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The City Law Review (the 'CLR') is City, University of London's student-managed, peer-reviewed journal of legal scholarship. We are proud to be sponsored by both Henderson Chambers and Bryan Cave Leighton Paisner LLP, the latter of which have kindly sponsored the prize for outstanding article concerning a diversity issue. We are primarily funded by the City Law School, without the endorsement and support of which the CLR could not function.

The CLR's primary objective is to create a high-quality journal through which students are able to have work published and recognised. We are committed to maintaining a robust peer-review process, which is why this year we have opted to operate a double-blind peer review process with three stages, so that all articles receive multiple rounds of input and oversight. Prizes have been awarded in the same fashion, voted on by the Editorial Board based on merit alone. The categories are Best Overall Article and Outstanding Article Concerning a Diversity Issue.

We continue to grow, with 58 submissions this year, of which we have published 23. These are both significant increases over last year's issue. We have an operations manual for the first time, which we hope will be useful to coming years of students, guiding them through the process and acting as a living document, to be edited and added to as the CLR evolves and develops.

The CLR was formerly known as the City Law Society Journal. This year we have decided to become a separate entity from the Law Society and have rebranded ourselves the City Law Review. Considering this, the Editorial Board have decided that the volume number will be reset to Volume 1 for this issue.

The views expressed by the contributors are not necessarily those of the CLR, the Editorial Board, the City Law School or our sponsors. This publication is intended to be a conduit for the scholarship of the student body. While every effort has been made to correct and develop the articles, the accuracy and completeness of information is the duty of each author individually. The CLR does not assume responsibility for any factual errors, misquotations, misleading representations or inconsistencies.

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Editor's Note

We are proud to present to you the first volume of the *City Law Review.*

The history of students attempting to produce non-scholarly legal publications at City, University of London can be dated to 2013. My own experiences with these projects began with the extensive rebranding the *City Law Society Journal*'s Editorial board undertook in transforming the Journal into City's first and sole student-led publication of legal scholarship. The goal was to create a journal that would abide by the constraints and confines of other notable student-led law reviews; this year's Editorial Board has seen the consolidation and development of these institutional milestones culminating in what has become the *City Law Review*.

The Editorial Board is proud to announce the City Law School, who have always been staunch supporters of student initiatives, have formally affiliated themselves with the Editorial Board, making the *City Law Review* the City Law School's only official legal publication. We are extremely grateful to the Law School's Executive Committee, in particular, Kay Jones and Dean Professor Andrew Stockley, for recognising the project in such a seminal way and for funding this year's publication. It is our hope that the inauguration of the *City Law Review* guarantees a long-lasting platform which will always support students seeking publication of their legal scholarship. Special thanks are owed to Dr. David Seymour, the project's longest standing academic supporter for organising academic board commentary while on sabbatical and assisting in the creation of a formalised Academic Advisory Board; the time academic faculty take out of their busy workload to offer some guidance and direction on student scholarship is a testament to their love of academia and student learning. Eternal gratitude is also owed to Deputy Dean Professor Chris Ryan for his indispensable support of the project, from arranging countless meetings, to helping secure support from the Law School, and for contributing so much of his personal time to meet with the Editorial Board to discuss the project and suggest that its merits be formally presented to the Executive Committee of the Law School; these have been central to the project's development this year. We would also like to thank Katharine Buckley who time and time again went above and beyond, devoting her time to help with admin responsibilities, organising Launch Event details, sending out invitations, and most importantly, bridging the gap between our student Editorial Board and the Law School.

In leading the project's Patron initiative in its trial year, former Editor-in-Chief Shabbir Bokhari has been instrumental, securing the sponsorship of Bryan Cave Leighton Paisner LLP as part of their Diversity and Inclusion initiative, marking the first occasion where students will have the opportunity to win an award for pieces relating to legal matters which concern LGBT, BAME, or Disability Rights issues. As a former Editor-in-Chief, he has also provided invaluable support to the whole team.

Above all, this year's Editorial Board is responsible for the product you now hold in your hands. The changes that we have implemented to develop the project into a more professional publication have required a great deal of work from the whole team throughout the academic year. This team unfailingly superseded all expectations with their work ethic, drive and devotion. The Law Review's Managing Editor Animaa Gungaamaa and Article Editors, Isabella Aders, Jonathon Lynch, Antoine Kley-Gomez, and Matthew

Manso De Zuniga took on more than their simple responsibilities with Matthew becoming the team's in house techy, Isabella our OSCOLA expert, Jonathon spearheading our allocation of awards and Animaa and Antoine taking on too many responsibilities to name beyond the scope of their individual roles. Particular thanks must go to Shubhkarman Deol, who as Publishing Editor has managed the logistics of assembly, design and printing with patience and dedication. Frederik Baron Van Randwyck, our Senior Editor, who not only helped lead the team's review process, but organised the Law Review's Launch Event, bringing high standards and integrity to the project. Lastly, two people most deserving of thanks and appreciation, are Lead Editors John Samuel Groom and Sophia Evans, who were instrumental to all aspects and stages of the whole process. These two editors stand out above all for their hard work and dedication in managing pieces, liaising with writers and sponsors, in aiding with the publishing process, in assisting with the launch event, and in handling our daily tasks. Both editors have been indispensable to the project and are the epitome of hard work and dedication. The members of the Editorial Board have consistently collaborated to address every issue that arose throughout the year and have maintained standards with skill and grace. They are a brilliant team and I am grateful to have had the opportunity to lead them.

Having the role of Editor-in-Chief this academic year has been an absolute privilege and granted me many opportunities to grow professionally. The role is one where a line of succession has become conventional, and my experiences on the Editorial Board of the previous edition of the project were instrumental in preparing me for this year's challenges. Although it has been rewarding, the position is not without burdensome responsibilities: it requires a sense of urgency, initiative, and execution. I have learned a great deal about making important decisions under pressure, communicating with and balancing commitments to multiple parties, and maintaining professional standards in difficult situations. Above all, it has been rewarding to motivate and inspire a team of capable individuals to achieve something remarkable. I am grateful to have had the support of the outstanding editors I have already described.

It has been a delight to serve as Editor-in-Chief this year and I look forward to seeing the law review's continued success. I hope that you enjoy reading the first edition of the *City Law Review*.

Yours faithfully,

Shabana Ciara Elshazly
Editor-in-chief
City Law Review

Foreword

I am delighted to have been invited to write a foreword to the first volume of the City Law Review. This is a journal still in its infancy but maturing and improving at a rapid pace. Last year's volume was twice as long as the two previous issues and was the first to be published in a traditional law journal format. The name of the journal has been changed this year from the City Law Society Journal to the City Law Review, reflecting its importance to the City Law School and its increased stature as a source of legal research and scholarship.

Like many of the very best American law journals, the City Law Review is student-led and student-edited. It provides a wonderful opportunity for some of our best students to be involved in all aspects of producing a law journal, from soliciting and reading a wide range of work, deciding what should be published, developing all the skills needed to edit legal writing, and overseeing the publication, marketing, and distribution processes. I congratulate the Editor-in-Chief, Shabana Elshazly, and all the other students involved in producing this volume.

This is a journal that aims to publish some of the very best of our students' research. One of the strengths of the City Law School is that we teach law at all levels, from apprenticeships to the LLB, LLM and PhD degrees, from the Graduate Diploma in Law for graduates of other disciplines, to the Bar Professional Training Course and the Legal Practice Course for intending barristers and solicitors. Having formerly been the Inns of Court School of Law we have a proud and distinguished history of legal education. Students from all parts of the School have an opportunity to submit work for the City Law Review and this volume shows the variety of legal and topical issues some of them have been researching and writing on.

My congratulations to everyone involved for their enthusiasm and hard work. The editors and contributors can be very proud of this issue of the City Law Review.

Professor Andrew Stockley
Dean of the City Law School

In comparison to the current patent-based regime, can a prize system provide an efficient mechanism for pharmaceutical innovation?

Huw Thomas*

Abstract

This article critically analyses and evaluates the extent to which a prize system can provide an efficient mechanism for pharmaceutical innovation. It will consider the advantages and disadvantages of using a prize system in place of the current patent-based regime, highlighting the inadequacies of the traditional approach in failing to stimulate pharmaceutical innovation. It will explore how a framework based on prizes or rewards provides a viable and effective alternative for innovation within the pharmaceutical sphere.

Introduction

Pharmaceutical innovation is closely entwined with the patent system.[1] Pharmaceutical research and drug development requires, 'substantial technical knowledge, and trials demonstrating safety and efficacy necessitate considerable up-front investment.'[2] Significant financial incentives are required to induce firms to engage in this practice.[3] At present, the patent system provides those incentives,[4] enabling pharmaceutical firms to develop novel and non-obvious products and to impede other drug manufacturers from producing, using, merchandising, or importing those pharmaceutical goods.[5] Consequently, this enables drug manufacturers to market their products above the cost of production during the market-exclusivity period to recoup initial costs and generate above-market profits.[6] The resultant profits provide the stimulus for firms to engage in pharmaceutical research and drug development.[7]

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[1] AS Kesselheim, 'Using Market-Exclusivity Incentives To Promote Pharmaceutical Innovation' (2010) 363 New England Journal of Medicine 1855, 1855-1862.
[2] ibid.
[3] WW Fisher and T Syed, 'A Prize System As A Partial Solution To The Health Crisis In The Developing World' [2010] Incentives for Global Public Health 181, 181-208.
[4] ibid 181.
[5] ibid.
[6] TM Sichelman, 'Commercializing Patents' (2010) Stanford Law Review 62(2) 341, 341-413.
[7] J Brougher and KM Linnik, 'Patents Or Patients: Who Loses?' (2014) 32 Nature Biotechnology 877, 877-880.

This system has led commentators[8] such as Hollis to criticise pharmaceutical markets as 'dysfunctional,' [9] suggesting that the patent system does not effectively stimulate pharmaceutical innovation.[10] Moreover, Hollis argues that the patent system 'induces large amounts of research into drugs with little incremental therapeutic value, while providing inadequate incentives to innovate in really novel areas.'[11] Furthermore, patents result in high prices which exclude many users from access to potentially life-saving therapies.[12]

In light of these shortcomings, there have been a number of proposals to reform the patent system.[13] Wright asserts that the two fundamental directions for change are funding research through direct grants from government agencies[14] and replacing patents with government-funded prizes or rewards.[15] This article will consider the latter, evaluating the extent to which a prize system can incentivise pharmaceutical innovation. It will examine how the current patent system is far from satisfactory,[16] supporting the conclusive theme of this article: the current patent-based regime will continuously fail to effectively stimulate pharmaceutical innovation.[17] Through closer examination, this article will conclude that a framework based on prizes or rewards provides a viable and efficient mechanism for pharmaceutical innovation.[18]

Deadweight losses

A framework based on rewards provides notable advantages for stimulating pharmaceutical innovation compared to a patent system.[19] Firstly, using a prize system for pharmaceutical innovation would ameliorate one of the more significant issues with the current patent-based system, specifically the welfare losses caused by the monopoly pricing of patented products.[20] The current framework permits a patent holder of a pharmaceutical drug to exclude potential market participants from competing in order for the holder to price its patented goods above what would be the competitive rate so as to generate above-market profits.[21] As a result, the price of the product under monopoly is higher than it would be under conditions of competition.[22] Some consumers who would possess the capacity to purchase the product at a competitive rate are unable to afford the higher monopoly price.[23] Economists refer to this market inefficiency as 'deadweight loss'[24] because the reduced level of trade leads to an inefficient allocation of resources, causing a reduction in the overall welfare within a society.[25]

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[8] A Hollis, 'An Efficient Reward System For Pharmaceutical Innovation' (*Who.int*, 2005) <http://www.who.int/intellectualproperty/news/Submission-Hollis6-Oct.pdf> accessed 8 January 2018.
[9] ibid 3.
[10] ibid.
[11] ibid 1.
[12] ibid.
[13] Sichelman (n 6).
[14] N Gallini and S Scotchmer, 'Intellectual Property: When Is It The Best Incentive System?' (2002) 2 Innovation Policy and the Economy 51, 51-77.
[15] BD Wright, 'The Economics of Invention Incentives: Patents, Prizes, and Research Contracts' (1983) The American Economic Review 73(4) 691, 691-707.
[16] Hollis (n 8) 3.
[17] ibid.
[18] Wright (n 15).
[19] Fisher and Syed (n 3) 184.
[20] ibid.
[21] MA Lemley, 'Ex Ante versus Ex Post Justifications for Intellectual Property' (2004) 71 University of Chicago Law Review 129.
[22] Fisher and Syed (n 3) 183.
[23] ibid.
[24] JA Kay, 'The Deadweight Loss From A Tax System' (1980) 13 Journal of Public Economics 111, 111-119.
[25] ibid.

Guell and Fischbaum claim that the scale of the deadweight loss of monopoly pricing of pharmaceutical drugs is anywhere between $3 billion to $30 billion annually for the US drug market alone.[26] Hollis predicts that the deadweight loss for the global pharmaceutical system is, 'certain to be many times this figure'[27] due to the fact that drug insurance is unavailable in many markets and therefore consumers are more price sensitive.[28]

Additionally, Flynn states that the 'incentives to innovate generated by monopoly pricing in developing countries may be very small in comparison to the deadweight losses created by high prices.'[29] Moreover, the 2003 Doha Declaration on TRIPS and Public Health, which permitted compulsorily licensed drugs to be supplied to developing nations,[30] highlighted the importance of identifying a solution to the welfare losses incurred by the monopoly pricing of patented pharmaceutical products.[31] The problem of 'access'[32] to drugs has created a 'crisis of confidence in the pharmaceutical system worldwide,'[33] as many people who live in developing nations are unable to purchase pharmaceutical drugs to counteract prevalent conditions such HIV and AIDS, 'aggravating a humanitarian disaster.'[34] The World Health Organization estimates that approximately ten million lives could have been saved with access to existing medicines and vaccines.[35]

Fisher and Syed posit that the welfare losses caused by the monopoly pricing of patented products can be mitigated through 'systems of price discrimination in the marketing of the drugs or through similarly discriminatory insurance systems.'[36] However, Fisher and Syed suggests that the capacity of both approaches to mitigate welfare losses caused by the unavailability of affordable pharmaceutical drugs in developing countries is severely limited.[37]

Hollis holds the view that a prize system ameliorates the welfare losses experienced by the current patent-based framework.[38] Fisher and Syed make the same argument, asserting that the prize model prevents developers of pharmaceutical products from excluding competitors and therefore pricing products above the competitive rate to generate above-market profits.[39] Rather, successful developers are rewarded by means of a cash prize and in return the invention is placed into the public domain, permitting generic manufacturers to enter the market immediately.[40] Subsequently, competition between generic manufacturers allows new pharmaceutical products to be sold at a marginal cost, enabling immediate access for all those

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[26] R Guell and M Fischbaum, 'Toward allocative efficiency in the prescription drug industry' (1995) 73 Milbank Quarterly 213, 226.
[27] Hollis (n 8) 6.
[28] ibid.
[29] S Flynn, A Hollis and M Palmedo, 'An Economic Justification For Open Access To Essential Medicine Patents In Developing Countries' (2009) 37 The Journal of Law, Medicine & Ethics 184, 184-208.
[30] Hollis (n 8) 6.
[31] Flynn, Hollis and Palmedo (n 30).
[32] Hollis (n 8) 6.
[33] ibid.
[34] ibid.
[35] A Kapczynski, 'Addressing Global Health Inequities: An Open Licensing Approach for University Innovations' (2005) 20 Berkeley Tech. L.J. 1031, 1046.
[36] Fisher and Syed (n 3) 184.
[37] ibid.
[38] Hollis (n 8) 6.
[39] Fisher and Syed (n 3) 184.
[40] MS Clancy and G Moschini, 'Incentives For Innovation: Patents, Prizes, And Research Contracts' (2013) 35 Applied Economic Perspectives and Policy 206, 206-241.

to consume absent deadweight losses.[41] Further, governments could use prize systems to signal the importance of certain areas of pharmaceutical innovation, ensuring that funding is allocated to health priorities in a fair and transparent manner.[42]

However, Spulber challenges the notion that prizes would eliminate deadweight costs created by the 'monopolies'[43] in the patent system.[44] Spulber asserts that whilst patents may result in temporary monopolies on specific pharmaceutical innovations, in practice patent holders rarely possess economic monopolies due to market competition.[45] Within the global pharmaceutical system, Spulber argues that there is 'extensive competition... involving both rivalries from substitute and complementary technologies,'[46] as well as from past new innovations.[47] Consequently, 'these market forces constrain the returns to inventors and innovators thus limiting deadweight welfare losses.'[48]

Misguided innovation

Proponents of a prize system [49] argue that using the regime as a means of stimulating pharmaceutical innovation would circumvent the misdirection of innovation caused by the production of drugs that have little incremental therapeutic value, namely 'follow-on drugs that are substantially similar to established blockbuster drugs (so-called "me-too" drugs).'[50] This is another major issue with the current patent-based regime.

Under the current patent system, pharmaceutical companies have 'little incentive to invest in Research and Development ("R&D") for low-return, and consequently neglected, diseases or other "non-profitable" diseases'[51] because patent holders of pharmaceutical products amass the rewards of innovating in areas which possess a strong consumer willingness to pay and high rates of return.[52] In contrast, diseases for which consumers are less able to pay, but are still in need of are undervalued and insufficiently researched.[53] This directs companies to invest in new drugs which possess 'little social value, while ignoring avenues of investigation which could be of immense social value.'[54] The result is that prices for pharmaceutical products 'may be either too high or too low in comparison to an ideal market (in which consumers are informed about the choices they make and therefore bear the resultant cost of those choices).'[55]

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[41] ibid.
[42] M Wei, 'Should Prizes Replace Patents? A Critique of The Medical Innovation Prize Act of 2005' (2007) 13(1) B.U. Journal of Science and Technology 1, 3.
[43] DF Spulber, 'Public Prizes versus Market Prices: Should Contests Replace Patents?' (2015) Journal of the Patent and Trademark Office Society 97(4) 690, 690-735.
[44] ibid.
[45] ibid 711.
[46] ibid 700.
[47] ibid.
[48] ibid.
[49] Wei (n 43) 2.
[50] ibid.
[51] ibid.
[52] A Gandjour and N Chernyak, 'A New Prize System For Drug Innovation' (2011) 102 Health Policy 170, 170-177.
[53] ibid.
[54] Hollis (n 8) 4.
[55] ibid.

When prices in pharmaceutical markets do not demonstrate value to consumers, profits are unlikely to be proportional to the social value of an innovation.[56] Therefore pharmaceutical companies receive substantial rewards through the development of products which 'possess relatively little incremental therapeutic value over pre-existing products.'[57] For example, 'a product such as Nexium, which is therapeutically extremely similar to generically available versions of omeprazole is able to command a significant premium in the marketplace.'[58] Using American[59] and Swedish[60] data, commentators[61] have demonstrated that drugs categorised by the US Food and Drug Administration ("FDA") as possessing "little or no therapeutic gain" were introduced at approximately the same price point as existing similar products in the US[62] and at twice the price of existing therapies in Sweden.[63] Moreover, pharmaceutical drugs categorised by the FDA as having "modest therapeutic gain" were introduced at around twice the price of competing existing drugs in the US[64] and at four times the price point of existing therapies in Sweden.[65] This demonstrates that incentives to innovate are distorted under the current patent system and rewards companies based on profitability and not on creating therapeutic value.[66]

Hollis asserts that the effort is 'misguided.'[67] Evidence supports this notion, demonstrating that a large proportion of R&D expenditures in global pharmaceuticals consistently target products, 'offering little or no therapeutic improvement over existing drugs.'[68] Under the current patent system, firms are permitted to generate above-market profits by imitating successful drugs. The Viagra imitators Cialis and Levitra for instance are the result of this practice.[69]

Hollis asserts that it is not clear what percentage of R&D expenditure is devoted to "me-too" products that have incremental therapeutic value of already existing drugs.[70] However, DiMasi estimates that over 50% of R&D expenditure in the US pharmaceutical market is spent on clinical testing.[71] Public statistics[72] demonstrate that only 20% of funding devoted to clinical testing is used to analyse drugs categorised by the FDA as offering a "significant improvement" in comparison to existing similar therapies.[73] Love reinforces the notion, advocating that the remaining 80% of expenditure devoted to clinical testing is allocated to products which do not

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[56] ibid.
[57] ibid 5.
[58] 'Therapeutics Letter, June-September 2002' (*Ti.ubc.ca*, 2002) <http://www.ti.ubc.ca/PDF/45.pdf> accessed 8 January 2018.
[59] ZJ Lu and WS Comanor, 'Strategic Pricing of New pharmaceuticals' (1998) Review of Economics and Statistics 80(1) 108, 108-118.
[60] M Ekelund and B Persson, 'Pharmaceutical Pricing in a Regulated Market' (2003) Review of Economics and Statistics 85(2) 298, 298-306.
[61] ibid.
[62] Lu and Comanor (n 60).
[63] Ekelund and Persson (n 61).
[64] Lu and Comanor (n 60).
[65] Ekelund and Persson (n 61).
[66] Hollis (n 8) 5.
[67] ibid.
[68] J Love, 'Evidence Regarding Research and Development Investments in Innovative and Non-Innovative Medicines' (2003) 22 Washington DC: Consumer Project on Technology 1, 1-33.
[69] Hollis (n 8) 5.
[70] ibid.
[71] J DiMasi and HG Grabowski, 'Patents and R&D Incentives: Comments on the Hubbard and Love Trade Framework for Financing Pharmaceutical R&D' [2004] Submission to the Commission on Intellectual Property Rights, Innovation and Public Health 1, 1-9.
[72] Love (n 69).
[73] ibid.

offer a "significant improvement."[74] This adds weight to the notion that the current patent system is far from satisfactory and misdirects research expenditure.[75] The profitability of "me-too" drugs'[76] results in disproportionate investment in research with little therapeutic benefit and restricts the incentives for investment in truly pioneering research into therapies for 'neglected diseases.'[77]

Similarly, Stevens challenges the view that the patent system misdirects innovation, arguing that a wide variety of pharmaceutical therapies are available to counteract 'neglected diseases'[78] such as Buruli ulcers and schistosomiasis which affect millions in developing nations.[79] Governments, foundations and the private sector have mobilised 'unprecedented levels of resource and expertise to neglected disease R&D, often through Product Development Partnerships ("PDPs") between the private and public or non-profit sector.'[80] Debackere states that the majority of PDPs operate within the existing international intellectual property ("IP") framework, 'granting royalty-free licenses for use in low-income countries, or agreeing to share IP amongst research partners in a way that promotes access to eventual products.'[81]

Commentators such as Lee oppose the view that the production of "me-too" drugs leads to misguided research expenditure, asserting that "me-too" products do not mean that 'imitation has replaced innovation in health care.'[82] Lee also claims that "me-too" products 'reflect and create competition among drug and device manufacturers, and that competition is a powerful driver of better quality and lower costs.'[83] However, this view is undermined by studies undertaken by Gupta which conclude that '"me-too" drugs do not compete with pioneer drugs on price, at least until the introduction of the fourth "me-too" drug bearing a similar chemical structure as the pioneer drug.'[84] The limitations of the patent system are clear; therefore reinforcing the argument put forward by Wei that a prize system is capable of eliminating the misdirection of innovation caused by the production of drugs that have little incremental therapeutic value.[85]

Socially wasteful expenditures

Another potential benefit of using a reward system as a mechanism for stimulating pharmaceutical innovation is that it could reduce wasteful expenditures by pharmaceutical firms.[86] Fisher and Syed assert that marketing costs would form the largest proportion of potential savings albeit 'estimates of the magnitude of those costs under the current [patent] regime vary.'[87] Cutler posits that pharmaceutical firms attribute approximately one third of revenues to marketing products.[88] Baker and Chatani highlighted that in the year 2000 the US

[74] ibid.
[75] Wei (n 43) 2.
[76] Hollis (n 8) 6.
[77] Wei (n 43) 2.
[78] ibid.
[79] P Stevens, 'Delinked From Reality' (*Geneva-network.com*, 2017) <https://geneva-network.com/wp-content/uploads/2017/11/Delinkage.pdf> accessed 8 January 2018.
[80] ibid.
[81] Stevens H and others, 'Vaccines: Accelerating Innovation and Access' [2017] Glob. Challenges Report. Geneva: WIPO <http://www.wipo.int/edocs/pubdocs/en/wipo_pub_gc_16.pdf> accessed 8 January 2018.
[82] TH Lee, '"Me-Too" Products — Friend Or Foe?' (2004) 350 New England Journal of Medicine 211, 211-212.
[83] ibid.
[84] A Gupta, 'Restructuring Incentives for Pharmaceutical Innovation' (2014) 6 Trade L. & Dev. 417, 424.
[85] Wei (n 43) 2.
[86] Fisher and Syed (n 3) 188.
[87] ibid.
[88] DM Cutler and others, *Frontiers in Health Policy Research* (MIT Press 2003).

pharmaceutical industry employed 87,810 people in sales promotion roles, in comparison to only 48,527 in R&D.[89] This reinforces the notion that expenditure by pharmaceutical firms on marketing purposes is significant.[90] Although advertising for the purposes of better informing patients and doctors concerning the merits of specific pharmaceutical drugs is clearly beneficial,[91] the extent to which marketing functions to 'expand or stabilise the market share of one of several substitute products or leads to increases in drug consumption unjustified by health benefits' is clearly detrimental and wasteful.[92]

By contrast, a properly structured reward system should possess the capacity to reduce socially wasteful expenditures.[93] Fisher and Syed propose a model in which, 'the mechanism for determining the magnitude of awards… be designed so as to reduce firms' incentives to engage in pernicious forms of promotion, while preserving their incentives to engage in beneficial forms of promotion.'[94] Furthermore, a reward system would lead to a reduction in litigation costs currently incurred under the patent-based model.[95] Evidence supports this notion as vast amounts of resources are currently employed in litigation disputes concerning pharmaceutical patents.[96] Although disputes would not be absent from a reward system, a properly designed framework could be designed to 'reduce the incidence of those controversies and the costs of resolving them,' reinforcing the idea that a prize system is a viable alternative for pharmaceutical innovation.[97]

I. Inefficient "rent-seeking"

A significant disadvantage of a prize system is that it generates inefficient "rent seeking."[98] As data[99] demonstrates, pharmaceutical companies are responsible for expending significant financial resources on political lobbying to ensure favourable policy regimes.[100] From an aggregate welfare perspective, 'such expenditures represent pure waste.'[101] However, a prize system could 'create major new incentives for "rent-seeking" [and] result in the wholesale politicisation of drug development'[102] as the amount spent on efforts to influence government could significantly increase - particularly to impact the methods in which prizes are quantified and allocated.[103] By contrast, Stevens argues that the patent system offers a 'far less arbitrary

[89] D Baker and N Chatani, 'Promoting Good Ideas On Drugs: Are Patents The Best Way? The Relative Efficiency Of Patent And Public Support For Bio-Medical Research' (Center for Economic and Policy Research, 2002) <https://www.researchgate.net/publication/242547779_Promoting_Good_Ideas_on_Drugs_Are_Patents_the_Best_Way_The_Relative_Efficiency_of_Patent_and_Public_Support_for_BioMedical_Research> accessed 8 January 2018.
[90] Fisher and Syed (n 3) 188.
[91] ibid 189.
[92] ibid.
[93] ibid.
[94] ibid.
[95] ibid.
[96] ibid.
[97] ibid.
[98] ibid.
[99] 'Pharmaceuticals/Health Products: Long-Term Contribution Trends' (*Federal Election Commission*, 2008) <http://www.opensecrets.org/industries/indus.php?ind=H04> accessed 8 January 2018.
[100] ibid.
[101] Fisher and Syed (n 3) 192.
[102] Stevens (n 80).
[103] ibid.

form of innovation incentive,'[104] whereby companies compete within the regulated IP framework.[105]

II. Progressive redistribution of wealth

Proponents[106] argue that a prize system presents opportunities for wealth creation and closing wealth disparity.[107] Evidence supports this notion as the majority of capital required to operate a prize system would derive from more economically developed nations ("MEDCs") where GDP per capita and income levels are on average higher than in developing countries.[108] Further, the majority of MEDCs operate progressive income taxation systems, which take a larger percentage of income from high-income groups than from low-income groups.[109] Due to the benefits of a prize system likely affecting those in low-income groups in developing countries the effect would be a progressive redistribution of wealth.

III. Tax-financing cost of a prize system

Spulber opposes this notion, asserting that the increase in tax burdens necessary to finance a prize system could cause economic distortions that involve significant deadweight losses.[110] Further, he argues that deadweight losses arising from a prize system are likely to significantly exceed any deadweight losses resulting from competitive markets;[111] replacing prizes with patents would substantially lower welfare.[112] As of 2018, R&D expenditure in the pharmaceutical industry is approximately US$141bn per annum.[113] This figure represents privately-raised capital which governments in a reward system would have to raise through taxation.[114] In particular, if this additional burden of taxation is collected via forms of income tax, this could severely distort labour markets, interfere with job creation and lead to an inefficient diminution in labour.[115]

However, Abramowicz is of the view that reducing deadweight losses by replacing the patent-based system with a prize framework would 'likely be partially - but not completely - offset by an increase in the welfare losses caused by a reduction in the output of labour in developed countries.[116]

IV. Bureaucracy, not R&D[117]

Spulber emphasises that the 'bureaucratic apparatus required for the administration of a prize system'[118] would incur further costs, associated deadweight welfare losses and increased tax

[104] ibid.
[105] ibid.
[106] WW Fisher and T Syed, 'Global Justice in Healthcare: Developing Drugs for the Developing World' (2006) 40 UC Davis L. Rev. 581, 581-678.
[107] ibid.
[108] ibid.
[109] ibid.
[110] ibid.
[111] ibid 692.
[112] ibid 693.
[113] Stevens (n 80).
[114] Spulber (n 44) 692.
[115] ibid 670.
[116] M Abramowicz, 'Perfecting Patent Prizes' (2003) 56 Vanderbilt Law Review 115, 115-242.
[117] Spulber (n 44) 693.
[118] ibid.

burdens.[119] Governments would be required to decide which types of pharmaceutical innovation to reward and quantify their market value prior to any R&D.[120] This would require governments to have 'technological expertise and foresight equal to the global pharmaceutical industry.'[121] Despite proponents[122] of prizes suggesting that minimal costs would be necessary to administer a reward system,[123] Spulber is of the view that governments could not replace the current patent-based model without creating significant administrative costs.[124] Furthermore, additional administrative expenses incurred fail to stimulate R&D and only generate pure losses.[125]

Shavell and Van Ypersele challenge this, writing that a prize system would generate significant administrative costs savings.[126] This would be primarily due to the absence of extensive administrative costs currently incurred under the patent-based system to protect IP rights.[127]

Conclusion

In conclusion, it is submitted that the patent-based regime will continuously stifle pharmaceutical innovation.[128] Instead, Shavell and Van Ypersele argue that a reward system appears to hold promise as an alternative to the current patent-based framework as there is 'no necessity to marry the incentive to innovate to conferral of monopoly power in innovations.'[129] Therefore, this article advocates the utilisation of a prize system as an effective alternative mechanism for pharmaceutical innovation. In constructing and administering such a framework, it is imperative that the model capitalise on the potential advantages and minimise the potential disadvantages reviewed.[130] In several respects, a reward system would prove far superior to the current patent-based regime.

[119] ibid.
[120] ibid.
[121] Stevens (n 80).
[122] S Shavell and T Van Ypersele, 'Rewards versus Intellectual Property Rights' (2001) 44 The Journal of Law and Economics 525, 544.
[123] ibid.
[124] Spulber (n 44) 693.
[125] ibid.
[126] Shavell and Van Ypersele (n 127) 544.
[127] ibid.
[128] Hollis (n 8) 3.
[129] Shavell and Van Ypersele (n 127) 545.
[130] Fisher and Syed (n 3) 198.

Should Greater Obligations be placed on Social Media Companies to Tackle Terrorist Crime Committed on their Platforms?

Ilana Davis*

Abstract

Cyberspace has provided unparalleled improvement in communication, accessing information and data storage; but innocent inventions can be corrupted. Criminals and terrorists are exploiting cyberspace to spread hatred, research explosives and hide correspondence. Cybercrime is a growing area of legal practice but police across the globe continue to struggle to get the information they need to investigate and prosecute cybercrime effectively. Without effective policing, terrorists can pursue their ventures unimpeded in the digital world, while still jeopardising the lives of the public in the real world.

We have all heard stories in the news about pleas with social media companies to take more responsibility for terrorist criminal material shared on their platforms. More needs to be done to ensure that terrorism can be tackled effectively in cyberspace. This essay will explore the extent to which current UK and international legislation are effectively tackling terrorist crime online before concluding that greater obligations should be placed on the social media companies facilitating the commission of terrorist crime.

Introduction

The advent of social media has created unparalleled improvements in communication, accessing and sharing information; but innocent inventions can be corrupted. Criminals and terrorists can exploit social media to spread hatred, and to radicalise and recruit new terrorists.[1] It should not be automatically presumed that the promoting of terrorism or extremism only takes place on the 'dark web' or on specific radicalisation websites.[2] Without effective policing, terrorists can pursue their ventures unimpeded in the digital world, while still jeopardising the lives of the public in the real

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[1] Max Hill, 'Responding to Terrorists' Use of Social Media: Legislation, Investigation and Prosecution' (3 September 2017) available at <https://terrorismlegislationreviewer.independent.gov.uk/responding-to-terrorists-use-of-social-media-legislation-investigation-and-prosecution/> accessed 27 November 2018.

[2] Robert Hannigan, 'The web is a terrorist's command-and-control network of choice' (3 November 2014, The Financial Times); for example, Tareena Shakil used Twitter to encourage acts of terrorism – BBC, 'Tareena Shakil jailed for six years for joining IS' (1 February 2016) <https://www.bbc.co.uk/news/uk-england-35460697> accessed 27 November 2018; and Zafreen Khadam who used Twitter to disseminate terrorist publications – BBC, 'Would-be IS bride jailed at Sheffield Crown Court for terror tweets' (18 May 2016) available at <https://www.bbc.co.uk/news/uk-england-south-yorkshire-36322924> accessed 27 November 2018.

world. This essay will explore the extent to which current UK and international legislation is effectively tackling terrorist crime online, before concluding that greater obligations should be placed on the social media companies that are facilitating the commission of terrorist crime. For these purposes, this essay focuses mostly on social media platforms such as Facebook, Twitter and YouTube.

Terrorist Crime

As social media is a relatively modern invention, specialist counter-terrorism legislation has been created to deal with the unique challenges posed in relation to terrorist crime facilitated by social media. The specialist offences introduced to combat terrorism can be found in the Terrorism Acts of 2000 and 2006 ("TA 2000" and "TA 2006" respectively) and criminalise conduct such as inviting support for proscribed organisations[3], publishing statements of encouragement for committing acts of terrorism[4], glorifying terrorism[5] and sharing terrorist publications[6]. A police constable has the power to issue a notice to a person[7] requiring them to remove a statement encouraging terrorism or sharing terrorist material.[8] Practically, law enforcement authorities can only exercise this power if they are aware of the terrorist material. If the police are not aware of a piece of terrorist content, the powers under this section cannot be invoked, and the material may remain publicly available which leaves a gap in the law for terrorists to exploit.

These offences sufficiently cover the spectrum of terrorist harm that can be committed through the use of social media by terrorists. Through effective enforcement of specialist terrorist offences, the public are protected from experiences of hateful messages spread through terrorist material and the likelihood of radicalisation and recruitment via social media is reduced because terrorist material is not permissible online. However, effective enforcement of these offences is not taking place, and ways to improve enforcement of these crimes shall be considered below.

Terrorist Use of Social Media

The specialist terrorism offences focus on the promotion and endorsement of terrorism; it being seen as harmful to support the suffering and injury caused by acts of terrorism. In addition to terrorists using social media as a form of promotion, David Fidler (Indiana University Maurer School of Law) has identified that "social media appears as a common feature in radicalisation and recruitment efforts",[9] which shows a broader use of social media to create a sustainable production of next generation terrorists. The Former Director of GCHQ, Robert Hannigan, has explained how the use of social media by terrorists has become an important part of their 'business plan':

> "*The extremists of ISIS use messaging and social media services such as Twitter, Facebook and WhatsApp, and a language their peers understand. The videos they post of themselves attacking towns, firing weapons or detonating explosives have a self-conscious online gaming quality. Their use of the World Cup and Ebola hashtags to insert the ISIS message*

[3] TA 2000, s 12(1).
[4] TA 2006, s 1(1).
[5] TA 2006, s 1(3).
[6] TA 2005, s 2.
[7] TA 2006, s3(2)(a).
[8] TA 2006, s 3(3)(b).
[9] David Fidler, 'Cyberspace, Terrorism and International Law' (2016) 21(3) JC&SL 475, 487.

into a wider news feed, and their ability to send 40,000 tweets a day during the advance on Mosul without triggering spam controls, illustrates their ease with new media. There is no need for today's would-be jihadis to seek out restricted websites with secret passwords: they can follow other young people posting their adventures in Syria as they would anywhere else."[10]

Due to the skilled and widespread use of social media platforms by terrorists, law enforcement efforts to tackle terrorism cannot stop at preventing impending attacks. The harm created by terrorists sharing extreme material as well as radicalising and recruiting the next generation of terrorists must be addressed.

Investigation and Enforcement

The issue in relation to terrorist crimes online, whether social media or the internet generally, is first identifying the crime committed. Social media platforms are vast, global networks – Twitter has 326 million active monthly users[11] and Facebook has 2.27 billion active monthly users[12]. The UK's total population is approximately 66 million,[13] which shows how it would be nearly impossible for the UK's law enforcement authorities to effectively police social media accounts by manually checking posts and tweets. To do so would be time-consuming and cost-ineffective. Therefore, reports of terrorist crime are relied on instead, whether that is by an individual or the social media company. No obligation exists to compel someone to report a crime to the police.[14] To make the reporting of online terrorist crime easier, the Home Office introduced a digital tool whereby individuals can report online material promoting terrorism or extremism.[15] However, there is no evidence to suggest that the number of reports has significantly increased or investigations have become more effective as a result of this digital tool.

The most effective short-term solution, but also the most arbitrary, is censorship. The issues with censorship are well summarised by Clive Walker (University of Leeds): "[s]uch blanket policies are unwelcome. As well as offending the consciences of liberal democracies, they easily become outdated, they can be evaded through proxies or other forms of disguise, and they create the danger of a disproportionate impact on free speech".[16] Walker explains that censorship is not considered an appropriate tool for Western democracies, likely due to the emphasis placed on Article 10 of the European Convention of Human Rights (the right to freedom of expression) and because the immediate benefits do not outweigh the long-term shortcomings of censorship. Though an outright ban on the use of and access to search terms such as 'terrorism', 'explosion' and 'beheading' might

[10] Hannigan (n 2).
[11] Twitter Investor Relations, 'Investor Fact Sheet' < https://s22.q4cdn.com/826641620/files/doc_financials/2018/q3/TWTR-Q3_18_InvestorFactSheet.pdf> accessed 9 January 2019.
[12] Facebook Newsroom, 'Statistics' <https://newsroom.fb.com/company-info/> accessed 29 November 2018.
[13] Office for National Statistics, 'Population estimates for the UK, England and Wales, Scotland and Northern Ireland: mid-2017' <https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationestimates/bulletins/annualmidyearpopulationestimates/mid2017> accessed 29 November 2018.
[14] CPS, 'Reporting a Crime' <https://www.cps.gov.uk/reporting-crime#a02> accessed 27 November 2018.
[15] Home Office, 'Report online material promoting terrorism or extremism' <https://www.gov.uk/report-terrorism> accessed 27 November 2018.
[16] Clive Walker, 'The War of Words with Terrorism: An Assessment of Three Approaches to Pursue and Prevent' (2017) 22(3) Journal of Conflict and Security Law 523, 536.

tackle some terrorist crime in cyberspace, other, innocent actors may be affected as a result. For example, law enforcement authorities may struggle to publish information about counter-terrorism operations online, or journalists may be prevented from reporting about non-terrorist-related news like a gas explosion caused by an engineering fault. In any event, those wishing to glorify terrorism or recruit future terrorists are unlikely to use words as clumsy as those suggested. As articulated by Walker, "extremists can promise glory, excitement and even divine blessings"[17]; it is not in their interests to promote the gore and violence attached to the ideology.[18] The precise words that terrorists use to spread their message cannot be effectively captured in a censorship filter; once some words have been proscribed, synonyms will be used to avoid the filter. As Walker explained, a filter will soon become 'outdated'.[19]

If the principles of British democracy do not allow for individuals to be compelled to report terrorist crime in cyberspace and are offended by the suggestion of censorship, improved enforcement of terrorist crimes facilitated by social media can only be achieved through greater participation in the reporting of online terrorist crime. Greater participation can be achieved in two ways: manually and automatically. Manual reporting refers to an online terrorist crime being reported by a real person or individual, whether that is a social media user, employee at a social media company or a police officer searching social media 'on the beat'. Automatic reporting refers to the use of technology to search the internet on behalf of law enforcement authorities for key words that might indicate terrorist content. Both of these methods to improve enforcement are best achieved through the cooperation and assistance of the social media companies facilitating the publication of the terrorist material.

In the aftermath of terrorism, there is a public desire to require more of social media companies in tackling terrorism online.[20] Terrorists are exploiting the benefits granted by social media companies to communicate and taking advantage of the protection of freedom of expression. As facilitators of criminal activity, greater responsibilities for preventing online terrorist crime should be imposed on social media companies. As a result of demands by politicians, Fidler concluded that "[s]ocial media companies found themselves squeezed by Islamic State abuse of their services, demands from governments to curb such abuse, and their commitments to privacy and free expression for customers".[21] To improve enforcement of terrorist crime online, there must be greater responsibilities placed on social media companies who are facilitating terrorist crime to report terrorist content to the appropriate law enforcement authority. It should be noted that the most significant social media companies are not based in the UK, but the USA. There must be an efficient and effective means of UK law enforcement authorities accessing the information they need from social media companies abroad. As these obligations are to facilitate the reporting of crime, it is important that regulation is limited to the investigation of crime rather than introducing blanket obligations which interfere with the rights of all users.[22]

Reporting of Terrorist Crime by Social Media Companies

[17] ibid 549.
[18] Hannigan (n 2).
[19] Walker (n 16) 536.
[20] Fidler (n 9) 475.
[21] ibid 486.
[22] *Tele2 Sverige AB v Post-och telestyrelsen (ECJ)* [2017] QB 771.

To counter terrorism and other crimes, it is not unprecedented for obligations to be imposed on innocent parties to assist in identifying criminals. One example is the anti-money laundering and terrorist financing regulations placed on accountants and solicitors when handling client money. Accountants and solicitors are required to comply with these regulations, which impose greater responsibilities on professionals than the average member of the public, and penalties for non-compliance. The aim of regulation is to help prevent money laundering or the financing of terrorism. In contrast to a solicitor accepting instructions and money from a client after building a relationship of trust, social media accounts can be freely, easily and remotely created. Therefore, the obligations on social media companies need not be as stringent as these regulations but the principle remains the same because both the solicitor and the social media platform are being innocently used by a terrorist or criminal to facilitate the commission of a crime.

Social media companies have policies requiring their users to refrain from posting certain material. For example, Twitter has a list of rules that its users must comply with; failure to comply may result in permanent suspension of the user's account.[23] The most relevant Twitter rule for the purposes of this essay is:

> "*You may not make specific threats of violence or wish for the serious physical harm, death, or disease of an individual or group of people. This includes, but is not limited to, threatening or promoting terrorism. You also may not affiliate with organizations that – whether by their own statements or activity both on and off the platform – use or promote violence against civilians to further their causes.*"[24]

However, if an account is permanently suspended for breach of the Twitter rules, with a new email address the same person can create a new account without issue. When the social media company enforces their rules and removes content, there is no obligation on the company to report incidents that may amount to crimes or keep the material to assist law enforcement authorities with their investigations. Additionally, there is little motivation for social media companies to report criminal content because it could damage their relationship with their users and hinder business development – if users believe that the company is policing their content and there is a risk of being reported to the police, they may be less inclined to use social media which is not in the company's interest. It is also likely to take longer for their employees to review the material because, in addition to forming a view as to whether it breached the social media platform's terms of use, the employee would have to consider whether the content may amount to a crime and time would be spent reporting the potential crime to the police. Therefore, it makes more commercial sense for the social media company to not report their users to the police.

Without reporting the terrorist material, police cannot investigate or bring a prosecution, and the deterrent effect of the criminal law is reduced. A terrorist may share radical or extreme material online, knowing that it may reach a few hundred or thousand people before the post is identified and removed. Even then, the most severe consequence is that their account will be permanently suspended – in which case, the terrorist can then create a new, free email address, create a new social media account, and continue to disseminate their terrorist material without a report being made about the offence they have committed. Zafreen Khadam, for example, set up 14 Twitter

[23] Twitter Help Centre, 'Violent threats and glorification of terrorism' <https://help.twitter.com/en/rules-and-policies/violent-threats-glorification> accessed 28 November 2018.
[24] Twitter Help Centre, 'Violent extremist groups' <https://help.twitter.com/en/rules-and-policies/violent-groups> accessed 28 November 2018.

accounts before she was convicted of disseminating terrorist publications.[25] The current system of social media enforcement of user rules has not prevented terrorist criminality. Additionally, Robert Hannigan has complained that some individuals have been able to circumvent the rules so that their content, though terrorist, passes the tests imposed by Twitter: "the videos stopped short of showing the actual beheading. [Terrorists] have realised […] that by self-censoring they can stay just the right side of the rules of social media sites, capitalising on western freedom of expression".[26]

In the same way that the UK government has required innocent professionals to report the suspected money laundering to the appropriate law enforcement authorities,[27] similar reporting obligations should be imposed on social media companies. As Garry Thomas (The Salus Fellowship) suggests that community cooperation in the tackling of terrorism is needed,[28] cyber-community cooperation is needed to tackle terrorist crime in cyberspace. If social media companies are obliged by regulations to report terrorist crime to the police when the material is removed from public access, there could be an increase in the number of prosecutions of terrorist crimes in cyberspace, providing a more effective deterrent to the commission of terrorist crimes in cyberspace. Police reports can be made manually or automatically. For example, when an individual employee of Twitter permanently suspends an account for breaching the rule articulated above regarding threatening terrorism, that employee could also make a manual report to the police. More likely, a scenario can be envisaged where technology companies develop software that enables an automatic report to be made to the police when an account has been permanently suspended for breaching the rule against promoting terrorism.

Two problems must be addressed to ensure the creation of effective reporting obligations for social media companies. First, a real individual may not be identifiable from the accounts used to post the terrorist material. Once a report has been made to the police by the social media company, a prosecution may not automatically follow due to the anonymity of the account user. Second, there must be an effective mechanism for law enforcement authorities to communicate with social media companies to access information needed.

Anonymity

The Economist has argued that "rather than attacking encryption, Western governments would do better to deal with a related but distinct problem: anonymity".[29] It would be too arbitrary to require social media companies to go to the lengths imposed on banks and lawyers to verify the identity of their clients before accepting instructions, and the benefits of doing so would be negligible compared to the disruption created in using the online platforms for ordinary law-abiding users. Online communications systems are meant to be easy to access and use for everyone. The Economist has argued that "in real life anonymity is constrained […] In most countries it is not possible to drive a car without registration plates, a licence or insurance. Most require babies to be registered at birth, and issue numbers to track payments in and out of social-security systems.

[25] BBC, 'Would-be IS bride jailed at Sheffield Crown Court for terror tweets' (18 May 2016) available at <https://www.bbc.co.uk/news/uk-england-south-yorkshire-36322924> accessed 27 November 2018.
[26] Hannigan (n 2).
[27] Proceeds of Crime Act 2002, s 330.
[28] Garry Thomas, 'A case for local neighbourhood policing and community intelligence in counter terrorism' (2016) 89(1) Police Journal 31, 42.
[29] The Economist, 'The terrorist in the data' (26 November 2015, The Economist).

People do not expect to live in an anonymous house, draw an anonymous income or (nowadays) open an anonymous bank account".[30] Yet, Twitter, Facebook and YouTube only require a mobile telephone number or email address in order to create an account. Both mobile phone numbers and email addresses are easily created, and easily disposed of. Introducing a requirement for a postal address – though perhaps the antithesis of modern technology – may help in combatting the anonymity of users because there will be a physical connection to the non-digital world. The problem with introducing a postal address requirement is that false addresses are likely to be provided by criminals seeking to avoid identification. Further, the examples used by the Economist to justify tackling anonymity apply to the state's need to check who is living and operating in the country so that they can be taxed and provided with state services.

The use of social media is not a state-provided service and there is no obligation to have a social media account – it is another means, open to personal preference, that one can use to communicate with friends and family. These characteristics distinguish social media from activities requiring registration such as that which takes place at birth. Requirements for a postal address or formal registration would mostly affect law-abiding citizens whose social media presence is not the target of state scrutiny and the risk of Orwellian state surveillance which is not desirable in a democracy. A course of action that would affect the public generally rather than targeting criminals was adopted by the government under the Data Retention and Investigatory Powers Act 2014 ['DRIPA 2014'] but this had to be repealed at the end of 2016. DRIPA 2014 allowed a notice to be issued requiring a public telecommunications operator to retain the data of all users for a period of time.[31] It was held by the European Court of Justice that this power breached EU laws protecting privacy and personal data as the retention of data applied to the general population, rather than what was necessary in order to fight serious crime.[32] Any measures to address the issue of anonymity in cyberspace must be tailored to tackling crime and cannot apply generally without sufficient safeguards. Safeguards that protect the anonymity of law-abiding citizens must be preserved in order to mitigate against the risk of state scrutiny, and the fact that criminals can take advantage of this anonymity before a crime is identified or investigated is not sufficient justification for blanket policies that affect law-abiding citizens. The current law, which permits warrants to be obtained to collect internet data[33], would be assisted by the recommendations above which would require social media to report criminal activity on their platforms. If reports are made, specific warrants can be obtained to gather evidence and data that would assist in the investigation and prosecution of terrorist crimes online.

Cross-Border Enforcement

Due to the global nature of social media, effective enforcement of obligations on social media companies should be a cooperative international endeavour. Russell Buchan (University of Sheffield) has argued that "it will be necessary to devise an international treaty (or even several international treaties) to regulate how states address threats emerging from cyberspace […] by requiring states to adopt those specific laws and institutions that are considered necessary to suppress cyber threats […and] require states to proactively cooperate over issues of cyber

[30] ibid.
[31] DRIPA 2014, s 1(1).
[32] *Tele2 Sverige AB v Post-och telestyrelsen* (n 22) 848.
[33] Investigatory Powers Act 2016.

security".[34] Though Buchan was focusing on cybersecurity rather than terrorist crimes in cyberspace, the same problem of cross-border criminality can be addressed through international agreements to criminalise certain terrorist material posted online, regulate social media companies facilitating the publication of terrorist material and impose obligations to remove and report criminal content to the relevant law enforcement authority.

Communication between States

Communication between states is a particular issue for the UK because a significant number of social media companies are based in the USA which means they are not within the jurisdiction of the UK. Law enforcement authorities need to be able to communicate easily and effectively with these companies if enforcement is to be successful. To gather evidence from Californian social media companies during police investigations, UK law enforcement authorities must do so via the 1994 Mutual Legal Assistance Treaty[35] ('MLAT') between the USA and the UK. Research into the effective use of requests for mutual legal assistance has not reached positive conclusions. A report published by the Cabinet Office concluded that "[t]he MLAT process is widely criticised for being slow, unresponsive (it can take up to nine months for information to be returned) and bureaucratic (it currently involves hard copies of legal documents being couriered across the Atlantic through numerous intermediary bodies)".[36] A similar experience has been recorded in Finland where Anna Leppänen, Timo Kiravuo and Sari Kajantie (Police University College) found, "[o]ur interviewee assumed that getting a reply [to an MLAT request] could take months, if at all".[37] David Fidler's research also concluded that "MLATs need reform to support countering online terrorist activities".[38] Therefore, reform needs to make the MLAT process more efficient, less bureaucratic and less time-consuming.

The Cabinet Office report stated, "[w]e have discussed options with the [social media] companies to improve the process for making communications data requests. The companies are developing their own technical solutions to this end, including online portals. We should encourage more of this".[39] Introduction of an electronic system for MLATs was also an area of specific reform recommended by Andrew Woods (Global Network Initiative).[40] One reason for the MLAT system being insufficient for today's purposes is that social media did not exist when the MLAT was drafted and the system has since become outdated. The creation of an online portal or other electronic method of dealing with MLAT requests would help to expedite the process of requesting and providing communications data. However, it would also require reform of the current MLAT due to the requirement that requests for mutual legal assistance are made in writing which is unlikely to permit requests being made digitally via a portal.[41] Further, there is currently no time

[34] Russell Buchan, 'Cyberspace, Non-State Actors and the Obligation to Prevent Transboundary Harm' (2016) 21(3) Journal of Conflict and Security Law 429, 452.
[35] Mutual Legal Assistance Treaty (USA – UK) (6 January 1994) available at <https://fas.org/irp/world/uk/us-uk-mla.pdf> accessed 2 December 2018.
[36] Cabinet Office, *Summary of the Work of the Prime Minister's Special Envoy on Intelligence and Law Enforcement Data Sharing* (2015).
[37] Anna Leppänen, Timo Kiravuo and Sari Kajantie, 'Policing the cyber-physical space' (2016) 89(4) Police Journal 290, 301.
[38] Fidler (n 9) 491.
[39] Cabinet Office (n 48).
[40] Andrew Woods, 'Data Beyond Borders: Mutual Legal Assistance in the Internet Age' (January 2015, Global Network Initiative) 2.
[41] MLAT, Art 4(1).

limit for compliance with a MLAT request which hinders the efficiency of the process.[42] Time limits would force those providing assistance to improve efficiency and motivate them to comply with the request. Time limits may be difficult to enforce because national courts are traditionally unable to interfere with the domestic processes of other states – therefore, a British court could not enforce compliance on an American company. However, a condition may be included that states are responsible for self-policing their compliance through the jurisdiction of their own national courts. Therefore, American courts would be expected to enforce compliance against American companies. Diplomatic pressure would be needed to ensure that states are self-policing to ensure the success of a reformed MLAT process.

Conclusion

Greater obligations should be placed on social media companies to tackle terrorist crime committed on their platforms through the imposition of reporting obligations. At present, user rules imposed by social media companies are not sufficient to prevent individuals sharing terrorist material. When an account is permanently suspended for sharing terrorist material, it should be a matter of course for the relevant law enforcement authority to be notified so that the crime can be properly investigated, and a prosecution brought if appropriate. Issues regarding anonymity of users would also be addressed through requirements to file police reports, as British police can utilise interception warrants to investigate and gather data related to the suspect. To properly adapt to the transnational nature of the internet and social media, the MLAT procedure must be reformed to allow evidence to be gathered efficiently.

[42] ibid, Art 5.

Estate Planning in the LGBTQ+ Community: A Kantian Perspective on the Exercise of Autonomy

Rosanna Drinkhouse

Abstract

Providing loved ones with financial security and property via a will is central to the contemporary conceptions of family and legacy. Though the 21st century has seen significant legal victories for LGBTQ+ individuals, through the The Marriage Act 2013, LGBTQ+ people are statistically less likely than heterosexuals to be married. In 2017, it was estimated there are around 9,000 same-sex unmarried couple families in the UK and 75,000 same-sex cohabiting couples without dependent children, the latter showing a 25% increase in a decade.

If a couple is married, significant portions of the estate will pass to the spouse independently of the will, through the intestacy rules. However, if there is no will and no marriage, then the partner has no automatic rights. This means that in the event of intestacy, the surviving partner will not automatically inherit any of the property and possessions owned in the sole name of the deceased. This question of what will happen to assets without a will, in the context of same-sex relationships will become a bigger question in coming decades. Though the The Inheritance and Trustees Powers Act 2014 (ITPA 2014) provided important reforms for groups, like adopted children, it made no provisions for unmarried couples.

Introduction

A will serves the primary purpose of insuring belongings accumulated over a lifetime are distributed to loved ones. A will is a legal instrument, heavily regulated by statute and case law, but it also serves an important cultural and interpersonal role: providing a medium for the deceased to dispose of their property. This involves tough decision making but leads to comfort through ensuring security for the recipients of the assets outlined within the will. Although creating a will has comparatively less formalities than other legal documents, it is a chronically underutilised legal tool. Estimates vary, but it is suggested that 40% of adults in the UK die without a will and are thus subject to the intestacy rules.[1] The primary legislation governing wills in the uk in the Wills Act 1837, which was drafted in the Victorian era and thus reflects antiquated social and economic norms. The Law Commission is currently reviewing this estate planning legislation and will be offering recommendations to parliament in 2019.[2] Addressing the woefully inadequate rights of cohabitees is a listed objective.

[1] Law Commission, 'Making A Will' (Law Commission 2018).
[2] Ibid.

In the one hundred and eighty-one years since the passage of the Wills Act, the UK has changed dramatically – in 2019, women have the right to vote, the UK is host to an increasingly ethnically and racially diverse population, and same sex marriage is legal. The UK's legal perspective about individual rights as well as a conception of diversity have shifted fundamentally, but the primary statute governing wills remains the same.

Wills as an act of autonomy: the LGBTQ+ perspective

The default assumption about family structure is a man and woman, but this is no longer the only legally recognised option. Case law concerning wealth transmission shows that wills are a nuclear family concept, a means for efficiently transmitting wealth, and ensuring survival. When there is no will, the legal assumption is that the assets will follow the bloodline. Wills provide an opportunity to look after anyone the testator chooses, it could be a blood family, or the family one chooses, which can have a social and economic impact on the people or organisations that they value. Dr. Aunu Soraine, who works as a Gender Studies Fellow at the University of Helsinki, asserts that wills are a means of caring for communities one values "inheritance could be conceptualised and re-imagined as not only transformation of property but also as taking care of those who actually matter in one's life: directed towards friends, lovers, and community. Will-writing offers a pathway to new identifications: we could re-imagine new concepts for care practices that the society tries to hide from the people who do not follow its dominant norms."[3] Dr. Soranine's articulation of wills serving as a reflection and statement of community ventures beyond the logistical view of wills as a simple, transactional document used to dispose of property. But rather reflects two active choices the testator must make it their lifetime: which property to give and which recipients. From this perspective, a will can be reimagined – testators can draft with purpose, thinking of giving as an expression of gratitude, an invitation for reflection, and impetus for social care. Though LGBTQ+ identities have become more socially acceptable, many LGBTQ+ people are still isolated by their families. Community, or a family of one's own choosing, serves as a support system that the nuclear family may have ceased to fulfil.

Publication of a will disrupts the default; instead of property automatically vesting with the families, one can exercise free choice and define one's own class of beneficiaries. Dr. Soraine explains, "will-writing is a reflection of an ideal of autonomy of the modern individual. If sexually or otherwise marginalised people would look at will-writing as their right to define the posthumous destiny of not only their wealth but also of the well-being of people who they really care for, also outside of the blood relatives circle."[4] Writing a will is an active act of support for lovers, friends, community, and other real life-care. This conception of wills as a vehicle for autonomy and opportunity to invest in the success of one's self-chosen community and reflects the versatility of the will. Though 2019 is many years from the Enlightenment, the conception of autonomy that emerged from these thinkers gives credence to this perspective on post humorous destiny.

Wills as an act of autonomy: a philosophical perspective concerning wills as a legal instrument

[3] Sorainen, Antu. 2015. "Queer Personal Lives, Inheritance Perspectives, and Small Places." Nordic Journal for Queer Studies
[4] Ibid.

Autonomy has a rich history in the disciplines of political theory and philosophy, reaching its culmination in the works of enlightenment thinkers, like Hobbs, Locke, and Kant.[5] Though these theorists were not considering estate law directly in their musings, their thoughts about the will and the exercise of autonomy provide a useful framework for understanding testamentary dispositions as an act requiring autonomy and reflecting individual's values. Kant saw the end of autonomy, when exercised in conjunction with reason, as granting dignity to the decision maker.[6] Wills send assets to specific people and places, transferring financial value when the asset passes from the original owner to the new. The testator has to utilise reason and judgement for this process to function. Through the exercise of discernment honed through their lives, they have to consider which causes and communities they value, and how much they want to give. Wills have a dual function (which is not mutually exclusive) – one is the utilitarian analysis, wills are chiefly a legal instrument and their function is to dispose of assets. Though this utilitarian perspective does reflect wills fundamental legal purpose, the more philosophical layer lies just beneath. Wills also serve as a reflection of personhood- a summary of who the testator loved, what causes they chose to empower, and the nature of the legacy they left. Combining the two perspectives of utility and sentimentality show that the act is important and it is an outpouring of reason, which makes testamentary dispositions eligible for the Kantian conception of autonomy. QUOTE! To Kant, the effect of act of autonomy was the experience of dignity.

Wills dignify and empower their authors, giving them a sense of creating something that will outlive them; offering peace of mind that their estates are well organised and equipped to impart value.

This opportunity for dignity is especially important to the LGBTQ+ community, as the LGBTQ+ identity is fraught with legal and social discrimination and homophobia, which fits with Kant's idea of negative freedom, as homophobic restricts the exercise of freedom. Freedom, to Kant, is being bound by ones own decisions[7]. Same sex marriage's illegality is an example of a negative freedom. Wills, in contrast, are exercises of positive freedom (ie act)s, and are written because one chooses. Making a will is discretionary- it is not legally required and the testator is allotted significant freedom throughout the process. Therefore they are a positive freedom, in the Kantian sense. Making a will is a choice that one makes to be bound by and thus is an exercise of positive freedom, and shows that a person is being voluntarily bound by their own will, rather than from an outside source, of which they do not consent to have a say in. Making a will means that one effectively opts out from the default of intestacy and realises that value of ones own assets. The document exercises authority and determines what will happen after death. To Kant, autonomy is only realised when individuals exercise free choice via a decision.

Though wills are not legally required, failing to create one will mean that assets will be distributed according to the legal framework created by statute and case law. As the judiciary is overwhelmingly white, male, and heterosexual, and many claims require appealing to their discretion, this places LGBTQ+ people in a precarious place. Though LGBTQ+ individuals have the right to marriage, and their spouses have automatic inheritance rights under the intestacy rules, LGBTQ+ individuals are less likely to marry and more likely to cohabitate than the rest of the

[5] Sensen, O. (2013). *Kant on Moral Autonomy*. 2nd ed. Cambridge: CUP, pp.53-77.
[6] Ibid
[7] Ibid.

population. Therefore, the positive act of drafting a will holds significant weight in terms of autonomy. When there is a will, there is an almost certain guarantee that the words drafted will take effect and will govern the passage of the assets. A will prevents legal intervention that is based on primarily heterosexual understandings of family structure and allows individuals to govern the passage of their own assets. A will is an expression of dignity because it affects the most personal items and is an expression of preference and control. It gives the testator agency. Nothing is more dignified for an individual than agency.

