speed limit on hypothetical highways was 20 mph 100 years ago. Would it be safer and beneficial to adhere to that limit where cars today are capable of going 70 mph without any complications, or should the law follow the technological and general advancements, allowing people to get to their destinations quicker? It would be totally irrational to restrict an advancement so potentially fruitful under the conjuncture of a Cold War treaty which has long lost its relevance.

Article XV[10] of The Outer Space Treaty allows amendments to be made to the Treaty. This Outer Space "Geneva Convention", despite currently causing hostile legal uncertainty for the asteroid mining field, could be manufactured into a modern piece of international legislation containing the essence of encouraging free trade and freedom to extract resources from asteroids whilst providing environmental and peacekeeping guidelines beneficial for all mankind. The Outer Space treaty, if amended vastly in order to comply with the peaceful commercial use of space resources would provide necessary and beneficial guidelines for the emerging sector.

Ultimately, it is clear that Asteroid Mining has the potential to yield great benefits for humanity. Through mining these resources, we can provide an unprecedented resource boost to every single global manufacturing sector without polluting our planet at the same rate we do today. Asteroid mining could mean all the conductor cables of the world could be manufactured of platinum at a very low cost. Asteroid mining can lead to human expansion beyond our solar system through lighter, lower cost launches by refilling fuel in outer space instead of loading all the fuel the vessel needs for the entirety of the journey, which immensely increases launch costs and decreases potential distances that could be covered. The same way coal, oil and petroleum fueled the global industry into unprecedented growth, asteroid resources will fuel the human expansion into space. The field should not be left in the dark in terms of certain legal guidelines and if these necessary regulations are set in a coherent spirit endorsing free trade and freedom of ownership of extractions, the private sector will lead the way into space…

10 *UNOOSA- Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies - Article XV*

Virtual Justice: Video-Conferencing in Courts and Our Right to a Fair Hearing

Laurène Veale*

ABSTRACT

The use of video-links in court has grown significantly in recent years as the government drastically cuts the budget for our justice system. In 2016/17 it was used in 137,000 cases. It has not attracted much media attention. Yet, "video-links are the new normal", from parole hearings to bail hearings for immigration detainees to sentencing of prisoners or people in custody. Several recent reports by the charity Transform Justice have documented the profound impact of video hearings on "the way the court, and justice itself, is perceived, and for the relationship between a lawyer and their client."In some cases, particularly probation hearings, telephone participation has replaced video-links, due to a lack of facilities. Many judges and lawyers report that the quality of the equipment is poor.In deciding whether to use a video-link or a telephone in court, the "interests of justice" test is rarely applied. All this raises the question of whether video-links and telephone hearings breach the right to effective participation and to be physically present at one's hearing or trial.

VIRTUAL JUSTICE: VIDEO-CONFERENCING IN COURTS AND OUR RIGHT TO A FAIR HEARING

"A hearing is an occasion, not simply a transaction" – Transform Justice, October 2017

The efforts of successive governments to continually reduce the budget of our justice system have caused profound disruptions to the way justice is accessed and administered. Drastic cuts to legal aid have been the most visible and harmful result of this policy, with serious human rights repercussions. But one reform has mostly escaped public scrutiny. The introduction of video-conferencing (VC) in courts is another strategy to cut the justice budget and may undermine our right to a fair hearing.

VC allows people to "dial in" to a court hearing without being physically present. It is used in both civil and criminal cases. In 2016-2017, 137,495 cases were heard via VC, 10%

more than in 2015-2016.[1] VC is particularly useful for short hearings, such as guilty pleas for criminal cases, or when a hearing is adjourned and rescheduled, which can last a mere ten minutes. Before the introduction of VC in our criminal courts, a police officer (or staff from a private government-contracted company) may spend half a day escorting someone to court, waiting for a time slot to be heard, before heading back to the police station or prison. VC is seen as a more efficient usage of time and public resources.

UNRELIABLE EQUIPMENT

Despite it being part of an attempt to "modernise the courtroom",[2] VC technology is far from state-of-the art - after all its introduction was motivated by a drive to cut costs. It offers sound and image quality falling short of a common Skype call. Most of it is now over seven years old. Users, including judges and lawyers,[3] say they often have trouble hearing and communicating. In January 2017 Sir James Munby, President of the Family Division in the Royal Courts of Justice wrote that "the video links in too many family courts are a disgrace – prone to the link failing and with desperately poor sound and picture quality."[4]

Magistrates have struggled with the VC system, citing poor quality, cut or distorted sound and dysfunctional equipment.[5] Penelope Gibbs, Director of Transform Justice, a charity advocating for a fair and humane justice system, writes that "all parties are frustrated by the fact that there are insufficient facilities to meet the demand. This means all parties have to wait long periods for cases to come on." In many probation hearings, participants can only attend via telephone due to a lack of video facilities.

When the government piloted the use of VC in 2009 in two magistrates' courts and 15 police stations in London and Kent, technical problems were immediately apparent. During

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1 Government Press Release 'Home Office funds new video enabled justice programme' (4 September 2017) https://www.gov.uk/government/news/home-office-funds-new-video-enabled-justice-programme Accessed 16 December 2017

2 Kevin Gallagher, Digital Director of HM Courts & Tribunal service, speech on modernising the justice system delivered on 21 June 2016 https://www.gov.uk/government/speeches/modernisation-of-justice-through-technology-and-innovation Accessed 16 December 2017

3 In an interview on 1 December 2017, Celia Clarke, Director of Bail for Immigration Detainees, said she had seen bail hearings where time was wasted as the judge tried to establish if they could be seen and heard by the other side.

4 Sir James Munby, 'View from the President Chambers' (January 2017) p.12 https://www.judiciary.gov.uk/wp-content/uploads/2014/08/view-from-the-president-of-family-division-16-jan-17.pdf Accessed 16 December 2017

5 Penelope Gibbs, 'Gathering Evidence on Video Justice', Bar Council Media Centre, 15th June 2017 http://www.barcouncil.org.uk/media-centre/bar-blog/contributing-writers/2017/june/guest-blog-gathering-evidence-on-video-justice/ Accessed 16 December 2017

the 12 months of the pilot, practitioners reported common delays in the audio, and those contracted to run the pilot said VC affected the perception of those in court about the quality of the service being delivered.[6] Dr McKay of the University of Sydney writes about her experience sitting in on a VC bail hearing in an Australian prison: "After some time, the judge turned to address the camera, facing the prisoner directly, silently mouthing words. The prisoner finally had the courage to say: 'I can't hear', and it was then that the judge realised that he had the mute button activated."[7]

A hearing is an important, solemn and often personal encounter between the individual and the State. For people charged with committing a crime, it is often their first contact with the penal system. For prisoners and immigration detainees, a bail hearing is a crucial decision about whether they will be allowed to temporarily escape the deplorable conditions of prisons and detention centres and return to something resembling normality. VC makes the experience even more stressful. In a November 2017 report commissioned by the Bar Council,[8] a lawyer interviewed said she had attended bail hearings where the detainees' video-link was not even connected. A monitoring exercise by the charity Bail for Immigration Detainees[9] found that too few judges in immigration bail hearings started by asking the applicant whether they could see and hear well. In more than one third of the cases in which there were sound or image problems, the hearing was conducted without the problem being fixed, meaning the applicant could not properly follow. This raises serious questions about the fairness of equating videoconferencing to physical attendance.

SCREENING OUT VULNERABILITY AND DISABILITY

Remote communication, particularly when the image is not of the highest definition, degrades the quality of interaction, blocking out important information for the judge such as body-language, facial expressions, tones of voice and the defendant's degree of attention and involvement.[10] It may also prevent a judge from detecting any special circumstances and conditions of a defendant through VC. According to Malcolm Richardson, National Chairman of the Magistrates Association, "court users tend, much more than the population

6 M. Terry, Dr S. Johnson and P. Thompson, 'Virtual Court Pilot Outcome Evaluation' (10 December 2010) Ministry of Justice Research Series 21 p.7 https://www.gov.uk/government/publications/virtual-courts-pilot-outcome-evaluation-report Accessed 16 December 2017

7 Carolyn McKay, 'Video Links from Prison: Permeability and the Carceral World' (2016) International Journal for Crime, Justice and Social Democracy 5(1) p.21-37

8 Dr Anna Lindley, SOAS (University of London), 'Injustice in Immigration Detention: Perspectives from Legal Professionals' (2017), research report commissioned by the Bar Council, p.21: http://www.barcouncil.org.uk/media/623583/171130_injustice_in_immigration_detention_dr_anna_lindley.pdf Accessed 16 December 2017

9 Bail for Immigration Detainees research report, *A Nice Judge on a Good Day: Immigration Bail and the Right to Liberty* (July 2010) p.33

10 Penelope Gibbs, Transform Justice report, *Defendants on video – conveyor belt justice or a revolution in access?* (October 2017) p.1 http://www.transformjustice.org.uk/wp-content/uploads/2017/10/Disconnected-Thumbnail-2.pdf Accessed 16 December 2017

as a whole, to suffer from difficulties with learning, communication and mental health that restrict their ability to engage with us face-to-face. The use of video links risks exacerbating these challenges."[11]

It is essential to assess whether the use of VC obstructs equality of access among users, particularly for vulnerable users who may find it more difficult to cope with an online process than a traditional courtroom.[12] There are currently no guidelines as to how to assess whether VC is appropriate for someone with a disability or learning difficulties. Practitioners consulted by Transform Justice[13] expressed concerns that people with disabilities or other vulnerable groups were regularly appearing via VC without any effort being made to detect whether this made them more uncomfortable or distressed.

In immigration bail hearings, clients may request to physically attend their bail hearing but Celia Clarke, Director of Bail for Immigration Detainees, says: "It is supposed to be granted under `exceptional circumstances' – which are not defined - but as far as I am aware, never is."[14]

UNDERMINING COURT CREDIBILITY?

This drive towards cutting costs as far as possible may also affect trust in our justice system. The government's 2009 VC pilot found that "some magistrates and district judges thought that the court had more difficulty in imposing its authority 'remotely', and perceived that defendants took the process less seriously."[15]

The ceremony of court proceedings helps to distinguish the hearing from other interactions with State administration. The fact that increasingly, a person's first interaction with a court is from behind a screen may affect the perceived authority and impartiality of our courts and blur the lines between prosecutors and the judiciary. As Dr McKay points out in her research in Australia, "prisons are non-neutral and closed environments" whereas

11 'The MA's response to a new report on defendants appearing by video link' https://www.magistrates-association.org.uk/news/mas-response-new-report-defendants-appearing-video-link Accessed 16 December 2017

12 Bail for Immigration Detainees 'BID briefing on failure to produce bail applicants at court and AIT proposal for video conferencing of applications for immigration bail' (June 2007) https://hubble-live-assets.s3.amazonaws.com/biduk/redactor2_assets/files/284/2007_BID_briefing_on_videoconference_bail_hearings.pdf Accessed 16 December 2017

13 Penelope Gibbs, Transform Justice report, *Defendants on video – conveyor belt justice or a revolution in access?* (October 2017) p.20 http://www.transformjustice.org.uk/wp-content/uploads/2017/10/Disconnected-Thumbnail-2.pdf Accessed 16 December 2017

14 In an interview on 1 December 2017 for the purpose of informing this essay

15 M. Terry, Dr S. Johnson and P. Thompson, 'Virtual Court Pilot Outcome Evaluation' (10 December 2010) Ministry of Justice Research Series 21 p.vi

https://www.gov.uk/government/publications/virtual-courts-pilot-outcome-evaluation-report Accessed 16 December 2017

courts should be seen as neutral."[16] She describes 'video rooms' in prison which are often not sufficiently soundproofed for the prisoners to feel they can speak with their lawyer in confidentiality. Some prisoners she interviewed said that at times they couldn't speak with their legal representative without the prison personnel or the prosecution in the court overhearing the conversation.

One notable finding of the 2009 VC pilot was that defendants in VC cases were found to be more likely to plead guilty, and the report asks whether police stations may be regarded as being "sufficiently neutral venues to hold a hearing". [17]

Lawyers have also expressed concern about how VC may degrade the relation with their client. Currently if counsel needs to talk to the client before the hearing, they are allocated a 15-minute slot to do so. This is often too short for all the necessary advice and explanations a lawyer must give, and to receive any instructions from the client. The New Law Journal recently quoted a defence lawyer as saying: "Often you resort to bullet points and end up rushing the client to make a decision. (…) If you have a client who is telling you about personal matters such as addiction, childhood abuse etc, you find yourself rushing them in order to cover everything you need to cover." [18]

INFLUENCING JUSTICE

There has been no attempt by the Ministry of Justice to measure the impact of video-links on the outcomes of hearings. Studies from other countries show that the use of VC significantly affects the judges' decision. In the USA, a study looked at over 500,000 asylum decisions (in 2005 and 2006) and found that VC "roughly doubles to a statistically significant degree the likelihood that an applicant will be denied asylum".[19] The difference remains clear even when controlling for the fact that applicants are more likely to be unrepresented in VC hearings. Looking only at applicants who are represented, VC applicants in 2005 were 15% less likely to be granted asylum than if they appeared in person, and 17% less likely in 2006.[20] The exceptional breadth of this study eliminates the possibility of data-distorting factors.

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16 Carolyn McKay, 'Video Links from Prison: Permeability and the Carceral World' (2016) International Journal for Crime, Justice and Social Democracy 5(1) p.24

17 M. Terry, Dr S. Johnson and P. Thompson, 'Virtual Court Pilot Outcome Evaluation' Ministry of Justice Research Series 21/10 (December 2010) p.21 https://www.gov.uk/government/publications/virtual-courts-pilot-outcome-evaluation-report Accessed 16 December 2017

18 Roger Smith, 'Transform Justice But Don't Wreck It' (*New Law Journal*, 3 November 2017) https://www.newlawjournal.co.uk/content/transform-justice-don-t-wreck-it Accessed 16 December 2017

19 F. M. Walsh; E. M. Walsh, 'Effective Processing or Assembly-Line Justice - The Use of Teleconferencing in Asylum Removal Hearings' (2008) 22 Georgetown Immigration Law Journal p.259

20 Ibid p.271

The US study offers some explanation for this stark difference in court outcomes. VC affects the judge's perception of the applicant, making them appear more distant. This distance is capable of negating empathy. Slight sound delays and image distortions may undermine the applicant's credibility: "The cognitive dissonance between hearing a story that should be emotionally evocative and not feeling that reaction because the applicant is perceived as distant leads to a subconscious skepticism in the Immigration Judge's mind…. This lack of trust also contributes to a skewed perception of the testimony."[21]

Another factor is the inability of eye contact with VC. If an applicant was to look straight in the camera to give the judge an impression of making eye contact, they would not be able to see the screen showing the reactions of the judge. However human beings deliver speeches very differently when they can see their listener's reaction.[22]

Similar findings in other countries show VC resulting in harsher court decisions. A comprehensive study in Australia[23] found that poor lighting, bad camera angles, distorted images and audio glitches in video-links does affect the outcomes of hearings. Another Australian study found that VC has a 'dehumanising' effect.[24]

In 2004 Canada commissioned a formal evaluation of VC on its Immigration and Refugee Board's asylum hearings, with the aim of assessing "whether the practice maintains an appropriate balance between fairness and efficiency".[25] Interviewed lawyers reported that their own impressions of their clients via video-link were initially negative and only changed when they met them in person. All of them said that VC made them less confident in the soundness of a court's decision.[26] Most counsel who were interviewed said their clients expressed additional anxiety due to the use of VC.[27] The report finished by recommending "a significant testing period" during which an "independent and scholarly empirical study" would compare the fairness of videoconferenced hearings as compared to traditional hearings.[28]

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21 Ibid p.269-270

22 Ibid p.269

23 E. Rowden, A. Wallace, D. Tait, M. Hanson and D. Jones, University of Western Sydney, 'Gateways to Justice: Design and Operational Guidelines for Remote Participation in Court Proceedings' (2013) http://www.uws.edu.au/__data/assets/pdf_file/0019/471223/Gateways_to_Ju stice_Guidelines.pdf Accessed 16 December 2017

24 A. Wallace, S. Roach Anleu, K. Mack, 'Judicial Work and AV use: Perceptions from Australian Courts' (2017), Oñati Socio-legal Series 7(4), 691-716 http://ssrn.com/abstract=3034200

25 Immigration and Refugee Board of Canada, 'Videoconferencing in Refugee Hearings' http://www.irb-cisr.gc.ca/Eng/transp/ReviewEval/Pages/Video.aspx Accessed 16 December 2017

26 Mark Federman 'On the Media Effects of Immigration and Refugee Board Hearings via Videoconference' *(2006) Journal of Refugee Studies* 19(4) p.433–452 https://doi.org/10.1093/refuge/fel018

27 Ibid, section 'The Information and Data Collected', sub-section 1 'Question 10', para 5.

28 Immigration and Refugee Board of Canada, 'Videoconferencing in Refugee Hearings' http://www.irb-cisr.gc.ca/Eng/transp/ReviewEval/Pages/Video.aspx Accessed 16 December 2017

In the UK no such wide-ranging study exists. The most recent government-commissioned assessment dates from the 2009 pilot in criminal hearings in two courts in London and Kent. It found that VC cases were more likely to get a prison sentence and less likely to receive a community sentence, no matter the kind of offence.[29]

In the absence of more recent government figures, British charities advocating for a fair and effective justice system have taken it upon themselves to monitor the impact of VC. A study by the Bail Observation Project on 212 immigration bail hearings in 2012 showed that the applicant's chances of being granted bail were reduced by 20% if they appeared by videolink as compared to attending in person.[30] In a study by Transform Justice,[31] 28% of lawyers surveyed thought that a video appearance would make remand more likely, compared to 8% who felt it would make bail more likely.[32]

Although these figures cover a limited number of hearings and may now be outdated, they suggest a potential threat to the fairness of our justice system, and particularly to the concept of equality of arms developed by the European Court of Human Rights and widely accepted as being enshrined in our right to a fair trial. This principle provides that both parties in litigation should have equal and balanced involvement in the legal process.[33]

HUMAN RIGHTS IMPLICATIONS

Our right to a fair hearing is enshrined in the common law[34] and human rights law. It is for courts to determine what constitutes a fair hearing and what balance must be struck between the requirements of fairness and the public interest. In the recent case of *R (on the applications of Kiarie and Byndloss) v Secretary of State for the Home Department*,[35] the Supreme Court examined the lawfulness of the Home Office policy commonly known as

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29 M. Terry, Dr S. Johnson and P. Thompson, 'Virtual Court Pilot Outcome Evaluation' (December 2010) Ministry of Justice Research Series 21/10 p25. https://www.gov.uk/government/publications/virtual-courts-pilot-outcome-evaluation-report Accessed 16 December 2017

30 Bail Observation Project, *Still a Travesty: Justice in Immigration Bail Hearings* (2013) https://bailobs.files.wordpress.com/2015/03/2nd-bop-report.pdf Accessed 16 December 2017. Out of 41 applicants appearing in person, 21 were granted bail (51.2%) but of the 171 applicants who appeared by videolink only 54 obtained bail (31.6%).

31 Penelope Gibbs, Transform Justice report, *Defendants on video – conveyor belt justice or a revolution in access?* (October 2017) p.20 http://www.transformjustice.org.uk/wp-content/uploads/2017/10/Disconnected-Thumbnail-2.pdf Accessed 16 December 2017.

32 Based on 180 online responses by legal practitioners, 8 in depth interviews with some of the survey respondents, and a round table discussion with a range of participants, including lawyers, magistrates, academics, HMCTS, an intermediary and liaison and diversion practitioners.

33 'Equality of Arms', Oxford Reference online dictionary.

34 See *Ridge v Baldwin* [1964] AC 40 (HL) and *R v Parole Board ex parte West* [2005] UKHL 1, para 27 in which Lord Bingham talks of the common law duty to act in a procedurally fair manner.

35 [2017] UKSC 42

'Deport First, Appeal Later'. It took account of the difficulties of appealing a deportation from abroad, using Skype or other remote communication tools, the costs of which appellants have to bear themselves. Lord Wilson found this obstructed the right of appeal.

However, the question of VC use in courts as it pertains to the right to a fair hearing has not yet been addressed by English courts. In the US, several Courts of Appeals found that VC does not equate to physical presence in court[36] and goes against the confrontation clause in the Sixth Amendment (the right to confront witnesses in court).[37] In 1993 the Sixth Circuit in *Stoner v. Sowders*[38] declared that "video tape is still a picture, not a life" and the rule of the confrontation clause "insists on real life where possible, not simply a close approximation." In *United States v Lawrence*[39] the Fourth Circuit found that "even in an age of advancing technology, watching an event on the screen remains less than the complete equivalent of actually attending it." While these are mostly cases of criminal appeals, they nevertheless express a general principle that remote participation may not be equated to physical presence in court.

The European Court of Human Rights has held that to assess whether an appellant has a right to be physically present, the Court must look at what is at stake for the appellant and whether their presence is needed to determine the facts. [40] This reasoning, if applied to bail hearings in the UK, suggests that the option of attending in person should be automatically given to the bail applicant. Particularly in the context of the UK's immigration detention system, where detainees do not know how long they will be detained (causing severe mental health issues), the use of VC screens the judge from the often-unnecessary suffering of detainees.

It seems that the aim to cut spending has taken precedent over the principles of equal access to justice and our right to a fair hearing. Without clear and up-to-date data, it is impossible to know to what extent the impact of VC on the administration of justice and the authority and effectiveness of our courts. The economic costs of those impacts must also be calculated, to ascertain whether VC is cost-effective. In 2009 the government's VC pilot found that it

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36 See *Thornton v. Snyder,* 428 F.3d 690, 692 (7th Cir. 2005), cited in F. M. Walsh, E. M. Walsh (2008) 'Effective Processing or Assembly-Line Justice - The Use of Teleconferencing in Asylum Removal Hearings' (2008) 22 Georgetown Immigration Law Journal p.277; *United States v. Torres-Pahena* 290 F.3d 1244, 1245 (10th Cir. 2002) (finding "presence" under Rule 43 means "physical presence"); *United States v Lawrence* 248 F3d at 304; *United States v. Navarro*, 169 F.3d 228, 235 (5th Cir. 1999)

37 US Constitution, Amendment VI: *"In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him"*

38 997 F.2d (6th Circ. 1993) at 213

39 248 F.3d 300, 304 (4th Circ. 2001)

40 *Ekbatani v Sweden* [1988] A 134; 13 EHHR 504 PC, para 25 and *Kamazinski v Austria* [1989] ECHR App no 9783/82, A/168, IHRL 93

was more expensive than traditional courts, even without taking account of the costs VC's secondary impacts and the costs of harsher sentencing.[41]

The 'Prisons and Courts Bill' proposed in February 2017 was abandoned in April of that year due to the snap elections. It proposed the introduction of fully online courts, which would clearly obstruct the rights of the parties to understand and participate in the process. Our justice system is complex and technology trying to reduce it to a short and cheap online interaction should be viewed with concern. In a response to the Bill, Transform Justice wrote: "Fundamental principles of justice and human rights are risked if we take justice wholly or partially out of the courtroom".[42] At a time where evidence-based policy should be the standard, it seems the government is reforming our justice system according to short-term economic goals rather than the principles of the rule of law and our country's constitutional values.

41 Penelope Gibbs, Transform Justice report, *Defendants on video – conveyor belt justice or a revolution in access?* (October 2017) p.31 http://www.transformjustice.org.uk/wp-content/uploads/2017/10/Disconnected-Thumbnail-2.pdf Accessed 16 December 2017

42 Transform Justice Briefing on the Prisons and Courts Bill (March 2017) http://www.transformjustice.org.uk/wp-content/uploads/2017/03/Transform-Justice-Briefing-on-the-Prisons-and-Courts-Bill-3.pdf Accessed 16 December 2017

Libel on Twitter post the Defamation Act 2013: An Overview

Isabella Cordua*

ABSTRACT

In an era dominated by social media, where Twitter has gained its status as a credible means through which to impart and receive news and opinions, establishing the legal implications of sharing content on such platforms are paramount. This essay discusses libel law on Twitter with a particular attention to Monroe v Hopkins, while focusing on new ways of expression on social media such as emoticons and hyperlinks, arguing that content on social media is subjected to the same rules as any other traditional form of publication was already compelled to observe.

INTRODUCTION

Increasingly employed by politicians, journalists and members of the public as a vehicle through which to impart and receive information, Twitter has become an important part of the broadcasting of news and has, to an extent, enabled people to contribute to the public debate. While most of its users consider it as a means of posting opinions without real legal consequences, recent cases involving defamation on Twitter show that this virtual social platform is regulated by the law, as any other means of publication. Indeed, the case law has evidenced that its irresponsible use can result in consistent pecuniary losses for persons who are found to have spread defamatory remarks through their 'tweets' and 'retweets'. Often misunderstood by the courts, as the famous case known as the Twitter joke trial[1] has highlighted, Twitter is nonetheless a platform which has been increasingly scrutinised by the law over the last few years.

Interestingly, words are not the only factor that the courts have taken into account when deciding whether a tweet conveyed a defamatory meaning. In fact, the *McAlpine* case shows that a simple and concise tweet, and especially an emoticon, can also carry a defamatory significance. [2] This paper will investigate the defamatory power of emoticons under the 2013 Act,[3] while also giving an overview of the developments of the law of defamation on Twitter in recent years.

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1 Chambers v DPP [2012] EWHC 2157 (Admin); [2013] 1 W.L.R. 1833 (DC)

2 The Lord McAlpine of West Green v Sally Bercow [2013] EWHC 1342 (QB)

3 Defamation Act 2013

DEFAMATION ON TWITTER

While over the last few years we have observed a decrease in defamation claims - arguably mainly due to the introduction of the threshold of 'serious harm' - the number of libel actions related to social media are predicted to continue rising.[4]

Those defamation claims often involve figures in the public eye, as they not only have more followers – meaning that they are more visible and can thus reach a greater number of people – but also because their statements often become 'trending' on Twitter, sometimes for several hours. This means that the likelihood of their tweets being retweeted and reaching even those people who do not follow them on the platform increases, together with, of course, the potential seriousness of the harm caused to the reputation of the person they have tweeted about. In fact, under the Defamation Act 2013, for a claimant to be able to sue for defamation, they must now prove not only that (i) the statement is defamatory, that (ii) it has been published by the defendant and that (iii) the right-thinking members of society will be able to understand that it refers to the claimant, but also that (iv) their reputation has been seriously damaged in the eyes of a reasonable person.

Monroe v Hopkins shows that Twitter is not immune to those requirements. [5] As reiterated by Warby J in the recent case, tweets must cause harm to one's reputation, which is serious, 'albeit not "very serious" or "grave"'.[6] In *Monroe*, the claimant was a left-wing food blogger, and the defendant was a journalist with right-wing opinions.[7] As they were both public figures, each had thousands of followers.

Just after the 2015 General Election, which had been won by the Conservative Party, there was an "anti-austerity" march in London. After it turned violent, the Memorial to the Women of WWII in Whitehall was vandalised with spray-paint spelling out the words "Fuck Tory Scum". Gaining extensive media coverage, the act was commented on, and allegedly condoned by, a columnist for the New Statesman, Laurie Penny, on Twitter. Subsequently, Ms Hopkins posted the tweet: "@MsJackMonroe scrawled on any memorials recently? Vandalised the memory of those who fought for your freedom". This was followed by a second tweet reading: "Can someone explain to me - in 10 words or less - the difference between irritant @PennyRed and social anthrax @Jack Monroe".

It follows that the central issue in this case was establishing whether the meaning of the tweets was defamatory and whether they had caused serious harm to the reputation of Ms Monroe. At trial, she argued that the first tweet conveyed either of the two natural meanings:

4 https://www.theguardian.com/media/2015/nov/14/facebook-twitter-libel-actions-defamation-cases

5 [2017] EWHC 433 (QB)

6 ibid, para 82

7 Monroe v Hopkins [2017] EWHC 433 (QB)

(i) that she had vandalised a war memorial and had thus dishonoured the memory of those who fought for her liberty, or that (ii) she at least condoned the the act of vandalism of such memorial. Regarding the second tweet, the claimant argued that it carried an innuendo meaning, whereby Ms Hopkins had indirectly hinted that Ms Monroe approved of the criminal damages carried out on the war memorial. Transposing to tweets the principle of the hypothetical reasonable reader established in *Jeynes v News Magazines Ltd*[8] and confirmed in, inter alia, *Simpson v MGN Ltd*[9], both claims were accepted by the trial judge. After finding that the tweets had met the serious harm threshold, Ms Hopkins was ordered to pay £24,000 in damages and £107,000 to cover the claimant's legal expenditures.[10]

INNUENDO

This case raises several interesting points. Firstly, it shows that, after some resistance, the courts have begun to understand the impact and enormous reach that tweets can have, thus applying to social media the rules any form of publication was already subjected to. Secondly, it confirms that libellous statements made on Twitter can have real legal and pecuniary consequences on the defendant. Thirdly, it raises the issue that comes with defamation by innuendo. Discussing innuendo in-depth is beyond the scope of this study, but it is worth mentioning the *Monson* case to understand it for the purpose of the second part of this paper. [11]

In the 1894 case, John Monson, who had been on trial for the murder of Cecil Hambrough, later released on the verdict of 'not proven', sued Madame Tussauds after a waxwork of him holding a gun was exhibited at the entrance to the museum's "Chamber of Horrors". The position of the statue, and the fact that it held a weapon, clearly implied that he was guilty of the murder; Mr Monson was awarded damages as a remedy for the suffered defamation. This case established the principle of libel by innuendo in common law, which provides that a publication can be defamatory even if it does not do so overtly with words but it implies by other means a libellous yet hidden meaning that the public can nonetheless work out.

8 [2008] EWCA Civ 130

9 [2016] EWCA Civ 772

10 Jennifer Agate, 'Serious harm and social media: Monroe v Hopkins' [2017] 28(4) Entertainment Law Review 157

11 Monson v Tussauds [1894] 1 Q.B. 671

EMOTICONS

Innuendo was at the centre of *McAlpine v Bercow*.[12] In this case, the BBC current affairs programme Newsnight had aired a reportage containing allegations of child abuse by a "leading Conservative politician from the Thatcher years". Although the programme did not directly name names, a list of potential abusers began to circulate online. Lord McAlpine's name came up so often that it started trending on Twitter. McAlpine was, in fact, a leading Conservative politician in those years. The defendant, the wife of the Speaker of the House of Commons and a TV personality with over 50,000 Twitter followers, published a tweet reading "Why is Lord McAlpine trending? *Innocent face*". The claimant sued and what was considered at trial were not only the words in itself but also the emoticon *Innocent face*.