Cohabitation patterns

Though same sex marriage is legal in the UK, cohabitation remains popular in the LGBTQ+ community, and thus bears heavy legal significance in the context of estate planning Marriage is no longer a near-universal institution, rather cohabitation has developed as a long-term flexible option for many couples.[8] The increasing prevalence of cohabitation UK, especially among younger generations, denotes that reform in light of this trend is increasingly important. *Cohabitation and Intestacy: Public Opinion and Law Reform*, which was published in the Child and Family Law Quarterly, explains, "religion has historically supported the elevated status of marriage within the UK.[9] However, society is now in an increasingly secular age and there are a dwindling number of people who continue to see cohabitation as 'immoral.' In their 2007 report, Cohabitation: The Financial Consequences of Relationship Breakdown Law Com No 307, the Law Commission notes, that twenty three years ago, in 1995 the Church of England declared that 'living in sin' was no longer sinful.[10] But not just the Church of England has seen cohabitation as a legitimate means, there has been a significant increase in the number of cohabiting couples, with over two million recorded in the 2001 census in England and Wales, 'a 67% increase on the figures from 1991. According to R. Probert and A. Barlow, 'Displacing marriage – diversification and harmonization within Europe,' 'the married family can no longer be assumed to be the near-universal institution of civil society it once was… as cohabitation develops into a longer-term option, the need for legal intervention to solve issues such as the division of property upon the termination of the relationship whether by death or by the choice of the parties becomes greater."[11]

Cohabitation and intestacy

Not all cohabitants are affected by intestacy; the lack of marital status is only in issue in respect of estate distribution when the there is no will. Typically, the items in an estate passes to beneficiaries subject to provisions in a valid will, subject to provisions in the Inheritance Act. If a testator has a valid will and provides for their partner, then the partner will inherit the nominated item. Certain classes of items will pass outside of a will, like property is held with a joint tenancy or a pension held on trust with a named beneficiary.[12]

If there is no will, the estate is considered intestate, and the devolution of property is distributed according to the Administration of Estates Act (AEA 1925). Essentially, AEA imposes a trust on

[8] 'A Critical Research Agenda For Equity And Trusts' [2014] ABA
[9] 'Cohabitation And Intestacy: Public Opinion And Law Reform' [2012] Child and Family Law Quarterly.
[10] Ibid.
[11] Ibid.
[12] Law Commission, 'Making A Will' (Law Commission 2018).

all estate property upon the death of the testator. After debts, including funeral expenses, or credit card debts, for example, are paid, the residuary estate is divided among surviving relatives, subject to the order in section 46 of AEA. According to J. Herring's work, *Family Law, "*the rules of distribution are complex, with their focus on blood relations and spouses and civil partners rather than other social relations."[13]

If the surviving partner has no equitable or legal claim upon the estate, the only available route of obtaining a legacy in via an application under the Inheritance Act[14]. The objective of the act is to ensure that those who have become dependent on the testator are provided for, to a reasonable standard. This is a discretionary, equitable remedy and relevant factors that a surviving partner would like include would be duration of relationship, length of cohabitation, and financial contributions. Utilising section 1(A) of IA requires cohabitants to show evidence of a two year period of the couple living together, "as husband and wife." This is ambiguous wording, and thus the case law lacks clear, consistent interpretation and application.[15]

In *Churchill v Roach,* the couple was together for seven years, but only lived together for one of those years. The court held that they satisfied the test of 'living in the same household.' Norris J held that it was 'perfectly possible to have one household and two properties.' "The facts of the case evidenced the presence of two separate establishments with their own domestic economies, but claimant was unable to satisfy the 2-year requirement. The applicant failed to make a successful claim as a cohabitant, and thus made a claim as a dependent. According to the work, Cohabitation and Intestacy, "it is clear that generally, as far as establishing a jurisdictional claim under the Inheritance Act is concerned, the courts have tried to be generous in interpreting the legislation. This can be seen in *Re Watson (Deceased)*."[16] Though the deceased was living in the hospital for weeks prior to death, and the relationship had not been consummated, the court held that the couple had "been living together as husband and wife" and thus satisfied the test in s. 1(A). Similarly, in *Gully v Dix*, the court deemed a three-month period where the couple maintained separate residences as merely transitory, even though it was immediately prior to the deceased's death.[17] Meaning that the woman would have returned to live with the deceased and that therefore she could successfully make a claim in s1(A).

Re Watson (Deceased) and *Gully v Dix* are two examples of the court utilising equitable discretion in favour of cohabitant's claims. Although these claimants received a share of the estate, their awards were smaller because the claimant and the deceased were cohabitating, rather than married. The standard for bringing a claim is that the application of intestacy rules has left the applicant without reasonable financial provisions. Reasonable is interpreted in light of the class of the applicant.[18]

Though the Law Commission did not recommend any changes to the intestacy rules in relation to cohabitation during their 2007 report about the financial consequences of cohabitation, in 2018,

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[13] Jonathan Herring, Rebecca Probert and Stephen Gilmore, *Great Debates In Family Law* (2nd edn, OUP).
[14] 'Cohabitation And Intestacy: Public Opinion And Law Reform' [2012] Child and Family Law Quarterly.
[15] Ibid.
[16] *Re Watson (Deceased)* CHD 31 December 1998
[17] 'Cohabitation And Intestacy: Public Opinion And Law Reform' [2012] Child and Family Law Quarterly.
[18] Rupert Mead, 'Uneasy Succession' [2018] New Law Journal.

the upcoming Law Commission reforms details addressing intestacy and cohabitation as one of the five objectives.[19] In the 2007 report, the Law Commission noted the complexity of the difficulty of creating rules that would reflect appropriately the very diverse range of cohabiting relationships, and proposed instead making better provision for cohabitants through amendments to the Inheritance (Provision for Family and Dependents) Act 1975 (Inheritance Act).[20]

In her 1994 research entitled "Will Making, Making Clients," Judith Masson found that the median age for making a will was age 69 for men and 73 for women. Research also shows cohabitating couples are statistically likely to be younger than married ones, with the peak cohabitation age being in mid to late 20s, according to Haskey's work, 'Cohabitation in Great Britain: Past, Present and Future Trends – and Attitudes.' This means that the average person will live the majority of their lives without constructing a will.

Societal attitudes are becoming more favourable towards cohabitation, Anne Barlow, an academic, who researches attitudes on the matter, found that two-thirds (66%) of those sampled thought that a cohabitant who had lived with her partner for 2 years, and who had no children, should have the same financial rights if the man died intestate as she would have done were the couple married, even though the relationship was short and she had not suffered any apparent financial disadvantage.[21] There is significant disconnect between the prevalence and favorable public opinion about cohabitation and the strict application of the intestacy rules[22]. Though there have been significant operations of the court's equitable, discretion, but requiring the claimant to both prove the standard of marriage as well as the court costs is a high bar.

Conclusions and Reform

Though wills are not costly to produce, an estimated 40% of the population does not have a will[23]. This means that their estates are distributed as per the intestacy rules, rather than to the people and causes that matter to them. Though these rules do not directly address heterosexual or homosexual relationships specifically, the impact disproportionately privileges heterosexual people. Though LGBTQ+ marriage became legal in 2013, via the passage of the Marriage Act, and therefore, there is no formal, legal bar to married partners inheriting under a valid will. Statistically many LGBTQ+ people do not have wills and are not married to their partners. Cohabitation is highly prevalent among the LGBTQ+ community. Marriage is a new, privileged status. Marriage may remain privileged, but even the interests of distant relatives currently take precedence over those of the unmarried partner in a situation of intestacy.[24] Though surviving partners are able to make claims under the AEA, the success of those claims is dependent on proving a standard of living like husband and wife, which is heteronormative the success of the claim is dependent upon the judge's equitable discretion, which is not a stable means of access to a vulnerable population.

[19] Law Commission, 'Making A Will' (Law Commission 2018).
[20] 'Cohabitation And Intestacy: Public Opinion And Law Reform' [2012] Child and Family Law Quarterly.
[21] Ibid.
[22] Rupert Mead, 'Uneasy Succession' [2018] New Law Journal.
[23] Law Commission, 'Making A Will' (Law Commission 2018).
[24] Sorainen, Antu. 2015. "Queer Personal Lives, Inheritance Perspectives, and Small Places." Nordic Journal for Queer Studies

Potential options for reform, which are discussed heavily within the academic literature, are expected to feature in the Law Commission's 2019 review of the Wills Act. This review could potentially include a tiered system of automatic inheritance. [25] If adopted, this system could be based on duration of cohabitation. If there was a child, then the partner would be treated more similarly to a spouse. If there were no mutual children, then the length of the relationship would be proportionate to the proportion of the estate, with a gradual increase, until eventually the surviving partner would be treated like a spouse.[26] Wills are not just a logistical document with morbid utility; they are also an avenue for personal, symbolic significance, which enables the testator to make a decision to leave a legacy (both literally and metaphorically).

[25] 'Cohabitation And Intestacy: Public Opinion And Law Reform' [2012] Child and Family Law Quarterly.
[26] Ibid.

ABC and NDAs: the press and parliamentary privilege

Emilia Carslaw*

Abstract

In October 2018, Lord Hain unexpectedly named Sir Philip Green in the House of Lords as the man who took out a court injunction to prevent a newspaper from publishing allegations of sexual and racial harassment. This act, made possible by the principle of parliamentary privilege, was labelled 'brave' by many, but lawyers were not so pleased, arguing that Lord Hain's intervention breached a legal contract and undermined the role of the courts in deciding the issues raised by the case. This conflict is not a new one. In 2011, the Liberal Democrat John Hemming MP named Ryan Giggs as the claimant who had taken out an injunction against News Group Newspapers to conceal details of his extra-marital affair. Lord Judge, the then Lord Chief Justice, raised the question 'whether it's a good idea for our lawmakers to be flouting a court order just because they disagree with [it] or they disagree with the privacy law created by parliament.'[1] This essay will attempt to answer Lord Judge's question by examining the legal relationship between parliamentary privilege and court injunctions, and assess whether Lord Hain was abusing his parliamentary privilege, or doing his public duty.

On 23 October 2018, the Court of Appeal granted an interim injunction to the anonymised 'ABC' preventing *The Daily Telegraph* from publishing 'confidential information disclosed in breach of confidence.'[2] The next day, *The Daily Telegraph*'s lead story, entitled 'The British #MeToo scandal which cannot be revealed', exposed the existence of an injunction taken out by a 'leading businessman' to prevent publication of sexual harassment and racial abuse allegations.[3]

Two days later, Lord Hain, a Labour Peer, named and identified the businessman in the House of Lords using the following words:

> "I feel it's my duty under parliamentary privilege to name Philip Green as the individual in question given that the media have been subject to an injunction preventing publication of the full details of this story which is clearly in the public interest."[4]

*The author is currently undertaking the GDL at City, University of London. The author's submission was written in response to the recent media scandal concerning Sir Philip Green, non-disclosure agreements and parliamentary privilege.

[1] 'Judge questions injunction 'flouting' in Parliament' (*BBC News Online,* 20 May 2011) https://www.bbc.co.uk/news/uk-politics-13475703 accessed 18 February 2019
[2] *ABC and Ors v Telegraph Media Group Ltd* [2018] EWCA Civ 2329
[3] *The Daily Telegraph* 'The British #MeToo scandal which cannot be revealed' (24 October 2018) 1
[4] HL Deb 25 October 2018, vol 793, Personal Statement

His decision generated considerable criticism from prominent members of the legal profession, including the Conservative MP and former Attorney General, Dominic Grieve QC, as well as cross-bencher Lord Pannick QC, a specialist in public law, human rights and constitutional law, who accused Lord Hain of both subverting the rule of law and of abusing his parliamentary privilege.[5] However, in an interview with BBC *Newsnight*, Lord Hain declared that he had received 'overwhelming support, particularly from women'. In the same interview, he stated that he was 'not disputing judges' responsibilities […] but discharging [his] function as a parliamentarian'.[6]

This incident is of course not the first time parliamentary privilege has been used to circumvent court orders. The early 2010s saw a surge in the number of injunctions and super-injunctions,[7] and correspondingly politicians using their privilege to break them both in the Commons and the Lords. Notable cases in 2011 alone included those relating to Ryan Giggs, John Terry, and (the then Sir) Fred Goodwin. Response from lawyers at the time was not welcoming, with the then Lord Chief Justice Lord Judge querying 'whether it's a good idea for our lawmakers to be flouting a court order just because they disagree with [it] or they disagree with the privacy law created by parliament'.[8]

Lord Hain's decision to name Sir Philip Green reignited a debate within the media on the difference between what is in the public interest and what is merely interesting to the public. It also initiated a renewal of a bitter battle between Parliament and the media on one side, and the courts on the other. This essay will examine whether the Peer, in carrying out his 'function as a parliamentarian', was championing the media in their stated duty to report in the public interest, or if he was undermining the rule of law and the separation of powers. It will cod

Parliamentary privilege

By naming Sir Philip in Parliament, Lord Hain was afforded the protection of Article IX of the Bill of Rights, which states that: 'the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.' This is an absolute rule which invests Members of Parliament and the Lords with immunity from the law of defamation when they are speaking in Parliament. Initially established to ensure that neither the court nor the Crown was able to interfere with Parliamentary business, it delimits the scope of the courts' powers and is a 'longstanding instance of the separation of powers'.[9]

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[5] David Pannick QC, 'Parliamentarians who think they are Solomon abuse their privilege' (*The Times,* 8 November 2018) https://www.thetimes.co.uk/article/parliamentarians-who-think-they-are-solomon-abuse-their-privilege-d5hbl5n90 accessed 18 February 2019

[6] 'Lord Hain defends naming Sir Philip Green over harassment claims' (*BBC News Online*, 26 October 2018) https://www.bbc.co.uk/news/uk-45987084 accessed 18 February 2019

[7] The 2011 Committee on Super-Injunctions Report, led by Lord Neuberger MR, defines an anonymised injunction as an 'interim injunction which restrains a person from publishing information which concerns the applicant. It is said to be confidential where the names of either or both parties are not stated'. Comparatively, a super-injunction 'restrains a person from: (i) publishing information about the applicant which is said to be confidential and private; **and** (ii) publicising or informing others of the existence of the order and the proceedings'. Neuberger MR, Committee on Super Injunctions, *Super-Injunctions, Anonymised Injunctions and Open Justice* (2011) 20

[8] 'Judge questions injunction 'flouting' in Parliament' (*BBC News Online,* 20 May 2011) http://www.bbc.co.uk/news/mobile/uk-politics-13475703 accessed 15 February 2019

[9] Neuberger MR (2011) 68

Matters subject to parliamentary privilege are therefore regulated not by the courts, but are in the sole jurisdiction of Parliament, known as its 'exclusive cognisance'. As Sir William Blackstone stated in *Commentaries on the Laws of England,* the maxim underlying the law and custom of Parliament is that 'whatever matter arises concerning either house of parliament, ought to be examined, discussed, and adjudged in that house to which it relates, and not elsewhere'.[10] This means not only that participants in parliamentary proceedings are not legally liable for what is said but also that those outside Parliament, such as the claimants in *ABC v Telegraph*, are not able to seek redress through the courts. It also means that there is 'no question that a super-injunction, or for that matter any court order, could extend to Parliament, or restrict, or prohibit Parliamentary debate or proceedings', as Lord Neuberger MR stated in his 2011 report on super-injunctions.[11] This lack of examination by the courts highlights a significant yet long-established tension between parliamentary privilege and the rule of law.

Parliament's exclusive cognisance should not, however, be licence for it to act unlawfully. Rather, parliamentary privilege is governed by certain conventions, including the *sub judice* rule, which prevents MPs or Lords from referring to a current or impending court case. This rule was agreed most recently by the Commons in 2001 after a proposal by the Joint Committee on Parliamentary Privilege, who outlined the principles behind it as follows:

> The present rule rightly tries to strike a balance between two sets of principles. On the one hand, the rights of parties in legal proceedings should not be prejudiced by discussion of their case in Parliament, and Parliament should not prevent the courts from exercising their functions. On the other hand, Parliament has a constitutional right to discuss any matters it pleases.[12]

The *sub judice* rule can provide a check on Parliamentary discussion, bearing in mind the possibility of influencing a forthcoming legal decision, but its use is entirely discretionary. Article IX applies to each individual Member of Parliament, and consequently, it is for each individual Member to choose when they wish to tip the balance in either direction. *ABC* was an interim injunction pending an expedited trial: Lord Hain made the decision to explicitly discuss it in breach of the *sub judice* rule.

Parliament's power is therefore essentially only restrained by the conscience of its members when it comes to flouting the decisions of the courts, conventions or not. It is worth noting that parliamentary privilege is rarely used to intrude on the workings of the judiciary. When it is, it is most often leveraged to bring information protected by injunctions into the public domain, raising the question of whether Parliamentary privilege is being misused a mechanism for the press to bring shady allegations that are 'in the public interest' to light, even if they have been deemed confidential by the courts.

Parliamentary privilege and the media

Parliamentary circumvention of injunctions is not just a 21st century phenomenon. In 1955, for example, the press reported an MP's privileged assertion that Kim Philby was a Soviet Spy without risk of being accused of libel under the Official Secrets Act. In 1979, four MPs named

[10] Joint Committee on Parliamentary Privilege, *Report,* (HC 214-1 1998-99 and HL 1998-99, 30 March 1999) paragraph 15
[11] Neuberger MR (2011) 68
[12] Joint Committee on Parliamentary Privilege, *Report* (1999) paragraph 1991

a witness, whom the court had allowed to remain anonymous, in a case concerning Time Out Magazine. In 1996, a Member of Parliament breached an anonymity order that had been granted in favour of a child (known publicly as 'Child Z'). At that time, the House deemed this 'exceptional' and was reluctant to act, merely 'urg[ing] members to exercise the greatest care in avoiding breaches of court orders.'[13]

From 2009, however, there began a flurry of instances of members of both Houses of Parliament breaking injunctions. Most famous, perhaps, is the case *CTB v News Group Newspapers*,[14] where professional footballer Ryan Giggs took out a super-injunction in order to prevent *The Sun* publishing information about his extra-marital affair. However, his identity became widely known when hundreds of users posted updates on Twitter identifying him and when, separately, *The Sunday Herald,* a Scottish newspaper, avoided English libel rules to name him on their front page. Following this, Liberal Democrat MP John Hemming identified Giggs during a Commons debate on the use of injunctions, essentially giving the green light to the rest of the UK media to name him without fear of redress. John Hemming MP had previously named in Parliament the former Royal Bank of Scotland chief Fred Goodwin, who had taken out an injunction to prevent the emergence of allegations surrounding tax evasion.

This trend called into question whether the media has a privilege to report on injunctions following their mention in Parliament. At a statutory level, the media is afforded qualified protection to report on Parliamentary proceedings. This was established in *Stockdale v Hansard*[15] and given a statutory footing by The Parliamentary Papers Act 1840, which provided a qualified privilege for any 'extract or abstract' from Parliamentary publication, provided it was published '*bona fide* and without malice' as stated in section 3 of the Act.

It is on this section that *The Guardian* newspaper sought to rely in 2009 when it claimed that its right to report on Parliamentary proceedings had been 'gagged' in the case of *RJW & SJW v Guardian*.[16] In this case, the claimant, oil giant Trafigura, under a pseudonym, was involved in litigation after dumping toxic waste off the coast of Ivory Coast, allegedly causing some 30,000 claimants to fall seriously ill. In the context of that lawsuit, Trafigura commissioned an expert report (the 'Minton Report') on the matter, a preliminary copy of which had fallen into the hands of *The Guardian*, who were now making moves to publish. Trafigura's solicitors, Carter-Ruck therefore acquired a super-injunction, which meant *The Guardian* was allowed to report only that an injunction existed and the name of the solicitors.[17] However, the true controversy arose when Carter-Ruck insinuated that this injunction prevented *The Guardian* from reporting on a question Paul Farrelly MP had tabled in Parliament to the then Justice Secretary Jack Straw regarding the injunction. After the MP asked the question, users took to social media to report it, resulting in the information being released into the public domain. This was heralded by the media as a victory for freedom of speech and a 'fantastic own goal' for Trafigura's PR.[18]

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[13] Commons Procedure Committee, *Fourth Report* (1996)
[14] [2011] EWHC 1232 QB
[15] (1840) 113 E.R. 428
[16] *RJW v Guardian News and Media Ltd* [2009] EWHC 2540(QB)
[17], 'Guardian gagged from reporting parliament' (*The Guardian*, 12 October 2009) https://www.theguardian.com/media/2009/oct/12/guardian-gagged-from-reporting-parliament accessed 18 February 2019
[18] Alan Rusbridger; 'As a way of handling PR it was a fantastic own goal' (*The Guardian*, 13 October 2011) https://www.theguardian.com/world/audio/2009/oct/13/alan-rusbridger-injunction accessed 15 February 2019

From Carter-Ruck's perspective, the public furore stemmed from a fundamental misunderstanding of its aims. Carter-Ruck was not attempting to prevent Parliamentary debate, it claimed. Rather, it was attempting to rely on both the *sub judice* rule and section 3 of the Parliamentary Papers Act 1840 in that *The Guardian* was publishing in contempt of court. In asking the question, asserted Carter-Ruck, Farrelly had wilfully breached the *sub judice* rule and therefore deliberately undermined the role of the courts. Since Parliament has exclusive cognisance, the courts were unable to intervene. Alternatively, if the *Guardian* had instructed Paul Farrelly MP to table the question, in light of the fact that the report may have been acquired unlawfully, this could be considered malicious, as pointed out in an *Inforrm* blog post by a Carter-Ruck partner Nigel Tait.[19]

The fundamental failing of injunctions is their public perception. Interim injunctions, while only granted in certain circumstances and are only allowed to be temporary, are perceived to be deeply problematic. Not only do they prevent justice from being seen to be done, but they are also perceived as a muzzle on the freedom of the press. Super-injunctions have a particularly poor public image, viewed as murky concealment of shady happenings, such as dumping oil, or sexual harassment, which very much ought to be in the public domain. What's more, they are not cheap.[20] Part of the issue is that injunctions are seen as only available to those who can afford them: celebrities, businessmen and politicians, who not only have sacrificed their so-called 'right to privacy' but also are perceived to have been provided with additional privileges because of their wealth and status. Lord Hain, in doing his 'duty', was not, therefore, purporting to question the authority of the courts, rather, he was preventing the rich and powerful from 'gagging' the press and concealing the 'truth' the public deserves to know.

ABC and NDAs

The court's decision to grant an anonymised or super-injunction is not a flippant one, according to the Neuberger Report. They derogate from the fundamental principle of open justice and therefore are only to be granted when 'strictly necessary' and cannot become 'in practice permanent'.[21] When the courts choose to grant an injunction they must carry out a careful balancing exercise, using a number of criteria to conclude whether the applicant's right to privacy under Article 8 of the European Convention of Human Rights - respect for privacy and family life - 'outweighs' the defendant's right to freedom of expression under Article 10.[22] Article 10 is a qualified right, tempered by Article 10(2); which states:

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society…for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence.

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[19] Nigel Tait: 'The Trafigura Story: who guards the Guardian?' (*Inforrm,* 13 October 2011) https://inforrm.org/2011/10/13/the-trafigura-story-who-guards-the-guardian-nigel-tait/ accessed 18 February 2019

[20] Emma Thelwell: 'Law for the rich: The cost of Giggs' gagging' (*Channel 4,* 24 May 2011) https://www.channel4.com/news/factcheck/law-for-the-rich-the-cost-of-giggs-gagging accessed 18 February 2019

[21] Neuberger MR (2011) v

[22] The UK has no actionable right to privacy, as famously stated in *Kaye v Robertson* [1991] FSR 62 but it has long been possible to protect confidential information by a court order (*Prince Albert v Strange* ChD 8 Feb 1849)). The passing of the Human Rights Act in 1998 led to development in the tort of breach of confidence under Article 8 of the Convention.

When deciding whether to grant an interim injunction, the court must consider these factors to decide whether the claimant is 'likely' to succeed at a full trial. In the first instance decision in *ABC*, Haddon-Cave J in the High Court decided that the *Telegraph*'s right to freedom of expression under Article 10 was likely to outweigh Sir Philip Green's rights under Article 8, or by the qualifications in 10(2), and refused to grant the injunction. In the Court of Appeal, however, the court allowed Sir Philip Green's appeal, taking into account factors such as whether the information had been obtained by *The Telegraph* in breach of confidence; what opportunity the claimants had to rebut the allegations, although they were 'reasonably credible'; the role of the existing contractual obligation to enforce confidence; the impact a lack of injunction would have on the claimant's business; and whether it was 'likely' that the claimants would establish at trial that the relevant information was acquired by *The Telegraph* with knowledge of the non-disclosure agreements and obligation of confidentiality. These, in sum, would outweigh *The Telegraph's* right to freedom of expression and therefore an injunction was granted, pending an expedited trial.

What these factors also were likely to outweigh was the public interest defence. Counsel for *The Telegraph* emphasised the importance of taking into account the 'independent right of the media to inform the public of matters of legitimate public interest'.[23] The court acknowledged that the allegations did have the potential to contribute to public debate, but ultimately concluded that 'there is a sufficient likelihood of the Claimants defeating a public interest defence at trial'.[24]

One of the primary reasons why the breach of confidence was held to be more severe by the courts was because confidence had been established by non-disclosure agreements ('NDAs') between the complainants and Sir Philip. In the wake of the Harvey Weinstein #MeToo allegations, the use of NDAs has been drawn into the public eye. Indeed, the respondent's counsel, Mr Browne, 'said that the public, including prospective employees of the claimants, have the right to know not just about the alleged misconduct but also the way in which senior management has (in his words) swept aside the complaints of the employees'.[25]

From the court's point of view, however, the contractual obligation created by the NDA played an important part in shifting the balance to the claimant's right to privacy, citing *Campbell v Frisbee*:

> We consider that it is arguable that a duty of confidentiality that has been expressly assumed under contract carries more weight, when balanced against the restriction of the right of freedom of expression, than a duty of confidentiality that is not buttressed by express agreement. [26]

It concluded that the weight of the express contractual obligation that had been established may well outweigh the Article 10 rights '[p]rovided that the agreement is freely entered into, without improper pressure or any other vitiating factor and with the benefit (where appropriate) of independent legal advice, and (again, where appropriate) with due allowance for disclosure of any wrongdoing to the police or appropriate regulatory or statutory body'.[27]

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[23] *ABC* 65
[24] *ABC* 66
[25] *ABC* 65
[26] [2003] ICR 141 paragraph 22, cited in *ABC* 69
[27] *ABC* 24

The court relied on *Mionis v Democratic Press SA*[28] in which the media defendants had entered into a confidential settlement agreement with the appellant, a businessman, preventing publication of articles regarding his alleged involvement in tax evasion. Following the publication of articles in breach of a provision of the agreement, and a failed trial, the Court of Appeal allowed the claimant's appeal, holding that the settlement agreement formed an important part of the analysis which section 12(4) of the HRA required the court to undertake.

It is not pertinent to compare a confidentiality agreement signed by a media conglomerate and a wealthy businessman, both of whom have access to the best lawyers, to *ABC*, which seems much more one-sided. As Jolyon Maugham QC pointed out in an opinion piece in *The Guardian*, the typical sexual harassment victim will be junior, know complaining about her boss means losing her job and potentially long-term career prospects and will fear a traumatic trial and burdensome legal costs.[29] For her, the stakes are much higher and bargaining capacity is much lower. To its credit, the court cited the Women and Equalities Select Committee's Report on Sexual harassment in the workplace, which states that NDAs should not be used unfairly by employers to silence victims of sexual harassment and should not be used unethically. The report did, however, acknowledge that:

> There is a place for NDAs in settlement agreements; there may be times when a victim makes the judgement that signing an NDA is genuinely in their own best interests, perhaps because it provides a route to resolution that they feel would entail less trauma than going to court or because they value the guarantee of privacy.[30]

It is this exception on which the court relied. The courts stated that the NDAs were entered into willingly and with both parties on an equal footing, there was 'no evidence that they were procured by bullying, harassment or undue pressure by the claimants',[31] and that all the claimants had received independent legal advice. However, this fails to take into account the inherent imbalance present in NDAs of this type, where the victim's bargaining capacity is much lower. The court should have been more alive to these moral ambiguities, and acknowledge that these types of settlement agreement require closer scrutiny.

When Lord Hain named Philip Green he made a value judgment. He assumed that the NDAs were created in the context of an imbalance of power (whether it is an illegal one or not), and that what they were concealing was of serious importance. He assumed also that the very existence of the NDA was in the public interest. In doing so he appeared to ignore the balancing act the courts had undertaken in order to decide that at this moment, the right to confidentiality outweighed both the public interest and the right to freedom of expression. Indeed, he 'substituted his opinion of what was in the public interest for that of the Court of Appeal judgment'[32] and fundamentally misunderstood the nature of the court order.

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[28] [2017] EWCA Civ 1194

[29] Jolyon Maugham: 'Why the judges got it wrong in granting Philip Green an injunction' (*The Guardian,* 27 October 2018 https://www.theguardian.com/commentisfree/2018/oct/27/why-judges-wrong-granting-philip-green-injunction accessed on 19 February 2019.

[30] Women and Equality Sub-Committee, *Report*, paragraph 109, cited in *ABC* 42.

[31] *ABC* 61.

[32] Penelope Bridgman Baker: 'Case Law: ABC v Telegraph Media Group: NDAs and Interim Injunctions, is there ever a public interest in breach of confidence?' (*Inforrm*, 30 October 2018) https://inforrm.org/2018/10/30/case-law-abc-v-telegraph-media-group-ndas-and-interim-injunctions-is-there-ever-a-public-interest-in-breach-of-confidence-persephone-bridgman-baker accessed 18 February 2019

Nonetheless, he provided an important contribution to the debate about the role of NDAs and whether they are in their very nature as balanced as the court concluded. The court placed significant emphasis on the NDAs as fair contractual bargains which play an important part in settling litigation, but they did not consider the wider context in which these NDAs are made, and the nature of the allegations they conceal. Lord Hain, in purporting to make his decision through a commitment to 'justice and liberty', was attempting to draw attention to this wider context. His failing, in doing so, was to violate the *sub judice* rule and irrevocably breach confidentiality, with no penalty. The impact of his decision is now reflected in the fact that, in a judgment handed down on 8 February 2019, the High Court granted the claimants in *ABC* permission to discontinue their action, with the result that the now 'pointless' interim injunction was discharged.[33] The claimants were reportedly saddled with a £3m legal bill. The NDAs still stand.

The reaction to decisions like Lord Hain's will inevitably continue to be divided. Lawyers have treated it as a subversion of the rule of law and a flagrant refusal to adhere to the separation of powers. The media and some politicians have considered it a victory for free speech over a wealthy businessman seeking to silence the underdog, and a check on an unfair decision made by the courts. One thing is clear, however: if you want everyone to know your secret, take out an injunction.

[33] [2019] EWHC 223 (QB)

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Selectivity in the International Criminal Court: How the admissibility regime of the 1988 Rome Statute impacts the legitimacy of the court

Zahrah Latief*

Abstract

In recent times, the legitimacy of the International Criminal Court has come under scrutiny after a series of seemingly political and biased selection decisions. It has been argued that the admissibility regime contained in the 1988 Rome Statute of the International Criminal Court fails to protect against selectivity, and that the Court is focused on prosecuting atrocities primarily and disproportionately in African nations. This essay seeks to gauge the strength of these critiques by exploring the gulf between the admissibility regime in theory and in practice, using Uganda and Sudan as case studies to illustrate how radically divergent political approaches taken by the Court leave it open to criticism nonetheless. It also broaches the topic of the strained relationship between the Court and African nations, while offering some insights into the nuances behind emerging claims of neo-imperialism. Ultimately, the tentative conclusion drawn is that because the Court is fundamentally political by nature, and yet assumed to be precisely the opposite, the situations it decides to pursue and the reasoning by which it chooses to pursue them will be inexorably mired in controversy. In the conflictual landscape in which the Court operates, achieving consensus by all parties as a legitimate institution is a difficult, if not impossible, charge.

Introduction

In the sixteen years since its establishment, the International Criminal Court (hereafter 'ICC' or 'the Court') has faced a number of criticisms levelled at its legitimacy. Detractors have argued that the Court is too expensive[1], too ineffective, too politicised and, as of late, too Eurocentric[2]. The central criticism addressed in this paper, which also encompasses some of the above concerns, is that by virtue of the admissibility regime contained in the 1988 Rome Statute of the International Criminal Court (Rome Statute), the Court is too selective in its application of international criminal law (ICL). This is a multifaceted contention; it demands examination of the constitutive elements of the Rome Statute's admissibility regime, and the correlation between the Court's selection

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[1] David Davenport, 'International Criminal Court: 12 Years, $1 Billion, 2 Convictions' *Forbes* (12 March 2014) <https://www.forbes.com/sites/daviddavenport/2014/03/12/international-criminal-court-12-years-1-billion-2-convictions-2/#136aada92405> accessed 12 May 2018

[2] 'Talk Africa: Is the International Criminal Court Anti-Africa?' *CGTN Africa* (19 October 2015) <https://www.youtube.com/watch?v=6fL4xnp1jUw> accessed 12 May 2018

decisions and the perception of its legitimacy. This paper will attempt a review of these issues, as well as briefly exploring the impact of admissibility in the context of the tempestuous and ever-controversial relationship between the ICC and Africa, which has given rise to the recent phenomenon that some have topically labelled 'Afrexit'. It was in light of the mounting reservations surrounding the ICC's role as an objective arbiter of international criminal justice that Jonathan Hafetz outlined how "the selection of situations and individuals for prosecution remains one of the most difficult challenges facing international criminal justice".[3] The future of the Court is hinged on the sustainability of its legitimacy, and its legitimacy, in turn, is hinged on the perceived successes or failures of the decisions it makes.

I. Complementarity: A Bastion of Legitimacy?

The principle of complementarity has variously been described by contemporary commentators as "the critical bulwark that protect[s] the authority…of sovereign states"[4], and "the most distinctive trademark of the ICC"[5]. Briefly mentioned in paragraph 10 of the Preamble to the Rome Statute, the principle is expounded upon by Article 17(1)(a), which holds that a case is admissible where "[…] the State is unwilling or unable genuinely to carry out the investigation or prosecution". The rationale behind the complementarity principle is first, to ensure that the Court's jurisdiction does not unacceptably encroach upon the domestic jurisdiction of national systems, and second, to affirm the status of the ICC as a court of last resort. At the heart of complementarity is the notion that "the ICC is not intended to replace national courts"[6], but rather, is intended to supplement them and reinforce their right to primacy. This idea is integral to the rendering of the Court as a legitimate institution; it demonstrates a manifest deference towards the capability of domestic systems to try nationals on their own territories. The principle also ostensibly suggests that the Court deals only in imperatives; striving to intercede where it must, and only where it is capable of doing so under its governing statute. To this effect, former Chief Prosecutor Luis Moreno Ocampo has said – whether naively or optimistically – that "…the absence of trials by the ICC, as a consequence of the effective functioning of national systems, would be a major success".[7]

Nonetheless, it must be questioned whether the complementarity limb of the admissibility regime is adequate insulation against capricious selectivity in the application of the ICL, and whether it positively contributes to the sustenance of the Court's legitimacy. It is contended below that there is a dissonance between complementarity in the abstract and its operation in practice. Briefly, the argument offered is that decisions as to admissibility on the Article 17 grounds of unwillingness or inability come attached with an implicit judgement by the ICC as regards the inefficiency of the

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[3] Jonathan Hafetz, 'Fairness, Legitimacy, and Selection Decisions in International Criminal Law' (2017) 50(5) Vand J Transnat'l L 1133, 1134 <https://heinonline.org/HOL/P?h=hein.journals/vantl50&i=1195> accessed 13 May 2018

[4] Mohamed M El Zeidy, 'The Principle of Complementarity: A New Machinery to Implement International Criminal Law' (2002) 23(4) Mich J Intl L 869, 898 <https://repository.law.umich.edu/mjil/vol23/iss4/3> accessed 13 May 2018

[5] Mauro Politi, 'Reflections on Complementarity at the Rome Conference and Beyond' in Carsten Stahn and Mohamed M El Zeidy (eds), *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge University Press, 2011)

[6] 'Paper on Some Policy Issues Before the Office of the Prosecutor', Office of the Prosecutor (September 2003) <https://www.icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905_Policy_Paper.pdf> accessed 13 May 2018

[7] ibid

national justice system in question. Thus, between the need to ensure state cooperation and the need to eradicate impunity and, above all, do justice, the Court is naturally placed in a precarious position. In these circumstances, it is understandable that some degree of diplomatic tact is necessary to manoeuvre a labyrinthine political landscape – but is the Court transparent in this regard, or does it wrongly insist upon its own objectivity?

The Complementarity Paradox and Positive Complementarity

Robert Cryer has written about the 'complementarity paradox'; the idea that "the ICC would have to rely on the assistance of authorities that it had declared to be unwilling or unable to prosecute crimes".[8] Practically, the Court lacks the time and resources to investigate situations on national territories with the same degree of rigour and robustness as domestic officials do. In circumstances where a state is genuinely unwilling or unable to try a case and ICC intervention has been triggered, Cryer's complementarity paradox crystallises. This is due mainly to the fact that the obtaining of evidence, witnesses, and the accused is difficult, if not impossible, without the full cooperation of the state being investigated. Yet, if complementarity advances the idea that national judicial systems are capable of dispensing with justice in their own right, and are proficient enough at it to not warrant outside intervention, then surely the reverse is true for cases which *do* warrant outside intervention. In these circumstances, surely the implication is that the state in question is neither capable of nor proficient at the administration of justice. As William Schabas has argued, "a decision to proceed in [such] a case would indicate a judgment about the quality of local justice and…a condemnation of the state for its failure to fulfil its duty to prosecute".[9] Thus, the Prosecutor may feel obliged to engage in a game of tactful mediations, whereby she must balance her fundamentally reproachful assertion that a state is unwilling or unable to investigate a crime with the need to sustain positive and mutually accommodating relations. The Court may realistically avoid unsettling the equilibrium that has been cautiously struck between itself and the concerned state, and in doing so, may refrain from pursuing certain government officials – a marked departure from the Court's promise to fight impunity and perhaps a step closer to the attrition of its legitimacy.

As per a 2004 Statement, positive complementarity means that " [r]ather than competing with national systems…we will encourage national proceedings…while states have the first right to prosecute…there may be situations where a state and the Office agree that consensual 'division of labour' is appropriate".[10] Positive complementarity encourages self-referrals by states and appears to have reformulated complementarity in the more palatable language of reciprocal collaboration; akin, almost, to a partnership between the ICC and the state. Arguably, positive complementarity is a manoeuvre designed to circumvent any potential for political hostilities, and as Schabas has accurately pointed out, results in "the Court [serving] as an adjunct to the national system, to be

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[8] Robert Cryer, 'Darfur: Complementarity as the Drafters Intended?' in Carsten Stahn and Mohamed M El Zeidy (eds), *The International Criminal Court and Complementarity: From Theory to Practice* (CUP, 2011)

[9] William A Schabas, 'The Rise and Fall of Complementarity' in Carsten Stahn and Mohamed M El Zeidy (eds), *The International Criminal Court and Complementarity: From Theory to Practice* (CUP, 2011)

[10] Statement of the Prosecutor Luis Moreno Ocampo to the Diplomatic Corps, The Hague (February 2004) <https://www.icc-cpi.int/NR/rdonlyres/0F999F00-A609-4516-A91A-80467BC432D3/143670/LOM_20040212_En.pdf> accessed 13 May 2018

used [either] when the national system cannot act because of the magnitude of the case and the paucity of its own resources, or when it prefers not to act out of concerns of political expediency".[11]

Uganda and Sudan

Sarah Nouwen and Wouter Werner have explored the conflict between divergent approaches to complementarity with reference to the 'friend-enemy dichotomy'[12], concentrating on the stark juxtaposition between the Court's relationships with Uganda and Sudan respectively. As the name suggests, the friend-enemy dichotomy draws a line between those states with which the ICC maintains friendly relations, and those with which relations have broken down; fundamentally, this distinction directly informs both case selection and case outcomes, and brings to the fore the extent to which bureaucracy and political nuance saturate the delivery of international criminal justice. Doubtless, an amicable relationship with a state confers greater benefits upon the Court, namely by increasing the likelihood of prosecution and consequently enabling it to appear stronger as an institution.

Certainly, the Court's experience with abovementioned Uganda is a key exemplar of the 'friend' dynamic. In 2004, it became the first state to refer a situation on its own territory to the ICC. Soon after, the Office of the Prosecutor (OTP) announced that "a key issue [was] locating and arresting the LRA [Lord's Resistance Army] leadership. This [required] the active cooperation of states…in supporting the efforts of the Ugandan authorities".[13] Notably, the OTP singled out the LRA as the focal point of the investigation – not the forces on either side of the conflict generally. Nouwen and Werner contend that the Ugandan government, rather than turning to the ICC after exhausting hopes of genuinely conducting trials against the LRA, exploited the Court to legitimise their struggle against a dangerously powerful rebel group and attach them to the stigmatic label of international enemy, thereby depicting themselves as international allies. In turn, "a referral of the situation concerning the LRA would make the ICC's Prosecutor dependent on the cooperation of the Ugandan government; and he might hesitate to jeopardise such cooperation [and by extension, the opportunity to prosecution] by charging his cooperative friends with crimes committed in neighbouring [Democratic Republic of Congo]".[14] This is an axiomatic illustration of the ramifications that can flow from a benign, partnership-based approach to complementarity; far too quickly, the Court becomes a weapon in the hands of the politically ambitious, and far too easily, drifts into the realm of political selectivity.

Where Uganda became a friend of the ICC, Sudan, in striking contrast, became an enemy. Unlike the self-referral in Uganda, the situation in Sudan was referred to the ICC by the United Nations Security Council, and Sudan vehemently opposed the Court's interference. The government considered the referral to be machinery for Western oppression – "an instrument to brand it an enemy of the international community".[15] Contrary to the positive complementarity approach

[11] Schabas (n 9) 156
[12] Sarah MH Nouwen and Wouter G Werner, 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan' (2010) 21(4) EJIL 941, 951 <http://0-www.ciaonet.org.wam.city.ac.uk/record/21618?search=1> accessed 13 May 2018
[13] 'Uganda', International Criminal Court <https://www.icc-cpi.int/uganda> accessed 13 May 2018
[14] Nouwen and Werner (n 12) 950
[15] ibid 955

taken in Uganda, the ICC assumed an unusually inimical stance with respect to Sudan, which Cryer has reasoned is closer to the spirit of complementarity as originally envisaged by the drafters of the Rome Statute.[16] It has been pointed out by commentators that the Court's involvement in Sudan was the genesis of embittered relations between the Court and Africa and, "following [the indictment of President Omar Al Bashir], the African Union (AU) adopted a hostile posture towards the ICC".[17] Indeed, Sudanese Justice Minister, Abdel Basit Sabdarat, explicitly "vowed his country would not co-operate with the ICC after the arrest warrant was issued".[18] Through this series of events, the Court came away with the important lesson that abandoning diplomacy yields only antipathy, and antipathy yields only fruitlessness. Without securing the support of the state under investigation, the aims of the Court – and by extension, the battle against impunity – are considerably frustrated. Although arrest warrants were issued against Al Bashir in 2009 and 2010, the case against him is caught in limbo as he continues to evade arrest.[19] As section II will explicate in greater detail, the Court's failure in this case not only further disaffected Sudan, but critically undermined its position on the global stage, and ignited wider debates about legitimacy and the ICC's alleged fixation on African states in particular.

II. Addressing the Neo-colonialism Critique

In late 2017, as Burundi became the first state to leave the ICC, Burundian office spokesman Willy Nyamitwe condemned it as a "political instrument and weapon used by the west to enslave [Africa]".[20] This departure set in motion a chain reaction; other African states, most notably South Africa, threatened to follow suit in a mass withdrawal, and the embers sparked by Burundi reinvigorated debate about the ICC's relationship with Africa. The anti-ICC polemic espouses that the Court is a neo-colonial tool; it is designed to suppress Africa and decry its ability to prosecute serious atrocities. These critics rely heavily on the fact that, thus far, the Court has only investigated and prosecuted crimes on African territories, while Western superpowers like the UK and USA remain untouched. Ghanaian President John Mahama, for example, has argued that "Africa feels targeted…[as] only African leaders are being arraigned by the ICC".[21] Others retort that these concerns have been sensationalised – current Chief Prosecutor Fatou Bensouda, a Gambian national herself, has repeatedly repudiated the veracity of anti-Africa accusations. "What offends me the most," she has said, "…is how quick we are to focus on…the propaganda of a few powerful… individuals, and to forget about the millions of anonymous people who suffer from

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[16] Cryer (n 8)

[17] Tim Murithi, 'The African Union and the International Criminal Court: An Embattled Relationship?' *Institute for Justice and Reconciliation* (March 2013) <http://www.ijr.org.za/portfolio-items/policy-brief-no-10-the-african-union-and-the-international-criminal-court-an-embattled-relationship/> accessed 15 May 2018

[18] 'World Reacts to Bashir Warrant' *Al Jazeera* (5 March 2009) <https://www.aljazeera.com/news/africa/2009/03/2009341438156231.html> accessed 15 May 2018

[19] 'Sudan's Pres Omar al Bashir Evades Arrest in S. Africa' *CNN* (15 June 2015) <https://www.youtube.com/watch?v=dpgAonYFPp8> accessed 15 May 2018

[20] 'Burundi Becomes First Nation to Leave International Criminal Court' *The Guardian* (28 October 2017) <https://www.theguardian.com/law/2017/oct/28/burundi-becomes-first-nation-to-leave-international-criminal-court> accessed 15 May 2018

[21] 'What African Leaders Think About the ICC, Conflict Zone' *DW English* (28 January 2016) <https://www.youtube.com/watch?v=aGAMRmO4j5E> accessed 15 May 2018

their crimes".[22] The question addressed at present is whether the admissibility regime contributes towards this purported bias against African states, and if it does, how does this impact legitimacy?

Gravity and the African States

Article 17(1)(d) of the Rome Statute stipulates that a case will be inadmissible where it "is not of sufficient gravity to justify further action by the Court". As per the Preamble to the Statute, this Article confirms that "only the most serious crimes of concern to the international community" will be prosecuted. Nonetheless, the precise scope of gravity remains somewhat nebulous. It is not defined in the Rome Statute and there appears to be a broad discretion conferred upon the Prosecutor to determine admissibility on this ground. Kevin Heller has written about the distinction between quantitative gravity and qualitative gravity; the former being determined by reference to the number of victims and the latter being determined by the 'systematicity' and organisation of the crimes committed.[23] Heller's argument is that the ICC errs in embracing a quantitative approach over a qualitative one; the reason African states appear to be disproportionately targeted is due to the Court's mistaken belief that "African situations are…graver than non-African situations, because they involve far greater numbers of victims".[24] While Mark Osiel's assertion that, "in prejudicing overall human welfare, there's nothing like death in large numbers"[25], is logical, surely a somewhat more insidious approach is that of a strategic and premeditated one, going straight to the highest levels of government. In this sense, there are merits to Heller's argument, which proposes moving towards a more qualitative by widening the ambit of situations that the ICC can investigate, shifting the focus away from Africa.

Yet, it cannot be accepted entirely that Africa is being unduly isolated by the ICC as a result of the gravity criterion of admissibility. The reality is arguably more nuanced, and there are other reasons as to why the Court's focus seems to have been directed towards African states – none of which include an implicit neo-colonial agenda. Together, Cannon, Pkalya, and Maragia have all explored the African Union's diatribe against the ICC; their credible conclusion being that the "effort to engineer a mass exit of African states from the Rome Statute [is] an elite conspiracy to escape being held accountable for human rights violations"[26]. Jean-Baptiste Vilmer has similarly proffered that Burundian President Nkurunziza's motivation to leave the Court was "to escape the preliminary examination…into allegations of a number of crimes committed in Burundi since early

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[22] 'Fatou Bensouda: We Are Not Against Africa' *New African* (11 September 2012) <http://www.newafricanmagazine.com/features/politics/fatou-bensouda-we-are-not-against-africa> accessed 15 May 2018

[23] Kevin Jon Heller, 'Situational Gravity Under the Rome Statute' in Carsten Stahn and Larissa van den Herik (eds), *Future Directions in International Criminal Justice* (CUP, 2009)

[24] ibid 2

[25] Mark Osiel, 'How Should the ICC Office of the Prosecutor Choose its Cases? The Multiple Meanings of 'Situational Gravity' (2009) Hague Justice Journal 1, 2 <http://www.haguejusticeportal.net/index.php?id=10344> accessed 16 May 2018

[26] Brendon Cannon, Dominic Pkalya, and Bosoire Maragia, 'The International Criminal Court and Africa: Contextualising the Anti-ICC Narrative' (2016) African Journal of International Criminal Justice 6, 16 <https://ssrn.com/abstract=3061703> accessed 16 May 2018

2015".[27] Furthermore, it is difficult to contest the simple fact that in many cases, it was African states themselves who called for the ICC's involvement. This argument has been separately invoked by both former and current Chief Prosecutors Louis Moreno-Ocampo[28] and Fatou Bensouda[29]; an argument that sits uneasily with the African Union's assertions.

Conclusion

Darryl Robinson has written about the 'apologia' and 'utopia' critiques: the former is the criticism "that one is adhering too closely to the policies and interests of states. One is merely reflecting power"[30], the latter is the criticism that "one is too *divorced* from the…interests of states…one is lacking in social or political consent…[and] attempting to impose one's own vision".[31] With regards to the complementarity limb of admissibility, this paper argues that regardless of how the Court attempts to frame its use of complementarity and select which cases to pursue, it will nonetheless be subject to one of these critiques; both amenable and antagonistic approaches are subject to their own pitfalls. On the one hand, a highly cooperative relationship may be regarded as unacceptable sycophancy on the part of the ICC, belying the anti-impunity agenda of the Court – this is the apologia critique. On the other hand, desertion of diplomacy may be construed by a state as an attack on its authority and a patent denunciation of its justice system – this is the utopia critique. The label of 'unwilling' or 'unable' is hardly an attractive one and, a state thus branded, may set out to make prosecution impossible. It will be recalled that, earlier, former Prosecutor Luis Moreno Ocampo was quoted as saying that a scarcity of trials before the ICC is a testament to the strength and efficiency of national justice systems, and is therefore a triumph for international criminal law in general. Quite the contrary, this rhetoric is largely weakened when one considers that the international community is gauging the effectiveness of the Court by the number of successful prosecutions it is able to secure. The raison d'être of the ICC is its capacity to adjudicate over the most egregious of international crimes and combat impunity on a global scale; as such, a Court that is dormant and underused is certainly not the victory that Ocampo suggests, and may, in fact, undermine its position as an authoritative institution. In light of these considerations, it is not difficult to arrive at the conclusion that the Court may be tempted to follow the path of least resistance when making selection decisions, in order to satisfy an implicit prosecution quota and respond to the pressures applied by the international community. The Court's looming twentieth anniversary is a sober reminder that soon, relative infancy will no longer be an adequate shield against pointed suggestions of underperformance and a low conviction rate.

In terms of the neo-colonialism critique and gravity, it should be acknowledged that this burgeoning area of ICL discourse was explored only in brief, and that the true scope of the issue

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[27] Jean-Baptiste Jeangéne Vilmer, 'African Nations and the International Criminal Court: The Real Motives Behind Withdrawal' *International Affairs Blog* <https://medium.com/international-affairs-blog/african-nations-and-the-international-criminal-court-the-real-motivations-behind-withdrawal-4eff59d48e2a > accessed 15 May 2018

[28] 'Upfront – Arena: Is the ICC Biased Against African Countries?' *Al Jazeera English* (12 March 2016) <https://www.youtube.com/watch?v=1XHyJYOYZDk> accessed 15 May 2018

[29] -- 'The International Criminal Court on Trial: A Conversation with Fatou Bensouda' *Foreign Affairs* (2017) <https://www.foreignaffairs.com/interviews/2016-12-12/international-criminal-court-trial> accessed 16 May 2018

[30] Darryl Robinson, 'Inescapable Dyads: Why the ICC Cannot Win' (2015) 28(2) LJIL 323, 325 <http://0-dx.doi.org.wam.city.ac.uk/10.1017/S0922156515000102> accessed 15 May 2018

[31] ibid 326

goes beyond the province of this paper. Nonetheless, it is concluded that in the context of selectivity against Africa, the Court's discriminatory application of the admissibility regime forms only a small fragment of soured relations. Taking into account the fact that it is mostly African states themselves who have initiated self-referrals and sought ICC intervention, it is difficult to reconcile the African Union's neo-imperialism accusations with the contradictory reality.

Jonathan Hafetz has distinguished sociological legitimacy, which "measures the perception of the relevant audience"[32] from legal and moral legitimacy, which focus on "adherence to legal norms and procedures"[33] and "the justness of outcomes"[34] respectively. While the Court acts lawfully and, in light of its noble aims, morally, it has yet to achieve the unanimous public and scholarly recognition that it is an entirely just and impartial establishment. The Rome Statute's admissibility regime necessarily invites selectivity, but as long as these selection decisions are tainted by surreptitious political constraints and allegations of discrimination, the Court's image as a nonpartisan, nonaligned body will continue to bruise. A sword of Damocles hangs over the Court's head; there are "unrealistic expectations of [the ICC]…that it not only punishes criminals but also pacifies the world…[and this] naturally condemns it to always disappoint".[35] Regrettably, there is no straightforward resolution for these issues, which are largely exacerbated by the context of war and conflict in which the ICC typically operates. Perhaps the Court can come close to achieving sociological legitimacy if it embraces, rather than conceals, its inherent politicism; if the image that it presents is no longer nonpartisan, but openly diplomatic. By balancing an acknowledgement of its political role with an assurance that its core purpose remains the eradication of impunity and injustice, the ICC may go some way towards alleviating tensions and securing all branches of legitimacy.

[32] Hafetz (n 3) 1149
[33] ibid
[34] ibid
[35] Jean-Baptiste Jeangéne Vilmer, 'The African Union and the International Criminal Court: Counteracting the Crisis' (2016) 92(6) International Affairs 1319, 1341 <https://doi.org/10.1111/1468-2346.12747> accessed 16 May 2018

Can Classical Intellectual Property Theory be Synergistic with Advancements in Biotechnology? A Look to Hohfeld's Jural Correlatives as an Alternative

Mehvish Ally*

Within the rich discourse of English law, a healthy sum of dialogue is apportioned to the justification of legal rights and their corresponding duties, as it is essential to the rule of law to know with clarity and accessibility the purposes for which statutory regulation of society is acceptable. Intellectual property rights (IPR), or property in intangibles[1], are no exception to this unspoken rule of legal theory. There is a great emphasis in textbooks[2] on placed on both the jurisprudential and philosophical justifications of intellectual property rights. Locke's Treatise[3] discusses the empowerment of the rights to the fruits of one's labour abound, positing that one's labour in a work – tilling the proverbial soils of the mind – entitles them to legal rights in it as such[4]. There is no longer much time spent on a dialectic of the justification of human rights law: it has been accepted as a part of the international legal framework. Similarly, time should not be wasted on the justifications of a field worth billions of pounds upon which society functions. This paper will argue that although the romance of the legal philosophy to justify IPR is alluring, it does not paint a realistic portrait of why and how IPR operate today.

The optimal lenses through which to view IPR is Hohfeld's legal correlatives. This framework was developed to better understand duality within the dynamics of interests in property. The theory, inter alia, holds that in law if there is a legal right, it exists with respect to a corresponding duty[5]. Applied to intellectual property, it means that for every IPR, there are corresponding duties that exist. When a patent is granted to an inventor, the inventor's right to the monopoly of the invention corresponds with the duty of others not to infringe that patent. It is important to note that Hohfeld's theory is descriptive in nature, in that it describes the pre-existing dynamics within IP rather than seeking to justify them through any normative theories. Looking to the dichotomy of rights and duties in IPR today, it will clearly elucidate that since their legal inception through the Statute of Monopolies as venture capitalism on behalf of the Crown, they have been justified through

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[1] M Spence, 'Passing off and the misappropriation of valuable intangibles' [1996] LQR Vol 112
[2] H Norman, *Intellectual Property Law: Directions* (Second edition OUP, Oxford 2014)
[3] M Morgan, Classics of Moral and Political Theory, 'Second Treatise of Government', (Fourth edition, Hackett 2005)
[4] Copyright of course illustrates that it is the expression and not the idea that is protected as illustrated by the Copyright Designs and Patents Act 1988.
[5] W Hohfeld, 'Theory of Jural Correlatives' [1917] Yale Law Journal Vol 26 No 8

their comprehensive positive contributions to the advancement of society managed through legal duties and corresponding rights for nearly half a millennium. It is better than to not get lost in the existential ramblings and trot decidedly towards understanding their operation, through a right corresponding with a duty analysis, in order to maximize their efficient use, as underscored by Quigley[6].

To understand the application of Hohfeldian analysis to IPR, an initial examination of property rights is necessary. Property rights are defined most importantly by their excludability and alienability and the necessity to balance the two[7]. That is, physically, legally, and morally, the right must be capable of ownership[8] and that ownership must be able to change hands in order to promote social equity and economic growth. Focusing on the legal aspect, intellectual property is legal property as it is something that can be owned and its corresponding rights and duties can be dealt with[9]. Specifically, intellectual property are choses in action, as they are, as per Channel, enforced by action and not by taking physical possession[10] through mechanisms like the registration of a trade mark or enforcement of patent licenses: it is through the actions of registering and enforcing these rights that these rights exist as such. Intellectual property rights then have their raison d'etre set out as the enforcement of their existence is manifested in the law and has been since 1607[11].

Following Hohfeld's methodology, these rights then must have corresponding duties set out in the law, and if they do, they seem to be rather well justified. Not only are there domestic enforcements of IPR through Acts of Parliament, but all of these acts are under the auspices of international law as demonstrated by the Court of Appeal in 2007 looking to the wording of the European Patents Convention rather than the relevant provision in the UK Patents Act 1994[12]. Moreover, the Universal Copyright Convention 1971 assists citizens of emerging economies in the developing world to obtain copyright for their qualifying works, underlining not only a UK and EU acceptance of IPR but an acceptance of their validity on an international scale[13]. By virtue of legally enforceable rights and duties, as illustrated above, IPR seems well justified. An examination is then needed of some of the major IPR to see how well Hohfeld's analysis holds up in each right in turn.

The physical enforcement of rights manifests through its excludability and alienability. IPR can be assigned, much like an easement or license can be assigned over real property for the free alienability of excluded land through a grant and patent. Copyright proprietors, by virtue of capable ownership, can grant licenses to use their legally protected scientific

[6] M Quigley, 'Propertisation and Commercialisation: On Controlling the Uses of Biomaterials' [2014] MLR Vol 77 Issue 5
[7] Ibid.
[8] NB that Honore describes ownership as the greatest extent of control possible over a thing; this illustrates an inherently weaker type of ownership in intangible property as opposed to tangible property, as full monopolies have been generally discouraged in IPR
[9] D Bainbridge, *Intellectual Property Law* (Ninth edition, Pearson 2012)
[10] Torkington v Magee [1902] 2 KB 427 at 430
[11] Statute of Monopolies 1624, establishing the Crowns right to grant letters of patent
[12] Aerotel Ltd v Telco Holdings (Macrossan's Application) 2007 RPC; n.b that this was before the creation of the United Kingdom Supreme Court and thus the Court of Appeal was the court of highest authority at the time of ruling
[13] administered by the United Nations Educational Scientific and Cultural Organisation

process or original literary work[14]. The only exception to these IPR, embodying generally aspects of a chose in action, is the copyright, which is doubted by Penner[15]. Patents are classified as personal property and pursuant to the Patents Act 1977, they must be recorded on the Registry in writing much like land[16] to deal with as other forms of personal property. IPR are territorial in nature as well, as illustrated in the dictum "what is not claimed is disclaimed"[17], meaning that patent claim documents, which describe the inventive concept being protected, set out exactly how far that idea goes through acting as legal fence posts.

Not only are these intangible property rights enforced, the corresponding duties are even mitigated in circumstances where fairness demands it so. Furthermore, these embodiments of intangible property are protected through negative legal mechanisms as well. Search orders[18] can be awarded and require the defendant in patent infringement cases to allow the claimant onto their premises to prevent any destruction or removal of evidence. In essence, an intellectual property right can be so powerful that it can empower the court to take an action which would otherwise be trespass of real property. This begs the question if a judge is awarding such a powerful remedy to an allegedly wrong IPR, are they contemplating its justification? To those fearing reductivism through legal correlatives, defences are available for potential intellectual trespassers. In copyright, there is a fair dealing defence where the court finds it acceptable for the purported infringer to deal with the copyrighted material[19] with a plethora of case law interpreting the relevant provisions[20].

This may then provoke the query, are IPR morally enforced? There is no extensive protection of IPR on ethical grounds. Copyright owners can occasionally argue on the grounds of moral rights to have ownership when an employee is battling a large employer for rights to their creation. There is not much moral enforcement with tangible property either, although there are some fringe academic arguments on behalf of squatters' rights if they use the property better than the legal owner, though judges generally do not look favourably upon this[21]. Moral enforcement of IPR then seems irrelevant if proprietors of the physical counterparts appear to be sleeping on their moral rights, rather than keeping vigil, and thus equity will be uninterested in advocating on any these collective behalves[22]. Equity is an active legal participant in tangible property through estoppel[23] and can prevent promises from being broken. But what of its role in creations of the mind? Interestingly, the first form of protection offered to trademarks and their guilds was offered through the common law tort of passing off[24], and the elements required to successfully obtain such an action has its origins in the equitable protection against fraud or dishonesty[25].

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[14] Bainbridge, p.10
[15] Ibid.
[16] The Land Registration Act 2002
[17]Lord Russell in E.M.I. Ltd v. Lissen (1939) 56 R.P.C.
[18] Also called Anton Piller orders as originating in Lord Denning's judgment in Anton Piller KG v Manufacturing Processes Ltd [1976] Ch 55
[19] Copyright Designs and Patents Act 1988
[20] Pro Sieben Media AG v Carlton UK Television Ltd [1999] 1 WLR 605
[21] Cobb and Fox, 'Living Outside the System, 'Living Outside the System? The (Im)morality of Urban Squatting after the Land Registration Act 2002' 2007
[22] N.B the equitable maxim "equity aids the vigilant, not the indolent'
[23] Dixon, Modern Land Law,
[24] L Bentley and B Sherman, *Intellectual Property Law* (Fourth Edition OUP, Oxford 2014)
[25] Bentley and Sherman

The above analysis illustrates that as required by Hohfeld, IPR have duties which are complemented with legally correlative rights. As a result, IPR are justified inherently through their enforcement as a legal duty and legal right dichotomy, thus proving Hohfeld's methodology to be apropos in illustrating that IPR are clearly dealt within the law. Quigley further illustrates that IPR are so far advanced in their legal existence that they do not beg the question as to their raison d'être, but rather beg the question of how to best facilitate their efficient use. Ownership also consists of the rights to income from the property and that the person who possesses these rights is the legal owner[26]. In intellectual property law, this leads to the fore questions which have not been addressed. One way to answer this question is to separate the powers of control from the right to income, which would allow the income from biomaterials to be a part of the market without the biomaterials becoming legally part of the market per se[27], avoiding any ethical and legal objections. In the United States, 'blood-banks' are repositories where people can sell their blood plasma for nearly $30 per donation, which can be done a few times a month. This illustrates a successful model of the separation of rights and ownership in IP, as the blood bank owns the blood per se and can use it for further scientific advancements, while the human donor owns the rights to the income[28]. Quigley advocates for such a model in the UK, as it would not only enforce the rights and duties but, as illustrated in IPR, allows mechanisms for remedies of any wrongs that are committed as well[29]. As the law stands, there are effectively weak to little proprietary rights in blood, as their sale is not permitted.[30]

Article 6(2)C of the European Commission's Biotech Directive[31] was interpreted by the European Court of Justice accepting that something is not a human embryo as long as it did not have the inherent capacity to develop into a human being as pursuant to its policies against patents, contrary to public policy[32]. Additionally, the UK holds that brain stem death is equivalent to legal death [33]. The Commission's Directive, enacted nearly two decades ago, implements a policy against the marketability and patentability of biomaterials, although it does allow patenting of procedures where a biological material is produced pursuant to Article 3(1). Science has grown radically since then, and the European Commission seems to be aware of this. In 2003, the European Commission awarded $1.3 billion for a project to simulate the human brain through a new scientific technique combining the disciplines of artificial intelligence and neuroscience[34]. Upon completion, would this be a biological material as such or fall under the exception in Article 3(1) and thus allow its patentability? Furthermore, this begs the question if brain death is legal death, could a fully functioning brain qualify legally as a living person?

[26] Quigley
[27] Ibid.
[28] 'Blood Plasma, Sweat and Tears' The Atlantic, https://www.theatlantic.com/business/archive/2015/09/poor-sell-blood/403012/
[29] Quigley
[30] Ibid.
[31] Directive 98/44/EC, implemented by all EU countries
[32] Case C-364/13 International Stem Cell Corporation v Comptroller General of Patents Designs and Trade Marks
[33] Re A (A Minor) [1992] 3 Medical Law Reports 303
[34] https://nectome.com/

IPR is undoubtedly entering a braver and newer world at an unprecedented pace, reflective of the rapid developments in human innovation. It is imperative the law reflects this, otherwise the law would fall foul of the normative prescriptions of the rule of law. It is trite law as per Lord Bingham that the law be accessible, intelligible, clear and predictable. Ergo, it should reflect technological advancements as made by the society for which the law is made. In *Dranez Anstalt v Hayek*[35], it was stated that it must be a wholly exceptional case in which the imposition of such restraints on a pioneer in a field of medical science — in the development of which there is an obvious public benefit — can be justified. Although obiter dictum, this illustrates the court's sentiment towards the unnecessary fettering of technological advancements. In such rapidly advancing disciplines, it is likely that the number of specialists are so scarce that they may only be one of the few parties seeking patent registration. As a result, the entire validity IPR could be called into question because the law has not focused enough on these questions of rights and duties involved while still questioning whether they are justified.

Quigley opined that the law reflects the norms of society, and if society found the current state of IPR to be unethical, it is arguable the law would reflect such qualms and such rapid progress within the discipline, which would not manifest. She also posited that focusing on questions of ethics will make the rights neither more equitable nor efficient[36]. As a result of this erroneous focus on the justification of IPR, their regulation is lacking significantly. A trite conclusion akin to 'the law is the law is the law' seems at best a shaky foundation and at worst one made of sand for the law on intangible property. If a glance at philosophical history is necessary, Descartes posited 'cogito ergo sum'. If by virtue of ones thoughts, one exists, and then arguably attains legal recognition of their existence, when will the law begin reflecting the very distinct possibility of an artificially simulated human brain demanding the enforcement of its legal rights? However, eschewing regulation of IPR through a Hohfeldian methodology would not only eschew ethics but ownership entirely. In order to keep pace with science, the law regulating it must clearly delineate the rights and duties of parties involved in order to elucidate the nuanced laws of intellectual property to avoid the romanticizing of a field that is microscopically realistic.

[35] Anstalt & Ors v Hayek & Ors CA [2002] EWCA Civ 1729, paragraph 25; Norman points out that this case is one of very few that turn on the justification of IPR
[36] Quigley

Why the Policing of Financial Crime is Inadequate and the best way forward

Maria Antria Petraki*

Abstract

'This paper will demonstrate that (1) the policing of financial crime is inadequate. It will then (2) outline the goals of the changes to policies to address these concerns, (3) draw on research in the area, (4) identify potential options to address the concerns and (5) suggest and justify the best way forward.

Introduction

The ability of the police to investigate and address financial crime in the UK is largely negligible. These crimes require specialist skills and knowledge to investigate due to not just the nature of the offences themselves, but also the environment in which they are committed and the identity of the offenders[1]. The Majority of these offences are committed by employees of large financial institutions with sophistication and in environments which cannot be accessed by the police. Some of the police's traditional investigatory powers, as a result, have been transferred to organisations including the City of London Police (within its Action Fraud Division), Serious Fraud Office and the Financial Conduct Authority. Distinctively, the UK has territorial police force. Policing areas correspond with local government areas such as Greater London, Yorkshire and others. Similarly, branches like the National Crime Agency (NCA) are tasked with more organised crimes including humans, weapons and also drug trafficking; cybercrime and economic crime, whereas the Transport police is tasked with policing transport. Even with their specialist skills, the bodies responsible for policing these crimes have made a minimal impact and financial crime continues to rise[2].

What is the problem and why is the current law and policy inadequate?

Financial crime is 'any offence involving fraud or dishonesty; misconduct in, or misuse of information relating to, a financial market; or handling the proceeds of crime.'[3] Financial or

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[1]Hilton, O. and Harrison, W.(1959), Suspect Documents, Their Scientific Examination. *The Journal of Criminal Law, Criminology, and Police Science*, 50(3), p.323 available at https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?referer=https://www.google.gr/&httpsredir=1&article=4913&context=jclc

[2] Sarah Wilson, *The Origins of Modern Financial Crime* (Routledge, 2014) p211.

[3] Financial Services and Markets Act 2000, s 6(3).

economic crimes may include crimes such as bribery, tax evasion and insider dealing[4]. According to Pinsent Masons, the UK is one of the leading countries with impeccable legislation relating to fraud and financial crime. [5]However, the number of prosecutions of such offences has been negligible while the number of offences has continued to rise[6]. The inadequacy of the way these offences are policed can be evidenced by way of looking at these offences in a social, political and legal construct.

Financial crime, especially crimes such as insider dealing and market abuse, are considered to be crimes of the elite, or 'white collar' crimes[7]. There is a general reluctance to police these offences. This was illustrated by a letter sent by the Serious Fraud Office in 1986. It stated that it did not consider crimes such as insider dealing serious enough to warrant investigation. Such reluctance by the law enforcement agencies demonstrates the ineffective policing of this sector and a need to address these concerns. This is in contrast with the statistics surrounding these offences. It has been evidenced that only 12% of financial crimes are reported and the cost to the UK economy for these crimes is at £52 billion[8]. The social divide between offenders of such elite crimes and other criminal conduct can be illustrated by way of example. Stephen Green was appointed government minister a mere eight months after allegations relating to insider dealing and other financial crimes[9], whereas, those convicted of other offences find it increasingly challenging to secure work after their convictions[10]. There are multiple examples of people convicting a crime to be subsequently pointed out in the society, as a result being then prohibited to work for certain jobs, as employers will find it unethical to recruit an individual with a bad criminal record but it always depends from the job. Although, there is an exception where after the sentence has been imposed the criminal record can then be disregarded. This is manifested in the Rehabilitation of Offenders Act 1974.[11] Nonetheless, this is applied in more rare occasions whereas the majority of organisations may want to carry out checks as in Disclosure and Barring Service to review at a certain point, an applicant's activities. However, people that are concerned in such occasions are protected by the Data Protection Act 1988 that selects what information will be given out for each applicant.[12] Furthermore, the ability of offenders to commit these offences may result in the acquirement of the funding to commit more serious offences.

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[4] Karen Harrison and Nicholas Ryder, *The Law Relating to Financial Crime in the United Kingdom,* (Ashgate Publishing Ltd, 2013) p2.
[5] Financier Worldwide. (2019). *White-collar crime enforcement in the UK — Financier Worldwide*. Available at: https://www.financierworldwide.com/white-collar-crime-enforcement-in-the-uk/
[6] Caroline Binham, "White collar prosecutions plummet even as crime rises," Financial Times (24th July 2017).
[7] Edwin H. Sutherland, "White-Collar Criminality," American Sociological Review Volume 5 Issue r1 February 1940.
[8] Kathryn Gaw, "Financial crimes cost the UK £52 billion each year – but only 12% are reported," City A.M. (29th January 2016).
[9] Juliette Garside, David Leigh, James Ball and David Pegg, "Ex-HSBC boss Stephen Green: the ethical banker with questions to answer," The Guardian (9th February 2015).
[10] Christy Visher, Sara Debus and Jennifer Yahner, "Employment after Prison: A longitudinal Study of Releases in Three States" Urban Institue Justice Policy Centre (2008), available at https://www.urban.org/sites/default/files/publication/32106/411778-Employment-after-Prison-A-Longitudinal-Study-of-Releasees-in-Three-States.PDF
[11] TheInfoHub by Unlock | for people with convictions and criminal records. (2019). *Spent and unspent convictions and employment law - theInfoHub by Unlock | for people with convictions and criminal records*. Available at: http://hub.unlock.org.uk/knowledgebase/convictions-employment-law-2/
[12] 'Criminal Record Checks | Nacro' (*Nacro*, 2019) <https://www.nacro.org.uk/resettlement-advice-service/support-for-individuals/disclosing-criminal-records/criminal-record-checks/>

Financial crime has not been addressed politically due to the impact on the offenders committing such crimes within the government. This was illustrated by the case of *BAE Systems Plc*[13]. This case involved the sale of Eurofighter jets to Saudi Arabia.[14]The company was penalised after the claim of appearing guilty due the lack of concentration of the accounting records.[15] This was addressed, to an extent, following the Bribery Act 2010 which created a strict liability corporate offence, where companies failed to prevent bribery by their representatives in order to protect on a global scale their security.[16] It is necessary to ensure that all financial crimes are treated with the same level of policing.

Under English and Welsh law, it is difficult to police, investigate and bring about the conviction of economic crimes[17]. The offences are too complex in nature and the burden of proof on the prosecution is far too high for individuals to be made accountable for their actions[18]. It is difficult for the general police to investigate these offences based on the skills required. Rider argues that the general police do not have the knowledge and skills to investigate these offences[19]. The police needs a combined consideration of finest training in investigating analytically the most suitable methods and also a good administration of a case. Material in all civil, common and criminal law must be developed to police offices for carrying out an improved investigation with accurate evidence management. It also requires an intense comprehension of fraud in the UK and also precise acquaintance in return to advance into a research that reaches the criminal prosecution standards. [20]This can be illustrated by way of example when considering the criminal offence of insider dealing under section 52 of the Criminal Justice Act 1993. The commission of the offence requires an insider to have used information obtained by his position as an insider to trade in price-affected securities, and to either encourage another to trade in price affected securities or disclose information relating to price-affected securities in a way not in line with his duties. [21]

In summary, there are various reasons for ensuring that financial crimes face the same level of scrutiny as general criminal conduct, however, the current law and policy in the area is inadequate. The need to police this sector is clear when considering the impact of financial

[13] "BAE Systems: timeline of bribery allegations," The Telegraph (21st December 2010), available at http://www.telegraph.co.uk/finance/newsbysector/industry/defence/8216172/BAE-Systems-timeline-of-bribery-allegations.html

[14] Leigh, D. and Evans, R. (2019). *'National interest' halts arms corruption inquiry*. The Guardian. Available at: https://www.theguardian.com/uk/2006/dec/15/saudiarabia.armstrade

[15] Telegraph.co.uk. (2019). *BAE Systems: timeline of bribery allegations*. Available at: https://www.telegraph.co.uk/finance/newsbysector/industry/defence/8216172/BAE-Systems-timeline-of-bribery-allegations.html

[16] Jarrett, T. and Mills, C. (2019). *Bribery allegations and BAE Systems*. Researchbriefings.parliament.uk. Available at: https://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN05367#fullreport

[17] Nicholas Ryder, Umut Turksen and Sabine Hassler, *Fighting Financial Crime in the Global Economic Crisis*, (Routledge, 2016)

[18] United Nations Development Programme, "Prosecuting Financial Crime: Guidelines for Judges and Prosecutors" (Beograd, 2005) p20.

[19] Barry Rider, "Getting one's hands dirty!" Journal of Financial Crime, Volume 21, Issue 2 (2014).

[20] (2019) <https://academy.cityoflondon.police.uk/images/prospectus>

[21] (*Uk.practicallaw.thomsonreuters.com*, 2019) <https://uk.practicallaw.thomsonreuters.com/8-107-6269?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk&bhcp=1>

offences and the social divide with which a criminal conduct is related to these financial offences and other general criminal conduct. It is necessary for all criminal conduct to be addressed in the same way to prevent discrimination in society since these offences should not be treated differently due to the positions of the accused. This would otherwise create an inherent bias in the legal system which needs to be addressed, since not all criminal offences are the same but should all be treated accordingly in order to prevent unfairness by being biased and prejudiced. All people should be treated equally and not concentrate on peoples powers and positions in society.

1. Goals and Values

The Government seeks to achieve the following goals over the next five years:

I. Increase in the number of investigations

Action Fraud, SFO and the FCA have minimal number of active investigations at any given point in comparison to the reports of offences they receive[22]. The number of investigations taken on remains low due to the resources required for investigations, the time taken for these investigations to be completed and the complexity of these investigations. This is illustrated by the fact that it took the SFO five years to conclude an investigation and enter into a Deferred Prosecution Agreement with Rolls Royce, which is 'an agreement reached between a prosecutor and an organisation which could be prosecuted, under the supervision of a judge.'[23] The contract permits a trial to be postponed for a distinct time specified that the administration encounter assured definite circumstances.[24]The lack of investigatory abilities is underlined by the fact that Rolls Royce complied with all SFO requests and assisted with the investigation. [25]It is of great concern that investigations being conducted by law enforcement agencies for other financial crimes will unlikely have offenders willing to assist with investigations, thus, making it unlikely that the investigations will go ahead at all. It is the goal of the UK government to increase the numbers of investigations and the resources available for investigations to ensure that complaints of financial crimes are addressed. Nonetheless, it inevitably will be contigent on the kind of crime as in several occassions inspections may be prolonged to outreach the pertinent resources required. The police in the UK may find it essential to entail outsource aid like the 'Public Prosecution Service (PPS)' in order to obtain counselling and instructions to support the research or investigation. This is conditional to the evidence specified in the tribunal. The police might even take many months to investigate a case. This is an issue that has to be start fading. This will be discussed in detail later on, but advanced training in the Police in multiple areas would make

[22] The Office for National Statistics indicated the number of fraud related offences, such as advance fee fraud was at 56,000 offences in 2017 (Office for National Statistics, "Statistical bulletin: Crime in England and Wales: year ending September 2017" available at https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/crimeinenglandandwales/yearendingseptember2017#what-is-happening-to-trends-in-fraud), while many of these are not investigated at all, as illustrated by the Telegraph (Katie Morley, "Victim of fraud? Why the authorities WON'T investigate" The Telegraph, (23rd August 2015)).

[23] 'Deferred Prosecution Agreements | - Serious Fraud Office' (*Sfo.gov.uk*, 2019) <https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/deferred-prosecution-agreements/>

[24] ibid

[25] 'Rolls-Royce PLC | - Serious Fraud Office' (*Sfo.gov.uk*, 2019) <https://www.sfo.gov.uk/cases/rolls-royce-plc/>

it easier to address financial crimes quicker and easier.[26] It is discernible that there are encounters about knowledge absences as well as the weight of the law that have at their fundamentals a failure to collaborate. An utmost organisation and partnership would considerably ease them. This ensues in all affiliations entailed in the battle towards anti-financial crimes. Approximately, the necessity for meeting anti-bribery panels in banks has been prolonged documented. Implementation also is disjointed with the 'police forces and SFO' to overlay authorities and errands. The variety of organisations distributing authoritarian guidance has previously been deliberated. Repetition though, does not only increase the expenses of compliance but solitary makes it firm for banks to preserve discretion. Improved material currents however, will reinforce the battle against financial crime because banks will then be able to avert tax circumvention and require additional enhanced reports. Similarly, banks will indubitably collaborate to do implementations additionally operational due to their intuition in monetary linkages that would do implementations more operative and additionally their material runs to law implications actions would efficiently aid to recognise configurations of performance and forestall corruptions.[27]

II. Simplification of the elements of offences

The complexity of proving the different elements of financial crimes makes it harder for the offences to be investigated and proven by law enforcement agencies. As illustrated earlier, it is a challenge to prove the offence of insider dealing, thus, making the current system of investigating these offences more challenging with the need to prove all elements of the offence beyond reasonable doubt. Where such crimes are being investigated by the law enforcement agencies, there is no deterrent for offenders weak investigation process of the matter by the law enforcement agencies. However, law enforcements agencies such as the Serious Fraud Office (SFO) which investigated the BAE with Saudi Arabia deal ended up proven that Saudi Arabia was guilty for bribe and had to pay the penanlty even though a lot of information was protected that made it hard to reach to the result. [28] In addition, the National Fraud Intelligence Bureau and the National Crime Agency are tasked with such investigations but may not always accomplish these wisely. Notwithstanding their developments, the danger from fraud remains to cause a harmful outcome. People, the private segment, donation services and community services likewise remain to pay extraordinary fiscal fees. Generally, fraud crimes taped by the police have continued relentlessly in contradiction of a background of commonly dwindling charges of greedy corruption and 'law enforcement bodies' are fronting resource troubles. The public being united can reduce fraud by the 'Fighting Fraud Together' tactic, which by 2015, the republic will be additionally strong and less injured by fraud.[29]This Government will, therefore, aim to simplify the elements of offences relating to financial crime to create a stronger deterrent for companies to prevent their employees committing financial offences, such as insider dealing.

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[26] 'Police Procedures | Nidirect' (*nidirect*, 2019) <https://www.nidirect.gov.uk/articles/police-procedures>

[27] (*Bba.org.uk*, 2019) <https://www.bba.org.uk/wp-content/uploads/2015/12/Future-Financial-Crime-Risks-DIGITAL-final.pdf>

[28] Swisher C, E MacAskillR Evans, 'US Investigation Into BAE Saudi Arms Deal Watered Down, Leaked Memo Suggests' (*the Guardian*, 2019) <https://www.theguardian.com/world/2018/mar/06/us-investigation-into-bae-saudi-arms-deal-watered-down-leaked-memo-suggests>

[29] (*Assets.publishing.service.gov.uk*, 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/118501/fighting-fraud-together.pdf>

III. Enhancement of UK's position as the world's leading financial centre

The UK is one of the leading financial centres in the world, however, it also has the reputation as, 'the world's launderer'[30]. It has been argued that the City of London assists the world to launder its money, thus facilitating financial crime. It is necessary to maintain the UK's position as a leading financial centre, especially in light of Brexit. Unfortunately, 'the City of London has vanished its high rank position in the Financial Centre in accordance with the ranking presenting advances for post-Brexit competitors.'[31]Many companies having their headquarter offices in London are concerned and started moving their offices in other European countries.[32] However, The Former UK Prime Minister Gordon Brown stated that 'London will recall it's supremacy even if other countries decide to relocate because there is no other place like London.' [33]

The fiscal sector is the most significant in the UK and this contributed to the accomplishments in the economy all these years. It was argued that London would not be challenged in a big extent with 'Brexit' as the economic system would be well prepared to deal with such an issue.

However, the UK may find it tough to battle attacks from other European countries from developing undertakings being transferred somewhere else in Europe. Also, the UK will mislay the defence of the European Court of Justice (ECJ). Additionally, an impact it would be that of occupation since people will then need to visas in order to be accepted to work in the UK. This force deteriorates the monetary centre of the UK, as other countries would be act more effortlessly to authorise employees to work there. There is a lengthy period of ambiguity; a lot of sectors are frozen since they do not know what will happen in the UK. UK's British Pound could also be dishonoured due to this. Last but not least, Brexit might limit the permission of investment professionals to make deals between UK and the EU. [34]Where the UK fails to address concerns relating to financial crimes, its position as a world leading financial centre is negatively impacted, thus attracting less foreign investment. This Government will, therefore, collaborate with leaders of financial institutions to address concerns of financial crime and enhance the position of the UK as a strong financial centre. Due to the fact that regulations are imposed domestically, in several occasions, implications will entail collaborations and joint-backup amid bodies with powers in dissimilar nations. As aforementioned, there is uncertainty in the UK due to 'Brexit' therefore the UK is in a position to need guidance. Post-Brexit, the UK will be not likely to simplify the regulations considering being always the top frontrunner in the monetary crime law. Therefore, the UK will have to ponder policies and also the fifth and last accepted

[30] James Hanning and David Connett, "London is now the global money-laundering centre for the drug trade, says crime expert," The Independent (4th July 2015)
[31] 'London Loses Top Spot In Global Financial Centre Rankings' (*Sky News*, 2019) <https://news.sky.com/story/london-loses-top-spot-in-global-financial-centre-rankings-11495765>
[32] ibid
[33] Campbell T, 'Can Post-Brexit London Survive As Europe's Cultural And Financial Capital?' (*the Guardian*, 2019) <https://www.theguardian.com/cities/2017/jan/23/post-brexit-london-economic-self-sabotage>
[34] (*Grantthornton.co.uk*, 2019) <https://www.grantthornton.co.uk/globalassets/1.-member-firms/united-kingdom/pdf/brexit-impact-financial-services.pdf>

'Money Laundering Directive (MLD5)' where it might levy supplementary duties in corporations.[35]

The Government seeks to prioritise the following underlying values behind its goals:

I. Fairness

There is an inherent unfairness related to corporate financial crimes. As illustrated before, they are committed by the elite of society, which make investigations more difficult. This occurs because these group of people want to protect their image therefore making it difficult for the investigation to be carried out due to the errors in information and the inability to process an collect all the relevant information needed. The possibility of presenting these people as immoral drives them to disclose all details. [36] Furthermore, as offenders settle back into society, these offences are considered regulatory in nature, and thus, not crimes that are immoral in nature[37]. These crimes are argued to be 'mala prohibita' which means wrongs because it is prohibited and offences rather 'mala in se' which means wrong in itself, allowing offenders to profit from their crimes while the impact remains on society. For example, the market abuse regime has seen offenders such as Tesco plc conduct a redress exercise for market manipulation and compensate investors who were impacted by their actions[38]. It is, however, argued that the civil regime offers companies an easy way out, thus reinforcing ideas of unfairness within the criminal justice system. The UK government seeks to address the inherent unfairness of companies, such as being able to escape their liability from offence through monetary payments.

II. Market Integrity

Market integrity refers to honesty within the market and has been adopted as a key goal by the government[39]. Where financial crime exists, it brings an element of fraud within the securities markets This apprehension occurs after an assortment of matters since the influence of 'financial crime' differs in diverse perspectives. As aforementioned, crimes can be convicted by a variety of people such as prepared criminals, immoral bodies of the government or commercial frontrunners that misrepresent monetary statistics in turn to twist a corporation's accurate economic place. Currently, this is extensively documented that the occurrence of a wrongdoing being economically driven in numerous civilisations is a considerable risk to the growth of frugalities and their steadiness. A consciousness of what establishes 'insider-dealing' is authoritative for monetary misconduct and compliance specialists in the discovery and deterrence of contact to the movement as a severe crime. At this degree, fiscal crime and compliance specialists must certify that companies and their workers obey completely with

[35] 'Implications Of Brexit For Anti-Corruption, Bribery And Financial Crime - Osborne Clarke' (*Osborne Clarke*, 2019) <https://www.osborneclarke.com/insights/implications-of-brexit-for-anti-corruption-bribery-and-financial-crime/>

[36] 'Dealing With The Stress Of Criminal Investigation: "It Gets To You"' (*PoliceOne*, 2019) <https://www.policeone.com/archive/articles/1669755-Dealing-with-the-stress-of-criminal-investigation-It-gets-to-you/>

[37] Michel Dion, *Financial Crimes and Existential Philosophy* (Springer, 2014).

[38] "Tesco to pay redress for market abuse," Financial Conduct Authority (23rd August 2017) available at https://www.fca.org.uk/news/press-releases/tesco-pay-redress-market-abuse

[39] G20 Leaders Request in November 2010

everything that is pertinent to the disclosure policies. Usually, financial service industries are open to insider dealing within clients that are betrothed in the action.[40] Rider argues that insider dealing is a fraud within the market[41]. Where someone is selling price-affected securities with the knowledge that the price of securities will shortly decline as a result of inside information that is soon to be made public, it is arguable that he has a duty to disclose this information to the one purchasing these securities. [42]Where an individual trades and does not disclose it, he is committing fraud[43]. The policing of such activity is necessary to ensure market integrity to provide a suitable market where trade can take place without hindrance by criminal conduct. This Government seeks to protect the integrity, and thereby, stability of the UK financial market.

2. Relevant academic and criminological research, official data and theories of crime and punishment

There has been limited research in this area as such, several senior individuals in the City of London did not consider financial crimes, such as insider dealing, as crimes at all[44]. A significant issue within the area of financial crime is, that the crimes are considered by a social class that is generally not associated with criminal activity. The term 'white collar crimes' was coined by Edwin Sutherland[45]. He identified financial crimes as those crimes which are committed by the elite or those in privileged positions. He portrayed that these offences were committed in abundance in the business sector, however, these were not treated in the same way as other offences due to the fact that they were committed by individuals in privileged positions. He argues that these individuals should be punished in the same way as other crimes to ensure the same level of deterrence that is expected to be applied to other offenders. There has been further analysis of this area by academic leaders such as Henry Manne and Barry Rider who have had opposing views on the matter. Henry Manne contended that afore 1901 nonentity had all openly interrogated the integrity of 'insider trading' where our humanity dispersed prosperity throughout a marketplace scheme constructed on disparity of economic supremacy and habitually promotes an individual who is bright to transform particular impermanent benefit in acquaintance or financial power into a place of marketplace benefit.[46] Most recently, however, with the success of Professor Rider's '*Symposium on Economic Crime'*, the prevailing view is that there is a lack of effective policing of financial crime and that these crimes have come under increased scrutiny. [47]

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[40] 'What Is Financial Crime?' (*Int-comp.org*, 2019) <https://www.int-comp.org/careers/a-career-in-financial-crime-prevention/what-is-financial-crime/>

[41] Barry Rider, Kern Alexander, Stuart Bazley and Jeffrey Bryant, *Market Abuse and Insider Dealing*, (Bloomsbury Professional, 2016)

[42] 'Selective Disclosure And Insider Trading' (*Sec.gov*, 2019) <https://www.sec.gov/rules/final/33-7881.htm>

[43] Article 8, Market Abuse Regulation (Regulation 596/2014)

[44] David Kynaston, *City of London: The History* (Vintage, 2012) p539.

[45] ibid

[46] (*Scholarship.law.berkeley.edu*, 2019) <https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1761&context=californialawreview>

[47] 'Emerald News - The 36Th Cambridge International Symposium On Economic Crime' (*Emeraldgrouppublishing.com*, 2019) <http://www.emeraldgrouppublishing.com/products/journals/news_story.htm?id=7212>

Official data from the Office for National Statistics illustrates the argument established by Sutherland and Rider; as it found that only 12% of financial crimes are reported[48]. This suggests a reluctance to report these crimes or possibly for these crimes to be identified or considered worth reporting.

It is necessary for these financial crimes to be policed, investigated and the offenders punished. Criminal law focuses on retributive justice, thus, aiming to punish the offender proportionately to the moral condemnatory of the offence that is committed. This 'Legal Punishment theory' in criminal law highlights the reasoning behind the lack of effective punishment of financial crime.[49] Financial crime is considered to be 'mala prohibita', rather than 'mala in se', thus, the offences are not considered morally reprehensible. These crimes are considered to be criminal only because they have been declared criminal by the law. Therefore, the punishment in this areais biased in a way and seems to be explained. There is no complete fairness in these occasions regards punishment. Financial crime might not be viewed as criminal in moral sense but it does not directly imply that there is lack of punishment for it, just that the punishment is taken by a biased opinion. An example presented could be that some negligent acts of employers breaching the statutory duty may not appear as criminal but they are still punished in the law of tort because they acted against the law. It is necessary for other relevant theories of crime and punishment to be incorporated within the criminal law to effectively deal with financial crime. It is proposed that restorative justice should be used to address financial crime. By use of restorative justice, the offenders can be charged with financial penalties to compensate the victims of the offence. This has been effective in the civil regime by bodies such as the Serious Fraud Office and the Financial Conduct Authority[50], and it is likely that the continued usage of significant financial penalties will create a strong deterrence for profit-making companies to avoid committing these crimes.

3. Key policy choices and their advantages and disadvantages

There are three options to address the policing of financial crimes.

I. Greater training of law enforcement agencies

'Traditional law enforcement agencies are not equipped to deal with financial crimes for various reasons.'[51] These include a lack of specialist knowledge and access to relevant information. It can be proposed that there needs to be a development according the level of knowledge of the traditional police to extend even further and include excessively an understanding of complex areas such as company law, the law of misrepresentation and financial crime to regulate corporate offenders. The territorial police force may entail division with officers trained in inverstigating such matters, however, a development into knowledge will only generate

[48] ibid
[49] 'Legal Punishment (Stanford Encyclopedia Of Philosophy)' (*Plato.stanford.edu*, 2019) <https://plato.stanford.edu/entries/legal-punishment/>
[50] As illustrated by the significant fines to Rolls Royce Plc (£497,252,645) and Tesco Plc (£128,992,500). "Rolls-Royce Plc", Serious Fraud Office, available at https://www.sfo.gov.uk/cases/rolls-royce-plc/ ; ibid
[51] Radio, S. (2019). *Report: Police struggle to prevent and investigate cybercrime*. Southern California Public Radio. Available at: https://www.scpr.org/news/2014/04/25/43714/report-local-law-enforcement-struggle-to-keep-up-w/

advanced results.[52] This would be advantageous since the duty to protect the public from crimes would be resting solely with the police, who could develop their own significant level of expertise. It will, however, divert their attention from traditional criminal conduct and offences against the persons. Furthermore, the training however is extra costly for states and may sometimes be seen as unnecessary to be activated.

II. Deregulation

As aforementioned, Manne being known for his opinions, he argued for deregulation. He suggested that 'the market regulates itself as it is necessary, and crimes such as insider dealing need not be policed at all.' [53]The advantages of this would be a higher availability of resources to allocate to other crimes that are considered to be far more immoral, such as physical offences against the persons. Furthermore, it is arguable that deregulation will attract greater capital investment in the UK by foreign investors who wish to benefit from a lesser regulated financial services sector. On the other hand, however, financial crime has a significant negative impact on the market and the UK economy as a whole. As it is recommended that 'structural regulation' marketplace averts the comprehension of frugalities of extent. Division also shaped a false equality between associates of the business. Inopportunely, this manages to undermine the procedures of invention and the chase of innovative chances within a business. In industries that they are considered 'unregulated', their competences and hereafter their tactical opinions vary as their development routes deviate as a consequence of surprises and consequent alteration. The immediate result of interference has triggered 'financial crisis'. 'Structural regulation' might be envisioned to pawn somewhat marketplace breakdowns. Such troubles are often faced in fiscal service industries to distress the establishment of well-adjusted assistance and the steadying of jeopardy in financial intercession. Besides, 'structural regulation' is also used to put boundaries at the actions of monetary intercessors due to the high-risk. [54]

III. Following the approach of Section 7 Bribery Act 2010

Section 7 of the Bribery Act 2010 creates a strict liability corporate offence which holds the corporate entity liable for those representatives of the organisation who commit the act of bribing a foreign official. The company will have a defence where it had adequate procedures to prevent the commission of an offence. The advantages of such a measure for all financial crimes is, that it creates a strong deterrent to prevent their commission. Where financial crimes, such as insider dealing, create significant profits for a company, the desire to prevent it from occurring is unlikely. By including a provision within a new financial crime statute to hold a corporate entity liable by preventing its representatives committing a financial crime, the policing would become far simpler. The crimes may remain complex, however, the investigation would only require the collection of evidence to prove the commission of the offence, thus, avoiding the complexity of proving elements such as the mens rea of a corporate entity.[55] However, an offence caused by

[52] (*Police-foundation.org.uk*, 2019) <http://www.police-foundation.org.uk/2017/wp-content/uploads/2010/10/more_than_just_a_number_exec_summary.pdf>

[53] Allen W, R KraakmanG Subramanian, *Commentaries And Cases On The Law Of Business Organization* (Wolters Kluwer Law & Business/Aspen Publishers 2007)

[54] (*Ifs.org.uk*, 2019) <https://www.ifs.org.uk/fs/articles/ingham_feb93.pdf>

[55] Business-humanrights.org. (2019). Available at: https://www.business-humanrights.org/sites/default/files/reports-and-materials/Allens-Arthur-Robinson-Corporate-Culture-paper-for-Ruggie-Feb-2008.pdf

preventing to imply the rules and policies can significantly cost majorly for businesses. In light of Britain's departure from the European Union, any such burden is likely to impact the profitability of businesses. [56]

4. Agenda for reform

This Government proposes to adopt the third option and create a provision within law. A new provision will be established to create an offence, similar to Section 7 Bribery Act 2010, which will hold corporate entities liable for their failure to prevent the commission of a financial crime by their representative.[57]Where the corporate entity is able to prove that it had adequate procedures to avert the commission of such an offence, it will be allowed as a defence. This change in law which was implemented in July 2011, allows far more efficient policing of financial crime by only requiring the law enforcement agencies to collect evidence of the commission of the offence. It will also speed up the process of prosecution and conviction. [58]

This reform will be implemented by way of a new statute which will repeal previous relevant statutes.

Advantages of Proposal

This proposal will create a stronger deterrent for companies to prevent the commission of economic crimes to prevent the corporate entity being held liable for the actions of individuals. This will reinforce an attitude of the commercial sector fighting financial crime. Furthermore, a move away from the civil regime and into a more serious criminal regime will highlight the significance of misconduct, thus, discouraging offenders from being involved with such offences.

Greater number of convictions: A simpler offence which covers areas of financial crime will allow the investigation of these offences to be more straight-forward by not requiring evidence for a greater number of elements within an offence. A strict liability offence will only require the commission of the offence, thus, removing the obstacles of proving the complex area of corporate mens rea. This will likely lead to a greater number of investigations and convictions.

Fairness and Market Integrity: Holding those accountable who have committed these offences will create an atmosphere of fairness and integrity within the UK markets. This offence will hold those committing offences accountable, regardless of their privileged positions, highlighting that crime does not pay.

Risks and Impact on Practitioners

Risk: There is a risk of over-regulation, thus hindrance to the business.

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[56] The Independent. (2019). *This is how Brexit has impacted the business world in 2017*. Available at: https://www.independent.co.uk/news/business/news/brexit-economy-sterling-currency-investment-cost-impact-business-financial-banks-insurance-retail-a7695486.html

[57] Bribery Act (2010), s.7

[58] ibid

Impact: Directors currently spend a significant proportion of their time addressing concerns of financial crime[59]. In light of laws that may hold the corporate entity liable for actions of any of its representatives, it is likely that more time will be spent addressing these concerns, thus, it may be that the commercial goals of the company will be difficult to achieve.

Risk: There is a risk of less business development within jurisdictions involving higher risks.

Impact: The UK's interactions with nations that are considered to be higher risk in business development may be reduced, thus possibly reducing integration of world trade. This may arise where firms are concerned about transactions in countries with a reputation of high levels of financial crime and corruption, such as China[60]. This, in turn, may reduce foreign investment in the UK.

Costs

In the event that these new policies will be successful, costs for the UK government are probable to decrease as a result of easier policing. Where these changes come into place, the elements of offences which are required to be proven will be reduced, thus, reducing the expenditure of public funds on long investigations. [61]

Expected Public Response

It is expected that the public will respond positively to this proposal. There has previously been criticism of corporate offenders not being held accountable for their actions. This proposal will aim to address this criticism and hold those who commit financial crimes accountable for their actions.

[59] "Future Financial Crime Risks: Considering the financial crime challenges faces by UK banks" British Bankers Association (2015) Available at https://www.bba.org.uk/wp-content/uploads/2015/12/Future-Financial-Crime-Risks-DIGITAL-final.pdf

[60] Wedeman, A. (2019). *Growth and Corruption in China | China Research Center*. [online] China Research Center. Available at: https://www.chinacenter.net/2012/china_currents/11-2/growth-and-corruption-in-china/

[61] London.gov.uk. (2019). Available at: https://www.london.gov.uk/sites/default/files/gla_migrate_files_destination/Police%20technology%20report%20-%20Final%20version.pdf [Accessed 10 Feb. 2019].

Somerset v Stewart and its Implications Under the British Imperial Constitution

Rory Goodson*

Introduction

Lord Mansfield's decision in the case of *Somerset v Stewart*, and his evocative statement that 'the state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral and political; but only positive law'[1], ranks amongst the most famous declarations of the English common law. It has equally proven to be amongst the most controversial. The status of *Somerset* in the law both of England, and the overseas colonies of the British Empire, have been the subject of considerable debate, and it will be the task of this paper to make sense of the various constructions that have been placed on the decision. It will be apparent from the discussion in 'Part 1' that various English judges grappled with the issue of slavery at common law for a century, between the late 17th century and *Somerset* in 1772, and before Lord Mansfield's decision the state of the common law with regards to slavery was far from transparent. Attempts to justify the doctrine of slavery as a continuation or evolution of the medieval status of villeinage are unsatisfactory, due to the fact that villeinage had disappeared from the English law by the year 1400. Indeed, the fact that this occurred more than 200 years before the first colonial Royal Charter was promulgated means villeinage is an equally implausible basis for justification of slavery in the American colonies, under some kind of parallel but not identical evolution of law.

'Part 2' of this discussion will move to dealing with the progress of, and decision in, the case itself. It is suggested that three crucial conclusions will be suggested by such an analysis: 1) that the arguments of counsel in the case at hand were based on the institution of slavery as a whole; 2) that Lord Mansfield made clear his understanding of the case on these terms; and 3) the decision he made tackled the issue of slavery writ large, and ought to be understood as a statement of its legal illegitimacy at English common law. Suggestions that the decision was intended to be a limited one, decided purely on the issue of forced removal of a slave from England to another country, have been made, and will be discussed, although it seems that such arguments fail to appreciate the terms in which Lord Mansfield understood the question before him, and, as such, mischaracterise the holding that he ultimately made.

From here, 'Part 3' will place the decision in *Somerset* in the context of the colonial Royal Charters, and ask two questions: first, did *Somerset* make an impact in the American colonies? And, secondly, as a normative question, ought it to have had such an impact? It is suggested that the answers to these questions are 'only a limited impact' and 'yes' respectively. Even if one seeks to draw a distinction between the southern and northern American Royal Charters

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[1] *Somerset v Stewart* (1772, King's Bench), 98 ER 499

by virtue of their slight differences in language, it appears plain that the imperial constitution, as it was composed at the time, required the decision in *Somerset* to override contrary law as it prevailed in the colonies. Other than in Massachusetts, evidence of such an impact is non-existent, although the argument can be located in the writings of 19th century abolitionists. Given the incorporation of the common law into the newly founded United States after the War of Independence, this analysis requires one to conclude that either the US Constitution created slavery in its own right, or that slavery was not only morally illegitimate until its abolition in 1865, but also legally illegitimate at common law.

1. Legal Background to the Case

Before considering the potential implications of the Court's decision in the *Somerset* case on the imperial constitution under the colonial Royal Charters, it is first necessary to tackle the issue of the holding of the case itself. In order to properly assess the implications of Lord Mansfield's decision on the English common law, a location of the question concerned within its contemporary legal context is required, and this inquiry will take up the first segment of 'Part 1' of this paper. It is submitted that it is only once one has assessed the impact of the decision on the common law in England that one can embark on the more complex question of its implications in the context of the colonial Royal Charters.

It can be stated without controversy that English law's position on the state of slavery pre-1772 was one of uncertainty. The legal precedents on the question from the past hundred years were inconsistent, although the extent to which this was the case has been debated. It has been argued by Fiddes that the holdings of these precedents were in outright disagreement, and that the law was unclear on the point[2]. Wiecek makes a more moderate assessment, stating instead that 'if the pre-1772 English precedents on slavery were not in hopeless disagreement on these questions, then they did at least suggest several different directions in which the law of slavery might evolve'[3]. The disagreement in academic interpretations highlights the difficulty in producing an accurate analysis of the law at this time. It can only be through returning to the primary source materials that we can truly tackle with this problem and attempt to cast some light on the state of English law on the question of slavery pre-1772.

If one were given the task of identifying the source of the confusion over the question of slavery in the English law, the case of *Butts v Penny* (1677)[4] is the necessary place to begin. Not only does the case represent the earliest reported English case on the issue, but it exemplifies the struggles of English judges to reconcile slavery with the common law approach to property. The plaintiff in *Butts* brought an action of trover. Trover was a form of common law pleading, requiring the plaintiff to have a property interest in specific chattels, which the plaintiff alleged had been the subject of wrongful taking and therefore sought damages[5]. The justices of the King's Bench accepted that there might be property rights in English law sufficient to allow an action of trover so as to regain possession of black slaves (100 slaves in the case at hand). In justifying this property interest, the court suggested two potential theoretical justifications, although committed itself to neither: first, that black people were 'heathens' who were, therefore, inherently capable of being possessed; and second, that 'they were usually being bought and sold among merchants, as merchandise', and that the law ought in such ways to

[2] Fiddes, *Lord Mansfield and the Somerset Case*, 50 LQ Review 499 (1934)
[3] Wiecek, *Lord Mansfield and the Legitimacy of Slavery in the Anglo-American World*, University of Chicago Law Review Vol. 42, No.1, 86 (1974), at 89
[4] *Butts v Penny*, 83 Eng. Rep. 518 (King's Bench, 1677)
[5] Chitty, *Precedents of Pleading* (8th Edition, 1840), p.148

give weight to the common practice of merchants. The former of these justifications was supported by the 1693 decision in *Gelly v Cleve*[6]. Were the law to have been upheld as *Butts* states it, one would have little trouble in identifying the principles involved in the consideration of slavery in the 17th and 18th century English courts.

However, the next 80-years are characterised by a continuous back-and-forth between judges and lawyers seemingly in favour of the *Butts* approach, and those who articulated something far more similar to the approach that would characterise Lord Mansfield's judgement in 1772. Indeed, the debate in the period between *Butts* and *Somerset* would be dominated by the conflicting opinions of three English legalists who would each, in their own moment of pre-eminence, leave indelible marks on the debate over slavery in England.

The first of these central actors was Sir John Holt, who served as Lord Chief Justice from 1689 until his death in 1710. Holt's first foray into the debate occurred with his decision in *Chamberlain v Harvey* in 1697[7]. His decision in that case explicitly rejected the finding of *Butts*, and the trover-based analysis on which it relied. Holt stated flatly and firmly in his judgement not only that an action of trover would not lie as a means of asserting title on a slave, but that no ordinary action of trespass would suffice either. To imagine that the issue was thus resolved would, sadly however, be wishful thinking. CJ Holt did state that a separate proper remedy might lie, in the old common law remedy of trespass *per quod servitum amisit*, an action claiming the loss of services of a regular servant. There was a crucial distinction between this approach and that of trover: whereas trover would hold implicitly that the slave was simply a chattel, lacking in any individual freedoms and therefore entirely saleable, *per quod servitum amisit* would instead liken the slave to a bound or apprenticed labourer at common law. Such a person would retain certain freedoms and liberties but would also surrender others that would be entitled to a free man. The slave would instead be 'a "slavish servant, a human being whose freedom was restricted but not annihilated'[8].

Chamberlain, then, marked the first signs of an anti-slavery approach manifest on the English bench. Whilst it ought to be noted that Holt did not accept the more sweeping contention of defence counsel that 'by Magna Carta, and the laws of England, no man can have such a property over another'[9], *Chamberlain* certainly marked a change in approach from *Butts*. However, Holt's greatest contributions to the debate were to come in his next two decisions: *Smith v Brown and Cooper* in 1701, and *Smith v Gould* in 1705. In the former, Holt delivered the following oft-quoted and evocative statement in the course of making his judgement: 'as soon as a negro comes into England, he becomes free; one may be a villein in England, but not a slave'[10]. In the latter, meanwhile, Holt made a similarly unequivocal statement of his opinion on the matter: 'no man can be the subject of property'[11].

However, whilst it would be correct to view these decisions as further evidence of CJ Holt pushing the common law away from the position that it had adopted in *Butts v Penny* 25 years earlier, its soundbites ought to be taken with caution. During discussions with counsel in *Smith v Brown and Cooper*, Holt made clear that the procedural means by which the plaintiff might recover the value of the slave by action of *indebitatus assumpsit* would still exist, and thus

[6] Unreported, but quoted in the report of *Chamberlain v Harvey*, 1 Ld. Raym. 146 (King's Bench, 1697)
[7] *Chamberlain v Harvey*
[8] Wiecek, at 91
[9] *Chamberlain*
[10] *Smith v Brown and Cooper*, 2 Salk. 666 (King's Bench 1701), at 666
[11] *Smith v Gould*, 91 Eng. Rep. 567 (King's Bench 1705)

ensured the retention of a mechanism for the selling of slaves in England. Nothing in the latter decision goes as to suggest that Holt considered this procedural action to have ceased to be valid. Moreover, the case became so confused by contractual issues that the Sakeld report concludes simply that 'nothing was done'[12]. Given these factors, we must not over-emphasise these early decisions, although there were further important statements in the *Smith v Gould* decision that speak to a move towards anti-slavery sentiment. The judgement in that case was the first to make explicitly clear that the *Butts* decision was 'not law'[13], and so represents an important early stage in the move towards abolishing slavery in England.

It is probably an exaggeration to argue, as Fratcher[14] and Sutherland[15] have, that these decisions abolished slavery in England and the colonies. However, Wiecek equally understates their significance when he suggests that their value as indicators of a move towards anti-slavery in the common law is 'dubious'[16]. Instead, the truth is likely to lie somewhere in between. When Chief Justice Holt died in 1710, the recent common law precedents on slavery were pushing in the same direction: towards de-legitimisation of the institution, and towards some of the evocative anti-slavery rhetoric that would dominate the US abolitionist movement in the 19th century.

The decisions in *Smith v Brown and Cooper* and *Smith v Gould* left English law in a position where the next logical step would be the express abolition of slavery. The direction of development during Chief Justice Holt's tenure is clear, and ultimate abolition of slavery does not appear to have been far away. The question therefore presents itself as to why it took another 70 years for the decision to *Somerset* to complete this progression (if, indeed, that is what we should see it as having held). The explanation for this lies with the second of the three individuals alluded to above, who shaped the development of this discussion, namely Philip Yorke, Attorney General and, later, Earl of Hardwicke, who served as Lord Chancellor from 1737 until 1756. Yorke's approach to the question was far more aligned to that set out in *Butts v Penny*, and he objected to what he saw as the creative vagaries of the doctrine advanced by Chief Justice Holt.

Yorke's position on the issue was made clear as early as 1729 when, in his role as Attorney General, he was taking part in an after-dinner event at the hall of Lincoln's Inn. Together with the Solicitor General Charles Talbot, Yorke, when invited by the members of the Inn to give their opinions on the question, stated his belief that the following four points were established points of law:

1. A slave coming to Britain from the Caribbean, whether with or without his master, remained a slave;
2. The property right held by the master in that slave in Britain was 'not determined or varied';
3. Baptism into the Church of England did not affect the slave's liberation; and
4. 'The master may legally compel him to return again to the plantations'[17].

Given the nature of the setting in which it was delivered, this was not a statement with binding legal force. Lord Mansfield, during counsel's argument in the Somerset case, would later

[12] *Smith v Brown and Cooper*
[13] *Smith v Gould*
[14] Fratcher, *Sovereign Immunity in Probate Proceedings*, 31 Mo. L. Rev. 127 (1966), at 139
[15] Sutherland, *Constitutionalism in America: Origin and Evolution of its Fundamental Ideas* (1965), p.129
[16] Wiecek, at 93
[17] Not reported, but fully quoted in: *Knight v Wedderburn*, 8 Fac. Dec. 5, Mor. 14545 (Scottish Court of Sessions, 1778)

interrupt discussion of the 'Yorke-Talbot opinion' to stress that the opinion's value as precedent was to be doubted, in part due to the questionable accuracy of the reporting of what was said at such events[18]. Indeed, its apparent direct contradiction to the cases decided by Chief Justice Holt in the preceding years would possibly have consigned it to historical obscurity had Yorke's friendship with Lord Newcastle, the Prime Minister, not led to him becoming Lord Hardwicke and being appointed as Lord Chancellor in 1737.

The 'Yorke-Talbot opinion' was later restated by the now Lord Hardwicke in his decision of *Pearne v Lisle* in 1749[19]. Here, Hardwicke explicitly resurrected the doctrine of *Butts v Penny* that had been rejected by Chief Justice Holt in his earlier decisions on the slavery question. Hardwicke held that the action of trover was valid as with regards to a black slave, since slaves were 'as much property as any other thing'. His rationale was that slavery in English law had grown out of the medieval doctrine of villeinage, and so was not a foreign concept to the common law, but was in fact shaped and shrouded in its rules and principles. The contrast with Chief Justice Holt's approach is striking.

The unreliability of much English law reporting at the time, however, means that the status of *Pearne* as legal precedent is open to debate. Indeed, Wiecek goes so far as to state that '*Pearne* exerted no influence as precedent'. One reason for this, undoubtedly, was that reporting of the decision only appeared in 1790, and as such any uses of it as precedent in the prior years would have relied solely on the hearsay of the presiding judge of the case in question. Furthermore, Wallace[20] has noted the extremely poor reputation of Ambler as a reporter, and it is only in Ambler's reports that we find evidence of the *Pearne* decision. What ultimately confirmed that *Pearne* would only feature as a footnote in legal history is no doubt the fact that the approach endorsed therein was roundly rejected by Lord Hardwicke's successor 13 years later.

It is this decision, *Shanley v Harvey*[21], that introduces the final of the three most important pre-*Somerset* actors in the common law slavery debate. Hardwicke was succeeded as Lord Chancellor by Sir Robert Henley, later Earl of Northington, in 1761. Henley's decision resembles in many ways the moralistic analysis that would be present later in Lord Mansfield's judgement in *Somerset*: 'As soon as a man sets foot on English ground he is free: a negro may maintain an action against his master for ill usage, and may have a *habeas corpus* if restrained of his liberty'[22]. Once more, the pendulum of judicial opinion swung, this time against the *Butts* and *Pearne* approach. The status of *Shanley* as precedent, as with *Pearne*, is questionable. Eden's reports were only widely circulated with the printing of the second edition in 1827, and as such many people would likely have been unaware of the *Shanley* decision, just as they would have been of the earlier decision in *Pearne.*

Given the foregoing analysis, however, it is submitted that a few points can reasonably be made. The first, and perhaps most important, is to note the uncertainty that pervaded the English law in this area. The courts of King's Bench and Chancery had both, over the course of almost 100 years, attempted to tackle the questions posed by slavery in the common law, and each had, at various times, supported both sides of the issue. The assessments of Fiddes and Wiecek, noted at the start of this analysis, whilst varying in their illustration of the extent

[18] *Somerset v Stewart*, at 503. Stated that: '[the opinion] was upon petition in *Lincoln's Inn Hall*, after dinner; probably, therefore, might not, as he believes the contrary is not usual at that hour, be taken with much accuracy'
[19] *Pearne v Lisle*, Ambl. 75, (Chancery, 1749)
[20] J. Wallace, *The Reporters Arranged and Characterised with Incidental Remarks* (4th edition, 1882), at 513
[21] *Shanley v Harvey*, 2 Eden 125, (Chancery 1762)
[22] Wallace, at 844

of the discordancy of judicial opinion, are no doubt correct in observing that no one answer jumped out as presenting itself as the obvious means of resolving the question as the years ticked on towards 1772. As such, when we move to the following discussion of the *Somerset* case and decision itself, a couple of broad questions ought to inform and pervade our analysis: why was Lord Mansfield, unlike his predecessors, willing to make as firm a statement as it will be suggested that he did? And, further, why was the *Somerset* decision given a status and authority that eluded its antecedent decisions on the topic? If we are to conduct a full and thorough analysis of *Somerset* and its implications, resolution of these questions is of high importance.

2. The Case

Part A - The Facts of *Somerset*:

The circumstances of the dispute that gave rise to the *Somerset* decision, both in the facts of the case and the bringing of the suit, are themselves of considerable intrigue, and brief discussion of them will allow for a greater understanding of the debate that resulted from Lord Mansfield's ultimate decision. This debate, both at the time and in the more than 200 years since, has focussed on whether the case was decided on the broad ground of declaring slavery illegal in English common law, or the far narrower ground that the specific facts of the case themselves raised. What is notable, and what bears a resemblance to the foregoing discussion on the development of the English law on this point, is the manner in which certain individuals, not least the leading advocates in the case itself, played a crucial role in influencing the outcome.

James Somerset was an enslaved man of African descent, who had been purchased by Charles Stewart some years previously, and had since been in his service in Virginia. In 1769, Stewart was required by business to travel to England, and did so, bringing Somerset with him 'to attend and abide with him'. It is accepted explicitly in Lord Mansfield's judgement that Stewart had the intention 'to carry [Somerset] back with him [to the colonies] as soon as the business should be transacted'[23]. In 1771, whilst still in England, Somerset escaped, and was on the run until he was recaptured in November. On Stewart's orders, Somerset was imprisoned on the vessel *Ann and Mary* (under the captaincy of a Captain James Knowles), which was bound for Jamaica. It was Stewart's intention that, upon arrival in Jamaica, Somerset was to be sold to a plantation on the island. The application for a writ of habeas corpus was in fact brought on Somerset's behalf by his Godparents. During his time in England, Somerset had been baptised as a Christian of the Church of England, and it was his appointed Godparents (John Marlow, Thomas Walkin, and Elizabeth Cade) who initiated proceedings on December 3rd 1771 in the Court of King's Bench. Being a writ of habeas corpus, the requirement was on 'Captain Knowles to show cause for the seizure and detainer of the complainant Somerset'[24].

It is at this juncture that a key player in the outcome of the case enters the fray, namely the renowned English abolitionist campaigner Granville Sharp. Sharp was a layman who had spent the preceding decade on campaign against the injustices of slavery, bringing test cases to court[25] and publishing the first English treatise advocating the abolition of slavery[26]. For him, *Somerset* was an opportunity to pursue his abolitionist agenda in the courts, especially since

[23] *Somerset v Stewart*, at 510
[24] *Somerset v Stewart*, at 499
[25] Such as *R v Stapylton* (1771) and *Hylas v Newton* (1769), both unreported
[26] G. Sharpe, *A Representation of the Injustice and Dangerous Tendency of Tolerating Slavery* (1769)

his prior attempts had been frustrated by the courts, including Lord Mansfield himself, who had restricted their rulings to narrow grounds of decision. Sharp sought to mobilise the British public behind Somerset's cause, and was successful in raising the money through public donations to pay for the lawyers to argue Somerset's case (although in the end they would do the case pro bono)[27].

Ultimately, Sharp recruited and briefed five lawyers who would argue for Somerset across the three hearings and six months that resolution of the case would take. The arguments put forward in their submissions warrant consideration, especially given the clarity of aim that they portray. It is clear from the submissions of the lawyers acting for Somerset that they sought to persuade Lord Mansfield to declare slavery to be contrary to the common law. This was not merely an attempt to free the single slave concerned in the case at hand; the purpose was far higher, and of far greater potential consequence.

One need only undertake a cursory perusal of these arguments to observe this to be true, but some deeper consideration of the specifics of the arguments is valuable. Most significant amongst these are the submissions of Francis Hargrave, a young lawyer of Lincoln's Inn in London, who would make his name from his performance in the case and go on to become a respected advocate and legal historian. For Hargrave, the argument for Somerset took on three distinct points:

1. The old English institution of villeinage had passed out of usage, and there exists 'the most violent presumption'[28] against its continued legality as a consequence of this;
2. 'It is very doubtful whether the laws of England will permit a man to bind himself by contract to serve for life: certainly, it will not suffer him to invest another man with despotism, nor prevent his own right to dispose of property'[29]; and
3. Given these two points there existed no existing grounds for recognising slavery in English law, and Hargrave argued that principles of natural justice required 'the exclusion of this new slavery, as our ancestors obtained the abolition of the old'[30].

For John Alleyne, another of Somerset's lawyers, the emphasis was on the horror of slavery itself: 'The horrid cruelties, scare credible in recital, perpetrated in America, might, by allowance of slaves amongst us, be introduced here'[31]. Of similar character is Sergeant Davy's oft-quoted comment that 'this air is too pure for a slave to breath in'[32].

What is perhaps most important from the arguments of Hargrave, Davy, Alleyne, and indeed the other lawyers for Somerset's cause, is that their arguments explicitly rely on the presumption that slavery is illegal in England already. In their view, for the court to recognise the right of Stewart to export Somerset to Jamaica would, in essence, be to introduce slavery anew into the common law. Needless to say, the cases noted above that supported this approach in prior English law (such as *Smith v Gould*[33] and *Shanley v Harvey*[34]) were cited by Somerset's lawyers in support of their propositions.

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[27] Oxford Dictionary of National Biography, entry: 'Granville Sharp'
[28] *Somerset v Stewart*, at 500
[29] *Somerset v Stewart*, at 500
[30] *Somerset v Stewart*, at 502
[31] *Somerset v Stewart*, at 503
[32] *Somerset v Stewart*, at 509
[33] *Smith v Gould*
[34] *Shanley v Harvey*

At this point it is necessary to briefly consider the common law doctrine of villeinage, which is a continuous presence in the discussion of slavery in the English common law in this period. From the judicial pronouncements already discussed here, we have two directly contradictory statements on the relationship between villeinage and slavery: CJ Holt in *Smith v Brown and Cooper* (1701: 'one may be a villein in England, but not a slave'[35]), and Lord Hardwicke in *Pearne v Lisle* (1749: justifying slavery as having grown out of the medieval doctrine of villeinage[36]). In truth, both of these analyses appear to be incorrect, or at the best only correct in a purely theoretical sense in regard to Holt's analysis. Lord Hardwicke's analysis is certainly incorrect. As a means of organising land, villeinage had almost entirely died out in England by 1400[37]. The rather rapid decline of villeinage, and indeed most of the medieval feudal statuses, has been most widely attributed to the impact of the Black Death, which wiped out between 30 and 40% of the English population in just over a year, and so dramatically increased the bargaining power of workers in their relationships with Lords[38]. Robert Palmer, who places a great deal of emphasis on the influence of the Black Death on the development of the common law, notes that as a result of the disease 'a large amount of peasant land was withdrawn from villein tenure and was turned into leasehold'[39]. As such, Lords began to lease the lands to those who had previously been subjugated as villeins, and the by the 16th century the common law courts recognised and protected these property interests, which came all the benefits of common law ownership. In practice, villeinage as a feature of the English common law died out long before the question of black slavery entered into English legal debate[40].

Nonetheless, Stewart's counsel were unwilling to concede that slavery was no longer countenanced y the English common law, and argued explicitly against that proposition. Dunning (for Stewart) explicitly stated that 'neither the air of England is too pure for a slave to breathe in, nor the laws of England have rejected servitude'[41]. In fact, Dunning's argument is almost the exact opposite of that advanced by Somerset's lawyers. He seeks to show by citing authorities such as the 'Yorke-Talbot opinion' that slavery remained part of the law at the time of the case, and that it would amount to a change in the law should Lord Mansfield allow Somerset's claim of habeas corpus. This, Dunning argued, would be ill-advised due to the social impact of releasing what he assessed to be 14,000 black people living in England[42]. Not only then, on this view, was slavery still authorised by the common law, but it would be a misstep for the court to simply abolish it in one fell swoop, given the widespread social and economic implications that would result.

Part B - Lord Mansfield's Judgement:

[35] *Smith v Brown and Cooper*
[36] *Pearne v Lisle*
[37] Given-Wilson, *The English Nobility in the Late Middle Ages: The 14th Century Political Community* (1987), at 122
[38] Musson and Ormrod, *The Evolution of English Justice: Law, Politics, and Society in the 14th Century* (1999), at 93
[39] Palmer, *English Law in the Age of the Black Death 1348-81: A Transformation of Governance and Law* (1993), at 24-27
[40] Various academics have advanced this theory, including: Plucknett, *A Concise History of the Common Law* (5th edition 1956), at 310-312; Baker, *The Oxford History of the Laws of England 1483-1558* (2003), at 644-650; and, Gray, *Copyhold, Equity, and the Common Law* (1963).
[41] *Somerset v Stewart*, at 506
[42] *Somerset v Stewart,* at 504

It is clear from a short opinion Lord Mansfield gave on May 14th 1772 that, at the conclusion of argument before him, he saw the case very much through the lens of the submissions he had received. He noted, following the argument of Dunning, that 'the setting 14,000 or 15,000 men at once free loose by a solemn opinion, is much disagreeable in the effects it threatens'. Further, he noted that whilst 'contract for sale of a slave is good [in England] …here the person of the slave is the object of enquiry; which makes a very material difference'[43].

It seems clear that Lord Mansfield understood the implications of the decision that he was required to make from his comment that he 'strongly recommended' that the parties resolve the dispute amongst themselves. Mansfield's reticence to make the judgement that he clearly believed himself bound to make, is clear: 'If the parties will have judgement, fiat Justitia, ruat coelum, let justice be done whatever the consequences'[44]. It seems very strange to suggest, as some academics have done, that Lord Mansfield would then make a judgement that was tightly restricted to the factual matrix at hand, when he was so clearly and unequivocally aware of the ramifications of the decision that he was set to take[45]. It probably is fair, however, to state that Mansfield was unsure as to how to cope with the question at the time of this initial opinion, like Blackstone before him. It is interesting, therefore, that much of what he goes on to declare belies such suggestions of uncertainty and reticence.