Mr Justice Tugendhat considered that the defendant's followers were probably mostly people who were interested in politics and current affairs and were thus very likely to know about the Newsnight allegations. He also maintained that because of their interests it was very plausible that they knew that McAlpine had been a leading Conservative politician in the 70s and 80s. However, even without this piece of information it would have been easy for her followers to connect the tweet to the Newsnight report because the tweet identified him by his title, Lord McAlpine. In fact, in the judge's view, it is common knowledge that today's Lords are often people who have covered important positions in politics.[13] It was thus clear that even if the natural meaning of the tweet was not that McAlpine was the child abuser mentioned in the BBC programme, the post carried an innuendo meaning hinting that he was. Tugendhat J said:

> "It follows that, for these reasons, I find that the Tweet meant, in its natural and ordinary defamatory meaning, that the Claimant was a paedophile who was guilty of sexually abusing boys living in care.[14]
>
> If I were wrong about that, I would find that the Tweet bore an innuendo meaning to the same effect. But if it is an innuendo meaning it is one that was understood by that small number of readers who, before reading the Tweet on 4 November, either remembered, or had learnt, that the Claimant had been a prominent Conservative politician in the Thatcher years".[15]

In the preliminary decision on meaning, Tugendhat J considered the *Innocent face* in addition to the words posted to establish whether the tweet bared a defamatory meaning:

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12 *ibid*

13 Jennifer Agate, 'McAlpine, the Attorney General and the Defamation Act - social media accountability in 2013' [2013] 24(7) Entertainment Law Review 233

14 The Lord McAlpine of West Green v Sally Bercow [2013] EWHC 1342 (QB), para 90

15 *ibid*, para 91

> "It is common ground between the parties that the words "innocent face" are to be read like a stage direction, or an emoticon (a type of symbol commonly used in a text message or e-mail). Readers are to imagine that they can see the Defendant's face as she asks the question in the Tweet. The words direct the reader to imagine that the expression on her face is one of innocence, that is an expression which purports to indicate (sincerely, on the Defendant's case, but insincerely or ironically on the Claimant's case) that she does not know the answer to her question".[16]

Following this rationale, the judge eventually deemed the emoticon to be defamatory as the reasonable reader would have known that the *Innocent face* was intended to be insincere and ironical. In fact, not only was Lord McAlpine not otherwise in the public eye when Mrs Bercow published her tweet, but there was also a great deal of speculation over who the prominent Conservative politician of the Thatcher years who had abused young boys was. Tugendhat J thus held that if the defendant really wanted to know the answer to that question, she would have had no sensible reason to add *Innocent face* to her tweet.[17] Settled outside court, Mrs Bercow is believed to have paid a large sum in damages and legal costs.[18]

It is argued that in this case the emoticon *Innocent face* was the factor that ultimately made the tweet capable of bearing a defamatory meaning. In fact, had Mrs Bercow not added such emoticon, the publication could have been read as a genuine question with no innuendo meaning. This decision, of course, comes with a warning. Although social media users often employ emoticons, gifs and pictures lightly, *McAlpine* shows that when put in context, they are in theory capable of carrying a defamatory meaning. While Twitter, and technology in general, indeed offer incredible benefits, they also come with a realm of yet to be discovered legal challenges, and open new discussions on how regulations should be developed in the future. In fact, while the *McAlpine* decision is indeed welcomed because it shows that the courts are finally understanding the power of social media, it can also be seen as a limitation on freedom of expression, protected under Article 10 of the European Convention on Human Rights (ECHR). In fact, certain cases limiting freedom of expression may produce a chilling effect, whereby a case should not only be considered in itself but also as to the effect that an interference would have on freedom of expression more in general.[19]

16 *ibid*, para 7

17 *ibid*, para 84

18 Jennifer Agate, 'McAlpine, the Attorney General and the Defamation Act - social media accountability in 2013' [2013] 24(7) Entertainment Law Review 234

19 Rónán Ó fathaigh, 'Article 10 and the chilling effect principle' [2013] 3 European Human Rights Law Review, 312

THE DEFAMATION ACT 2013

Following two years of intense scrutiny and hearings by a Parliamentary Committee, the Defamation Act 2013 received Royal Assent in April 2013. Altering – and in certain instances replacing – sections of the Defamation Act 1996, the 2013 Act has arguably brought considerable changes to defamation law in terms of social media liability.

SERIOUS HARM

Building upon the requirement of a 'threshold of seriousness' established in *Thornton v Telegraph Media Group*[20] - where the claimant sued the newspaper in defamation for a review in which she was accused of "copy approval" - s. 1 of the Defamation Act 2013 provides that a statement is not defamatory 'unless its publication has caused or is likely to cause serious harm to the reputation of the claimant'.[21] Setting the bar higher before a libel claim can be brought, s. 1 of the 2013 Act is very likely to deter individuals from abusing the processes of the court and effectively gives the courts greater statutory power to struck out trivial claims.

Furthermore, s. 1 (2) has introduced the necessity for companies to show (likelihood of) financial loss before they can bring a libel action. Leaving the principles established in *Derbyshire CC v Times Newspapers Ltd*[22] behind, this section effectively makes it more difficult for big companies to show serious harm (but not impossible, *Ames v Spamhaus Project Ltd*[23]), even if they can prove that their shares have fallen (*Colin Stewart Ltd v Financial Times*[24]).

Proving serious harm has indeed become more difficult than it was in the past. In *Cooke v MGN*, for instance, such requirement was not met. [25] In this case, Cooke was the CEO of a private housing association who had been mentioned in an article about a landlord who was allegedly benefitting from renting sub-standard homes to tenants on benefits. Bean J held that although the article was capable of bearing a defamatory meaning, the words complained of could not infer serious harm.[26] Such a decision was reached mostly because the newspaper had issued an apology shortly after the publication of the article. It is, in fact, contended that harm is unlikely to be serious when the claimant already has a bad reputation, when the publication is limited or the claimant unknown and, more importantly, when the damage is limited because there was a swift clarification or apology.

20 [2010] EWHC (QB) 1414

21 Defamation Act 2013, s. 1

22 [1993] AC 534

23 [2015] EWHC (QB) 127

24 (No. 1) [2004] EWHC 2337

25 [2014] EWHC (QB) 2831

26 *ibid*, 895

The last point is an interesting one because it shows that under s.1 of the new Defamation Act 2013, it could, in some instances, be sufficient to issue an apology or clarification on Twitter to limit the seriousness of the harm of the libellous tweet previously published. This might have great implications in the future of social media users who might be able to share what they want, provided that they then issue apologies or clarifications. Nevertheless, it seems unlikely that users with a great reach will be able to avail themselves of this mechanism as, even with an apology, the catastrophic effects of a widely shared defamatory tweet would not be limited.

WEB OPERATORS

The Defamation Act 2013 has also introduced other defences which attempt to address the challenges arising from new technology and social media. While these should be welcomed by the media and the operators of websites alike, there are obvious limitations which will be analysed.

Section 5 of the 2013 Act sets out a new defence for web operators who can show that (i) they did not post the material on their site and that (ii) after receiving a complaint, they have followed the procedure set out in the Defamation (Operators of Websites) Regulations 2013. Such a defence has become increasingly important for news organisations, which allow the public to post comments and heavily rely on user generated content. Therefore, section 5 attempts to limit the liability of web operators who have published defamatory comments without having personally written them.[27]

Ostensibly, this appears to protect operators of websites and hold users accountable instead. In reality, such a provision often proves itself to be insufficient. In fact, section 5 (3) provides that the defence will be defeated if the claimant can show that it was not possible to identify the actual poster. This is clearly problematic as it is often very difficult for operators to identify their users and they are unlikely to provide the claimant with the the users' information without first informing them and receiving their consent to disclose. This clearly gives rise to the question of how Twitter users who hide behind a pseudonym will be held to account.

Nonetheless, section 10, effectively gives further protection to those who act as intermediaries, such as web operators and operators of social media platforms. In fact, the section states that the court 'does not have jurisdiction to hear and determine an action for defamation brought against a person who was not the author, editor or publisher of the statement complained of unless the court is satisfied that it is not reasonably practicable for an action to be brought against the author, editor or publisher'.[28] Although, it remains to be

27 http://www.publications.parliament.uk/pa/ld201415/ldselect/ldcomuni/37/3706.htm, No 90

28 Defamation Act 2013, s. 10

established what is meant by 'reasonably practicable',[29] section 10 attempts to protect those intermediaries that publish tweets capable of bearing defamatory without being the original posters, meaning that users will hopefully to be held to account for the material that they publish to a greater extent than they have been in the past.

HYPERLINKING

Another interesting point that should be raised concerns the issues around hyperlinking. Can hyperlinking a defamatory article or comment give rise to a new cause of action? To answer this question, *Hird v Wood* might be of some assistance.[30] In this 1894 case, a man sitting in a chair pointed out a defamatory placard at the side of the road to a passerby. The man was deemed to be the publisher as his pointing out of the sign was evidence of his contribution to its publication. Similarly, hyperlinking has the effect of pointing out a link to the public. This means that if the publication that can be accessed by clicking the link provided is defamatory, much like the man in *Hird v Wood*, the user who hyperlinked it is, in theory, likely to open themselves up to a libel suit. Nonetheless, even if the hyperlink provider is found to be the publisher of the material, they may now be able to rely on section 8 of the Defamation Act 2013, the 'single publication rule'.

THE SINGLE PUBLICATION RULE

While the repetition rule survives (*Slipper v BBC*[31]), the 2013 Act abandons the principle established in *Loutchansky v Times Newspapers*, where the court established that each new publication allowed a fresh cause of action. [32] Under section 8 of the 2013 Act, individuals may now bring a libel suit only for the first publication made by a publisher, provided that the subsequent publications do not materially differ from the first one. It is important to note that the single publication rule only applies to a second publication made by the initial publisher. This is an important change that finally recognises the impact of the Internet on the media. As most news organisations now have both a printed and an online presence, the single publication rule shields journalists from receiving several suits for the same piece and is also likely to reduce the need to undertake the expensive task of scrutinising archived content. Furthermore, as already discussed, this may become a crucial defence for hyperlink providers.

29 Corinna Coors, 'Opinion or defamation? Limits of free speech in online customer reviews in the digital era' [2015] 20(3) Communications Law, 75

30 (1894) 38 SJ 234

31 [1991] 1 (QB) 283

32 [2001] EWCA Civ 1805; [2002] (QB) 783

CONCLUSION

As analysed, the Defamation Act 2013 and recent case law, seem to show a greater understanding of the impact of Twitter. The public should be aware of the fact that defamatory emoticons, and tweets in general, can give rise to a cause of action and are not immune to the rules any publication was already subjected to. The greater understanding that the courts have developed of social media may mean that in the future the judicial system may more closely scrutinise the internet and sanction those social media behaviours that bring harm to the reputation of others. Furthermore, the introduction of the defences for operators of websites and social media, albeit limited, will mean that users could be held accountable more than they were in the past. In fact, the objective of such section appears to be that users will no longer be able to shield themselves from libel actions by hiding behind their usernames. Additionally, while users should be wary of disseminating defamatory material through the use of hyperlinks, they may also be able to avail themselves of the newly introduced single publication rule.

In conclusion, social media and the internet are indeed a great means through which to impart and receive information, a fundamental feature in a healthy democracy. However, although there is still a realm of unregulated internet material, the courts and our statutes seem to have finally recognised the catastrophic effects that defamatory remarks on social media can have on the reputation of others.

Tackling the Problem of Pollution Under The HKC

Marianna Alexoglou*

ABSTRACT

At the end of the operational life of ships, shipowners send them for recycling-also known as shipbreaking, scrapping, dismantling- in order to recover their investments from the sale of obsolete ships to shipbreakers. Then, the latter make profit selling the scrap metal which is on board. This makes the ship recycling a big industry. However, the disposal of ships usually takes place in substandard shipyards in developing countries, due to the lax environmental regime and the corruption in these countries. The used techniques, especially "the beaching method", for the shipbreaking and the high percentage of hazardous metals remained on board during recycling result in several environmental and human casualties. Ideally, these damages must be recovered in accordance with the "polluter pays principle" (PPP). However, the Hong Kong International Convention for the Safe and Environmental Sound Recycling of Ships (HKC) failed to incorporate this regime leaving serious gaps and giving rise to several accidents. By consequence, a substantial number of vessels are still "beached" and dismantled in substandard yards. A good example is that, in 2015, 469 vessels were sold to South Asia for scrapping in beaching yards. In this case, it is uncertain who is responsible for bearing of the high cost of environmental pollution caused by scrapping, since from the time of shipbuilding until the time of shipbreaking a variety of factors are involved. Hence, it is very challenging to examine the impact of this lacuna in the new Convention because, even though the latter has a clear environmental character, it purposely avoids to encompass this cornerstone principle of environmental law.

ESSAY

The absence of the PPP constitutes a crucial disadvantage of the HKC. However, it is worth finding if this lacuna can be surpassed. The first effort to find a solution relates to the notion and the legal classification of the Principle.

Despite its absence from the HKC, the principle has been embodied in other Conventions after the Rio Declaration in 1992 [1], although in a different form. On the one hand, some of these treaties refer to the polluter pays regime in their preamble without any further definition. Therefore, it can be argued that the principle cannot be considered as a legal

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1 Rio Declaration on Environment and Development (adopted 14 June 1992) 31 ILM 874, Annex 1 Principle 16

binding rule.[2] Besides, the form under which the principle was expressed in Rio Declaration shows that the normative character of the principle does not exist.[3] On the other hand, some other treaties encompass the PPP recognizing it as a general principle of international environmental law which contributes to the evolution of international law.[4] Particularly in respect of the normative character of the PPP, the issue is debatable between scholars.[5]

On the other hand, it would be simplistic to say that the PPP is only an economic rule and not a legal principle which influences and affects more and more the economic activities of operators.[6] It must be remarked that the International Law Commission (ILC) cited that the PPP may be seen as a general principle of international environmental law in order to achieve 'prompt and adequate compensation' given to those harmed by a certain environmental damage.[7] Yet, despite the fact that the principle has been accepted by a great number of States and international organizations and has been enforced progressively through the national jurisdictions, it is very early to support that the principle constitutes customary international law, i.e. binding all States.[8] Besides, in the *Rhine Chlorides* case, the tribunal pointed out that even though the importance and the effectiveness of PPP is major, it cannot be viewed as being a part of general international law.[9]

Be that as it may, the principle is considered as an inherent part of the legal system mainly in regional level, such as in the EU and the countries of OECD. However, there are still countries such as the United States which strongly oppose the incorporation of the principle in their legal order.[10] Notably, some scholars such as Grossman have also opined that the principle has created a legal status which helps to consider this regime as a general principle.[11]

Overall, it can be fairly assumed that the international community has approved the PPP as a crucial key for the protection of the environment and it tends to become progressively

2 A Boyle, 'Polluter Pays' (2009) MPEPIL < http://0-opil.ouplaw.com.wam.city.ac.uk/view/10.1093/ law:epil/9780199231690/law-9780199231690-e1602?rskey=6cRVbo&result=1&prd=EPIL>
Accessed 23 July 2017

3 Ibid

4 Ibid

5 S Kravchenko, T M.R Chowdhury, Md J H Bhuiyan, Principles of International environmental law [Routledge Handbook of International Environmental Law Routledge 2012] 50

6 A Aust, *Handbook of International Law* [Cambridge University Press 2005] 331

7 ILC, 'Draft Principles on the Allocation of loss in the case of Transboundary Harm Arising out of Hazardous Activities, with Commentaries' (2006) 2(2) Yearbook of the International Law Commission 115

8 S Trehan and S Mandal, 'The polluter pays principle' (1998) 10 Student Advoc. 67, 70

9 *Case Conserning the Auditing of Accounts Between the Kingdom of the Netherlands and the French Republic pursuant to the Additional Protocol of 25 September 1991 to the Convention on the Protection of the Rhine Against Pollution by Chlorides of 3 December 1976 (Netherlands v France)* [2004] 25 RIAA 267, para 103

10 S Atapattu, *Emerging Principles of International Environmental Law* (Brill Nijhoff 2007) 483

11 M R Grossman, 'Agriculture and the Polluter Pays Principle' (2006) Netherlands Comparative Law Association < https://www.ejcl.org/113/article113-15.pdf> accessed 23 July 2017

customary law.[12] Relying upon this, the absence of the PPP from the HKC could be surpassed insofar it can be considered that it is a general principle of international law. In this case, it does not need to be established as customary law to have legal effect nor does it need to be embodied in the HKC.[13] In effect, the principle governs the Convention as a whole in the same way as a constitutional principle.[14] For Birnie and Boyle, it can be used as a useful tool in the interpretation, application and the development of Convention in accordance with a. 31(3) of the 1969 Vienna Convention on the Law of Treaties.[15]

The presence and the incorporation of the PPP in HKC should be obligatory due to the high costs of properly managing of ships to be recycled.[16] The vital aim of the HKC is to ensure that end-of-life ships do not jeopardise the human health and safety or the environment. The mission of the Convention is the regulation of all issues around ship recycling, around the environmental conditions in many shipbreaking yards worldly and the operation of recycling in a safe and environmentally sound manner.[17] Thus, this gap can be covered by recognizing the PPP as general principle.

Nevertheless, it is true that '*scripta manent*'. Notwithstanding the significance of the general principles, they fail to meet the modern requirements. Today, the subject-matters of international law are more pressing.[18] On those grounds, regulation of ship recycling must be based upon written law. In any event, this does not mean that the general principles will lose their importance; due to their flexibility and adaptability, they will continue to revitalize the international law as a whole. In this light, they are perceived as a 'bridge' between the world of *sein* and of *sollen*.

The HKC, falling to adopt provisions regarding the civil liability in respect of damages deriving from the entire procedure of ship recycling, remains an insufficient legal material since it does not deal with the crucial issue of liability and the relevant compensation. Nevertheless, some scholars such as M. Tsimplis support that the absence of the principle from the Convention and of a certain section dedicated to regulate liabilities are not a significant

12 S Kravchenko, T M.R Chowdhury, Md J H Bhuiyan, *Principles of International environmental law* [Routledge Handbook of International Environmental Law Routledge 2012] 53

13 P Birnie, A Boyle, C Redgwell, *International Law and the Environment* (3rd edn, OUP 2009) 27

14 P Sands, 'International Law in the Field of Sustainable Development: Emerging Legal Principles' in W Lang (ed), *Sustainable Development and International Law* (Springer 1995) 53

15 R Wolfrum, 'General International Law (Principles, Rules, and Standards)' [2010] MPEPIL < http://0-opil.ouplaw.com.wam.city.ac.uk/view/10.1093/law:epil/9780199231690/law-9780199231690-e1408?rskey=hOs1Rk&result=1&prd=EPIL> accessed 23 July 2017

16 NGO Shipbreaking Platform, "Legal Shipwreck: IMO Convention Legalizes Toxic Ship Dumping" distributed at the May 2009 IMO conference < http://www.shipbreakingplatform.org/shipbrea_wp2011/wp-content/uploads/2011/11/briefing-paper-may-2009.pdf> accessed 23 July 2017

17 IMO, The Hong Kong International Convention for the safe and Environmentally Sound Recycling of Ships (2009) <http://www.imo.org/en/About/conventions/listofconventions/pages/the-hong-kong-international-convention-for-the-safe-and-environmentally-sound-recycling-of-ships.aspx> accessed 23 July 2017

18 E Roukounas, *Public International Law* (Legal Library 2011) (tr) 159

omission.[19] In other words, the remained gap could be surpassed by having recourse to other Conventions which regulate the civil liability, the protection of environment and, in that way, incorporate the PPP.[20]

As it has already been mentioned, in the case of oil pollution, environmental damage can be covered by the CLC 1969/1992 since CLC foresees strict liability of shipowner channeling all liabilities of other persons to him. Moreover, regarding damage by pollution from bunkers, both CLC 1969/1992 and the 2001 Bunker Pollution Convention provide for strict, but limited, liability for the owner of the ship.[21]

Additionally, the "London Convention"[22], its 1966 Protocol[23] and the Marpol 73/78[24] contain provisions under which the dumping of toxic wastes found on board to marine environment is prohibited and also provisions for the protection of marine environment from operational or accidental discharges from ships.[25] Nevertheless, it is doubtful if these provisions are applicable in the case of wastes from decommissioned ships. Additionally, many international organizations have noted that the ship recycling is an extremely dangerous activity for the human health and safety.[26] An efficient option to deal with the injuries of workers would be through employment and tort laws at national level and, secondly, through the existing international treaties.

Notwithstanding this, none of the IMO Conventions interferes with any kind of harm which can occur during the process of ship recycling, particularly in shipbreaking yards. The only relevant regime is under the Basel Convention which represents the predecessor of HKC, but it has failed to regulate the ship recycling and recognise the end-of life ships as wastes.[27]

However, in December 1999 the Basel Protocol on Liability and Compensation was adopted by the 5th Conference of Parties.[28] The aim of the Protocol is to offer a comprehensive regime in terms of liability and to provide adequate and prompt compensation for environmental

19 M N Tsimplis, "The Hong Kong Convention on the Recycling of Ships" (2010) LMCLQ 305,335

20 Ibid

21 International Convention on Civil Liability for Bunker Oil Pollution Damage (adopted 23 March 2001, entry into force 21 November 2008) 40 ILM 1493

22 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London Convention) (adopted 29 December 1972, entry into force 30 August 1975) 1046 UNTS 120

23 1996 Protocol to the London Convention 1972 (London Protocol) (adopted 11 July 1996, entry into force 24 March 2006) 36 ILM 1

24 International Convention for the Prevention of Pollution from Ships (MARPOL 73/78) (adopted 2 November 1973, entry into force 2 October 1983) 1340 UNTS 184

25 London Convention, Arts (I) and (IV.1); London Protocol, Art 4

26 UNGA 'Report of the Special Rapporteur on the adverse effects of the movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights' UN Human Rights Council 12th Session (15 July 2009) UN Doc A/HRC/12/26

27 Nele Matz-Luck, 'Safe and Sound Scrapping of "Rusty Buckets'? The 2009 Hong Kong Shop Recycling Convention" [2010] 19(1) RECIEL 95, 98

28 Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their disposal (adopted 10 December 1999) UN Doc. UNEP/CHW.1/WG/1/9/2

harm caused from the transboundary movement of the ships are to be recycled. It follows that the specific objective of the Protocol is the identification of financially responsible for the potential damages.[29]

Thus, in relation to the Basel Protocol, liability does not only concern the carrier but also the generator, the exporter, the importer and the disposer of the wastes, while ships are considered as wastes.[30] Even further, the Protocol provides that the compensation for the damage could be based on either limited strict liability of the aforementioned actors[31] or on unlimited fault-based liability[32] in combination with compulsory insurance cover[33] and a compensation from Funds in cases where the provisions of Protocol are inadequate.[34] Each actor is liable for a different part of voyage.[35] Moreover , under the Protocol the scope of damage is clearly stated. Therefore, the potential compensation covers deaths and injuries during the transboundary movement,[36] damage to property,[37] loss of income directly deriving from an economic interest in any use of the environment,[38]the cost of reinstatement of the environment[39] and the costs for the necessary preventive measures.[40]

However, if the Basel Convention and the Basel Protocol are the most relevant to the HKC, there is a significant problem regarding the fair enforcement of the PPP. More precisely, under the Protocol the shipbreakers have strict liability to compensate for any damage occurred during the operation of ship recycling,[41] unless the shipowners have pre-cleaned their vessels before their arrival to the shipyards. By allocating the total liability to shipbreakers, it is indeed very difficult and almost impossible that the shipowners will ever be liable for their negligence; they will unlikely declare that the ship is contaminated by asbestos.[42] Moreover, using the Basel Convention as the 'problem-solver' for the identified lacunae under the HKC may seem like a step backwards when the Basel's regime has been internationally declared as inadequate to deal with the ship recycling.[43]

29 Secretariat of the Basel Convention, Basel Protocol on Liability and Compensation < http://www.basel.int/TheConvention/Overview/LiabilityProtocol/tabid/2399/Default.aspx> accessed 24 July 2017

30 M Tsimplis, 'Liability and Compensation in International Transport of Hazardous Wastes by Sea: The Protocol to the Basel Convention' (2001) 16(2) International Journal of Coastal and Marine Law 295, 306

31 Basel Protocol, Arts 4 and 12

32 Ibid, Arts 5 and 12

33 ibid, Art 14 of

34 ibid, Art 15

35 M Tsimplis, supra note 85

36 Basel Protocol, Art 2.2.c.i

37 Ibid, Art 2.2.c.ii

38 Ibid, Art 2.2.c.iii

39 Ibid, Art 2.2.c(iv)

40 Ibid, Art 2.2.c(v)

41 Ibid, Art 5

42 M N Tsimplis, "The Hong Kong Convention on the Recycling of Ships" (2010) LMCLQ 305, 336

43 NGO Shipbreaking Platform, 'New 'Ship Recycling' Convention Legalizes Scrapping Toxic Ships on Beaches of Poor Countries – 'A major step backwards' (2009) < http://www.shipbreakingplatform.org/new-ship-recycling-convention-legalizes-

It follows from the foregoing considerations regarding the vague and broad provisions of HKC that the latter encompasses the characteristics of a framework Convention. Generally, the key feature of Framework Conventions is their 'two-tier' design.[44] Particularly, a framework legal instrument includes in its basic and main body only the general provisions which are expressed typically with a broad manner. The details for the settings and the specific standards or specialized provisions for specific issues can be found in the second part of those Conventions usually in the form of a Protocol. In effect, the latter are independent legal acts which, albeit in complete harmony with the international law, they are linked with the mother Convention via specific clauses for exclusive issues.[45]

The HKC, despite having Annexes not legally independent[46] the same way as Protocols are, resembles other framework Conventions.[47] In that regard, an acceptable solution would be a new Annex which would include liability provisions and would establish a Fund for financial assistance of the State-Parties to the HKC, as well. The Fund would provide shipowners with sufficient amount of money to pay their claims whenever they were unable to provide an adequate compensation for the damage. Furthermore, it would help developing countries in which the shipbreaking yards are found to establish the appropriate mechanisms and facilities.

As it has become apparent from the paper, the shipbreaking yards in Bangladesh, India and Pakistan are preferred because of the lower cost. The beaching method is cheaper than other more ecofriendly methods such as dry dock recycling, while the salaries of workers are scant and the taxes are almost non-existent.[48] With the financial support of the Fund, the import states will be able to develop their yards, their equipment, the working condition, waste handling and to adopt more ecofriendly methods for dismantling.[49] By upgrading their standards, the costs will be raised up and therefore both shipbreakers and shipowners will be able to pay for the environmental damage. Moreover, the Fund may also assist to the clean-up of every kind of wastes and mechanical equipment which can be found in yards, and of extended pollution in general.[50]

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scrapping-toxic-ships-on-beaches-of-poor-countries/> accessed 24 July 2017

44 Nele Matz-Luck, 'Safe and Sound Scrapping of "Rusty Buckets'? The 2009 Hong Kong Shop Recycling Convention" [2010] 19(1) RECIEL 95, 99

45 Nele Matz-Luck, 'Framework Agreements' (2011) MPEPIL < http://0-opil.ouplaw.com.wam.city.ac.uk/view/10.1093/law:epil/9780199231690/law-9780199231690-e703?rskey=zp458M&result=1&prd=EPIL> accessed 24 July 2017

46 Hong Kong Convention, Art 1(5)

47 Nele Matz-Luck, 'Safe and Sound Scrapping of "Rusty Buckets'? The 2009 Hong Kong Shop Recycling Convention" [2010] 19(1) RECIEL 95, 99

48 Science for Environment Policy, *Ship recycling: reducing human and environmental impacts* (2016) thematic issue 55 produced for the European Commission DG Environment by the Science Communication Unit, p 21 http://ec.europa.eu/science-environment-policy accessed 6 July 2017

49 M Galley, *Shipbreaking: Hazards and Liabilities* (Springer 2014) 181

50 Ibid

The provisions for funding are essential since the costs for remedying environmental damage, including the identification of additional activities in terms of prevention and restoration, are extremely onerous not only for the shipbreaking states but also for the shipowners and the flag states. Additionally, the existence of a Fund may also act as a motivating force for more States to sign the HKC and it is also an opportunity for the shipbreaking industry to become modernized and respectful of the international accepted standards and the general principles of international law.

Arguably, funds should be addressed to shipowners preferably, not to shipbreakers for two reasons. The first one is that this choice provides incentives for shipowners to send their end-of-life vessels for ship recycling to the more modern and safe yards. The second one is that in this way it can be achieved transparency since it is doubtful if the money to shipbreakers will be given for operational improvements.[51]

In my opinion, a crucial feature of a Fund should be the principle of common but differentiated responsibility (CBDR).[52] This principle will point out the differing capabilities of developed and developing countries and thus, the need for different treatment of them.[53] Both developed and developing states have common responsibility to the protection of environment, although depending on the financial and the technological capacities, their contribution should be differentiated. Therefore, the Fund can be financed by proportional levies from the State- Parties to the Convention and by shipowners, shipbreakers and even builders and, thus, achieving the internalization of costs. Moreover, including funding provisions in the HKC, the PPP would be reinforced since CBDR is a clear expression of the general principle of equity and fairness in international law.[54]

Except for the funding, the adoption of strict and direct obligations on the shipowner to pre-clean his obsolete vessels before the ship recycling would also be effective. With these obligations in place, it is logical that the funds directed towards shipbreakers would be reduced and, in parallel, the amounts to shipowners would be increased because they must bear more risks.[55]In this way, the issue of who/ which authority will receive the funds can be solved.