Lord Mansfield returned on June 22nd 1772 to give his judgement. Having set out the facts as agreed, and the question before the court, Mansfield held that:

- 'The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral and political; but only positive law, which preserves its force long after the reasons, occasion, and time itself from whence it was created, is erased from memory: it is so odious, that nothing can be suffered to support it, but positive law';
- 'Whatever inconveniences, therefore, may follow from a decision, I cannot say that this case is allowed or approved by the law of England'; and
- 'Therefore, the black must be discharged'[46].

In making these statements, Mansfield had come to the same conclusion as Blackstone, writing a decade before, who had stated: 'the law of England abhors, and will not endure the existence of, slavery within this nation'[47].

Indeed, the language of the judgement itself leads one to make a couple of early conclusions, which will be tested below against contemporary and subsequent judicial and academic reaction. These are: first, that Lord Mansfield believed his decision to be of great consequence, and this in itself would seem to work against the argument that he had intended to decide the case solely on the narrow issue of whether a slave-owner could compel a slave to leave the country; and, second, that the explicit and morally-charged criticisms that he levels at the institution of slavery do not suggest a judge who is attempting to avoid tackling the contentious issue before him. Lord Mansfield, it is contended, had a strong view on the rightness of the

[43] *Somerset v Stewart,* at 509
[44] *Somerset v Stewart,* at 509
[45] Wiecek, Ibid; Nadelhaft, *The Somerset Case and Slavery: Myth, Reality, and Representation*, (1966) The Journal of Negro History 51, 193-208; Fiddes, *Lord Mansfield and the Somerset Case*, (1934) 50 Law Quarterly Review 499
[46] *Somerset v Stewart*, at 510
[47] Blackstone, *Commentaries on the Laws of England* (1765), 1:412

practice of slavery, and made this clear in the moralistic tone of his judgement. However, this has not proven to be a universal reading of the decision in *Somerset*, as will be discussed below.

Part C - The Debate Over *Somerset*'s Legal Implications in England:

It is notable that almost as soon as the decision in *Somerset* was handed down, interpretations on its impact began to be made in the lower courts of both England and Scotland. Importantly, the interpretations that were made in those fora were overwhelmingly of the view that has been advanced in Part B of this section of the paper: that Lord Mansfield's decision in *Somerset* was a clear and explicit ruling on the illegality of slavery in English law, given the lack of a positive law legitimising the practice. In considering these developments, it will be necessary to consider Wiecek's argument that '*Somerset* burst the confines of Mansfield's judgement', for the reasons that it opened a new avenue for the use of habeas corpus, and that justificatory comments made by Mansfield in the judgement, rather than the holding itself, were what was seized upon by future courts[48].

Just one year after the decision in *Somerset*, in the unreported case of *Cay v Crichton*[49], it was held that Lord Mansfield's judgement, given the historical absence of positive laws legitimising slavery, also had retroactive effect in its holding. Slavery, by this reckoning, had never had a legitimate presence in England under the common law, except for any periods where there may have been positive law that validated the practice. Then in 1778, the Scottish Court of Sessions reiterated the *Somerset* judgement in the context of Scottish law and held that not only could a master not compel a slave to leave the country, but that the slave was a free man so long as he remained in the realm[50].

Criticisms of this broad interpretation of the decision in *Somerset* tend to stem not from the wording of the judgement itself, which we have suggested above commends such a broad approach, but rather from later comments of Lord Mansfield relating to such broad applications of the decision. Most famous in this regard is an interjection he provided in 1785, during counsel's arguments in the case of *Rex v Inhabitants of Thames Ditton*[51]. When discussion turned to the question of a master's right to a slave's service whilst both were in England, Mansfield offered the following plain interpretation of his holding in *Somerset*: 'the determination got no further than that the master cannot by force compel him to go out of the kingdom', a statement that if true would constrain *Somerset* almost entirely to its own facts. How we are expected to square such an approach with Lord Mansfield's premonition that there would be dramatic consequences from his decision[52] is a question that proponents of this constrained view seemingly fail to address[53]. It must be further noted in support of this view, however, that Thomas Hutchinson, ex-Governor of Massachusetts, reports in his diaries from 1779 a conversation with Lord Mansfield, in which the judge sought to stress to Hutchinson that 'there had been no determination that they were free, [and] the judgement went no further than to determine the master had no right to compel the slave to go into a foreign country'[54].

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[48] Wiecek, at 108
[49] *Cay v Crichton* (1773), Prerogative Court
[50] *Knight v Wedderburn* (1778), 8 Fac. Dec. 5
[51] *Rex v Inhabitants of Thames Ditton* (1785, King's Bench), 4 Doug. 300, 99 Eng. Rep. 891
[52] *Somerset v Stewart*, at 509
[53] Wiecek, Ibid, and Fiddes, Ibid, are especially guilty of this, seemingly taking Lord Mansfield's later construction of *Somerset* as gospel, and attempting to pass off his more expansive holdings as a result
[54] Hutchinson, *The Diary and Letters of His Excellency Thomas Hutchinson Esq* (1886), p.277

What is particularly noticeable about the *Thames Ditton* case, however, is that Lord Mansfield appears to compare the position of a slave to that of a 'villein in gross', an ancient feudal status of servitude that had not technically been abolished in English law, but which had died out in practice[55]. He made these comments in discussion, and as such they have no precedential value, but it is notable that they appear to be in conflict with his earlier statements in the *Somerset* judgement. He noted in *Somerset* that, whilst the status of 'villein regardant to manor' (another variety of common law villeinage) had been abolished by the Statute of Tenures, the status of villeins in gross had not been abolished by this statute[56]. However, it is not noted by Lord Mansfield in either *Thames Ditton* or *Somerset* that, as we observed in the discussion of villeinage included earlier in this paper villeinage had long ceased to be used in English law. Nonetheless, his subsequent comments on the nature of slavery do not appear to leave open to him the possibility of attempting to justify the use of slavery by some archaic mechanism of feudal law, especially on one that was only even conceivably still a part of the law in the most technical, historical sense, in that it had not been officially repudiated by either Parliament, the Crown, or the courts. Along with the quotations already noted, he states that 'so high an act of dominion must be recognised by the law of the country where it is used'[57].

How, then, are we to explain this apparent about turn in Mansfield's approach to the question of slavery? Or will we be forced to concede to those who advocate a narrow construction of *Somerset*? The first point to be made here is a broad one regarding questions of judicial interpretation. As has been submitted above, the language of the judgement and reasoning in *Somerset* does very little to suggest that it was intended to have such minimal effect as these interpretations have one believe. The moralistic language is high-minded, evocative and appears completely incompatible with the idea that Lord Mansfield would continue to tolerate the practices of slavery in England in the absence of any supporting positive law. And yet, this is the conclusion which the narrow view is compelled to adopt.

There is a further point that can be made here, relating to Lord Mansfield's private life, that supports the view that it was highly unlikely that he would adopt a position that would allow for the continued practice of slavery in England. For 28 years, from 1765 until 1793, Lord Mansfield had housed at his estate at Kenwood House his great niece Dido Elizabeth Belle, the daughter of Lord Mansfield's nephew Sir John Lindsay and an enslaved African woman known as Maria Belle. Dido was brought up along with Mansfield's other great niece, Lady Elizabeth Murray, and within the family household, at least when there were no guests present, they were treated as equals[58]. Indeed, the aforementioned Thomas Hutchinson noted on a visit to Kenwood that Lord Mansfield had an especially close relationship with Dido, and that she even worked as his secretary and scribe to aide him with his work. He describes how Dido 'was called upon by my Lord every minute for this thing and that, and showed the greatest attention to everything he said'[59], and that she did on occasion dine with the entire family when high-status guests were visiting, which was somewhat unusual for bastard relations of any racial background at the time. Further to all this, 'he also bequeathed her with £500 as an outright sum and a £100 annuity, which she received after his death in 1793'[60]. Given this background, and the contemporaneous nature of it within Lord Mansfield's life, it seems likely, if not

[55] *Thames Ditton*
[56] *Somerset v Stewart*, at 510
[57] *Somerset v Stewart*, at 510
[58] Adams (1984), *Dido Elizabeth Belle, A Black Girl at Kenwood, an account of a protégée of the 1st Lord Mansfield*, *Camden History Review*, p.10–14
[59] Hutchinson, at p.274
[60] Adams, at 13

certain, that he would have been far more resistant to the dehumanising arguments that were proffered in defence of the institution of slavery. Indeed, that he made the decision he did in *Somerset* did not come as a shock to some. One slave owner was recalled to have stated at the time that 'no doubt...[Somerset] will be set free, for Lord Mansfield keeps a Black in his house which governs him and the whole family'[61].

It must be questioned why Lord Mansfield might have backtracked on *Somerset* in the *Thames Ditton* ruling in 1785. A couple of potential reasons can be found for this, although they necessarily rely on a degree of speculation. The first of these occurred in 1780, when his house had been firebombed by a mob of Protestants, who objected to the judgements Lord Mansfield had made which upheld the rights of Catholics. The second concerned Dido. Hutchinson comments on the rumours that had been swirling surrounding his relationship with his great niece ('He knows he has been reproached for showing a fondness for her – I dare say not criminal'[62]), and it is certainly plausible that this, and a desire to avoid provoking a similar attack on himself as had occurred in 1780, prompted him to row back on the more controversial impacts of his decision.

Regardless of this, the decision of *Somerset* had been made, and judicial interpretation of it in the decades to come was consistently in favour of the broad interpretation advocated here. Whatever the reasons for Lord Mansfield's apparent change of heart, he never made an official statement rejecting the moralistic elements of the *Somerset* judgement, and its place in English law only strengthened. Lord Chief Justice Alvanley, in the Court of Common Pleas in 1802, held that the case had established that a black slave, at least whilst in England, was 'as free as any one of us'[63]. Further, in 1824, Justice Best interpreted *Somerset* as having held 'on the ground of natural right' that slavery was 'inconsistent with the genius of the English constitution', and that no persons, whatever race, could be the subject matter of property[64]. Justice Holroyd, in the same case, held that as soon as a slave 'puts his foot on the shores of this country, his slavery is at an end'. *Somerset* had been clearly interpreted in the broad way advocated in the earlier sections of this paper, and indeed Holdsworth is in agreement that this approach was both the 'popular view' and 'substantially correct'[65].

It's clear, despite the *Somerset* ruling, that slavery continued in England. Buying and selling of slaves continued, and these later cases were further instances of the courts being forced to step in to secure the freedom of a black slave, but it was established by *Somerset* that were such a person to bring a habeas corpus claim before an English court, the court would direct that they be set free. That this was established in 1772, 4 years before the commencement of the American War of Independence, will be of crucial importance for the final section of this paper.

3. *Somerset* and the Royal Charter

It is only at this juncture, with an understanding of *Somerset* and its domestic legal implications now attained, that the broader investigation of this paper can be embarked upon. This is, namely, what the impact of the *Somerset* decision was under the colonial Royal Charters, especially on the thirteen American colonies that were, at the time, part of the British Empire. Literature on *Somerset*'s influence in the American abolitionist debate has tended to focus on

[61] Hutchinson, at 274
[62] Hutchinson, at 275
[63] *Williams v Brown* (1802, Common Pleas), 3 Bos. & P. 69, at 71
[64] *Forbes v Cochrane & Cockburn* (1824, King's Bench), 107 Eng. Rep. 450
[65] Holdsworth, *A History of English Law* (1938), p.247

the way it was harnessed by abolitionists in the early and middle periods of the 19th century, rather than on the institutional question that will be posed here. That question can perhaps be most accurately summarised thus: under the British imperial constitution as set out in the colonial Royal Charters, should the *Somerset* decision have been construed as having abolished the institution of slavery in the colonies? And, as a corollary, are there any instances in fact to support such a conclusion? However, before such questions can truly be tackled, a further descriptive element of inquiry is required, into the Royal Charters themselves. The Charters often differed in the precise wording they afforded to the clause relating to the supremacy of the English law, and it is necessary to determine whether such differences had any meaningful impact on their operation.

Part A - The Substance of the Colonial Royal Charters:

The Royal Charters that were used to set up the administration and organisation of the thirteen colonies on the east coast of the American continent contain a great deal of information with which we are not interested at the present moment. For current purposes, it is the clause, that makes its first appearance in the Second Virginia Charter of 1609[66], stating the primacy of English law over that established independently in the colonies, with which we are concerned. An in-depth analysis of the respective clauses of every such charter, and the ways in which their differences played out in detail, is too lengthy an investigation for the present medium. As such, this paper will confine itself to an analysis of a few of the most important such charters, and briefly ask whether their content differed both over time and geographically.

The Second Virginia Charter, the first to include such a clause, stipulated the requirement thus: the officials of the Virginian colony were to have the power to adjudicate and legislate over those in the territory of the colony, 'so always as the said statutes, ordinances and proceedings as near as conveniently may be, be agreeable to the laws, statutes, government, and policy of this our Realm of England'[67]. A couple of points are worth noting from this: firstly, that the clause is primarily aimed at ensuring consistency between the two bodies of law in situations where they may appear to conflict on the surface; and, secondly, that it makes not provision for the way in which a dispute would be resolved in the case of an unresolvable conflict. It is perhaps this that led to the alterations we can identify in the Third Virginian Charter, which was established just two years later in 1611. Here, the clause stated that the colonial authorities would have the powers to administrate and legislate for the colony, 'so always, as the same be not contrary to the laws and statutes of this our Realm of England'[68]. The lack of clarity from the Second Charter as to the primacy of one body of law over the other, therefore, was clearly rectified by the 1611 Charter. Where there was conflict, the common law and statutes of England were to take precedence over the law of the colonies.

The Third Charter of Virginia came to set something of a precedent for the form of the supremacy clause as related to English law in the colonies. The Charter of the Bay of Massachusetts, from 1629, expressed the clause in similar, if superficially different, terms: 'so as such laws and ordinances be not contrary or repugnant to the laws and statutes of this our realm of England'[69]. Maryland's constituting Charter, enacted in 1632, also spoke in this

[66] The Second Charter of Virginia, May 23rd 1609. All references to the Charters themselves will be taken from the Avalon Project website, which has helpfully compiled an extensive resource of all the documents relating to the establishment of the American colonies.
[67] Ibid
[68] The Third Charter of Virginia, March 12th 1611
[69] The Charter of Massachusetts Bay, 1629

manner on the subject: '[the laws enacted by the colonial administration must] be consonant to reason, and be not repugnant or contrary, but (so far as conveniently may be) agreeable to the laws, statutes, customs, and rights of this our Kingdom of England'[70]. Indeed, across all of the northern American colonies of the British Empire, places which would later form states that remained part of the Union in the American Civil War, we see clauses within the colonial Royal Charters of this content[71].

In the northern-most colonies of the American continent held by the British Empire, then, it was clearly established by the Royal Charters that, in cases of unresolvable conflict, the English law on the subject was to overrule the colonial law or regulation. There is an inclination to attempt to force the appearance of difference between the northern supremacy clauses and those of the would-be secessionist Southern states to fit what we might consider to be the logical conclusion of the analysis that will follow. This temptation will be strenuously resisted as the inquiry continues, although it appears, on the surface at least, that no forcing of tenuous distinctions will be necessary.

What is most notable from an analysis of the Charters from the southern-most American colonies of the British Empire, namely Georgia and Carolina (which encompassed both North and South Carolina in modern terms), is the absence of the requirement that the colonial laws and regulations not be 'contrary' to the laws of England. As we see from the foregoing analysis, the Charters from the more northerly colonies tended to have the concordant requirements that the laws and regulations of the colonies be neither contrary nor repugnant to the laws of England[72]. In Carolina and Georgia, however, the requirement that laws not be 'contrary' is not present in the Charter. The Carolina Charter of 1663 states the requirement thus: 'the said laws [must] be consonant to reason, and as near as may be conveniently, agreeable to the laws and customs of this our kingdom of England'[73], and these words are exactly repeated in the subsequent Carolina Charter of 1665[74]. 60 years later, Georgia's foundational Royal Charter described the duties ascribed to the institutions of the province thus: '[they] shall and may form and prepare, laws, statutes and ordinances, fit and necessary for and concerning the government of the said colony, and not repugnant to the laws and statutes of England'[75].

The picture we are presented with, then, by an analysis of the substance of the various supremacy clauses of the Royal Charters establishing the Thirteen Colonies, is one of distinction between the northern and southern territories. Whilst the Charters of the northern territories required that the laws enacted by the colonial institutions be neither contrary nor repugnant to the English law, those of the southern territories only express the requirement that said laws not be repugnant. Whilst evidence on this point is lacking, one can see how an attempt might be made to use this distinction as a lexical hook on which to base a justification of the different, and less exact, application of the English common law in the southern colonies. Such an argument might posit that the notion of 'repugnant' implies a higher level of incompatibility than merely 'contrary'. Indeed, one could argue, it suggests some deep and fundamental incompatibility on the level of morality and principle, rather than merely in practice. Consider

[70] The Charter of Maryland, 1632
[71] The Charter of Delaware, 1701, The Charter of Connecticut, 1662, The Charter for the Province of Pennsylvania, 1681, and various documents, not specific charters themselves, relating to New York, New Hampshire, New Jersey, and Rhode Island, are available on the Avalon Project website, and display this marked similarity, if not exact replication.
[72] Ibid [61], [62], [63], and [64].
[73] Charter of Carolina, March 24th 1663
[74] Charter of Carolina, June 30th 1665
[75] Charter of Georgia, 1732

two legal rules, X and Y. Whilst X and Y may be contrary to each other in the sense that they stipulate different courses of action, X will only be repugnant to Y if it stipulates a course of action that is not only contrary to Y, but also invalidates some kind of core higher order principle which is fundamental to Y and the system in which Y is located. We might say that the statement 'everyone ought to drive on the right' is contrary to the law of England, but we would not say that the statement is repugnant. There is no foundational principle, moral or otherwise, of English law that stipulates that people must drive on the left, only a principle which states that people must drive on the same side, with the left having been chosen from two options which are identical in their practical application. When assessing the implications of the *Somerset* decision in the American colonies, this distinction between 'repugnant' and 'contrary' is potentially of great significance, as will be shown below.

Part B - The *Somerset* Decision and the Colonial Royal Charters:

On the texts of the northern Royal Charters, colonial slave laws that were merely contrary to the English common or statute law would be deemed invalid. In the Southern colonies, the colonial laws could conceivably have had to pass the higher standard of repugnancy. On the more general question of how the Charters were perceived in the colonies themselves, it has been noted that 'the conformity clauses came to be seen by Americans in the 18th century as an assurance that the settlers enjoyed the same rights and liberties as English people who had never left the realm'[76]. Of related value is the observation that the American colonies not only adopted and then began to adapt the common law substance, but that by the 1650s the common law institutions of civil and criminal juries, rules of inheritance, and procedures akin to the common law writs, could be observed in the colony of Virginia[77], the first province to have a constituting Royal Charter.

By the time of the *Somerset* decision, it was clear that the Privy Council was able to disallow colonial statutes that violated the provisions of their constituting Royal Charters. Further to this, Attorney Generals of England, including a pre-peerage Lord Mansfield[78], had issued opinions or statements supporting the proposition that colonial laws that were indeed repugnant to the principles of the English common law would not be binding. The same Yorke and Talbot as referred to above, as well as the Attorney General of Barbados in the early 18th century, also issued opinions in favour of this view[79].

It has been argued that, in part because of the power held by the West India Interest in the corridors of power in Westminster, had the question of the validity of the colonial slave regulations reached the Privy Council, the court would have been reluctant to declare slavery illegal with a simple articulation of the supremacy clauses of the Royal Statutes[80]. There is no doubt a good deal of plausibility in this claim. Further, it ought to be noted that, given the ad hoc quality of the Privy Council's decisions as regarded the colonies, in large part due to the difficulty of disseminating the substance of their decisions, the ability of the Council to fundamentally reshape colonial law was in reality fairly limited[81]. Indeed, in the wake of the

[76] Hall, *American Legal History: Cases and Materials* (1996), at 24
[77] Nelson, *The Common Law in Colonial America 1607-1660* (2008), at 16
[78] Chalmers, *Opinions of Eminent Lawyers on Various Points of English Jurisprudence* (1858), at 341
[79] Ibid, at 333 and 373
[80] Wiecek at 113
[81] Langbein, *History of the Common Law: The Development of Anglo-American Legal Institutions* (2009), at 878-879; and, Ross, *Legal Communications and Imperial Governance: British North America and Spanish America Compared*, 1 Cambridge History of Law in America, at 104

Somerset decision, it was the colonial courts in the northern American colonies, most notably Massachusetts, that took up the issue of *Somerset*'s implications on colonial law.

That the *Somerset* case and decision was well-reported and known about in the colonies is evidenced at least in part by the occurrence of freedom suits, brought by black slaves, in the years immediately subsequent to the decision. Whilst these cases were unreported, a letter from the time describes how the arguments of the slaves in such suits would be of a two-pronged nature: firstly, it would be asserted that there was no positive law legitimising the institution of slavery in the colony of Massachusetts, and secondly, that the *Somerset* decision rendered slavery contrary to the common law of England, and given the status of the Royal Charter in Massachusetts, this entitled the slave to be freed[82]. Another letter, found in the same collection of Jeremy Belknap, a clergyman and historian of north-east America in the second half of the 18th century, declares that these suits were uniformly successful in the state of Massachusetts[83]. In 1836, the Chief Justice of the Supreme Court of the state suggested, no doubt on the back of the history of these freedom suits, that *Somerset* had had the impact of abolishing slavery in the state[84].

The impact of the decision across the other American colonies is far from clear. That it was known about, we can be sure of. The Virginia Gazette on June 30th 1774 contains a plea from a slave-owner, whose slave had fled, for the return, and included the warning that the slave may have been trying 'to get on board some vessel bound for Great Britain, from the knowledge of the determination in *Somerset*'s case'[85]. It can be implied from this apparent necessity of getting to England in order for the slave to reap the benefits of the *Somerset* decision that at least the prevailing view in Virginia was that the decision did not have the effect of abolishing the institution of slavery. Newspapers in the South also contained reports of the case itself, but evidence of attempts by slaves to utilise the decision, and the success or failure of any such attempts, have not emerged, if they ever existed.

We do find a couple of contemporaneous contributions to the debate which advance what, at least to this writer, appears to be the soundest interpretation of how the law in the colonies ought to have responded to *Somerset*. In a 1773 introduction to Granville Sharp's *Essay on Slavery*, the view was posited that, because slavery was inconsistent with the 'the principles of the [English] constitution, neither in England or any of the colonies, is there one law directly in favour of, or enacting slavery, but only a kind of side-wind, admitting its existence, and [attempting] its regulation'[86]. This 'advanced position'[87] appears to comport with the interpretations of the decision in *Somerset* and substance of the Royal Charters that have been outlined above. The 'side-wind' of which the writer speaks are the so-called 'black codes', which set out regulations for the administration and practice of slavery, but did not on their face make an explicit statement of its legality. Indeed, the only norm that the research for this paper has turned up that one might conceivably argue has the status of a true 'positive law' of the kind Lord Mansfield spoke comes from the Fundamental Constitutions of Carolina, enacted in 1669. It is stated there that 'every freeman of Carolina shall have absolute power and

[82] Letter from EA Holyoke to Jeremy Belknap, from: Belknap, *Letters and Documents Relating to Slavery in Massachusetts* (published in 1877)
[83] Letter from Samuel Dexter to Jeremy Belknap, 1795
[84] *Commonwealth of Massachusetts v Aves* (1836), 35 Mass. 193, at 209
[85] Virginia Gazette, June 30th 1774, page 3, column 1
[86] Sharp, *An Essay on Slavery* (1773), introduction. The introduction itself is anonymous
[87] Wiecek,at 116

authority over his negro slaves, of what opinion or religion so ever'[88]. Even this, however, has more the character of a regulation, stating the powers that fall within an already implied institution of slavery, rather than an explicit statement of the legitimacy of said institution. If we are to avoid distorting the statements of Lord Mansfield's judgement, it is such an explicit statement that we ought to regard as the threshold for overturning the presumption that he outlines.

A very similar point was made by Richard Wells, from Philadelphia, in 1774, who wrote a pamphlet in which he argued that 'by the laws of the English constitution, and by our own declaration, the instant a negro sets his foot in America, he is as free as if he had landed in England'[89]. Further, the American abolitionist Lysander Spooner made this very argument, that by virtue of *Somerset* and the Royal Charters slavery had been illegal in the American colonies since 1772, in *The Unconstitutionality of Slavery*, published in 1845. Spooner further noted that, since the American Constitution incorporated the English common law into the new American Republic, this impact of *Somerset* had not simply evaporated following the War of Independence[90].

Indeed, the view that the American Revolution marked a clean break[91] from the 18th century past of incorporating the English common law has more recently been largely debunked, with the consensus view being that the independent USA continued the approach of the colonies of adapting the adopted institutions and doctrines of the common law. Given that slavery was not a doctrine present in the common law at any point during the prior two hundred years of British colonisation of America, and in the absence of any express addition of such a doctrine to American law, it follows that the institution had no legitimacy on a purely legal level, as well as clearly lacking legitimacy of a moral variety[92].

Of course, statements such as this make an assumption that the correct interpretation of the law will be applied by the courts, and that they will not be swayed instead by political or practical considerations. In truth, it was always unlikely that the decision of a court in England would have the practical impact of abolishing an institution which, especially in the south, had become a fundamental part of the culture and economy of the American colonies. That is not to say, however, that the institutions were correct to deem that *Somerset* did not have this impact. In theory, as has been advanced above, it ought to have had just this implication. Of course, the question of the higher burden potentially imposed by the Royal Charters of the southern American colonies could be raised as an objection to the normative force of *Somerset* in Georgia and the Carolinas, but such an argument should be quickly rebuffed. If anything is repugnant to the statement that 'the state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral and political; but only positive law'[93], then it is surely the continued practice of slavery absent such a positive law, as continued to be the case in those parts of the USA that persevered with the institution.

Conclusion

[88] The Fundamental Constitutions of Carolina, March 1st 1669, at 110
[89] Wells, *A Few Political Reflections Submitted to the Consideration of the British Colonies* (1774), at 82
[90] Spooner, *The Unconstitutionality of Slavery* (1845), Chapter III 'The Colonial Charters'
[91] See: Pound, *The Formative Era of American Law* (1938)
[92] This distinction is important if we are to accept the positivist view that questions of moral rightness or wrongness do not enter into the class of sources of law for determining the legal validity of a norm, in the vein of HLA Hart (*The Concept of Law*), and Raz (*The Authority of Law*)
[93] *Somerset v Stewart*, at 510

It goes without saying, of course, that Lord Mansfield's decision in *Somerset v Stewart* did not have the practical effect of abolishing slavery in the American colonies. The horrors of the 'peculiar institution' so treasured in the southern United States would continue until the Civil War and the 13th Amendment, nearly a century later. Other than in Massachusetts, any claim to the contrary would be at best entirely speculative, and at worst downright false, depending on which province of the Thirteen Colonies one was discussing. As a descriptive claim, the statement that *Somerset v Stewart* abolished slavery in the American colonies by virtue of the supremacy clauses of the Royal Charters, therefore, has no weight, and can be immediately dismissed. However, the conclusion to which the foregoing analysis directs us is instead of a normative nature. Whilst it did not in practice have this effect (no doubt in part because the American Revolution in 1776 only gave the decision 4 years to truly take root), given the best reading of the holding of *Somerset* as articulated earlier, and the nature of the colonial Royal Charters, the decision *ought* to have abolished slavery in the American colonies. That it did not is not only a human tragedy, but also a failure of the nascent American legal system to apply the law demanded by the established sources of legal validity. As stated above, the approach of the newly founded United States was to incorporate the English common law as it has operated before the revolution. In the large part, this was carried out without controversy, and this makes the ignoring of Lord Mansfield's decision more striking. *Somerset* created a legally valid norm, applicable in the American colonies, that the institution of slavery was illegitimate in the absence of explicit positive law to the contrary. That this did not take affect should be seen as a failure not only of moral justice, but also of legal justice.

From the Sabine Women to the International Criminal Court: the development of international criminal law prohibiting sexual crimes in armed conflict

Nicholas Fryer*

Abstract

This article focuses on the development of international criminal law prohibiting rape and other sexual crimes in conflict, from its origins in military codes through to its current manifestation in the International Criminal Court (ICC). Despite progress over the last 100 years in this area, the ICC is yet to live up to its promise and it may only be possible via national prosecutions to address alleged sexual crimes in conflicts such as Syria.

Introduction

The award of the 2018 Nobel Peace prize to Denis Mukwege and Nadia Murad for their work responding to sexual violence in armed conflict has drawn attention to efforts to end this scourge of war. Sexual violence in conflict has a long history, going back at least to the forced abduction of the Sabine women in Rome.[1] Efforts to counter sexual violence in conflict in the centuries since have culminated today in 155 states signing a Declaration of Commitment to End Sexual Violence in Conflict.[2] Yet sexual violence continues in conflicts globally. Given this persistence, the question is how international criminal law has developed in this area and to what extent it allows the prosecution of these acts. This article considers in turn the pre-20th century context, the trials following both World Wars, the ad hoc tribunals after the Cold War and the International Criminal Court. Finally, an analysis of efforts to prosecute allegations of sexual crimes in a contemporary conflict, the Syrian civil war, will examine the efficacy of different means of addressing these crimes. Overall, while the increasing focus on prosecuting sexual crimes is a positive development it may not be not well-placed to respond to allegations arising from ongoing conflicts such as that in Syria.

Before the 20th Century: Prohibition of crimes against women in military codes

Before the twentieth century, prohibitions of sexual crimes in conflict were most prominent in the military codes, though they feature to a lesser extent in international tribunals and international law. While there are scant examples of international tribunals prosecuting individuals for offences during armed conflicts prior to the 20th century, the first international prosecution for rape was that of Peter von Hagenbach in 1474. Hagenbach was tried in Breisach by judges from several states of the Holy Roman Empire for offences committed as governor of Burgundy, in a context comparable to belligerent occupation. He was found guilty despite the defence he put forward of following orders

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[1] Livy, *The Rise of Rome Books 1-5.* trans. Luce TJ (Oxford: Oxford University Press, 1998): 14-15.
[2] McVeigh, K, "Hague hails 'tremendous start' to sexual violence scheme set up with Jolie", *The Guardian* 23 Nov 2018, accessed at http://www.theguardian.com/global-development

from his superiors and was executed.[3] His trial is the only example of an international tribunal prosecuting rape as a crime in conflict before the twentieth century.

Prohibitions of sexual crimes in military law codes were more widely used than international tribunals to counter sexual violence in conflict before the twentieth century. Such prohibitions date back to the ordinances Richard II gave his army in 1385, which ordered soldiers not "to force any woman, on pain of being hanged" (Article III).[4] The code formed the basis for English military regulations for the remainder of the Hundred Years war and later.[5] This prohibition was not, however, widely accepted in medieval warfare, as the predominant attitude was that the opportunity to rape was a positive inducement for soldiers alongside looting.[6]

Prohibitions against sexual crimes featured in other European military law codes in the early modern period. In the 1621 Codes of Articles of King Gustavus Adolphus, it stated that any soldier who coerced any woman, abused her and had this proved against him would be killed (Article 85).[7] A further example is King James II's Articles of War of 1688, which stated that "Whoever shall force a Woman to abuse her (whether she belong to the Enemy, or not) and the fact be sufficiently proved, shall suffer Death for it" (Article XXXIII).[8] These codes simply punished individual soldiers for crimes against women.

Sexual crime was not absent from the fundamental developments in international law in this period either, featuring in Gentili's De Jure Belli (1598) which states in language that today might be seen as demeaning towards victims (as the only person dishonoured by sexual crime is the perpetrator), "to violate the honour of women will always be held to be unjust".[9] Similarly, Grotius stated in The Rights of War and Peace (1625) "this should be observed among Christians, not only as a Part of military discipline, but as a Part of the Law of Nations…that whosoever ravishes a Woman, tho' in Time of War, deserves to be punished in every Country".[10] Grotius' work had real influence on the battlefield, so much so that it was said that Gustavus Adolphus slept with a copy of *The Rights of War and Peace* under his pillow while leading his military campaigns.[11]

More recently, rape was prohibited in the United States military code under Article 2 of Order No.20 (1847) supplement to the US Rules and Articles of War, a prohibition which featured in the 1863 Lieber Code of the United States.[12] The latter made rape an offence punishable by death and was very influential as it served as a model for other major military powers including France, Prussia, Russia and Great Britain.[13]

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[3] See Gordon G S, "The Trial of Peter von Hagenbach: Reconciling History, Historiography and International Criminal Law" in Heller, K and Simpson, G, eds, *The Hidden Histories of War Crimes Trials* (Oxford: Oxford University Press, 2014): 13-49.
[4] Winthrop W, *Military Law and Precedents* (Washington: War Department, 1920): 904.
[5] Keen, M., "Richard II's Ordinances of War of 1385" in Archer, RE and Walker, S, eds, *Rulers and Rules in Late Medieval England: Essays Presented to Gerald Harris* (London: Hambledon Press, 1995): 34.
[6] Brownmiller, S, *Against Our Will: Men, Women and Rape* (Open Road Media: 2013): 35.
[7] Trans and printed in Ward, "Animadversions of Warre" (London, 1639) and printed in Winthrop, W, *op. cit.*: 912
[8] Winthrop, W, *op. cit.*: 924.
[9] Gentili, *De Jure Belli, Lib. II,* cap. xxi (Carnegie trans. 1933, 251, 257) in Green, LC *The Contemporary Law of armed conflict* (Manchester: Manchester University Press, 2008): 32.
[10] Grotius, H, Tuck, R, *The Rights of War and Peace: Book III* (Indianapolis: Liberty Fund, 2005): 1301.
[11] Morris, S.R., "The Laws of War: Rules by Warriors for Warriors" *The Army Lawyer* Dec 1997: 5.
[12] Khushalani, Y, *Dignity and Honour of Women as Basic and Fundamental Human Rights 3* (1982): 4 cited in Askin, K D, *War Crimes Against Women: Prosecution in International War Crimes Tribunals* (The Hague: Kluwer Law International, 1997): 34.
[13] Articles 44 and 47 of "General Orders No. 100: The Lieber Code: Instructions for the Government of Armies of the United States in the Field" accessed at http://avalon.law.yale.edu/19th_century/lieber.asp and Green, LC, *op. cit.*: 37.

Before the 20th century then, prohibitions against sexual crimes in armed conflict had limited recognition in international law and negligible enforcement, primarily existing in military codes imposed by states on their soldiers. Sexual crimes in conflict were conceived of in terms of rape as an offence directed against women, rather than the broader spectrum of crimes recognised today. Prohibitions focused on individual acts of soldiers, rather than the broader concept developed in the 20th century of those in positions of power being held responsible for the actions of those whom they commanded.

The aftermath of World Wars - a nascent norm

The first half of the 20th century was a formative era in international criminal law with the introduction of the Hague and Geneva Conventions and the Nuremberg and Tokyo tribunals. However, efforts to prohibit sexual crimes in conflict in the period had limited success.

Treaties to regulate conflict such as the Hague Conventions of 1899 and 1907 did little to develop international law concerning sexual crimes. Rape and other sexual crimes were omitted from them, with the closest approximation a loose interpretation of Article 46 requiring "respect for family honour and rights". The article neither defines "family honour" nor clearly prohibits sexual crimes.[14]

Following the First World War limited steps were taken to acknowledge rape as a crime of war. At the Preliminary Peace Conference of 1919, a Commission was created to investigate breaches of the laws and customs of war. When the Commission presented its report, it recommended investigation of crimes allegedly committed by the Central Powers' forces, including rape and forced prostitution.[15] In spite of these recommendations, no international tribunals occurred. This is despite Article 227 of the Treaty of Versailles allowing the Allies to try the Kaiser and the German government recognising the Allies' right "to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war" (Article 228).[16] In fact, bar a few exceptions, German nationals were exclusively tried in their national courts in the "Leipzig trials", with rape not being charged.[17] Following the conflict, it was only in the 1919 Ottoman Special Military Tribunal to prosecute the Armenian genocide that rape was prosecuted. It was included in the Key Indictment of Ittihad Party leaders, Central Committee Members and government ministers, who were found guilty of committing massacres of Armenians. Despite the initial intention of the Allies in the Peace of Sèvres to try those responsible for the massacres, this was never included in the successor Treaty of Lausanne.[18] As a result, no international trials prosecuted sexual crimes following the First World War, with these crimes only being tried in national courts in the Ottoman empire.

Following the Second World War there was a similar absence of sexual crimes in the International Military Tribunals of Nuremberg and Tokyo. While these tribunals were foundational events in international criminal law, their Statutes included neither rape nor sexual crimes. At Nuremberg the French and Soviet prosecutors introduced evidence of rape to establish war crimes and crimes against humanity, but rape was not mentioned in the judgment.[19] It is unsurprising that rape was neither

[14] Inal, T, *Looting and Rape in Wartime: Law and Change in International Relations* (Philadelphia: University of Pennsylvania Press, 2013): 61.
[15] "Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties" *The American Journal of International Law* Vol 14, No 1/2 (Jan-Apr 1920): 114.
[16] Accessed at http://avalon.law.yale.edu/imt/partvii.asp
[17] Bassouni, C, *Crimes Against Humanity: Historical Evolution and Contemporary Application* (Cambridge: Cambridge University Press, 2011): 655-658 and Neuner, M, "When Justice is Left to the Losers: The Leipzig War Crimes Trials" in Morten, B, Cheah WL, Yi, P, eds, *Historical Origins of International Criminal Law: Volume 1*, FICHL Publications Series No.20 (2014): 333-377.
[18] Balint, J, "The Ottoman State Special Military Tribunal for the Genocide of the Armenians. Doing Government Business" in Heller, K and Simpson, G, *op. cit.*: 83-4, 89, 91.
[19] Goldstone, RJ, "Prosecuting Rape as a War Crime", *Case Western Reserve Journal of International Law* (2002): 279.

included in the Nuremberg Statute nor mentioned when the issue of victor's justice is considered, as among the nations trying the alleged war criminals was the USSR, whose soldiers had raped an estimated 2 million women when advancing into Germany.[20] Personnel from other Allied nations were also implicated in rape in the war,[21] meaning that any attempt at Nuremberg to prosecute Nazi leaders for sexual crimes committed by their forces would have been open to accusations of hypocrisy. This may be one reason for the absence of rape as a crime in both the Nuremberg Statute and the court's judgment.

In the Far East, the first war crimes trial was that of General Yamashita by a US Military Commission in Manila and this trial did represent a step forward in prosecuting sexual crimes. The Commission found that Yamashita had "unlawfully disregarded and failed to discharge his duty as commander to control the operations of members of his command, permitting them to commit brutal atrocities and other crimes". These crimes were particularised as including rape,[22] a significant step in international recognition of rape as a crime in conflict. The Yamashita trial included one of the first articulations of command responsibility,[23] which has since become one of the primary means of prosecuting war crimes in international law.

Further recognition of rape as a crime in war came with the International Military Tribunal for the Far East (IMFTE), or Tokyo tribunal. At Tokyo, Japanese civilians and military personnel including Generals Matsui and Toyoda and former Foreign Minister Hirota were charged with rape as an offence, specifically for failing to carry out their duty to ensure their subordinates complied with international law.[24] The indictment listed rape of female prisoners by Japanese soldiers, contrary to Article 4 of Annex D of the Hague Conventions, rape of female nurses and rape of large numbers of inhabitants of occupied territories. [25] Yet no victims of rape were called to give evidence. In its judgement, the tribunal acknowledged the approximately 20,000 rapes committed during the "Rape of Nanking", but did not consider the Japanese Army practice of using "comfort women", a euphemism for sex slaves.[26] Following the Yamashita trial, the Tokyo tribunals marked an important step in international prosecution of rape as a crime in war, though this was hampered by the exclusion of victims and of the crime of sexual slavery.

On a non-international level, other developments after the Second World War went further to establish the prohibition of sexual crimes in conflict. In Batavia, a Netherlands tribunal found Japanese military defendants guilty of war crimes such as rape, coercion to and abduction for prostitution because they had enslaved Dutch women and girls as comfort women.[27] This represents a much broader conception of what constituted sexual crimes than that apparent up to this point in international criminal tribunals.

A broader conceptualisation of sexual crimes in conflict was also evident in the tribunals held by the occupying powers in Germany after 1945. Council Control Law No.10 established the jurisdiction

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[20] Beevor, A, "They raped every German female from eight to 80" *The Guardian*1 May 2002 accessed at https://www.theguardian.com/books/2002/may/01/news.features11

[21] Askin, K D, *op. cit.*: 50, 52, 59.

[22] *Law Reports of Trials of War Criminals* Vol IV (London: UN War Crimes Commission, 1948): 3-4 and 33-34 accessed at https://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-4.pdf

[23] Cassese, A, Acquaviva, G, Fan, M, Whiting, A, *International Criminal Law: Cases and Commentary* (Oxford: Oxford University Press, 2013): 422.

[24] Meron, T, "Rape as a Crime under International Humanitarian Law", *The American Journal of International Law* Vol 87, No 3 (Jul, 1993): 426 and de Than C, Shorts, E, *International Criminal Law and Human Rights* (London: Sweet & Maxwell, 2012): 348.

[25] Appendix D to the Full Indictment of the IMFTE, Sections 1, 5 and 12, from the G Carrington Williams Papers in the University of Virginia Law Library, accessed at: http://imtfe.law.virginia.edu/collections/carrington-williams/1/3/full-indictment

[26] Goldstone, RJ, *op cit:* 279.

[27] Gutman, R, Rieff, D, eds, *Crimes of War: What the Public Should Know* (London: WW Norton & Co, 1999): 328.

of military tribunals in Allied Occupation zones in Germany and included rape under Article II(1)(c) concerning crimes against humanity. This was the first time rape had been explicitly considered a crime against humanity in the founding document for a tribunal.[28] Yet rape was absent from the indictments in the 13 Council Control Law trials.[29] However, other sexual crimes were prosecuted. In the *RuSHA* Case, forced abortion was included as a crime against humanity under Count 1 of the indictment (para 2 (b) and para 12),[30] which two defendants were found guilty of alongside other offences, receiving prison sentences of 25 years each.[31] While the other offences on the indictment, such as punishment of intercourse with a German or hampering the reproduction of enemy nationals might or might not be considered sexual crimes today, forced abortions would be, as they were included in the definition of sexual crimes in the Trial Chamber judgement in the *Kvočka* case at the International Criminal Tribunal for the Former Yugoslavia (2001).[32] Thus the Far Eastern and non-international tribunals were more responsible than the Nuremberg tribunals for developing the prohibition on sexual crime in international law.

The move towards recognising rape as a specific crime against humanity in international law was reflected in its inclusion in 1949 in Geneva Convention (IV), relative to the Protection of Civilian Persons in Time of War. Under Article 27, it states: "Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault." This provision was added following a proposal by the International Women's Congress and the International Federation of Abolitionists[33] and focuses on women as victims of sexual crimes. It was reaffirmed in 1977 in Additional Protocols I and II to the Geneva Conventions, which relate to international conflicts including occupations (under Article 76) and to the Protection of Victims of Non-International Armed Conflicts (under Article 2(e)). However, under Article 146 of the Convention, rape and sexual crimes are not grave breaches which require the provision for effective penal sanctions from signatories if committed.[34] Thus, while rape and sexual crimes were recognised as violations of international law in the period, they were not considered the most serious crimes.

Although the first half of the 20th century was a watershed in developing international criminal law, with the Hague and Geneva Conventions and the Nuremberg and Tokyo Tribunals, this was not the case for prosecuting sexual crimes in conflict. Efforts to combat these crimes developed more slowly. Rape and some other sexual crimes were prosecuted in this period primarily by national courts in a small number of cases concerning female victims. Rape was explicitly established as a crime in international treaties and legislation, but to a limited extent. Nevertheless, this provided a legal framework for the prosecution of sexual crimes, which would be built upon after the Cold War by the ad hoc tribunals and International Criminal Court, leading to a far greater number of successful prosecutions.

The ad hoc Tribunals – Prohibition in word and deed

[28] Erb, NE, "Gender-Based Crimes under the Draft Statute for the Permanent International Criminal Court" *Columbia Human Rights Law Review* 29 (1998): 409.
[29] For the US cases, see *Nurnberg Military Tribunals: Indictments* accessed at https://www.loc.gov/rr/frd/Military_Law/pdf/NT_Indictments.pdf
For a summary of the French case, see de Than, C, Shorts, E, *op. cit.*: 122.
[30] Case No. 8, The USA v Greifelt, U & others: 5, 9-10, accessed *supra* note 29.
[31] "The RuSHA Case", *Trials of War Criminals Before the Nuernberg Military Tribunals*, Volume V (Washington, 1950): 109-112, 116-125, sentencing at 166, accessed at: http://loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-V.pdf
[32]Case: IT-98-30/1-T, Prosecutor v Kvočka and others (2001), note 343, accessed at http://www.icty.org/x/cases/kvocka/tjug/en/kvo-tj011002e.pdf
[33] Geneva Conventions of 1949 and Additional Protocols and their Commentaries, accessed at https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp
[34] Solis, GD *The Law of Armed Conflict: International Humanitarian Law in War* (New York: Cambridge University Press, 2016): 340.

The creation of the ad hoc tribunals of the International Criminal Tribunal for the former Yugoslavia (ICTY) in 1993 and the International Criminal Tribunal for Rwanda (ICTR) in 1995 marked a sea change in efforts to prosecute sexual crimes in international criminal law. This trend was furthered by the Special Court for Sierra Leone (SCSL) and to a lesser extent the Extraordinary Chambers in the Courts of Cambodia (ECCC), both of which use both international and domestic law.

As the first ad hoc tribunal, the ICTY had concerns about sexual crime incorporated from the outset, with its founding UN Security Council Resolution 827 listing rape in the conflict as 'causing grave alarm'.[35] The intent to address sexual crime in the ad hoc tribunals was apparent from the start, as rape was included as a crime against humanity in the Statutes of both the ICTY and ICTR (under Articles 5(g) and 3(g) respectively).[36] The ICTRSt explicitly states under Article 4 that rape and enforced prosecution are considered violations of common Article 3 to the Geneva Conventions underlining the growing acknowledgement of sexual crimes in international criminal law.

Despite such statutory developments, inclusion of sexual offences in indictments in the two Tribunals at times only occurred due to the pressure exerted by amicus briefs by women's rights groups. This was the case in *Tadić* (1996) which marked the first testimony given of rape as a war crime and led to the defendant's conviction for sexual crimes against men and women.[37] These included sexual mutilation constituting cruel treatment as a violation of the laws or customs of war recognised in Article 3(1)(a) of the Geneva Conventions and as a crime against humanity in the form of an inhumane act.[38] Judges have also argued for the inclusion of rape charges in indictments where there is evidence but the Prosecutor omitted them, as in *Dragan Nikolic* (2003).[39] External pressure and an amicus brief were also required in a landmark ICTR case, *Akayesu* (1998) where rape charges were added over a year after the initial charges.[40] The focus on sexual offences in these tribunals owes much to the efforts of women's groups and judges, showing that statutory inclusion alone is not enough.

There has been criticism of the limited number of rape charges at the ICTY.[41] However, as of September 2016, 48% of those indicted by the Tribunal faced charges of sexual crimes and 32 individuals were convicted of either superior or direct responsibility for them, receiving prison sentences.[42] Whereas this may pale compared to the scale of sexual violence in the conflict, it marks a step-change from the trials following the Second World War. In the ICTR, prosecution of sexual crime was less successful, with 7 convictions in 52 cases involving sexual offences as of January 2014.[43]

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[35] United Nations Security Council Resolution 827, 25 May 1993 accessed at: http://www.icty.org/x/file/Legal%20Library/Statute/statute_827_1993_en.pdf

[36] http://www.icty.org/en/documents/statute-tribunal and http://unictr.irmct.org/sites/unictr.org/files/legal-library/941108_res955_en.pdf

[37] de Than, C, Shorts, E, *op. cit.:* 363.

[38] Case No IT-94-1-T, Prosecutor v Tadic (1997): paras 194-244 and 722-30 accessed at http://www.icty.org/x/cases/tadic/tjug/en/tad-tsj70507JT2-e.pdf.

[39] de Than, C, Shorts, E, *op. cit.*: 360.

[40] Ibid*:* 354.

[41] Ibid*:* 346.

[42] "Crimes of Sexual Violence: In Numbers" accessed at http://www.icty.org/en/features/crimes-sexual-violence/in-numbers

[43] "Statistics from the ICTR's Rape and Sexual Violence Cases", Annex B, *Prosecution of Sexual Violence: Best Practices Manual for the Investigation and Prosecution of Sexual Violence Crimes in Post-Conflict Regions: Lessons Learned from the Office of the Prosecutor for the International Criminal Tribunal for Rwanda* (2014) accessed at: http://www.irmct.org/sites/unictr.org/files/legal-library/140130_prosecution_of_sexual_violence.pdf

In spite of these issues, the ad hoc tribunals' jurisprudence regarding rape has been ground breaking, broadening the definitions of rape and other sexual offences in international criminal law.[44] This may have been due to the scale of rape in both conflicts, putting pressure on judges to provide "a comprehensive and undisputed definition of the crime, which left very little room for future adjustments".[45] This began with *Akayesu*, in which the Trial Chamber judgement provided the first definition of rape in international law. In this, it aimed to avoid a mechanical description and drew on the approach in the UN Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment by not focusing on specific acts. The Court stated that rape could be torture if inflicted with the consent or acquiescence of a public official or other person acting in an official capacity. Its definition of rape was "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive". This fell under a broader concept of sexual crime which "is not limited to the physical invasion of the human body and may include acts which do not involve penetration or even physical contact".[46] The Court stated that rape could be a genocidal crime, marking the first conviction for genocide since the passing of the Genocide Convention in 1948. This elevated rape to the level of the gravest crimes under international law.[47] This is particularly significant as an obstacle to charging genocidal rape is the difficulty of proving ulterior or specific intent, ie that the act was committed pursuant to the destruction of a national, ethnic, racial or religious group.[48]

While the *Akayesu* definition was used in the ICTY case of *Delalić and others* (1998),[49] the definition was developed in the ICTY case of *Furundžija* (1998), where the Trial Chamber also referred to national law to define rape as:

(i) The sexual penetration, however slight,
(a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or
(b) of the mouth of the victim by the penis of the perpetrator;
(ii) By coercion or force or threat of force against the victim or a third person.[50]

Furundžija developed the law on sexual crime in that the defendant was found guilty of rape despite not having touched the victim. Instead, the defendant had interrogated her over a period of days while another soldier, who he was not superior to, raped her repeatedly.[51]

In the ICTY case of *Kunarac, Kovac and Vukovic* (2001) the Trial Chamber further developed the *Furundžija* definition, surveying national definitions. They concluded that "the basic principle…truly common to these legal systems is that serious violations of sexual *autonomy* are to be penalised. Sexual autonomy is violated wherever the person subjected to the act has not freely agreed to it or is otherwise not a voluntary participant." The Trial Chamber thus developed *Furundžija* definition, replacing part (ii) of the above definition with where (i) occurs "without the consent of the victim". The Court added the mens rea of "the intention to effect this sexual penetration, and the knowledge it occurs without the consent of the victim". Regarding coercion, the

[44] Aloisi, R, Meernik, J, *Judgment Day: Judicial Decision Making at the International Criminal Tribunals* (Cambridge: Cambridge University Press, 2017): 43, 193.
[45] Ibid: 110.
[46] Case No. ICTR-96-4-T, The Prosecutor v Akayesu (1998), paras 687-8 accessed at http://unictr.irmct.org/sites/unictr.org/files/case-documents/ictr-96-4/trial-judgements/en/980902.pdf
[47] Aloisi, R, Meernik, J, *op. cit.:* 12, 43.
[48] de Than, C, Shorts, E, o*p. cit.:* 355.
[49] Cassese, A, Gaeta, P, Baig, L, Fan, M, Gosnell, C, Whiting, A, *Cassese's International Criminal Law* (Oxford: Oxford University Press, 2013): 97.
[50] Case No. IT-95-17/1-T, Prosecutor v Anto Furundžija (1998), para 185 accessed at http://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf
[51] Solis, GD, *op. cit.*: 341-2.

judgement stated that threatening or using force may be evidence that there is not "genuine and freely given consent or voluntary participation", a finding confirmed on appeal.[52] This marks an important development in war crimes and crimes against humanity cases, where context may play a role in coercing victims.[53] In the prior case of *Delalić and others*, the Trial Chamber judgement had stated that coercion is inherent in situations of armed conflict.[54] Jurisprudence by the ad hoc tribunals regarding rape did not lead to extensive controversy or deliberation by the chambers, though this may be due to a paucity of cases and similarity in those which went to trial.[55] The tribunals helped establish an effective definition of rape in international law.

Beyond definitions, the ICTY recognised victims' needs in crimes, with the ICTR Rules of Procedures 69 and 75 allowing evidence to be given *in camera* or by one-way CCTV, with pseudonyms and anonymisation of voices and photos, and the redaction of witness identities from transcripts. Questions about the past sexual history of a victim were not permitted and a Victims and Witnesses Unit was created.[56] This more comprehensive approach to victims of sexual crimes sharply contrasts their absence from the Tokyo trials.

A further development outside these tribunals was in the SCSL, established in 2002, which convicted Charles Taylor in 2012 for the crimes against humanity of aiding and abetting and planning rape and sexual slavery. This was the first conviction by an international tribunal of a former head of state for sexual crimes.[57] The SCSL judgement in the *Brima* case (2007) was also significant as it equated forced marriage with sexual slavery as a crime against humanity (under Article 2(g) of the SCSL Statute).[58] More recently, in the ECCC in Case 002/02, a conviction of forced marriage as a crime against humanity was made.[59]

The ad hoc tribunals and the hybrid courts in Sierra Leone and Cambodia marked a meaningful change in combatting sexual crimes through international criminal law. They were the first international tribunals to include sexual crimes in their Statutes, prosecute these crimes, engage victims and define rape and other crimes. This institutionalisation went beyond previous concepts to acknowledge a wider range of offences and that victims can be of any gender. Nevertheless, these tribunals were intentionally temporary, responding to specific situations. Full and permanent institutionalisation of sexual crimes in international criminal law would only come with the ICC.

ICC - Permanent Institutionalisation

The ICC's creation in the Hague in 2002 under the Rome Statute constituted the first permanent international tribunal for trials of crimes of aggression, crimes against humanity, genocide and war crimes, including sexual crimes. Under the Rome Statute[60] Article 7, crimes against humanity include

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[52] Cases: IT-96-23-T & IT-96-23/1-T, Prosecutor v Kunarac, Kovac and Vukovic (Trial Chamber) [2001], paras 457-460 accessed at http://www.icty.org/x/cases/kunarac/tjug/en/kun-tj010222e.pdf
and the same (Appeals Chamber) [2002]: 133 accessed at http://www.icty.org/x/cases/kunarac/acjug/en/kun-aj020612e.pdf
[53] Cassese, A, et al, *supra* 23: 194.
[54] Case IT-96-21-T, Prosecutor v Delalić & Delić (1998), 496, accessed at: http://www.icty.org/x/cases/mucic/tjug/en/981116_judg_en.pdf
[55] Aloisi, R, Meernik, J, *op. cit.:* 109-10.
[56] de Than, C, Shorts, E, *op. cit.*: 356.
[57] See http://www.rscsl.org/Taylor.html and Case No. SCSL-03-01-T: Prosecutor v Taylor (2012): para 6994 (a) iv and v and (b) iv and v, accessed at http://www.rscsl.org/Documents/Decisions/Taylor/1283/SCSL-03-01-T-1283.pdf
[58] Case No. SCSL-2004-16-T, Prosecutor v Brima & others (2007): para 711, accessed at http://www.rscsl.org/Documents/Decisions/AFRC/613/SCSL-04-16-T-613s.pdf
[59] Summary of Judgement Case 002/02 (2018): Paras 39-41, 71-2 accessed at https://www.eccc.gov.kh/en/document/court/summary-judgement-case-00202-against-nuon-chea-and-khieu-samphan
[60] Rome Statute of the International Court accessed at https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf

the following, when committed as part of a widespread or systematic attack directed against a civilian population, with knowledge of the attack:

> (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

And under Article 8(2)(b)(xxii) in an international armed conflict, war crimes include the above, except that the final clause concerns "any other form of sexual violence also constituting a grave breach of the Geneva Conventions". Under the same article at (e) the same wording applies to non-international armed conflicts except that instead of a grave breach the wording is "a serious violation of article 3 common to the four Geneva Conventions". Thus, the Statute elevates sexual crimes to the highest level of international crime. The importance of the words "any other form" in these cases is that the range of crimes is not closed and expand to include other humiliating conduct common in some conflicts, such as enforced masturbation or forced nudity.[61] The Statute is clear under Article 10 that the "Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute", leaving open the potential for further development of the law.

Outside the Statute each crime has had its elements outlined, meaning that sexual crimes have been codified. Although the Statute was intended to codify international law rather than to develop it, there was pressure from the Women's Caucus for Gender Justice to ensure that the deficiencies they perceived in treaty law were remedied by drawing on customary international law.[62] The definition of rape in the ICC Elements of Crime is broader and less focused on offences perpetrated by men against women, as it involves penetration, however slight, "of any part of the body of the victim or of the perpetrator with a sexual organ".[63] This broader conception of sexual crime addresses sexual crimes committed against men in conflict, something which has occurred throughout history, though to a lesser extent than sexual crimes against women.[64] This broader approach builds on the conviction of the first woman for rape as a crime against humanity under ICTR, in *Nyiramashuko* (2001).[65] Under the ICC Elements of Crimes, genocide by causing serious bodily or metal harm has also been broadly defined as potentially including conduct such as rape.[66] The Elements of Crime additionally suggests that rape can be committed as the crime against humanity of persecution, something which will likely to lead to further developments in international law in this area. [67]

Under the Rome Statute, victims of sexual crime receive similar support to that under ICTY. The Statute requires the Office of the Prosecutor (OTP) to appoint one or more advisers with legal expertise on sexual and gender violence (Article 42(9)), and the Victim and Witnesses Unit must include staff with expertise dealing with trauma related to crimes of sexual violence (Article 43(6)). In addition to provisions for vulnerable victims giving evidence they may benefit in future from the Court's ability to award compensation.[68]

The OTP has highlighted the importance of sexual crime by making one of its strategic goals since 2012 to "Enhance the integration of a gender perspective in all areas of our work and continue to pay

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[61] Sivakumaran, S, *The Law of Non-International Armed Conflict* (Oxford: Oxford University Press, 2014): 267.
[62] de Than, C, Shorts, E, *op. cit.*: 377.
[63] https://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf p.8 (Article 7 (1)(g)-1 1.)
[64] Sivakumaran, S, "Sexual Violence Against Men in Armed Conflict" *The European Journal of International Law* Vol 18 No 2 (2007): 257-9.
[65] Jurasz, O, "Gender-based crimes at the ICC- where is the future?" *Proceedings of the Annual Meeting American Society of International Law* Vol 108, The Effectiveness of International Law (2014): 429.
[66] *Supra* 63; Article 6(b)1, note 3.
[67]Aloisi, R, Meernik, J, o*p. cit.:* 66.
[68] de Than, C, Shorts, E, *op. cit.*: 381.

particular attention to sexual and gender based crimes".[69] In 2014 the OTP issued a Policy Paper on Sexual and Gender-Based Crimes,[70] demonstrating the prominence of these issues for its Prosecutor, Fatou Bensouda.

Although the OTP has shown this focus and must investigate sexual offences under the Statute (Article 54 (1)(b), it has failed in prosecuting them. Despite issuing arrest warrants or making charges for sexual crimes in 14 of its 28 cases to date, there have been no convictions of sexual crimes. In *Lubanga* (2011), the first ICC conviction, no charges of sexual crimes were made, ignoring widespread evidence provided by NGOs. Despite no evidence being introduced in court of such offences, references to them were included in the Prosecutor's opening and closing submissions, a discrepancy highlighted by the judges.[71] The 2016 conviction of Jean-Pierre Bemba, the first by the ICC for rape, was overturned on appeal in 2018, as command responsibility had not been properly established.[72] However, at the time of writing, the decision of the Trial Chamber on 15 January 2019 to acquit Laurent Gbagbo and Charles Blé Goudé of crimes against humanity including rape (and other forms of sexual violence in Blé Goudé's case) may still be appealed, once a written judgement is issued.[73] A judgement is also awaited in *Ntaganda*, where the defendant faces war crimes and crimes against humanity charges including sexual crimes. The trial of *Ongwen* also includes charges of war crimes and crimes against humanity involving sexual crimes and is ongoing. Charges including sexual crimes are to be confirmed in May 2019 against Al-Hassan Ag Abdoul Aziz Ag Mohamed Ag Mohamed. Therefore, successful prosecutions may soon be forthcoming. Significantly, 8 individuals have either had charges of sexual crimes against them dropped or have been acquitted, while 8 individuals are at large with outstanding arrest warrants for sexual crimes issued between 2005 and 2012.[74] Thus, prosecutions of sexual crimes form a large proportion of the ICC caseload, but the obstacles to prosecution are lack of evidence and inability to arrest suspects, which the ICC relies on states to do. While the ICC may be criticised for limited progress prosecuting sexual crimes, bringing perpetrators to justice can only be done with the cooperation of states. It is true that prosecution of rape is challenging without control of the territory where the investigations would take place and the custody of suspects, as exemplified in Nuremberg and Tokyo, but the situation was the same for the ICTY, which did successfully convict many of sexual crimes.[75]

Despite mitigated success in prosecuting sexual crimes, the ICC represents an important institutional progression in codifying and broadening the concept. The duty it places on the prosecutor to investigate these crimes and its inclusion of victims are positive features of its approach. The Prosecutor has certainly placed emphasis on prosecuting sexual crimes in policy and in the cases pursued, but due to issues partly beyond their control, they have neither been able to bring all the cases to trial nor to secure convictions. In practice, the ICC has yet to deliver on its institutional promise through actual convictions for sexual crimes in conflict.

Present and Future – the limits of the ICC and the challenge of conflicts like Syria

[69] International Criminal Court, Office of the Prosecutor, *Strategic plan June 2012-2015* (Oct 2013): 17, para 32.3 and *Strategic Plan 2016-2018* (Nov 2015): 6, both accessed at https://www.icc-cpi.int/about/otp/Pages/otp-policies.aspx
[70] International Criminal Court, Office of the Prosecutor, *Policy Paper on Sexual and Gender-Based Crimes* (Jun 2014) accessed at https://www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf
[71] Jurasz, O, *op. cit.*: 430
[72] Case No ICC-01/05-01/08 A, Situation in the Central African Republic in the Case of The Prosecutor v Jean-Pierre Bemba Gombo (2018): paras 2-11, accessed at https://www.icc-cpi.int/CourtRecords/CR2018_02984.PDF
[73] "Statement of the ICC Prosecutor, Fatou Bensouda, following the conditional release of Mr Gbagbo and Mr Blé Goudé", 1 Feb 2019, accessed at https://www.icc-cpi.int/Pages/item.aspx?name=190201-otp-stat-gbagbo
[74] Based on case summaries published on https://www.icc-cpi.int/Pages/cases.aspx
[75] de Than, C, Shorts, E, *op. cit.*: 360.

Given this background, the question is what the future holds for the prosecution of sexual crimes in international criminal law. A case study of the difficulties in prosecuting sexual crimes in the Syrian conflict reveals some of the issues facing the ICC. There are allegations of widespread sexual crimes being committed in the conflict,[76] but Syria is not a party to the ICC. Therefore, unless Syria submits itself voluntarily to ICC jurisdiction, the only way that the Prosecutor could investigate would be through a referral by the UN Security Council under Rome Statute Article 13(b). This was vetoed by China and Russia in 2014.[77] Nevertheless, in December 2016 the UN General Assembly established the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under the International Law Committed in the Syrian Arab Republic since March 2011 (IIIM).[78] The IIIM gives special attention to sexual crimes and has reported twice to the General Assembly, including on the challenges facing their investigations.[79] The IIIM may thus be an important foundation for future prosecutions of sexual crimes.

In terms of prosecutions for grave crimes in the Syrian conflict, the only successful approach has been the use of universal jurisdiction to try Syrians in Sweden and Germany. The availability of universal jurisdiction in these countries coincides with them having received the highest number of asylum applications from Syrians of any European country between April 2011 and July 2017.[80] Challenges to such prosecutions remain, particularly the obstacle that ongoing conflict poses to access to potential crime scenes. This approach is also only open to countries with truly universal jurisdiction and the only other European country with this is Norway. Of those convictions secured by this approach, as of March 2018, none were for sexual crimes.[81]

The challenges in bringing perpetrators of sexual crimes in Syria to justice are symptomatic of the political challenges which often prevent prosecutions of the worst crimes in conflict. Selective justice is not new and there have been many conflicts in the twentieth century where there was no ability to bring perpetrators to justice due to difficulty of investigation and great power influence. To expect the ICC not to be subject to the same geopolitical calculus which governs other international institutions would be unrealistic.

While the creation of the ICC has been a significant advance in prosecuting sexual crimes, it will not be effective at addressing these crimes in every conflict. Different institutional and legal approaches tailored to the circumstances of each conflict are required.

Conclusion

The limitations of the ICC in being able to investigate a current conflict such as Syria and its limited progress in prosecutions for sexual crimes to date should not be reasons to doubt the efficacy of the overall project. The passage of time may lead to successful convictions for sexual crimes by the ICC and opportunities to investigate and prosecute allegations of sexual crimes in Syria. Considered in the broader sweep of history, there has been substantial progress in the century since the report to the

[76] See "'I lost my dignity': Sexual and gender-based violence in the Syrian Arab Republic", Conference room paper of the Independent International Commission of Inquiry on the Syrian Arab Republic, 8 Mar 2018, accessed at https://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/A-HRC-37-CRP-3.pdf

[77] "'These are the Crimes we are Fleeing' Justice for Syria in Swedish and German Courts", Human Rights Watch, Oct 2017: 1, accessed at: https://www.hrw.org/report/2017/10/03/these-are-crimes-we-are-fleeing/justice-syria-swedish-and-german-courts

[78] A/Res/71/248 Resolution adopted by the General Assembly on 21 Dec 2016 accessed at http://undocs.org/A/RES/71/248

[79] Reports by the Secretary-General to the General Assembly on 28 Feb 2018: para 23 accessed at http://undocs.org/en/A/72/764 and on 3 Aug 2018: V.G.1. accessed at http://undocs.org/en/A/73/295

[80] *Supra* 77: 18-19.

[81] Ibid: 16.

Preliminary Peace Conference in 1919 recommended investigation of alleged rapes, without result. In many instances since then, progress has only been assured through the efforts of non-governmental women's groups and through the critical questioning of judges. When the international community has shown limited will, sexual crimes in conflict have been prosecuted in national courts. The lesson is clear that international criminal law approaches to addressing these crimes will not work in every circumstance. International tribunals do not exist in a vacuum, but instead are actors in a constellation of global and national tribunals that may be used. In this, they will be influenced by state actors, non-governmental organisations and individuals.

In the century since 1919, sexual crimes have been recognised within international criminal law as crimes against humanity and war crimes and a possible element of genocide. Sexual crime is no longer seen as simply involving rape of women by men but includes a broader range of crimes, whose perpetrators and victims may be any gender. Former heads of state and senior military and political figures have been convicted for not doing more to prevent these offences and a permanent international court has been created with a prosecutor under a duty to investigate them, in a process that includes victims. The contrast is stark. While challenges remain, achievements to date prohibiting sexual crimes in conflict through international criminal law augur well for continued progress in bringing the perpetrators of these abominable crimes to justice.


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European Counterterrorism Policy after the Caliphate: Repatriating and Prosecuting ISIS Fighters and Families

Genevieve Zingg*

Abstract

Thousands of foreign fighters have travelled to Iraq and Syria in recent years to join the self-proclaimed caliphate of the Islamic State of Iraq and Syria (ISIS). Nearly a fifth are nationals of Western European countries, with particularly large numbers hailing from France, the United Kingdom, Belgium, and Germany. Now, as ISIS crumbles and loses territory, dozens of its Western members have successfully returned home or sought repatriation while hundreds more are being held in makeshift prisons by Kurdish forces in northern Syria.

This paper will examine the complicated legal questions surrounding the repatriation and prosecution of ISIS fighters and their families, paying particular attention to the stateless children born under ISIS rule. Using a human rights framework, I will first conduct a comparative analysis of current policies adopted by the aforementioned European countries. I will subsequently assess challenges to prosecution in domestic courts and analyze the possibility of establishing an ad hoc international criminal tribunal to try ISIS fighters. Ultimately, I argue that the refusal of Western countries to repatriate jihadist nationals on the basis of counterterrorism and national security violates the fundamental right to a fair trial and is therefore a breach of international human rights law.

List of Acronyms

AMT	*Association de malfaiteurs en relation avec une entreprise terroriste*
CAT	Convention Against Torture
CEDAW	Convention for the Elimination of Discrimination against Women
CoE	Council of Europe
CRC	Children's Rights Convention
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
HRW	Human Rights Watch
ICAT	International Court Against Terrorism
ICC	International Criminal Court
ICCPR	International Covenant for Civil and Political Rights
ICCT	International Centre for Counter-Terrorism - The Hague
ICSR	International Centre for the Study of Radicalisation & Political Violence

ICT	International Criminal Tribunal
IHL	International Humanitarian Law
ISIS	Islamic State of Iraq and Syria
KRG	Kurdistan Regional Government
OHCHR	UN Office of the High Commissioner for Human Rights
SDF	Syrian Democratic Forces
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNAMI	UN Assistance Mission for Iraq
UNHCR	United Nations High Commissioner for Refugees
UNSC	United Nations Security Council
UK	United Kingdom

Introduction

Since its rise in the aftermath of the 2003 invasion of Iraq and subsequent Iraqi insurgency, the Salafi jihadist militant group known as the Islamic State of Iraq and Syria (ISIS) has attracted thousands of Western and European nationals to its ranks.[1] The International Centre for the Study of Radicalisation and Political Violence (ICSR) estimates that approximately 20,000 foreign fighters have joined ISIS.[2] According to the European Union (EU) Counterterrorism Coordinator, Gilles de Kerchove, more than 5,000 members of ISIS are Western European nationals who travelled to Iraq and Syria to join the so-called *caliphate* carved out across the Levant.[3] In recent months, ISIS has crumbled under repeated offensive assaults from a variety of regional and international armed forces, currently controlling only 1% of the territory it had only four years ago.[4] Though there is much debate over whether ISIS will regroup sufficiently to pose a substantial threat in the future, it is clear that the group's power has waned from what it was at the height of its power.

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[1] The group known as the Islamic State of Iraq and Syria (الدولة الإسلامية ad-Dawlah al-Islāmiyah) has a lengthy and complex history dating back to the formation of Jama'at al-Tawhid wal-Jihad in Jordan in 1999. This article will refer primarily to ISIS under the leadership of Abu Bakr al-Baghdadi, from the period 2010 to present, as opposed to its early forms between 1999-2010.

[2] These numbers are "conflict totals," which estimate the total number of foreign fighters that have joined ISIL. ICSR estimates that between 5 to 10% of these foreigners have already died and that 10 to 30% of these individuals have left the conflict. *See* Peter R. Neumann, Foreign fighter total in Syria/Iraq now exceeds 20,000; surpasses Afghanistan conflict in the 1980s, International Centre for the Study of Radicalisation and Political Violence http://icsr.info/2015/01/foreign-fighter-total-syriairaq-now-exceeds20000-surpasses-afghanistan-conflict-1980s

[3] So far as European authorities are aware, to date more than 1,500 of the 5,000 who left to join the Islamic State in Iraq and Syria have already returned to their home countries in the EU. This figure includes approximately 400 returnees to the United Kingdom (UK), 271 to France, and 300 to Germany. For more information, *see* Salacanin, S. "How will Europe deal with returning Islamic State group?" *The New Arab.* June 28, 2018. https://www.alaraby.co.uk/english/indepth/2018/6/28/how-will-europe-deal-with-returning-is-fighters

[4] "After the caliphate: what next for IS?" *BBC*. 27 November 2018.

With ISIS facing looming demise, its members from Western and European states have reconsidered their future in the caliphate. Of the 5,000 European nationals who joined ISIS, nearly 30% have already returned to the EU, while approximately 14% are confirmed dead and 47% remain abroad.[5] The majority of those who remain in Iraq and Syria have been detained by the predominantly Kurdish Syrian Democratic Forces (SDF), as the latter steadily recaptures territory from ISIS. As a non-state militia with limited resources and insecure detention facilities, the SDF has repeatedly requested that Western and European countries repatriate their detained nationals for the purposes of arrest and prosecution. The SDF is currently holding approximately 1,100 ISIS members in seven makeshift prisons in northeast Syria, along with 2,000 wives, children, and other family members of the fighters in three other guarded camps.[6] Several hundred detainees are European nationals[7], many of whom have publicly pleaded to be returned home. Perhaps most notable is the recent case of Shamima Begum[8], a 19-year-old British national who joined ISIS in 2015 and has now asked to bring her newborn son back to Britain, sparking considerable debate over the obligations of EU member states to former ISIS members.

EU member states have thus far refused to repatriate their detained nationals from Iraq and Syria, though the European response to repatriation is in a constantly evolving state of flux. The European position changed in February 2019 as a result of American President Donald Trump announcing an impending withdrawal of U.S. troops from Syria, as demonstrated by a major policy reversal in Paris. Concerned that French ISIS suspects will now be released by the Kurdish SDF as a result of the American decision to withdraw military and financial support, France is now reportedly planning to repatriate 130 detained nationals in the coming weeks.[9] According to Christophe Castaner, France's Interior Minister, the suspected jihadists will be subject to prosecution upon their return: "All those who will return to France will be entrusted to the judges. The judge will decide that it will be necessary to put them in prison."[10] The policy reversal makes France the first western European country to agree to repatriate its citizens from Iraq and Syria.[11] Aside from this, of the forty-four countries with nationals suspected to have joined ISIS in Iraq and Syria, only Lebanon, Russia, Indonesia, Iraq, and Sudan have agreed to repatriate their nationals, with France joining the U.S. as the sole exception among Western countries.[12]

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[5] The whereabouts of the remaining 9% are unknown. *See* 'The Foreign Fighters Phenomenon in the European Union: Profiles, Threats & Policies,' International Centre for Counter-Terrorism - The Hague. January 2016. https://icct.nl/wp-content/uploads/2016/03/ICCT-Report_Foreign-Fighters-Phenomenon-in-the-EU_1-April-2016_including-AnnexesLinks.pdf

[6] Approximately 1,000 children are in the detention camps. *See* 'US Syria withdrawal highlights unresolved fate of SDF's ISIS prisoners', *The National*, January 9 2019, https://thenational.ae/world/mena/us-syria-withdrawal-highlights-unresolved-fate-of-sdf-s-isis-prisoners-1.811135

[7] Savage, C. "As ISIS fighters fill prisons in Syria, their home nations look away." *New York Times.* July 18, 2018. https://www.nytimes.com/2018/07/18/world/middleeast/islamic-state-detainees-syria-prisons.html

[8] 'Shamima Begum: I didn't want to be IS poster girl,' *BBC News*. February 18, 2019. https://www.bbc.co.uk/news/uk-47276572

[9] Up to 1,700 French nationals are thought to have travelled to Iraq and Syria to fight with the IS group between 2014-2018, according to French government figures. *See* France 'to repatriate 130 suspected Isil members from Syria' over security concerns, *The Telegraph*, january 29, 2019, available at: https://www.telegraph.co.uk/news/2019/01/29/france-repatriate-130-suspected-isil-members-syria-security/

[10] *Ibid.*

[11] *Ibid.*

[12] "US Syria withdrawal highlights unresolved fate of SDF's ISIS prisoners," *The National*. January 9, 2019. https://thenational.ae/world/mena/us-syria-withdrawal-highlights-unresolved-fate-of-sdf-s-isis-prisoners-1.811135

On the grounds of legitimate national security concerns and poor public opinion towards repatriation, Western European countries have generally taken three approaches to suspected terrorist nationals in Iraq and Syria. First, several EU member states have responded by supplementing domestic legal frameworks in order to ensure the successful arrests and prosecutions of ISIS fighters upon re-entry, or in order to facilitate the prosecution of suspected terrorist nationals in absentia. Second, some EU member states, most notably the UK, have begun stripping suspected ISIS nationals of citizenship, thus effectively absolving themselves of any legal responsibility for the individual. Other EU governments have openly suggested a preference for their nationals to be killed on the battlefield rather than returned home for trial and prosecution. Overall, however, the most common response among European countries has been inertia and refusal to engage in active repatriation and prosecutorial efforts.

The lack of a coherent strategy and organised European response to the issue is inadequate with respect to security policy and certainly controversial from the perspective of international humanitarian and human rights law. The issue of returnees is only in its infancy, with the Italian National Anti-Mafia Directorate predicting another 10,000 foreign terrorist fighters to travel through the Balkans to return to Western European countries in the coming years.[13] It is therefore highly necessary for the EU to develop a sufficient response that balances the urgent need to hold perpetrators of international crimes to account while complying with fundamental human rights obligations under international law.

A growing body of scholarship has addressed the policy considerations relevant to the issue of European ISIS members, largely focusing on the potential security risks posed by returnees. A related body of literature has examined the criminal justice options for suspected terrorist returnees, considering whether 'deradicalisation' programs and rehabilitative approaches are preferable to punitive criminal justice sanctions. A similar degree of attention has been paid to the concerning issue of children in the caliphate, particularly those born there, and to what extent the best interests of the children should factor into repatriation policies and the prosecutions of their parents. However, there is a striking lack of literature examining the issue of European ISIS members and the reluctance to repatriate them using a human rights framework, with a seemingly tacit understanding among Western European countries that the national security impetus of the state outweighs the individual rights ISIS members are entitled to as citizens.

This paper aims to contribute to the existing literature by analysing the human rights implications of the current counterterrorism laws and policies EU member states have adopted towards the issue of ISIS returnees. This paper will focus on those rights impacted most heavily by the current policies: the right to life and the right to be free from torture and cruel, inhuman, or degrading treatment or punishment; the right to fair trial, which encompasses due process guarantees and the right not to be charged retroactively; and the right to citizenship and nationality. Finding that the current situation violates the aforementioned rights, this paper will then briefly assess the possibility of establishing a hybrid international criminal tribunal in order to try ISIS members and deliver justice to the victims of ISIS crimes.

[13] "10,000 foreign fighters returning to Europe: What can be done to stop them?" *Al Arabiya.* December 13, 2017. http://english.alarabiya.net/en/News/world/2017/12/13/10-000-foreign-fighters-returning-to-Europe-What-can-be-done-to-stop-them-.html

Definitions

Terrorism scholarship unfortunately suffers from the lack of an accepted definition for the term and concept of 'terrorism'. Indeed, noted terrorism expert Walter Laqueur once found more than 100 definitions of terrorism used throughout the literature.[14] While a fuller interrogation of 'terrorism' is beyond the scope of this paper, it is necessary to briefly discuss the equally complex terms and definitions frequently used in discussions of ISIS fighters, members, and sympathisers.

In much of the existing scholarship analysing the present subject, people who travelled from elsewhere to voluntarily live under ISIS rule in Iraq and Syria are generally referred to as 'foreign terrorist fighters' or 'foreign fighters.' For example, the International Centre for Counter-Terrorism - The Hague (ICCT), a leading authority on the topic, relies on the definition of 'foreign fighters' advanced by de Gultry, Capone and Paulussen (2016), which is used to describe "individuals, driven mainly by ideology, religion, and/or kinship, who leave their country of origin or their country of habitual residence to join a party engaged in an armed conflict."[15]

However, the popular use of the terms 'foreign terrorist fighters' and/or 'foreign fighters' to return to returnees from ISIS territory is worryingly misleading. Such terms obscure the critical distinctions between different types of returnees, namely combatants and non-combatants, and particularly fail to encapsulate the complicated role of women and children returnees. The need to accurately distinguish between the groups is paramount, as combatants and non-combatants are treated significantly differently under international humanitarian law (IHL). In the context of ISIS, the characterization of men as combatants and women and children as non-combatants is generally accurate, but it is important to emphasize that there is not necessarily a clear division between the aforementioned groups. The lines between groups are particularly blurry in the case of children, usually boys, who are trained and deployed as active ISIS combatants. As has been the case with other radical militant groups, for example Boko Haram and Al Shabaab, young boys often occupy a dual role as victim and perpetrator, posing a sensitive problem to criminal justice.

Another question is raised by those who participate in non-violent roles fundamental to ISIS crimes. A driver who picks up the components of a suicide vest or a mechanic who offers expertise regarding the making of a car bomb, or perhaps less clearly, a propagandist who sits in an office and takes no part in violence personally but incites others to do so. In modern warfare, the distinction between combatants and non-combatants is increasingly unclear, and counterterrorism law and policy continues to struggle with how best to approach non-violent members of terrorist groups. This issue was perhaps most famously exemplified in the case of Salim Hamdan, who worked as a driver for Osama bin Laden.

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[14] Walter Laqueur, *The New Terrorism: Fanaticism and the Arms of Mass Destruction*, New York: Oxford University Press, 1999.

[15] A. de Guttry, F. Capone and C. Paulussen, 'Introduction', in *Foreign Fighters under International Law and Beyond*, T.M.C. Asser Press/Springer Verlag: The Hague 2016.

Given these legal complexities, this paper will not employ the commonly used terms 'foreign terrorist fighter' or 'foreign fighter.' Instead, it will use the broader term 'returnees' to refer to both combatant and non-combatant European nationals returning from ISIS territory in Iraq and Syria. Similarly, it will employ the broader term 'detainees' to refer to those European nationals currently being held in Iraq and Syria.

Current European Policies towards Repatriation and Prosecution of ISIS returnees

To date, the EU has failed to adopt any clear collective policy or joint strategy towards the repatriation and prosecution of ISIS returnees. Instead, the patchwork policies that have emerged generally comprise three principal approaches to the issue. First, most member states have refused to repatriate their nationals but have amended domestic counterterrorism legislation so as to facilitate the arrest and prosecution of ISIS returnees upon re-entry to the country of their own accord, or in order to prosecute them in absentia prior to their return. Second, some EU member states, most notably the UK, have passed legislation enabling the government to strip nationals and dual nationals of citizenship, thus casting off any legal responsibility for their repatriation and prosecution. On the whole, most EU member states have adopted a policy of inaction, seemingly content to leave their nationals to be either killed, tried, or tortured in Iraq and Syria.

This section will briefly review the current policies European member states have adopted towards EU nationals suspected of joining ISIS in Iraq and Syria. Particular attention will be paid to the policies of the United Kingdom (UK), France[16], Belgium[17], and Germany[18], the four European member states with the largest per capita numbers of nationals currently in or recently returned from ISIS territory.

Domestic, regional and international legal frameworks

While the EU has been slow to develop a coordinated repatriation policy, the bloc has made stronger progress establishing the legal framework necessary to prosecute returnees. This process was first initiated at the international level in August 2014, when the United Nations Security Council (UNSC) first made reference to the phenomenon of 'foreign terrorist fighters' in Resolution 2170. The legally binding resolution called upon UN member states "to take national measures to suppress the flow of foreign terrorist fighters...and bring them to justice."[19] In Resolution 2178, passed the following month, the UNSC defined 'foreign terrorist fighters' as "individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with armed conflict."[20] The Resolution required in paragraph 6 that member states criminalize in their national laws and

[16] According to former president Francois Hollande, at least 700 French nationals have left the country to join ISIS.
[17] Among EU member states, Belgium has the highest per capita number of nationals who have travelled to ISIS territory in Iraq and Syria. Belgian authorities reported in 2014 that at least 300 individuals had travelled to Syria to participate in terrorist activities.
[18] More than 960 people have left Germany since 2012 to join ISIS.
[19] UNSC Res. 2170 of 15 August 2014, available at: http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2170(2014).
[20] UNSC Res. 2178 of 24 September 2014, available at: http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2178(2014)

regulations, as serious criminal offences, "(attempted) travel, fundraising and the organisation (or other facilitation, including recruitment) of the travel of foreign terrorist fighters."[21]

In May of the following year, the Council of Europe (CoE) Committee of Ministers followed the lead of the UNSC by adopting the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism, a regional response known as the Riga Protocol.[22] With a mind to the impending return of ISIS fighters and their families, the Riga Protocol criminalised a range of relevant terrorism offences including participating in an association or group for the purpose of committing terrorism (Article 2), receiving training for terrorism (Article 3), travelling abroad for the purpose of terrorism, including attempting to do so (Article 5), and organising or otherwise facilitating travelling abroad for the purpose of terrorism (Article 6).[23]

The European Parliament further considered a series of directives and resolutions aimed at combating terrorism, with a view towards updating the regional framework on criminalising terrorist offences and harmonising the criminalisation of foreign fighter-related offences.[24] As noted at paragraph 26 of the European Parliament resolution of 11 February 2015 on anti-terrorism measures, the EU was cognizant of major issues including poor cross-border cooperation, prosecutorial gaps, and practical and legal challenges hindering the gathering and admissibility of evidence in terrorism cases.[25] A week after the Paris attacks perpetrated by ISIS members in November 2015, the EU Justice and Home Affairs Council called for an update the Framework Decision on Combating Terrorism before the end of 2015 in order to collectively implement into EU law UNSC Resolution 2178 and the Riga Protocol.[26] By the end of the year, the European Commission published a proposal criminalising a broader range of 'terrorist activities' and expanding on several terror-related offences, including the receiving of training for terrorism, travelling abroad for terrorist purposes, and the organising, financing, or otherwise facilitating such travel.[27]

Many national jurisdictions have developed further legal frameworks and policies to deal with their jihad inclined citizens, both pre- and post- departure to terrorist groups in conflict zones. According to Human Rights Watch (HRW), since 2013 at least 47 countries worldwide have

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[21] UNSC Res. 2178, para. 6.
[22] The Riga Protocol entered into force on July 1, 2017.
[23] "Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism." Council of Europe Treaty Series - No. 217. Riga: October 22, 2015. https://rm.coe.int/168047c5ea
[24] Briefing - Combating terrorism. EU Legislation in Progress, European Parliamentary Research Service. September 2017.
http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/608682/EPRS_BRI(2017)608682_EN.pdf
[25] European Parliament resolution of 11 February 2015 on anti-terrorism measures (2015/2530(RSP).
http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2015-0032+0+DOC+XML+V0//EN para. 26.
[26] Council of the European Union, Outcome of the Council Meeting, 3432nd Council meeting, Justice and Home Affairs, Brussels, 20 November 2015, 14382/15, available at:
http://www.consilium.europa.eu/en/meetings/jha/2015/11/st14382_en15_pdf(1), para. 9.
[27] European Commission, 'Proposal for a Directive of the European Parliament and of the Council on combating terrorism and replacing Council Framework Decision 2002/475/JHA on combating terrorism', Brussels, 2 December 2015, COM(2015) 625 final, available at: http://eur-lex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:52015PC0625&from=EN.

enacted legal measures to criminalise a greater breadth of terror-related activities.[28] Most states have focused on preventative rather than responsive measures, with national counterterrorism laws and policies largely aimed at identifying and monitoring persons suspected of radicalisation and preventing terror-related travel. Indeed, in most European countries, planning to travel to a conflict zone is not in itself a criminalised activity, unless there are 'clear indications' that the individual aims to join a terrorist organisation, to commit crimes, or has already committed preparatory crimes.[29]

Of course, in order for such preventative approaches to be successful, governments require the powers necessary to identify ISIS-inclined nationals prior to departure to Iraq and Syria. To identify 'clear indications' of terror-related activity, governments have increasingly relied on widened powers of surveillance, monitoring, and detention. As Aksenova (2017) observes, the perceived extraordinary nature of the terrorism threat is used to justify extraordinary ways in which domestic legal systems fight against terrorism: "Concrete examples of the shifting focus of criminal justice systems in the fight against terrorism are restrictions on the freedom of movement, extended administrative detentions of terrorist suspects, employing the notion of conspiracy that criminalizes the agreement to commit terrorism rather than the act itself and the introduction of the broad legal categories such as 'material support of terrorism' or 'possession of materials likely to be used for terrorism'."[30]

Several countries have further relied on administrative measure, for instance administrative powers related to immigration or child protection, as supplementary counterterrorism tools. The Netherlands, for example, has drawn criticism from Amnesty International and other human rights organisations for increasingly using administrative measures as part of its counterterrorism policy, without the necessary safeguards for review and challenge.[31] While this paper focuses on the responsive measures adopted by EU member states in relation to repatriation and prosecution, preventative counterterrorism measures pose equally problematic issues under international human rights law and deserve continued scrutiny in order to ascertain their precise impacts on individual rights and freedoms.

A. Arresting and Prosecuting Returnees in EU Member States

Returning ISIS members pose a tripartite challenge to European criminal justice systems. First, there is the question of whether suspected combatants should be charged with 'ordinary' crimes of murder, rape, and so on, or with international crimes of genocide and crimes against humanity. Second, there is the formidable issue of evidentiary challenges to successful prosecutions in Europe. Finally, there is the issue of how to approach the return of non-

[28] Taylor, L. '"Foreign Terrorist Fighter" Laws. Human Rights Rollbacks Under UN Security Council Resolution 2178', Human Rights Watch, December 2016, https://www.hrw.org/sites/default/files/supporting_resources/ftf_essay_03feb2017_final_pdf.pdf

[29] Vidino, L. et al. "Foreign Fighters: An Overview of Responses in Eleven Countries." Center for Security Studies ETH Zurich. Zurich: March 2014. https://doi.org/10.3929/ethz-a-010144347

[30] Aksenova, M, "Of Victims and Villains in the Fight against International Terrorism." European Journal of Legal Studies. Vol. 10, No. 1, 2017, at p. 28.

[31] "The Netherlands: Excessive Immigration Detention, Ethnic Profiling and Counter-Terrorism Measures," Amnesty International Submission for the UN Universal Periodic Review - 27th Session of the UPR Working Group, May 2017. https://www.amnesty.nl/content/uploads/2017/05/EUR3554622016ENGLISH.pdf?x54649

combatants, who may not have directly committed any terror-related offences but may nonetheless have been radicalised and pose an uncertain security risk.

EU member states have responded to the threat of ISIS returnees by expanding the domestic legal architecture pertaining to terrorism and criminalising a broad range of terrorist-related activity. In the UK, while the act of travelling to Iraq and Syria is not in itself illegal, such travel is closely monitored and assessed by the British authorities on a 'case-by-case basis' in order to determine 'what each individual has done in Syria and if his or her actions constitute a violation of the country's Terrorism Act.'[32] The provisions of the 2006 Act are wide enough in scope to apply to most ISIS returnees even if their participation was allegedly limited to non-combatant roles, and even if evidentiary challenges render it impossible to charge the returnee with more serious crimes.

Indeed, the UK Terrorism Act 2006 created several controversial new offences, virtually all of which can be used to arrest and try ISIS returnees. Section 1 criminalises 'encouragement of terrorism', which includes the publication of statements which directly or indirectly encourage others to commit acts of terrorism or statements that 'glorify' terrorism[33], while section 2 criminalises 'dissemination of terrorist publications', which encompasses selling, loaning, sharing or otherwise disseminating publications that encourage terrorism or may be useful to terrorist activities.[34] These provisions may be particularly useful to try female ISIS returnees, who have generally been used as propagandists and recruiters.

ISIS returnees who allege non-combat roles within the militant group can be charged under sections 6 and 8 of the 2006 Act. Critically, section 6(2) of the UK Terrorism Act 2006 criminalises 'passive participation' in terrorism training as opposed to the actual plotting or perpetration of a particular terrorist act: "A person commits an offence if -- (a) he receives instruction or training in any of the skills mentioned in subsection (3)."[35] In turn, section 6(3) uses strikingly broad language to describe terrorism-related skills training: "The skills are - (b) the use of any method or technique for doing anything else that is capable of being done for the purposes of terrorism, in connection with the commission or preparation of an act of terrorism or Convention offence…"[36] Finally, Section 8 criminalises 'attending at a place', whether in the United Kingdom or elsewhere, where 'instruction or training is provided there wholly or partly for purposes connected with the commission or preparation of acts of terrorism or Convention offences…'[37], which may be broad enough to ensnare any ISIS returnee regardless of their specific role within the militant group. Section 129a of the German Criminal Code uses similarly broad language to punish terrorist offences, criminalising 'the formation of, participation in, or

[32] Frank Gardner, "What Triggers a Terrorism Arrest?" BBC, January 16, 2014. https://www.bbc.co.uk/news/uk-25753480
[33] United Kingdom: Terrorism Act 2006 [United Kingdom of Great Britain and Northern Ireland], 2006 Chapter 11, 30 March 2006. https://www.legislation.gov.uk/ukpga/2006/11/section/6
[34] *Ibid.*
[35] *Ibid.*
[36] *Ibid.*
[37] *Ibid.*

support for a terrorist organisation'[38] while in France the 2012 law *relative à la sécurité et à la lutte contre le terrorisme* (Law No. 2012-1432) allows investigative judges to prosecute individuals for passive participation in terrorism-related training camps abroad.[39]

France has adopted a particularly aggressive prosecutorial approach to ISIS returnees. The rising number of French nationals joining ISIS created a correlated trend towards tougher sentencing for terror-related offences in France, as was observed by Hecker (2018) in his recent study of jihadists before French courts: "The sentences given today are much more severe than several years ago...in the sample, the average fixed prison sentence increased from four years in 2014 (17 individuals) to four and a half years in 2015 (15 individuals), six and a half years in 2016 (34 individuals), and ten years in 2017 (30 individuals)."[40] The first French ISIS returnee was prosecuted in November 2014 and sentenced to seven years in prison for having spent ten days in Syria, while his brother was tried in 2017 and given the maximum sentence of ten years for the offence of *association de malfaiteurs en relation avec une entreprise terroriste* (AMT).[41] The French antiterrorism system is notable first in that it has specific procedural rules allowing for the use of special investigative techniques and second, in that all cases concerning terrorism are dealt with by specialised judges using specialised intelligence and investigation services adapted specifically to deal with terrorism.[42]

The Belgian government amended its federal terrorism legislation in the winter of 2013, incorporating several provisions designed to aid the successful prosecutions of returnees. The amendments introduced three new offences into the Belgian Criminal Code, including 'public provocation to commit a terrorist offence, recruitment for terrorism and training for terrorism.'[43]Article 140, paragraph 1 of the Belgian Penal Code criminalises participation in terrorist activities, which it defines as "anyone who participates in an activity of a terrorist group, including by providing it with information or material resources or through any form of financing of a terrorist group's activity, in the knowledge that such participation aids the commission of a crime or an offence."[44] Article 140, paragraph 4 further punishes any individual who provides terrorist instructions or training, while paragraph 5 criminalizes "any person who, in Belgium or abroad, receives instructions or training as referred to in Article 140, paragraph 4."[45] Belgium is also notable in that it tries defendants in their absence, a process known as trials

[38] Criminal Code in the version promulgated on 13 November 1998, Federal Law Gazette [Bundesgesetzblatt] I p. 3322, last amended by Article 1 of the Law of 24 September 2013, Federal Law Gazette I p. 3671 and with the text of Article 6(18) of the Law of 10 October 2013, Federal Law Gazette I p 3799.
[39] Loi n° 2012-1432 du 21 décembre 2012 relative à la sécurité et à la lutte contre le terrorisme; in English, Law No. 2012-1432 of December 21, 2012, Regarding Security and the Fight Against Terrorism. https://www.legifrance.gouv.fr/affichTexte.do;jsessionid=D46C1F96B91799303C3EA3CC818BE94A.tpdjo16v_1?cidTexte=JORFTEXT000026809719&dateTexte=20121222
[40] Marc Hecker, "137 Shades of Terrorism: French Jihadists Before the Courts." *Focus strategique,* No. 79 bis, April 2018. https://www.ifri.org/sites/default/files/atoms/files/hecker_137_shades_of_terrorism_2018.pdf
[41] *Ibid.*
[42] Committee of Experts on Terrorism: Profiles on Counter-Terrorism Capacity - France. Council of Europe: September 2013. https://rm.coe.int/1680641029
[43] Committee of Experts on Terrorism: Profiles on Counter-Terrorism Capacity - Belgium. Council of Europe: February 2014.
[44] *Ibid.*
[45] *Ibid.*

in absentia.[46] Interestingly, a proposal to criminalise travel to Syria to join ISIS, tabled by a Belgian special task force established by the minister of interior, was rejected by the core cabinet in 2013.[47] The proposal was rejected on the basis that it had limited deterrent effect, may discourage families from reporting on their relatives and approaching authorities for intervention and assistance, and would be difficult to enforce due to expected evidentiary issues.[48]

Of the total number of European nationals who joined ISIS in Iraq and Syria, approximately 17% have been women.[49] This varies by country, with approximately 32% of Dutch ISIS members being women compared to only 10-12% in Germany, Denmark, and the UK.[50] EU states vary in their perceptions of and approaches to female ISIS members, most of whom assumed non-combat roles as wives, child-bearers, and homemakers while others participated in 'morality enforcement', operating checkpoints, participating in home raids, and operating as recruiters, fundraisers, and propagandists.[51] In Belgium, according to a recent study by the Brussels-based Egmont Institute, female returnees 'as a rule' have not faced prosecution[52], whereas the Office of the German Federal Prosecutor has adopted a far more punitive approach to female returnees.[53] Recently, however, legislation changes adopted throughout Europe have created a policy of non-distinction between men and women.[54]

Similarly, EU member states vary widely in their approaches to child detainees in Iraq and Syria. On one end of the spectrum, Germany has taken a harsh approach to children returnees: German intelligence chief Hans-Georg Maassen has warned that children from ISIS strongholds 'have become so radicalised and identify so deeply with IS-ideology that, by all accounts, they must

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[46] Example are the Sharia4Belgium case from February 2015 (with 36 persons tried in absentia), see Europol, European Union Terrorism Situation and Trend Report (TE-SAT) 2016, https://www.europol.europa.eu/sites/default/files/documents/europol_tesat_2016.pdf, p. 19, and P. Cruickshank and T. Lister, 'Immense challenges remain despite arrests of terror suspects', CNN, 8 April 2016, http://edition.cnn.com/2016/04/08/europe/belgium-arrests-significance/index.html and the case involving the Verviers cell from July 2016 (with 9 persons tried in absentia), see Europol, European Union Terrorism Situation and Trend Report (TE-SAT) 2017, https://www.europol.europa.eu/sites/default/files/documents/tesat2017_0.pdf, 18.

[47] "Addressing the Foreign Terrorist Fighters Phenomenon from a European Union Perspective: UN Security Council Resolution 2178, Legal Issues, and Challenges and Opportunities for EU Foreign Security and Development Policy." Joint report by the Global Center on Cooperative Security, Human Security Collective, and the International Centre for Counter-Terrorism - The Hague. December 2014. https://www.icct.nl/download/file/Dec2014_EU-FTFS_GCCS_HSC_ICCT.pdf

[48] *Ibid*, 12.

[49] "The return of foreign fighters to EU soil: Ex-post evaluation." European Parliamentary Research Service Study, Ex-Post Evaluation Unit. May 2018. http://www.europarl.europa.eu/RegData/etudes/STUD/2018/621811/EPRS_STU(2018)621811_EN.pdf

[50] *Ibid*.

[51] Farahnaz Ispahani (2016) Women and Islamist Extremism: Gender Rights Under the Shadow of Jihad, The Review of Faith & International Affairs, 14:2 https://doi.org/10.1080/15570274.2016.1184445

[52] "The Homecoming of Foreign Fighters in the Netherlands, Germany, and Belgium: Policies and Challenges." *Egmont Institute*. April 12, 2018. http://www.egmontinstitute.be/the-homecoming-of-foreign-fighters-in-the-netherlands-germany-and-belgium-policies-and-challenges/

[53] *Ibid.*

[54] "How will Europe deal with returning Islamic State group fighters?" *Al Araby*. June 28, 2018. https://www.alaraby.co.uk/english/indepth/2018/6/28/how-will-europe-deal-with-returning-is-fighters

also be identified as jihadis.'[55] As a result of such perceptions, Germany has not indicated any intention to repatriate children from Iraq and Syria, though the government is 'watching the French case closely.'[56] Belgium, on the other hand, has adopted a policy of rehabilitation and reintegration towards children, making explicit its intention to immediately repatriate children under 10 years old and ensure that they remain with their parents, even during incarceration, or otherwise be placed in the custody of grandparents or specific childcare services.[57] Belgium has adopted a flexible approach to children between the ages of 10 and 18, maintaining that they should be dealt with on a 'case-by-case basis.'[58]

The legal complexities regarding the repatriation and prosecution of women and children are distinct, with the latter for example protected by specific provisions per the United Nations Convention on the Rights of the Child (CRC). Considerations impacting the repatriation, prosecution and sentencing of female ISIS returnees include a range of factors including pregnancy, domestic violence, role and activity within the caliphate, demonstration of remorse, or whether the woman is the sole caretaker of a child. While a more comprehensive analysis of these specific issues is beyond the scope of this paper, it is certainly worth highlighting the markedly complex legal regimes and relevant issues concerning female ISIS returnees and children that were brought to or born into the caliphate

Challenges to Prosecutions in National Jurisdictions

At both international and local levels, robust legal frameworks have been created and supplemented to apprehend ISIS returnees. However, thus far EU member states have achieved little success in bringing former ISIS members to justice. This was made clear in 2017, when Pieter Omtzigt, a Dutch Member of Parliament (MP) and the CoE Special Rapporteur on bringing ISIS to justice, requested that all CoE member states provide information on the number of prosecutions pursued against ISIS returnees within their respective jurisdictions. At the time, the number of prosecutions across all EU member states was strikingly low in comparison to the total number of returnees per country. In Belgium, for example, only seven of 47 returnees had even been arrested[59], while the British government admitted that of 350 returnees only 54 had faced charges.[60] This trend has continued into 2018, largely as a result of serious evidentiary challenges to successful domestic prosecutions.

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[55] "German intel chief warns of potential threat posed by wives, children of German jihadis." *DW.* March 12, 2017. https://www.dw.com/en/german-intel-chief-warns-of-potential-threat-posed-by-wives-children-of-german-jihadis/a-41630197

[56] "What is Europe's approach to repatriating ISIS members?" *Euronews.* February 16, 2019. https://www.euronews.com/2019/02/16/what-is-europe-s-approach-to-repatriating-isis-members-euronews-answers

[57] "The return of foreign fighters to EU soil: Ex-post evaluation." European Parliamentary Research Service Study, Ex-Post Evaluation Unit. May 2018. http://www.europarl.europa.eu/RegData/etudes/STUD/2018/621811/EPRS_STU(2018)621811_EN.pdf 48.

[58] "What is Europe's approach to repatriating ISIS members?" *Euronews.* Feb. 2019, https://www.euronews.com/2019/02/16/what-is-europe-s-approach-to-repatriating-isis-members-euronews-answers

[59] Lorenzo Vidino et al. "Foreign Fighters: An Overview of Responses in Eleven Countries." Center for Security Studies ETH Zurich. Zurich: March 2014. https://doi.org/10.3929/ethz-a-010144347

[60] Anthony Dworkin, "The problem with a "shoot-to-kill" policy on foreign fighters," European Council on Foreign Relations, December 13 2017, https://www.ecfr.eu/article/commentary_the_problem_with_a_shoot_to_kill_policy_on_foreign_fighters

The foremost challenge to domestic prosecutions in the EU is collecting enough evidence to convict. As EU Counter-Terrorism Coordinator Gilles de Kerchove stated: "Evidence from the battlefields in Syria and Iraq is difficult to obtain, collection and use of internet based evidence is challenging, cross-border legal cooperation is often necessary to get access to evidence (foreign fighters transit through other countries, internet providers might be located abroad), some information originates from security services, hence the challenges of using intelligence information in judicial proceedings arise."[61] In an effort to address evidentiary challenges to domestic prosecutions, the Dutch Public Prosecution Service opened criminal investigations against all 190 Dutch nationals still in Iraq and Syria in early 2017.[62] According to Ferry van Veghel, the Dutch national coordinating prosecutor, this was done in an effort to pre-empt the possibility that the Netherlands would find itself unable to prosecute returnees upon arrival back home: "Given the high risk of people who come back from this area, we do not want to wait until they come back before opening criminal investigations."[63]

In some cases, evidentiary challenges may be circumvented by using 'regular' or ordinary criminal law provisions to secure convictions against ISIS returnees rather than charging them with special terrorism offences. For example, in a landmark Dutch case in October 2013, the defendants Mohammed G. and Omar H. were convicted by the District Court of Rotterdam of preparatory acts for murder, an ordinary criminal offence under Dutch domestic law.[64] However, the major issue with reliance on non-terrorism offences is that it usually leads to light sentences that fail to reflect the full severity of the case[65], and has thus far primarily been successful when used as a preventative measure against EU nationals planning to travel to Iraq and Syria to join ISIS as opposed to prosecuting returnees for the full breadth of crimes committed.

The second issue with relying on national prosecutions of ISIS returnees is that such a piecemeal approach has lead to uneven sentencing between EU member states for crimes similar on the facts. The sentencing discrepancies can in part be traced to the wording of UNSC Resolution 2178, which requires that states establish serious criminal offences sufficient to prosecute and penalize terrorism-related offences 'in a manner duly reflecting the seriousness of the offence', but has left it to the discretion of the member states to determine the precise nature and scope of the relevant penalties.[66]

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[61] Council of the European Union, EU Counter-Terrorism Coordinator, 'Foreign fighters and returnees', 15715/14, 24 November 2014, available at: http://statewatch.org/news/2014/nov/eu-council-foreign-fighters-discussion-paper15715-14.pdf 3.

[62] "Dutch take legal action against jihadis while they are in Syria and Iraq." *Dutch News.* February 16, 2017. https://www.dutchnews.nl/news/2017/02/dutch-start-building-up-files-on-jihadis-while-they-are-in-syria-and-iraq/

[63] "Prosecute Dutch Jihadists Still in Syria, Iraq: Public Prosecutor." *NL Times*, 16 February 2017,: https://nltimes.nl/2017/02/16/prosecute-dutch-jihadists-still-syria-iraq-public-prosecutor.

[64] The 2013 decision against Mohammed G. is available at: http://www.internationalcrimesdatabase.org/Case/3294/Prosecutor-v-Mohammed-G The decisions against Omar H. are available at: http://www.internationalcrimesdatabase.org/Case/3292 (first instance), http://www.internationalcrimesdatabase.org/Case/3293 (appeal) and http://www.internationalcrimesdatabase.org/Case/3274 (cassation).

[65] UN Security Council, 'Letter dated 18 February 2015 from the Chair of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council. Annex: Bringing terrorists to justice: challenges in prosecutions related to foreign terrorist fighters', S/2015/123, 23 February 2015, available at: https://www.un.org/sc/ctc/wp-content/uploads/2015/09/S_2015_123_EN.pdf, para. 16.

[66] UNSC Resolution 2178.

B. Deprivation of Citizenship and 'Denationalisation' Policies

Perhaps having recognised the significant deficiencies of national prosecutions, even with the addition of broad new terrorism legislation, several countries have recently adopted policies of citizenship deprivation. Outside of the EU, Canada has implemented new citizenship laws that permit the government to revoke the citizenship of dual national suspected ISIS fighters[67] and Australia has even proposed revoking the nationality of close family members of suspected fighters, including spouses and children.[68] Within the EU, in the aftermath of 9/11 several member states decided that grounds for denaturalisation needed to be broadened in the context of the 'war on terror' and amended their laws accordingly, easing the ability of the government to revoke the citizenship of both naturalised and born citizens.[69]

Deprivation of citizenship or 'denationalisation' policies have been most notably used in the UK. Prior to 9/11, revocation powers had not been used in the UK since 1973.[70] According to a longstanding investigation conducted by the Bureau of Investigative Journalism, however, since 2010 the British government has 'dramatically escalated its use of secretive citizenship-stripping powers.'[71] In 2014, the British government amended the British Nationality Act 1981 in response to the *Al-Jedda* case, in which it had attempted to make a denationalisation order against Mr. Al-Jedda, an Iraqi citizen who had obtained British citizenship in 2000, on the basis of alleged terrorist activities.[72] The Supreme Court blocked the denationalisation order as it would have deprived Mr. Al-Jedda of his sole nationality and thus left him stateless.[73] The 2014 amendments to the British Nationality Act now allow the Home Secretary to deprive an individual of nationality 'where this is in the public good' due to 'conduct seriously prejudicial to the UK', even if such a policy renders the individual stateless.[74] According to a report released by the

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[67] "Canadian government begins invalidating passports of citizens who have left to join extremist groups." *National Post.* January 24, 2015. https://nationalpost.com/news/canada/canadian-government-revoking-passports-of-citizens-trying-to-join-extremist-groups

[68] "Children may lose Australian citizenship under proposed legislation," *The Guardian*, June 11, 2015, http://www.theguardian.com/australia-news/2015/jun/24/childrenmay-lose-australian-citizenship-under-proposed-legislation

[69] Shai Lavi, "Citizenship Revocation as Punishment: on the Modern Duties of Citizens and their Criminal Breach." *University of Toronto Law Journal*, Vol. 61, No. 4 (Fall 2011). https://www.jstor.org/stable/41429397

[70] Patrick Sykes (2016) "Denaturalisation and conceptions of citizenship in the 'war on terror'," *Citizenship Studies*, 20:6-7, https://doi.org/10.1080/13621025.2016.1191433, 750.

[71] Ross, Alice K., and Patrick Galey. 2013. "Rise in Citizenship-Stripping as Government Cracks down on UK Fighters in Syria." *Citizenship Revoked*. December 23. http://www.thebureauinvestigates. com/2013/12/23/rise-in-citizenship-stripping-as-government-cracks-down-on-uk-fighters-insyria/

[72] Sykes (2016) *supra* note 68, at 754.

[73] "Case Watch: UK Supreme Court Delivers Victory Against Statelessness in Al-Jedda Case." *Open Society Foundation.* October 8, 2013. https://www.opensocietyfoundations.org/voices/case-watch-uk-supreme-court-delivers-victory-against-statelessness-al-jedda-case

[74] This power is confined to naturalized citizens, must be reviewed periodically and can only be used where the Home Secretary has 'reasonable grounds for believing' that the person is able to acquire another nationality. *See* "Briefing Paper: Deprivation of British citizenship and withdrawal of passport facilities," UK House of Commons Library, June 9, 2017.

Bureau of Investigative Journalism, since 2010 the British government has stripped 33 individuals of British nationality on national security grounds.[75]

In his analysis of the Home Secretary's speech in the House of Commons on 30 January 2014, Sykes (2016) observes that the British government's position is essentially that citizenship is a privilege, rather than a right.[76] Further, the government has indicated that the purpose of citizenship deprivation is effectively expulsion: in 2014, then-Home Secretary Theresa May stated that "the whole point of the measure is to be able to remove certain people from the UK."[77] Prime Minister David Cameron similarly remarked that: "We must also keep out foreign fighters who would pose a threat to the UK. ... What we need is a targeted, discretionary power to allow us to exclude British nationals from the UK."[78] Sykes (2016) suggests that such a perception "extends the familiar expectation of loyalty to the state (usually only violated through treason or service with a foreign military)"[79] and thus renders citizenship conditional on good behaviour rather than a right to which people are entitled. As Mantu (2018) points out, citizenship deprivation as a counterterrorism tool used for the purposes of expulsion or deportation is strictly prohibited by Article 15 of the Universal Declaration of Human Rights (UDHR).[80]

Britain is not alone in its emerging reliance on denationalisation policies. France, the Netherlands, and Romania have each passed legislation specifically permitting citizenship deprivation in response to the crime of terrorism, while Belgium and Austria introduced amendments to existing legislation in 2014 and 2015 to ensure that crimes of terrorism can be punished with denationalisation.[81] Shortly after the attack on the *Charlie Hebdo* offices in Paris, the Belgian government introduced Article 23(2), which allows it to denationalise 'individuals convicted of any terrorist offence to more than five years of imprisonment.'[82] Austria passed a similar provision, used for the first time in March 2017 against an Austrian national with ISIS links.[83]

In France, a legislative amendment in 1998 allowed naturalised citizens to be deprived of citizenship in cases of a conviction for terrorist offences, though the state is barred from applying this measure if the person would be rendered stateless.[84] Thus the measure has primarily been used against dual nationals, like Moroccan-born Ahmed Sahnouni in 2014 and five dual-national

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[75] Deprivation of citizenship also has a statutory basis in the Counter-Terrorism and Security Act 2015. *See* V. Parsons, 'Citizenship stripping: new figures reveal Theresa May has deprived 33 individuals of British citizenship' (The Bureau of Investigative Journalism, 21 June 2016).
[76] Sykes (2016) *supra* note 68, at 754.
[77] House of Commons Debates, 30 January 2014, col 1043.
[78] House of Commons Debates, 1 September 2014, col 26.
[79] Sykes (2016) *supra* note 68, at 754.
[80] Sandra Mantu (2018) 'Terrorist' citizens and the human right to nationality, Journal of Contemporary European Studies, 26:1, 28-41, https://doi.org/10.1080/14782804.2017.1397503, 38.
[81] Belgian Nationality Law, arts 23-23/2; Federal Law on Austrian Nationality 1985, art 33.
[82] P. Wautelet, 'Deprivation of Citizenship for "Jihadists" Analysis of Belgian and French Practice and Policy in Light of the Principle of Equal Treatment' 30 RIMO Bundel 49 (2017), 5.
[83] 'Austria firstly stripped off citizenship a man for ISIS links' (Report News Agency, 27 March 2017) https://report.az/en/other-countries/austria-firstly-stripped-off-citizenship-of-convicted-for-relations-with-isis/
[84] Wittendorp et al. "Measures against jihadist foreign fighters: a policy comparison between the Netherlands, Belgium, Denmark, Germany, France, the UK and the US (2010 to 2017)." ISGA Report. Leiden University: 2017.

French citizens stripped of their nationality in 2015 as a result of their association with *milieux islamistes*.[85] Other states allow denationalisation on broader grounds of national security, not exclusively acts of terror. Indeed, loss of nationality in Europe has traditionally resulted from acts of 'disloyalty' or treason against the state or service in a foreign army[86], and denaturalisation has historically increased in times of war.[87]

Issues with 'denationalisation' policies

Public safety is a legitimate concern and national security is foundational to a functioning sovereign state, as it allows citizens to freely go about their daily lives.[88] As Lavi (2010) writes, deprivation of citizenship is the 'necessary precondition of being able to deny unwanted individuals...the protection that citizenship status entails.'[89] Citizenship, which is defined as an individual's membership to a territorial political entity and 'denotes entitlement, under the law of a state, to full civil and political rights'[90], has historically been at the discretion of the state to determine, per the principles of state sovereignty at the heart of the Westphalian system. Indeed, the right of states to regulate and manage their own affairs, including the granting and revocation of citizenship, free from any external interference has traditionally fallen beyond the reach of international law.[91]

However, the growth of the international human rights regime over the past decades has changed the traditional understanding of citizenship as purely a matter left to national governments.[92] Citizenship is increasingly seen as a core right at the centre of the rights-based matrix for, as Hannah Arendt observed in the seminal text *The Origins of Totalitarianism* (1951), most basic civil and political rights flow through one's citizenship.[93] Audrey Macklin has similarly noted that the absence of citizenship 'places all rights in the balance'[94], while Blitz and Lynch (2011) argue that 'the very notion of statelessness exposes the essential weaknesses of the global political system, which relies on the state to act as the principal guarantor of human rights'.[95] In *Yean and Bosico v Dominican Republic* at the Inter-American Court of Human Rights, the Court opined that: 'The importance of nationality is that, as the political and legal bond that connects a person to a specific state, it allows the individual to acquire and exercise rights and obligations

[85] *Ibid*, 40. The latter case has been referred to the ECtHR and is ongoing as of 2019.
[86] Lawrence Preuss, "Denaturalization on the Ground of Disloyalty," *The American Political Science Review*, Vol. 36, No. 4 (August 1942), https://www.jstor.org/stable/1949980
[87] Herzog, Ben. 2010. "Dual Citizenship and the Revocation of Citizenship." Research in Political Sociology 18.
[88] Patti Tamara Lenard, "Democracies and the Power to Revoke Citizenship," *Ethics and International Affairs* 30, no. 1 (2016), pp. 73-91. doi:.10.1017/SO892679415000635.
[89] Shai Lavi, "Punishment and the Revocation of Citizenship in the United Kingdom, United States, and Israel," *New Criminal Law Review*, Vol. 13 No. 2, Spring 2010, DOI: 10.1525/nclr.2010.13.2.404.
[90] *Ibid.*
[91] Peter J. Spiro, A New International Law of Citizenship, 105 AM. J. INT'L L. 694, 697–703 (2011)
[92] Jeffrey L. Blackman, State Successions and Statelessness: The Emerging Right to an Effective Nationality under International Law, 19 MICH. J. INT'L L. 1141, 1143–48 (1997).
[93] Hannah Arendt, The Origins of Totalitarianism (1951).
[94] Audrey Macklin, "Kick-off Contribution" in Audrey Macklin and Rainer Baubock, eds., "The Return of Banishment: Do the New Denationalisation Policies Weaken Citizenship?" European University Institute Working Paper RSCAS, http://cadmus.eui.eu/bitstream/handle/// RSCAS__.pdf?sequence
[95] Brad Blitz and Maureen Lynch, "Statelessness and citizenship: A comparative study on the benefits of nationality," Edward Elgar Publishing: 2011.

inherent in membership in a political community. As such, nationality is a requirement for the exercise of specific rights.'[96]

The legitimacy of denationalisation policies as a counterterrorism tool is questionable under international human rights law, which recognises nationality as a fundamental human right and expressly prohibits its arbitrary deprivation. The emerging status of citizenship and nationality in the international human rights framework will be addressed in the subsequent section.

C. 'Shoot to Kill' Policies and Refusal to Repatriate

Aside from a recent pledge from Paris to repatriate 130 French nationals, no other EU member state has actively engaged in repatriating its citizens from ISIS territory in Iraq and Syria.[97] On the contrary, European officials have explicitly advocated against allowing their wayward nationals to return. French Defence Minister Florence Parly, for example, stated that 'if the jihadists perish in this fight, I would say that's for the best'[98] while UK junior foreign minister Rory Stewart said in an interview with the *BBC*, 'The only way of dealing with them will be...to kill them.'[99] The sentiment was echoed by Britain's Defence Secretary, Gavin Williamson, who said that the UK should 'hunt down and kill' ISIS terrorists rather than allowing them to return to Britain: 'A dead terrorist can't cause any harm to Britain...I do not believe that any terrorist should ever be allowed back into this country.'[100]

Armed groups in Syria with Western-backing, like the Kurdish Syrian Democratic Forces, have reportedly been instructed by the international anti-ISIS coalition to kill foreign fighters on the battlefield: 'Ideally, no prisoners.'[101] Similarly, French Special Forces were reportedly sent to Syria with instructions to 'eliminate French IS fighters before they are captured or able to return home.'[102] Altogether, the anti-ISIS coalition of Western forces seem to agree with the statement issued by US envoy Brett McGurk, who said that the coalition's mission is to ensure that any foreign fighter who joined ISIS "will die...in Syria."[103]

'Shoot to kill' policies may lawfully apply to combatants during active hostilities, if all other rules of engagement under the laws of war are satisfied. However, this approach offers a deeply limited solution, as it does not apply to detainees, non-combatants (*hors de combat*), non-active

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[96] Case of the *Yean and Bosico Children v. The Dominican Republic*, Inter-American Court of Human Rights (IACrtHR), 8 September 2005, available at: https://www.refworld.org/cases,IACRTHR,44e497d94.html

[97] Salacanin, S. "How will Europe deal with returning Islamic State group?" *The New Arab.* June 28, 2018.https://www.alaraby.co.uk/english/indepth/2018/6/28/how-will-europe-deal-with-returning-is-fighters

[98] *Ibid.*

[99] "British IS fighters 'must be killed', minister says," *BBC News*. October 23, 2017. https://www.bbc.com/news/uk-politics-41717394

[100] "British Isis fighters should be hunted down and killed, says defence secretary," *The Guardian*. December 8, 2017. https://www.theguardian.com/politics/2017/dec/07/british-isis-fighters-should-be-hunted-down-and-killed-says-defence-secretary-gavin-williamson

[101] "Tacit orders for troops who come across ISIL's foreign fighters: Kill them in battle," *National Post*. October 21, 2017. https://nationalpost.com/news/world/foreigners-who-joined-is-faced-almost-certain-death-in-raqqa

[102] Salacanin, S. "How will Europe deal with returning Islamic State group?" *The New Arab*. June 28, 2018.https://www.alaraby.co.uk/english/indepth/2018/6/28/how-will-europe-deal-with-returning-is-fighters

[103] "US envoy on the battle to retake ISIS's capital: "They will die here in Syria," *Vox*. June 28, 2017. https://www.vox.com/world/2017/6/28/15888584/us-envoy-brett-mcgurk-isis-raqqa-syria

combatants who no longer pose a threat, and returnees either in transit or already back on European soil. The efficacy of shoot-to-kill policies are further diminished by ISIS' rapidly waning ability to wage combat, as it hemorrhages members and concedes territory.

Beyond the three policies discussed above, most EU member states have adopted a largely *laissez faire* approach to their ISIS nationals detained in Iraq and Syria. Refusing to repatriate has thus far effectively handed exclusive judicial responsibility for European citizens to either the SDF, a non-state armed actor with limited judicial capacity, or the Iraqi government, which has been accused of torturing detainees and which uses the death penalty. Citizenship deprivation has much the same effect. The above analysis of existing policies towards European ISIS members makes clear that current policies are in contravention of a myriad of human rights obligations and are not a sufficient long-term solution to the issues posed by returnees.

Prosecution and Repatriation under the International Human Rights Regime: Challenges and Obligations

The various counterterrorism measures designed and implemented to deal with ISIS returnees have largely been met with criticism from human rights groups. Human Rights Watch, for example, has criticized the expanded security and intelligence powers, control orders, emergency laws, and dubious citizenship stripping possibilities created by national counterterrorism measures aimed at returnees.[104] Further human rights issues have been raised with respect to criminal law prosecutions, namely the overly broad and vague definitions of terrorism, use of secret evidence, lengthy pre-charge and pre-trial detention, and disproportionate penalties for terrorism offences.[105] Indeed, the controversial counterterrorism policies used to suppress the activities of suspected jihadist nationals and the domestic prosecutions of returnees have been the subject of widespread debate in the EU.

The current policies of EU member states towards repatriation, in contrast, have received comparatively little attention despite constituting a major breach of international human rights law.[106] This is understandable from a policy standpoint: obviously, there is no public appetite to welcome radical jihadists back into European communities and politicians have accordingly been reluctant to advocate for any expanded repatriation efforts. In fact, in the UK and France in particular, there has been a general trend towards diminished human rights protections in the context of counterterrorism and national security. In June 2017, for example, British Prime Minister Theresa May called for fundamental changes to human rights laws in order to impose harsher penalties and policies on terrorist suspects: "And if our human rights laws stop us from doing it, we will change the laws so we can do it."[107] In such a political climate, European political leaders have shown markedly little interest in a rights-based approach to the repatriation and prosecution of nationals from ISIS territory in Iraq and Syria.

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[104] L. Taylor, 'Foreign Terrorist Fighter Laws: Human Rights Rollbacks Under UN Security Council Resolution 2178', Human Rights Watch, December 2016, https://www.hrw.org/sites/default/files/supporting_resources/ftf_essay_03feb2017_final_pdf.pdf.

[105] *Ibid.*

[106] The recent case of British national Shamima Begum and her newborn baby is an exception, having provoked considerable media attention regarding EU repatriation policies in February 2019.

[107] "May: I'll rip up human rights laws that impede new terror legislation," *The Guardian*. June 6, 2017. https://.theguardian.com/politics/2017/jun/06/theresa-may-rip-up-human-rights-laws-impede-new-terror-legislation

However, EU member states are legally obligated to respect the fundamental rights of all nationals - jihadist or not - under both international and national laws. All twenty-eight EU member states are party to the European Convention on Human Rights (ECHR), a legally binding international treaty designed to protect human rights and political freedoms that entered into force in 1953, as well as core international human rights treaties including the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), and the Convention on the Rights of the Child (CRC).[108] Major human rights provisions in the ECHR and ICCPR are further incorporated into the domestic laws of EU member states.

As it stands, the current policies of EU member states towards the repatriation of ISIS returnees are in contravention of the right to life, the right to be free from torture and other cruel and degrading treatment, the right to a fair trial and due process guarantees, and the right to citizenship and nationality. The following section will assess how current practice and present policies towards repatriation violate the obligations of EU member states under the aforementioned international human rights treaties and conventions.