51 Ibid

52 P Sands, J Peel, Adriana Fabra and Ruth MacKenzie, *Principles of International Environmental Law* (3rd edn, Cambridge University Press 2012) 233

53 Birnie, A Boyle, C Redgwell, *International Law and the Environment* (3rd edn, OUP 2009) 133

54 Charlotte Epstein, 'Common but differentiated responsibilities (CBDR)' < https://www.britannica.com/topic/common-but-differentiated-responsibilities> assessed in 24 July 2017

55 Timothy Carey, 'The Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships: Progress?' (Master Thesis, University of Lund 2011), 40

CONCLUSION

The HKC is undoubtedly the only international framework which regulates exclusively ship recycling, albeit not yet in force. This can be considered as an important step forward by international community which supported from both IMO and ILO.[56] However, the Convention suffers from several omissions and, particularly, from the resounding absence of the PPP. The latter situation results in the reluctance of many States, e.g. United States, India, Pakistan and the majority of European States, to ratify the new Convention.[57] The HKC, failing to include the PPP, is unable to solve the problems arising from the beaching method and the non-pre-cleaning. There is uncertainty in all sides; both States with ship recycling facilities and States with open registers are hesitant to sign the Convention, since the aforementioned problems affect significantly not only the ship recycling industry in general but also the value of end-of-life ships.[58] Thus, in the light of the most recent official forecasts, it is extremely difficult for the HKC to fulfill the requirements in order to enter into force before 2020 at least.[59]

Consequently, the future for the environmental and working conditions sounds dismal since the environmental degradation caused by the beaching and the accumulated chemical substances cannot be counteracted by the present regime and, on the other hand the basic aims of international organizations is far to be succeeded. Moreover, the success of the HKC is undermined by the non-establishment of a Fund which would improve the operations of ship recycling and the internalizations of costs between the relevant actors and therefore, polluters of this process.

The international practice has shown that the international conventions which have embodied the PPP, such as the Conventions for oil pollution, have achieved important and efficient results.[60] Thus, the inclusion of the principle in the HKC would be an attractive point and a necessary tool for the best enforcement of convention. Moreover, the incorporation of polluter pays regime would encourage the effective implementation of equity between developed and developing countries. However, the new Convention includes onerous risks and responsibilities for developing states which are unable to deal with them effectively. Despite the variety of solutions, the ambiguous wording of the HKC's provisions leaves

56 ILO, 'ILO welcomes new regulations on ship breaking as crisis boosts the industry' (2009) < http://www.ilo.org/global/about-the-ilo/newsroom/features/WCMS_106542/lang--en/index.htm> accessed 27 July 2017

57 IMO, 'Status of Conventions' (28 July 2017) < http://www.imo.org/en/About/Conventions/StatusOfConventions/Pages/Default.aspx> accessed 30 August 2017

58 D Devault, B Beilvert, P Winterton, 'Ship breaking or scuttling? A review of environmental, economic and forensic issues for decision support' (2016) P. Environ Sci Pollut Res 1

59 Council Recommendation on the draft Council decision concerning the ratification of, or the accession to, the Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships, 2009, by the Member States in the interests of the European Union [2013] OJ L 330

60 R. B K Kiran, 'Liability and Compensation for oil pollution damage: an examination of IMO Conventions' (2010) 3 NUJS L.Rev. 399, 421

room for discretionary judicial interpretation. Moreover, the fact that the PPP is not written in the Convention and therefore, it is possible to ask the assistance of other conventions is a challenging issue. In that regard, the new Convention seems insufficient and unable to face the modern challenges and especially, the sustainable development as a sine qua non.[61]

In conclusion, the incorporation of the PPP, of course, would indisputably strengthen the HKC by addressing serious issues regarding the environment, the employment and the human rights in general.[62] From this scope, it is doubtful whether the current regime will achieve the objective of safe and environmentally sound ship recycling. Nevertheless, it is still unknown to *what degree* a PPP would strengthen the new Convention, since there are many other problematic provisions under HKC. The answer to this interesting question will be given over time since HKC has not entered into force yet and this is still remote.

61 T G Puthucherril, 'Trans-boundary Movement of Hazardous Ships for their last rites: Will the ship recycling Convention Make a Difference?' [2010] 24 Ocean Yearbook 283, 330

62 Ibid

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Form E = MC2?: 'Genius' in the Family Courts

Henrietta Boyle* GDL

FORM E = MC^2?: 'GENIUS' IN THE FAMILY COURTS[1]

Since *White v White*,[2] the starting point in ancillary relief cases is an equal split of total matrimonial assets between a husband and wife upon divorce. Although it was held that there is no legal presumption of equal division of the parties' assets, the House of Lords directed that a judge should exercise his statutory discretion pursuant to s. 25 of the Matrimonial Causes Act 1973, and before making his final decision, should check his view against the yardstick of equality of division, and should depart from equality 'only if, and to the extent that, there is good reason for doing so' (*per* Lord Nicholls).

In cases where one party (usually the husband) has enjoyed particular financial success, he often argues that the 'sharing principle' (that is, the starting point of an equal sharing of the parties' assets) should be departed from. This is on the grounds that he made a 'special contribution' to the parties' wealth, based on s. 25(2)(f) of the Matrimonial Causes Act 1973, which sets out that the court shall have regard to 'the contributions which each of the parties has made, or is likely in the foreseeable future to make to the welfare of the family, including any contribution made by looking after the home or caring for the family'.

This article will survey the history of special contributions claims, both successful and unsuccessful, and will examine the key issues that remain in the area.

THE HISTORICAL BACKGROUND

The special contributions argument originated in the case of *Cowan v Cowan* (where the assets were c. £11.5 million).[3] The husband had become a multi-millionaire by running a company that produced plastic bin liners for household waste. The Court of Appeal held that the husband was entitled to £7.1 million, while the wife received £4.4 million, because his contribution in terms of 'entrepreneurial flair, inventiveness and hard work' was 'truly exceptional' (*per* Robert Walker LJ). Indeed, it was in that case that the word 'genius' was

1 'Form E' is the name given to the financial statement parties fill in for applications for a financial order from the courts upon divorce.

2 [2001] 1 AC 596.

3 [2002] EWCA Civ 679.

first referred to, with Thorpe LJ saying that 'fairness certainly permits, and in some cases requires, recognition of the product of the genius with which one only of the spouses may be endowed', before declaring in regards to the husband that 'it was his genius to perceive the potential of bin liners which would revolutionise the collection and disposal of household waste'. Since that case, the party arguing for a special contribution has had to prove 'genius' or exceptionality. In the words of Coleridge J in *G v G*,[4] *Cowan v Cowan* opened up a 'Pandora's box' in terms of special contributions claims.

There then came a trio of important cases in 2002, with *H v H* (where the husband was an equity partner in a city law firm, and the assets were between £27-30 million),[5] *H-J v H-J* (where the husband was a businessman, and the assets were c. £2.7 million),[6] and *Lambert v Lambert* (where the husband founded a company which produced a free local newspaper, funded by advertising revenue, and the assets were c. £20 million).[7] In all these cases, it was held that no special contribution had been made by the husband, and it looked as though special contributions were falling out of favour with the court, as in *Lambert* Thorpe LJ said that 'special contribution remains a legitimate possibility but only in exceptional circumstances'. The criteria for a special contribution remained unclear, as Thorpe LJ held that 'it would be both futile and dangerous even to attempt to speculate on the boundaries of the exceptional', while Bodey J offered no specific guidance as to what constitutes 'exceptional' except for saying that circumstances would have to 'very obviously be inconsistent with the objecting of achieving fairness…for them to be ignored'.

However, a few years later in *Sorrell v Sorrell*, [8] where the husband built up a company which had manufactured supermarket shopping baskets into one of the world's most successful advertising companies and the net assets were c. £75 million, Bennett J held that 'the husband does possess the 'spark' or 'force' or 'seed' of genius', so that 'fairness in the circumstances of this case demands that there be a departure from equality'. Similarly, in *Charman v Charman*,[9] where the husband had an extremely successful career in insurance and the assets were £131 million, the Court of Appeal accepted the special contribution claim, but held that the 'special contributor' was likely to receive a maximum of two-thirds of the assets.

4 [2002] 2 FLR 1143.

5 [2002] 2 FLR 1021.

6 [2002] 1 FLR 415.

7 [2002] EWCA Civ 1685.

8 [2005] EWHC 1717 (Fam).

9 [2007] EWCA Civ 503.

More recently, however, there has been a spate of mainly unsuccessful attempts to argue for special contributions. In *X v X* (where the husband ran a hotel business and assets were £36.9 million), [10] *Evans v Evans* (where the husband wrote software for the financial industry and assets were c. £40 million),[11] *Robertson v Robertson* (where the husband founded the online fashion website ASOS and assets were £219 million),[12] *AAZ v BBZ and others* (where the husband was an oil and gas trader, and assets were £1 billion)[13], *Chai v Peng and others* (where the husband was a businessman and assets were c. £161 million),[14] *Work v Gray* (where the husband worked for a private equity firm and assets were c. $225 million)[15] and *WM v HM* (where the husband generated his wealth through a business which supplied materials for installation in ceilings, and assets were c. £145.7 million),[16] the husbands have all failed in their arguments, and the courts appear to be more unwilling to find special contributions. It therefore seems that it is becoming harder for special contributions claims to succeed. Recently, only one special contribution argument has been accepted: in *Cooper-Hohn v Hohn* (where the husband was a hedge fund manager and assets were $1.35-1.6 billion, although the husband had in fact generated $6 billion through his business, of which $4.5 billion had been placed in a charitable trust)[17] Roberts J took the view that the husband qualified as a 'financial genius in his particular field of financial investment', and that the special contribution he made 'should and will be reflected in a departure from equality'.

The current approach of the courts was set out in *Work v Gray*, where the Court of Appeal held that Holman J correctly identified the approach that should be taken regarding the concept of special contributions. He said that the circumstances which would result in a departure from equality have to be of a 'wholly exceptional nature such that it would very obviously be inconsistent with the objective of achieving fairness for them to be ignored', that 'exceptional earnings are to be regarded as a factor pointing away from equality of division when, but only when, it would be inequitable to proceed otherwise, and that 'only if there is such a disparity in [the parties'] respective contributions to the welfare of the family that it would be inequitable to disregard it should this be taken into account in determining their shares'.

10 [2012] EWHC 538 (Fam).

11 [2013] EWHC 506 (Fam).

12 [2016] EWHC 613 (Fam).

13 [2016] EWHC 3234 (Fam).

14 [2017] EWHC 792 (Fam).

15 [2017] EWCA Civ 270. NB. All assets calculated in dollars refer to US Dollars.

16 [2017] EWFC 25.

17 [2014] EWHC 4122 (Fam).

IS THERE A THRESHOLD?

Although the question of what constitutes 'exceptional wealth' has not yet been formally answered, it is interesting to analyse whether there is a financial threshold over which judges tend to feel they ought to find in favour of a special contribution. The parties in *Sorrell v Sorrell* had total assets of £75 million, and this was considered to be an exceptional enough amount of wealth to justify a special contribution argument, and in *Charman v Charman* the assets were about £131 million. However, in the more recent failed special contribution claims, the total assets have been greater. The total assets in *WM v HM* were £145.7 million, in *Chai v Peng* £161 million, in *Robertson v Robertson* £219 million, in *Work v Gray* $225 million, and in *AAZ v BBZ* £1 billion. Yet in the last few years, only total assets of $1.35-1.6 billion (where the husband had actually generated wealth of $6 billion through his company, but had donated $4.5 billion to a charitable foundation) in *Cooper-Hohn v Hohn* have been found sufficient to warrant special consideration. Clearly, the exceptionality of the wealth produced requires a very great sum indeed, although the answer as to what constitutes 'exceptional wealth' appears to be fluid.

We have at the very least got a figure below which it seems special contributions arguments will not succeed: Moor J in *SK v TK*[18] refused to accept a contributions claim, where the assets came to £18 million, and said that contribution cannot be a factor where the wealth generated by the parties, as in that case, is not 'truly vast'. Although he emphasised that he was 'certainly not intending to lay down a rule that it is impossible to make a 'special contribution' if the assets are below £20 million', he felt that the wealth generated by the husband's business was not sufficient to justify him getting a greater share of the wealth than his wife, who 'contributed herself in an equally valuable way to the best of her ability'. Despite this caveat, which follows Sir Mark Potter's warning in *Charman* that it would be 'dangerous' to identify any figure as a guideline threshold for a special contribution, it would seem that it would now be unwise to bring a special contribution claim where assets total £18 million or less.

However, it has now become clear that the courts are concerned with more than the mere amount of wealth generated by the breadwinner. In *Gray v Work*,[19] Holman J, upheld by the Court of Appeal, held that the amount of the wealth alone may be so extraordinary as to make it easy for the party who generated it to claim an exceptional and individual quality which deserves special treatment, but that often they will need independently to establish such a quality, whether by genius in business or some other field, so that a windfall is not enough. Although wealth is important, it will often have to be justified by a demonstration of 'genius'.

18 [2013] EWHC 834 (Fam).

19 [2015] EWHC 834 (Fam).

WHAT MAKES A 'GENIUS'?

So far all special contribution arguments have been run by entrepreneurial businessmen and those successful in the commercial or financial world. The courts do not appear to treat special contribution arguments differently depending on how the party has made their money, and what kind of 'genius' they claim to be, as they have allowed the claims of some businessmen, and not others. There has not yet been a case brought on the basis of artistic or sporting genius, and it would be intriguing to see how the courts would treat a claim based on that kind of success.

While Ryan Giggs and his wife must be praised for settling their ancillary relief proceedings in November 2017, it would have been interesting to see how the courts would have treated the special contribution claim for footballing skill that Mr Giggs said he would bring. As Holman J questioned in *Gray v Work*, 'it may one day fall for consideration whether a very highly paid footballer, who is very good at his job but may be no more skilful than past greats, such as Stanley Matthews or Bobby Charlton, makes a special contribution or is merely the lucky beneficiary of the colossal payments now made possible by the sale of television rights'. However, until a claim for musical or sporting genius is made, we can only speculate, and given the courts' reluctance to accept special contributions through business success, it would seem unlikely that a distinction would be made between commercial and other talents.

The term 'genius' itself is in any case relatively unhelpful, as was recognised by Holman J and upheld by the Court of Appeal in *Work v Gray*. He felt that 'the word 'genius' tends to be overused and is properly reserved for Leonardo Da Vinci, Mozart, Einstein, and others like them'. It is certainly difficult to compare a modern day 'genius' like Mr Cowan, the bin liner revolutionary, to Albert Einstein. The subjective nature of the term, together with the fact that no guiding criteria have been produced by the courts setting out what constitutes 'genius', has resulted in confusion and inconsistency as to when the courts do recognise 'genius'.

Perhaps the Court of Appeal's dicta in *Work v Gray*, upholding the decision of Holman J, that 'the use of the word 'genius' is unhelpful', and that 'it is sufficient for the court to determine whether the contribution is wholly exceptional', will result in less of a reliance being placed upon proving 'genius'. However, the court did not lay down any helpful guidance regarding what counts as 'exceptional', and merely said that the it was required to look 'both at the nature of the contribution and to determine whether it derives from an exceptional and individual quality', so that 'if the contribution does not derive from the 'exceptional and individual quality' of the contributor, it could not be a special contribution'. What the nature of the contribution should be, and what constitutes an exceptional and individual

quality, appears to be just as subjective and arbitrary as the term 'genius': indeed, the Court of Appeal itself in the same case held that that whether a party's contribution amounted to something special justifying a departure from equality is nothing more than a 'value judgment'.

HOW MUCH CAN THE BREAD-WINNER HOPE TO BE AWARDED IF THEY ARE SUCCESSFUL?

Rather than looking at the sums awarded to each party in every case, a better comparison of the cases can be made by considering the percentage splits between husband and wife in cases where the courts have recognised a special contribution. In *Cowan v Cowan*, the first successful special contributions claim, the husband got 62% of the assets to the wife's 38%. In *Sorrell v Sorrell*, the husband got 60% of the assets to the wife's 40%, while in *Charman v Charman* the husband received 64% of the assets to the wife's 36%, and in *Cooper-Hohn v Hohn*, the husband received 64%, and the wife received 36%. We can therefore see very similarly proportioned awards being given by the courts in successful cases, regardless of the amount of wealth.

Given that the court has never bestowed more than 64% of the assets upon the husband, and that some failed special contribution cases still provide a higher percentage of assets to the husband than the wife because of the advantages of having capital or a house over shares, it must be questioned how much of a difference a special contribution argument would actually make to the overall percentage split.

OTHER ARGUMENTS FOR A DEPARTURE FROM EQUALITY

It seems clear that special contributions should be viewed as a last resort, given the inconsistency of the courts to apply this rule and their reluctance to do so. For example, courts are much more willing to accept that the sharing principle should be departed from if something can be identified as non-matrimonial property. Indeed, it has been the general approach of the courts to ring-fence non-matrimonial assets in financial remedies proceedings, such as in *S v S*,[20] where it was held that any money the wife was expected to receive as an inheritance from her parents after the marriage had ceased could not be taken into account. Similarly, in *K v L*,[21] it was held that special contribution arguments did not apply to non-matrimonial property, including inheritances, and that normally non-matrimonial property led to departure from an equal split of assets. This is still the prevailing view, as in *WM v HM*, the most recent such case, Mostyn J said that 'the correct approach to

20 [2007] EWHC 1975 (Fam).

21 [2011] EWCA Civ 550.

give effect to the sharing principle is to try to calculate the scale of the matrimonial property and then normally to share that equally leaving the non-matrimonial property untouched'.

It is interesting to analyse the percentage splits of assets awarded by the courts in cases where the husband claimed both non-matrimonial assets and special contributions. While the husband in *Robertson v Robertson* failed to prove a special contribution, he was awarded 69% of the total assets on the basis that half of the shares in his company that had existed before the marriage were classed as non-matrimonial property. As he was awarded a higher proportion of the assets than any special contributions case to date, it may be questioned whether the courts are reticent to combine factors to enable either party to walk off with too great a share of the assets when they have the ability to argue both for a special contribution and for a non-matrimonial asset to be ring-fenced.

Meanwhile, in *AAZ v BBZ*, the husband was awarded 58.5% of the assets while the wife received 41.5% (all she had sought). Again, we see a result hovering around a 60/40 split, and if the judge had found that the husband had made a special contribution we would once more have seen a digression too far from equality.

In *Chai v Peng*, where the husband was found not to have made a special contribution, the husband was awarded 60% and the wife 40% of the assets, with the wife receiving less than 50% because the fact that she was awarded liquid assets was felt to justify the departure from an equal split. The prevalence of this kind of ratio surely points towards the court's reluctance to award any one party any more than about 60% of the total assets, regardless of the arguments submitted: in that case, had the judge found a special contribution on the part of husband, the percentage split would have swung further in favour of the husband than the courts seem willing to accept.

We can therefore see that for any claim brought, in the majority of cases the courts are unwilling to swing below 35% or above 65% for either party. It would seem that Sir Mark Potter P's ruling in *Charman v Charman* that the courts would not award higher than two-thirds of the total assets to the party arguing a special contribution can be extended. Instead, we can posit that the courts will not award higher than two-thirds of the total assets to either party, regardless of the number of arguments for a departure from equality being submitted. In cases where there are stronger grounds on which to argue a departure from equality, the addition of a special contribution claim would seem not to make a difference to the final split.

THE NEW 'CONDUCT' ARGUMENT?

Section 25(2)(g) states that the court shall have regard to 'the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it'. In *Miller/McFarlane*, Lord Mance said this section recognised the 'difficulty and undesirability' of any attempt to assess marital conduct, before then saying that he recognised the same difficulty as in conduct in respect of marital contributions, while Lady Hale wrote that 'the question of contributions should be approached in much the same way as conduct'.

Since the early 1970s and the judgment of Ormrod J in *Wachtel v Wachtel*,[22] conduct has not been relevant 'save in the most obvious and gross cases'. The number of cases therefore claiming conduct as a reason to depart from equality has significantly dropped, and where parties have tried to claim conduct inequitable to disregard, as in *Miller/McFarlane*, it was held that 'in most cases fairness does not require consideration of the parties' conduct', and should only be taken into account in exceptional cases, for example where there has been serious financial mismanagement, as there was by the husband in *R v B.*[23]

Similarly, the courts have been reluctant to find special contributions. In *WM v HM,* Mostyn J repeated his analogy from *JL v SL*,[24] which is that only cases 'as rare as a white leopard' will justify an unequal division of assets. The English courts have certainly shown their reluctance to accept contributions as a factor in ancillary relief proceedings. The Family Court of Australia has gone even further, stating in *Hoffman v Hoffman*[25] that 'the notion of special contribution has all been a terrible mistake'.

GENDER DISCRIMINATION

The clear potential for gender discrimination in special contributions claims has been something the courts have been eager to avoid. In *Lambert v Lambert*, Thorpe LJ says that section 25(2)(f) 'does not suggest any bias in favour of the breadwinner', and says that 'there must be an end to the sterile assertion that the breadwinner's contribution weighs heavier than the homemaker's', where the 'homemaker' usually runs the household, looks after the children, and performs other domestic tasks, often having given up their job to do so. Similarly, in *Miller/McFarlane*[26] Lady Hale stated that Section 25(2)(f) of the 1973 Act 'does not refer to the contributions which each has made to the parties' accumulated wealth,

22 [1973] EWCA Civ 10.

23 [2017] EWFC 33.

24 [2015] EWHC 360 (Fam).

25 [2014] Fam FACF 92.

26 [2006] 1 FLR 1186.

but to the contributions they have made (and will continue to make) to the welfare of the family. Each should be seen as doing their best in their own sphere'. Indeed, Lady Hale made it clear that a homemaker of exceptional ability in that area has as much of a right to bring a claim for special contributions as the creator of a multi-million pound business when she said 'a domestic goddess self-evidently makes a 'stellar' contribution' in *Miller/McFarlane*.

However, a year later in *Charman v Charman* Sir Mark Potter, President of the Family Division, said that 'the notion of a special contribution to the welfare of the family will not successfully have been purged of inherent gender discrimination unless it is accepted that such a contribution can, in principle, take a number of forms; that it can be non-financial as well as financial, and that it can thus be made by a party whose role has been exclusively that of a home-maker'.

Although the courts have not yet seen a special contributions claim brought by a homemaker, they certainly do take the contribution of the wife to the family extremely seriously in considering whether it balanced out a husband's financial contribution. Indeed, the courts' approaches to special contributions appear to be extremely unbiased when it comes to traditional gender roles, and often explicitly acknowledge the discrimination that the making of a distinction between a husband's financial and a wife's domestic contribution would create. Recently, in *Gray v Work*, Holman J (whose decision was upheld by the Court of Appeal) said that it would 'be unjustifiably gender discriminatory to make an unequal award…they each contributing in a range of differing, but all of them important, ways to a marriage'.

Although the Court of Appeal in that case said that 'the fact that there has only been one reported case since *Charman* in which special contribution has resulted in an unequal division of matrimonial property makes it difficult to sustain the submission that the manner in which it is being applied is discriminatory', supported by that fact that in reality the courts do seem to actively seek to avoid discrimination, it is clear that in theory the concept of special contribution does have the potential to discriminate. This was recognised even after the Court of Appeal's judgment in *Work v Gray*, when Mostyn J in *WM v HM* referred to a successful special contribution claim as a 'highly discriminatory unequal division of the product of the matrimonial partnership', and pointed out that the problem with the whole concept of special contribution is that 'it gives rise to the Orwellian oxymoron that "all contributions are equal but some are more equal than others"'.

CONCLUSION

The law remains stuck in a mire of confusion, and no threshold or specific definition as to what constitutes the 'exceptional contribution' that the Court of Appeal held in *Work v Gray* must be proved has been provided, so that the finding of a special contribution by the courts remains relatively arbitrary. Indeed, the Court of Appeal itself in that case said that finding whether one party has made such an exceptional contribution that the disparity in the parties' respective contributions makes it inequitable to disregard it or not is a discretionary value judgment. It seems a 'special contribution' remains the 'term of art' it was labelled by Wilson LJ in *K v L*, rather than an exact science.

However, despite this uncertainty, it is clear that special contribution arguments are rarely successful, and that even if they are, the courts are unlikely to award more than two-thirds of the total assets to the party whose special contribution has been recognised. The courts are also wary of the possibility of gender discrimination inherent in the traditional male breadwinner/female homemaker split, and it is difficult to persuade them that the disparity in contribution between a breadwinner and homemaker is sufficient enough to make it inequitable to disregard.

Despite the low success rate of special contribution arguments, it nonetheless seems likely that where parties have created substantial wealth through their own talent, so that they feel it would be unfair for their spouse to receive half of the assets, a special contribution will continue to be claimed in an effort to escape the sharing principle. It will be interesting to see whether a homemaker will ever claim a domestic special contribution, and also how the courts would treat vast wealth created by a means other than success in the business sphere.

Sexual Harassment in the Workplace: How Women are Failed by the Law

Rosie Richardson*

ABSTRACT

The increased media attention surrounding sexual harassment in the workplace has shed light on an issue which is deserved of critical legal analysis. Through the lens of feminist legal theory this article argues that the English legal system fails to provide satisfactory remedies for the tort of sexual harassment in the workplace. Societal acceptance of this often-ignored tort alongside insufficient legislation has left women to suffer humiliating and degrading treatment. Sexual harassment case law has developed significantly from Porcelli in 1984 to Marks in 2016 due to the implementation of EU law directives and the Equality Act 2010. Whilst women's legal position has improved over time, true equality has not been achieved. The issues of sex and power have impacted the application of discrimination law and how women are viewed in the eyes of the law. The introduction of a reasonable woman standard like that in the US and a more representative judiciary would help address the gendered group harm of sexual harassment in the workplace. Both renewed legislation and a change in societal attitudes are key to women participating in the labour-market free from ridicule and oppression.

SEXUAL HARASSMENT IN THE WORKPLACE: HOW WOMEN ARE FAILED BY THE LAW

The recent outpouring of accusations of sexual harassment in the workplace has highlighted the extent of the ignored discrimination and suffering women still face in the Western world today. Whilst sexual equality is a fairly common legal guarantee[1], inequality of the sexes continues to play out societally. Sexual harassment in the workplace is a product of the clash between sex and power; a change in societal attitudes alongside legislation is fundamental to making sexual harassment less of a commonality. Why then, with legislation to protect women from such harm, is the question posed nearly 30 years ago by the eminent feminist legal scholar Catherine MacKinnon still relevant today: 'does sexual discrimination law grasp the true dimensions of women's inequality?'[2]. The characterisation of women in law

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1 C MacKinnon, Women's Lives, Men's Laws (Harvard University Press 2005) 44

2 C MacKinnon, Sexual Harassment of Working Women: A Case of Sex Discrimination (Yale University Press 1979) 11

as 'different' has impacted how they are seen as objects and subjects of the law[3]. This article argues that a culture which tacitly accepts sexual harassment in the workplace is bolstered by a legal system which fails women in harassment cases. Examining the legislation and case law of sexual harassment, this article seeks to examine why this 'taboo' still pervades society today. The Equality Act 2010[4] may have further enshrined women's rights in law but sexual harassment in the workplace is still rife, with 52% of women having experienced it at some point during their working lives[5].

THE DEVELOPMENT OF SEXUAL HARASSMENT LAW

Whilst having always been experienced by women, sexual harassment was not recognised as a legal wrong until MacKinnon's seminal work in 1979[6]. This landmark gave a concrete phrase to the ridiculing, shameful and unpleasant behavior women faced in their daily life; in a sense, this step alone gave women more empowerment to seek to remedy the tort made against them. In this jurisdiction, sexual harassment cases are brought within the context of employment law as well as discrimination law under the Equality Act 2010[7]. The law of tort, MacKinnon argues, is the wrong approach to remedying sexual harassment; tort focuses on individual wrongs, whereas sexual harassment should be seen as a 'group injury', which is socially based[8]. It has been argued that there is potential within tort law for the development of a specific tort of sexual harassment[9]. MacKinnon proposed the use of sex discrimination law in 1979, when analyzing sexual harassment in the US context[10]; English discrimination law is based on differential treatment and therefore sexual harassment is hard to prove. Conaghan argues that 'if sexual harassment is about abuse of power in a gendered context, why present it as simply differential treatment?'[11]. In fact, the development of case law on sexual harassment from the late 1980s through to the early 2000s highlights the

3 M Fineman, 'Feminist Theory and Law' [1992] 18(2) Harvard Journal of Law and Public Policy, 351

4 Equality Act 2010

5 Trades Union Congress, *Still just a bit of banter? Sexual harassment in the workplace in 2016* https://www.tuc.org.uk/sites/default/files/SexualHarassmentreport2016.pdf

6 C MacKinnon, Sexual Harassment of Working Women: A Case of Sex Discrimination (Yale University Press 1979); L Claire, 'Harassment, sexual harassment and the Employment Equality (Sex Discrimination) Regulations 2005' [2006] Industrial Law Journal, 2; J Conaghan, 'Gendered Harms and the Law of Tort: Remedying (Sexual) Harassment' [1996] 16 Oxford Journal of Legal Studies 409

7 L Claire 'Harassment, sexual harassment and the Employment Equality (Sex Discrimination) Regulations 2005' [2006] Industrial Law Journal, 1 ; J Dine and B Watt, 'Sexual Harassment: Moving Away from Discrimination'[1995] 58 The Modern Law Review, 343

8 C MacKinnon, Sexual Harassment of Working Women: A Case of Sex Discrimination (Yale University Press 1979) 112

9 J Conaghan, 'Gendered Harms and the Law of Tort: Remedying (Sexual) Harassment' [1996] 16 Oxford Journal of Legal Studies 428

10 C MacKinnon, Sexual Harassment of Working Women: A Case of Sex Discrimination (Yale University Press 1979)

11 J Conaghan, 'Gendered Harms and the Law of Tort: Remedying (Sexual) Harassment' [1996] 16 Oxford Journal of Legal Studies, 430

failings of assessing sexual harassment through the lens of discrimination law[12].

Porcelli[13], 1986, was a landmark case for sexual harassment as it was the first of its kind to be successful in England and Wales; the Employment Appeal Tribunal held that Porcelli, after being subjected to a campaign of sexual harassment by two male colleagues, had been treated less favourably on the grounds of her sex than a man would have been. This was the first time that sexual harassment was seen as sex discrimination in light of the Sex Discrimination Act (SDA) 1975. The progress made in *Porcelli*[14] was however thwarted by the House of Lord's decision in the 2003 case of *Pearce*[15] where the sexual harassment of a lesbian teacher was held not to be sex discrimination because she was not treated less favourably than a similarly situated man. In *Porcelli*[16], the comparator was simply a man, but in *Pearce*[17] the question of a correct comparator was more complex. It was decided that a homosexual man was the accurate comparator and that he would have been treated just as badly; therefore, there was no discrimination on the basis of *Pearce's* sex. It was held that the abuse suffered by Pearce because of her sexual orientation fell outside of the 1975 Act. Samuels[18] argued that after *Pearce*[19], when the House of Lords disapproved the reasoning in *Porcelli*[20], it was much harder to bring a case of sexual harassment under the 1975 Act.

The framing of sexual harassment within discrimination law is problematic in cases where women and men are both exposed to a harm; in the case of *Stewart 1994*[21], employees were exposed to pictures of naked women and in *Brumfitt 2003*[22], offensive language was used against the employees. There was no recognition in these cases that the harm may affect men and women differently and therefore it can be argued that the discrimination lens through which sexual harassment is analysed fails to see the complicated and subtle ways harassment affects women[23]. Dine and Watt argue that 'issues of differential treatment are irrelevant in sexual harassment claims because the injury derives from the bullying nature of the harasser's behavior which exploits the sexual sensitivities of the victim'[24]. The cases of

12 Sex Discrimination Act 1975

13 *Porcelli v Strathclyde Regional Council* [1986] ICR 564

14 *Porcelli v Strathclyde Regional Council* [1986] ICR 564

15 *Pearce v Governing Body of Mayfield School* [2003] UKHL 34

16 *Porcelli v Strathclyde Regional Council* [1986] ICR 564

17 *Pearce v Governing Body of Mayfield School* [2003] UKHL 34

18 H Samuels 'A Defining Moment: A Feminist Perspective on the Law of Sexual Harassment in the Workplace in the Light of the Equal Treatment Amendment Directive [2004] 12 Feminist Legal Studies, 190

19 *Pearce v Governing Body of Mayfield School* [2003] UKHL 34

20 *Porcelli v Strathclyde Regional Council* [1986] ICR 564

21 *Stewart v Cleveland Guest (Engineering) Ltd* [1994] I.R.L.R. 440

22 Brumfitt v Ministry of Defence [2004] All ER (D) 479

23 L Claire 'Harassment, sexual harassment and the Employment Equality (Sex Discrimination) Regulations 2005' [2006] Industrial Law Journal,4

24 J Dine and B Watt, 'Sexual Harassment: Moving Away from Discrimination'[1995] 58 The Modern Law Review, 343

Brumfitt[25] and *Stewart*[26] highlight the difficulty of translating the realities of women's lives into law.

In 2005, under the Equal Treatment Directives[27], EU law framed both harassment relaxed to sex and harassment of a sexual nature as discrimination. Despite the fact these directives have been implemented more or less correctly, their impact is not necessarily what would have been expected[28]. Whilst taking some elements from US sexual harassment law, EU law deviates on the understanding of sexual harassment; instead of focusing on discrimination, it focuses on the 'dignity harm' which harassment causes[29]. EU law instead ignores the formal approach that insists on less favourable treatment by one sex, thus removing the need for a comparator [30]. As the EU law provisions are directives, their effectiveness is dependent on the way national tribunals interpret them; there is a danger of discrepancy between Member States in their understanding the difficulties women face when reporting harassment[31]. Whilst discrimination based on sex existed prior to the directives in this country, discrimination on the grounds of age, religion or sexual orientation was implemented as a direct result of the directives[32]. The Equality Act 2010 defines sexual harassment as:

> 'unwanted conduct of a sexual nature which has the purpose or effect of violating someone's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment'[33].

Significantly, whilst the Act is domestic law, substantial proportions of it could be repealed without rights under EU law, which is concerning in light of Brexit[34]. The act distinguishes between gender harassment and sexual harassment; it focuses on protected characteristics which are sex and sexual orientation. Whilst the law enshrines women's rights in the workplace, instances of reporting and successful cases at Employment Tribunals are low.

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25 *Brumfitt v Ministry of Defence* [2004] All ER (D) 479

26 *Stewart v Cleveland Guest (Engineering) Ltd* [1994] I.R.L.R. 440

27 Council Directive 2002/73/EC; Council Directive 2006/54/EC

28 A Numhauser- Henning and S Laulom, 'Harassment related to Sex and Sexual Harassment in 33 European Countries: Discrimination versus Dignity' [2012] European Union, 1

29 A Numhauser- Henning and S Laulom, 'Harassment related to Sex and Sexual Harassment in 33 European Countries: Discrimination versus Dignity' [2012] European Union, 4

30 Fredman, S 'The Future of Equality in Britain' Working Paper Series 2002 (5) Equal Opportunities Commission, 14

31 H Samuels 'A Defining Moment: A Feminist Perspective on the Law of Sexual Harassment in the Workplace in the Light of the Equal Treatment Amendment Directive [2004] 12 Feminist Legal Studies, 209

32 *Trades Union Council: UK Employment Rights and the EU: Assessment of the impact of membership of the European Union on employment rights in the UK*, 8 https://www.tuc.org.uk/sites/default/files/UK%20employment%20rights%20and%20the%20EU.pdf

33 Equality Act 2010

34 Trades Union Council: *UK Employment Rights and the EU: Assessment of the impact of membership of the European Union on employment rights in the UK*, 9 https://www.tuc.org.uk/sites/default/files/UK%20employment%20rights%20and%20the%20EU.pdf

SEX AND POWER

The development of law and legal institutions which govern society have, throughout history, been written and developed by men. The law was created by men at a time when women were explicitly excluded from participation[35]. As a result, the law, including that which applies to women's lives specifically, is constructed through the male perspective[36] This leads to a dichotomy between the reality of women's lives and the legal system which should be in place to protect those lives. MacKinnon argues that legal method, stretching from Aristotle's Nichomanean Ethics, has been predicated on distinctions: treating likes alike and un-alikes differently[37]. The concepts of equality and difference have dominated the history of legal thought but have failed to address gendered issues. The question is raised by feminist legal theory of whether women want to be treated equally to men or whether gender equality is best achieved through different treatment? There are two options to achieve gender equality through law, argue Bartlett and Kennedy: equality on the basis of similarities between the sexes or special treatment because of differences[38]. They favour the similarities argument since the difference notion leads to a comparator approach[39]. Fineman corroborates this, asserting that women's difference from men is for the most part socially constructed and negatively impacts the way the law sees women[40], thereby preventing the advancement of women's legal position.

The difference concept can be a positive tool to establish increased rights for women in law however the concept is also used to explain the predominance of male perpetrators and female victims of sexual assault, leaving the issue not one of sex inequality but merely of sex 'difference'[41]. It can be seen that by focusing on difference, the law fails to consider the inherent sameness of men and women and therefore the ensuing equality they should receive. In contrast, radical legal feminism asserts that the law fails women because they simply do not matter to the law and therefore the patriarchal hierarchy must be dismantled[42]. Whichever view is taken it is a universal truth that 'no law addresses the deepest, simplest, quietest and most widespread atrocities of women's everyday lives'[43]. This is seen in the low conviction rates for rape, the unequal pay women still endure and society's tacit acceptance of sexual harassment as part of the day to day life of a woman. It is interesting to consider

35 M Fineman, 'Feminist Theory and Law' [1992] 18(2) Harvard Journal of Law and Public Policy, 350

36 C MacKinnon, Women's Lives, Men's Laws (Harvard University Press 2005) 34

37 C MacKinnon, Women's Lives, Men's Laws (Harvard University Press 2005) 45

38 K Bartlett and R Kennedy, Feminist Legal Theory: Readings in Law and Gender (Westview Press 1991) 4

39 K Bartlett and R Kennedy, Feminist Legal Theory: Readings in Law and Gender (Westview Press 1991) 5

40 M Fineman, 'Feminist Theory and Law' [1992] 18(2) Harvard Journal of Law and Public Policy, 360

41 C MacKinnon, Women's Lives, Men's Laws (Harvard University Press 2005) 51

42 R West, 'The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory' in M Fineman and N Thomadsen (eds) At the Boundaries of Law: Feminism and Legal Theory (Routledge 1991), 117

43 C MacKinnon, Women's Lives, Men's Laws (Harvard University Press 2005) 34

that many of the gender specific harms which women face are within the private sphere, rather than the public sphere[44]. Domestic abuse, prostitution and lack of reproductive control are all harms which are more hidden in society and from the law; it can be argued that the law is simply absent from the private sphere, therefore disregarding the women who are deemed 'unworthy of legal regulation'[45]. MacKinnon argues that it is not just what the law actively does which affects women's lives, but it is just as much what it fails to do[46]. Law which fails to consider the reality of women's lives therefore gives unsatisfactory remedies when gender specific harms such as sexual harassment in the workplace are inflicted.

WOMEN IN THE WORKPLACE

Sexual harassment in the workplace combines a number of forces which control and repress women in society. Sexual power is used to maintain economic control and conversely, economic power is used to maintain sexual control[47]. Without concrete legal challenge to this abuse of power in the workplace it is tacitly sanctioned and allowed to remain an ordinary feature of a woman's experience. MacKinnon argues that power is central to harassment; the employer controls the employee, and the predominantly male perpetrator exerts sexual dominance over his female victim[48]. Sexual harassment in the workplace can be explained as a response to the threat of women impinging on men's traditional breadwinner role. Work is fundamental to women's survival and independence and sexual harassment seeks to degrade women as a workforce[49] . The crux of sexual harassment in the workplace is less about the unwanted sexual advances which women receive and more about the about the underlying sexism from which it stems. Women in the workplace is still seen by some as an issue and sexual harassment is utilized to constrain women's progress. As Schulz neatly states, 'the real issue isn't sex, it's sexism on the job'[50] .

The failure of the law to provide a satisfactory remedy for sexual harassment claims therefore perpetuates the oppression of women in society. The legal protection for workers who suffer sexual harassment is 'patchy'[51]. Conaghan argues that 'harms suffered by women are not traditionally recognized and remedied by the legal system'[52]. It is crucial that torts against

44 A Howe 'The Problem of Privatized Injuries' in M Fineman and N Thomadsen (eds) At the Boundaries of Law: Feminism and Legal Theory (Routledge 1991), 156

45 E Schneider and N Taub "Perspectives on Women's Subordination and the Role of Law' in The Politics of Law (Basic Books 1982) 122

46 C MacKinnon, Women's Lives, Men's Laws (Harvard University Press 2005) 34

47 A Scales, 'Law and Feminism: Together in Struggle' [2003] University of Kansas Law Review 51, 294

48 C MacKinnon, Sexual Harassment of Working Women: A Case of Sex Discrimination (Yale University Press 1979), 1

49 C MacKinnon, Sexual Harassment of Working Women: A Case of Sex Discrimination (Yale University Press 1979), 7

50 V Schultz "Sex is the Least of it: Let's Focus Harassment Law on Work, not Sex", in L. Le Moncheck & J. Sterba (eds) Sexual Harassment: Issues and Answers (Oxford University Press 2001), 269–273

51 L Claire 'Harassment, sexual harassment and the Employment Equality (Sex Discrimination) Regulations 2005' [2006] Industrial Law Journal

52 J Conaghan, 'Gendered Harms and the Law of Tort: Remedying (Sexual) Harassment' [1996] 16 Oxford Journal of Legal

individual women are viewed in the wider context of the white male supremacy which still dominates society, and especially the labour market. Sexual harassment is not simply an issue between two individuals but is a 'manifestation of power abuse in gender relations'[53]. Sexual harassment in the workplace is a substantial barrier to women's success in the workplace and therefore their advancement in society; it is a method through which the dominant male hierarchy can be reaffirmed.

The Equality Act 2010 has gone some way to improve the outcome of sexual harassment cases for claimants. It crucially removed the need for a similarly situated comparator[54], meaning that today *Pearce*[55] would hopefully be decided differently. Secondly, the revised burden of proof which requires the employer to prove that the treatment 'was in no sense whatsoever on the grounds of sex' will aid claimants, however there is still the need to prove the primary facts of the harassment before the Employment Tribunal. In the UK women make up around 45% of tribunal judges, 28% of court judges and 24% Court of Appeal judges[56]; whilst this shows an upward trend over time, women are still very much underrepresented in the judiciary. The Council of Europe's report into diversity across the judiciaries in Europe showed that the UK was well below the Europe-wide average for the percentage of women in the judiciary; the European average is 51% whereas the average in England and Wales was a mere 30% in 2016[57]. Establishing that the actions by the harasser were discriminatory may still be problematic for women as they have to prove that the conduct was not reasonable; women are therefore still reliant on the court's interpretation of unreasonableness[58], courts which are significantly dominated by men who are unlikely to comprehend the fundamentally gendered harm of sexual harassment.

WHAT CAN BE DONE?

Sexual harassment in the workplace is still prevalent in the UK today and therefore the law needs to be reformed in order to effectively tackle this infringement of women's rights. Legal scholars have proposed contrasting alterations to the law on sexual harassment[59]. Monti

Studies, 408

53 J Conaghan, 'Gendered Harms and the Law of Tort: Remedying (Sexual) Harassment' [1996] 16 Oxford Journal of Legal Studies 408

54 H Samuels 'A Defining Moment: A Feminist Perspective on the Law of Sexual Harassment in the Workplace in the Light of the Equal Treatment Amendment Directive [2004] 12 Feminist Legal Studies, 203

55 *Pearce v Governing Body of Mayfield School* [2003] UKHL 34

56 Ministry of Justice , 'Judicial Diversity Statistics 2017' https://www.judiciary.gov.uk/wp-content/uploads/2017/07/judicial-diversity-statistics-2017-1.pdf

57 Council of Europe 'European Judicial Systems: Efficiency and Quality of Justice' [2016] 23 CEPEJ Studies https://www.coe.int/t/dghl/cooperation/cepej/evaluation/2016/publication/REV1/2016_1%20-%20CEPEJ%20Study%2023%20-%20General%20report%20-%20EN.pdf

58 H Samuels 'A Defining Moment: A Feminist Perspective on the Law of Sexual Harassment in the Workplace in the Light of the Equal Treatment Amendment Directive [2004] 12 Feminist Legal Studies, 204

59 L Claire 'Harassment, sexual harassment and the Employment Equality (Sex Discrimination) Regulations 2005' [2006] Industrial Law Journal; J Dine and B Watt, 'Sexual Harassment: Moving Away from Discrimination'[1995] 58 The Modern Law

suggests that a 'reasonable woman' standard, like that in the US, should be implemented in UK tort law[60]. Tort law is known to treat cases based on the relevance of individual characteristics, and specific facts, and therefore the fact that the victim is a woman should be something of recognizable legal importance. A reasonable woman standard would 'legitimise women's perceptions and reactions to unwelcome behaviour'[61]. This would therefore recognize the harm of sexual harassment at the individual level of the victim and also at the gendered harm towards women at the societal level. A reformed law of tort which acknowledged the unique position of women in society and therefore remedied individual torts against them would construe the wider message that such derogatory behavior is unacceptable.

Claire proposes that a statutory tort of sexual harassment should be implemented as the discrimination law framework is not proving a successful remedy for claimants[62]. A statutory tort would ensure more emphasis on the effect of the tort, rather than focusing on whether the conduct was due to sex or of a sexual nature. Dine and Watt go even further to suggest that sexual harassment could be a tort or a crime; the anticipation of immediate unlawful personal violence could lead to an assault being found, or if touching takes place, a battery could be found[63]. Determining whether an act is criminal is discussed by Ashworth and Feinberg[64]; it can be asserted than something is criminal if it is deemed wholly unacceptable and causes harm. Dine and Watt conclude that sexual harassment within such a definition of a crime, should be criminalized[65]. Whether this is a possibility in UK law remains to be seen. Reforming the current law of tort so that the unique characteristic of being a woman who may experience gendered harms should be the priority.

The Trades Union Congress report 'Still just a bit of banter?'[66] highlighted the low reporting rates of sexual harassment in the workplace. 79% of women surveyed did not report the harassment to their employer, and only 6% who reported it felt their claim had been dealt with satisfactorily[67]. The greatest reasons given for not reporting were embarrassment, not being taken seriously and concerns over reporting leading to negative relationships in the

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Review; Monti, G 'A Reasonable Woman Standard in Sexual Harassment Litigation' [1999] Legal Studies

60 Monti, G 'A Reasonable Woman Standard in Sexual Harassment Litigation' [1999] Legal Studies, 552

61 Monti, G 'A Reasonable Woman Standard in Sexual Harassment Litigation' [1999] Legal Studies, 571

62 L Claire 'Harassment, sexual harassment and the Employment Equality (Sex Discrimination) Regulations 2005' [2006] Industrial Law Journal, 8

63 J Dine and B Watt, 'Sexual Harassment: Moving Away from Discrimination'[1995] 58 The Modern Law Review, 352-3

64 Ashworth, A, Principles of Criminal Law, (Clarendon Press 1991); Feinberg, J, Moral limits of The Criminal Law: Volume One, Harm to Others, (Oxford University Press 1984)

65 J Dine and B Watt, 'Sexual Harassment: Moving Away from Discrimination'[1995] 58 The Modern Law Review, 362

66 Trades Union Congress, 'Still Just a Bit of Banter?: Sexual Harassment in the Workplace in 2016' [2016] Trades Union Congress Publications

67 Trades Union Congress, 'Still Just a Bit of Banter?: Sexual Harassment in the Workplace in 2016' [2016] Trades Union Congress Publications, 19

workplace[68]. The Equality Act 2010[69] has allowed for some successful sexual harassment in the workplace claims to be won, for example the 2016 case *Marks v Derbyshire Healthcare NHS Foundation Trust*[70] where the claimant had suffered a torrent of sexual harassment at work and was subsequently unfairly dismissed. Successful cases are infrequent and this can be explained by the workplace attitude towards sexual harassment but also the strict time limit for claims: claims have to be brought within three months of the alleged harassment. Harassment of a sexual nature may be particularly difficult to process and therefore the short deadline for claims is problematic for women. Between July 2013 and July 2017 the government introduced fees of up to £1200 to bring a claim before an Employment Tribunal, which saw claims drop from an average of 5000 a year in 2012 to an average of 1500 a year between 2013-2017[71]. This attempt by the government to reduce 'nuisance cases' and thereby infringe workers' rights was ruled unlawful in 2017 by the Supreme Court and the £32million profit from the fee introduction shall be repaid to claimants. Women who were deterred from bringing a sexual harassment claim during this period will have missed the chance to apply to the Employment Tribunal, except for in specific circumstances, for example if they can prove they had started a claim but withdrew it because of being unable to pay fees[72]. The deterrence of high fees may have been removed since July 2017, but many factors such as fears of reporting leading to a negative working environment for the claimant remain a significant issue for women.

CONCLUSION

A disjuncture between women's lived experiences and the legal protection which they receive for harms committed against them still pervades society today. The question posed by MacKinnon in 1979 'does sexual discrimination law grasp the true dimensions of women's inequality?'[73] is unfortunately still pertinent. The landmark case of *Porcelli*[74] recognized sexual harassment in the workplace for the first time in English law, but the subsequent overruling by the House of Lords in *Pearce*[75] was a major set-back for women's status in law. The framing of sexual harassment in discrimination law was problematic for

68 Trades Union Congress, 'Still Just a Bit of Banter?: Sexual Harassment in the Workplace in 2016' [2016] Trades Union Congress Publications, 21

69 Equality Act 2010

70 *Marks v Derbyshire Healthcare NHS Foundation Trust Case* Nos:2603606/13

71 BBC, 'Employment tribunal tees unlawful, Supreme Court rules' (26 July 2017) http://www.bbc.co.uk/news/uk-40727400

72 Citizens Advice, 'If Fees Stopped You Making an Employment Tribunal Claim' 2017, https://www.citizensadvice.org.uk/work/problems-at-work/employment-tribunals-from-29-july-2013/what-will-it-cost-to-make-a-claim-to-an-employment-tribunal/if-fees-stopped-you-making-an-employment-tribunal-claim/

73 C MacKinnon, Sexual Harassment of Working Women: A Case of Sex Discrimination (Yale University Press 1979) 11

74 *Porcelli v Strathclyde Regional Council* [1986] ICR 564

75 *Pearce v Governing Body of Mayfield School* [2003] UKHL 34

Brumfitt [76]and *Stewart*[77] because of the difficulty of aptly construing the gendered harms women face. The Equal Treatment Directives[78] increased the rights of women in EU law, which consequently increased rights in English law; for the first time, discrimination on the basis of sexual orientation was recognized. The Equality Act 2010[79], following EU law, importantly removed the need for a similarly situated comparator harassment cases and reversed the burden of proof onto the employer who has to prove that the conduct was in 'no sense whatsoever on the grounds of sex'. Sexual harassment in the workplace remains a serious issue for women and there have been calls to reform English discrimination law, with some suggesting it should be criminalised[80]. English law has not followed the US reasonable woman test; introducing this would legitimize women's reactions to unwelcome and humiliating behavior[81]. Women remain underrepresented in the judiciary[82]; such an institution needs to be reflective of wider society in order to address the 'group injury'[83] of sexual harassment in the workplace. With the impending loss of EU law rights after Brexit it is concerning to note that whilst the Equality Act 2010 is domestic law, significant areas of the act could be repealed[84], meaning that the advances made in recent years for women's legal position could be thwarted. At the centenary of partial women's suffrage in this country, it is worth pausing to consider how the women who fought for their rights might view society today: whilst significant progress in women's rights must be celebrated, society should continue to strive for true equality. The freedom to participate in the labour market unhindered by sexual harassment is fundamental to achieving equality. Legislation which considers women's unique position in society and the gendered harms they face is crucial to improving women's legal standing. Without such recognition in law, the English legal system is complicit in the continued oppression of women.

76 *Brumfitt v Ministry of Defence* [2004] All ER (D) 479

77 *Stewart v Cleveland Guest (Engineering) Ltd* [1994] I.R.L.R. 440

78 Council Directive 2002/73/EC; Council Directive 2006/54/EC

79 Equality Act 2010

80 J Dine and B Watt, 'Sexual Harassment: Moving Away from Discrimination'[1995] 58 The Modern Law Review, 362

81 Monti, G 'A Reasonable Woman Standard in Sexual Harassment Litigation' [1999] Legal Studies, 571

82 Ministry of Justice , 'Judicial Diversity Statistics 2017' https://www.judiciary.gov.uk/wp-content/uploads/2017/07/judicial-diversity-statistics-2017-1.pdf

83 C MacKinnon, Sexual Harassment of Working Women: A Case of Sex Discrimination (Yale University Press 1979) 112

84 Trades Union Council: *UK Employment Rights and the EU: Assessment of the impact of membership of the European Union on employment rights in the UK*, 9 https://www.tuc.org.uk/sites/default/files/UK%20employment%20rights%20and%20the%20EU.pdf

The Inexorable Rise of Investor-State Arbitration in Regional and Bilateral Agreements

Laura McDonald*

ABSTRACT

Since the mid-1990s there has been a large increase in the use of investor-state arbitration. This paper argues that this trend is predominantly the result of growing awareness about the benefits offered by investor state dispute settlement amongst the legal and investor communities. The proliferation of investment agreements has facilitated this learning process, as has the inherent bias in the arbitration system. Despite continuing concerns regarding 'regulatory chill', shifts in domestic political and economic conditions have led to greater state intervention in the economy. This can be seen in the rise of the 'New Left' in Latin America, as exemplified by the nationalisation of core industries by the Venezuelan government, which has led to a raft of investor claims since the early 2000s. The responses of European governments to the financial crisis since 2007-8 have similarly produced disputes with investors, even where the effects on foreign investment were incidental results of the policies concerned. Despite moves to limit the provisions for investor-state arbitration in recent regional and bilateral investment agreements, the terms of old treaties will continue to bite. The Energy Charter Treaty will be an ongoing source of arbitration, as governments seek to implement environmentally friendly policies.

INTRODUCTION

Since the mid-1990s there has been a large increase in the use of investor-state arbitration, particularly taking off at the end of the decade.[1] The number of known cases peaked in 2015, and though dipping slightly in 2016, the total was still higher than the previous record.[2] The proliferation of regional and bilateral agreements containing an agreement by the host state to compulsory future arbitration has been essential to enabling this.[3]

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1 UNCTAD, 'Recent Trends in IIAS and ISDS', *IIA Issues Note*, Feb 2015, No. 1.

2 UNCTAD, 'Special Update on Investor-State Dispute Settlement: Facts and Figures', *IIA Issues Note*, Nov 2017, No. 3.

3 See for example: Gus Van Harten, 'Private Authority and Transnational Governance: The Contours of the International System of Investor Protection' (2005) 12 Review of International Political Economy, 600, 607; Zachary Elkins, Andrew T Guzman, Beth A Simmons, 'Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000', (2006) 60 International Organization, 811.

However, these agreements are not in themselves sufficient to explain the spread of investor-state arbitration. An important element in the increased use of arbitration by investors appears to be a function, at least in part, of greater awareness of the possibilities available to them through such means.[4] This is important because only investors can initiate arbitration proceedings. In this sense, it is an investor-driven system.[5] According to the United Nations Conference on Trade and Development (UNCTAD), recent years have seen an increase in the proportion of cases in which the respondent state is a developed country.[6] Whilst firms from developing countries are now investing in developed economies at greater levels,[7] this does not appear to have been the cause of the increased vulnerability of developed states to arbitration. Instead, cases brought against developed states are the result of policies taken by their governments in response to the financial crisis and in relation to increased concerns around climate change.[8] At the same time, greater investor and lawyer experience in using the mechanism may also play a role. There has also been an increase in the number of cases taken to arbitration by firms from the global South.[9] Developing countries make up a higher proportion of respondents in cases brought by developing country firms than in all claims: 73% against 53% of total cases.[10] However, this is relatively easy to explain with reference to the increasing trend towards capital export in developing countries.[11] This is a distinct pattern from that of the increase in developed states as respondents. It is perhaps more difficult to explain the continued use of investor-state arbitration on a more general level, especially given the oft-repeated mantra that the presence of a regional or bilateral trade agreement is likely to induce 'regulatory chill'.[12] This paper argues that the general spread and continued increase in the use of investor-state arbitration is linked not only to increasing awareness in the legal and investor communities, assisted by systemic bias, but also to shifts in domestic policy towards greater state intervention, as well as policies implemented by European governments in response to the financial crisis and climate change.

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4 See Matthew Skinner, Cameron A Miles, Sam Luttrell, 'Access and Advantage in Investor-State Arbitration: The Law and Practice of Treaty Shopping', (2010) 3 Journal of Energy Law and Business, 260.

5 Van Harten 2005 (n3); Gus Van Harten, *Investment Treaty Arbitration and Public Law* (OUP, 2007); Gus Van Harten, 'Investment Treaty Arbitration and Its Policy Implications for Capital-Importing States', in Diego Sánchez-Ancochea and Kenneth C. Shadlen eds., *The Political Economy of Hemispheric Integration: Responding to Globalization in the Americas* (Palgrave Macmillan, 2008).

6 UNCTAD 2015 (n1).

7 UNCTAD, *World Investment Report 2014: Investing in the SDGs: An Action Plan*, 2014, ix.

8 David Herlihy, David Kavanagh, Timothy G. Nelson, 'The Increasing Appeal and Novel Use of Bilateral Investment Treaties', 2013, Skaden; Frédéric G. Sourgens, 'Keep the Faith: Investment Protection Following the Denunciation of International Investment Agreements' (2013) 11 Santa Clara Journal of International Law, 335, 357.

9 UNCTAD 2015 (n1)

10 Compiled from UNCTAD, Database of Investor-State Dispute Settlement (ISDS), <http://unctad.org/en/Pages/DIAE/ISDS.aspx> Accessed 19 December 2017; UNCTAD 2015, 1 (n1).

11 UNCTAD 2014, ix (n7).

12 See for example Ann Capling and Kim Richard Nossal, 'Blowback: Investor-State Dispute Mechanisms in International Trade Agreements', (2006) 19 Governance, 151.

SYSTEMIC BIAS

Although only states can authorise the use of private arbitration in matters of public law,[13] investor-state arbitration is an investor driven process, since only investors can take claims to arbitration. It is therefore important to look at what factors contribute to the choice by investors, on an increasing scale, to seek damages through arbitration. It seems probable that this is in large part influenced by how likely they believe they are to win; if the chances of success were small, investors would be unlikely to go through such costly proceedings. A significant aspect of this appears to be the bias inherent in the system.[14] Franck has used the figures from cases that have been concluded to argue that this fear of bias is irrational, since investors win less than half of the time, and where they receive awards these are generally significantly lower than the original claim.[15] She argues that if the system were truly biased, we would see investors winning a greater proportion of the cases they bring to arbitration, with award figures much closer to claims.[16]

Franck counters the arguments put forward by Lerner, amongst others, that the incentives are aligned such that arbitrators are likely to find in favour of investors, and the statistics on outcomes would seem to support her argument.[17] Of the 528 cases concluded to the end of 2017, the state won in 37% of cases, and the investor in only 27% of cases, whilst 24% of cases were settled.[18] Moreover, Franck has found that in cases that investors do win, there is a statistically significant difference between the sum claimed and that actually awarded.[19] It is worth noting, though not central to the current question, that from the state's perspective, the chance of losing in more than a quarter of cases represents a high risk.[20] Franck argues that any legal system is dependent on the integrity of its arbitrators or judiciary, and points out that investment treaty arbitrators would be discredited within the legal community if it were found that they were giving undue advantage to one party over another.[21] She suggests that the pattern of outcomes in concluded disputes demonstrates that arbitrators are not behaving in such a way as to lead to suspicion of bias.

However, to argue that the system is biased in favour of investors is not to suggest that individual arbitrators are guilty of corruption or dishonesty. Franck does not adequately deal

13 Van Harten 2005 (n3).

14 Van Harten 2007 (n5).

15 Cited in Kevin P Gallagher and Elan Shrestha, 'Investment Treaty Arbitration and Developing Countries: A Re-Appraisal' [2011] World Investment & Trade, 919.

16 Ibid.

17 Cited in Susan D Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions', (2005) 73, Fordham Law Review, 1521, 1587 n329.

18 UNCTAD, ISDS Database (n10). It is important to note that we do not know the outcome in settled cases.

19 Cited in Gallagher and Shrestha 2011, 920 (n15).

20 See also ibid. 926.

21 Franck 2005, 1587 at n329 (n17).

with the basic problem that, in the absence of a multilateral mechanism through the World Trade Organisation (WTO), arbitrators are selected on a case by case basis.[22] In this way they are dependent on investors, since only investors can initiate proceedings. It is therefore in the institutional interests of the arbitrator community to interpret disputes and investment agreements to the benefit of investors.[23] This can be seen in the broad interpretations of some elements common to most regional and bilateral investment agreements, such as 'minimum standards', 'umbrella clauses', and 'nationality'.[24] This is not to say that such a reading of these clauses and terms is incorrect, but as Charles ("Chip") Roh, the deputy chief negotiator of North Atlantic Free Trade Agreement (NAFTA) on the American side, pointed out, the legal profession is 'creative'.[25] It is difficult to dispute that such creativity of interpretation is in the interest of arbitrators, as it widens their jurisdiction. It also means that tribunals are more likely to find in favour of the investor.