I. The Right to Life and the Right to be Free from Torture and Cruel, Inhuman or Degrading Treatment or Punishment

The clear preference EU member states have shown for using shoot-to-kill policies on European ISIS members in Iraq and Syria rather than adopting policies of imprisonment and prosecution raises serious questions regarding the right to life. As one might expect, the right to life is the centerpiece of the rights matrix, included in every major human rights treaty and binding on all EU member states. It is considered 'one of the most fundamental provisions' of the human rights framework, and states are not permitted to derogate from the right to life even during states of emergency.[109] Article 2 of the ECHR sets out that: "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which the penalty is provided by law."[110] Article 6(1) of the ICCPR similarly states that: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."[111] With a view to protecting the right to life, the use of lethal force by the state is constrained by the principles of necessity and proportionality.

The European Court of Human Rights (ECtHR) first established the test of necessity in relation to the right to life in the 1995 case *McCann and Others v the UK*. In this case, which concerned the fatal shootings of three IRA members in Gibraltar, the Court concluded that there had been a

[108] "The European Union and International Human Rights Law," UN Office of the High Commissioner of Human Rights, Europe Regional Office. https://europe.ohchr.org/Documents/Publications/EU_and_International_Law.pdf
[109] *Makaratzis v. Greece* judgment of the Grand Chamber of 20 December 2004, § 56
[110] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, https://www.echr.coe.int/Documents/Convention_ENG.pdf
[111] UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999 https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx

violation of the right to life because 'the operation could have been planned and controlled without the need to kill the suspects.'[112] In its judgment, the Court interpreted Article 2 to allow exceptions to the right to life only when it is "absolutely necessary", which is a "stricter and more compelling test of necessity...than that which is normally applicable."[113] This interpretation was upheld by the Court in *Andreou v Turkey* (2009) and *Putintseva v Russia* (2012), in which it again emphasized that the authorities have a duty to minimise recourse to lethal force. The statements made by European political officials regarding a preference for "killing them on the battlefield" and ensuring that they "die in Syria" strongly implies that lethal force is not being limited to strictly necessary situations, but rather used as a convenient way to avoid the costly and politically charged route of repatriation and prosecution.

The use of lethal force by the state is further constrained by the principle of proportionality. The proportionality principle is not expressly provided for in the text of Article 2, but has been firmly established by the ECtHR case law.[114] The Court's decisions in *Wasilewska and Kulucka v Poland* (2010) and *Finogenov and Others v Russia* (2011) are perhaps most pertinent to the present situation, as they both concern the state's use of force during counterterrorism operations. In the former, which concerned the death of a suspect during an anti-terrorist operation, the Court found that the Polish Government had violated Article 2 by failing to institute an adequate legislative and administrative framework to safeguard people against arbitrariness and abuse of force.[115] In *Finogenov*, the Court found that the Russian Government violated Article 2 by inadequately planning and implementing a rescue operation in Moscow.[116] It would similarly seem that European authorities, in choosing to resort to lethal force against ISIS members in an effort to avoid repatriation obligations, could be held liable for failing to plan and implement less lethal measures focused on apprehending and trying European ISIS members rather than killing them on sight.

In addition to the issues posed by 'shoot-to-kill' policies, the right to life is further jeopardised by the use of the death penalty in Iraq and Syria. The right to life provided by Article 2 of the ECHR has been interpreted by the ECtHR as prohibiting the death penalty in all circumstances[117], having evolved from its original wording which did allow for the possibility of imposing the death penalty. In 1983, the CoE adopted Protocol No. 6 to the ECHR, which unconditionally abolished the death penalty in peacetime, and in 2002 adopted Protocol No. 13, which abolishes the death penalty even in times of war or of imminent threat of war.[118] Article 6(2) of the ICCPR similarly addresses the death penalty in relation to the right to life, stating that: "In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the

[112] *McCann and Others v the UK* - Judgment 1995.
[113] European Court of Human Rights - Factsheet, Right to Life. June 2013, https://www.echr.coe.int/Documents/FS_Life_ENG.pdf
[114] European Court of Human Rights - Factsheet, Right to Life. June 2013, https://www.echr.coe.int/Documents/FS_Life_ENG.pdf
[115] *Ibid.*
[116] *Ibid.*
[117] European Court of Human Rights - Factsheet, Death Penalty Abolition. Oct 2015, https://www.echr.coe.int/Documents/FS_Death_penalty_ENG.pdf
[118] "Human Dimension Implementation Meeting - Exchange of views on the question of abolition of capital punishment," Council of Europe Working Session 4: Rule of Law I, Warsaw: September 24 2014, https://www.osce.org/odihr/124116?download=true

commission of the crime and not contrary to the provisions of the present Covenant… This penalty can only be carried out pursuant to a final judgment rendered by a competent court."[119] Article 6(4) of the ICCPR further states that "Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence" while 6(5) prohibits the imposition of the death penalty on persons below eighteen years of age and pregnant women.[120]

Per the evolving international legal standards reflected above, the EU has adopted a strict policy against capital punishment 'in all circumstances and for all cases', in accordance with the EU Strategic Framework and its related Action Plan on Human Rights and Democracy.[121] According to a statement on the death penalty released by the European External Action Service in late 2018, abolition of the death penalty 'is an explicit and absolute condition to become a Member of the European Union and also a prerequisite for membership to the Council of Europe.'[122] All EU member states have now ratified Protocols No. 6 and No. 13 to the ECHR.[123] As a result of the bloc's explicit position that the death penalty constitutes a violation of the right to life, no execution has taken place in the CoE member states since 1997.[124]

Most importantly to our purposes here, the ECtHR has consistently held that the extradition or expulsion of a person to a third country in which that person might face the death penalty would give rise to violations of the right to life.[125] The scope of a state's responsibility for breaches of the Convention includes breaches on the territory of a non-signatory state, as was first established by the Court's ruling in *Soering v United Kingdom* (1991).[126] Following the *Soering* case, a state cannot rely on the fact that ill-treatment or capital punishment is beyond its control, nor on general assurances from the third country. Instead, signatories to the ECHR are responsible for ensuring that third countries to do not breach the Convention rights of their nationals even if the treatment occurs outside their jurisdiction in non-signatory states.[127] This principle was subsequently adopted by the EU Committee of Ministers in the Guidelines on Human Rights and the Fight against Terrorism in 2002 and the Amending Protocol to the 1977 European Convention for the Suppression of Terrorism in 2003, both of which contain provisions prohibiting EU member states from extraditing persons to countries where that individual may be at risk of capital punishment unless 'certain guarantees' have been obtained.[128]

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[119] UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999 https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx
[120] *Ibid.*
[121] "Fight against death penalty," European Commission - International Cooperation and Development, https://ec.europa.eu/europeaid/sectors/human-rights-and-governance/democracy-and-human-rights/fight-against-death-penalty_en
[122] Statement on the death penalty, European External Action Service, Strasbourg: October 17, 2018, https://eeas.europa.eu/delegations/council-europe/52324/statement-death-penalty_en
[123] In 2012, Latvia became the last EU member state to abolish capital punishment in war time. As of 2019, among all European countries (whether or not in the EU), the death penalty during peacetime has been abolished in all countries except Belarus, while the death penalty during times of war has been abolished in all countries except Belarus and Kazakhstan.
[124] Death Penalty - Factsheet, Council of Europe. https://rm.coe.int/168008b914
[125] *Supra* note 118.
[126] Lillich, R. (1991) "The Soering Case". *The American Journal of International Law*. 85 (1): 128–149.
[127] *Ibid.*
[128] *Supra* note 118.

While the *Soering* principle has most frequently been applied to cases concerning extradition and expulsion, it should equally apply to the present issue of European ISIS members in Iraq and Syria. Indeed, the Iraqi Government re-introduced the death penalty in 2004 after it was suspended by the Coalition Provisional Authority in 2003, resuming executions in 2005.[129] More than 1,000 executions have been carried out since its resumption, making Iraq the third most frequent user of the death penalty worldwide.[130] The Iraqi Government has received widespread public support for its use of the death penalty against ISIS-affiliated individuals, framing executions as fitting punishment and an effective deterrent to future sympathisers: "These Islamic State criminals committed crimes against humanity and against our people in Iraq, in Mosul and Salahuddin and Anbar, everywhere...to be loyal to the blood of the victims and to be loyal to the Iraqi people, criminals must receive the death penalty, a punishment that would deter them and those who sympathize with them."[131]

According to a 2014 report on the death penalty in Iraq published by the UN Assistance Mission for Iraq (UNAMI) and the UN Office of the High Commissioner for Human Rights (OHCHR), nearly all cases to which the death penalty is applied relate to convictions for crimes under the Anti-Terrorism Law no.13 of 2005.[132] Under Iraq's Anti-Terrorism Law, anyone found guilty of joining ISIS, including non-combatants, may be subject to the death penalty.[133] Currently, more than 100 captured ISIS members of European nationality are facing the death penalty in Iraq[134], which is clearly in striking conflict with the EU's opposition to the death penalty and its legal obligation to protect EU nationals from capital punishment in third countries.

The situation in Syria is far more complex than in Iraq, given the ongoing armed conflict and the uncertain political future of the Assad government.[135] European ISIS fighters detained in Syria may be prosecuted in any number of several 'ordinary' and 'special' courts: in government-controlled areas, the 2012 Counter Terrorism Law no. 19 established a Counter-Terrorism Court in Damascus to try terrorist-related offences, while 'local' courts and 'quasi-judicial' tribunals have been set up by various armed opposition groups like the SDF in other areas of the country.[136] According to HRW, the autonomous administration in Northern Syria 'has set up

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[129] UNAMI/OHCHR, 'Report on the Death Penalty in Iraq,' Baghdad: October 2014 https://www.ohchr.org/Documents/Countries/IQ/UNAMI_HRO_DP_1Oct2014.pdf

[130] Amnesty International, 'Death sentences and executions around the world in 2013' http://www.amnesty.org.uk/death-penalty-2013-report-use-statistics-executions#.U0PkRl72-c8

[131] A 10-Minute Trial, a Death Sentence: Iraqi Justice for ISIS Suspects, *New York Times,* April 17, 2018, https://www.nytimes.com/2018/04/17/world/middleeast/iraq-isis-trials.html

[132] "Report on the Death Penalty in Iraq," UN Assistance Mission for Iraq and the UN Office of the High Commissioner for Human Rights, Baghdad: 2014, https://www.ohchr.org/Documents/Countries/IQ/UNAMI_HRO_DP_1Oct2014.pdf

[133] "Iraq: 15 Turkish women face death penalty over Isis membership," *The Independent*, 26 February 2018. https://www.independent.co.uk/news/world/middle-east/iraq-turkey-isis-membership-women-death-penalty-islamic-state-a8229416.html

[134] "At least 100 European Isis fighters 'to be prosecuted in Iraq, with most facing death penalty," *The Independent*, October 7, 2017. https://www.independent.co.uk/news/world/middle-east/isis-foreign-fighters-iraq-prosecuted-death-penalty-families-mosul-a7987831.html

[135] *See* Tanya Mehra, "Bringing (Foreign) Terrorist Fighters to Justice in a Post-ISIS Landscape Part I: Prosecution by Iraqi and Syrian Courts," International Centre for Counter-Terrorism - the Hague. December 22, 2017, https://icct.nl/publication/bringing-foreign-terrorist-fighters-to-justice-in-a-post-isis-landscape-part-i-prosecution-by-iraqi-and-syrian-courts/

[136] *Ibid.*

local ad-hoc counterterrorism courts, but has only tried Syrian and Iraqi nationals', with local officials stating that they 'prefer not to prosecute foreigners.'[137] Aside from this, there is little reliable information available as to who is being prosecuted in these courts.[138] Similarly, according to Amnesty International, there is a lack of reliable information regarding the use of the death penalty in Syria, which remains in force for many offences, as the Syrian government does not disclose information about death sentences passed or executions carried out.[139]

In addition to the right to life, the EU's failure to repatriate may violate the right of its nationals to be free from torture or cruel, inhuman or degrading treatment or punishment. The prohibition of torture is enshrined in Article 3 of the ECHR, Article 7 of the ICCPR, Article 5 of the UDHR, and Article 4 of the EU Charter of Fundamental Rights.[140] All EU member states are further party to the UN Convention Against Torture (UN-CAT) and its Optional Protocol[141], as well as the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.[142] The prevention and eradication of torture and ill-treatment is a 'main objective of the EU's human rights policy' and a key aim of its foreign policy in non-member countries.[143]

Both Syrian and Iraqi authorities have been credibly accused of torturing ISIS detainees. According to HRW, torture is 'rampant in Iraqi detention facilities'[144] and judges 'routinely fail to investigate' security forces alleged to have tortured ISIS suspects.[145] Syrian security services are notorious for their use of torture in government-run prisons, though this has most often been used against anti-Assad rebel fighters and political activists. International human rights groups have however alleged that Kurdish security forces in Syria, including the SDF, have used torture to coerce confessions of involvement with ISIS. According to a report released by HRW in January 2019, Kurdish security forces have used beatings and electric shocks to extract confessions, 'often prior to trials lasting a handful of minutes.'[146] Such methods have allegedly been used against both child and adult detainees.

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[137] "US Sent ISIS Detainees to Possible Abuse," *HRW*, August 3, 2018. https://www.hrw.org/news/2018/08/03/us-sent-isis-detainees-possible-abuse
[138] *Ibid*.
[139] Amnesty International, Annual Report on Syria, 2017/2018. https://www.amnesty.org/en/countries/middle-east-and-north-africa/syria/report-syria/
[140] Prohibition of torture and inhuman or degrading treatment or punishment, EU Charter of Fundamental Rights, https://fra.europa.eu/en/charterpedia/article/4-prohibition-torture-and-inhuman-or-degrading-treatment-or-punishment
[141] UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465, https://www.refworld.org/docid/3ae6b3a94.html
[142] Council of Europe, European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 26 November 1987, ETS 126, https://www.refworld.org/docid/3ae6b36314.html
[143] Anti-torture measures, Service for Foreign Policy Instruments, European Commission. https://ec.europa.eu/fpi/what-we-do/anti-torture-measures_en
[144] "Trump admin may send captured ISIS fighters to Iraq prison, Guantanamo," *NBC News*, August 18, 2018, https://www.nbcnews.com/storyline/isis-terror/trump-admin-may-send-captured-isis-fighters-iraq-prison-guantanamo-n905066
[145] Iraq: Judges Disregard Torture Allegations, *HRW*, July 31, 2018, https://www.hrw.org/news/2018/07/31/iraq-judges-disregard-torture-allegations
[146] Children 'still being tortured to confess to Isis links' by Kurdish security forces, *The Guardian*, January 8, 2019, https://www.theguardian.com/global-development/2019/jan/08/children-allegations-tortured-to-confess-isis-links-kurdish-security-forces-human-rights-watch

The current situation is precisely the inverse of the usual issue: that is, whereas usually EU member states must first ensure that third party treatment of their nationals will not violate certain fundamental rights in order to legally expel them from EU territory, in this case the EU is aware that the Convention rights of their nationals are seriously at risk and should accordingly seek to have them returned. It would seem absurd that a state should be legally prohibited from deporting or extradite its nationals to states where their rights may be violated, but bear no responsibility to uphold the rights of their citizens abroad otherwise. Yet in fact, whether a state has the right under international law to protect its citizens abroad is not a firmly established principle. According to Wild (2008), states have 'limited jurisdiction' over their citizens abroad, such as consular protection, which is generally expected to be 'exercised with respect for the principle of sovereignty and friendly relations.'[147] It would appear that the political sensitivity of any interference has led to a general principle of non-intervention, particularly for dual nationals.

This issue is in fact currently before the European Court of Human Rights in the case of *Ali Aarrass v Belgium.* Mr. Aarrass is a Belgian-Moroccan dual national who has allegedly been tortured by Moroccan authorities. The Belgian Government has refused to intervene and denied Mr. Ali's repeated requests for consular assistance. At first instance, the Belgian Court of Cassation found that the Government was entitled to discretion as to whether and what assistance to provide a dual national and ultimately had 'no obligation' to assist Mr. Aarass. The decision has been appealed to the ECtHR based on Article 1 of the ECHR, the right to life, and Article 3, the prohibition of torture. According to international human rights organisation REDRESS, the judgment of the ECtHR is expected to be a landmark decision in shedding light on the question of whether, 'in a situation where there is a risk of serious injury to physical or moral integrity, a State has a positive obligation to provide consular protection to try and put a stop to the inhuman and degrading treatment being received by one of its nationals in another country'.[148]

II. The Right to a Fair Trial and Due Process Guarantees

The right to a fair trial is enshrined in virtually all major international human rights treaties and conventions, most notably the UDHR and the ECHR. Article 10 of the UDHR provides that 'Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him'[149] and further establishes the principle of the presumption of innocence per Article 11.[150] The latter article also established the principle of non-retroactivity in international criminal law, a fundamental element of due process.[151] The right to a fair trial is further provided for in Article 6 of the ECHR, which requires that any person charged with a criminal offence has the right to

[147] Wild, N, 'Does A State Have The Right To Protect Its Citizens Abroad?' *Radio Free Europe,* August 2008, https://www.rferl.org/a/Does_A_State_Have_The_Right_To_Protect_Its_Citizens_Abroad/1193050.html
[148] REDRESS Casework, Ali Aarrass v Belgium, https://redress.org/casework/ali-aarrass-v-belgium/
[149] UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), http://www.un.org/en/udhrbook/pdf/udhr_booklet_en_web.pdf
[150] 'Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.'
[151] Article 11(2): No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

defend himself in person or through legal assistance.[152] Similar due process guarantees are set out under Article 14 of the ICCPR.[153]

Altogether, international human rights law is unequivocal that all persons have the right to a fair trial and that this right encompasses several fundamental due process guarantees including the right to be presumed innocent, the right to a hearing within a reasonable time, by a competent, independent, and impartial tribunal, and the right to have a conviction and sentence reviewed by a higher tribunal.[154] Similar protections are afforded to persons under international humanitarian law (IHL)[155], which may also be applicable to ISIS members. Moreover, though international human rights law incorporates a level of flexibility in order to accommodate security and public order objectives, the right to fair trial is a strictly non-derogable right that states are barred from deviating from even in times of crisis or public emergency.

As all EU member states are bound by these provisions, European nationals charged with terrorism-related offences should accordingly be arrested and tried in full compliance with the fair trial obligations and due process guarantees set out above. The current refusal by European countries to repatriate their nationals violates the right to a fair trial by delegating prosecutorial responsibilities to judicial systems that fail to observe due process in line with the standards established by international human rights law, and further by adopting policies of citizenship deprivation that do respect fair trial principles and due process guarantees.

First, the ongoing refusal to repatriate European ISIS members in favor of remanding custody to Kurdish or Iraqi authorities does not satisfy the provisions of Article 6 of the ECHR. In Iraq, the judiciary has 'relentlessly churned out terrorism convictions' after '10-minute trials' that international human rights groups warn are seriously flawed and 'more concerned with retribution than justice.'[156] According to two people familiar with the special counterterrorism courts used in Iraq but unauthorized to speak publicly, more than 10,000 cases have been referred to the courts since the summer of 2017 and approximately 2,900 trials have been completed with a conviction rate of 98 percent.[157] At least 1,350 foreign nationals have been detained for ISIS-related terrorism charges since 2014[158], and there is mounting concern that the system is fundamentally prejudiced against foreigners. As a senior Iraq researcher at HRW remarked after observing several dozen terrorism trials: "The presumption is because you are foreign, and you were in ISIS territory, there is no need to provide more evidence."[159]

The judicial process in Iraq does not appear to meet the standards established by international human rights instruments. According to UNAMI, the Iraqi Government has consistently failed to

[152] "Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."
[153]UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999 https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx
[154] Human Rights Committee, general comment N° 13 (1984).
[155] E/CN.4/2005/103, para. 44
[156] 'A 10-Minute Trial, a Death Sentence: Iraqi Justice for ISIS Suspects,' New York Times, April 17, 2018, https://www.nytimes.com/2018/04/17/world/middleeast/iraq-isis-trials.html
[157] *Ibid.*
[158] Consigli, Prosecuting the Islamic State Fighters Left Behind, 2018, https://www.lawfareblog.com/prosecuting-islamic-state-fighters-left-behind
[159] *Supra* note 156.

respect due process and fair trial standards as required under both the Constitution of Iraq and international human rights obligations.[160] In a joint report published in October 2014, UNAMI and OHCHR highlighted several concerns, including 'lengthy pre-trial detention without charge or trial for extended periods; interrogation of accused persons without the presence of a lawyer; the use of torture to induce confessions; the reliance by the Courts on confessions of the accused or the untested evidence of secret informats as the sole evidence on which convictions are founded; lack of opportunity for accused persons to prepare and present an adequate defence; and corruption by officials involved in the administration of justice.'[161]

According to a more recent investigation by HRW into terrorism trials conducted by both the Iraqi Government and the Kurdistan Regional Government (KRG), due process rights have largely been ignored, among them guarantees to bring detainees before a judge within 24 hours, to grant access to a lawyer throughout interrogations, and to allow communication between detainees and their families.[162] Persons suspected of ISIS membership are often held incommunicado and denied any access to lawyers throughout the investigation process, and are 'rarely' informed of their rights by investigating judges.[163] In northern Syria, the SDF is reportedly committing similar violations of due process guarantees, neither providing detainees with access to a defense lawyer nor the opportunity to appeal convictions.[164] The SDF's status as a non-state actor raises further questions as to whether rulings handed down in makeshift courts administered by members of the SDF qualifies as a fair trial at all.

Second, citizenship deprivation and denationalisation policies negatively impact basic procedural fairness and due process guarantees. This is particularly true given that most citizen deprivation proceedings are conducted in *absentia*, this hindering the individual's right to be present at his or her appeal, effectively defend him or herself, and to sufficiently communicate with legal representatives.[165] According to the UN Human Right Committee, without such procedural standards and safeguards in place, the revocation of citizenship ends up being illegal.[166] The aforementioned considerations were recently reiterated by the International Law Commission in its 2014 Draft Articles on 'the Expulsion of Aliens'.[167] Indeed, the ECtHR has previously interpreted expulsion as amounting to unlawful interference with an individual's right to respect for private and family life per Article 8 of the ECHR.[168]

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[160] UNAMI/OHCHR, 'Report on the Death Penalty in Iraq,' Baghdad: October 2014 https://www.ohchr.org/Documents/Countries/IQ/UNAMI_HRO_DP_1Oct2014.pdf
[161] *Ibid.*
[162] Iraq: Flawed Prosecution of ISIS Suspects, https://www.hrw.org/news/2017/12/05/iraq-flawed-prosecution-isis-suspects
[163] *Supra* note 161
[164] Bringing ISIS to Justice: Running Out of Time? https://www.hrw.org/news/2019/02/05/bringing-isis-justice-running-out-time
[165] ILPA (n 68)
[166] UN Doc A/HRC/25/28 (19 December 2013) para 31.
[167] International Law Commission's Draft Articles on the Expulsion of Aliens, with commentaries, YB ILC (2011) vol II (Part Two)
[168] European Court of Human Rights, Guide on Article 8 of the European Convention on Human Rights, Right to respect for private and family life, home and correspondence, https://www.echr.coe.int/Documents/Guide_Art_8_ENG.pdf

If there is a legitimate reason to interfere with an individual's Article 8 rights, the Court has required states to 'make available to the individual concerned the effective possibility of challenging the deportation or refusal of residence order' and to have the issue examined with 'sufficient procedural safeguards...by an appropriate domestic forum offering adequate guarantees of independence and impartiality.'[169] In the current situation, wherein suspected ISIS members are generally stripped of citizenship while abroad, it is difficult to see how they can effectively challenge such measures. As demonstrated by the case of British ISIS member Shamima Begum, for example, many alleged ISIS members may be living in refugee camps in remote areas or SDF detention facilities, with little access to legal representation and likely limited knowledge of whether they have the right to defend themselves and how to go about doing so.

III. The Right to Citizenship and Nationality

As discussed above, several countries have introduced legislation allowing for 'suspected terrorists' to be stripped of their citizenships, which effectively absolves states of repatriation responsibilities. Though international law has traditionally allowed states a level of discretion with respect to nationality practices[170], such discretion has arguably been restricted as the international human rights regime grows more robust.[171] Indeed, while the right to life, the right to be free from torture and cruel, inhuman or degrading treatment or punishment, and the right to a fair trial and due process guarantees are long established in international human rights law, widespread consensus in recent years has recognized that citizenship and nationality is a fundamental human right.

The right to citizenship and nationality was first recognized by the UDHR, which at Article 13 states that: 'Everyone has the right to leave any country, including his own, and to return to his country.' Article 15 of the UDHR expressly recognises a right to nationality, stating: '(1) Everyone has the right to a nationality. (2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.' While the UDHR has the status of customary international law, its provisions are not binding law on states parties. The right to citizenship and nationality was made binding international law by the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness. As of September 2014, 82 states are party to the 1954 Convention and 60 states are party to the 1961 Convention, with 17 accessions to the former and 22 to the latter in the last three years. Article 1(1) of the 1954 Convention describes a 'stateless person' as 'a person who is not considered as a national by any State under the operation of its law', while the 1961 Convention prohibits a state from revoking the nationality of an individual if doing so would leave that person stateless.[172]

While the ECHR does not expressly provide for a right to citizenship, recent ECtHR case law provides some support for the growing consensus that nationality is a fundamental human

[169] *See* De Souza Ribeiro v. France [GC], § 83; M. and Others v. Bulgaria, §§ 122-132; Al-Nashif v. Bulgaria, § 133.
[170] See, for example, International Court of Justice, Nottebohm Case (Liechtenstein v. Guatemala): Second Phase, 6 April 1955.
[171] Pinto, M, The Denationalisation of Foreign Fighters: How European States Expel Unwanted Citizens, July 2018.
[172] UN General Assembly, Convention on the Reduction of Statelessness, 30 August 1961, United Nations, Treaty Series, vol. 989, p. 175, available at: https://www.refworld.org/docid/3ae6b39620.html

right.[173] The 1997 European Convention on Nationality further recognised the right to nationality, using language that closely mirrored the 1961 Convention.[174] However, Article 2 of the European Convention states that the Convention 'shall not apply' to people who have committed 'war crimes or serious non-political crimes', acts of disloyalty or prejudicial conduct towards the granting state or individuals who obtained citizenship fraudulently.

The right to citizenship and nationality is also discussed specifically in relation to women in the Convention on the Elimination of Discrimination Against Women (CEDAW) and the Convention on the Nationality of Married Women (CNMW). Both conventions, for example, prohibit women from being deprived of their nationality on the basis of a change to their spouse's status or nationality. With respect to children, the Convention on the Rights of the Child (CRC) recognises nationality as a fundamental right of the child, stating at Article 7 that the 'child shall have the right to acquire a nationality.'

With respect to ISIS returnees, the key issue turns on the use of the word 'arbitrarily' in Article 15 of the UDHR, as states may attempt to circumvent their obligations by arguing that citizenship deprivation on the basis of terrorism and national security does not constitute 'arbitrary' deprivation. To determine the meaning of 'arbitrariness', the Report of the UN Human Rights Council (UN-HRC) Secretary-General on Human Rights and Arbitrary Deprivation of Nationality offers particularly helpful guidance.[175] According to the UN-HRC, a state is not acting arbitrarily by depriving an individual of citizenship if the action is proportionate, done in pursuit of a legitimate aim, and is not discriminatory in nature. Further, per the principle of legal certainty, the power to revoke citizenship must be authorized by a law that is clear, accessible, foreseeable to the individual concerned[176], and determines the limits and conditions of the government's power in this regard.[177] In essence, existing guidelines suggest that arbitrariness is determined by evaluating necessity, proportionality, and reasonableness.[178]

The 'Tunis Conclusions' produced by an Expert Meeting of representatives of the Office of the UN High Commissioner for Refugees (UNHCR) in 2014 offers an illuminating interpretation of what factors might render citizenship deprivation 'necessary'.[179] The Tunis Conclusions suggested that an individual may be stripped of his nationality even if he or she becomes stateless 'if he has conducted himself in a manner seriously prejudicial to the vital interests of the State.' The report suggests that this is an 'extremely high threshold that must threaten the foundations and organizations of the state', thus eliminating ordinary criminal activities that merely 'implicate national interests' as grounds for citizenship deprivation. The Tunis Conclusions instead suggest that a state should only invoke Article 8 for extreme crimes that are

[173] *See* for example *K2 v United Kingdom* App no 42387/13 (ECt
[174] *See* Gerard-René de Groot & Maarten Peter Vink, A Comparative Analysis of Regulations on Involuntary Loss of Nationality in the European Union, CEPS PAPER IN LIBERTY AND SECURITY IN EUROPE (Dec. 2014), http://www.ceps.eu/publications/comparative-analysis-regulationsinvoluntary-loss-nationality-european-union
[175] 'Human Rights and Arbitrary Deprivation of Nationality, Report of the Secretary General' (14 December 2009) UN Doc A/HRC/13/34
[176] UN Doc A/HRC/13/34 (14 December 2009), para. 25.
[177] *Ivcher Bronstein v Peru* (n 74), para. 49.
[178] Adjami & Harrington at 101.
[179] U.N. High Commissioner for Refugees, Expert Meeting - Interpreting the 1961 Statelessness Convention and Avoiding Statelessness resulting from Loss and Deprivation of Nationality ("Tunis Conclusions") (Mar. 2014), http://www.refworld.org/docid/533a754b4.html.

'highly prejudicial to the state', noting that such crimes may include espionage, treason, or a violation of the duty of loyalty owed to one's state, but also noting that 'terrorist acts may be considered to fall within the scope of this paragraph.'[180] As Jayaraman (2016) notes, the discretion left to the state to determine whether terrorist acts fall within the scope of Article 8 suggest that some terror-related activities may indeed fall outside the bounds of Article 8.[181] Moreover, Jayaraman (2016) makes the interesting point that the fact that European ISIS members travelled to other countries to join the terror group and commit the acts in question rather than committing actions directly against their own state. This might suggest that many activities of ISIS returnees may not sufficiently fulfil the criteria of threatening the 'vital interests' of the state.[182]

The centrality of citizenship in the human rights framework makes it difficult to justify its deprivation as a proportionate measure, as the loss of citizenship is an extreme measure that effectively strips the individual of the ability to claim social, political and economic rights. The proportionality of citizenship deprivation is particularly questionable when one considers its impact on the right to a fair trial and due process guarantees. While Article 8 requires that contracting states 'shall provide for the person concerned the hearing by a court or other independent body', this provision is compromised by the popular practice of depriving an individual of citizenship while he or she is abroad. The individual is thus denied the ability to easily challenge the charges and present a defense in a court of law, as Verkaik (2015) observes: "Instead of allowing a suspect to contest his or her status, introduce evidence asserting innocence, and meaningfully cross-examine the evidence introduced against him, a bureaucrat is making a unilateral decision. No insulated and independent body reviews the government's factual determinations, nor is a defendant afforded the right to contest them."[183] As noted above, international human rights conventions including the ECHR, the ICCPR and the UDHR guarantee the right of access to domestic courts, yet denying individuals the right to be 'actually or virtually present in the country' to challenge the revocation of citizenship seriously hinders the ability of an individual to challenge the decision or present evidence refuting the allegations against him.[184] This is completely contrary to conventional understandings of due process and highlights the disproportionality of citizenship deprivation.

And what of the reasonableness of citizenship deprivation? Scholars on the subject have argued that citizenship deprivation as a practice of modern banishment or forced exile is so fundamentally at odds with theories of democratic citizenship that it is 'no longer considered an acceptable form of punishment for citizens, even heinous criminals' in democratic states.[185] This point was made quite forcefully by Justice Warren in the seminal American case *Trop v Dulles*, who said of denationalization policies: "There may be involved no physical mistreatment, nor

[180] Jayaraman, S, (2016) "International Terrorism and Statelessness: Revoking the Citizenship of ISIL Foreign Fighters," Chicago Journal of International Law: Vol. 17: No. 1, Article 6.
https://chicagounbound.uchicago.edu/cjil/vol17/iss1/6
[181] *Ibid.*

[182] *Ibid.*
[183] *See L1 v Secretary of State for the Home Department* [2013] EWCA Civ 906 and R. Verkaik, 'Mahdi Hashi: Guilty of supporting al-Shabaab – but was his plea coerced?' The Independent, 15 May 2015
[184] Jayaraman, S, (2016) "International Terrorism and Statelessness: Revoking the Citizenship of ISIL Foreign Fighters," Chicago Journal of International Law: Vol. 17: No. 1, Article 6.
https://chicagounbound.uchicago.edu/cjil/vol17/iss1/6
[185] Carens, J,The Ethics of Immigration, New York: Oxford University Press.

primitive torture. There is instead the total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development. The punishment strips the citizen of his status in the national and international political community…"[186]

Further, as Cohen (2016) remarks, denationalization is distinct from other forms of punishment for criminal behaviour in that it is permanent and is thus a sort of 'civil death': "Unlike incarceration, which may be meted out in periods of years rather than permanently, and which may be revisited via procedures that allow an inmate to request parole or clemency or even present exonerating evidence of their innocence, there are no contemporary versions of denaturalization that are not permanent."[187] The UN Human Rights Committee stated in 1999 that 'there are few, if any circumstances in which deprivation of the right to enter one's own country could be reasonable.'[188] The European Court of Justice similarly held in *Van Duyn v Home Office* that a state is 'precluded from refusing its own nationals the right of entry or residence.'[189]

Finally, it must be noted (indeed, emphasised) that in terms of policy implications there is no evidence that citizenship revocation has any tangible benefit to national security. Existing evidence suggests that the deterrent effect of citizenship deprivation is very weak and does not prevent the deprived individual from committing terrorist attacks.[190] Denationalisation policies should thus be seen as doubly unjustifiable from both standpoints of law and policy, as there is no hard evidence that citizenship deprivation deters, reduces, or halts terrorist threats to national security or other crimes.[191]

An International Criminal Tribunal for ISIS Crimes in Iraq and Syria?

ISIS members have perpetrated numerous war crimes in Iraq and Syria, including crimes against humanity and arguably genocide against several ethnic minority populations. According to a recent report from the UN High Commissioner for Human Rights, ISIS has particularly targeted certain ethnic and religious minorities, including Yezidis, Christians, Turkmen,, Kurds and Shi'a.[192] ISIS fighters have committed mass rape, forced women into sexual slavery, and allowed other unspeakable acts of sexual violence, in addition to committing numerous other crimes, including summary executions of political opponents, forcible conversions, torture, child conscription, displacement of civilian populations, and slavery. As the Islamic State's power in

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[186] *Trop v. Dulles* 1958, 783.
[187] Cohen, E, 'When Democracies Denationalize: The Epistemological Case against Revoking Citizenship' June 2016 Ethics & International Affairs 30(02):253-259 DOI: 10.1017/S0892679416000113
[188] UN Human Rights Committee, 'CCPR General Comment No 27: Article 12 (Freedom of Movement)' (2 November 1999) UN Doc CCPR/C/21/Rev.1/Add.9 (General Comment 27), para. 21.
[189] Case 41/74 *Van Duyn v Home Office* [1974] ECR I-1337, para. 22 ("It is a principle of international law ... that a state is precluded from refusing its own nationals the right of entry or residence")
[190] De Hart, Terlouw (n 6) 316.
[191] Cohen, E, 'When Democracies Denationalize: The Epistemological Case against Revoking Citizenship' June 2016 Ethics & International Affairs 30(02):253-259 DOI: 10.1017/S0892679416000113
[192] Office of the U.N. High Commissioner for Human Rights, Report of the Office of the United Nations High Commissioner for Human Rights on the human rights situation in Iraq in the light of abuses committed by the so-called Islamic State in Iraq and the Levant and associated groups, Human Rights Council, at 5, U.N. Doc. A/HRC/28/18, (Mar. 13, 2015)

Iraq and Syria withers, the attention of the international community has begun to turn more seriously to the pursuit of justice for these horrific atrocities.

Several attempts at achieving justice and accountability have been made thus far. In 2015, for example, Romania and Spain proposed the establishment of an International Court Against Terrorism (ICAT) which would have complementary jurisdiction to national courts and the International Criminal Court (ICC) and be modelled after the International Criminal Tribunals for Yugoslavia and Rwanda and the Special Tribunal for Lebanon.[193] In 2018, the UN established the UN Investigative Team to Promote Accountability for Crimes Committed by Da'esh/Islamic State in Iraq and the Levant (UNITAD) at the request of Baghdad in an effort to devote proper resources to investigate crimes committed by ISIS.[194]Just recently, the arrests of formerly high-ranking Syrian intelligence officers in France and Germany have raised hopes that universal jurisdiction principles might be similarly successfully used to arrest and try returning ISIS members.[195]

Pursuing justice and accountability for crimes committed by ISIS is complicated by two major factors. First, as discussed above, for foreign ISIS members, the use of capital punishment and allegations of torture in Syrian, Iraqi, and Kurdish prisons pose potential legal and political problems to European and Western governments. Second, the current political situation in both countries is fragile and the immediate post-conflict landscape will not be conducive to achieving any legitimate justice. In Syria, the ongoing war between the Assad regime and various rebel factions has rendered ISIS crimes secondary to the Government's priority of recapturing its lost territory and reasserting control over the country. Indeed, the special counterterrorism courts set up in Syria have largely been used to try anti-Government rebel fighters as opposed to members of ISIS. Moreover, the Assad regime itself stands accused of grievous war crimes and crimes against humanity, and the current Syrian judiciary has been accused of complicity, having lost the trust of the people to perform objectively. The judicial and political machinery has been deeply discredited in the eyes of large sections of the Syrian population, to the point that trials of ISIS members would not seem legitimate to many of its victims.

The issue is much the same in Iraq: as Waters (2016) notes, while there have been a scattered set of trials against ISIS members, there is 'general agreement that a comprehensive set of cases cannot be brought' not because of any technical inability but because of the 'political impracticality' of a legal process that would surely implicate all parties involved.[196] These are not problems unique to Syria, but rather a common context that illuminates precisely why international criminal tribunals with some degree of neutrality and objectivity are necessary in

[193] Luca Pantaleo and Olivier Ribbelink, 'The Establishment of a Special Court against Terrorism' (EJIL Talk, 7 January 2016) https://www.ejiltalk.org/the-establishment-of-a-special-court-against-terrorism/
[194] Sistani backs UN investigation into ISIS crimes, *Rudaw* January 2019, http://www.rudaw.net/english/middleeast/iraq/230120193
[195] Three Syrians arrested in Germany and France for suspected crimes against humanity, *Reuters,* https://.reuters.com/article/us-germany-syria/three-syrians-arrested-in-germany-and-france-for-suspected-crimes-against-humanity-idUSKCN1Q21FO
[196] Waters, T, (2016), The shaping flame: trials, conflic and reconciliation in Syria https://onlinelibrary-wiley-com.ezproxy.cul.columbia.edu/doi/epdf/10.1111/issj.12134

post-conflict environments. Waters (2016) convincingly argues that the issue with post-conflict trials in domestic courts is the inevitable 'triumphalist bias' that infects them.[197]

The International Criminal Court (ICC) is a similarly unsuitable fora to try ISIS crimes. Neither Syria nor Iraq are party to the Rome Statute, so the ICC lacks territorial jurisdiction over crimes committed on their soil.[198] The UN Security Council does possess the power to refer situations in non-party states to the ICC Office of the Prosecutor, as it did previously with situations in Darfur in 2005 and Libya in 2011. However, a UNSC draft resolution to refer the situation in Syria to the ICC was vetoed by Russia and China in 2014, and it is unlikely that their positions have changed substantially since then.[199]

Given the issues preventing the pursuit of justice in either the ICC or domestic courts in Iraq and Syria, an ad hoc international criminal tribunal (ICT) should be established to try ISIS members. Ideally, the ICT should be a hybrid court, meaning that it should have majority Syrian and Iraqi grassroots participation but be financially, logistically, and politically supported by international actors. According to scholarship on the most effective forms of international criminal justice, a hybrid court is best positioned to 'capture the legitimacy and authority of a locally grounded institution, but with the political and procedural neutrality of an international institution operating outside the vicissitudes of the local conflict.' The establishment of a hybrid international criminal tribunal would be essential in mitigating several of the potential issues posed by prosecutions in national jurisdictions.

First, prosecution in national jurisdictions will virtually eliminate any substantial role for victims of ISIS crimes in Iraq and Syria. If the forty-six countries with suspected ISIS members detained in Iraq and Syria do decide to repatriate their nationals, and prosecute them in domestic courts, what level of victim participation can possibly be expected? Such a practice would mark a sorry regression from the increasing emphasis on victim participation in transitional justice mechanisms and post-conflict peacebuilding. Electronic methods of victim participation are developing, but would be less accessible to victims than would a hybrid criminal tribunal in the vicinity of former ISIS territory in Iraq and Syria. Moreover, not only would the geographic proximity of a local hybrid tribunal allow for heightened victim participation, but it would also benefit in practical and technical senses from the ability to rely on local experts, knowledge, and processes in order to ensure that the judicial system adequately respects the cultural, political, religious and historical complexities of the region and properly accounts for the context of the crimes committed. Ensuring that victims of ISIS atrocities are not denied the opportunity to participate in the process of justice and accountability is paramount, and would be far easier to incorporate by consolidating the prosecutorial duties into one hybrid court rather than splintering them across forty-six national jurisdictions.

Relatedly, a hybrid ICT established in the region would also maximise the chances of successfully convicting ISIS members. As it stands, national prosecutors are hesitant to repatriate

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[197] *Ibid.*

[198] Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the alleged crimes committed by ISIS, https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-08-04-2015-1

[199] Referral of Syria to International Criminal Court Fails as Negative Votes Prevent Security Council from Adopting Draft Resolution, May 2014, https://www.un.org/press/en/2014/sc11407.doc.htm

potentially dangerous ISIS members because of the significant evidentiary challenges hindering successful convictions upon return. A hybrid court in the region, however, would not only allow victims to participate for their own benefit but would increase the ability of prosecutors to identify and compel witnesses and heighten the availability of evidence within range. Securing available evidence could again be greatly assisted by relying on locals with the appropriate linguistic, political, and practical knowledge as opposed to relying solely on European legal teams with no substantive understanding of Syrian and Iraqi locales. Locals experts, for example those working in legal, medical or humanitarian contexts, may have certain knowledge of local social media websites or apps less commonly used in European and Western states, or may indeed have vital personal connections that can be leveraged to great effect in the pursuit of justice and accountability.

Third, a hybrid criminal tribunal could be deeply beneficial to securing convictions successfully by creating a framework for the joint collecting and sharing of information. If ISIS members are tried in local jurisdictions, prosecutors will not have the benefit of shared security and intelligence apparatuses and would be wasting valuable resources by repeating the same work already conducted in another state. An international tribunal can establish interagency legal guidelines for collecting and using information that would be admissible in a court of law, and create a system for sharing sensitive information between national law enforcement and intelligence agencies, which will help address the evidentiary challenges facing prosecutors in the EU. Analysing social media data, for example, is a potential trove of highly useful evidentiary material that can be collected and processed once and subsequently used and reviewed for several different cases, minimizing resources and enabling prosecutors to 'connect the dots' between affiliated individuals and their activities. Further, the joint nature of a hybrid tribunal would also mitigate current fears regarding uneven sentencing and piecemeal applications of justice, instead helping to ensure legal consistency and a coherent approach to ISIS members across a wide number of states. Ultimately, a hybrid tribunal could consolidate and centralize available evidence to the potential benefit of prosecutors and thus maximise the potential of achieving proper justice for ISIS crimes.

Of course, there would certainly be a number of legal, logistical and political challenges to the establishment of a hybrid international criminal tribunal. Logistically, there is the significant question of funding and resource allocation, whereas procedurally there is a lack of jurisdiction issue that could only be resolved with the full agreement and consent of Iraqi and Syrian authorities. As briefly discussed above, the political situation in Syria remains uncertain. The Iraqi Government, however, might be willing to agree to a hybrid tribunal on its territory in exchange for financial and technical assistance and with full assurances that Iraqi security forces and government officials will have complete immunity throughout the course of the tribunal's investigations. The Iraqi Government would likely be under pressure from its allies similarly involved in supplying, coordinating, funding, or otherwise connected to any of the parties involved in the conflicts in Iraq and Syria, and may request further assurances to that effect.

However, the current Iraqi Government has worked closely with the international anti-ISIS coalition and allowed for Western and European forces to launch various counterterrorism efforts from its territory, so there is some indication that a hybrid tribunal could be negotiated. For its part, the Kurdish regional government and the SDF have repeatedly requested assistance from

Western and European states and would likely welcome some stronger action than is currently the case.

International criminal justice suffers from a perception that it is a post-colonial exercise imposed by wealthy western states on actors from poor, developing countries. This argument has some merit, which has been discussed exhaustively elsewhere. However, justifiable criticisms of international criminal justice mechanisms should not completely override the sentiments of the communities in Syria and Iraq who have suffered under ISIS rule. Indeed, ignoring the demands of the victims for justice as a matter of self-righteous principle would surely in itself be a grotesque exercise in colonial paternalism. Several communities have called for an international criminal mechanism to try ISIS fighters, for example Yazidi, Christian, LGBT+, Turkmen, Kurdish, and other minorities as well as broader Syrian and Iraqi populations.

Conclusion: ISIS and the International Responsibility to Prosecute

According to the doctrine of a 'rules-based global order', the international community has a responsibility to protect and uphold international criminal and humanitarian law, known as the 'responsibility to prosecute.'[200] To protect the integrity of the global order and the effectiveness of international criminal, humanitarian, and human rights law frameworks, states are obligated to pursue and apprehend its nationals suspected of terrorism.[201] In September 2006, the General Assembly adopted the UN Global Counter-Terrorism Strategy, which recognised that a lack of the rule of law and violations of human rights amount to conditions conducive to the spread of terrorism.[202] Subsequently, UNSC Resolution 2249 called upon Member States "that have the capacity to do so to take all necessary measures, in compliance with international law…to prevent and suppress terrorist attacks committed specifically by ISIS."[203] Thus, the responsibility to repatriate and prosecute can be derived from UNSC resolutions as well. Given the clear security concerns with leaving ISIS members in what the SDF has itself warned are increasingly unstable and insecure detention facilities, failure to repatriate might be argued as a failure to uphold obligations prescribed by the aforementioned UNSC resolution.

From a policy standpoint, too, it is short-sighted for EU member states to abandon citizens and residents to weak judicial processes in Iraq and Syria. The denial of due process and other human rights violations suffered from terrorist suspects in Western countries has proven to be a key instrument of terrorist propaganda and rhetoric. "Those who are tortured, entrapped by the government agents into conspiracies they were not intending to join, and stripped of the possibility to effectively question their detention in court may equally be viewed as 'victims'."[204]

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[200] Rankin, M (2018) Australia's responsibility to prosecute? Bridging the gap of international criminal law in Syria and Iraq, Australian Journal of International Affairs, 72:4, 322-328, DOI: 10.1080/10357718.2017.1414772
[201] UNODC, Handbook on Criminal Justice Responses to Terrorism, U.N. Sales No. E.09.IV.2 (2009).
[202] Conte, A, 'An Old Question in a New Context: Do States Have to Comply with Human Rights When Countering the Phenomenon of Foreign Fighters?' March 2015, https://www.ejiltalk.org/an-old-question-in-a-new-context-do-states-have-to-comply-with-human-rights-when-countering-the-phenomenon-of-foreign-fighters/
[203] (UNSC Res 2249 (20 November 2015) UN Doc S/RES/224 9 , para 5)
[204] Jesse Norris, 'Why the FBI and the Courts are Wrong about Entrapment and Terrorism' (2014-2015) 84 Mississippi Law Journal 1257., Aksenova 26-27)

ISIS members themselves have used the non-repatriation policies of the West as propaganda, highlighting what they view as hypocrisy towards democratic principles. Detained British national and ISIS fighter Alexanda Kotey, for example, recently said to a journalist: "The American administration or British government - if they decided they wanted to be champions of the Sharia and apply Islamic law upon myself and Shaf [el-Sheikh], then by all means. If not, then they should adhere to that which they claim to be champions of." El Shafee el-Sheikh, another British ISIS fighter implicated in the grisly murders of aid workers and journalists, similarly stated: "I am not a democratic person, but I am being subjected to democratic law. So it is only right for those who claim to uphold this to fully uphold it." Resolution 2178 also recognises that the lack of state compliance with obligations under international human rights law "is one of the factors contributing to increased radicalisation and fosters a sense of impunity."[205]

Further, denationalisation disincentivizes fighters from ending participation in a terrorist organisation. For example, the former head of counterterrorism at MI6, the U.K.'s external intelligence agency, recently stated that foreign fighters who wish to renounce their involvement in foreign terrorist activity need "to know that there is a place for them back at home."[206] This is because ex-foreign fighters are better positioned to undermine the terrorist narrative and more concretely explain to potential recruits why joining ISIS is a bad decision. In political science literature, this is referred to as 'cost': denationalisation policies increases the individual's cost of exiting the conflict and accordingly increase the risks he or she is willing to take.

Third, it is more dangerous and difficult to monitor stateless persons. UK Member of Parliament Chris Bryant, for example, warned in the Commons that revoking citizenship could present a threat[207], while in the House of Lords, Baroness Smith of Basildon also questioned the efficacy of creating a statelessness population: "Does that not mean that we have people who are stuck here, whom we cannot deport and to whom we have obligations, but no charge has been brought against them? How does that help ensure that national security is protected?"[208] Lord Pannick similarly inquired: "Does the Minister therefore accept that, far from contributing to national security, the exercise of Clause 60 against persons in this country will positively damage national security by making it more difficult to remove people who are a danger to the public good?"[209]

Finally, the current reluctance of European states to repatriate and prosecute suspected terrorist nationals in Iraq and Syria may create serious political friction and resentment. Worster (2009) argues that by expelling or failing to repatriate nationals, and thus 'forcing' them to remain elsewhere, the expelling state is potentially violating the sovereignty of the receiving state.[210] In effect, the expelling state places an unfair burden on the receiving state, who can then no longer

[205] UNSC Resolution 2178
[206] 'Isis fighters must be allowed back into UK, says ex-MI6 chief,' *The Guardian,* Sept. 7, 2014, http:/.theguardian.com/world/2014/sep/06/richard-barrettmi6-isis-counter-terrorism.
[207] Hansard, column 267WH
[208] Hansard, House of Lords Debate 17 March 2014, Column 44
[209] *Ibid,* Column 48
[210] *See* William Thomas Worster, International Law and the Expulsion of Individuals With More Than One Nationality, 14 UCLA J. INT'L L. & FOR. AFF. 423, 427 (2009).

deport or remove the stateless person to another country without violating international law.[211] According to Gross (2003), citizenship deprivation or otherwise failing to repatriate citizens should only be a possibility if the 'receiving state' consents to having the deportee within its territory.[212] Obviously, that is not the case in the present situation, as European ISIS members did not enter the borders of Iraq and Syria legally.

It is certainly true that government repatriation of European ISIS members may face strong public backlash. Public apprehension is in fact quite justified given that returnees may walk free amidst evidentiary challenges to successful convictions. However, security policy will only be forced to confront the same jihadi-inclined individuals later if they escape from poorly resourced SDF detention facilities or, for those who are not captured in Iraq and Syria, gravitate towards other fragile states like Libya, Yemen, or Somalia to wage jihadist activities from new turf. As repeatedly emphasized in UNSC Resolution 2178, European counterterrorism policy towards ISIS returnees must comply with state obligations under international human rights and humanitarian law.

[211] W. Worster, 'International Law and the Expulsion of Individuals with More than One Nationality' (2009) 14 UCLA Journal of International Law and Foreign Affairs 2, 423, 432.
[212] E. Gross, 'Defensive Democracy: Is It Possible to Revoke the Citizenship, Deport, or Negate the Civil Rights of a Person Instigating Terrorist Action Against His Own State?' (2003) 72 UMKC Law Review 51, 90.

Can psychoanalysis help PTSD survivors when they commit crimes which inflicts them with the law?

Kelly Purcell-Chandler*

Abstract

The question this paper poses, is whether psychoanalysis can offer us tools with which to intervene before it is too late, with a view to identifying the condition and helping rather than punishing the sufferers. This paper acknowledges that getting the two discourses to talk let alone understand each other faces major obstacles because of their differing aims and presuppositions but also points out that movement has been witnessed over decades of development including the recovery of damages for nervous shock.

Introduction

Historically, it has been acknowledged that witnessing a traumatic event can leave a long-term effect on the mind.[1] PTSD can be undiagnosed and mistreated. In adults, traumatic events are experienced by an estimated 70% of the population and are linked etiologically to the development of PTSD, but why do few go on to commit crimes on others.[2]

This paper will argue society would be 'better off' responding to the signs, rather than waiting for a deed to be committed and punishing according to the (man-made) law. There is a responsibility of society to do more to protect those most vulnerable. This paper does not address the powers that currently exist under the Mental Health Act 1983, this legislation does allow authorities to detain a person against their will and treat them without their agreement, but it does not focus on the reason these symptoms come to be externalised through crime. The scope of this paper is the relationship of psychoanalysis and the law and whether it could be used as another tool in mental health to prevent and protect society along side the Mental Health Act 1983.

Can Psychoanalysis Help?

Nowadays most psychiatric experts refer to PTSD using one of two key classifications, the *Diagnostic and Statistical Manual of Mental Disorders* (*DSM 5*)[3] or the ICD-10 Classification of Mental and Behavioural Disorders: Clinical Descriptions and Diagnostic Guidelines 1992, published by the World Health Organisation (ICD-10). A concern is the rigid legal classification of these manuals that do not account for true medical need and therefore, they do not reflect the

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[1] Barrett, 1958, p170

[2] Davidson, J. R. T., & Foa, E. B. (Eds.). (1993). Post-traumatic stress disorder: DSM-IV and beyond. Washington, DC: American Psychiatric Press.

[3] American Psychiatric Association. (1994). Diagnostic and statistical manual (4th ed.). Washington, DC: American Psychiatric Press.

real difficulties of categorising mental illness as one disorder rather than another. In the psychiatric classification PTSD relies on identifiable external experience. Classified as an anxiety disorder, it is typically defined by the coexistence of three clusters of symptoms: re-experiencing, avoidance, and hyperarousal.

The law as an institution, it is man-made and because of this, there are limits to what it can accomplish. The law has started to admit that mental illness can limit the mental capacity of a person to act 'responsibly', it also recognises that PTSD can reduce a person's mental capacity. This in turn, means that the law can treat a person diagnosed with PTSD with a different, more lenient, standard from persons who are considered 'sane.' A question to consider is could psychoanalysis also address this discrepancy before an individual is found within the bounds of the legal system.

This work will question the possibility of using another option from the current legal framework for societies most vulnerable, stepping in before the law to deal with mental health, in a way that differs from the unsuccessful framework that exists. The current method is generally reactive: to punish. Could more be done to prevent the initial the crime (a cry for help), when the person is known to services such as the army, which in turn, will prevent the punishment. If the law can deprive people of freedom after the crime is committed, it is possible it could also deprive people of freedom before, the individual could seek help before they find it is too late, using therapy rather than medicating, often before the underlying causes are explored. Mental illness is normally an unconscious expression of something, so simply numbing it doesn't cure people, but it allows people to be productive members of our capitalist society.

Psychoanalysis has the potential to go a step further in the right direction. The current legal system uses black letter legal vocabulary, but words such as guilt, hysteria, obsessions and paranoia are not yet fully understood.'[4] As Goldstein so eloquently puts it psychoanalysis tries "to provide a systematic theory of human behaviour. Law, both as a body of substantive decisions and as a process for decision-making, has been created by man to regulate the behaviour of man."[5] Bearing this in mind, it is imperative to remember that the aim of psychoanalysis is to understand the mind. The law is made by the mind of man. Psychoanalysis can be defined as a technique of investigating the mind, Schwartz suggests that it can be defined in three ways; literature, psychiatry, academic psychology.[6] I suggest adding a legal definition could benefit not only the individual, but also the legal system as a whole. More importantly if these definitions are to be understood, it is useful to have an understanding of them all to be able to make necessary distinctions.

According to the US Department of Veteran Affairs investigations shows that 10% to 18% of troops are prone to PTSD after they return.[7] It was found there was a need for greater clinical consideration to the role of guilt in the evaluation and treatment of veterans with PTSD.[8] This is where psychoanalysis could really open the closed ideas of the mind and infiltrate the minds of those who do not know but do need it most. To make but one point, we can support this claim by saying that the main goal of psychoanalytic treatment is *not* the 'healing' of the patient, but rather the change of the fantasy field. That is to say, in a very simplified manner, that the aim of

[4] Gay, Peter. Freud: A Life/or Our Time. Ontario: Penguin Books Canada, 1988
[5] http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=3445&context=fss_papers (accessed 05/09/2017)
[6] Van der Kolk, B.A. & Ducey, C. P. (1989). The Psychological Processing of Traumatic Experience: Rorschach Patterns in PTSD. Journal of Traumatic Stress, 2 (3), 259-274
[7] The study was 19/100 veterans had made a post service suicide attempt, and 15 more had been preoccupied with suicide since the War. It was found five factors were significantly related to suicide attempts: guilt about combat actions, survivor guilt, depression, anxiety, and severe PTSD.
[8] Interpersonal Guilt the Development of a New Measure, Journal of Clinical Psychology, Vol. 53(1), 73–89 (1997)

psychoanalysis is to "teach" the patient to learn to live with her symptoms. This can be hugely beneficial, as mentioned earlier merging the two disciplines by also having a standard application that the law can adhere to as well.

Law and Mental Health

There is a lot of case law relating to psychiatric injury, Psychiatric harm is defined in the case of *McLoughlin v O'Brian*[9]. A claimant seeking damages for psychiatric injury must establish that he or she is suffering "not merely grief, distress or any other normal emotion, but a positive psychiatric illness,"[10] but the merge between the law and medical view has been described as minimal. In English Tort Law, PTSD comes under the old-fashioned umbrella of 'nervous shock.' This term dates back to 1882 referring to a physical illness. In 1901, it was also recognised as a psychological reaction and awarded damages to a pregnant barmaid who was frightened after seeing a pair-horse (a small carriage) driven into the bar where she was serving.[11] Many scholars have expressed their concern over the name not being sufficient, although little has changed in the legal landscape.

Stone discusses the relationship between PTSD and the law. Its impact has been crucial, possibly more than any other psychological or medical disorder, PTSD has not only influenced the law, but been influenced by the law.[12] There have been concerns regarding individuals exploiting PTSD in criminal cases, although this is questionable considering the PTSD insanity defence is not often raised and it is usually unsuccessful.[13] PTSD is usually used as a factor in diminished responsibility, which is a partial defence to murder, such as the Bradley case. There are other reasons such as a pre-trial plea bargaining, or sentencing.[14] In some self-defence cases, PTSD can highlight provocation such as "battered woman syndrome."[15] Pitman points out the difficulty of a PTSD diagnosis because it is limited by the 'illusory objectivity of the traumatic event and the subjectivity of the ensuing syndrome'.[16] He goes on to explain the causes that support a crime related to PTSD. This stringent test requires the individual to have done things in such a specific way it becomes rigid to pass. To qualify for the diagnosis of 'PTSD', one must follow this rigid formula. The consequence of having such rigid diagnosis in relation to PTSD, is that people are bound to fall outside the scope of it. If one does not receive the right diagnosis one cannot receive any treatment, this in turn not only impacts on the individual, but also society's ability to deal with mental illness, namely PTSD appropriately. If the law takes on board Lacan's less rigid distinctions the process would be far more manageable.

Current Law for 'Nervous Shock'

As this section is referring to the law, the term for 'psychiatric injury' claims will be referred to as 'nervous shock' claims. In *Page v Smith*, Lord Oliver split claimants into primary and secondary victims. This still remains good law. The dated opinion still stands that primary victims will be

[9] McLoughlin v O'Brian [1983] 1 A.C. 410
[10] Ibid
[11] Page H: Injuries of the Spine and Spinal Cord Without Apparent Mechanical Lesion. London: J. & A. Churchill, 1885
[12] https://www.ptsd.va.gov/professional/newsletters/research-quarterly/V9N2.pdf (accessed 13/09/2017)
[13] Sparr, L.F. (1995). Post-traumatic stress disorder: Does it exist? Neurologic Clinics, 13, 413-429
Dutton & Goodman, (1994). Posttraumatic stress disorder among battered women: Analysis of legal implications. Behavioral Sciences and the Law, 12, 215-234.
[14] https://www.ptsd.va.gov/professional/newsletters/research-quarterly/V9N2.pdf (accessed 10/09/2017)
[15] Dutton & Goodman, (1994). Posttraumatic stress disorder among battered women: Analysis of legal implications. Behavioral Sciences and the Law, 12, 215-234.
[16] Pitman R.K. (1993) cited in Sparr, L.F. (1995). Post-traumatic stress disorder: Does it exist? Neurologic Clinics, 13, 413-429

able to recover damages provided that at least physical injury was foreseeable even if psychiatric injury was not foreseeable. Secondary victims, who were not in the immediate vicinity, will have to overcome the control mechanisms. In the case of *Donachie v Chief Constable of Greater Manchester 2004* a policeman developed PTSD. This was because of his increased risk of physical danger in work. The court held he was entitled to damages as a primary victim. The test is not so simple for secondary victims. They have a higher burden of proof to overcome. Those claimants who have suffered a psychiatric injury notwithstanding that they were not in immediate danger themselves, must meet the criteria set out in *Alcock Chief Constable of South Yorkshire Police [1991]*. This is an influential case in this area of law when police negligently allowed too many supporters into the stadium which resulted in 95 deaths. This in itself was a tragedy but the whole event was recorded on live TV and it was witnessed by family members of those injured. The House of Lords dismissed all ten claims and held as a "mere witness" to a horrific event they must prove firstly, the concept of proximity to the victim which is close ties of love and affection with the victim (this can only be assumed in the case of spouses and parents); secondly that they were present at the accident or its immediate aftermath, and thirdly that the psychiatric illness was caused by the direct perception of the accident or its aftermath (and not hearing it via another source including by television. Lastly, they must also prove that the injury arose out of the sudden appreciation by sight or sound of a horrifying event and was in fact "nervous shock".

'Nervous shock' does not appear to be moving forward consistently with medical knowledge, Alcock still being the leading case. A key criticism of the existing law is that, in an attempt to place limits on recovery for negligently inflicted psychiatric illness, the courts have established criteria that does not follow the case law[17]. This in particular refers to case law for secondary victims on grounds of policy. I propose along with many other scholars[18] that this distinction should be abolished, as it is outdated with current research surrounding PTSD; it is not whether the victims were there what counts it is whether they have a diagnosis of PTSD from the traumatic event. When these criteria are scrutinized for support with medical evidence, they are found to be arbitrary and indefensible, because of the lack of consistency; this brings the law into disrepute with the general public because they do not create an understanding if anything they create a lack of understanding. One way of dealing with this, is to introduce an individual assessment of PTSD from the medical profession so that the two work in conjunction with each other to establish reliably the diagnosis of PTSD, particularly in legal cases rather than limiting the medical knowledge for policy purposes. The individual, and the law could benefit from the extensive research in this area helping people to seek support before it is too late, so to speak. A revision of the law referring to 'nervous shock' medical research progressing so rapidly.[19] Until then, it is due to policy reasons and not medical evidence that informs the law in relation to 'nervous shock'. Although the law here is mainly in relation to the victim of the event, it also extends into the realm of those with PTSD who go on to commit crimes. There is a lack of consistency in the literature on these results in law and until this is addressed the law will not provide a sufficient backdrop[20].