Where 'minimum standard' is understood as 'an all-encompassing guarantee of highly flexible notions of fairness, equity, and due process', this is a much higher standard than that usually found in customary international law, and may go beyond the intentions of the states parties to an agreement.[26] UNCTAD recognises this and argues that going forward, investment treaties should provide a clearer – and tighter – definition of terms.[27] However, it is important to note that the critical mass of investment agreements has already been reached;[28] without renegotiating existing treaties, there will be little impact on reducing the liability of states to wide readings of 'fair and equitable treatment' clauses, amongst others. The tendency of arbitrators, therefore, to interpret investment treaties to the advantage of investors is likely to encourage investors to pursue claims through arbitration. Such interpretations are likely to become more common over time, as arbitrators have shown themselves to be willing to be guided by the decisions of earlier tribunals.[29] Moreover, states have no chance of pursuing arbitration against investors; as Van Harten has argued, the system of investor-state dispute settlement is designed to regulate capital-importing countries, rather than investors or capital-exporting countries.[30] This surely contributes to investors' willingness to engage in the process, as they are at no risk of retaliation, at least through private arbitration.

22 Van Harten 2008, 103 (n5).

23 Van Harten 2005 (n3); Van Harten 2007 (n5); Gallagher and Shrestha 2011 (n15).

24 UNCTAD, *Investment Policy Framework for Sustainable Development*; Van Harten 2007, 87 (n5).

25 Quoted in Capling and Nossal 2006, 163-4 (n12).

26 Van Harten 2007, 89 (n5).

27 UNCTAD, *Policy Framework* (n 24).

28 Skinner, Miles and Luttrell, 2010, 263 (n4).

29 Paul Michael Blyschek, 'Access and Advantage Expanded: *Mobil Corporation v. Venezuela* and other recent arbitration awards on treaty shopping', (2011) 4 Journal of World Energy Law and Business, 32; see also *Pac Rim Cayman LLC v Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision, 1 June 2012, italaw.

30 Van Harten 2005 (n3); Van Harten 2007 (n5); Van Harten 2008 (n5).

INCREASING AWARENESS IN THE INVESTOR AND LEGAL COMMUNITY

Such bias in the system is one element in the increasing use of investor-state arbitration, but this has always been present even if its implications in terms of broad interpretations of key elements of many treaties had not been fully understood when investment agreements were first signed. Charles Roh, for example, noted that the effects of NAFTA's investment chapter as it relates to investor-state arbitration simply had not been anticipated.[31] This points to a second important element, namely the increasing awareness of investors and their lawyers of the options available to them.[32] Practitioner literature makes it clear that investors did not at first recognise the possibilities open to them through various investment agreements, including trade agreements with investment chapters, such as the Energy Charter Treaty.[33] The Asian Financial Crisis of 1997-8 and the Argentine Currency Crisis of 1999 'made it clear to the international legal fraternity, and to some extent its clients, that the BIT [Bilateral Investment Treaty] system worked'.[34] Whilst it is difficult to quantify the effects of the awareness of lawyers and investors, it is important to recognise that the groups are intimately linked. Lawyers are therefore able to draw on experience from pursuing arbitration to advise other investors. Moreover, literature from the legal perspective aims to demonstrate to investors the options available to them under investment agreements.[35] Lawyers have repeatedly emphasised the importance of increasing expertise in the growth of investor-state arbitration, which many regard as inexorable.[36]

Part of this awareness is related to the increasing prevalence of treaty shopping, whereby investors seek to structure their corporate nationality in such a way as to benefit from more advantageous investment agreement terms.[37] This is possible due to the broad definition of 'national' present in some investment agreements, accompanied by liberal rules of incorporation; the Netherlands, in particular, fits this framework.[38] Famously, after hard fought negotiations in which Australia resisted the inclusion of compulsory investor-state arbitration in the free trade agreement with the USA (AUSFTA), American tobacco giant Philip Morris circumvented AUSFTA and took a case against the Australian state through the Australian-Hong Kong BIT.[39] The alternative would have been to sue the Australian

31 Capling and Nossal 2006, 164 (n12). Chapter 11 is the investment chapter. It provides for investors to file claims against states in arbitration proceedings.

32 See Franck 2005, 1538-1539 (n17).

33 See Deborah Ruff, Julia Belcher and Charles Golsong, 'Energy Charter Treaty: Coming up for 20 Years', [2014] International arbitration report (Issue 2) Norton Rose Fullbright.

34 Skinner, Miles and Luttrell 2010, 263-4 (n4).

35 See for example ibid.; Norton Rose 2014 (n33).

36 See for example, the legal practitioner at Herbert Smith, quoted in Van Harten 2005, 610 (n3).

37 See for example Skinner, Miles and Luttrell 2010 (n4); Franck 2005, 1583 (n17).

38 Van Harten 2005, 610-611 (n3); Skinner, Miles and Luttrell 2010, 275 (n4).

39 Capling and Nossal 2006 (n12); Australian Government, 'Tobacco plain packaging—investor-state arbitration', Attorney-

government through domestic courts – a process which many investors prefer to avoid both for reasons of confidentiality, and because they appear to believe they are less likely to succeed than through private arbitration.[40] That it was possible to circumvent AUSFTA by using the Australian-Hong Kong BIT is again related to the tendency of arbitrators to interpret treaty terms broadly, as this has led to an environment in which treaty shopping is deemed permissible.[41] Indeed, questions on the permissibility of treaty shopping are now centred not around whether it is admissible under *any* circumstances, but under which specific circumstances it is *not* permitted as a way of bringing claims against host states.[42] This means that even where states have gone to great lengths to limit or prevent investor state arbitration in the context of regional and bilateral treaties, investors are able to get around this by careful nationality planning in their ownership structures. They are thereby able to access international arbitration, rather than being forced to bring proceedings in domestic courts. Some commentators suggest that the possibility of nationality planning makes the marginal importance of the first investment agreement far more significant than any subsequent agreement.[43]

An area of focus has been on the timing of nationality planning by investors. *Pac Rim Cayman LLC v Republic of El Salvador* illustrates this point: the respondent claimed that the arbitration tribunal did not have jurisdiction over the dispute under DR-CAFTA not because it had engaged in treaty shopping, but because it had done so in bad faith once a dispute was already in process:

> What [the] Claimant and its parent company did in the present case, however, is not *prospective nationality planning* but a *retrospective* gaming of the system to gain jurisdiction for an *existing* dispute based on existing facts over which there would not otherwise be jurisdiction. This is an abuse of the international arbitration system and process.[44]

The tribunal in this instance ruled that such gaming of the system had not taken place, but agreed that it would not have jurisdiction over the case had this occurred.[45] It is not yet clear which way the debate will be settled with regard to such cases. Blyschek calls for a 'bright line' approach, whereby an investment tribunal would not have jurisdiction over disputes

General's Department <www.ag.gov.au/tobaccoplainpackaging> Accessed 4 May 2015.

40 See for example Capling and Nossal 2006 (n12);

41 Skinner, Miles and Luttrell 2010 (n4).

42 See Blyschek 2011 (n29).

43 Ken Shadlen, 'The Emerging International Investment Regime', LSE 12 February 2015.

44 Decision 1, 2012, Part 2, 6 Paragraph 2.19 (emphasis in original). DR-CAFTA is the free trade agreement between the USA, the Dominican Republic and Central American countries.

45 It nonetheless ruled that the case could not continue under DR-CAFTA due to the Denial of Benefits Clause, which could be invoked to deny benefits to an investor that did not have 'substantial' business activities in a state party to DR-CAFTA, other than the respondent state (Pac Rim Cayman LLC Decision, 2012, Part 4 (n29)). Such a rule does not apply in all investment agreements. The Netherlands model BIT and Dutch corporation rules require only that a firm be incorporated in the Netherlands (Skinner, Miles and Luttrell 2010, 276 (n4)).

that began before the treaty shopping occurred. This is exemplified by the *Phoenix Acton v Czech Republic* decision. However, he shows that this has by no means been established in jurisprudence.[46] In the meantime, it is in investors' interests to continue pursuing treaty shopping cases as they may yet benefit from ambiguity around this issue. This is true even though it is not clear that a shift towards greater tolerance of nationality planning once a dispute is already under way is likely. This would be a high risk approach for investors.[47] Earlier nationality planning is perhaps likely to increase in frequency with growing awareness of the potential benefits from shopping into more advantageous agreements.[48] That the Netherlands continues to be the second most common home state for investors bringing claims suggests that this may already be the case.[49]

Treaty shopping is potentially of great importance in relation to claims against developed countries. The majority of investment flows continue to be between developed economies, although the share has shrunk in recent years, but they often do not have BITs among themselves.[50] US and Canadian experiences under NAFTA's investment Chapter 11 have reduced the appetite for investor state dispute settlement arrangements in agreements between developed countries.[51] The AUSFTA negotiations are a prime example of this, and the states parties have clarified that unless the circumstances around the reliability of either country's legal system changed, investors would continue to have to pursue disputes through domestic courts.[52] Similarly, the question of the inclusion of investor state arbitration in the Transatlantic Trade and Investment Partnership (TTIP) has sparked intense public debate, prompting the European Commission to launch a public consultation.[53] The question of investor state dispute settlement mechanisms remained an outstanding issue, before the treaty was put on ice following the election of Donald Trump. As in the US-Australian negotiations, critical responses to investor state dispute resolution in TTIP have pointed out that domestic legal systems in the US and in EU countries are sufficiently robust to make arbitration unnecessary.[54] In response to popular opposition to the ad hoc dispute resolution mechanisms that currently characterise the system, the EU introduced an arbitration court in the Canada-EU trade agreement.[55] It is too early to tell how this will operate in practice.

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46 Blyschek 2011 (n29).

47 Skinner, Miles and Luttrell 2010, 260 (n4).

48 Ibid.

49 UNCTAD ISDS Database (n10)

50 Van Harten 2007, 40 (n5).

51 See for example Capling and Nossal 2006 (n12).

52 Ibid., 161.

53 Markus Krajewski *Modalities for investment protection and Investor-State Dispute Settlement (ISDS) in TTIP from a trade union perspective* (Friedrich-Ebert-Stiftung, 2014) 4; European Commission 'Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)', 13 Jan 2015, Brussels.

54 Krajewski 2014, 12 (n53); European Commission 2015, 14 (n53).

55 See Nicolette Butler and Surya Subedi, 'The Future of International Investment Regulation: Towards a World Investment

In light of the general reluctance to include standard investor-state arbitration mechanisms in treaties between developed countries, treaty shopping is likely to continue to be of importance: the Australian experience has demonstrated that any investment agreement containing compulsory arbitration has the potential for the host state to be subject to claims.

Still, it is worth noting that of the 66 potential cases of treaty shopping up to 2012, developing countries were respondents in 53, or 80.3%, of cases.[56] As such, it is not clear that an increase in treaty shopping explains the increased exposure of developed countries to arbitration proceedings. The number of potential treaty shopping cases has risen since the early 2000s but this has been subject to fluctuation, and the overall trend does not suggest that treaty shopping cases account for a substantially higher proportion of cases in recent years than in the period from 2003 onwards.[57] As such, treaty shopping may be an important element in the spread of investor-state dispute settlement, but other factors are clearly present in maintaining the level of demand for arbitration. It is therefore perhaps best understood as part of the broader trend towards increased confidence amongst investors and their lawyers in pursuing claims through investor-state arbitration.

AN INCREASED ROLE FOR THE STATE

It is unlikely, however, that greater investor awareness alone could account for the spread of investor-state arbitration. It is therefore worth noting that politics at the national level has seen a move away from the neo-liberal ideas of the 1990s in favour of a renewed role for the state in recent years. The rise of the so-called 'New Left' in Latin America is perhaps the best example of this trend.[58] It helps to explain the large number of cases against Venezuela, the respondent in 41 cases since 2004 according to data available through the UNCTAD Investor-State Dispute Settlement database.[59] Venezuela has seen a dramatic turn towards interventionist policies under Hugo Chávez and his successor since the early 2000s.[60] The renationalisation of core industries has been seen as an act of independence, rather than a purely economic policy,[61] and has sparked a series of disputes where investors feel they have not received adequate compensation for expropriation.[62] An important element of

Organisation?' [2017] Netherlands International Law Review, 43.

56 Development Management MSc Dissertation, 'Treaty Shopping in International Arbitration: How often has it occurred and how has it been perceived by tribunals?', 2014, Candidate No.: 24495, 12.

57 See Ibid.

58 Barbara Hogenboom and Alex E. Fernindez Jilberto, 'The New Left and Mineral Politics: What's New?' (2009) 87 European Review of Latin American and Caribbean Studies, 93.

59 UNCTAD, ISDS Database (n10).

60 Sourgens 2013, 357 (n8).

61 Hogenboom and Fernindez Jilberto 2009, 95 (n58).

62 Sergey Ripinsky, 'Venezuela's Withdrawal From ICSID: What it Does and Does Not Achieve', 13 April 2012, *Investment*

this is related to the interpretation of the relevant BITS and other agreements. As noted above, arbitrators have tended to interpret 'fair and equitable treatment' broadly, and this has generally meant that compensation has been required at the market rate.[63] The Venezuelan government has challenged this, insisting that investors have been compensated fairly, in accordance with Venezuelan law'.[64] Domestic policy shifts are likely to have an impact on foreign investors. This is not unique to Venezuela and the more general trend towards interventionism which can also be seen elsewhere helps to explain the spread of investor-state arbitration. However, it should be noted that the Venezuelan experience is an extreme example, and its spiral into economic and political crisis may make such policies less popular in the region and further afield.[65] Nevertheless, it is the second most frequent respondent state, after Argentina.[66]

More broadly, host nations are currently subject to contradictory dynamics. Whilst the threat of investment treaty arbitration has the tendency to induce 'regulatory chill', in the aftermath of the financial crisis mainstream economists are increasingly advocating greater state involvement in the economy.[67] Van Harten has pointed out that regional and bilateral investment agreements may sanction state actions that have only an incidental effect on foreign investment.[68] As such, government measures that are now deemed acceptable by many economists are not allowed under many regional and bilateral investment agreements if they can be seen to amount to indirect expropriation of assets.[69] This may be particularly pertinent for cases involving developed countries as the respondent. As Sourgens argues, 'A significant number of investment treaty claims were borne from economic crisis'.[70] Argentina is the best example of this, having been subject to 55 cases since the economic crisis of 2001-2.[71] Disputes have hinged on whether actions taken by the government were necessary in the context of the crisis, thereby making the investor agreement inapplicable, or whether they did in fact constitute a breach of the agreement to the detriment of a particular investor or investors.[72] Sourgens argues that there has been a shift in the tendency

Treaty News <www.iisd.org/itn/2012/04/13/venezuelas-withdrawal-from-icsid-what-it-does-and-does-not-achieve/> Accessed 10 April 2015.

63 Ibid.

64 Ibid.

65 See for example, 'Hunger eats away at Venezuela's soul as its people struggle to survive', 27 August 2017 *The Guardian*, <www.theguardian.com/world/2017/aug/26/nicolas-maduro-donald-trump-venezuela-hunger> Accessed 12 December 2017.

66 UNCTAD, ISDS Database (n10).

67 See for example Justin Lin and Ha-Joon Chang, 'Should Industrial Policy Conform to Comparative Advantage or Defy It?' [2009] 27, Development Policy Review, 483.

68 Van Harten 2008, 102 (n5).

69 Herlihy, Kavanagh and Nelson, 2013 (n8).

70 Sourgens 2013, 356 (n8).

71 Ibid.; UNCTAD ISDS Database (n10).

72 Sourgens, 2013, 357 (n8).

to see a broader range of state actions as necessary in the context of extreme conditions.[73] However, the actual results seem to counter his claim that arbitrators are increasingly willing to give states the benefit of the doubt. Of the cases in which Argentina is the respondent, 38 have been concluded, of which 18 were decided in favour of the investor, 5 in favour of the state, 1 found liability but no damages were awarded, and 14 were settled.[74] Thus in a significant number of cases, tribunals found that the state was not acting in extremis. This makes Sourgens' argument difficult to sustain, and is an important factor in the continued use of investor state arbitration by investors.[75] Foreign investors would be unlikely to go through what is a costly process if they felt there was little chance of being awarded damages.

In light of this insight on the importance of crisis in prompting a raft of investor claims, the fact that the financial crisis of 2007-8 had a greater affect on developed than on developing and transition economies may help to account for the increased representation of developed countries among respondent states in recent years.[76] For example, Spain was subject to a total of eleven claims in 2013 and 2014, all arising from the same set of policies, which reduced subsidies to the renewable energy sector and increased taxes on power generators in order to tackle the budget deficit.[77] Although Spain has clearly not experienced a crisis to the same degree as Argentina, it has undoubtedly been subject to significant economic difficulties since 2007.[78] As a result, it is unsurprising that the Spanish government has adopted policies that have proved detrimental to investors, in particular those relating to the energy sector. Similarly, given the preparedness of tribunals in the much more serious Argentinian case to find in favour of investors, it was to be predicted that investors would choose to pursue claims against the Spanish state. Proceedings in which Spain is the respondent account for 52 of the 138 cases against developed countries since 2011.[79] This brings into question the extent to which the increasing incidence of developed country respondents is part of a broader pattern, or is better seen as an outcome of the specific circumstances faced by OECD countries in the aftermath of the financial crisis of 2007-8.

73 Ibid. 358.

74 Of the remainder, 9 are pending, 6 were discontinued for unknown reasons, and for 2 the data is not available. UNCTAD ISDS Database (n10).

75 Ibid.

76 UNCTAD 2015, 1 (n1).

77 Ibid. 5.

78 See for example, 'Spain Financial Crisis', In Depth, *Financial Times* <www.ft.com/indepth/spain-financial-crisis> Accessed 19 December 2017.

79 UNCTAD ISDS Database (n10).

CONCLUSION

The spread of investor-state arbitration has been made possible by the bias inherent in a system in which arbitrators are dependent on claimants. It is in the interests of tribunals to interpret treaty terms broadly, both in terms of jurisdictional issues and on the merits. Closely related to this, is the increasing awareness amongst investors and their lawyers of the possibilities open to them through the provisions of investment agreements. Part of this has been the increase in the use of treaty shopping in recent years. This may make the marginal importance of a single BIT allowing investor-state arbitration critical. However, more fundamentally, an important element of the increased use of arbitration by investors appears to be a function of greater awareness of the possibilities available to them through such means.[80] Thus, although in theory it would be sufficient for any capital-importing country to have only one BIT in order to be exposed to investor-state arbitration as a result of nationality planning by investors, in practice it seems unlikely that this could have produced such a rapid increase in the use of the mechanism. Investors and their lawyers may not have realised the agreements' potential so quickly had they not gained experience across a range of instruments. The shift towards an increased role for the state in recent years has been an important factor in the spread of investor-state arbitration in cases in which developed countries are the respondents. This has been the result primarily of policies intended to deal with fiscal difficulties in the aftermath of the financial crisis, which have had a largely incidental effect on foreign investors. An important trend in the last few years, though one that this paper has not explored, has been the increased use of arbitration by investors from developing countries. This reflects the growing importance of capital flows from developing countries, and suggests that investor-state arbitration will continue to spread in years to come.

80 Skinner, Miles and Luttrell, 2010 (n4); Van Harten 2007 (n5); Norton Rose 2014 (n33).

No Más Bloqueo: Cuba, the US Blockade and Human Rights

Lucy Chapman*

ABSTRACT

For the past 60 years the USA has attempted to control Cuba, its economy and right to self-determination through the embargo, unique legislation with extraterritorial reach, which breaks international law and is much maligned by commentators. Although unsuccessful at its primary aim, to destabilise the Cuban government, these blockade measures breach the fundamental human rights of the island's inhabitants, and, often against domestic legislation of other states, bind Cuban nationals abroad, US citizens, and those wishing to provide aid to or trade with Cuba the world over, including in the UK.

BACKGROUND AND LEGAL BASIS

'The Embargo on Cuba is the most comprehensive set of American sanctions ever imposed on a country'.[1] The series of sanctions, with global reach, is known as being 'the worst in the world',[2] with a dire effect on the lives of ordinary Cubans and extraterritorial consequences for companies and individuals the world over, including within the European Union and Britain. The total cost of estimated damages to Cuba by the blockade in its 60-year history amount to $822 280 000 000 dollars. In the period June 2016-17 alone, damages from the blockade are estimated to cost Cuba $4 305 400 000.[3] In real terms, this is equivalent to double the amount needed annually in order to develop its economy. The US is effectively keeping a developing foreign nation in a financial stranglehold.

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1 US Accountability Office, *Economic Sanctions: Agencies Face Competing Priorities in Enforcing the US Embargo on Cuba* (November 2007), quoted in Salim Lamrani, *The Economic War Against Cuba* (Monthly Review Press 2013) 13

2 Noam Chomsky, *Pirates and Emperors: New and Old International Terrorism in the Real World* (Between the Lines 2002) 82

3 *Cuba vs Bloqueo: Cuba's Report on Resolution 71/5 of the United Nations General Assembly entitled 'Necessity of ending the economic, commercial and financial blockade imposed by the United States of America against Cuba'* (June 2017) 3. This report will be referred to as Cuba vs Bloqueo henceforth.

The reasoning given by the US in justification of the blockade are Cuba's human rights record and non-democratic government, yet the US has normalised relations with China, Vietnam and other past 'enemies of the state' without question. The true motivation behind the imposition and continuation of the US blockade on Cuba can be found in countless governmental documents now in the public domain, which illustrate that destabilising the Cuban government through systematic destruction of the island's inhabitants' human rights was the primary agenda on the blockade's inception. Commentary from diverse sources, both US domestic and international bodies, including Amnesty International, the United Nations and the American Association for World Health, have noted the damage caused by the blockade on the basic human rights of ordinary Cubans.[4]

Fundamental rights breached are Article 25 of the Universal Declaration of Human Rights, the right to food and medicine, Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights, plus the right to self-determination, covered by the United Nations Charter and other international agreements.[5]

Cuban authorities view the blockade as, 'a massive, flagrant and systematic violation of the human rights of all Cubans (which) qualifies as an act of genocide under the Convention on the Prevention and Punishment of the Crime of Genocide of 1948…also an obstacle to international cooperation'.[6] This claim that the blockade equates to genocide comes from two sources. The first, stated in Article II of the Convention, defines genocide as acts;

> [C]omitted with intent to destroy, in whole or in part, a national, ethical, racial or religious group…causing serious bodily or mental harm to members…deliberately inflicting...conditions of life calculated to bring about its physical destruction is whole or in part.

The second is an internal US governmental communication explaining the aim of the economic sanctions to be applied, three months before the first was introduced;

> The majority of Cubans support Castro. There is no effective political opposition… The only foreseeable means of alienating internal support is through disenchantment and disaffection based on economic dissatisfaction and hardship…every possible means should be undertaken promptly to weaken the economic life of Cuba…a line of action which…makes the greatest inroads in denying money and supplies to Cuba, to decrease monetary and real wages, to bring about hunger, desperation and overthrow of government.[7]

4 Amnesty International, *The US Embargo Against Cuba: Its Impact on Economic and Social Rights* (Amnesty International Publishing 2009), American Association for World Health (AAWH), *Denial of Food and Medicine: The Impact of the US Embargo on Health and Nutrition in Cuba* (AAWH 1997)

5 UN General Assembly, Universal Declaration of Human Rights (1946), International Covenant on Economic, Social and Cultural Rights (1966); Isaac Saney, *Cuba: A Revolution in Motion* (Zed Books 2004) 174

6 UN General Assembly; Cuba vs Bloqueo 3

7 Lester D Mallory, 'Memorandum for the Deputy Assistant Secretary of State for Inter-American Affairs (Mallory) to the Assistant Secretary of State for Inter-American Affairs (Rubottom)', US Department of State, Central Files, 737.00/4-660,

In his book, *The Economic War Against Cuba*, Salim Lamrani explains the blockade in the context of international and US law. It has long gone against international law to apply blockade measures outside of times of war, to adversaries. This dates back to The London Naval Conference 1908-1909, a principle further endorsed by the United States in 1916, 'The United States does not recognise the right of any foreign power to impose barriers to the exercise of the commercial rights of any non-interested nations, by using the blockage when there is no time of war'.[8] Cuba has never officially been at war with the United States.

In 1962, Executive Order 3447 cleared the way for the total embargo on trade with Cuba. Inclusive of medicines and food, against international law.[9]

The Fourth Convention for the Protection for Civilian Persons in Times of War, Geneva 1949, ratified by the US, among other states, provides that parties permit. '[F]ree passage of medical and hospital stores…intended only for civilians or another... (party), even if the latter is its adversary…free passage of all consignments of essential foodstuffs, clothing and tonics.'[10]

Despite the clear US government direction, even the US Supreme Court recognised the right of Cuba to nationalise its assets according to international law, and the beneficial interest of all world players to uphold the doctrine of self-determination of sovereign states, in *Banco Nacional de Cuba v Sabbatino*,[11] 23 March, 1964;

> However offensive to the public policy of this country and its constituent States an expropriation of this kind may be, we conclude that both the national interest and progress toward the goal of establishing the rule of law among nations are best served by maintaining intact the act of state doctrine in this realm of its application.[12]

Within seven months, this decision was effectively quashed by legislators with the Foreign Assistance Act 1964 Hickenlooper Amendment, despite concerns of conflict with international law[13] and the Charter of The Organization of American States, Article 19;

> No state or group of states has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State…(prohibiting) not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic, and cultural elements.

Secret, in *Foreign Relations of the United States (FRUS*), 1958-60, vol 6, Cuba (US Government Printing Office, 1991) 885; quoted in Lamrani 73

8 President Woodrow Wilson, Bravo, *¿Por que Bloqueo y no embargo?* Lamrani 56

9 John F Kennedy, 'Proclamation 3447: Embargo on All Trade with Cuba', Lamrani 24

10 International Committee of the Red Cross, Convention (IV) relative to the protection of civilian persons in times of war, Geneva, 1949, quoted in Lamrani 25

11 376 US 398 (1964), quoted in Lamrani 26-7

12 Ibid

13 Lamrani 27

And 20:

> No State may use or encourage the use of coercive measures of an economic or political character in order to force the sovereign will of another State and obtain from its advantages of any kind.[14]

Despite opposition, the blockade continued to grow. At its inception, the legal basis was an antiquated provision to be used specifically in times of war and national emergency, the Trading with the Enemy Act 1917 (TWEA), built on over time with subsequent legislation. Section 5 (b) gives the US government power to apply economic sanctions and 'prohibit trade with the enemy or allies of the enemy.'[15] The International Economic Powers Act 1977 limited presidential ability to enforce further sanctions reserved for national emergencies, yet the TWEA remained in force against Cuba, despite never having been the subject of a US national emergency.[16]

Due to the TWEA, the US was able to introduce other related laws, such as the CACR 1963, which gave the blockade an extraterritorial jurisdiction;

> US nationals or persons under US jurisdiction are prohibited from carrying out financial transactions with Cuba; Cuban assets were frozen and importing goods of Cuban origin into the US was banned, along with other restrictions. *Cuba is the only country against which this legislation is enforced*.[17]

This disallowed any person or company, in or out of the US, from trading with Cuba using the dollar. Cuban assets in the US were frozen and all 'financial and commercial transactions…(unless) approved by a license,' banned.[18]

Since the beginning of the blockade nearly 60 years ago, various US laws have followed, enacted to restrict and regulate the activities of Cuba, aid and service provision to Cuba, trade with Cuba and Cuban trade with other nations. During the cold war, the Foreign Assistance Act 1961 introduced a complete trade embargo and prohibited assistance to Cuba and its government, including banning the use of international aid payments from the US, distributed by international bodies, to be used for any Cuban projects. Kennedy's Presidential Proclamation 3447 stated the 'total embargo on trade' was under the remit of the Foreign Assistance Act, s 620 (a).[19]

Following the CACR 1963, The Export Administration Act, 1979, introduced the 'Commodity Control List,' controlling exports from various countries, including Cuba, for

14 Ibid, (1993)

15 Cuba vs Bloqueo 3

16 Ibid

17 Ibid (emphasis added)

18 Cuba vs Bloqueo 3

19 3 February, 1962. Cuba vs Bloqueo 3

national security reasons.[20] The same year, the Export Administration Regulations (EAR), blocked 'exports and reexports' to Cuba, placing items and activities under US control.[21]

Post-Cold War, the sanctions continued and developed an unmistakably policy driven flavour, with bills being pushed through congress by anti-Cuban individuals. The Cuban Democracy Act, 1992 (CDA, known as the Torricelli Act after its patron), furthered the extraterritorial remit, banning third country ancillaries of US companies from dealing with Cuba or Cuban persons. Foreign ships docked in Cuba, cannot 'enter US territory for 180 days... (without a) license' issued by the US Treasury.[22] The Cuban Liberty and Democratic Solidarity Act 1996 (CLDASA or Helms-Burton Act), 'codified the provisions of the blockade,' preventing foreign, third party, businesses or persons from trading with nationalised US holdings, by threat of legal action. For the first time, legislation pledged US governmental support to anti-Cuban groups, financially or otherwise, in essence, legislating propaganda. Renewed annually, the CLDA restricts 'presidential prerogatives for suspending this policy.'[23]

Further rights were curtailed consequently. Cuba's intellectual property rights were denied recognition in the US by the Emergency Appropriations Act for the 1999 Fiscal Year, s 211. In practice, this means Cuban products cannot be trademarks in the US, such as Havana Club rum, permitted by the US Patent Office to be produced and marketed in the US by Bacardi, instead of the Havana Club associated with Havana, Cuba, which is distributed elsewhere.[24] US citizens' rights to travel to Cuba for 'tourism,'[25] was curtailed by the Trade Sanctions Reform and Export Enhancement Act, 2000. Although the act 'authorised the export of agricultural products to Cuba,' this was only if cash payment was made 'in advance without any US financing.' The view of what constitutes this has been strict.[26]

MODERN EFFECTS OF THE BLOCKADE

May 2017, I am staying at the rural Julio Antonio Mella Camp 40 kilometres outside of Havana, with an international delegation. Working alongside local farmers, the other delegates and I experience the cumbersome way needed to get things done. There is little to no machinery for this type of agricultural work, a result of trade restrictions, meaning machinery needs to be imported at great expense from geographically distant places such as East Asia. An increase in the population moving towards cities means fewer hands to

20 s 2401 (b) (1), ibid

21 1979, ibid

22 Ibid 4

23 Ibid

24 Pernod Ricard USA, LLC, Appellant v. Bacardi U.S.A., INC. United States Court of Appeals, Third Circuit. No. 10-2354 04 August, 2011.

25 Any purpose not expressly defined by Section 515.560 of Title 31 of the Federal Regulations Code, Cuba vs Bloqueo 4

26 Cuba vs Bloqueo 4

work the ground and tend to crops. Farmers use oxen and mule to plough fields instead of tractors, the unpredictable water supply preventing washing after work some days; worse luck if after a session cutting off the dead bark from the banana tree crop, the sap from these causes a chemical reaction, burning the skin. The last three years Cuba has suffered a drought which has been especially damaging for food production, meaning water has needed to be rationed.[27] Since my visit, Hurricane Urma, though adding some much-needed density to the country's reservoirs, has caused extensive damage. Despite Cuba's impressive storm prevention methods, already stretched resources have been spread even thinner; the hurricane damaging and destroying 'homes, crops, airports, schools, hospitals, water storage and power stations', affecting around 159 thousand homes, with communities suffering from flooding, high winds and lack of necessities.[28]

People are eager to talk about life here. Although a common factor of discontent amongst Cubans is their pay from government jobs, which is incredibly poor, there is an infectious irrepressibleness in general, and a spirit of making do and resilience is truly alive. People have two jobs to survive, state and supplementary work. People are incredibly aware of the effects of the blockade and how it impacts on pay, which they articulated well. In Artemisa, café staff told me their hopes for the future, that Raul Castro would improve things and often mentioned issues with wages.

Erick, a 25-year-old Informático (IT Technician), has two degrees from the University of Havana. He says he has been lucky to get a professional job, hard to come by with so many graduates in the market. All education is free in Cuba, the quality highly respected worldwide, despite common problems such as lack of materials: pencils, pens, paper, plus more specialist items, for example items needed for medical and engineering studies. The blockade restricts material aid as well as trade, with imports of anything being expensive as they must be shipped from trade partners at a great distance. Although his job is good, Erick only gets paid the equivalent of US $20 a month. To survive, he also raises chickens and lives at home with his family. He enthusiastically tells me his ancestors could be traced back a long way, all of them Cuban as far as he knew. He said his parents and grandparents were big supporters of the revolution and loved their country, as did he, but with the level of pay as it is, he is facing the fact he might have to leave. Getting the money together to travel is another matter, it is going to take him years.

After reading much of the criticism levelled at Castro, Cuba, and Cuban life in the press, I was surprised not to meet people with particularly negative things to say about the government. That is not to say these people do not exist, but I did not encounter them. Some of the younger people in cities, I was told, resented the lack of material goods in particular, wanting to move with the times, own fashionable clothes, have access to newer technology, but people I spoke to understood why these things were not forthcoming. Having experienced internet access, Cuban style, these concerns are not just material. At

27 Ibid 20

28 'Incredible Response to Hurricane Urma Appeal', *CubaSi* (Autumn 2017) 11

the camp, there was a small computer room open at set hours for us to use, with dial up internet access. All the sites I wanted were freely available, despite press rumours, but the machines themselves got cut off due to weather and power failures frequently. Many of the mobile network providers will not serve Cuba due to the blockade, like mine. In Havana itself, internet access involves either paying extortionate rates at tourist hotels, prices which would cost two week's wages for a Cuban, or sampling the options available for locals. These comprise buying a distinctly unofficial looking piece of paper with a code on from someone's shop-cum-kitchen window to use on your phone, or, as I chose, joining the crowd sitting on the pavement in an alleyway, on their laptops and smart phones, after paying a ten-year-old to share his mobile data.

Delegates visited a Hospital in Cienfuegos, and spoke to the staff. Cuban medicine is another well respected area, free for all citizens. Cuban doctors regularly travel abroad to assist in emergencies and train others, renowned for their skill, domestic success rates 'comparable to highly developed nations'.[29] One of the barriers here is lack of equipment and pharmaceuticals that are only available from the US or through companies the US has banned trading with. In the last year Cuba has spent an estimated $1066600 sending patients abroad for treatment due to the refusal of the US to supply lifesaving and ground-breaking technologies.[30] Several bodies have recognised the extreme detrimental effect of the blockade in Cuba on health and nutrition, including Oxfam, Amnesty International, and the American Association for World Health[31]. Chomsky notes, 'a detailed study by the AAWH concluded that the embargo had severe health effects, and only Cuba's remarkable health care system had prevented a "humanitarian catastrophe"; this has received virtually no mention in the US'.[32]

Extraterritorially, the blockade has far reaching consequences, affecting other trade partners. For example, this year, two companies that previously traded with Cuba, one providing antibiotics, the other prosthetic limbs, had to cease due to measures imposed by the US government. Both were being supplied by European companies. In the case of the antibiotics, from a Spanish supplier, the original manufacturer of the pharmaceuticals stated, 'since Cuba was subject to the OFAC sanctions, the company could not supply any product, whether directly or indirectly'.[33] The Cuban medical field has had to be innovative, creating new pharmaceuticals with what they have, recently inventing the world's first skin cancer treatment, which given the climate, is excellent news for Cubans.[34] Unfortunately for the rest of the world, the blockade works both ways. What Cuba can export is also limited, which in turn limits their impact on global medicine. Things are incredibly difficult despite

29 World Health Organisation, *Cuban Experience with Local Production of Medicines, Technology Transfer and Improving Access to Health* (WHO 2015)

30 Cuba vs Bloqueo 10

31 Oxfam America, *Cuba: Going Against the Grain* (Oxfam 2001); Amnesty International (2009); AAWH 1997

32 Chomsky, *Hegemony or Survival: America's Quest for Global Dominance* (Macmillan, 2003) 88;

33 Cuba vs Bloqueo 11

34 'World's First Skin Cancer Drug Available in Every Pharmacy', *CubaSi* (Autumn 2017) 5

the innovations achieved in the medical field, cutting edge technology often being denied.

It is astonishing Cuba has managed to rebuild its infrastructure to this point, since the harrowing *Período Especial*. The collapse of the Soviet Union in 1989, Cuba's greatest financial supporter and trade partner, responsible for 85% of exports, basic necessities such as detergent, food, fuel, clothing and medicine disappeared almost overnight, resulted in famine and strict rationing.[35] Rations often lasted only two weeks each month, feeding black market trade. Sugar, the main crop, dropped production by half by the mid-nineties. Lack of animal feed meant at some point that, eggs, milk, and meat vanished. Factories stopped producing due to lack of parts so the transport network depleted, isolating rural communities. Housing deteriorated. Fuel shortages meant blackouts and inability to preserve food in refrigerators from the heat. Bicycles replaced cars; animals, farming machinery. Many with disabilities went without treatment, 300 medicines no longer available. At one point, there were 9 abortions for every 10 births. Compounding these horrendous events, a 1993 storm left 150,000 homeless, causing $1 billion of damage.[36] Throughout this period the blockade remained and intensified, little wonder Cuba regards it as attempted genocide.

2 May, 2017, Havana. As a guest at The International Solidarity Conference at the Palacio de las Convenciones, where the Cuban Parliament meets, it was clear the idea the world had been given that the embargo was finally over and US/Cuban relations had been repaired was not the case. Various dignitaries spoke including Ana Teresita Gonzales Fraga, the Cuban Vice Minister for Foreign Affairs. The majority of restrictions remained. Russia and far off countries being main trade partners, with trade with the US for the most part still forbidden, including 'indirect' trade with other countries, items destined for the Cuban market, or of Cuban origin. Guantanamo Bay remains illegally occupied against the wishes of Cuba by their powerful neighbour.

THE EXTRA TERRITORIAL NATURE OF THE BLOCKADE

The unique way the blockade operates is what makes it so powerful. Instead of purely binding US companies and individuals from trading with Cuba, an embargo, limiting or ceasing business and relations with another state, it goes much further, infringing on the rights of other states and individuals to have relationships with Cuba, aiming to stop the flow of resources totally, a blockade. Not only is this against international law, UN Resolution 2625 describes the 'inalienable right' of states over their respective political, economic, social and cultural affairs, without intervention or coercion from others,[37] but questions the sovereignty of foreign states, undermining their own rule of law.

The blockade extends to bind US and Cuban citizens abroad, international trade partners

35 Luis A. Perez Jnr. *Cuba: Between Reform and Revolution 5th Ed.* (Oxford University Press 2014) 381-387

36 Ibid

37 UN General Assembly, 25th Session, 1970 Quoted in Lamrani 56

and financial service providers, both directly and indirectly. Often, use of an intermediary is not recognised, as in the case of the antibiotics mentioned earlier.[38] The sale of anything containing Cuban materials in the US is not permitted,[39] so foreign car manufacturers, for example, must prove to the US Treasury Office there is not any Cuban nickel present in their automobiles. The same would apply to any foreign confectioners using Cuban sugar in their products.[40]

A period of especially strict liability was brought in by the CACR 2004, making US citizens sampling Cuban cigars or rum liable for penalties of ten years' imprisonment and a million-dollar fine.[41] When asked if US citizens could buy Cuban products, such as tobacco and alcohol, from countries other than Cuba, the Treasury Office responded;

> The answer is no. The regulations prohibit persons subject to the jurisdiction of the United States from purchasing, transporting, importing, or otherwise dealing in or engaging in any transactions with respect to any merchandise outside the United States if such merchandise (1) is of Cuban origin; or (2) is or has been located in or transported from or through Cuba; or (3) is made or derived in whole or in part of any article which is the growth, produce or manufacture of Cuba. Thus, in the case of cigars, the prohibition extends to cigars manufactured in Cuba and sold in a third country from tobacco grown in Cuba.[42]

Until the 2016 reforms, the announcement made on 15 March 2016 by the US Treasury Department, it was not legally possible to trade or provide international payments in US dollars, which impacted heavily on banks and financial services that wanted to process payments from or to Cuba.[43] Even with reforms in place, the former restrictions were still enforced by several US governmental bodies, in particular OFAC (Office of Foreign Assets Control), and the Departments of the Treasury and Commerce. This in turn has caused reluctance to trade with Cuba, as there was still fear of reprisals from the US government.[44] These have been either in the form of large financial penalties, or by being 'blacklisted', banned completely from trading in the US market (the Caribbean arm of ING, NCB discovered this when prevented from engaging in 'any business relations with any US company or citizen' in 2006),[45] something most cannot afford.

In fact, the amount businesses were fined for dealing directly or indirectly with Cuba in the period 2016-17 increased.[46] Monetary transfers involving non-US financial institutions

38 See para 2, 19

39 Cuban Asset Control Regulations 2004

40 Lamrani 54;

41 Lamrani 58

42 US Department of the Treasury, *Cuban Cigar Update* (30 September 2004) quoted in ibid

43 Cuba vs Bloqueo 1-2

44 Ibid 2

45 Reuters *ING Unit Put on US Blacklist for Cuba Business* (3 October 2006) mentioned in Lamrani 57

46 Cuba vs Bloqueo 2

continued to be fined under blockade measures. Purchase of goods or services in non-US territories, it was claimed were somehow related to Cuba, were cancelled at cost. Many examples are noted in Cuba's report to the UN, such as the French bank BNP Paribas, in Belgium, refusing to process a Euro transfer from the Cuban embassy in Spain to European Forax Services, claiming 'international restrictions of operations on behalf of Cuba'. Likewise, HSBC Bank Canada refusing to accept a transaction for Dutch Reuven International, addressed to the Cuban Consulate in Toronto, because it was allegedly related to Cuba.

The Helms-Burton Act 1996 has faced much opposition from the European Union due to its extraterritorial claims to bind EU citizens and businesses, preventing them from trading with Cuba by threatening and enforcing sanctions, plus the legislation's contempt for international law (especially what was the Agreement on Tariffs and Trades, now within the World Trade Organisation).[47] These bully boy tactics demand the rest of the world play ball on the pitch of US interests, with the goal being total implication of American policy objectives. Unfortunately, despite the illegality of such provisions and frequent non-compliance with domestic discrimination legislation of other states, companies and individuals kowtow to these demands out of trepidation that the US will take them to task with its sanctions, causing potentially irreparable financial damage to businesses. As seen earlier, this fear is all too real; it has happened to others. Some must feel they are performing a balancing act, on one hand the demands of the US, proffering the keys to the world's largest market, ready and willing to snatch them away for daring to disobey, and on the other, the requirements of domestic legislation.

Companies behaving in a manner contrary to national discrimination legislation include those in the UK. Governments, as well as companies, are not readily willing to confront the elephant in the room, preferring to adopt an attitude of quiet deference. Only recently, in Britain, the Open University refused to accept applications from Cuban nationals, by reason of the US blockade, stating it would not enrol students on policy grounds, based on 'international economic sanctions and embargoes.'[48] The OU later stated it considered itself;

> [W]ithin the jurisdiction of US regulation with regard to economic embargoes… the OU has…employees who hold US citizenship (and are therefore subject to US regulation in this regard wherever they are in the world) …the OU has significant links with the US (notably using US financial systems). The OU is taking necessary precautions…Those steps include not trading with those countries impacted by… US 'comprehensive' sanctions and embargoes.49

47 Peter Schwab, Cuba: Confronting the US Embargo (St martin's Griffin 1999) 47 in Saney 170

48 Email from OU Assistant Director of Policy and Governance quoted in 'Open University Bars Cuban Students' *CubaSi* (Summer 2017) 8

49 Dawn Turpin,OU Acting Assistant Director, Academic Policy and Governance (24 April 2017) quoted in Ibid 8

Despite this being against the Equality Act 2010, discrimination on grounds of nationality, included under the protected characteristic of race; and the Protection of Trading Interests Legislation 1996, which stipulates the UK government should prosecute companies who accept the US blockade over domestic law and implement such measures, Lord Nash, on behalf of the government, commented, 'there are no UK or EU sanctions against Cuba. However, we understand that private organisations such as the Open University have to make decisions about their exposure to sanctions on the basis of commercial considerations, their own legal advice and appropriate risk assessments.' This suggests the government are allowing a British institution to base its admissions policy on US law. The British government website states, 'the UK Protection of Trading Interests Act makes it illegal for UK based companies to comply with extraterritorial legislation and there is provision for fines to be levied against offending companies and individuals. In parallel, an EU Blocking Statute also makes it illegal to comply'.

There has been a condemning response from across the political spectrum.[50] Due to a campaign organised by the Cuba Solidarity Campaign (CSC), the OU eventually changed the policy, after being threatened with legal action. This is not the first occasion something like this has happened in Britain; the Hilton group in 2007 banned Cuban citizens from staying in their hotels, justifying themselves by reason of 'threat of fines from the US Treasury Department's Office of Foreign Assets Control'. After a boycott by trade unions and others, they too changed their policy.[51]

CONCLUSION

Much like the late Fidel Castro, Cuba has survived assault upon assault of oppressive, discriminatory, targeted US legislation designed to force regime change by making daily life intolerable. These measures have not only prevented trade with the US, the rich neighbour, but inhibited Cuba's right to trade with other nations including those in Europe, by the extra territorial nature of the blockade which uses bully boy tactics, the threat of legal jeopardy and financial penalties, to control the world stage, compromising the human rights of Cuba's citizens, particularly damaging health, sanitation and food. Until the world takes a stand against the intimidating spectre of the ultimate super power, the situation is set to continue and even worsen.

Whatever the future may hold, one thing is certain. Cuba will persevere. 'No matter what difficulties we have faced in Cuba – the blockade, invasion, US interference, the Special Period – we have overcome them. So, we are ready.'[52]

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50 'Open University Facing Legal Challenge Over Cuban Student Ban' *CubaSi* (Autumn 2017) 8-9

51 'Open University Bars Cuban Students' *CubaSi* (Summer 2017) 8-9

52 Dr Carlos Alzugaray (former Cuban diplomat, writer and academic) speaking to an all-party parliamentary group, 26 June, 'Cuban Futures: Trump's Threat to Cuba,' CubaSi (summer 2017) 15

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CASE C-210/06 *Cartesio*: An Excessive Restriction on the Right of Establishment of Companies?

Sandra Ekpo*

ABSTRACT

Corporate mobility is the transfer of a company from one place to another.[1] *According to Valk, corporate mobility has become more prevalent in the EU as companies transfer to jurisdictions with more favourable company laws.*[2] *Under European Union law, Article 49 and 54 TFEU guarantees companies the freedom of establishment across the Member States. However, these provisions are problematic as they clash with two entrenched, yet conflicting theories of company law. The ECJ's attempts to bring clarity to this area have only made matters more complex as it is unclear whether companies are governed by the 'real seat' theory of the 'incorporation' theory. Cartesio is the latest judgement by the ECJ to add to this discussion, however critics have argued that the ECJ's interpretation is excessive and harsh. This article will critically discuss the ruling in Cartesio* **to** *assess whether it is an excessive restriction on the right of establishment of companies and whether it should be overruled.*

INTRODUCTION

The extent to which companies within the European Union (hereinafter EU) should be able to enjoy the right of 'freedom of establishment,' has laid fertile ground for academic debate. Despite the overriding objective of the single market, namely facilitating free movement between the Member States, it is apparent that the 'legal set-up'[3] of such freedom constitutes a significant burden on companies' intra-European mobility.

Obstacles to companies' cross-border movement persist due to two seemingly entrenched, though conflicting, theories of inter-legal company law.[4] The *siège reel*[5] (real seat) theory provides that the company's *real seat* or where the principal seat of management is located

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1 Olivier Valk, 'C-210/06 Cartesio: Increasing corporate mobility through outbound establishment' (2010) Utrecht law Review 151

2 Ibid

3 Eddy Wymeersch, 'The Transfer of the Company's Seat in European Company Law', (2003) Common Market Law Review 664

4 John Lowry, Eliminating obstacles to Freedom of Establishment: The Competitive edge of UK Company Law' (2004) The Cambridge Law Journal 332

5 Jan Wouters, "Private International Law and Companies' Freedom of Establishment" (2001) European Business Organization Law Review 101

will determine the law applicable to that company. Thus, Member States that follow this rationale have control over foreign companies whose headquarters are within their territories.[6]

The incorporation theory provides that the law applicable to the company is governed by the Member State where the company has a registered office in.[7] This theory appears to favour the mobility of companies; however it has been suggested that the real seat theory has been used to restrict companies' freedom of establishment as it has often required companies to reincorporate when they transfers seats.[8] Indeed this has resulted in an obvious clash within private international law as the ability of Member States to regulate company activity is at odds with the enforcement of companies' rights of establishment.[9]

The European Court of Justice (ECJ) has followed an unclear line of reasoning when assessing the interrelationship between private international law and the right of establishment for companies. *Centros*,[10] *Ubeseering*[11] and *Inspire Art*[12] established a somewhat problematic legal authority. The parameters of companies' rights of establishment were presented in sweeping judgements supplemented with fairly 'subtle distinctions'.[13] *Cartesio*[14] was much awaited as a clarifying decision in a rather grey area of the law relating to companies' freedom of establishment. However, instead of consolidating this right under Article 49 and 54 of the Treaty on the Functioning of the European Union (TFEU), *Cartesio's* barely comprehensible decision seems to introduce new 'subtleties and complexities' to an already confusing area of law.[15] The ECJ held Articles 49 and 54 TFEU are to be interpreted as not precluding the legislation of a Member State.[16] Thus a company governed under the law of its own State may not transfer its seat to another Member State whilst retaining its legal status under the law of its host State.[17]

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6 Peter Dyrberg, 'Full Free Movement of Companies in the European Community at last?' (2003) European Law Review 529-530

7 Jan Wouters, "Private International Law and Companies' Freedom of Establishment" (2001) European Business Organization Law Review 101

8 Peter Dyrberg, 'Full Free Movement of Companies in the European Community at last?' (2003) European Law Review 529-530

9 Peter Vargaova, 'The Cross-Border Transfer of company's registered office within the European' (Master's thesis, Central European University 2010) 6; Carsten Gender-Neutral, et al, 'The Mysteries of Freedom of Establishment after Cartesio' (2010) International and Comparative Law Quarterly 333

10 Case C-127/97 Centros Ltd v Erhvervs-og Selskabsstyrelsen (1999) ECR, I-1459

11 Case C-208/00 Uberseering BV v Nordic Construction Baumanagement GmbH (NCC) (2002) ECR I-9919

12 Case C-167/01 Kamer van Koophandel en Fabriken voor Amsterdam v Inspire Art Ltd (2003) ECR I-10 155

13 Ibid

14 Case C-210/06 Cartesio Oktato ´ Szola ´ltato ´ bt (2008) ECR I-9641

15 Ibid

16 Ibid at 124

17 Ibid

The phraseology of *Cartesio* suggests that Member States can lawfully restrict their own companies from incorporating in other EU jurisdictions. This decision has exacerbated the tension by rendering the 'freedom of establishment for companies an ineffective tool for the establishment of the Internal Market',[18] as it makes cross-border mobility of companies more difficult.

Thus, this paper intends to analyse the *Cartesio* judgment in light of prior authorities aiming to underline the decision as a disproportionate and unjust restriction on the right of establishment for companies. Therefore, this paper will suggest that *Cartesio* should be overruled because the nature of the decision hinders the very fabric of the internal market. This stance shall be explored by critically analysing case law and academic opinion where appropriate.

1. THE LEGAL FRAMEWORK — FREEDOM OF ESTABLISHMENT FOR COMPANIES;

Before examining case law, it is pivotal that the legislative context of this freedom is outlined. According to Borg-Barthet 'unclear case law is often rooted in equally unclear written law'[19]. Article 49 TFEU states, *'freedom of establishment shall include the right to…set up and manage…companies or firms*[20]' within the meaning of Article 54. Accordingly, Article 54 TFEU provides *'Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community shall, for the purposes of this chapter (the Chapter on freedom of establishment), be treated in the same way as natural persons who are nationals of Member States'*.[21]

These provisions highlight that the establishment of the company, in accordance with the law of a Member State, forms the prerequisite requirement for cross-border mobility. However, Article 54 generates confusion in relation to the trigger clauses (the registered office, the central administration, or, the principal place of business) for companies' cross-border mobility. It is unclear whether the existence of one of the connecting factors will bestow the right for company's freedom of establishment or if the use of the word 'or' provides the option for Member States' company law to adopt one of the connecting factors preferentially to the others.[22]

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18 Carsten Gerner-Beurle, et al, 'The Mysteries of Freedom of Establishment after Cartesio' (2010) International and Comparative Law Quarterly 303

19 Justin Borg-Barthet, 'European Private international law of companies after Cartesio' (2009) International and Comparative Law Quarterly 1021

20 Article 49 TFEU

21 Article 54 TFEU

22 Justin Borg-Barthet, 'European Private international law of companies after Cartesio' (2009) International and Comparative Law Quarterly 1021

Indeed, prior to the adoption of the Treaty of Lisbon, Article 293 of the European Community Treaty (EC Treaty) [which has since been repealed] provided what was arguably a reserve of legislative competence in Member States, allowing them to regulate companies as well as the relevant conditions under which a company may transfer its seat.23 Thus the nature of these provisions is deeply contentious as it remained unclear how they would interact with one another; mainly due to lack of cross-referencing between the articles.24 As such, the ECJ have produced an extensive list demarcating the boundaries of companies' right of establishment which this essay shall explore below.

1.1 1980S: THE ECJ'S EARLY JURISPRUDENCE

In the 1980s the ECJ delivered two important, yet conflicting judgements concerning companies' right of establishment. Indeed, it was clear from the outset that the lack of harmonised rules to define a company for the purposes of EU law was deeply problematic. Member States were left with a considerable amount of discretionary power to determine company law within their borders that impeached this of their neighbouring States when the companies crossed borders.

(I) SEGERS25

Slenderose Ltd was a Dutch company incorporated under English law. When Mr. Segers became the director of Slenderose Ltd, the company's business was conducted by its Dutch subsidiary.[26] An action was brought against the Dutch authorities by Mr. Segers after he was refused sickness insurance. The national court had held that Mr. Segers would not be entitled to receive this benefit, so long as he remained the director of a company that had been incorporated under foreign law. The ECJ was therefore asked to rule on whether the refusal of sick insurance, on the grounds of geographical location of the registered office, was compatible with Article 54 on the freedom of establishment.[27]

The ECJ held, a company formed in accordance with the law of another Member State that conducts its business through a subsidiary, cannot be deprived of the benefits it is entitled to.[28] The right of establishment as far as companies are concerned, requires companies to be formed in accordance with the law of *a Member State* and having their registered office,

23 Ibid

24 Ibid

25 Case 79/85 *Segers* (1986) ECR 2375

26 Ibid

27 Ibid at 9

28 Ibid at 14

central administration or principal place of business *within* the community.[29] It should be noted that it is their registered office in the aforementioned sense which *'serves as the connecting factor with the legal system of a particular state'*.[30] Thus the denial of sick insurance amounted to an indirect restriction on the right of establishment because it undermined equal treatment of national and non-national companies within the Union. The ECJ confirmed its opinions in *Factortame*[31] and *Commission v. France*[32] stating that where freedom of establishment confers the pursuance of economic activity in another member state, then restrictions on secondary establishments are unlawful.

(II) DAILY MAIL[33]

Daily Mail intended to transfer its central management to the Netherlands while it stayed incorporated in the United Kingdom (UK) for taxation purposes. Under UK law, a company incorporated under its legislation and having its registered office in the UK, may establish its central management and control outside the United Kingdom. Therefore, it is still able to maintain its legal personality so long as the Treasury has consented to the transfer. Daily Mail had alleged that consent was not necessary as Article 54 TFEU granted an unqualified right to transfer its central management to another Member State without consent.

The ECJ held that Articles 49 and 54 prohibit the Member State of origin from hindering freedom of establishment in another EU jurisdiction.[34] These provisions, however, confer 'no right'[35] on a company incorporated under the legislation of a Member State which has its registered office in that Member State, to transfer its central management to another jurisdiction. There is a presumption that as companies are *'creatures of national law*[36] , they hence only exist by the virtue of their domestic legal system. This opinion is clearly questionable as the ECJ seem to suggest that although companies' right to establishment should not be restricted, the national rules of a Member State could in many ways rebut this very right.

29 Ibid at 13; Case 270/83 Commission v France (1986) ECR 273

30 Ibid

31 R v Secretary of State for Transport, ex p Factortame Ltd ('Factortame II') (1991) ECR I-3905

32 Case 270/83 Commission v France (1986) ECR 273

33 Case 81/87 Daily Mail (1988) ECR 5483

34 Ibid at 16

35 Ibid at 25

36 Ibid at 19

It is evident the two cases deliver contradictory judgments.[37] *Segers*' delivers a formal pro-establishment decision before the *per se* creation of the internal market.[38] In contrast, *Daily Mail* retreats from this authority with an opinion that, as Gelter argues, is reliant on the real seat theory.[39] The ECJ in *Daily Mail* demonstrated that companies' freedom of establishment could be lawfully condensed as a protective mechanism to deter the so-called '*Delaware effect*'[40] in the internal market.

2. THE MILLENNIUM ROADMAP TO CARTESIO

The *Cartesio* decision was highly anticipated due to the *Centros*,[41] *Ubeseering*[42] and *Inspire Art*[43] trilogy at the start of the millennium. Although it can be argued that these cases generated a rather consistent authority by ruling in favour of the incorporation theory; there was much discrepancy within the judgements that needed to be addressed. The ECJ appeared to have differing views on the applicability of the right to freedom of establishment. This, in turn, created much uncertainty relating to this doctrine; which it was hoped *Cartesio* could address.[44]

(I) CENTROS

Centros, a private limited company registered in the UK sought to establish a registered branch in Denmark where it was trading. The application was refused by the Danish authorities who contended that the establishment of a branch was a way to circumvent the Danish minimum share capital requirement. *Centros* argued that it was entitled to set up a branch in accordance to the right of freedom of establishment conferred in Article 49 and 54 TFEU. The ECJ held the refusal to register a branch in Denmark constituted an obstacle to the freedom of establishment which includes the right to set up and manage undertakings within the community.[45] 'It is immaterial to argue that the company was formed in the first Member State only for the purpose of establishing itself in the second;

37 Martin Gelter, 'Centros, the Freedom of Establishment for Companies, and the Court's Accidental Vision for Corporate Law' (Fordham University and ECGI Law Working Paper N° 287/2015, 2015) 14

38 Renate Eichin, *Freedom of Establishment versus Creditor Risk in Germany: A Clash of Principles?* (diplom.de 2007) 74

39 Martin Gelter, 'Centros, the Freedom of Establishment for Companies, and the Court's Accidental Vision for Corporate Law' (Fordham University and ECGI Law Working Paper N° 287/2015, 2015) 14

40 The argument here is that the seat doctrine prevents a "race to the bottom" among Member States who might otherwise compete to frame a company law regime which foreign companies find attractive.

41 Case C-127/97 Centros Ltd v Erhvervs-og Selskabsstyrelsen (1999) ECR, I-1459

42 Case C-208/00 Uberseering BV v Nordic Construction Baumanagement GmbH (NCC) (2002) ECR I-9919

43 Case C-167/01 Kamer van Koophandel en Fabriken voor Amsterdam v Inspire Art Ltd (2003) ECR I-10 155

44 Carsten Gerner-Beurle, et al, 'The Mysteries of Freedom of Establishment after Cartesio' (2010) International and Comparative Law Quarterly 307

45 Case C-127/97 Centros Ltd v Erhvervs-og Selskabsstyrelsen (1999) ECR I-1459 at 19

especially when this is where its main, if not entire, business is to be conducted'[46] The right to set up branches in other Member States is inherent in the exercise of corporate mobility.[47]

However, Member States are still entitled to design measures to prevent individuals from improperly or fraudulently taking advantage of provisions of Community law. [48] The national provisions the Danish authorities believed Centros was aiming to avoid were rules governing the formation of companies and *not* rules on how the company is to carry out its business. As such, a national wishing to set up a company in a Member State whose company law rules seem the least restrictive [and then chooses to set up branches in other Member States] cannot, in itself, constitute an abuse of the right of establishment.[49]

Hommelhoff opines that as a consequence of Centros there is an unconditional requirement for all Member States to recognise any company which is validly incorporated in a Member State, even though the company's actual head office (or 'real seat') is relocated to another Member State.[50] Indeed the ECJ in Centros seem to echo the sentiment in Segers. Companies' cross-border rights to establishment cannot be restricted because the economic activities of a company and its headquarters are not concentrated in one Member State. The creation of the internal market aimed to promote economic competitiveness across the Union; thus, denying such cross-border freedoms would fall short of achieving this very purpose.