My Family Case Study[21]

On Monday 9th July 2006, David Bradley was remanded in custody, charged with four counts of murder. Bradley was a former soldier, known to various agencies to have suffered from PTSD having served in Northern Ireland, Bosnia, Kosovo and the Gulf War. Bradley shot four members

[17] Hicks, Post Traumatic Stress Disorder and the law
[18] Gray S. N, Carmen N G, Rodgers P, MacCulloch M J, Hayward P and Snowden R J in Post-traumatic stress disorder caused in mentally disordered offenders by the committing of serious violent or sexual offense
[19] Simon R I: Post traumatic Stress Disorder in Litigation: Guidelines for Forensic Assessment. Washington, DC: American Psychiatric Press, 1995
[20] Carveth, The Unconscious Need for Punishment: Expression or Evasion of the Sense of Guilt?
[21] The people murdered in this case study are the writer's father, grandfather, grandmother and uncle.

of his family in their home with a silenced pistol over a period of 24 hours, cleaned up, and then calmly walked into his local police station with the items in a rucksack to inform the police officers about the multiple murders he had committed. Bradley is currently detained at Rampton secure hospital in Nottinghamshire. It is currently unknown if the prolonged emotional suffering following physical or emotional war trauma can be restructured, let alone cured. Beyond the personal guilt of Bradley, society must look at the institutional failures and its responsibility arising from the misdeeds of the state and its decisions. This guilt, more or less unconscious, that is attributed to the failing of mentally ill individuals, in reality arises from the fact that the state is out of touch and the unconscionable exploitation of the mentally ill, such as Bradley.

In the courtroom, Bradley appeared to show no guilt or remorse for what he had done, although guilt stems largely from the unconscious desire to hurt others; stemming from such motives as revenge. Taking analysis into consideration it was in fact the guilt that became the driver for Bradley's acting out. Bradley had experienced a dysfunctional relationship with his parents from a young age. Bradley left the Army in 1995 with PTSD and never worked again. In 1997 he saw his doctor complaining of feeling tense, wound up and wanting to 'kill someone' - a desire he had harboured for many years. A Freudian explanation would be that Bradley was oppressed by an unconscious idea of guilt which he could not remove. He therefore committed a criminal act to make the guilt come to the surface, no longer internal but an external issue for all to see. This is a clear example of transgression – Bradley had overwhelming feelings of guilt before committing the crime or transgressing any norms. The subject who suffers from a cruel super ego and the unbearable feeling of guilt, that the latter imposes on him or her often leads to the commission of a crime in order to be at least made guilty of something. It seems that Bradley wanted to be punished, if Freud is to be believed, his crime was a transgression of guilt he was already suffering because a person who is oppressed by an unconscious sense of guilt, commits a crime in order that the guilt carried becomes real.[22] Melanie Klein reinforced Freud's idea, writing the motive behind the crime is the "externalisation of unconscious guilt."[23] Bradley admitted to feeling ready to "explode in violent outbursts" and external punishment is thought to be less intrusive than the Super-Ego.[24] Rank further reiterates this theory by suggesting that guilt causes a desire for punishment, deriving from the idea of a baby fearful of losing the attachment to its mother. Freud talks about an unconscious sense of guilt and the need for punishment, "as far as the patient is concerned this sense of guilt is dumb: it does not tell him he is guilty; he does not feel guilty, he feels ill".[25] Freud argues that if the idea of guilt existed before the crime; the crime emerged from the sense of guilt. He goes on to discuss how people can be described as criminals from this sense of guilt but the 'pre-existence of the guilty feeling had of course been demonstrated by a whole set of other manifestations and effects'.[26] It is this that needs to be addressed to stop the crime surfacing.

Sometimes the feeling of guilt is so strong, that person commits a crime. This could be the reason David Bradley committed his crime; the guilt was too much to handle following his time in the army. As Freud so eloquently puts it, "…He was suffering from an oppressive feeling of guilt, of which he did not know the origin, and after he had committed a misdeed this oppression was mitigated. His sense of guilt was at least attached to something."[27] People, like Bradley, who have been exposed to violence, seem to be more vulnerable to the likelihood of committing crimes

[22] Grigg, R. Guilt, Law, and Transgression, Cardozo Law Review, Vol 24:6 2003, 2371-2380
[23] Ibid 2374
[24] Salecl, What is on my Mind, The Law, Neuroscience and Psychoanalysis
[25] Freud, 1923, 49
[26] Freud, S. (1916). Some Character-Types Met with in Psychoanalytic Work. The Standard Edition of the Complete Psychological Works of Sigmund Freud, Volume XIV (1914-1916): On the History of the Psycho-Analytic Movement, Papers on Metapsychology and Other Works, 309-333
[27] https://www.princeton.edu/~ereading/FreudCriminals.pdf (accessed 05/09/2017

themselves. Some people can control anger or frustration and seek appropriate help. Others exhibit an alarming lack of control such as Bradley, or more recently Brevik the Norwegian mass-murderer of 77 young people and children, in two separate events. On August 24 2012, he was sentenced to 21 years in prison. Breivik went through two forensic evaluations: the first concluded that he had a psychotic disorder, thus being legally unaccountable, whereas the second concluded that he had a personality disorder, thus being legally accountable.

PTSD is now firmly entrenched in the legal landscapes, yet there has not been enough systematic examination of the underlying cause especially with the development of psychology which could aid further analysis of the mind[28]. Psychoanalytic theorists' key aim is helping the individual recognise and bear the trauma and the resulting psychic damage, as well as developing coping strategies so they can bring their traumatic memories into their current experience, thus in turn preventing the desire to externalise the guilt.[29]

It seems society does not want to address the root of the problem. For Foucault, law does not prohibit desire, the desire already exists. For Bradley, it is possible that the law was the driver behind the desire, it had the opposite effect. One explanation could be that by encouraging Bradley to think about violence; the law created a set of actions which in turn created a desire that did not exist before. Lacan also observes, "I can only know of the thing by means of law. In effect, I would not have had the idea to covet it if the law hadn't said.'[30] Lacan's notion of the law is different from Foucault's because the person, produced by the law does not only have a desire but the law creates the desire, in turn, the prohibition incites the desire. Without the prohibition there would be no desire to do it. As well as this, there is also a desire not to have a desire, meaning the subject denies his desire. This is shown through the contradiction that exists between the subject and his desire. In the Dostoyevsky case Freud explored the relationship between guilt and transgression. Guilt happens between people as much as it happens individually.[31] Returning to the case of Bradley if this theory is to be believed, Bradley responded by externalizing the guilt, by transgressing and murdering his family, which allowed him to go to the police station and be punished. Hence, Klein gives further support to Freud in suggesting that when criminal behaviour is initiated from the unconscious guilt, the external punishment becomes less threatening than internalizing the guilt itself. Psychoanalysis also highlights criminal transgression in wartime massacres, although these are not random events, but prior planned and many people condone the actions of those fighting in war if it is for their side. Hendin holds that "the overwhelming presence of guilt related to combat among the veterans who were suicidal points to the need for clinical attention to such guilt in both the evaluation and the treatment of veterans with PTSD."[32]

One main function of law is to decide what to do in particular cases. Luhmann asks us to consider law as a system having a dichotomizing function at its core. He says the point of many legal decisions is to distinguish the legal from the illegal action. A court decides whether a defendant is guilty or innocent, or whether a contract is valid or invalid, '… from the perspective of psychoanalysis, all selves are complex and layered; selves are in constant motion and dynamic tension. They have conscious and unconscious dimensions. They are ambivalent and ambiguous. They can never be reduced to a dichotomous choice between state A or state B' [33], so where the law misses the point, the mind is more than a simple answer. In other circumstances such as when

[28] Foa, E. B., & Kozak, M. J. (1986). Emotional processing of fear: Exposure to corrective information. Psychological Bulletin, 99, 20-35.
[29] St Paul, Lacan J, Seminar 7 Ethics of Psychoanalysis http://www.lacanianworks.net/?p=386 (accessed 12/09/2017)
[30] Ibid
[31] Baumeister, Stillwell, Heatherton: Guilt, an Interpersonal Approach, Psychology Bulletin 1994, Vol. 115, No 2, 243-267
[32] Johnson J.D. 'Combat Trauma – A Personal Look at Long-Term Consequences' p4
[33] http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1350&context=yjlh (accessed 10/09/2017)

the law asks whether a defendant will be dangerous, psychoanalysis can provide answers. The more psychoanalysis is understood, the more efficient the legal system will be, which makes it more fluid and less structured.

Psychoanalysis on the Couch

Psychoanalysis attacks the very ideas and logic of the law. Aristodemou claims it upsets the distinction between the public being external and the private being internal. This is important because it is the public realm of the law versus the private realm of the mind. The private of the mind becomes public discreetly through the unconscious.[34] Psychoanalysis upsets the whole relationship, by unravelling the clear distinction between human being and the so-called society. It undermines the whole idea that there is such a thing as an inside and outside. This is problematic because it unravels the relationship between the two. For law, it is extremely hard to avoid psychoanalysis. Law and legal theory have dwelled for centuries on the level of consciousness. For psychoanalysis, it is important to understand how the individual and society correlate: until that is understood the nature of the individual and the relationship to society, our ability to reform the way society and the legal realm, will be limited.[35] It is in the human psyche and its relationship to the 'Big Other'[36] that people must look for change if they are to make lasting social and legal reforms. The difficulty being is that social structures are entrenched in the unconscious.

According to Darian Leader, what is far more difficult for the idea of mental health in the 20th and 21st centuries is the concept of the unconscious, the suggestion that there are regions of the mind we can never fully control.[37] The unconscious goes on further to explain the desire of the unknown. Salecl has observed that crime is another way of showing the blind spot in the individuals' identification with the law; this relates to the law in a quite specific way. She suggests that the superego generally ensures that people submit to the law, but the question arises about what happens when one suffers with mental health issues, because of one becoming more psychologically vulnerable.

Trauma, desire and symptoms determine the way we attach ourselves to the law. For Freud, violence and crime lie at the beginning of humankind. Crime comes before the law and determines the nature and the response. For Hegel, unlike many of his peers, he said law and ethics are the causes of the social bond, with an active conscious and the likes of Plato, Kant and Hegel saw the study of law in its social setting as paramount. More recently Douzinas argues that the study of jurisprudence and its conscious is the "moral compass".[38] The law lost its ethics and because of this jurisprudence, which was earlier seen as the consciousness of law was arguably downgraded losing its moral value. One could question the value of the law more recently, because it has not extended itself further even though psychology; psychoanalysis for the purposes of this work, has allowed further development in the field of the workings of the mind, especially a damaged mind and how it responds to external factors such as the law.

I argue this failure with the added dimension of mental health is having a detrimental effect on society. If psychoanalysis is going to help today in the late global capitalism, it is not to teach people how to enjoy but how to learn to live with the pressure of the enjoyment of what they desire. For those suffering with mental health issues, the person would be better equipped to deal with the

[34] Aristodemou, Law, Psychoanalysis, Society: Taking the Unconscious Seriously, 2
[35] ibid
[36] According to Lacan, one of the (if not the) most significant and indispensable conditions of possibility for singular subjectivity is the collective symbolic order (sometimes named "the big Other," http://plato.stanford.edu/entries/lacan/ accessed 16/01/2016
[37] Leader, D. Corfield, D. Why Do People Get Ill?
[38] https://intersectionsj.wordpress.com/2010/01/23/god-is-unconscious/ (accessed 21/08/2017)

failure, which in turn would prevent the lashing out in order to externalise the guilt. Fernando Pessoa said "Decadence is the total loss of unconsciousness, which is the very basis of life. Could it think, the heart would stop beating."[39]

Zizek discusses the ironic situation that if God does not exist then why is it that everything is prohibited. The fear is that one's own prohibitions are more restricting than those of the church. Everybody wants God to do the hard work for them, otherwise there is the chance you, the subject is more restrictive on oneself than God himself.[40] The subject has struggled to understand what God wants for their life rather than having to decide for themselves, especially if they are unable to see as 'clearly' because the state of their mental health is attempting to fill the emptiness, which is central to human subjectivity.

The rule of God is less detrimental to one's mental health than a person's own obscene desires. The empty space allowing for perverse thoughts, ultimately being subject to the law of God is better than being subject to one's own mind and desires. Aristodemou considers the 'hangover period' when one realises the space is still there but it is now empty, it is this where the interest of this work lies, as it is this that is often referred to as "guilt, nausea, depression or PTSD."[41] Pessoa, goes on to say he is 'at the bottom of a bottomless depression', because without a master there is less chance of enjoyment. The fantasy of God, the Father or a master is very much still needed, we believe because of the desire to believe,[42] even if, religion is not believed without this we not only lose the lack of the subject but the lack in the symbolic order.[43]

Psychoanalysis therefore implies life with God was easier for society than life without him; to transgress against God was easier than transgression against oneself. Kafka showed us his suffering of shame and guilt in his writing; Pessoa highlighting anxiety as well as depression, and boredom. For psychoanalysis, the question is what is the difference between the 'moral law that governs the individual in his inner self and the legal norms that govern an individual in the outer world?'[44] The problem that external law cannot restrict the inner law, in one's own mind.

Psychoanalysis turns the person, and arguably the institution, if society will allow it because the inside can be 'dirty' and it seems the subject, society, the institution or the system is not ready or willing for a lack of better word to deal with people's dirty laundry. Because of this some crimes become unavoidable, a cry for help, a release of guilt. This paper argues that exactly within this area psychoanalysis could step in and take the lead. If psychoanalysis is to be believed, there are cries for help that can be listened to before one is embroiled in crime and law.[45]. In *Anxiety* Lacan insists that if law is to legislate for the individual, it should try to understand the individual and perhaps just as importantly their relationship to society.

Conclusion

Until this discrepancy regarding what was learnt about the mind and what has been addressed regarding the institutions of the state, legal system and army is addressed underneath the surface, from below; there will be no change and tragedies will occur such as the one in my own family 10 years ago that still causes so much pain and suffering. Sometimes those with little or no direct

[39] Pessoa, F. The Book of Disquiet Page 11
[40] Tad DeLay, "Excess: The Obscene Supplement in Slavoj Žižek's Religion and Politics," *International Journal of Žižek Studies* 8.2 (2014): 1–20.
[41] ibid
[42] Aristodemou, Law, Psychoanalysis, Society: Taking the Unconscious Seriously, 2
[43] Salecl What is on my Mind, The Law, Neuroscience and Psychology
[44] A. J. P. Taylor, The Struggle for Mastery in Europe 1848-1918
[45] ibid

exposure to the trauma can develop PTSD. This can be referred to as the 'ripples outward' effect, something the writer of this work understands because she too was diagnosed with PTSD following the brutal murder of her father, grandfather, grandmother and uncle.[46]

Lacan says, "The progress of psychoanalysis is further retarded by the dread felt by the average observer of seeing himself in his own mirror. Men of science tend to meet emotional resistances with arguments, and thus satisfy themselves to their own satisfaction."[47] Analysis is asking the law to rethink its inherent ideas, not to deliver the solutions, but to keep questioning the language, ideas and notions. This would lead to a safer society where one would understand his own desires and not need to externalise them through guilt and crime. Law serves to express our ideals and values, law is used to sanction principles which are believed by man at the time to be sufficiently significant, it is now time to acknowledge the mind is not as simple as the law.[48]

Psychoanalysis has the potential to traverse the fantasies with a real understanding of individual needs. It allows the individual to explore inner conflicts in a safe environment, just the analyst and patient, who together aim to resolve the conflicts. Failure to satisfy these needs have lasting negative effects on the individual and society. The understandings of psychoanalysis are essential to emotional well-being and to society as a whole. The question of how to help somebody who has mental imbalances is not an easy task, because human beings have limitations, as do the institutions who control them. Neither the psychological nor legal structure are working for PTSD and crimes being committed, psychoanalysis differs from psychology so far as, psychoanalysis very much focuses on the nature of guilt, as Freud wrote 'anxiety is a reaction to danger.'[49] It is clear when the law finally intervenes, not only is it too late, but the intervention is flawed. This is a major mental health issue that the government will argue they cannot afford, but this paper challenges whether it is productive to put a price on people's well-being. 'Treatment not punishment'[50] should be the new mantra for all those who need it, including soldiers returning from the battlefield, or women who have been abused or for children who have trauma and rejection in their upbringing. The law is the last place such survivors should find themselves.

[46] Lacan, Anxiety,

[47] Lacan, My Teaching, trans. David Macey (New York, NY: Verso, 2008), 9.

[48] Crockett, Interstices of the Sublime: Theology and Psychoanalytic Theory (Bronx, NY: Fordham University Press, 2007), 23.

[49] Freud, S. Inhibitions, Symptoms and Anxiety

[50] Grigg, R. Guilt, Law, and Transgression, Cardozo Law Review, Vol 24:6 2003, 2371-

British, BAME & Brexit
How the loss of free movement rights will disproportionately affect British BAME citizens

Michael Cabot*

Abstract

The free movement of people is one of four fundamental freedoms upon which the community, culture and economy, of the European Union (EU) is built. Citizens who enjoy the liberties that accompany the status of 'EU citizen' have the ability to move seamlessly through the borders of the Schengen area without scrutiny, visa requirements or fear of being ejected or rejected.

Since the referendum of June 2016 where the United Kingdom voted to leave the EU, the question regarding whether the U.K. will continue to allow the free movement of EU citizens into the U.K., and vice versa, has been a hotly contested point. The U.K. now seeks to navigate through political negotiations championing a strict stance against movement of people, the EU opposes this position, campaigning for the right to freedom of movement to be preserved post-Brexit.

Although commentary has highlighted that right-wing, nationalist popularity appears to be on the rise across the U.K. and Europe alike; and that voices calling for strict immigration control, rallying against free movement drove the rhetoric supporting Brexit; the effect that the British-European climate will have on Black, Asian and minority ethnic (BAME) citizens seems to have been side-stepped, this may in-part be due to the fact that the EU is reserved about collecting statistics regarding ethnicity.

The following essay aims to show that, if the United Kingdoms' stance is applied, the loss of free movement rights post-Brexit will disproportionately affect the lives of British BAME citizens.

Introduction

In 1946, in the wake of post-World War II nationalism, Winston Churchill probed at a "kind of United States of Europe"[1] in a speech at Zurich University. By February 1992, after a troublesome road through national referendums, the Maastricht Treaty on the European Union was signed. In 1995 the borders within the EU were dropped. As a result of the Schengen agreement Germany, Portugal, Spain, France, Belgium, the Netherlands, and Luxembourg began a trend of doing away with border controls within the EU.

The years of 2004 and 2007 saw the inclusion of many Eastern and Central European Countries (Cyprus and Malta also joined), this caused a massive change in the dynamic of the UK's work

* The author is currently pursuing an LLM and has written this piece out of his own personal interest in the topic.

[1] Jürgen Habermas and Ciaran Cronin, *The Lure Of Technocracy*.

force, as 7% of the working-age population was born in another member state by 2014[2] and in turn a change in the perception of free movement of people.

On the 20th of February 2016 David Cameron set a date for a national referendum to decide whether or not the UK would remain a member of the EU. The campaign that followed was, perhaps, the most volatile and divisive that the nation has seen. The political rhetoric revealed an engrained xenophobia, in the UK. During this time a large proportion of the political discourse revolved around the idea of freedom of movement, border control and migration.

On 23rd June 2016, Britain voted by referendum that it should leave the European Union. Making it clear that British people now wanted to prevent EU citizens from coming across the channel, and they were willing to sacrifice the protections afforded to them as EU citizens to achieve this aim. Prime Minister May stated at the time, that the vote for Brexit was the "very clear message" on public demands to prevent free movement of people.

This essay aims to analyse the lead up to the Brexit referendum, the continental rise of European nationalism, and explore the shift in the UK's national philosophy regarding freedom of movement. The following also endeavours to investigate the ways in which the decision by the majority to cast aside EU citizenship, and the rights that accompany it, will disproportionally effect BAME citizens.

The EU and the UK are becoming increasingly racialized spaces.

In an interview with *The Guardian* dated 16th June 2016, Dave Prentis, of the Unison union commented on his reasons for reporting a poster that had been unveiled to the police by Nigel Farage, the former leader of UKIP. The poster, taken in 2015[3], contained a picture showing a queue of thousands of refugees and migrants in Slovenia. Most of the refugees were non-white. The only conspicuously white person in the photograph was obscured by a text box. Imposed over the image, was the tag-line "Breaking point: the EU has failed us all"[4]. When the image was spread over social media it featured the caption "The EU has failed us all. We must break free of the EU and take back control of our borders."[5] The impact if this image on British citizens, enthralled by the ancillary rhetoric, was an immediate and visceral sense fear. A section of the population was scared by the concept of a caravan of immigrants marching towards the UK border. This fear manifested in a spike of hate crime, it was reported that "more than 14,000 hate crimes were recorded between July and September. In 10 forces the number of suspected hate crimes increased by more than

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[2] Michael Comer, 'International Immigration and The Labour Market, UK - Office For National Statistics' (*Ons.gov.uk*, 2018) <https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/internationalmigration/articles/migrationandthelabourmarketuk/2016> accessed 3 December 2018.

[3] Heather Stewart and Rowena Mason, 'Nigel Farage's Anti-Migrant Poster Reported To Police' (*the Guardian*, 2018) <https://www.theguardian.com/politics/2016/jun/16/nigel-farage-defends-ukip-breaking-point-poster-queue-of-migrants> accessed 3 December 2018.

[4] Dore, L. (2019). *These maps will change how you think about immigration*. [online] indy100. Available at: https://www.indy100.com/article/immigration-map-jakub-marian-europe-un-population-data-update-7655511 [Accessed 5 Dec. 2018].

[5] Dore, L. (2019). *These maps will change how you think about immigration*. [online] indy100. Available at: https://www.indy100.com/article/immigration-map-jakub-marian-europe-un-population-data-update-7655511 [Accessed 5 Dec. 2018].

50%, compared to the previous three months"[6]. This behaviour ostracized BAME citizens and further polarised the voting population.

The imagery was compared to Nazi propaganda almost immediately on Twitter and was described by Prentis as a "blatant attempt to incite racial hatred." According to the SNP leader, Nicola Sturgeon, the banner was "disgusting"[7]. There was a huge public and political back-lash.[8] Nevertheless, the image encapsulated and displayed the fear that many U.K. voters felt; that a concession to freedom of movement within the EU amounted to a failure to defend against the migrant invaders.

In response, Boris Johnson distanced the official leave campaign from Ukip, stating that the poster was "not our campaign" and "not my politics"[9]. However, that statement was not entirely accurate, the official leave campaign did seek to persuade voters by overtly promoting border control and migration limitation. The official Vote Leave campaign spent £2.7 million on ads targeting groups on Facebook. Immigration featured in many of these ads, one ad suggested that Turkey would join the EU and its entire population of 76 million could immigrate to the UK. Others targeted the envisioned assentation of Albania, Montenegro, Serbia and Macedonia, suggesting that these nations would burden the rest[10].

Whilst the tact taken by UKIP may have been considered too uncouth, politically incorrect, and offensive to publicly back, the official leave campaign was relying on similar imagery in their rhetoric to persuade voters. Johnson has since been accused of "dog-whistle" Islamophobia after he compared Muslim women in burqas to "letterboxes" and "bank robbers."[11] The fear of an imagined immigrant invasion was distilled into political soundbites and taglines, and the public reacted. This type of political discourse was widely attributed to a rise in racially motivated hate crimes and assaults within the UK. The MP David Lammy, blamed the rise in hate crime on political rhetoric, saying "The extent to which hate crimes have risen in recent years is shameful. It comes from the very top. Divisive, xenophobic rhetoric from politicians and leaders trickles down into abuse and violence on our streets." [12]

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[6] Casciani, D. (2019). *'Record hate crimes' after EU referendum*. [online] BBC News. Available at: https://www.bbc.co.uk/news/uk-38976087 [Accessed 21 Jan. 2019].

[7] Heather Stewart and Rowena Mason, 'Nigel Farage's Anti-Migrant Poster Reported To Police' (*the Guardian*, 2019) <https://www.theguardian.com/politics/2016/jun/16/nigel-farage-defends-ukip-breaking-point-poster-queue-of-migrants> accessed 10 February 2019.

[8] Anealla Safdar and Anealla Safdar, 'Brexit: UKIP's 'Unethical' Anti-Immigration Poster' (*Aljazeera.com*, 2018) <https://www.aljazeera.com/indepth/features/2016/06/brexit-anti-immigration-ukip-poster-raises-questions-160621112722799.html> accessed 4 December 2018.

[9] Stewart, H. and Mason, R. (2019). *Nigel Farage's anti-migrant poster reported to police*. [online] the Guardian. Available at: https://www.theguardian.com/politics/2016/jun/16/nigel-farage-defends-ukip-breaking-point-poster-queue-of-migrants [Accessed 21 Jan. 2019].

[10] 'Targeted Pro-Brexit Facebook Ads Revealed' (*BBC News*, 2018) <https://www.bbc.co.uk/news/uk-politics-44966969> accessed 4 December 2018.

[11] Elgot, J. (2019). *Boris Johnson accused of 'dog-whistle' Islamophobia over burqa comments*. [online] the Guardian. Available at: https://www.theguardian.com/politics/2018/aug/06/boris-johnsons-burqa-remarks-fan-flames-of-islamophobia-says-mp [Accessed 21 Jan. 2019].

[12] Weaver, M. (2019). *Hate crime surge linked to Brexit and 2017 terrorist attacks*. [online] the Guardian. Available at: https://www.theguardian.com/society/2018/oct/16/hate-crime-brexit-terrorist-attacks-england-wales [Accessed 21 Jan. 2019].

Outside of the political arena, we see non-partisan organisations rallying around race to pursue an objective. Operation Black Vote's released their own posters calling for minorities to register to vote in the lead up to the referendum. The posters depicted black people, some of whom were celebrities, with their skin painted white accompanied by the tag-line: "If you don't register to vote, you're taking the colour out of Britain". Again, the images created public and political backlash, but nevertheless encapsulated a truth, that the debate in Britain surrounding the Brexit referendum was about race, identity and multi-culturalism.

The same proxy-debate was being fared in continental Europe at the time of the referendum. France was in the midst of a hotly contested, and socially divisive, election between a more liberal, Emmanuel Macron and National Front leader Marine Le Pen. Far-right groups were vocal across Europe, in Sweden they were calling for 'Swexit, in the Netherlands a 'Nexit'[13] and there were right wing riots in Germany and Poland, all calling for the border control and immigration restrictions to be implemented and using a foetal Brexit as a model to emulate.

"The Populist Zeitgeist" suggests that modern populism is a "thin ideology that considers society to be essentially divided between two antagonistic and homogeneous groups, the pure people and the corrupt elite, and wants politics to reflect the general will of the people"[14]. The rise of populism across Europe and Britain alike has bred a new wave of nationalist, one who distances themselves from biological racism and instead focuses on ethnopluralism, xenophobia and cultural uniformity. This ideology is fundamentally opposed to the concept of freedom of movement and the principles of cultural inclusion that the EU has built itself upon. The EU and the UK have become racialized spaces, yet the EU is reserved about collecting statistics regarding ethnicity. Therefore, it is difficult to quantify the effects that this post-Brexit surge of populism has had on EU citizens in continental member states.

The current position

The Treaty on The Functioning of The European Union outlines at Article 20;

"Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.

Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties[15]…"

UK citizens are also EU citizens and benefit from the rights that are provided to citizens of the EU in addition the rights they hold as UK nationals. Article 45 provides an outline of the right to freedom of movement;

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[13] BBC News. (2019). *UK vote sparks EU referendum demands*. [online] Available at: https://www.bbc.co.uk/news/world-europe-36615879 [Accessed 21 Jan. 2019].

[14] 'Far Right Politics In Germany: From Fascism To Populism?' (*EUROPP*, 2018) <http://blogs.lse.ac.uk/europpblog/2018/01/24/far-right-politics-in-germany-from-fascism-to-populism/> accessed 4 December 2018.

[15] Eur-lex.europa.eu. (2019). [online] Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT [Accessed 22 Jan. 2019].

"Freedom of movement for workers shall be secured within the Union.

Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.

It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:

(a) to accept offers of employment actually made;
(b) to move freely within the territory of Member States for this purpose;
(c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;
(d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission."[16]

As EU citizens, British people are entitled to; search for work in another EU country, work without a work permit, live in any EU country for that purpose, stay there after their work has ended, enjoy equal treatment with locals in access to employment, working conditions and all other social and tax advantages, they are also insulated from discrimination by tight EU legislation. Once Britain leaves the EU and UK citizens become third-country nationals, as opposed to EU citizens, these rights will be renegotiated. Prime Minister May said in her letter to the nation dated 24th November 2018 that "We will take back control of our borders, by putting an end to the free movement of people once and for all. Instead of an immigration system based on where a person comes from, we will build one based on the skills and talents a person has to offer"[17]. This 'skills and talents' - based system is said to begin in 2021, pending the approval of parliament, so for the time being, the free movement of people between the UK and EU will continue. After Britain leaves the EU officially in 2019, there will be a (variable) two year 'transition'.[18] During the transition period the Prime Minister has outlined that Britain will still be a member of the free market and therefore its citizens will retain the right to travel around the EU without scrutiny the way that they do now and vice-versa. If no withdrawal agreement is reached, then there is more uncertainty surrounding what would happen after March 2019.

Britain and the EU released a "political declaration" dated 22nd November 2018, which outlined what their mutual negotiation commitments are going forward. In the declaration both parties accept that the UK's intention to stop free movement will take effect at the end of the transition period.

"*It must also ensure the sovereignty of the United Kingdom and the protection of its internal market, while respecting the result of the 2016 referendum including with regard to the*

[16] Eur-lex.europa.eu. (2019). [online] Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT [Accessed 22 Jan. 2019].

[17] BBC News. (2019). *Theresa May's 'letter to the nation' in full*. [online] Available at: https://www.bbc.co.uk/news/uk-politics-46333338 [Accessed 21 Jan. 2019].

[18] (*Assets.publishing.service.gov.uk*, 2018) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/758557/22_November_Draft_Political_Declaration_setting_out_the_framework_for_the_future_relationship_between_the_EU_and_the_UK__agreed_at_negotiators__level_and_agreed_in_principle_at_political_level__subject_to_endorsement_by_Leaders.pdf#page=11> accessed 4 December 2018.

development of its independent trade policy and the ending of free movement of people between the Union and the United Kingdom."[19]

Accepting that the UK wishes to end free movement, the document goes on to state that "*the Parties should establish mobility arrangements... based on non-discrimination between the Union's Member States and full reciprocity… In this context, the Parties aim to provide, through their domestic laws, for visa-free travel for short-term visits."*[20]

This is the crux of the current stalemate in negotiations, the EU pushes for free movement in one form or another, either as a right or as a privilege, and the UK resists even this small concession to EU citizens. It also compels the Parties to consider the possibility of 'special arrangements' for people moving between the UK and EU for study, training or youth exchanges.

Where does this position leave British BAME citizens?

The British majority supported putting an end to free movement. This is evidenced by the referendum result and the majority that were willing to sacrifice their rights as EU citizens to achieve this end, yet ultimately it is the British BAME minority who will suffer the loss of the rights and protections - that the majority were willing to gamble with.

The BAME community in Britain is likely to be disproportionately affected by the removal of free movement. The current position on free movement of people is a tinderbox. Especially now where the political landscape, in both the UK and the EU, is rife with the rhetoric and partisanship that cultivates an environment poised to spore racially charged populism. The British will be subject to border control and once at the border the BAME travellers will be subject to disproportionate scrutiny based on what the European Network Against Racism (ENAR) Chair Amel Yacef called "structural and individual racism"[21]. According to the Special Eurobarometer 437, in 2015 ethnic origin-based discrimination continues to be perceived as the most widespread in the EU (64%). The "political declaration" suggests that there may be visa requirements for workers. According to Ian Macdonald, former President of the Immigration Law Practitioners' Association, "a rise in discrimination on the basis of religion is clearly a major concern in Western states, including the European Union[22]" He goes on to explain that there is an "increasing confusion in EU visa and border law and policy regarding permitted and prohibited discrimination"[23]. British BAME people seeking work in the EU will face disproportionate discrimination before they reach the border,

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[19] Rentoul, J. (2019). *Political declaration on Brexit: what it says and what it means*. [online] The Independent. Available at: https://www.independent.co.uk/news/uk/politics/brexit-deal-theresa-may-political-declaration-draft-future-relationship-uk-eu-a8646661.html [Accessed 21 Jan. 2019].

[20] Assets.publishing.service.gov.uk. (2019). [online] Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/758556/22_November_Draft_Political_Declaration_setting_out_the_framework_for_the_future_relationship_between_the_EU_and_the_UK__agreed_at_negotiators__level_and_agreed_in_principle_at_political_level__subject_to_endorsement_by_Leaders.pdf [Accessed 21 Jan. 2019].

[21] Enar-eu.org. (2019). *No progress in curbing racial discrimination in the (...) - European Network Against Racism*. [online] Available at: https://www.enar-eu.org/No-progress-in-curbing-racial-discrimination-in-the-European-labour-market-in-1490 [Accessed 21 Jan. 2019].

[22] Ilpa.org.uk. (2019). [online] Available at: https://www.ilpa.org.uk/data/resources/13281/ilpa_mpg_borders.pdf [Accessed 21 Jan. 2019].

[23] 'Migration Index | Immigration | European Union' (*Scribd*, 2018) <https://www.scribd.com/document/270597521/Migration-Index> accessed 4 December 2018.

when applying for visas, and at the border when submitting to border controls, this is something that no British citizen currently has to endure or even consider when planning to move to another member state. Once in the labour market, a 2018 German report states there has been "no progress in curbing racial discrimination in the European labour market[24]" since 2013. "In Germany, the monthly income of people of African descent was almost 25% less than the national mean monthly net income.[25]" The British BAME community will again be disproportionally affected if they seek work in the EU and are met with this form of discrimination. According to the 'Indicators of Immigrant Integration 2015', a report conducted by the OECD and the European Commission, "perceived discrimination is larger among third-country nationals than among EU nationals, even for those born in the host country. Third-country nationals perform worse in the labour market, in Austria and Greece, two in five non-EU nationals report experiencing discrimination." This discrimination is largely attributed to systemic social issues which have developed into a lack of social cohesion.

Conclusion

The EU was founded and built on principles of equality and inclusion, the idea that nations are stronger and can do more when united together. These principles were engrained in treaty articles 45, 20 and 21 of the TFEU and subsequently incorporated into the law of every nation subject to them. Now, after much division and separatism, people are being asked to choose sides. In the lead up to the referendum and after it, ideas like race, multiculturalism, immigration and the nightmare of an imminent immigrant invasion have been and have continued to be such a large part of the rhetoric used to sway the masses and fuel fears, yet it seems that the needs of BAME British citizens are over-looked, side-stepped.

BAME individuals are only considered in this political landscape when they walk in their thousands as refugees, a treat to the economy, or when they vote, a threat to the majority, or perhaps when they do not vote and are seen as a threat to democracy. Obviously, there need for a gentle reminder that a British citizen can be both British and BAME, and that the decisions of the 'majority' may make can have a disproportionate effect on the minority.

Chances are the 'average', white, British national will not have a problem getting a visa to work in the EU after 2020.However, a British Muslim might because of "confusion in EU visa and border law and policy[26]".

Chances are the 'average', white British national will not have an issue getting paid equally in the EU. However, Black British citizen might because of 'structural and individual racism' that has manifested inside the EU and leaves people of African descent, who migrate from non-member states, paid 25% less than the average monthly income.

It is therefore clear that BAME citizens will be disproportionally affected by the loss of EU citizenship and the rights that are attached to it.

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[24] Enar-eu.org. (2019). *No progress in curbing racial discrimination in the (...) - European Network Against Racism*. [online] Available at: https://www.enar-eu.org/No-progress-in-curbing-racial-discrimination-in-the-European-labour-market-in-1490 [Accessed 21 Jan. 2019].

[25] Enar-eu.org. (2019). *No progress in curbing racial discrimination in the (...) - European Network Against Racism*. [online] Available at: https://www.enar-eu.org/No-progress-in-curbing-racial-discrimination-in-the-European-labour-market-in-1490 [Accessed 21 Jan. 2019].

[26] Ilpa.org.uk. (2019). [online] Available at: https://www.ilpa.org.uk/data/resources/13281/ilpa_mpg_borders.pdf [Accessed 21 Jan. 2019].

When the majority elected to leave the EU, that mass was willing to sacrifice rights and protections granted to EU citizens, all this, if it meant putting an end to free movement of people. Conversely, it is the minority who will feel the harshest effects of that decision.

Exporting Warships: Legal Issues with Political Implications

Hugo Birtle*

Abstract

The British government has recently attempted to increase the international export profile of UK warship building, in order to promote British trade abroad and to lower the price of British naval equipment at home. The export of arms, however, can lead to significant legal complications. Not only are contractual issues raised around the sale of warships, but also concerns around providing export licences for the sale of warships, and the eventual use of those military assets in the countries to whom they are sold. The recent success of the Type 26 programme in achieving export orders to Canada and Australia provides an example of a highly complex ship being exported to close allies, but major British defence contractors such as BAE Systems, have also exported ships to a diverse range of countries, including Brazil to Oman. This essay seeks to set out the system of British arms export licensing, particularly within the scope of warship exports.

Introduction

Sea power has long been a crucial tool for the United Kingdom. Throughout the eighteenth and nineteenth centuries, Britain increasingly sought to secure and develop its global, European and imperial positions by exerting naval power. Even with the substantially reduced size and global role which the Royal Navy has occupied since the end of the Second World War, the use of sea power has continued to be of vital importance. The ability of a nation to exert hard power in the maritime sphere is ultimately dependent on the warships that is has at its disposal. As a result, it is crucial for any nation wishing to be able to exert influence at sea to obtain and operate high quality warships, suitable for the role with which they are tasked. The United Kingdom has long possessed the ability to construct warships of the finest calibre and other nations have sought to purchase British built warships for their own service.[1] Over the past ten years, the United Kingdom has exported newly built ocean patrol vessels to Oman and Brazil, with used ships going to Turkey and Indonesia. In perhaps the most significant recent development for the British warship building industry, both Canada and Australia have selected the Royal Navy's upcoming Type 26 frigate to be the new workhorse frigate of their navies. This export order will potentially take the construction run to over thirty ships, making it one of the largest British warship export programmes since the Second World War.

The export of such valuable and powerful military equipment raises significant legal and political issues. There are two areas of law which will be considered. First, the legal

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[1] Ministry of Defence, 'HMS Astute Arrives Home from US Sea Trials' (*Ministry of Defence News Publication*, 2 March 2012). As a demonstration of the quality of British ships this report includes accounts of the British built submarine, HMS Astute, outperforming her US Navy counterpart in sea trials.

mechanisms required to export military equipment from the United Kingdom. The primary concern for a potential exporter is the acquisition of an Export License which is a legal requirement for military equipment to be exported. The governing domestic legislation for arms exports is the Export Control Act 2002 and the Export Control Order 2008. These measures establish the process for allowing the legal export of arms, or any item on what is known as the 'Consolidated List' a list of restricted and controlled items that specifically require a license before export. This is influenced by international agreements, such as the Wassenaar Arrangement: the comprehensive list of all controlled items from various national and international lists. A request to export an item on this list is then judged using the Consolidated Criteria, which sets out the criteria against which license applications are judged. These require the government to respect international treaties and other obligations and commitments. In addition, they require the government to consider what the end use of an exported item might be, such as the risk of it being used for internal repression in the buyer country.

The second aspect of the legal implications of warship exports is the legality of the end use of those warships. The legal use of military assets in the maritime sphere is informed from a number of different sources. Perhaps most significantly the United Nations Convention on the Law of the Sea. What a purchaser chooses to do with military equipment is not, strictly, the business of the United Kingdom. However, there is a potential tension between strict legal obligations, and the uncomfortable political ramifications which arise from ignoring how exported products might be used.

This essay seeks to use warships to outline British laws regarding the export of military equipment, and the potential legal and political difficulties which arise.

The Legal Export of Arms in UK Law

The main piece of legislation governing the export of arms in British law is the Export Control Order 2008. This is a secondary piece of legislation which consolidated a number of previous pieces of legislation. The governing primary legislation is the Export Control Act 2002. It is from the Export Control Order 2008 which the majority of the Consolidated List of strategic military items require export authorisation. However, this is not the only source from which this list is drawn from. The EU Common Position on Arms Exports of 2008 is another significant source for the items on the Consolidated List. In addition, international agreements such as the Wassenaar Arrangement inform the content of the Consolidated list. In particular, appendix 3 of the Wassenaar Arrangement provides a definition of a warship for the purpose of that treaty:

> 'Vessel or submarines armed and equipped for military use with a standard displacement of 150 metric tonnes or above, and those with a standard displacement of less than 150 metric tonnes equipped for launching missiles with a range of at least 25 km or torpedoes with a similar range.'[2]

This definition is notable for its breadth. 150 metric tonnes is very small for a warship of any capability. A relatively small patrol vessel, such as those sold by BAE Systems to Oman or Brazil, can easily reach over 2000 tonnes.[3] This provides some insight as to the nature of

[2] Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies, Public Documents, Volume I, Founding Documents (2017), Appendix 3.
[3] BAE Systems, 'Products: Corvettes' (*BAE Systems*, 2018).

warships within arms control legislation: they are a tightly regulated product which will almost always fall within the legal definition requiring the issuing of an export license.

Issuing arms Export Licenses is the responsibility of the Secretary of State for International Trade. The Export Control Organisation, the body responsible for the day to day administration of the export license system, sits within the Department of International Trade. This body takes advice from the Ministry of Defence and the Foreign and Commonwealth Office when deciding whether to issue an export license in a given case. Parliamentary oversight is provided by the Committee on Arms Export Controls, a parliamentary select committee which draws its membership from the Foreign Affairs, Defence, International Trade and International Development parliamentary select committees. What is clear, therefore, is that the legal arrangements established to govern the export of arms in United Kingdom law, are designed to ensure that a very wide interpretation of restricted items is maintained. Combined with this, the legal framework ensures that a wide range of government departments have to be consulted before a license can be awarded.

Whenever a request is made to export an item on the Consolidated List of strategic military items, the Export Control Organisation assesses the request against eight criteria to decide whether a license should be issued. These eight criteria are the Consolidated Criteria for arms exports.

1. Respect for the UK's international obligations and commitments, in particular sanctions adopted by the UN Security Council or the European Union, agreements on non-proliferation and other subjects, as well as other international obligations.
2. The respect for human rights and fundamental freedoms in the country of final destination as well as respect by that country for international humanitarian law.
3. The internal situation in the country of final destination, as a function of the existence of tensions or armed conflicts
4. Preservation of regional peace, security and stability
5. The national security of the UK and territories whose external relations are the UK's responsibility, as well as that of friendly and allied countries
6. The behaviour of the buyer country with regard to the international community, as regards in particular to its attitude to terrorism, the nature of its alliances and respect for international law.
7. The existence of a risk that the items will be diverted within the buyer country or re-exported under undesirable conditions
8. The compatibility of the transfer with the technical and economic capacity of the recipient country, taking into account the desirability that states should achieve their legitimate needs of security and defence with the least diversion for armaments of human and economic resources.'[4]

The first four criteria are compulsory. They are examined objectively and, if a potential export is likely to breach them, then a license for such an export is refused. The remaining criteria,

[4] House of Commons Library, *An Introduction to UK Arms Exports* (Briefing Paper, Number 8312, 16 May 2018).

however, are not applied mechanistically, and when considering them the application is considered holistically. Although a license will not be granted if it doesn't meet the criteria, the level of refusals is low. In 2016 for example, 13,723 Single Issue Export Licenses, the most common license granted, were awarded, while only 353 were refused.[5] In the event of a refusal, the applicant can appeal. The appeal will be considered at a higher level than the original application and will be considered by officials who had no part in the original decision. Appeals, however, are not normally successful. In 2017, 49 Single Issue Export Licenses refusals were appealed, of which 41 were upheld and eight overturned.[6]

The importance of considering each application on its own merits is highlighted by the example of warships. In 2018, the United Kingdom has allowed only four licenses for the export of military equipment related to warships to Brazil. The value of these licenses is just under £85 million. The total number of other export licenses to Brazil is 34, to a value of around £3 million.[7] The importance of the legal criteria for any single warship export license is considerably greater in monetary terms than almost any other. The ramifications for British diplomatic relations and international trade is subsequently greater as well.

The Consolidated Criteria are applied cooperatively between different government departments. The Foreign and Commonwealth Office is consulted when applying the first seven criteria, with the exception of criterion five, the Ministry of Defence is consulted on criteria five and seven, and the Department for International Development is consulted when considering criteria eight. The type of license which can be issued falls into one of two broad types: individual and general. These types specify what can be exported and the destinations to which they can be exported. General licences are pre-published and can be used by all eligible exporters. Individual licenses only allow those named to export certain goods. Each type can then be either standard or open. Standard licenses have more restrictions than open, because they state specific quantities, goods, and destinations.[8] Standard Individual Export Licenses are the most commonly issued by far. This is important because the most restrictive process has to be used frequently by arms manufacturers. This means that the process of obtaining an export license has to be used repeatedly by exporters. The efficacy of the system, therefore, is vital for the industry.

Principles of contract law have effect when considering 'gifts' of military equipment. Unlike contracts for sale, gifts of arms are given under Crown exemption letters. As a result, they do not require an arms export license issued in the normal way. Although they are still assessed against the Consolidated Criteria, and Parliament is informed if the value of the gifted items exceeds £300,000, this still means that the legal requirements for giving gifts is substantially easier than for contracts for sale. The Treasury stated that the giving of a gift is without preconditions or expectation of return.[9] As such, if a gift is given with the expectation of further commercial dealings, or other advantageous results for the future economic position of the giver, then they would not count as gifts and be subject to the full licensing criteria. A key element, therefore, is to consider whether valid consideration has been given in exchange for

[5] *Ibid*.
[6] House of Commons, *United Kingdom Strategic Export Controls Annual Report* (Report, 23 July 2018).
[7] Department for International Trade, *Strategic export controls: licensing statistics, 1 April to 30 June 2018* (Report, 16 October 2018).
[8] Department for International Trade (Export Control Organisation), *Strategic export controls: country pivot report* (January 2018).
[9] HM Treasury, *Managing Public Money* (Treasury Report, January 2015)

the gift, because such consideration would mean that the gift, in effect, forms part of a contract, rather than merely being a gift.

The Implications of Exporting Warships

The promotion of British arms exports, including the export of warships, still remains a government policy objective. Since the 2015 Strategic Defence and Security Review the Ministry of Defence has had a duty to promote arms exports. The sale of Type 26 frigates to Australia and Canada as part of the National Shipbuilding Strategy is one of the most successful examples of this. There is, however, a potential tension between the duty to promote sales of arms for the economic benefit of the United Kingdom, and the risk of those arms being used by foreign governments for purposes that are embarrassing at best and violations of international law at worst. These purposes can conflict with the second, third and sixth criteria of the Consolidated Criteria of arms exports. The controversy and opposition to the British export relationship with Saudi Arabia is a manifestation of this perceived tension.

This sale of arms exports to Saudi Arabia has not escaped litigation, as exemplified by *R. (on the application of Campaign Against Arms Trade) v Secretary of State for International Trade*. In 2016, the Campaign Against the Arms Trade was given leave for judicial review by the High Court against the Secretary of State for International Development's decision not to suspend arms sales to Saudi Arabia. The Campaign had argued that the Secretary of State had not asked himself the appropriate questions to determine whether the exported equipment would be used to violate international humanitarian law, and that his finding that there were no clear risks of such a violation and following refusal to suspend arms exports, was irrational. The High Court held that the Secretary of State had acted rationally and that he had made appropriate inquiries.[10] This case held that the examination of potential violations was to be a prospective assessment, with all different elements to be considered in the round. Past, or even present violations, although perhaps an indicator as to future behaviour, was held not be determinative. Additionally, the privileged position of the Secretary of State was held to give him a better ability to judge against the Consolidated Criteria than external observers. This case demonstrates the wide discretion which the government enjoys in granting export licenses. The Consolidated Criteria are flexible enough to prioritise the economic benefit of the sale of arms, but the Secretary of State has the power to prevent exports where it is believed they will be used violate international law.

The law of the sea presents particular challenges for the end use of military equipment. During the Second World War, international law recognised only two maritime jurisdictions: territorial waters and the high seas. At that time, territorial waters only extended to three miles. Today, territorial waters extend to twelve miles, and in addition there is an Exclusive Economic Zone, which extends to some two hundred miles. The sovereign state enjoys full rights in its territorial waters and it has some sovereign rights in its Exclusive Economic Zone. As a result, the likelihood of warships running into jurisdictional problems has significantly increased in the second half of the twentieth century. Furthermore, there is very little international law on the use of warships in a military capacity.[11] The United Nations Convention on the Law of the Sea sets out the rights of passage for non-military use for warships in international and sovereign

[10] *R. (on the application of Campaign Against Arms Trade) v Secretary of State for International Trade* [2017] EWHC 1754 (Admin). Leave to appeal was granted by the Court of Appeal in May 2018: *R. (on the application of Campaign Against Arms Trade) v Secretary of State for International Trade* [2018] EWCA Civ 1010.
[11] J. Ashley Roach, 'Legal Aspects of Submarine Warfare' (24 September 2001).

waters. Any liability would lie firmly with the state to which the ship had been exported, not with the United Kingdom. This is made clear in Article 31 of the Convention:

> 'The flag State shall bear international responsibility for any loss or damage to the coastal State resulting from the non-compliance by a warship or other government ship operated for non-commercial purposes with the laws and regulations of the coastal State concerning passage through the territorial sea or with the provisions of this Convention or other rules of international law.'[12]

Whilst this might be the position in international law, this still leaves the potential problem established in *R. (on the application of Campaign Against Arms Trade) v Secretary of State for International Trade*: it can be difficult for the British government to guarantee that the exported warships would be used in a way that was in keeping with international law. Fostering good relationships with buyers, and ensuring that British foreign policy promotes compliance with international law, therefore, is a desirable concomitant agenda to a robust export regime.

Conclusion

The United Kingdom has a comprehensive system of export licenses which has been established over a number of years and in relation to a number of international treaties and obligations. This essay has attempted to outline the system, its structure, and some of the major legal issues around it. Moving to the future, there is potential for the United Kingdom's exit from the European Union to affect the way in which the export of arms are regulated and the policy which British governments take towards such exports.[13] The framework outlined above will not be immediately affected as the governing legislation, the Export Control Act 2002 and the Export Control Order 2008, are United Kingdom domestic law and will likely remain in force whatever the ongoing relationship with the European Union is. This legislation incorporates the EU Common Position. As a result, any divergence will likely be slow, as it would require domestic United Kingdom law and European Union regulation on arms exports to move in different directions. Given that the United Kingdom has given no indication that it will leave arms trade limitation treaties, such as the Arms Trade Treaty and the Wassenaar Arrangement, it is likely that their influence, which guide both the United Kingdom and the European Union, will remain in place.

The areas of disruption, where they exist, will likely centre around the economic relationship between the United Kingdom and the European Union. If the United Kingdom leaves the European Union's Single Market and does not have an equivalent access agreement to replace it, there will likely have to be additional checks on arms and parts exports from the United Kingdom into the Single Market. Additionally, and in relation, the United Kingdom as a Member State currently enjoys the right to export into the European Union without the need for any European Union arms license. When it ceases to be a member, United Kingdom licenses will no longer enjoy their status as valid across the whole of the European Union.

What will remain, however, is the comprehensive established regulatory regime in the United Kingdom on the export of arms. Furthermore, it is unlikely that the position of warship building and export will be substantially affected. British warship building has always been supported by orders from the government to supply the Royal Navy, and the majority of exports are to

[12] United Nations Convention on the Law of the Sea, Article 31.
[13] At the time of writing, it is unclear what exactly the terms of the United Kingdom's exit from the European Union will be.

the global market. Frigate exports to Canada and Australia, second hand sales to Brazil, and patrol vessel exports to Oman will be governed by the established regulatory framework for the foreseeable future. The law relating to the framework is wide ranging, from contractual principles, to judicial review. As a result, whilst the framework of the regulations is governed by statute, the way in which they are implemented and challenged, will continue to evolve with the common law.

Do the Hague-Visby Rules represent a fair compromise between the interests of the Shipper and the interests of the Carrier?

Lewis John*

Background

Historically, the common carriers' duties were strict, unless carriers could prove that its negligence had not contributed to the loss, and that one of four "excepted causes" (i.e. act of God, act of the Queens enemies, shipper's fault, or inherent vice of the goods), the carrier was deemed responsible for the loss.[1] This led many to describe the carrier as an "insurer" of the goods; as per Lord Mansfield in Forward v Pittard.[2] Although incorrect, this conveys the idea that the carrier was subject to broad liability under maritime law.

However, the rights of freedom of contract, and the common law allowed for some flexibility. Although the bill of lading clauses are represented in The Carriage of Goods by Sea Act, Tin terms of the agreement between the shipper and the carrier, the reality is that the shipper has very little discretion in negotiating these terms. Accordingly, Reynolds[3] argued that the common law position was seen to favour the carrier.

The Harter Act 1893[4] was the first statute on the area. In the U.K., The Carriage of Goods by Sea Act 1924[5] implemented The Hague Rules 1924,[6] which governed the area. In Goose Millerd,[7] Viscount Sumner suggested that the revision of The Hague-Visby (amendments) 1968, as enacted by The Carriage of Goods by Sea Act 1971[8] was an attempt to represent a fair compromise between the interests of the shipper and the interests of the carrier, because of the constant attempt by carriers to relieve themselves from liability by legislative bargains. Indeed, complex and wide ranging clauses exempting carriers from liability undermined the usefulness of bills of lading. This was unsatisfactory to holders of clean bills of lading, who were not parties to the original contract of carriage because they had no influence on its formation. For example, bankers who accepted the bills as security for advances, and insurers who were subrogated to the rights of the shipper. The Hamburg Rules have not been adopted by the U.K.; The Hague Visby Rules are the applicable rules for this jurisdiction.

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[1] *Steel v State Line (1877) 3 App. Cas. 72; (1877) 7 WLUK; Nugent v Smith (1875) 1 C.P.D. 19; (1875) 11 WLUK 5; Duncan v Koster (The Teutonia) (1871-73) L.R. 4 P.C. 171; (1872) 2 WLUK 72; Albacora SRL v Westcott & Laurence Line Ltd (1965) 2.*

[2] *Forward v Pittard (1785) 1 Term Rep. 27; (1785) 1 WLUK 1.*

[3] [3] Francis Reynolds, "The Hague Rules, the Hague-Visby Rules, and the Hamburg Rules" (1990) 7 MLAANZ 16.

[4] The Harter Act 1893.

[5] The Carriage of Goods by Sea Act 1924.

[6] The Hague Rules 1924.

[7] *Gosse Millerd Ltd v Canadian Government Merchant Marine Ltd, The Canadian Highlander (1929) AC 223, 32 LI L Rep 91; (1928) All ER Rep 97.*

[8] The Carriage of Goods by Sea Act 1971.

A Fair Compromise? – Due diligence

Per Article 3, r. 1(a) of The Hague Visby Rules, "before and at the beginning of the voyage, the carrier should exercise due diligence to make the ship sea worthy."[9] Arguably, The Hague Visby Rules seem to favour the carrier because the duty of seaworthiness is less strict than under the common law. Although the common-law duty was strict; Kopitoff v Wilson,[10] carriers circumvented the seaworthiness requirement via negligence as exhibited in The Thorsa,[11] whereby an apparent breach of seaworthiness was framed in negligence by the carrier to avail himself of liability. However, under Article 4 r. 1 of The Hague Visby Rules, it is arguable that the language frames seaworthiness to favour the carrier. Stating not to do something strikes as favourable. The rules could say the same thing, but by stipulating *"*you have an absolute obligation to exercise due diligence to make the ship sea worthy," which implies that the carriers are on notice. This reflects the attitude that has gone into the drafting.

Seaworthiness

Article 4, r. 1(a) of The Hague Visby Rules says that whenever damage has resulted from unseaworthiness, "the burden of proving the exercise of due diligence shall be on the carrier."*[12]* The obligation of seaworthiness is non-delegable, so the carrier is responsible for the negligence of independent contractors if due diligence is not carried out; The Apostolis.[13] Thus, if contractors or sub-contractors do not do their job properly, then the carrier is still liable. This is harsh on the carrier; he is essentially liable for acts concealed, or unknown to him. Furthermore, he holds liability for not only crew members but also agents employed to make the vessel seaworthy. Contrasting the common law, which according to, Grant v Norway[14] a carrier would not be liable if he could prove that the bill of lading was signed by an agent without authority;

Deviation

Article 4, r. 4 of The Carriage of Goods By Sea Act 1971 says that "any deviation in attempting to save life, any property at sea or any 'reasonable deviation' shall not be deemed to be an infringement or breach of these rules, or of the contract of carriage and the carrier shall not be liable for any loss or damage resulting therefrom."[15] The word reasonable is ambiguous which will always have adverse cost consequences on the claimant. Mann[16] avers that the rules are international, and should be interpreted internationally, paying attention to international court decisions. However, Clarke[17] avers that in England, the courts clearly generally derive their interpretations from English precedents. Confirming Clarke's statement, in the matter of Stag Line,[18] Lord Justice Atkin, did not cite any international cases. Furthermore, in A v B (2018),[19] Lord Justice Butcher did not cite any international cases for guidance. This uncertainty favours the carrier because the claimant is subject to long and expensive legal proceedings; this favours the

[9] Article 3, r. 1(a) of The Carriage of Goods by Sea Act 1971.
[10] *Kopitoff v Wilson (1876) 1 QBD 377, 45 LJQB 436, 3 Asp MLC 163, 24 WR 706; (1874-80) All ER.*
[11] *The Thorsa (1915) T. 486) ; (1916) P. 257.*
[12] Article 4, r. 1(a) of The Carriage of Goods by Sea Act 1971.
[13] *A Meredith Jones and Company Limited v Vangemar Shipping Company Limited (The 'Aspostolis') (2000) Lexis Citation 1484; (2000) All ER (D) 958.*
[14] *Grant v Norway (1851) 10 CB 665, 20 LJCP 93.*
[15]The Carriage of Goods By Sea Act 1971
[16] F.A. Mann, "The Hague-Visby Rules and "the force of law" (1987) L.Q.R. 523.
[17] Malcom Clarke, The consignee's right of action against the carrier of goods by sea' (1991) L.W.C.L.Q.
[18] *Stag Line, Ltd v Foscolo Mango & Co, Ltd (1932) AC 328; 146 LT 305.*
[19] *A v B Andreas, The (2018) EWHC 2310 (Comm); (2018) 7 WLUK 753.*

carrier who has more resources to bleed-out the claimant during lengthy litigation proceedings. In contrast, at common law, deviation is much stricter – it is only permitted to save life; Scaramanga v Stamp,[20] and to avoid danger; The Tutonia.[21] Deviation may also be brought about by some default on the part of the charterer; Phelps, James v Hill[22] and where deviation is involuntary i.e. unseaworthiness of the ship; Kish v Taylor.[23] Therefore, in this respect the carrier is less favoured.

Tetly[24] also argued that The Hague-Visby Rules favour the carrier in The European Enterprise[25] because carriers could escape The Hague Visby Rules by issuing non-negotiable receipts.[26] For example, by the issue of a sea way bill, as opposed to a bill of lading, or other non-negotiable receipts in the case of ordinary shipments to avoid the application of the Hague -Visby Rules. However, recently in Maersk[27] the Court of Appeal held that The Hague-Visby Rules will compulsorily apply when the contract of carriage requires the issue of a bill of lading, and or, entitles cargo interests to demand the issue of a bill of lading, even if a sea waybill is in fact issued. The shipper must "demand" from the carrier a bill of lading containing these particulars.

Socio-political reasons as to why the courts may favour a group over another.

Sturley[28] argues that carriers were politically powerful,[29] because the subcommittee appointed to draft the code were representatives of carriers. However, Reynolds[30] argues that this was the case because a person participating in such a voyage assumes that the carrier would do the best he could; therefore, it was fair to excuse him of the rules of the sea, as opposed to the aspects of the responsibilities undertaken. However, sailing in the 1800s was much more perilous than sailing today given technological advancements enhancing the security of the journey.

Conclusion & Reforms

A suggestion for reform would be to change the language in the Articles. For example, the language in Article 3, r. 1(a) of The Hague Visby Rules to put carriers on notice. Consider employing a panel of experts to dictate and interpret the meaning of the terms as per the Vienna Convention model. The experts are multinational, giving an international interpretation of the convention. The Hague Visby rules would be interpreted by these experts, clarifying instances where the jurisdictional law would differ from country to country; increasing certainty, and reliability of the rules, falling in line with Mann's objective of international harmonious interpretation. Additionally, judges need to cite international cases to uphold the international nature of the convention. The Rotterdam Rules propose an alternative set of rules, in which 'the restrictions as to the carrier's right to make reservations are tighter.[31] However, the U.K. nor any other country has implemented these rules into domestic law. Alternatively, the Hamburg Rules,

[20] *Scaramanga & Co v Stamp (1879) 4 C.PD. 316; (1879) 5 WLUK 8.*
[21] *Duncan v Koster (The Teutonia) (1871-73) L.R. 4 P.C. 171; (1872) 2 WLUK 72.*
[22] *Phelps James & Co v Hill (1891) 1 Q.B. 605; (1891) 2 WLUK 76.*
[23] *J&E Kish v Charles Taylor & Sons & Co (1912) A.C. 604; (1912) 5 WLUK 20.*
[24] William Tetly, 'interpretation and contruction of the Hague, Hague Visby Rules and Hamburg Rules' (2004) 10 JIML 30.
[25] *Browner International Ltd v Monarch Shipping Co Ltd (The European Enterprise) (1989) 2 Lloyd's Rep. 185; (1989) 4 WLUK 60.*
[26] *Browner International Ltd v Monarch Shipping Co Ltd (The European Enterprise) (1989) 2 Lloyd's Rep. 185; (1989) 4 WLUK 60.*
[27] *AP Moller-Maersk A/S (t/a Maersk Line) v Kyokuyo ltd (2018) EWCA Civ 778; (2018) 3 All E.R. 1009.*
[28] Michael F. Sturley, "The History of COGSA and the Hague Rules" (1991) J.M.L.C Vol. 22, No 1.
[29] A. Knauth, "Ocean Bills of Lading" 118-32 (4th ed. 1953)
[30] Francis Reynolds, "The Hague Rules, the Hague-Visby Rules, and the Hamburg Rules" (1990) 7 MLAANZ 16.
[31] The Rotterdam Rules 2009, article. 40(2).

offer a longer period to bring action against the carrier, as opposed to the Hague rules; this would set the rules to favour the Buyer more.