(II) UBERSEEING

Uberseeing was incorporated in the Netherlands where it had its primary seat. Uberseeing sought to enter into a contract with a German company to redevelop its building which was later claimed to be defective. During this period all of Uberseeing's shares had been acquired by German nationals and as such, the company now had its real seat in Germany, though it had not been reincorporated under German law. The German national court held the company had no standing to sue under German law since it had not been properly incorporated under German law; and therefore, had no legal capacity.

When the case was referred to the ECJ for a preliminary ruling it was held that Article 49 and 54 precluded Germany from denying such legal capacity of a company in Uberseeing's position. The requirement for reincorporation is *'tantamount to an outright negation of the freedom of establishment conferred on companies by Articles 49 and 53 TFEU'*.[51] Union law provides that a necessary precondition for the exercise of the freedom of establishment is the recognition of companies and their branches by *any* Member State which they wish to

46 Ibid at 17

47 Ibid at 27

48 Ibid at 24

49 Ibid at 27

50 Marcus Lutter, Peter Hommelhoff, *GmbHG Kommentar zum GmbH-Gesetz, 15. Auflage* (Dr. Otto Schmidt, Köln 2000) 225

51 Case C-208/00 Überseering BV v. NCC (2002) ECR I-9919 at 93

establish themselves in.[52] Although the interests of creditors, minority shareholders and employees could potentially also be considered as imperative requirements that *could* justify restrictions on this freedom, any possible justification was denied at this case.[53]

Furthermore, the ECJ referred back to its judgment in Centros to highlight that the issue contested was whether the Member State of formation allows a company to transfer its headquarters to another Member State whilst retaining its legal personality in its State of incorporation. Kugler argues that even though it is possible to draw such a differences between the cases, they can be criticised insofar as they appear arbitrary.[54] The argument that freedom of establishment relates only to immigration, but leaves the States free to deal with emigration, is rather idealistic.[55] National regulators would be entitled to continue to 'impose substantial restrictions' on the free movement of legal entities, thereby 'jeopardising the free movement of legal persons'.[56] Differentiation in domestic legislation requirements for companies would provide a 'very unbalanced'[57] authority, as certain States would be entitled to stop their corporate 'citizens' at their borders whilst others would be allowing them to move freely.

(III) INSPIRE ART

Inspire Art was a private limited company established in the United Kingdom but solely trading in the Netherlands. After *Inspire Art* had decided to register a branch in the Netherlands, it was formally classified as a foreign company, and as such was required to comply with minimum provisions on share capital. The ECJ confirmed its rhetoric in the prior cases stating, '*the reasons for which the company was formed in that other Member State, and the fact that it carries on its activities exclusively or almost exclusively in the Member State of establishment, does not deprive it of the right to invoke the freedom of establishment guaranteed by the Treaty.*'[58] The rule requiring Dutch branches (incorporated outside of Netherlands) to disclose that they are pseudo-foreign companies breached the Eleventh Council Directive.[59] Therefore this minimum share requirement could not be deemed compatible with Union law.

The nature of this ruling is deeply problematic because of the lack of clear distinctions in the

52 Ibid at 59

53 Ibid at 92

54 Henrik Norinder, 'The aftermath of Inspire Art- Applicability of the real seat theory and grounds for justification' (Masters' Thesis, University of Lund (2004) 22

55 Ibid

56 Ibid

57 Eddy Wymeersch, 'The Transfer of the Company's Seat in European Company Law', (2003) Common Market Law Review 676

58 Case C-167/01 Inspire Art (2003) ECR I-10155 at 105

59 Ibid 67-72

ECJ's rationale. *Überseering* provides that the law of the host state *can* indeed be applied in certain situations as a mandatory requirement when it needs to justify national restrictions; but remarkably, *Inspire Art* makes 'no reference to this part of the *Überseering* decision'.[60] As such, *Inspire Art* has been criticised as 'lapidary' in the way it was argued as the ECJ denied the possibility of any justification without however providing a detailed explanation.[61] The subtle substitutes in the judgements created further ambiguity around the right to freedom of establishment at a time when it was obvious there should be further harmonisation of Member States' private international rules on companies.

3. WHY CARTESIO IS PROBLEMATIC?

According to Advocate General Maduro, *Cartesio*[62] was a *needed* decision in order to rationalise the uncertainties in earlier case law.[63] Case law on immigration and emigration of companies had never been 'entirely convincing',[64] thus *Cartesio* was in many ways, the perfect opportunity to finally put to bed the confusion. However, *Cartesio's* novel subtleties produced more perplexities by exerting further restrictions on the rights of establishment.

The Facts

Cartesio, a limited partnership formed in accordance with Hungarian Law, wished to amend its registration and register its new operational headquarters in Italy. The courts' initial reaction was to refuse to enter the new address; Hungarian law prohibited companies with Hungarian legal status from transferring their operational headquarter to another Member State. Such an action would not be possible until *Cartesio* dissolved its company in Hungary and re-incorporated in Italy. Thus, the ECJ were asked to determine whether Articles 49 and 54 precluded national rules preventing the transfer of a company's operational headquarters to another Member State, where such restrictions had been established under national law.

The Decision

The ECJ held that referring back to *Daily Mail*, 'companies are creatures of national law and exist only by virtue of the national legislation which determines [their] incorporation and functioning'.[65] In *Überseering* whilst confirming this dictum, it was 'concluded that a Member State is able, in the case of a company incorporated under its law, to make the company's right to retain its legal personality under the law of that Member State

60 Henrik Norinder, 'The aftermath of Inspire Art- Applicability of the real seat theory and grounds for justification' (Masters' Thesis, University of Lund (2004) 16

61 Christian Kersting, 'The ECJ´s Inspire Art Decision of 30 September 2003 and its Effects on Practice' (2003) German Law Journal 1280

62 Case C-210/06 *Cartesio* (2008) ECR I-9641

63 Ibid Maduro opinion

64 Ibid 28

65 Ibid para 104

subject to restrictions on the transfer to a foreign country of the company's actual centre of administration.'[66]

The ECJ in *Cartesio* confirmed this authority stating that, in the absence of a uniform definition of the companies which may enjoy the right of establishment, national law is free to determine any restrictions applicable to such companies.[67] 'Thus a Member State has the power to define both the connecting factor required of a company if it is to be regarded as incorporated under the law of that Member State…and if the company is to be able subsequently to maintain that status.'[68]

Therefore, a Member State has the power to prohibit a companies' right to transfer its seat without dissolution to another Member State as it breaks the 'connecting factor'[69] required under the national law of that Member State. This jurisprudence however can be criticised for being rather illogical. Even if the company wishes to move its operational headquarters elsewhere it will still have its registered office, central administration and principal place of business within the EU.[70] Therefore such a distinction is unmerited as Member States would be able to get a free pass to restrict companies' right to freedom of establishment. Arguably *Cartesio* offers a new interpretation of Article 54 TFEU; the provision has been construed as if companies *'formed and existing in accordance with'* the law of the home Member State.[71] Thus this suggests that companies must 'continually comply with the requirements set out by the national law'[72] provided by the Member State to maintain its status.

Despite this seemingly strict authority, the ECJ confirmed that the *per se* restrictive measures of a Member State needs to be justified if it serves an overriding requirements in the public interest.[73] In *Sevic Systems*,[74] it was held that the basis of public interest includes: the protection of the interests of creditors, the preservation of the effectiveness of fiscal supervision and the fairness of commercial transactions, are all reasons which may justify a measure restricting the freedom of establishment. This highlights that although freedom of establishment can be restricted, the measures that national courts shall rely on must be proportionate to the public interest. Interestingly, the ECJ did not state the *Cartesio's* restriction could indeed need to be justified, which suggests they did not perceive it to be unlawful as *Cartesio* was still a Hungarian company under Hungarian law.

66 Ibid

67 Ibid at 109

68 Ibid at 110

69 Ibid

70 Carsten Gerner-Beurle, et al, 'The Mysteries of Freedom of Establishment after Cartesio' (2010) International and Comparative Law Quarterly 311

71 (Szydl (2009) 716) cited in Sinida Petrovie, 'The ECJ Ruling in Cartesio and Its Consequences on the Right of Establishment and Corporate Mobility in the European Union' (2010) European Journal of Law Reform 288

72 Ibid

73 See (supra note 60) at 113

74 Case C-411/03 Sevic Systems [2005] ECR I-10805 para 28-29

Arguably, the rationale of *Cartesio* is conceptually clear; albeit seemingly arbitrary. Companies 'formed in accordance with the law of a member state' can rely on freedom of establishment.[75] Therefore, the ECJ seems to draw an analogy between, on the one hand, the 'connecting factor' ultimately determining the applicable law and on the other hand, domestic substantive and procedural rules on company formation. However. this 'clear' concept is slightly distorted if we consider this notion from the viewpoint of the company founders whose right to freedom of establishment also includes an intrinsic right 'to set up companies'.[76] The *Dassonville,*[77] formula has been extended by the ECJ to apply to the freedom of establishment, thus embracing *any* and *all* national measures liable to 'hinder or make less attractive' that right. Therefore, a company's founders could challenge the connecting factor for incorporation by the national law of the Member State in the same way they could challenge the restrictive rules for company formation.[78] As such, national law restrictions would have to be set aside because, whether justified or not, they constitute a hindrance to this right.

In *Sevic*,[79] it was established that 'National rules that allow a company to transfer its operational headquarters only within the national territory clearly treat cross-border situations less favourably than purely national situations'.[80] Therefore, it can be argued that *Cartesio,* by requiring companies to continually apply with their obligations under national law, amounts to an *'outright negation of the freedom of establishment'*.[81] It seems like *Cartesio* gave a free pass to Member States in enjoying the absolute freedom to determine the 'life and death' of companies incorporated under their domestic law, irrespective of the consequences for the freedom of establishment. [82] Ironically, before the ECJ's ruling, Advocate General Maduro was of the opinion that *Cartesio* could be used by the ECJ as an example. It was suggested that it should be ruled that Articles 49 and 54 overrule national laws that make the transfer of administrative seats impossible because they have a direct effect on companies' mobility.[83] It appears that this interpretation of the freedom of establishment would enable a less restrictive approach to corporate mobility between Member States that would adhere to the EU principle of freedom of movement.[84] Clearly, the *Cartesio* judgment could not have strayed further away from this aim.

75 Carsten Gerner-Beurle, et al, 'The Mysteries of Freedom of Establishment after Cartesio' (2010) International and Comparative Law Quarterly 310

76 Article 49 TFEU (ex-art 43 EC); Wolfgang Schön, 'Niederlassungsfreiheit als Grundungsfreiheit' in Peter Hommelhoff, wt al (eds), *Festschrift fu¨r Hans-Joachim Priester zum 70. Geburtstag* (Dr Otto Schmidt, Ko¨ln, 2007) 737, 739–743

77 C-8/74 Procureur du Roi v Dassonville (1974) ECR 837 (free movement of goods)

78 Carsten Gerner-Beurle, et al, 'The Mysteries of Freedom of Establishment after Cartesio' (2010) International and Comparative Law Quarterly 311

79 Case C-411/03 Sevic Systems AG (2005) ECR I-10805

80 Case C-210/06 *Cartesio* (2008) ECR I-9641 AG Maduro para 25

81 Ibid 34

82 Ibid 31

83 Ibid 28-40

84 Sinida Petrovie, 'The ECJ Ruling in Cartesio and Its Consequences on the Right of Establishment and Corporate Mobility

Indeed, the ECJ's judgement in *Cartesio* can be regarded as deeply restrictive. The ECJ essentially held that the Member State of incorporation could, by requiring the winding-up or liquidation of the company upon the cross-border seat transfer, lawfully prevent a companies' right of establishment.[85] Therefore in many ways, Member States would have carte blanche to impose a 'death sentence' on companies constituted under there laws.[86] As such, *Cartesio* is clearly a restrictive decision; however as it does not completely void the right to freedom of establishment, it can be argued it is not 'excessively' restrictive.

Instead, it has arbitrarily encouraged the outcome of cases depending on whether the *real seat* theory or the *incorporation* theory applies. For instance, if the Member State follows the real seat theory it will apply its internal company law which might or might not require re-incorporation. This would be immune from the EU freedom of establishment, as held in *Cartesio* and *Uberseering*. Although if the Member State follows the incorporation theory, it will refer to the law of the country where the company's registered office has remained. Thus, if the latter's law requires, for instance, the movement of the operational headquarters outside its territory then this law will be restricted under *Cartesio*.

CONCLUSION

To conclude, it can be argued that Cartesio is not so much an 'excessive restriction', as it is completely inconsistent with the right of establishment of companies. Its attempt to remedy the confusion surrounding the right of establishment in prior case law has clearly failed. The ruling reduced a right as pivotal as the freedom of establishment to arbitrarily depend on the relevant type of private international company law doctrine (*real seat* or *incorporation* theory). As a result, this produces wildly divergent outcomes, even on the same facts.

It is necessary to acknowledge the complexities surrounding the legal regime of the right to establishment; and *Cartesio* has done nothing but add to its complexities. It has ensured the right of establishment operates in many ways as a qualified right, and not as an inherent right like EU provisions would suggest. Thus, the nature of the judgement fails to ensure a competitive market as it preserves the Member States' competence to scrutinize companies attempting to enter their territories. Therefore, *Cartesio* should be overruled and the boundaries of this freedom of establishment need to be revisited. Not only does the *Cartesio* dictum clearly fail to offer a useful interpretation for the internal market, it can also be seen as a dangerous precedent offering a carte blanche to Member States by imposing restrictions to companies which ultimately undermines the very goal of Union law and the internal market.

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in the European Union' (2010) European Journal of Law Reform 266

85 Wolf-Georg Ringe, 'No Freedom of Emigration for Companies', (2005) European Business Law Review 639; Veronika Korom et al, 'Freedom of Establishment for Companies: the European Court of Justice confirms and refines its Daily Mail Decision in the Cartesio Case C-210/06' (2009) European Company and Financial Law Review 154

86 Case C-210/06 *Cartesio* (2008) ECR I-9641 AG Maduro para 31

Mr. Big Versus the People
Canada's Mr. Big Sting and the Lawfulness of the Confessions it has Produced

Gwendolyn Violet Shaw*

ABSTRACT

This paper will discuss the legality behind confessions obtained under false pretences that could lead to potentially wrongful convictions, with a particular focus on confessions that are reached with a procedure known as the "Mr. Big" sting, or the "Canadian Technique". While the Mr. Big sting is deemed illegal in both the United States and in the United Kingdom, it is still actively used in Canada, particularly to aid in solving "cold" cases. The paper will closely examine the case of Nelson Hart and a subsequent Canadian Supreme Court ruling. It will also examine the convictions of Atif Rafay and Glen Sebastian Burn, whose case was recently re-popularised by the Netflix documentary series, The Confession Tapes., Canadian citizens, Burns and Rafay were residing in Canada at the time of the sting, were tried and convicted in the US for the murder of Rafay's family using confessions generated by a "Mr. Big" sting. Sources will include: brief evidence from the original investigations, R v Hart (2014), United States v Burns (2001), as well as the affected laws and selected studies around Mr. Big procedures.

INTRODUCTION

In a criminal case, confessions are one of the most powerful tools in securing a conviction, with more than 80% of these cases solved with the aid of a confession.[1] Police and prosecutors are always under pressure to solve outstanding crimes and provide successful convictions. However, when the crime scene lacks conclusive physical evidence, tactics have been employed that sometimes result in confessions obtained under false pretenses, which is a form of coercion.[2]

A coerced confession is any confession that is not given freely by the suspect: "a confession is considered false if it is elicited in response to a demand for a confession and is either intentionally fabricated or is not based on actual knowledge of the facts that form its

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1 Philip George Zimbardo, ' The psychology of police confessions' [1967] 1(2) Psychology Today

2 Richard Conti, 'The Psychology of False Confessions' [1999] 2(1) The Journal of Credibility Assessment and Witness Psychology 14-36

content".[3] There are levels to the potential coercion that can range from pressure and suggestions of guilt from the police to threats against and torture of the suspect. One end of the spectrum seems extreme, but it has the potential to produce the same results as the authorities pressuring a confession or falsifying evidence, given the circumstances. It should be noted, however, that a confession that might have been brought about through pressure or coercion, but "accurately accounts for significant portions of evidence should not be classified as a false confession".[3]

In 1989, a Lloyd-Bostock report found that in "Great Britain, false confessions ranked second only to mistaken identifications as a cause of wrongful conviction among cases referred to the Court of Appeal".[4] According to the Innocence Project, an American organisation founded in 1992 that works to overturn miscarriages of justice, more than 25% of people who were exonerated by DNA evidence after being wrongfully convicted had falsely confessed or made some type of incriminating statement to authorities.[5] However, it is difficult to establish a definitive number for the incidence rate of wrongful convictions, let alone a number for false confessions.[6]

Even when the confession does not appear to be supported by evidence found at the crime scene, more often than not the confession becomes the most important element of the prosecutor's argument. The United States Supreme Court Justice William Brennan has observed that "the introduction of a confession makes the other aspects of a trial in court superfluous, and the real trial, for all practical purposes, occurs when the confession is obtained".[7] According to Underwager and Wakefield in 1992, a confession, no matter how it was obtained, is "considered to be the most damaging form of evidence produced at a trial".[8] One reason for this is that it is difficult for jurors to believe that anyone would confess to a crime they didn't commit.

Investigators can use a number of different tactics to elicit a confession from a subject, including extensive questioning for extreme lengths of time without a charge, claiming to have evidence that would implicate the suspect and offering them some type of deal if they confess, and so forth. In the United States, 24 states now require the recording of interrogations through common law ruling or legislation, but even though this has seen success in terms of remedying unlawful and illegitimate interrogation tactics, there are still loopholes. For example, investigators have interviewed a suspect for hours before

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3 Richard Ofshe, 'Coerced Confessions: The Logic of Seemingly Irrational Action' [1989] 6(1)Cultic Studies Journal 1-15

4 *Ibid.* (n 2)

5 Innocence project, 'False Confessions or Admissions' (*Innocence Project*, 15 July 2011)<https://www.innocenceproject.org/causes/false-confessions-admissions/> accessed 4 December 2017

6 Georgina Smith, 'The Psychology of False Confessions' [2009] 1(1) Criminal Bar Quarterly 8-10

7 *Colorado v. Connelly* [1986] 479 U.S. 157 United States Supreme Court

8 Ralph Underwager and H. Russell Wakefeld, 'False Confessions and Police Deception' [1992]10(3) American Journal of Forensic Psychology 163-174

actually beginning the recording.[9] A suspect can also confess for many different reasons. The Innocence Project lists intoxication, diminished capacity or mental impairment, coercion, and fear of a harsh sentence, to name a few. This paper will focus solely on the "Mr. Big" or "Canadian Technique" and how it is used to generate confessions and further evidence for an investigation.

WHO IS MR. BIG?

"Mr. Big" has been described as a "non-custodial interrogation procedure" but is not an interrogation technique in the strictest sense.[10] Uniquely Canadian in its usage, Mr. Big tactics are illegal in many countries, among them the United States, the United Kingdom, and Germany.[11] Mr. Big is used in murder cases that lack crucial physical evidence, or in "cold" cases.[12] It is a sting which targets the 'primary suspects' in an investigation, and tends to be most effective when used on vulnerable individuals who are alienated from society in some way, particularly those who are unemployed and in need of money at the time.[13]

The sting will usually begin with undercover Royal Canadian Mounted Police (RCMP) officers posing as members of a crime syndicate or a gang, who approach a suspect in an attempt to befriend them, usually by offering a small amount of money to complete a task, as will be shown below in the case studies. The suspect then will be "drawn in" to the gang, normally by being asked to handle what they perceive to be stolen or laundered money, stolen cars, or by transporting packages with unknown or illegal contents. This series of minor crimes serves to cement the suspect's loyalty to and dependence on the "gang".

As the suspect becomes more involved with the gang, he will eventually be offered the opportunity to meet the boss, "Mr. Big", to be formally inducted into the criminal organisation.[11] Prior to this meeting, though, and to prove his commitment, the suspect will often be asked to confess to a serious crime. Ultimately, this could be for a number of reasons, depending on the scenario that the RCMP has created. It could be a form of collateral insurance that they gang will then be able to hold over the suspect, "so that Mr. Big can draw on his purported influence and connections to make the evidence or 'problem' disappear; or both".[14] Suspects have also been led to believe that the police have already discovered incriminating evidence that would be more than sufficient to make an arrest, or had an informant who had accused the suspects, but that if the suspect confessed, Mr. Big

9 *Turner v. United States,* 582 U.S [2017] United States Supreme Court

10 Steven Smith and others, 'USING THE "MR BIG" TECHNIQUE TO ELICIT CONFESSIONS: SUCCESSFUL INNOVATION OR DANGEROUS DEVELOPMENT IN THE CANADIAN LEGAL SYSTEM?' [2009] 15(3) Psychology, Public Policy, and Law 168-193

11 Caroline Law, 'The Law on Mr Big Confessions' (*Ablawgca*, 23 July 2015)<https://ablawg.ca/2015/07/23/the-law-on-mr-big-confessions/> accessed 1 December 2017

12 Smith and Other (n 10)

13 This was seen in both Burns' and Hart's case

14 Smith and Others (n 10)

would use his connections to destroy the evidence, or directly influence an informant. In another instance, Mr. Big promised that he could get someone else to confess to the crime, so long as he knew all the relevant details of the crime. This has been seen in quite a few cases, but in the case of R v Franz, Mr. Big had told Franz that "that a convict serving a life sentence in Mexico would admit to the murder which would permit the convict to be extradited to Canada; the clear implication was that Franz's confession would improve the convict's prison conditions and quality of life".[15]

This session is typically recorded, and after a confession is made, the suspect is usually arrested within the following twenty-four hours. In all video-taped confessions, the officer playing Mr. Big is either off camera, or his face is blurred to hide his identity.[16]

This undercover procedure produces a confession 75% of the time and boasts a 95% conviction rate, and the RCMP has indicated that the technique has been used more than 350 times.[17]

GLEN SEBASTIAN BURNS AND ATIF RAFAY

On May 26th, 2004, Glen Sebastian Burns and Atif Rafay were convicted in Seattle, Washington for the 1994 murders of Tariq, Sultana, and Basma Rafay. It was the end of a 10-year investigation and trial sequence that had kept the two men behind bars in two countries since July 1995.[18] Because there was a lack of physical evidence to tie the suspects to the crime scene, the US prosecutors used confessions made by the suspects during a Mr Big sting to two undercover Royal Canadian Mounted Police members.

On July 12th, 1994, Burns and Rafay were visiting Rafay's family in their new home in Bellevue, Washington after they had recently moved from Vancouver, Canada. The pair, who were nineteen at the time, had returned from a night out when they claimed to have found all three members of Rafay's family gruesomely bludgeoned in what was an apparent home-invasion-gone-wrong. When they telephoned emergency services to report the crime, Basma, Rafay's sister, was still alive, but she died in the hospital the following morning. Rafay's parents had died at the scene.

The police questioned the two young men, tested them for gunpowder residue, and had them fingerprinted and photographed, all without legal representation.[19] After three days, the Bellevue Police Department gave the two permission to take a bus back to Vancouver to stay with Burns' parents.

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15 *Ibid*

16 *Mr. Big (2007)*

17 C Gardner, 'R C M P clarify & defend the "Mayerthorpe Mister Big" operation' (*RCMP Watch*, February 2004) <http://www.rcmpwatch .com/rcmp-clarify-defend-the-mayerthorpe-mister-big-operation/> accessed 4 December 2017

18 'Timeline' (*Rafay-Burns Appeal*)<http://rafayburnsappeal.com/timeline> accessed 1 December 2017

19 Ken Klonsky, 'THE WRONGFUL CONVICTIONS OF SEBASTIAN BURNS AND ATIF RAFAY: Presumption of Guilt' (Justice Delayed,)< http://www.en-vero.org/wp-content/uploads/2015/01/Burn-and-Rafay-Case-by-Ken-Klonsky.pdf

In January 1995, the Bellevue Police Department met with the RCMP Serious Crime Unit to discuss the case. They requested biological samples from Burns and Rafay, "to eliminate them as possible suspects", and the RCMP agreed to acquire these samples "covertly".[20] Subsequently, it was decided that the Mr. Big sting would be used to potentially obtain a confession from the suspects.[21]

Multiple sources confirm that there was no scientifically-gathered physical evidence that linked either Burns or Rafay directly to the crime scene, which is why a confession would be so crucial to 'cracking' this seemingly perfect murder.[22] Both Rafay and Burns had alibis—on the evening of the murder, they were seen at a restaurant having dinner, sighted at a movie theatre, and confirmed to have been at a diner afterwards—but there were other factors that brought suspicion onto them. Burns and Rafay had both acted strangely following the murders, and the press coverage that the two received did not help their case. Rafay had missed the funeral of his family, as he said he was not alerted to the fact that it was happening. When his parent's life insurance policy paid out, Burns and Rafay had gone on a spending spree, which only drew more attention and cast further doubt on their innocence.[23]

The RCMP began their operation, which lasted for four months and cost more than $1 million CAD. The investigation involved wiretapping the house where Burns and Rafay were living with a friend, Jimmy Miyoshi, so that they could learn their habits and determine when the best time to first approach them would be.[24] At the time, Burns was unable to find a job that would employ him because many people perceived him to be guilty. He didn't have many friends, had no source of income, and for all intents and purposes, he had become a social outcast.[25] Burns was first approached by undercover officer "Gary", who told him that he had locked his keys in his car, and that he would give Burns $100 if he could get a ride home. Burns accepted. Gary and "Al", another undercover officer, soon had Burns, and occasionally Miyoshi, doing a number of odd jobs, such as counting and handling money.[26] Burns also was exposed to the illusion of serious violence: an officer told him about how his gun was 'still warm,' and he was also sitting in a car while Gary went to 'beat up' someone who had crossed the gang, when in reality he had just scuffed his knuckles to create the illusion that he had been in a fight.[27] Gary also admitted to Burns that

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> accessed 4 December 2017

20 Detective Robert Thompson, Bellevue Police Department, 'Testimony' (2003);'Timeline' (n 18)

21 *Ibid* Detective Robert Thompson (n 20)

22 Klonsky (n 19)

23 *The Confession Tapes* (2007)

24 *Ibid*

25 *Mr. Big (n 16)*

26 *The Confession Tapes (n 25)*

27 *Ibid*

he had served jail time because he had "toasted" a guy, but that Al had gotten rid of anyone who could confirm his involvement before the trial had begun.[28]

On multiple occasions, Burns denied any involvement in the killings, many of which were recorded, as the RCMP had chosen to record almost all of their interactions with Burns. Every time Burns denied his involvement, the officers told him that he was lying and that "the police must know" the truth.[29] On the audio that was captured from the wiretapping, Rafay, Burns, and Miyoshi never once talked about the murders, nor confessed in private.[30]

In early July 1995, the Bellevue Police Department held a press conference, at the request of the RCMP, during which they claimed that they had obtained Burns' DNA. However, they did not mention that the DNA evidence actually pointed away from Burns.[31] Following the press conference, the RCMP created a document that said there was hair and other DNA evidence that had been collected from the crime scene. While this was true, the memo also said that, following this evidence, they were preparing to file charges against Burns and Rafay, which was false; Burns even denied the legitimacy of this statement and the evidence, when confronted with it by the Mr. Big gang.[32]

The undercover officers then confronted Burns alone, demanding that he tell them everything that happened, because if they knew the whole story, they could know exactly what evidence needed to be destroyed in order to protect Burns and Rafay, as Burns was now 'part of the gang'. The officers made it clear that they were worried that if Burns and Rafay were arrested, then they could point a finger at the whole criminal organisation.[33] At one point Burns said, "there is this possibility that there could be things I don't know about that, like, they're basically fabricating to look like they count", but is told by Gary and Al that the evidence is real and that they needed a full disclosure of what happened the night of the murders.[34]

Burns then confessed, and the undercover officers demanded that Rafay be brought to meet them, to make sure that he would not turn on the gang either. Up to this point, Atif Rafay had never personally met either of the undercover operatives, nor had he interacted with them in any way. After being briefed by Burns on the police 'evidence', Rafay agreed to the meeting, and he and Burns recounted details of the night of the murders. During this meeting, it became clear that the details provided by Burns and Rafay did not align with the physical evidence that was found at the crime scene. The joint 'confession' directly

28 RCMP, 'Mr. Big Recorded Tapes' (2005)

29 *The Confession Tapes (n 25)*

30 Michael Levine, Mr. Big Expert, *'The Confession Tapes',* (2017)

31 *The Confession Tapes (n 25)*

32 *The Confession Tapes (n 25)*

33 RCMP (n 28)

34 *The Confession Tapes (n 25)*

contradicted Burns' earlier account of the night of the murders, including how they physically carried out the murders, how and where they disposed of the murder weapon and other evidence like their bloody clothes, and their motive.[35]

According to Michael Levine, a former US Drug Enforcement Administration supervisory officer who had actually played the role of Mr. Big in previous stings, Burns', and later, Rafay's, confession and demeanor were far from outlandish. He cites "criminal braggadocio," and in a statement that he published after the recent Netflix documentary *The Confession Tapes* was released, he even likened their behavior to "Mafia interns" who were just trying to impress the boss and "gain favor or admittance to the inner circle of the crime family".[36] But fear was just as likely a motive for the confessions—fear that there truly was implicating evidence or even the fear that the gang might threaten to 'get rid' of them.

The confession was enough to have Burns and Rafay arrested for the conspiracy to commit murder in Canada, and it was probable cause for warrants for their arrest in the state of Washington. From 1995 until 2001, Rafay and Burns fought extradition to the United States.[37] In 1996, the Canadian Minister of Justice ordered their extradition without taking any procedural steps to assure that the death penalty would not be imposed against them. In 1997, the Court of Appeal for British Columbia rejected the Minister of Justice's decision and directed him to ensure that the death penalty would not be sought against them. Following this decision, the Canadian Supreme Court allowed another appeal, which was delayed for four years until February 15th, 2001, after which the Minister's appeal was dismissed, and there were assurances from US prosecutors that the death penalty would not be pursued. In March 2001, Burns and Rafay were extradited to Washington State.[38]

They were sent to a maximum-security prison in Washington state, where they spent most of their time in solitary confinement conditions until their trial began in 2003. The trial judge ruled that the confessions that were obtained during the RCMP's Mr. Big sting, a procedure that is specifically illegal within the United States, would be admissible in court. Judge Mertel made this determination based on the fact that the confessions were obtained in Canada and had followed Canadian law.[39]

As the trial began, family and friends admitted to being surprised by the overwhelming lack of physical evidence against Burns and Rafay, as the police department had made it seem as if there was physical evidence that connected the both of them to the crime scene which would explicitly implicate them, rather than just two confessions which were brought about

35 *Ibid*

36 Michael Levine, 'Series: The Confession Tapes Episode 1 &2: "TRUE EAST"' (*Linkedin*, 8 September 2017) <https://www.linkedin.com/pulse/series-confession-tapes-episode-1-2-true-east-netflix-michael-levine> accessed 4 December 2017

37 *United States v. Burns* (2014) 1 S.C.R. 283, Supreme Court of Canada

38 *Burns* (n 33)

39 Jason Saunders, Appellate Attorney, '*The Confession Tapes*' (2017)

with falsified evidence and taken under coercive conditions. During the trial, the defense was blocked from presenting evidence which pointed to other suspects, one of which was a recognised terrorist organisation named Al-Fuqra, and another which was given to the police by an informant.[40] Sebastian Burns was also barred from giving testimony regarding the sting that had been conducted, testimony which he deemed as "critical" during his statement before sentencing.[41]

In 2004, Atif Rafay and Glen Sebastian Burns were convicted on three counts of first degree murder, and they are currently serving consecutive life sentences. As of 2017, Sebastian Burns has exhausted all of his appeals, and Atif Rafay has one remaining appeal being processed through the Washington State Supreme Court.

UNLAWFUL OR IMMORAL?

The use of the Mr. Big sting is considered highly controversial and is illegal in many countries, with Canada being the only country that overtly authorises and promotes the use of the technique for obtaining confessions.[42] The laws surrounding typical police interrogations are rooted in a number of principles: "privilege against self-incrimination, ensuring the reliability of the confession, preventing abusive interrogation practices, and protecting the rights of suspects to make voluntary and autonomous decisions".[43] The United Kingdom has comprehensive guidelines which require that suspects being interrogated must be "reminded of their rights after every break, have eight hours of uninterrupted rest in each 24, and those who are less than 18 years of age (or who have below-normal mental functioning) must have an "appropriate adult" accessible to provide advice and ensure the fairness of the procedures.[8] Perhaps more importantly, police officers are not permitted to use any type of misdirection or embellishment of evidence to promote the likelihood of a confession.[44]

The exclusionary rule that is applied in the United States prevents the use of evidence that is gathered in such a way that it violates the defendant's constitutional rights. The exclusionary rule was created by the courts as a remedy against unlawful searches and seizures that violated the Fourth Amendment, which also ensures that any search warrant must be judicially sanctioned.[45] After *Miranda v. Arizona,* the landmark case which required suspects to be read their rights prior to incarceration or questioning, the exclusionary rule was expanded to cover the Fifth Amendment right against self-incrimination and would exclude "improperly elicited self-incriminatory statements".[46]

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40 *The Confesstion Tapes* (n 25)

41 Sebastian Burns, 'Closing Statement' (2003)

42 Underwager and Wakefield (n 8)

43 *Ibid*

44 Police and Criminal Evidence Act 1984

45 'Exclusionary Rule' (*Legal Information Institute*)<https://www.law.cornell.edu/wex/exclusionary_rule> accessed 4 December 2017

46 *Ibid*

According to Slobogin in a 2004 article, even when the suspect has full knowledge of his legal rights, this does not serve as an absolute prevention against any coercion or "trickery".[47] However, any acknowledgement of a suspect's rights is particularly absent in a Mr. Big sting.

In the United Kingdom, the Police and Criminal Evidence Act 1984 notes that "'confession' includes any statement wholly or partly adverse to the person who made it, whether made to a person in the authority or not", and during court proceedings, if the prosecution wants to submit a confession as evidence, it "is represented to the court that the confession was or may have been obtained… in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in the consequence thereof", even if the confession is proven to be true.[48] The court can also require proof that the confession was not obtained through oppression before it can be submitted.[49]

In the United States, a trial judge is given broad authority when determining the admissibility of confession evidence. If the trial judge "determines that the confession was voluntarily made, it shall be admitted in evidence and the trial judge permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances".[50] The trial judge is asked to make certain considerations, such as "whether or not such defendant was advised or knew he was not required to make any statement and that any statement could be used against him"—essentially a restatement of the Miranda rights—as well as if the defendant had been advised about his right to counsel before questioning, or if the defendant didn't have any legal counsel during questioning and then gave the confession.[51]

In Canada, the judiciary has made a number of determinations regarding the Mr. Big technique and its usage over the years. In 1998, it was determined by the Canadian courts that a Mr. Big sting cannot be constituted as entrapment. The case *R v Mack* discussed the concept in detail, but it was determined that if the police only provide an opportunity to commit a crime, the suspect is not entrapped if they act on it. It is also important to clarify that because this undercover operation is seeking a confession regarding a crime that "occurred before the operation started and not for criminal activity during the undercover operation, this type of sting operation falls outside of the Canadian definition of entrapment".[52]

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47 C. Slobogin, 'An empirically based comparison of American and European regulatory approaches to police investigation' [2004] 17(1) Adversarial versus inquisitorial justice: Psychological perspectives on criminal justice systems 27-54

48 Police and Criminal Evidence Act 1984 cl 82(1); Police and Criminal Evidence Act 1984 cl 76(2) b

49 Police and Criminal Evidence Act 1984 cl 76(2) a; Police and Criminal Evidence Act 1984 cl 76(3)

50 Crimes and Criminal Procedure 18 U.S.C 223 § 3501 (1948)

51 *Ibid*

52 *R v Mack* 3 S.C.R. 3, Supreme Court of Canada

Interestingly, in the 1981 case *Rothman v The Queen*, Justice Lamer held that authorities have the right to occasionally use "trickery" in their investigations, and what "should be repressed vigorously is conduct on their part that shocks the community".[53] This ruling was upheld in *R v. Mentuck (2000)*, another case where the Mr. Big sting was used. This ruling reaffirmed the Mr. Big procedure as acceptable, as the sting did not rise to the level established in *Rothman.*

RECENT DEVELOPMENTS FOR MR. BIG

Shortly after Rafay and Burns received their verdicts in the US, Nelson Hart was the target of a Mr. Big sting. He was suspected of drowning his twin daughters, Karen and Krista, at Gander Lake in August 2002. The family had financial issues, were on social assistance, and social workers had considered taking their daughters from their home. In 2002, the family had a brief period of homelessness before they found an apartment. They were still receiving regular visits from a social worker.

Following the incident, Hart originally told police that Krista had fallen in the lake, and that, being unable to swim and in a panic, he had driven home to get his wife, Jennifer. After bringing his wife back to the lake, he then left a second time to drive into town and phone for help. By the time authorities and an ambulance had arrived, Karen was dead, and Krista was unconscious. Krista was taken off life support the following day.

However, Hart soon changed his story, saying that he, being epileptic, had suffered a massive seizure and when he became conscious again, Krista was in the water beyond reach and Karen was missing. Hart claims that he lied because he was afraid of losing his license, as had happened in the past, which would have jeopardised his job and livelihood. Hart did suffer another seizure in the back of the police cruiser.[54]

The family was in such deep financial instability, with Hart developing a chronic gambling addiction, that Nelson and Jennifer could not afford a proper mattress, and after the deaths, they could not afford headstones for their children.

In February 2005, "Steph Suave", an undercover RCMP officer, approached Hart and offered him $50 cash to help him look for his sister, who was a drug and gambling addict. Hart failed to find her, and Suave offered him $50 more and a carton of cigarettes to look in a different town. Suave was soon paying Hart to deliver packages, drive cars and haul trailers, and later, he was delivering casino chips, passports, cigarettes, and cash.[55] In all,

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53 *Rothman v The Queen* S.C.R. 958, Supreme Court of Canada

54 Nicholas Kohler, 'The case of Nelson Hart: 2 girls, 3 years and a mystery 'Mr Big' ' (Maclean's,31 October) <http://www.macleans.ca/politics/the-case-of-nelson-hart-2-girls-3-years-and-a-mystery-mr-big/> accessed 4 December 2017

55 *Ibid*

Hart was exposed to 63 "scenarios" that were carefully constructed by the RCMP.[56] Jennifer accompanied him on many of these trips; the couple was treated to "pizza dinners… free hotel rooms" and there was even a discussion of organising the couple a "real Vegas wedding".[57]

After meeting Suave, the Harts had a cashflow they had never experienced before. His wife confirms that the first thing Hart bought was a $4,000 engraved headstone for his daughters, and soon after, a used Pontiac and a mattress.[58] His mother described his purchases as "a lot of necessaries".[59]

The sting followed its usual trajectory: in June 2005, it was time for Hart to meet the boss, during which he was asked how he had "done away with" his daughters.[60] When Hart told the boss that he didn't intentionally hurt his daughters, but that he had suffered an epileptic fit, he was told to stop lying. He then confessed, claiming to have knocked Krista and Karen into the lake with his knee. Hart stated in an interview: "I knew then that I wouldn't have my ribs broke. I knew I wasn't going to be made away with".[61]

Shortly after the meeting with the boss, Suave called and informed Hart that there was a man who was threatening to turn him in, and Suave promised that they would "take care of him".[62] Hart requested that he be told when it would happen, so that he would be able to produce a solid alibi. According to one source, when they received this call, Hart insisted that he and Jennifer go to a Wal-Mart, where they apparently stood in front of a security camera and "stared into the camera for 20 minutes".[63]

On June 13th, 2005, Hart was arrested at an airport where he had been directed by Suave to pick up a ticket. In all, the sting cost over $400,000 CAD and took about four months to complete. In 2007, Hart was convicted of the murders of his seven-year-old twin daughters.

In 2011, Hart's appeal was heard by the Newfoundland and Labrador Court of Appeal, but the decision was not delivered until September 2012. Chief Justice Green and Justice Harrington held that the confessions should not have been admitted to trial, while Justice Barry thought that the confessions had been rightly admitted. In the end, the appeal was allowed, and a new trial was ordered.

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56 Brendon Murphy and John Anderson, 'Confessions to Mr Big: A new rule of evidence?'[2016] 20(1) The International Journal of Evidence & Proof

57 Kohler (n 48)

58 *ibid*

59 Pearl Hart, 'Interview for Maclean's', (2013)

60 Kohler (n 48)

61 Kohler (n 51)

62 *ibid*

63 Kohler (n 51)

Following this determination, the Crown appealed to the Supreme Court of Canada, and on July 31st, 2014, the Supreme Court unanimously dismissed the appeal. Justice Moldaver, who delivered the majority judgment, identified "serious problems" that arose from Mr. Big: "'the spectre of unreliable confessions', highly prejudicial effect of being involved in simulated crimes and the potential for such operations to become abusive".[64] Moldaver proposed a "two-pronged approach" to remedy these issues.[65] The first was a "principled rule of evidence", and the second a "conscious deployment of the abuse of process doctrine that may result in a temporary or permanent stay of proceedings".[66] The goal of this was to bridge the gap that existed in the current "confession rule" in Canada; any confession must be given at free will, but this does not apply to those who do not realise that they are making a confession to a police officer. Moldaver, in his judgment, felt that the current state of the law was "insufficient protection…to accused persons who confess during Mr. Big operations".[67]

The Supreme Court found "three specific concerns" with Mr. Big operations on the whole: they increased the likelihood of undependable or falsified confessions; the confessions that were solicited had a huge impact on the "credibility and character" of the suspect; and, because of the nature of the characters that the officers were portraying—violent criminals—it "may constitute an abuse of process where officers then seek to rely on unlawfully and improperly obtained evidence".[68]

After the appeal was dismissed, with the confession evidence being disallowed at the new trial, the Crown declined to file new charges. Under this new rule, confessions that were brought about during the sting would be "presumptively inadmissible", and it placed the burden on the prosecution to prove that "on a balance of probabilities, that the probative value of the confession outweighs its prejudicial effect".[69]

Prior to *Hart,* there had been other cases involving Mr. Big confessions that were overturned, but this was the first case that created a new rule for the admittance of the evidence in trial.

The judgement for *R v. Mack* was delivered on September 26th, 2014, two months after *Hart*. This case was not argued on the new test that was created in *Hart,* but nonetheless, the Supreme Court of Canada considered how they might apply. When applying the test, the court, with Chief Justice Moldaver writing for a unanimous court, dismissed Mack's appeal.

It was determined that Mack's confessions had a high probative value[70]; the incentives for a confession were "modest", as Mack had only been paid about $5,000 CAD over a four-

64 *R v. Hart* (2014) 2 S.C.R. 544 [10]

65 *R v. Hart* (2014) 2 S.C.R. 544 [87]

66 *Ibid*

67 *R v. Hart* (2014) 2 S.C.R. 544 [67]

68 *Ibid*

69 Stuart Woods, 'Revisiting "Mr Big" Confessions: R v Mack ' (The Court, 7 November) <http://www.thecourt.ca/revisiting-mr-big-confessions-r-v-mack/> accessed 4 December 2017

70 *R v. Mack* (2014) 3 S.C.R. 3 [33]-[35]

month period, much less than either Hart or Burns; and that there "was an abundance of evidence that was potentially confirmatory".[71] The Court felt that "any prejudicial effect arising from the Mr. Big confessions was easily outweighed by their probative value".[72]

Moldaver did discuss that the trial judge should, in the future, provide some "guidance" to the jury, stating that the trial judge should "alert the jury to the concern about the reliability of the confession, and to highlight the factors relevant to assessing it", but they are not under the obligation to delve into the technical details of all factors that might affect that reliability.[73]

THE FUTURE OF MR BIG

Following the decision in *Hart,* it seems as if the Canadian courts will take police oversight into more consideration in the future, but when juxtaposed with immediate *Mack* decision, the court is still extremely willing to allow this procedure, so long as it is conducted in a way that meets the few standards that they have established.

It remains unclear how the Supreme Court of Canada's ruling will potentially affect the appeals process, as the technique was already deemed illegal on American soil, and the investigation complied with Canadian law at the time. While Sebastian Burns has run out of appeals as of Fall 2017, Atif Rafay's final appeal is being processed. Under the rule that was laid out in *Hart*, it would follow that their appeal for a new trial with the confessions being declared inadmissible would be granted. Unlike with the *Mack* case, there was not an abundance of "potentially confirmatory" physical evidence that was produced in conjunction with the confessions.

The recent Netflix documentary has brought Burns' and Rafay's case back into the limelight and has served to educate people around the world on both the facts of the case and the undercover technique that was ultimately used to convict them, including other attorneys and innocence projects. There was an outpouring of shock, despair, and support on different social media platforms, with many reaching out to different organisations and asking if there was any way that they could offer help. While, of course, there were still some who were convinced that the pair had been correctly found guilty, the court of public opinion appears to have a hung jury.

Twenty-three years down the line, it appears that it is much less a question of whether or not Sebastian Burns and Atif Rafay are guilty, but rather, a question of the lawfulness of the trial that they received due to the confessions being allowed into evidence, and if the jury could have possibly reached the same verdict if they had not been admitted.

71 *R v. Mack* (2014) 3 S.C.R. 3 [33]-[35]

72 *Ibid*

73 *Ibid*

Bermuda's Paradise (Status) Lost

Izabella Arnold*

Dear Editor,

Please consider the following timeline:

23 June 2016 – A non-binding Same-Sex Marriage Referendum fails to represent public opinion surrounding civil unions and SSM with 46.8% voter turnout.[1]

5 May 2017 – The Supreme Court of Bermuda declares same-sex couples entitled to be married under the Marriage Act (*W Godwin et al v Registrar General).*[2]

13 December 2017 - The Domestic Partnership Act 2017 passes in the Senate (8 - 3) with legislation to ban same-sex marriage (SSM) replacing it with domestic partnership.

29 January 2018 – Labour MP Chris Bryant brings an adjournment debate to the UK's House of Commons prompting a response from Sir Alan Duncan (Minister of State at the Foreign Office). He states that while a disappointing situation for the British Overseas Territory, the Island remains freely self-governing.[3]

7 February 2018 – Governor John Rankin announces, 'After careful consideration in line with my responsibilities under the Constitution, I have today given assent to the Domestic Partnership Act 2017'.[4]

The origin of these events can be traced back to a 2013 amendment in the Human Rights Act 1981 which introduced the concept: 'sexual orientation'.[5] Justice Charles-Etta Simmons would interpret this amendment in May 2017 declaring 'same-sex couples are entitled to be married under the Marriage Act 1944'.[6] It was a momentous occasion for Bermuda's LGBTQ community. The ratio decidendi examines the definition of marriage, discrimination based on sexual orientation, and refers to common law as by definition, judge made law. As such it is a creature of change.[7] But not all courts in common law jurisdictions have taken a similar position.

*The author is a GDL student studying the Graduate Diploma in Law/CPE at City, University of London.

1 The Referendum Act 2012, s 6(4)

2 [2017] SC (Bda) 36 Civ

3 HC Deb 29 January 2018, vol 635, col 652

4 'Governor Gives Assent: Domestic Partnerships' (Bernews, 7 February 2018) <http://bernews.com/2018/02/governor-gives-assent-to-domestic-partnership-act/> accessed 7 February 2018

5 Human Rights Amendment Act 2013, s 2(b)

6 *W Godwin et al v Registrar General* [2017] SC (Bda) 36 Civ para 135

7 ibid 135

Let us cross the *pond* to Belfast: In August 2017, two same-sex couples brought a request for Judicial Review before an Irish High Court to be 'married' rather than 'civil partners', thus requesting an end to the ban on same-sex marriages.[8] They challenged Article 6 of the Marriage (NI) Order 2003 that prohibits marriage 'if both parties are of the same sex'. This is similar wording, but not identical, to Bermuda where a marriage is to be void on the grounds 'that the parties are not respectively male and female'.[9] The Belfast case was selected for comparison namely because: Historically, Ireland has a socially conservative position on same-sex marriage similar to Bermuda's; the autonomy of the Northern Ireland Assembly resembles this Island's British Overseas Territory status; and O'Hara J's reference to binding European Court of Human Rights (ECtHR) case law.

The judgment states, 'that on the basis of case law [from the ECtHR] which is summarised above I am driven to conclude that the Convention rights of the applicants have not been violated. It is not the role of a judge to decide on social policy'.[10] O'Hara J also made a point to recognise the developing global awareness of same-sex marriage, even though the courts in Strasbourg have not yet given a favourable judgment; the appeal was subsequently dismissed. The contrasting judgments illustrate there is no clear-cut path to establishing equal SSM rights.

The Chambers representing the appellants of *W Godwin et al* are preparing to challenge the validity of the Domestic Partnership Act 2018 in accordance to the constitution and possibly appeal the Privy Council.[11] Recent global headlines lambasting the Island's recent revocation of SSM[12] have only energised them further.

Bermuda's Governor, John Rankin withheld Royal Assent to the Domestic Partnership Act 2018 for an unprecedented two months while seeking legal advice.[13] Speculation arose around whether Her Majesty's Government would intervene with Bermuda's right to self-governance following the reversal of a Supreme Court Ruling that legalised same-sex marriage. I believe Chris Bryant MP (Rhondda) erred in stating 'the Governor is entirely within his rights to delay a final decision or, if he chooses, to refuse Royal Assent, as the Bermudian constitution states at section 35'.[14] The Conservative's response was one

8 *In The Matter of an Application By Grainne Close, Shannon Sickles, Christopher Flanagan Kane and Henry Flanagan Kane for Judicial Review* [2017] NIQB 79

9 Matrimonial Clauses Act 1974, s 15(c)

10 *Re Close* 16

11 Jonathan Bell & Paul Johnston, 'Pettingill says battle may be far from over' (*The Royal Gazette*, 8 February 2018) < https://www.royalgazette.com/same-sex-marriage/article/20180208/pettingill-says-battle-may-be-far-from-over> accessed 8 February 2018

12 Camila Domonoske, 'Bermuda Revokes Same-Sex-Marriage Rights, In a World First' (*National Public Radio*, 8 February 2018) <https://www.npr.org/sections/thetwo-way/2018/02/08/584297218/bermuda-revokes-same-sex-marriage-rights-in-a-world-first> accessed 8 February 2018

13 Sarah Lagan, 'Governor Seeks Advice on Partnership Bill' (The Royal Gazette, 30 December 2017) <https://www.royalgazette.com/same-sex-marriage/article/20171230/governor-seeks-advice-on-partnership-bill> accessed 30 January 2018

14 HC Deb 29 January 2018, vol 635, col 648

of caution; it condoned Bermuda's actions, but could not settle with Bryant's demands sighting Bermuda's internal autonomy. While the MP's passionate statement regarding the rights of the LGBTQ community in Bermuda was well informed, as a Bermudian observing the commentary, the sense was one of lost hope and disenfranchisement.

Contrary to Bryant's comments, Bermuda retains the right to self-governance; therefore, legislation affirming equal rights for a minority community may come at snail's pace under conservative leadership. I believe it will take another generation for a shift in the antiquated sentiment and law reform. Conflicting with the opinion of O'Hara J, Justice Simmons quoted McCardie J: 'the common law does not remain static. Its very essence is that it is able to grow to meet the expanding needs of society'.[15]

Bermuda is known for its pink beaches, turquoise waters, and rainbow hued homes; the irony is equally charming.

Respectfully,

Izabella Arnold

GDL Student

City, University of London

15 *Prager v Blatspiel, Stamp & Hancock Ltd* [1924] 1 KB 566 at 570

Businesses are Exploiting Human Psychology to Their Advantage, Why is the Law Not Taking Account of This?

Olaoluwa Awogbade*

Dear Editor,

Given that many of the now biggest companies in the world have arisen in the last 12 years, I think it is safe to say that consumer behaviour is changing. The preferred medium for consumers has shifted, from initially preferring listening to the radio to moving to the television, and *now* consumers have focused their attention on mobile devices, and social media. For instance, as of Q3 2017, Facebook has 1.368 billion daily active users, whilst Snapchat's daily users have climbed from 46 million to 178 million between Q1 2014 and Q3 2017[1]. Moreover, on Facebook's owned platforms (Facebook, Instagram and Whatsapp), amongst daily users, the average user individually spends 50 minutes a day.[2] This shows that Facebook not only has a wide range of consumer attention with different demographics of users, but also great depth, which creates money making opportunities. Significantly, this means the types of legal issues that large businesses have is changing. In the past when television was more dominant, it may have been that broadcasters disputed when their TV shows would be aired on channels [3]. However, copyright and trademark law is likely to become more prominent with tech-centred firms. Instagram, which is owned by Facebook, was legally able to copy Snapchat Stories with their Instagram Stories feature. This was because the underlying source code used by Instagram was different to that of Snapchat and because the interfaces, and therefore the expression of the two apps, were also different. I think that various forms of law, such as IP, have fallen behind modern technological innovations which creates an exciting, present opportunity as a lawyer to shape future law.

*The author is a current GDL student at City, University of London who has an interest in technology, particularly in intellectual property and trademark law. The author has written this letter to the editor through personal interest and hopes it will be particularly interesting for future lawyers in the society we are going to live in.

1 All products require an annual contract Prices do not include sales tax, 'Facebook: Global Daily Active Users 2017 | Statistic' (Statista) <https://www.statista.com/statistics/346167/facebook-global-dau/> accessed 1 December 2017.\\uc0\\u8216{} Facebook: Global Daily Active Users 2017 | Statistic\\uc0\\u8217{} ({\\i{}Statista}å

2 James B Stewart, 'Facebook Has 50 Minutes of Your Time Each Day. It Wants More.' *The New York Times* (5 May 2016) <https://www.nytimes.com/2016/05/06/business/facebook-bends-the-rules-of-audience-engagement-to-its-advantage.html> accessed 3 May 2017.

3 Silvio Waisbord, 'McTV: Understanding the Global Popularity of Television Formats' (2004) 5 Television & New Media 381.

On the other hand, this may lead to turbulent times ahead, as the law is still catching up. Therefore, I think considering human psychology is important, to try and understand *why* consumers are moving to social media so quickly, and where they may move next, to understand where the law may need to be addressed. For example, as Moira Burke highlights, communicating on social media can increase your "social capital" and social standing amongst your peers[4]. However, Burke also highlights that direct communication on Facebook is more satisfying than the "one click communication" such as liking someone's post, it stands to reason that social media communication would generally be less satisfying than human interaction. Although it can still have benefits given that social media allows you to contact friends who live further away, it makes sense than social media would cause "arousal" (in terms of…Respiratory activity), given that it can become addictive, as opposed to increasing "brain activity" like actual human interaction would [5]. The overarching narrative of this point is whilst social media gives a lower level of communication than actual communication, its *ease of access* along with giving some benefit, is a reason why it has become more popular. In the future, it is expected that businesses will continue to aggressively tap into human psychology to bring greater convenience to consumers. In turn, it should then not be surprising that new legal debates will emerge as businesses exploit new technology, such as voice technology.

It can be expected that voice technology, such as through Amazon Echo, is going to become increasingly popular as it saves time, and therefore brings convenience to the consumer. The device's ability to order products through speaking, whilst not *much* faster than ordering online and clicking, in the long-run will be perceived as beneficial to consumers, as we tend to value time, which is finite, above other commodities. Already, novel legal issues have arisen, such as in America, the case of Arkansas v Bates (2016) where the law enforcement took an Amazon Echo device from a house as part of a murder investigation, and subsequently issued a search warrant to Amazon to seek data held on the advice, such as any text records and audio recordings in the 2-day period around the time of the death.[6] Notably, it is not clear how the Fourth Amendment (right against unreasonable searches) fits in with Amazon Echo, but clearly new technology is being able to run ahead of the law, whilst new precedents and judgements are being set. [7]

4 Stephen Marche, 'Is Facebook Making Us Lonely?' [2012] *The Atlantic* <https://www.theatlantic.com/magazine/archive/2012/05/is-facebook-making-us-lonely/308930/>.

5 Maurizio Mauri and others, 'Why Is Facebook So Successful? Psychophysiological Measures Describe a Core Flow State While Using Facebook' (2011) 14 Cyberpsychology, Behavior, and Social Networking 729.

6 '"Alexa, Do You Have Rights?": Legal Issues Posed by Voice-Controlled Devices and the Data They Create | Business Law Section' <https://www.americanbar.org/publications/blt/2017/07/05_boughman.html> accessed 1 December 2017.

7 George W Baltzell, 'The Constitution of the United States - We the People - an Easy to Read and Use Version' <http://constitutionus.com/> accessed 2 December 2017."plainCitation":"George W Baltzell, 'The Constitution of the United States - We the People - an Easy to Read and Use Version' <http://constitutionus.com/> accessed 2 December 2017."},"citationItems":[{"id":3177,"uris":["http://zotero.org/users/3955543/items/QSMNX8VC"],"uri":["http://zotero.org/users/3955543/items/QSMNX8VC"],"itemData":{"id":3177,"type":"webpage","title":"The Constitution of the United States - We the People - an easy to read and use version","abstract":"A highly accessible, easy to use online version of the U. S.

Lastly, a growing issue with technology is that businesses are clearly exploiting their workers through human psychology, and legal loopholes. This is evident with Uber, the taxi company, whereby to induce their drivers to work longer, automatically loads the next nearby passenger for them to pick up after they have finished with one, whilst also alerting them when they are close to an earnings target.[8] As most of Uber's drivers are independent contractors rather than employees, they do not benefit from employee protections that may stop this behaviour. Amazon has operated in similar covert ways, as their 'Buy Box' is intentionally orange, as humans associate the colour with a "Call to Action" of some kind, either to subscribe, buy or sell a product. [9]

The largest businesses are fully aware of the nature of human psychology and are using it to their advantage, and it is time the law does the same to fight back.

Yours faithfully,

Olaoluwa Awogbade

GDL Student

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Constitution with the full text including the Bill of Rights and the rest of the Amendments includes both sequential and subject indexes.","URL":"http://constitutionus.com/","author":[{"family":"Baltzell","given":"George W."}],"accessed":{"date-parts":[["2017",12,2]]}}}],"schema":"https://github.com/citation-style-language/schema/raw/master/csl-citation.json"}

8 Noam Scheiber, 'How Uber Uses Psychological Tricks to Push Its Drivers' Buttons' *The New York Times* (2 April 2017) <https://www.nytimes.com/interactive/2017/04/02/technology/uber-drivers-psychological-tricks.html> accessed 1 December 2017.

9 'How Do Colors Affect Purchases? Infographic' <https://blog.kissmetrics.com/color-psychology/> accessed 1 December 2017.

AFTERWORD

It is indeed a pleasure to be invited to write the afterword of the City Law Society Journal 2017/2018. The Journal's lifetime has corresponded with my tenure as Director of the City Law School LLB Programme. In this capacity, I have had the privilege of working with editors and contributors of a journal whose origins lie in the imagination and determination of the City Students' Union Law Society. Each passing year, I am continually impressed by the determination and enthusiasm that students show for publishing a journal of real quality. In liasing with the Editorial Board this year, I have been thoroughly impressed by a team whose primary objective has been to produce a student-led journal of legal scholarship. The efforts of the Editorial Board this year in introducing the use of OSCOLA and the Cambridge Redbook for a rigorous process of single-blind review are unprecedented and should be commended.

The Journal is entirely student-run and the work herein pays testament to the ability of the present Editorial Board, who decide which articles merit entry and which do not, no doubt devoting countless hours of their time, whilst also juggling the demands of their studies, to ensuring the peer-review process is of a high standard. The Academic Advisory Board serves in an advisory capacity; it is an honour to have the opportunity to commend the work of this year's students on behalf of academic colleagues who have offered their suggestions to provide some input on how students might improve the direction of their work.

From its beginnings, the watchword for the Journal has been 'inclusivity', with this year's Editorial Board introducing a mission statement which stresses the importance thereof. All students from the university, regardless of their course of study, are encouraged to contribute; a priori no topic or approach to law is excluded; the only prerequisite is that of quality.

Thanks are due also to all members of the Editorial Boards over the years individually and collectively, to the contributors to each volume as well as to many faculty members. City Law School's support over the past three years and its continuing support into the future, combined with the dedication of its extraordinary students, mean that the City Law Society Journal will continue to be a forum to showcase the best student scholarship and will remain a source of pride for our university.

Special congratulations are due to this year's Editorial Board on the completion of Volume III. I have every confidence that the Journal will continue to build on its current success, passing on its methods of best practice and serving its key purpose in exposing City Law School students to academic scholarship at such an early stage in their academic careers.

Dr David Seymour
Director of the City Law School LLB Programme
City Law School, March 2018

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