In conclusion, the duty to exercise due diligence under the Hague Visby rules is less strict than that of the common law, which favours the carrier because his inspection duties are diminished. Accordingly, the rule could be drafted using more thorough language, which would put the carrier on notice that he has to abide to his duties under The Carriage of Goods By Sea Act 1971. In contrast to the common law, where the carrier could defer liability onto an agent, the duty of sea worthiness is non-delegable, which disfavours the carrier because he can be liable for the acts of his agents. The deviation provisions are ambiguous, and the courts are not giving consideration to the international nature of the rules because they are not citing international cases in their judgments. The Court of Appeal in Maersk[32] provided some clarity on non-negotiable receipts. Moreover, given the lack of evidence to suggest that politicians have an interest in carriers' vessels, more quantitative and qualitative data needs to be obtained to justify the harshness of The Hague Visby Rules. Arguably, the Rotterdam rules are a better alternative, yet, no country has implemented them.

[32] *AP Moller-Maersk A/S (t/a Maersk Line) v Kyokuyo ltd (2018) EWCA Civ 778; (2018) 3 All E.R. 1009.*


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‘Armed with a Kiss:’ Peace Reconciled with Justice in Northern Ireland

Rory Turnbull*

Abstract

This essay seeks to bring a new perspective to the so-called ‘justice-versus-peace’ debate in international criminal law, the academic discussion about whether prioritising vindictive justice for victims of conflict can undermine attempts to pursue lasting peace. Having briefly surveyed the traditional debate, the author looks to the case of Northern Ireland, where reconciling the peace offered by the Good Friday Agreement with justice for victims remains a significant contemporary issue in political debate. The author looks at the impact of the early release of prisoners and a proposed blanket payment for victims, irrespective of their circumstances, on the peace process. A verse in the book of Psalms, where in English translations peace is said to ‘kiss’ justice (although the original Hebrew verb can also be translated as ‘equip with’ or ‘arm’), inspires the author’s thesis: rather than compete with each other, peace and justice should be considered to be mutually supportive, each ‘arming’ the other. Thus, the traditional ‘justice-versus-peace’ debate creates a false dichotomy and one should not be prioritised over the other.

נָשָׁקוּ וְשָׁלוֹם צֶדֶק נִפְגָּשׁוּ וֶאֱמֶת-חֶסֶד

mercy and truth have met together; justice and peace have kissed

Psalm 85:10[1]

Imagining a state of affairs that is as appealing now as when the ancient Hebrew author first wrote it at least two and a half thousand years ago, Psalm 85:10 presents a world where ‘mercy and truth have met together’ and ‘justice and peace have kissed.’ Such a world remains an ideal because of the unique tensions that arise when these virtues are placed side by side. All too often, they seem to have conflicting aims. Especially in the context of rebuilding a state after a period of civil violence, reconciling mercy with truth, and peace with justice, raises difficult moral and legal choices. Can it be right, for example, to grant mercy to the perpetrators of the most heinous crimes in exchange for the truth, or waive punishment for a crime in order to end a war? Should justice ever be compromised in the hope of achieving a more lasting peace?

Grappling with these questions, which form the heart of the so-called ‘peace-versus-justice debate,’ will be the task of this essay. Having reviewed first some of the general issues, I shall narrow my focus to the case of Northern Ireland. I shall argue that reconciling peace with justice

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[1] Translation my own.

in Northern Ireland has proven particularly difficult when one is prioritised over the other. I shall conclude that it is both unnecessary and unhelpful to make such a binary choice and that the so-called 'peace-versus-justice' debate really creates a false dichotomy. Far from being mutually exclusive, peace and justice are mutually dependent, and it is only when each is pursued in cooperation with or 'armed with' the other that the goals of both may be satisfactorily accomplished.

It is necessary, first, to define 'peace' and 'justice,' as this has implications on how incompatible they may or may not be. Some scholars make a useful distinction between 'negative peace' and 'positive peace.'[2] 'Negative peace' is characterised by an absence of conflict and the immediate end of war, while 'positive peace' entails positive efforts for reconciliation. According to Mani, this latter ambition must also include a commitment to overcoming some of the structural causes of violence to prevent violence erupting again in the longer term, a goal that is all too often treated as subordinate to the primary aim of ending the war.[3] In the so-called peace-versus-justice debate, 'justice' is often considered as being either retributive or distributive and, having clarified what is meant by 'peace,' this gives rise to the clash. For example, while waiving retributive justice and prioritising peace by choosing to 'dig a hole and bury the past'[4] may bring about negative peace, some argue that it will not achieve positive peace. This is because, ignoring the truth, such an approach fails to hold perpetrators sufficiently accountable for their crimes and therefore compromises justice.[5] On the other hand, the famous Truth and Reconciliation Commissions in South Africa, where amnesty was granted to perpetrators of crimes in exchange for the truth, arguably opened the way for South Africa's modern democracy and lasting peace, but these also were cause for great resentment.

Failing to negotiate this fine balance between peace and justice sensitively can lead to disastrous outcomes. Mansour and Riches, for example, cite the case of Sudan's al-Bashir, whose prosecution in the ICC for crimes against humanity caused the expulsion of humanitarian aid agencies and consequently left over a million people in need.[6] This is an example where pursuing justice negatively affects the pursuit of peace.

The problems arising out of the so-called peace-versus-justice debate are particularly pertinent within the context of transitional states, those that are transitioning from a period of conflict to a period of peace and are in the process of clarifying on what moral norms the new state will be founded.[7] As well as due to those states' inherent instability, one reason why the so-called peace-versus-justice debate is especially important is because, as Eisikovits argues, 'if a transitional society cannot consolidate peace and functioning government, the very effort to create a decent

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[2] See e.g. Galtung, J. *Theories of Peace: A Synthetic Approach to Peace Thinking* [Oslo: International Peace Research Institute, 1967]; Mani, R. 'Balancing Peace with Justice in the Aftermath of Violent Conflict' *Development* 48(3) [2005] pp. 25-34, esp. p. 28; Mansour, K. and Riches, L. 'Peace versus Justice: A False Dichotomy.' Paper presented for 'Contemporary Issues in Conflict Resolution,' Sciences Po Paris School of International Affairs, Spring/Summer 2017.

[3] Mani, R. 'Balancing Peace with Justice in the Aftermath of Violent Conflict' p. 32.

[4] These was the approach of the Cambodian Prime Minister, Hun Sen. See Mydans, S. 'In Cambodia, Clinton Advocates Khmer Rouge Trials' *New York Times*, 1 November 2010.

[5] M. Cherif Bassiouni. 'Justice and Peace: The Importance of Choosing Accountability Over Realpolitik' *Case Western Reserve Journal of International Law* 35(2) [2003] pp. 191-204.

[6] Mansour, K. and Riches, L. 'Peace versus Justice: A False Dichotomy' p. 8. See also Akhavan, P. 'Are International Criminal Tribunals a Disincentive to Peace?: Reconciling Judicial Romanticism with Political Realism', *Human Rights Quarterly*, 31(3) [2009] 624-654, p. 648.

[7] Eisikovits, N. 'Transitional Justice' in *Stanford Encyclopaedia of Philosophy*. See also C. Albin, 'Peace vs Justice – and Beyond' in J. Bercovitch, V. Kremenyuk & I W. Zartman (editors), *The SAGE Handbook of Conflict Resolution* [London: SAGE Publications Ltd, 2009] pp. 580-594.

new state suffers shipwreck.'[8] Understanding how peace can be reconciled with justice is therefore fundamental to the very founding of the new state and its move away from conflict.

The peace process in Northern Ireland, following the Troubles of the late twentieth century, is a helpful case study when examining these issues. Two decades on from the Good Friday Agreement, Northern Ireland remains a transitional society: it is still divided by differing political ideologies and cultural identities, as well as physically by the existence of the 'peace walls' that separate communities, and still grapples with the legacy of sectarian conflict. Indeed, the issue of 'dealing with the past' remains an ever-present political stumbling block, and concerns over Brexit, parades, the Irish language, and the flying of the union flag were other issues that cumulatively caused the executive to collapse in January 2017. The state of peace is fragile and, since the Good Friday Agreement, successive policies have tried to reconcile peace with justice in Northern Ireland in different ways.

The early release of some prisoners, including Patrick Magee (the man responsible for the Brighton bomb), is perhaps one Northern Irish example of the state prioritising peace over justice. An end to violence was considered an aim superior to ensuring that every perpetrator of a crime in the Troubles was punished in a way that could be considered retributively just. Although it was an integral part of the Good Friday Agreement, and therefore a key step on the path to peace, the policy was controversial not only because of its apparent erosion of justice but also because of its generality: all criminals were treated equally, regardless of their crime.[9] The same criticism was raised later, in 2010, when the government proposed offering a blanket payment of £12,000 to the relatives of every victim killed, regardless of whether or not the 'victim' was killed when fighting against the British state.[10] This example of prioritising peace over justice was criticised for lacking nuance and undermining the rule of law. Already, a period of civil violence, as Bingham writes, 'tests adherence to the rule of law to the utmost.'[11] This is because, as Bingham continues,

> 'states, as is their duty, strain to protect their people against the consequences of such violence, and the strong temptation exists to cross the boundary which separates the lawful from the unlawful.'[12]

Yet, the periods following civil violence can also threaten the rule of law. Given that an individual who commits violence against the state breaks the law, while the individual innocently passing an evening in a Birmingham pub is not breaking the law, awarding the same sum of £12,000 to the relatives of each 'victim' seems to breach Lord Bingham's second principle, that 'questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion.'[13] Ironically, therefore, it can be the indiscriminate nature of prioritising peace over justice that specifically seems incompatible with the indiscriminate nature of the rule of law. The rule of law requires all those who break the law to be brought to justice, and tampering with its universal application can lead to the bitterness imbedded in discretion: the sense that the law applies to some but applies differently to others.

Upholding the universality of the rule of law, however, and prioritising justice over peace, can be no less problematic, since this too can lead to resentment in communities. As Eisikovits argues, a

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[8] Eisikovits, N. 'Peace Versus Justice in Transitional Settings' *Quinnipiac Law Review* 32(3) [2014] 707-722, p. 717.
[9] Biggar, N. 'Peace and Justice: A Limited Reconciliation' *Ethical Theory and Moral Practice* 5(2) [2002] 167-179, p. 176.
[10] Moriarty, G. 'Negative reaction to Eames-Bradley proposals' *Irish Times*, 19 July 2010.
[11] Bingham, T. *The Rule of Law* [London: Penguin, 2010] p. 158.
[12] Bingham, T. *The Rule of Law* p. 158.
[13] Bingham, T. *The Rule of Law* p. 48.

general problem with pursuing draconian prosecutions after periods of conflict is that it can also lead to some perceiving the state's policy to be a witch hunt, and this has a negative effect on political stability.[14] Peace in the long term is jeopardised. This is particularly dangerous in Northern Ireland where the peace is already very fragile, demonstrated as recently as January 2019 through the car bombing in Derry/Londonderry. Indeed, a government report in 2015 concluded that 'all the main paramilitary groups operating during the period of the Troubles remain in existence'[15] and, with economic inequality between Protestant and Catholic communities, Republicans could easily become even more disenfranchised. Furthermore, such an approach of prioritising justice over peace can be hugely expensive and the money could be spent to further a peaceful future rather than seek to avenge the crimes of a violent past. The Saville Inquiry, for example, which examined the deaths of the thirteen people who died on Bloody Sunday, cost £195m.

If, then, prioritising one over the other is an unsatisfactory way of reconciling peace with justice, a more balanced approach based on pragmatism and mutual recognition may be required. This method has been advocated recently in a letter to the Secretary of State for Northern Ireland, Karen Bradley MP, from eight members of the House of Lords. Given that four of them also served as Secretary of State for Northern Ireland, the authors of the letter come with great experience of the issues. Encouraging the government not to waste resources on further prosecutions and sentencing, since 'it would be a mistake to expect that judicial outcome in any but a tiny percentage of the crimes that have not already been dealt with,'[16] they advocate instead prioritising victim compensation when spending the £150m of budgeted funds. In addition to its pragmatism, another benefit of this approach is that it is victim-centred and so seeks justice restoratively for the victim rather than retributively with a view to punishing perpetrators. Recent evidence from the Ballymurphy Inquest, which heard that a witness of the Ballymurphy massacre in 1971 has suffered from post-traumatic stress disorder ever since, highlights how broad the definition of 'victim' can be, and so recognising victims on all sides of the conflict overcomes the problem of witch hunts noted above.[17]

An analysis of Psalm 85:10, with which this study began, helps to bring some of these themes together, and forms a fitting lens through which to view the issues this essay has raised. While I have rendered it in English as 'mercy and truth have met together; justice and peace have kissed,' examining the original Hebrew gives a wider scope to its meaning. For example, the noun translated as 'justice' (צֶדֶק) has particularly moral connotations in the Hebrew with the sense of 'behaving in the right way' as much as 'putting wrongs right' (indeed, most English translations opt for 'righteousness'). Similarly, the word for 'peace' (שָׁלוֹם) means more than just the absence of violence, it also brings with it the sense of wellness or societal prosperity and so is indicative more of a positive peace than a negative peace. The verb translated as 'kissed' (נָשָׁקוּ) also allows room for interpretation. In this verse, 'kissed' seems an appropriate translation, not least because the verb is paralleled with 'met together' in the first half of the verse. Some scholars have noted, however, that it does not mean 'kissed' in an erotic sense; rather, it is the sort of kiss relatives might share when greeting each other after not seeing each other for a while.[18] The same verb is used in the book of Genesis, when Esau embraces and kisses his twin brother Jacob (Genesis 33:4) in reconciliation after Jacob stole his birth right in exchange for a bowl of pottage. Such a distinction between the kiss of lovers and the kiss of brothers or friends may seem trivial, but it is

[14] Eisikovits, N. 'Peace Versus Justice in Transitional Settings' p. 710. See also Meredith, M. *Coming to Terms: South Africa's Search for Truth* [New York: PublicAffairs, 1999].
[15] *Paramilitary Groups in Northern Ireland*, Northern Ireland Office, 20 October 2015 p. 1.
[16] 'Letter to Karen Bradley' *Belfast Telegraph*, 10 October 2018.
[17] Leitch, W. 'Ballymurphy inquest: Shooting witness suffering PTSD' *BBC News online*, 28 November 2018.
[18] Eder, S. 'Do Justice and Peace Really Kiss Each Other? Personifications in the Psalter and an Exemplary Analysis of Ps 85:11' *Vetus Testamentum* 67 [2017] 387-402.

helpful to reread the verse from the Psalm in these terms: when peace and justice kiss, they do so in reconciliation. Moreover, the same verb suggests that that reconciliation is fragile: another sense of it is the idea of 'touching' or 'brushing against each other' (see e.g. Ezekiel 3:13), even 'fighting' in some circumstances, implying fleeting contact. A final meaning of the verb, following on from its sense as 'touching,' is 'equipped with' or 'armed with,' the general idea being that one touches that with which one is armed. Indeed, the same root in modern Hebrew, נשק, comes to mean 'arms' or 'weapons.' Perhaps, therefore, another translation of the verse could be, 'mercy and truth have met together; justice and peace have armed each other.'

Such philological acrobatics by just one verb reveals many layers that help to elucidate the relationship between peace and justice not only in the ancient Hebrew poem but even today and in the sort of contemporary legal debates that this essay has problematised. Like Esau forgiving Jacob, the kiss of peace and justice is reconciliatory and a long time coming. In order for that reconciliation to take place, the definition of each, together with the scope of their goals, must be broadened so that 'peace' entails more than just the end of violence in the short term, and 'justice' means more than just retribution. More than just putting right, to be reconciled with peace, justice involves *doing* right too, and doing right in a way that focusses on victims, on both sides of the sectarian divide. This allows for a rebuilding of the state that is characterised by both sensitivity to the effect of the crimes and flexibility in how best to respond to them. It is not simply one of pragmatic political compromise or some passive passing-over of the past for fear that anything else would do more harm than good. Rather, such a holistic approach is active and dynamic, and is paralleled with the premise that mercy and truth must also coalesce. Indeed, without truth, and the recognition of the harm, all other attempts to build a lasting peace will be futile. If founded on truth, however, and approached sensitively, peace and justice may not just brush against each other in a fragile truce but instead come together in a more permanent and positive peace, one that opens the way for general societal wellbeing as much as the end of war.

Peace and justice are not, therefore, mutually exclusive. On the contrary, they are mutually dependent, with each 'arming' the other. Prioritising one and rejecting the other, as a slave to either excessive mercy or blind legalism, is destined to fail since it is only by allowing peace and justice to interact, or 'touch,' that the rewards of both may be realised. As Cherif Bassiouni writes, 'peace is not merely the absence of armed conflict; it is the restoration of justice.'[19] The two are mutually supportive. Pursuing the aims of one must be actively integrated with pursuing the aims of the other. Only then may justice and peace 'kiss.' Only then, ironically, may 'peace,' 'armed with' justice, truly herald the end to armed violence.

[19] Cherif Bassiouni, M. 'Justice and Peace: The Importance of Choosing Accountability Over Realpolitik' p. 192.

The Education Act 2011 and Permanent Exclusion from School: A Culture of Intolerance

Flora Curtis*

Abstract

This article examines the consequences of the policy that drove the implementation of the Education Act 2011. It argues that the implications of the Act were twofold: first, there has been a shift in schools' approach to dealing with misbehaviour, with teachers able to adopt a more punitive approach. Second, the Act has removed parents' and children's access to a truly effective independent means to review permanent exclusions from school. It is argued that the current state of the law is inadequate. The county of East Sussex is used as a case study to show the punitive approach that schools take to disciplining pupils, and to highlight the low rates of reinstatement of excluded pupils. Finally, the article expresses a wish that the Timpson Review will lead to a shift in the law relating to permanent exclusions.

Introduction

The Education Act 2011 brought about a shift in government policy relating to pupil misbehaviour in schools. The White Paper released by the Department for Education in 2010 advocated a policy whereby autonomy would be returned to teachers to discipline pupils in the classroom. An important part of this policy involved removing the ability of bodies independent of the school that carried out the exclusion to reinstate pupils after hearing appeals from parents against their children's exclusion.

The Act has thus given more robust powers to teachers to discipline and exclude pupils without challenge. This raises the question whether those powers are being used appropriately. A House of Commons Education Committee Report in 2018 answered that question in the negative. The Report described the current approach to pupil discipline as creating 'a school culture which is intolerant of minor infractions…[which could] create an environment where pupils are punished needlessly where there should be flexibility and a degree of discretion'.[1]

This article will examine the 'culture of intolerance' to pupil misbehaviour, which has been strengthened by the policy that drove the Education Act. First, it will examine the issues surrounding the lack of an independent body with a power directly to reinstate pupils. This will include considering potential violations of Article 6 rights, as well as the sense of disempowerment that exists among parents and excluded children. It will argue that the lack of independent review is inadequate, given the significant ramifications that permanent exclusion can have for children's

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[1] House of Commons Education Committee, *Forgotten children: alternative provision and the scandal of ever increasing exclusions* (2017-19, HC 342) 11.

future prospects. Second, it will move on to consider examples of pupils who were excluded in East Sussex in 2018, in order to highlight in more details some of the inadequacies surrounding the current exclusion process. Finally, it will touch upon the Review of School Exclusions currently being undertaken by Edward Timpson, and some of the changes that this could bring about.

The Exclusion Process and the Education Act 2011

The Education Act 2011 represented a conscious effort on the part of the coalition government to return autonomy to schools when it came to discipline. One of the key aims of the 2010 White Paper that preceded the Act was to improve the UK education system as a whole by attracting and retaining high quality teaching staff.[2] An important way of achieving this aim, according to the Paper, was to reduce teachers' fears of a lack of safety in the classroom. The Paper stated that the most common reasons for undergraduates choosing not to enter the teaching profession were student misbehaviour and related safety concerns.[3] The Paper also stressed that those who were already in the teaching profession were more likely to leave as a result of student misbehaviour. Apparently, around half of all teachers in the UK felt that there was inadequate support available in their schools for those who were struggling to manage pupil behaviour.[4] Tackling this sense of a lack of control among teachers was thus a key purpose of the Education Act.

Rather than put forward a policy which sought to increase the support given to teachers and students struggling with misbehaviour, the Department for Education took an approach that focused on discipline. Pupil misbehaviour was to be dealt with not by seeking to tackle the underlying causes of that misbehaviour, but primarily through returning disciplinary autonomy to teachers.[5] This approach was embodied in the Education Act 2011. Part 2 of the Act gave increased powers to teachers to search pupils, issue detentions, use force, and to permanently exclude pupils. Section 5, for example, removed the legal requirement on members of staff in schools in England that they give a parent, guardian or carer a minimum of 24 hours' written notice should their child be required to attend a detention out of normal school hours.[6]

The most significant legal change brought about by the Act was the removal of excluded pupils' right to an independent review of their exclusion that could directly lead to their reinstatement. Before 2011, the initial decision to permanently exclude was taken by the headteacher of the school in question, and was only to be taken 'in response to serious breaches of the school's behaviour policy…if allowing the pupil to remain in school would seriously harm the education or welfare of the pupil or others in the school'.[7] Following the headteacher's decision to permanently exclude, the governing body of the school was required, within 15 school days, to arrange a meeting to which the parents of the child were invited in order to review the headteacher's decision to exclude.[8] The governing body could either uphold the permanent exclusion or decline to do so. If the governing body upheld the exclusion, parents had the right of appeal to an Independent Appeal Panel ('IAP'), organised by the local authority in which the school was located.[9] The primary function of the IAP was to 'decide, on the balance of probabilities, whether the pupil did what he or she is alleged to have done'.[10] Essentially, the IAP considered the lawfulness of a headteacher's

[2] Department for Education, *The Importance of Teaching: the Schools White Paper 2010* (2010) 3-4.
[3] Ibid. 32
[4] Ibid.
[5] Ibid.
[6] Education Act 2011, s 5
[7] Department for Children, Schools and Families, *Improving behaviour and attendance: guidance on exclusion from schools and Pupil Referral Units* (2008), 12.
[8] Ibid. 41.
[9] Ibid. 45.
[10] Ibid. 52.

decision to exclude a child on the facts. If they decided that an exclusion was not lawful, the appeal panel had the power to direct that the student be reinstated. That decision was binding on the headteacher and the school governors.[11]

The 2011 Act fundamentally changed this process. Section 4 of the Education Act amended the Education Act 2002 by inserting section 51A. According to s.51A, and the Regulations and Statutory Guidance that followed it, the decision to exclude must still be taken by the headteacher of the school in question. The school's governing board must then review the headteacher's decision to exclude, as before.[12] The next step, however, involves the newly named 'Independent Review Panel' (IRP). The IRP does not have the power to direct reinstatement of an excluded child. They may only 'recommend that the governing board reconsiders reinstatement', or 'quash the decision and direct that the governing board reconsiders reinstatement'.[13] Little explanation is given as to the distinction between a decision to 'recommend' reconsideration and a decision to 'direct' reconsideration. What is clear, however, is that the panel does not have the power to directly reinstate a student.

Another change is that the IRP, unlike the IAP, does not undertake a factual evaluation of the decision taken by a headteacher to exclude. Rather, the IRP reviews the decision of the *governing body* to uphold an exclusion. It can only quash the decision of the governing body 'if it considers that [the governors' decision] was flawed when considered in the light of the principles on an application for judicial review'.[14] The IRP does not evaluate the initial factual circumstances which led to a pupil's exclusion, then. It only reviews the legality, rationality and procedural fairness of the decision taken by the governors. Following a direction or recommendation that the governors reconsider their decision, the governing body must reconvene in order to do so.[15]

Essentially, the new procedure for challenging exclusions enhances schools' autonomy in relation to permanently excluding pupils. There is no longer an independent panel with the power to directly reinstate an excluded pupil. This change sits alongside the broader powers given to teachers to discipline pupils in a more robust manner. The message sent by the Act is that pupils are responsible for improving their behaviour, and if they are unable to do so they will be punished or excluded from school. The autonomy given to teachers in disciplining pupils has priority.

The Flawed Basis of the Education Act 2011

The problems arising from the policy behind the Education Act are twofold. Firstly, it has not addressed the underlying causes of pupil misbehaviour. Secondly, in changing the procedure for challenging exclusions, the Act deprived parents and children of the right to access a truly effective and independent review of their child's exclusion. This is unsatisfactory, due to the serious implications that permanent exclusion from school can have on children's lives and future prospects, the way in which exclusion disproportionately affects already disadvantaged groups of pupils, and the reported practise of unlawful 'off-rolling'.

Considering the first issue, the ineffectiveness of the policy advocated by the Department for Education from 2010 has been highlighted by numerous commentators. As noted above, the 'Forgotten Children' report published by the House of Commons Education Committee in 2018

[11] Ibid. 54-5.
[12] Education Act 2002, ss.51A(2)-(3); School Discipline (Pupil Exclusions and Reviews) (England) Regulations 2012, SI 2012/1033, regs 5-6.
[13] Department for Education, *Exclusion from maintained schools, academies and pupil referral units in England: Statutory guidance for those with legal responsibilities in relation to exclusion* (2017), 35.
[14] Ibid.
[15] School Discipline (Pupil Exclusions and Reviews) (England) Regulations 2012, SI 2012/1033, reg 8.

expressed concerns about a growing culture of intolerance to minor infractions of school behaviour policies in schools. According to the report, mainstream schools are not the 'bastions of inclusion' that they should be.[16] Many schools are failing to provide adequate support to pupils with behavioural issues, meaning that children who should be included within mainstream schooling are not so included. Witnesses who gave evidence to the Committee described challenges, such as a lack of expertise and funding, which contributed to schools' 'inability or unwillingness to identify problems and then provide support' to pupils at an early stage.[17] Some witnesses expressed concerns that schools were deliberately failing to encourage the diagnosis of children with special educational needs, due to the belief that it would then be harder to exclude those children.[18] In general, there seems to be a problem relating to schools' inability or unwillingness to intervene in order to tackle pupils' disruptive behaviour at an early stage, despite that principle being advocated in the 2017 Exclusion Statutory Guidance.[19]

Moving on to the second issue, there is a lack of a truly effective independent means by which parents of excluded students can challenge the basis of exclusions from school. Under the current law, the final decision as to whether a student is reinstated is taken by the governing board of the school itself. This is a body with a close working relationship with the headteacher who initially took the decision to exclude. Governors and headteachers of maintained schools are constantly working in tandem to ensure the effective management of the school. Statutory guidance released in 2017 detailing the constitution of governing bodies stated that the 'relationship between the governing body and the headteacher is of critical importance'.[20] Governors are even legally responsible for the initial appointment of the headteacher.[21]

This close relationship between school governing bodies and headteachers raises serious concerns as to the independence of school governors in the exclusion review process. These concerns are justified when one considers recent exclusion statistics provided by the Department for Education. Prior to the passing of the 2011 Act, the then Secretary of State commented that he felt it was 'likely that most governing bodies will offer to reinstate pupils if directed to reconsider by a panel'.[22] The reality has proved otherwise. Governing bodies more often than not refuse to reinstate pupils at the second reconsideration stage, even after the IRP has directed a reconsideration. In the 2016-2017 academic year, only 38% of students were reinstated by governing bodies after a direction by the IRP.[23] In 2015-16, only 30.1% were offered reinstatement following an IRP direction.[24] Governing bodies are clearly disinclined to overturn headteachers' decisions to permanently exclude. As a result, only 0.6% of the 7,720 permanent exclusions in the

[16] House of Commons Education Committee, *Forgotten Children* 3
[17] Ibid. 10
[18] Ibid.
[19] Department for Education, *Exclusion: Statutory Guidance* 6
[20] Department for Education, *The constitution of governing bodies of maintained schools: Statutory guidance for governing bodies of maintained schools and local authorities in England* (2017), 9.
[21] Department for Education, *Recruiting a headteacher: A guide to the recruitment and selection of headteachers and other leadership roles* (2017), 8.
[22] Joint Committee on Human Rights, *Legislative Scrutiny: Education Bill; and other Bills* (2010-12, HL 154, HC 1140), 61.
[23] Department for Education, 'Permanent and fixed-period exclusions in England: 2016-17, Underlying data' (19 July 2018) < https://www.gov.uk/government/statistics/permanent-and-fixed-period-exclusions-in-england-2016-to-2017> accessed 28 September 2018.
[24] Department for Education, 'Permanent and fixed-period exclusions in England: 2015 to 2016, Underlying data' (20 July 2017) < https://www.gov.uk/government/statistics/permanent-and-fixed-period-exclusions-in-england-2015-to-2016> accessed 28 September 2018.

academic year 2016-17 led to students' reinstatement after an IRP recommendation or direction.[25] At the same time, overall rates of exclusion are constantly climbing.[26]

This is despite strong disincentives for failing to reinstate a pupil after an IRP direction. The 2017 Statutory Guidance makes clear that, following a direction by the IRP, '[w]hilst the governing board may still reach the same conclusion as it first did, it may face challenge in the courts if it refuses to reinstate the pupil, without strong justification'.[27] Where governing bodies do not reinstate pupils after a direction, the school's budget may even be reduced by £4,000 by the local authority.[28]

Under the current system, therefore, a truly independent means for parents to challenge a headteacher's decision to permanently exclude does not exist. IRPs are unable to direct reinstatement of students, and governors are unwilling to overturn the decisions taken by headteachers. Parents do not even have an automatic right to appear at the governing body's reconsideration meeting: the 2017 Statutory Guidance makes clear that when the governors take their second and final decision, there is 'no requirement to seek further representations from…parties or to invite them to the reconsideration meeting'.[29] In light of this, it is unsurprising that the Parliamentary Joint Committee on Human Rights, commenting before the passing of the 2011 Act, suggested that the exclusion review process would breach individuals' fundamental rights under Article 6 of the European Convention of Human Rights, as incorporated into domestic law through the Human Rights Act 1998.[30] Article 6(1) provides that:

> In the determination of his civil rights and obligations or of any criminal charge against him…everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.[31]

At the time of passing of the Education Act 2011, the Department for Education argued that Article 6 was not engaged in exclusion hearings, as they were not determinative of a 'civil right or obligation'. Recent case law from Strasbourg, however, suggests that the Department's view on this point was erroneous. The Grand Chamber of the European Court of Human Rights in the case of *Orsus v Croatia* held that where a state had granted civil rights which can be enforced by means of a judicial remedy these can, in principle, be regarded as civil rights within the meaning of Article 6.[32] Permanent exclusions can be challenged by recourse to judicial review after the IRP stage. It would seem to follow that there *is* in fact a civil right that a child may attend a particular school from which she has been excluded for the purposes of Article 6. If Article 6 is engaged, it appears that the lack of independence of the review process leads to a breach of parents' and pupils' human rights, for which the government provided no justification at the time of passing the Education Act.

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[25] Calculated from Department for Education, 'Permanent and fixed-period exclusions in England: 2016-17, Underlying Data'.
[26] Department for Education, 'Permanent and fixed-period exclusions in England: 2016-17, Main Text' (19 July 2018) < https://www.gov.uk/government/statistics/permanent-and-fixed-period-exclusions-in-england-2016-to-2017> accessed 2 March 2019.
[27] Department for Education, *Exclusion from maintained schools, academies and pupil referral units in England: Statutory guidance for those with legal responsibilities in relation to exclusion* (2017), 41.
[28] Ibid.
[29] Ibid. 42.
[30] Joint Committee on Human Rights, *Legislative Scrutiny: Education Bill; and other Bills* (2010-12, HL 154, HC 1140), 13-15.
[31] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 6.
[32] (2011) 52 E.H.R.R. 7, 301.

In light of the lack of independence in the exclusion review process, it is unsurprising that parents and students feel disempowered. A report by the Office of the Children's Commissioner in 2017 found that many pupils do not feel that they were given a chance to have a say about what had happened when they got into trouble at school.[33] A 2018 report by the House of Commons Education Committee further reported that parents too feel disillusioned by the exclusion process. They feel that they are often seen as pushy for advocating for better support for their child, and that schools are more focused on punishing students than working with them to find out how best to help the child. Parents and pupils find themselves fighting a system which they think is weighted against them, without any leverage.[34]

Although it is important for schools to maintain some independence and autonomy in pupil discipline and the exclusion process, there must be effective checks on this autonomy. This is because of the significant impact that permanent exclusion can have on the lives of students. Permanent exclusion from school can have a devastating long-term impact on children's lives. Many have noted the existence of a 'school-to-prison pipeline', whereby children who are permanently excluded from school are more likely to become involved in criminal activity.[35] A link between school exclusion and criminal activity can certainly be observed in England and Wales. In HM Chief Inspector of Prisons for England and Wales Annual Report 2017-18, 89% of children surveyed in Young Offender Institutions reported being excluded from school before they came into detention.[36] As well as the risk of becoming involved in criminal activity, exclusion from school is associated with low academic attainment should pupils end up in alternative provision. A 2012 report by the DfE highlighted that only 1.4% of pupils in alternative provision leave school with 5 or more GCSE grades at A*-C.[37] The lack of opportunity outside of mainstream schools is recognised by pupils themselves. A 2017 report by the Office of the Children's Commissioner stated that some students in alternative provision described, for example, not being able to do the GCSE subjects they wanted.[38]

An independent exclusion procedure, whereby schools are held accountable for their exclusion decisions in an effective manner, is thus necessary in order to ensure that pupils whose behaviour could be addressed within mainstream schooling do not face these negative long-term consequences. An independent system of accountability is also necessary because of the way in which exclusion disproportionately affects children with certain characteristics, some of whom are already from disadvantaged backgrounds. 2016-17 statistics from the Department for Education show, for example, that the rate of permanent exclusion of children eligible for and claiming free school meals is quadruple that of children who are ineligible.[39] Furthermore, children receiving support for special educational needs ('SEN') have the highest permanent exclusion rate, and accounted for nearly half of all permanent exclusions in the 2016-17 academic year.[40] Students of Gypsy/Roma and Irish Traveller heritage had the highest rates of permanent exclusion of any ethnic group, and Black Caribbean pupils had a permanent exclusion rate nearly three times higher

[33] Office of the Children's Commissioner, *Children's Voices: A review of evidence on the subjective wellbeing of children excluded from school and in alternative provision in England* (2017), 18-19.
[34] House of Commons Education Committee, *Forgotten children* 15-17.
[35] Jo Deakin and Aaron Kupchik, 'Tough choices: school behaviour management and institutional context' (2016) 16(3) Y.J. 280, 280-1.
[36] HM Inspectorate of Prisons, *HM Chief Inspector of Prisons for England and Wales: Annual Report 2017-18* (2018), 68.
[37] Charlie Taylor, *Improving Alternative Provision* (2012), 6.
[38] Office of the Children's Commissioner, *Children's Voices: A review of evidence on the subjective wellbeing of children excluded from school and in alternative provision in England* (2017), 10.
[39] Department for Education, 'Permanent and fixed-period exclusions in England: 2016-17, Main text' (19 July 2018) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/726741/text_exc1617.pdf> accessed 28 September 2018.
[40] Ibid.

than the school population as a whole.[41] Exclusion and its associated negative repercussions disproportionately affects students with particular characteristics, then, some of whom would benefit from increased support from their schools rather than increased punishment.

A final reason why the lack of effective independent review in the exclusion process is concerning is the reported practice of unlawful 'off-rolling' carried out by schools in order to improve Ofsted scores. Ofsted scores presently value schools which have effective behaviour management policies, as opposed to giving credit to support systems for difficult pupils.[42] As a result, children who are low achievers or who are persistently poorly behaved are vulnerable to being removed from school. This is particularly the case given that current exclusion statutory guidance provides that a student did not have to commit a *serious* breach of the school's behaviour policy in order to be permanently excluded from school. Children can be excluded for persistent low-level breaches of the school's behaviour policy.[43] The removal of the IAP with the power to directly reinstate student removed an important safeguard against off-rolling. Headteachers are able to remove poorly-performing students in the knowledge that their decision cannot be overturned by a body independent from the school, and that governors are unlikely to overturn their decision. The 2018 House of Commons Education Committee expressed concern about this phenomenon. The Committee reported that headteachers disclosed that school progress scores acted as a disincentive to retaining children who were academic underperformers, and who could be classed as difficult or challenging. Some headteachers even admitted that improving progress scores could positively act as an incentive to remove a child from school.[44] The ability of schools to engage in such practices in the knowledge that the IRP will not be able to direct the reinstatement of the removed children is indeed concerning.

For a number of reasons, then, the changes brought about by the Education Act 2011 give rise to concerns as to the effectiveness with which mainstream schools are addressing student misbehaviour, and whether the power to remove students without fear of the child's reinstatement has been abused. In order to examine these issues further, this article will consider exclusions from maintained schools in East Sussex as a case study.

Permanent Exclusion in East Sussex: A Case Study

Freedom of Information ('FOI') requests were made to a number of maintained secondary schools in East Sussex. Secondary schools were chosen because this is the period in which the highest number of exclusions occur: 25% of exclusions occur at age 14, and over half of all exclusions happen at year 9 or above.[45] The location of East Sussex was chosen because the county has a permanent exclusion rate of 0.20 in maintained secondary school. This is the average exclusion rate for England in this category.[46] As such, it is unlikely that the information received will be skewed by an unusually high or low exclusion rate.

FOI requests were submitted to the eleven secondary maintained schools in East Sussex, asking for information relating to exclusions in the calendar year of 2018. For the purposes of this article, the eleven schools will be referred to as Schools A to K. This is because of a concern to preserve the anonymity of the pupils discussed in this article. For the same reason, the neutral pronoun 'their' will be used to refer to excluded children.

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[41] Ibid. 7.
[42] Deakin and Kupchik, 'Tough Choices', 290-2.
[43] Department for Education, *Exclusion: Statutory Guidance* 10.
[44] House of Commons Education Committee, *Forgotten children* 12-14.
[45] Ibid. 9
[46] Department for Education, 'Permanent and fixed-period exclusions in England: 2016-17, Underlying Data'.

The level of information that schools were willing to provide in response to the FOI requests also differed widely. Some schools, concerned about students' anonymity and data protection, were unwilling to provide any information relating to the numbers of pupils excluded or the reasons for those exclusions. Others provided very general statements about the numbers of students that had been excluded, and the basic reasons for those exclusions. Fewer schools were willing to provide detailed and anonymised information regarding the behaviour of excluded pupils. The information provided by two of the eleven schools was detailed enough to carry out an analysis of the schools' approach to student misbehaviour. These schools were School C and School J. In general, the information provided by the schools suggests a punitive approach to student misbehaviour, with few pupils being able to challenge their exclusions effectively.

A single pupil was excluded from School C in 2018 ('Student C'). Student C was excluded from school in November 2018, while in Year 9. The reason for Student C's exclusion given in the exclusion letter sent by the headteacher was 'persistent defiance and a risk to health and safety around school'. Student C's Special Educational Needs SEN records reveal that they suffer from Autistic Spectrum Disorder ('ASD'), which manifests itself in aggression and anxiety. According to guidelines provided by the National Institute for Health and Clinical Excellence ('NICE'), these can be common symptoms for autistic children of school age. The NICE guidelines provide that autistic children can have a strong dislike of change, and such change can lead to anxiety and aggression.[47] Autistic children can also often exhibit characteristics which, in a non-autistic child, would be interpreted as misbehaviour. The NICE guidelines state that autistic children may have a reduced or absent awareness of personal space, or an unusual intolerance of people entering their personal space.[48] They may exhibit extremes of emotional reactivity to change or new situations, and an insistence on things being 'the same'.[49] Furthermore, autistic children may have a lack of awareness of socially expected behaviour, and unusually negative responses to the requests of others ('demand avoidant behaviour').[50]

In other words, then, children of secondary school age with ASD can present in a way which could be understood by teachers to be defiant. A recent judgement in the Upper Tribunal (Administrative Appeals Chamber) showed the courts' appreciation for this, and a concern to avoid punishing children with autism for behaviour that may in other children be evidence of disobedience.[51] Judge Rowley, who was asked to consider whether the exclusion of an autistic pupil had been discriminatory, stated that:

> An autistic child who feels very anxious and stressed - for example, because they are experiencing sensory overload, or are overwhelmed by social demands and interactions - may behave in a way that cannot reasonably be described as a choice. They may not understand the effect of their behaviour and any prospect of punishment is unlikely to have any deterrent effect upon them.[52]

It is important, then, that schools make reasonable adjustments for children who have been diagnosed with ASD in order that they be integrated into the mainstream school environment.

[47] National Institute for Health and Care Excellence, *Autism spectrum disorder in under 19s: recognition, referral and diagnosis, Clinical guideline* (Published: 28 September 2011) 43
[48] Ibid. 42
[49] Ibid. 36
[50] Ibid. 43
[51] *C&C v The Governing Body of a School, The Secretary of State for Education (First Interested Party), The National Autistic Society (Second Interested Party) (SEN)* [2018] UKUT 269 [81]
[52] Ibid.

Indeed, they are required to do so by law.[53] School C did make some adjustments for Student C based on their ASD diagnosis, providing them with SEN support. They received some alternative provision, and were given a 'THRIVE assessment'. THRIVE is a programme designed to assist children's social and emotional development.[54] Student C also had an 'Early Help Plan' and three Behaviour Support Plans put in place.

Despite the school recognising Student C's additional needs, their approach to Student C's behaviour was nonetheless overwhelmingly punitive. In Year 7 alone, Student C received 73 detentions, twenty-one internal isolations, three Fixed Term Exclusions and one internal exclusion. In Year 8, Student C received 119 detentions, 35 internal isolations and 2 Fixed Term Exclusions. Prior to their exclusion in Year 9 in November 2018, Student C received four Fixed Term Exclusions and one detention. The punitive approach taken by School C to Student C's misbehaviour persisted even where that behaviour was clearly linked to characteristics associated with autism. They were given detentions, for example, when teachers attempted to block them in hallways in order to speak to them and they refused. This was despite communications from school staff to their teachers noting that blocking made Student C feel trapped and prone to lash out. Overall, then, despite School C recognising Student C's additional needs, they took an incredibly punitive approach to 'defiant' behaviour on the part of Student C that may in fact have been strongly linked to C's ASD. In terms of the blocking, teachers actively aggravated conditions of C's ASD, and then punished them for their negative reaction.

A similar, although less stark, punitive approach can be seen in relation to Student J from School J. Student J was excluded for a serious breach of School J's behaviour policy. In its behaviour policy, School J emphasises that it is important that staff identify the underlying causes of poor behaviour, rather than simply resorting to punishment. Nonetheless, School J has an inflexible system of automatic 'consequences' in lessons, tiered at levels C1 to C4. Where a student does not behave in an acceptable manner, he or she will be issued with a 'C1', representing a warning that the pupil should modify their behaviour. If the pupil fails to modify their behaviour, they are issued with a 'C2', a warning with the additional requirement that the student speak with the member of staff at the end of the lesson. Should the pupil continue to behave in an unacceptable manner, they will be issued with a 'C3'. The pupil will have to continue their learning in another classroom as well as being automatically issued with a detention. If at that point the pupil refuses to leave the classroom to continue their learning in a support room they receive a 'C4'. A member of staff will collect the student and take them to the support room, and they will again be automatically issued with a detention.

Student J was permanently excluded from school in 2018, while in Year 10. Their behavioural record demonstrates that they had a number of behavioural sanctions and consequences prior to their exclusion in 2018. In Year 7, for example, Student J received a total of 23 C2s, which were logged in their behavioural record. Student J further received four C3s, and one C4. A number of these sanctions were for not following tasks and distracting and for disrupting others in the classroom. A total of 18 detentions were issued to Student J during Year 7. A similar picture emerges as regards Student J's behaviour in Year 8. In that year, Student J received 27 total C2s, four C3s and one C4. Once again Student J had mainly been sanctioned as a result of disruptive behaviour in the classroom. A total of 22 detentions were given in response to Student J's disruptive behaviour. In Year 9, Student J received 22 C2s, four C3s, and two one-day internal exclusions as a result of their poor behaviour. Additionally, Student J was involved in two 'hate incidents', in which teachers found them with a swastika drawn on their arm, and was repeatedly sanctioned for truancy. The number of detentions received by Student J increased drastically

[53] Equality Act 2010 s 85(6)
[54] https://www.thriveapproach.com/the-thrive-approach/

during Year 9 to 38 in total. Overall, Student J appears to have been a persistently disruptive student up until their exclusion in September of Year 10. Prior to being excluded in Year 10, Student J received one C2 and a number of sanctions for lateness and truancy, as well as 10 detentions. Student J was ultimately excluded following a serious incident, which led to a fixed period exclusion followed by permanent exclusion.

School J did provide Student J with some support prior to their exclusion. On 12 instances, Student J received coaching from their tutor in order to address their low level disruption. Student J discussed progress with their tutor and how to improve, as well as how to resolve issues without losing their temper. Additionally, on a number of occasions Student J's parents met with or spoke with members of staff in order to discuss Student J's poor behaviour. Student J was also in the school's 'Raising Achievement Programme'. Nonetheless, no formal behaviour support plans were put in place to address Student J's behaviour in the classroom, despite the high number of detentions that they were receiving. No SEN assessment was carried out, despite the 2017 Statutory Guidance clearly indicating that '[d]isruptive behaviour can be an indication of unmet needs', and that schools should intervene early to identify causal factors for misbehaviour. Rather, as the number of detentions received by Student J each year suggests, the primary way in which School J chose to address Student J's behaviour was by way of sanctions. When Student J was disruptive in the classroom, the school's automatic response was to punish them. Automatic punishment took priority over formal support.

Overall, the approach taken by schools in East Sussex to pupil discipline seems to mirror the approach espoused by the 2010 White Paper and the Education Act. While some support is offered, ultimately pupils are held accountable for their misbehaviour by way of sanctions, regardless of whether these sanctions are the best way to deal with the underlying causes of the misbehaviour. Additionally, the success with which parents are able to challenge exclusion decisions taken by schools also appears to be worryingly low. Of the ten schools that responded to the FOI request, seven gave precise figures detailing how many children had been excluded, and how many of those exclusions had been overturned by governors or by IRPs. Of the seven children excluded in East Sussex in 2018, none were reinstated by the school governors, and none were reinstated following an IRP decision.

The Timpson Review: Hope for the Future?

Despite the rather negative picture painted by the patterns of permanent exclusion that have emerged since the passing of the Education Act, it is possible that the government's position on exclusions will change. In 2018, the Prime Minister announced a review of school exclusion, to be led by Edward Timpson (the 'Timpson Review'). The terms of reference of the review made clear that the government wanted to better understand the effect of exclusions, and to understand why some groups of pupils are more likely to be excluded than others.[55]

It is possible that the Review will lead to an overhaul of the exclusion review procedure. The National Governance Association ('NGA'), a representative body for school governors and trustees of state-funded schools in England, submitted a proposal to the Review suggesting that the governing body stage of the review process should be entirely replaced by independent tribunals.[56] Whether or not the NGA's proposals will be recommended by the Timpson Review

[55] Department for Education, *A Review of School Exclusion: Terms of Reference* (16 March 2018) <https://www.gov.uk/government/publications/school-exclusions-review-terms-of-reference>, Accessed 02 March 2019

[56] National Governance Association, *Appealing exclusions: time for a review?* <https://www.nga.org.uk/News/NGA-News/October-2018-December-2018/Appealing-exclusions-time-for-a-review.aspx> (12 October 2018), Accessed 2 March 2019

remains to be seen, as the Department for Education is still collating the evidence submitted to the Review last year.

Whether or not the Review will lead to a culture-shift in relation to schools' management of poor behaviour remains to be seen. The terms of reference of the Review were ambivalent in this regard. The government did state that they wished to explore behaviour management in schools, and identify 'effective approaches which improve outcomes'.[57] Presumably, this indicates a desire on the part of the government to tackle behavioural problems at an early stage in mainstream schooling, and reduce the extent to which exclusions are used. Nonetheless, the terms of reference went on to state that the government 'will not seek to curb the powers head teachers have to exclude'.[58] As such, whether or not there will be a change in government policy towards behaviour management remains to be seen.

Conclusions

In summary, the Education Act 2011 contributed to two key issues in the discipline and exclusion process which need to be addressed. Firstly, the Act and the policy behind it have contributed to 'culture of intolerance' towards misbehaviour in schools, in which a punitive disciplinary approach is favoured. While the government's aim of attracting and retaining high-quality teachers was, and still is admirable, too little attention is being given to addressing the underlying needs of students who misbehave. This can be seen, for example, in the staggering number of behavioural sanctions given to Student C, one of the many vulnerable pupils with SEN excluded in 2018.

Secondly, the Act has removed parents' ability to effectively challenge the disciplinary actions taken by schools, particularly where schools have permanently excluded children. The levels of success that parents have when they attempt to have their children reinstated is worryingly low, even where an IRP has directed that a school reconsider its decision. The result is that children and parents feel disempowered throughout the process of challenging a school exclusion. This is unacceptable, given the lasting impact that exclusion has on the lives of children. It is hoped that the upcoming Timpson Review of school exclusions leads to significant change in policy in relation to school discipline and exclusions.

[57] Department for Education, *A Review of School Exclusion*
[58] Ibid.

Gender and Sexual Minorities: Legislative Erasure and the Sexual Offences Act 2003

Georgia Fineberg*

Abstract

In this paper, I argue that the focus on the presence of a penis within the legal construction of rape creates a hierarchy of sexual offences which excludes the experiences of Gender and Sexual Minorities. I critically evaluate the sentencing guidelines on sexual offences as well as the Sexual Offences Act 2003 in order to demonstrate that this hierarchy is not merely ideological, for the lack of reporting of abuse by GSM survivors must be considered within the context of a legal framework that does not account for their experiences. Whilst the law has improved in terms of its recognition of some male victims, the persistence of a heteronormative denial of female sexuality has led us to a point in which we account for male victims of rape, but not for (cisgender) female rapists. I suggest that we do away with the category of assault by penetration and expand the definition of rape to include non-penile penetration as seen in some other jurisdictions. I argue that for GSM survivors to be adequately protected, the heteronormality of the law in relation to sexual offences needs to be fully deconstructed.

Language, Terminology and Framework

In order to address the current legal designation of rape in relation to gender and sexual minorities, the language around gender, sex, and sexuality must be carefully selected and applied. In approaching this subject, it would be inappropriate for me to use the term LGBT as it does not adequately account for the range of experiences which will be enveloped within this discussion. Recognizing the expansive ways in which gender, sex and sexual orientation can overlap, I acknowledge there are those who identify as gay men who do not have penises and those who identify as heterosexual women who do. For the purpose of this paper, I invite the reader to treat gender identity and sexual orientation as distinct categories which may or may not merge to create a singular sense of identity.[1] I am using the term Gender and Sexual Minority (GSM) as an umbrella term instead of LGBT to ensure that the scope of my argument is expanded to include and validate as many experiences of sexual violence as possible. In doing so, this discussion becomes inclusive of survivors who may not identify as LGBT whose experiences are nevertheless relevant within its scope. Thus, I use GSM as a term inclusive of LGBT identity, as well as other minority experiences as related to the current majority heteronormative paradigm of rape.

To account for the many ways in which sexual violence within GSM communities may manifest itself, I have adopted the terms "gender transgressive rape" and "gender paradigmatic rape" from

* The writer is currently a GDL student at City, University London. The writer felt compelled to write in response to the deafening silence on this matter which only became louder when she realized the number of GSM people are experiencing sexual violence within this context. The context of this piece developed as the writer did her Masters in Gender and Cultural Studies, as well as personal experience with GSM survivors, in hopes to elevate the topic beyond the theoretical.

[1] Judith Butler, *Bodies that Matter* (First Published 1993, Routledge) xii.

Kelly Anne Malinen's reading of Judith Butler's theory of performative gender.[2] Butler's account of "constructedness" and "transgressiveness" makes sexual violence which operates outside of easily contextualised interpretations of hegemonic heteronormality legally viable. Such acts of sexual violence will henceforth be termed as gender transgressive rapes. Conversely, gender paradigmatic rape refers to the heteronormative understanding of sexual violence we currently see enshrined within the law. As a disembodied legal construct, with no specific conduct through which actus reus can be established, gender transgressive rape is inherently intangible in nature. In acknowledging sexual violence which 'transgresses' heteronormative expectations, we open up a discussion which carries potentially vast implications for the breadth of identity, abusiveness and the law's ability to navigate these concepts.

In addition to recognizing the ways in which intersections of identity require nuance in approach, we must also recognize the nature of sexual violence as it relates to sexual identity. A man who identifies as heterosexual, for instance, could still commit an act of sexual violence against another man. Such crimes are understood to occur frequently within the prison system.[3] In such cases the perpetrator's ability to separate the sex act from their own ordinary experiences of sexual attraction and desire illuminates the violence of rape in its truest form. An act of sexual violence is not necessarily an indication of an individuals' sexual orientation or gender identity. Rape is an act committed to humiliate and degrade one party whilst asserting the dominance and control of the other. It is committed through sex but not for sex. In order to ward off this potential slippage, I have focused my research primarily on sexual violence within the context of intimate partner abuse (IPA). Within these circumstances, the various gender and sexual identities of the individuals concerned are already established. Additionally, due to endemic underreporting within GSM communities, the reports published by organisations that work with GSM survivors of IPA provide the most extensive and reliable data set available at present.

Introduction

Under the English law, a sexual offence can be established only where the relevant actus reus occurs in the absence of the Survivors consent, under the additional condition that the perpetrator also lacks a reasonable belief that they have the survivor's consent. These criteria must be met for rape, sexual assault and sexual assault by penetration respectively.[4] The three categories are distinguished from each other not by their context but rather by the form which the related conduct takes. Under the current legal definition, the crime of rape is only established in such instances where penile penetration constitutes the actus reus of the offence.[5] Conversely, sexual assault by penetration occurs when there is intentional sexual penetration of the anus or the vagina with any other part of the body or another object.[6] Sexual assault occurs where there is other (non-penetrative) intentional touching of a sexual nature.[7] Given that the crime of rape and sexual assault by penetration are prima facie characterised by the penetrative nature of the act, the distinction between the two categories appears in the least to be negligible and artificial. Such a construction determines who may or may not use the language of rape to account for their own experiences; This is not based on the levels of trauma experienced, nor the penetrative nature of the offence, but rather the instrument used to penetrate. Consequently, the law on sexual offences as it stands does not sufficiently validate and protect GSM survivors, or effectively try and convict

[2] Kelly Anne Malinen, Thinking Woman to Woman Rape: A Critique of Marcus's Theory and Politics of Rape prevention: *Sexuality and Culture* [2003] 363.

[3] Sasha Gear, Behind the Bars of Masculinity: Male Rape and Homophobia in and about South African Men's Prisons. *Sexuality and Culture* [2003] 213.

[4] Sexual Offences Act 2003 s 1(2) (42).

[5] Ibid.

[6] Ibid s 2 (a) (42).

[7] Ibid s 3 (a) (42).

perpetrators, committed as it is to upholding the concept of gender paradigmatic rape. This is not to suggest that establishing a law that deals effectively with gender transgressive rape is an easy task. Indeed, rape, as a singular and stark word, "evokes only paradigms." [8] My suggestion that the use of the term be expanded legally is with respect to the reflexive power of its past and current use; the word rape is charged with a greater power than the term sexual assault, regardless of the mechanisms of that assault or the lengthy explanation appended within the legal guidance.[9] From a descriptive linguistic standpoint, even where they have no legal recourse under this definition, survivors of sexual violence regularly utilize the term in order to articulate their own experiences.[10] The legal language of rape is the language of gender paradigmatic rape, whilst the experience of rape as described by survivors is far more expansive. Consequently, rape as a legal construct fails to reflect rapes as they occur and are recognised as such in society, instead constructing them as the site of heteronormative power.[11] In indicating that GSM communities are particularly vulnerable to erasure both in policy and law, my overarching argument is that the language of the law penetrates culturally, validating and denying different experiences of sexual violence. It is a matter of great concern that the law as it stands segregates GSM survivors, denies their access to a universally accepted language, and, in its attempt to solve this problem, has simply ghettoised the GSM community under yet another subcategory. Having spent the past years working within women's refuges and as an outreach worker for GSM survivors of intimate partner and sexual violence, I have personal insights which have informed my understanding of this topic. Whilst I will not be referring extensively to the work I have undertaken personally, I am informed by the stories of those who were brave enough to seek support and speak out about their experiences.

Transgressive Rape and Intimate Partner Violence – Intangible Realities for GSM Survivors

Findings from Galop's 2018 report on LGBTQI+ domestic abuse reveal the alarming prevalence of abuse within GSM relationships. For instance, it was found that 82% of lesbian clients and 25% of transgender males reported abuse from a female partner, and a total of 18% of all participants surveyed reported sexual abuse within their relationship.[12] Whilst it is not the case that sexual violence is an element of all abusive relationships, current available data indicates that its prevalence at least mirrors heteronormative experiences of sexual violence.[13] In the National Intimate Partner and Sexual Violence Survey carried out by CDC in the United States, the first study of its kind, lesbian women and gay men reported levels of intimate partner violence and sexual violence higher than or at least equal to those of heterosexual women and men.[14] Bisexual women are recorded to be at a significantly higher risk of experiencing sexual and physical violence and/or stalking by an intimate partner when compared to both lesbian and heterosexual women.[15] Additionally, it has been found that more than a quarter of British trans* people in a

[8] Mary White Stewart, Shirley A Dobbin and Sophia I Gatowski, "Real Rapes and Real Victims": The Shared Reliance on Common Cultural Definitions of Rape [1996] FLS 159.165

[9] Kelly Anne Malinen, supra, Thinking Woman to Woman Rape: A Critique of Marcus's Theory and Politics of Rape prevention: *Sexuality and Culture* [2003] 363.
[10] Lori B, Girshick, Woman -to-Woman Sexual Violence: Does She Call It Rape? (1st, North-eastern University press, Boston 2002) 126.
[11] Sharon Marcus, 'Fighting bodies, fighting words: A theory and politics of rape prevention.' [1992] In J. Butler & J. Scott (Eds.), Feminists theorize the political 385, 387.
[12] Galop, LGBT+ Peoples experience of Domestic Abuse (2018).
[13] Ibid.
[14] Mikel L. Walters, Jieru Chen, and Matthew J. Breiding (2013). The National Intimate Partner and Sexual Violence Survey (NISVS): 2010 Findings on Victimization by Sexual Orientation Atlanta: National Centre for Injury Prevention and Control/Centres for Disease Control and Prevention.
[15] Ibid.

relationship in the last year have faced domestic abuse from a partner (28%).[16] It is important to interpret these statistics within the context of systemic mass underreporting by GSM survivors. Current research indicates that 60% to 80% of survivors have never reported incidents to the police. There are an estimated two million cases of domestic abuse each year, costing the government an annual sum of £66 billion. Of this 49.3 billion is understood to be spent on addressing the needs survivors who have suffered physical injury and emotional trauma as a result of the abuse. A further 1.3 billion is spent on policing and an additional £774 million is spent on specialist victim services.[17]

Popular discussion on the failure of GSM survivors to report incidents of abuse tends to focus on the community's fear and mistrust of the police. Indeed, it is true that many survivors who have been brave enough to contact the police have been subject to ridicule or even further abuse.[18] However, even where crimes are reported, the police rarely register the sexual orientation or gender identity of the individuals concerned. A police officer with whom I was working once told me that an officer would have to "go out of their way" to log gender or sexual orientation in relation to sexual or domestic violence cases. This is because their models of data collection rarely allow for such details to be recorded. Where an officer may have an option to include this, they may only find suitable categories if the offence is logged as a hate crime. Consequently, GSM survivors are frequently erased through data collection and are therefore likely to be overlooked during the formation of law and policy.[19]

Sentencing Guidelines and Continuing Abuse Cycles

The 2003 Sexual Offences Act which came into force on 1 May 2004 has rightly been commended for its radical attack on sexual violence.[20] Notably, it introduced the offences of causing a person to engage in sexual activity without consent, causing or inciting children to engage in sexual activity and meeting a child with the intention of committing a sex offence. It also expanded the definition of rape to include oral penetration,[21] (section 143 of the Criminal Justice and Public Order Act had already incorporated anal rape into the definition in 1994).[22] In its recognition of the impact of non-penile penetrative assaults the Act created a new category of "Assault by Penetration" as separate from both sexual assault and rape. In order to cement the category of assault by penetration into the law with some substantive legal weight behind it, the sentencing guidelines on sexual offences, published in 2014, aligned the maximum sentencing provisions for this category with that of rape as life imprisonment. However, it failed to align the minimum sentencing provisions, with those for rape remaining at 4-7 years' imprisonment and those for assault by penetration ranging from a community order to 4 years' imprisonment.[23]

Given that courts are encouraged to only use suspended sentence orders (SSOs) in cases where a custodial sentence of less than twelve months is probable, the discrepancy between the minimum sentencing provisions outlined is potentially problematic. SSOs are applied more frequently in cases that fall under the bracket of sexual assault, with 50.5% of cases of sexual assault against a female in 2011 resulting in the immediate detention of the offender. This is in comparison to 95.7% of cases concerning rape against a female.[24]

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[16] Galop, LGBT+ Peoples experience of Domestic Abuse (2018).
[17] Home Office ' The economic and social costs of domestic abuse' [2019] 6.
[18] National Centre for Trans* Equality, 'Reforming Police and Ending Transgender Violence' [2009] ,28.
[19] Stonewall UK: LGBT in Britain: Trans Report. London [2018], 19.
[20] Mitchell Davies, ' Lawmakers, Law Lords and Legal Fault: Two Tales from the (Thames) River Bank: Sexual Offences Act 2003; R v G and Another' [2004] JCL 68, 70.
[21] Sexual Offences Act 2003.
[22] Criminal Justice and Public Order Act 1994 s 143.
[23] Sentencing Council, 'Sexual Offences Definitive Guideline' [2014], 1-20.
[24] Ministry of Justice, Home Office & the Office for National Statistics, 'An Overview of Sexual Offending in England and Wales' [201], 40-43.

Correspondingly, in the same year, a higher percentage of offenders convicted of the sexual assault of a female received community sentences than received custodial sentences.[25] The possible implications of this become apparent when one considers the significant overlap between sexual and intimate partner abuse as previously outlined. One of the most substantial challenges faced by survivors attempting to end an abusive relationship is their inability to physically escape a partner with whom they may live, have children, share a social circle, and so on. This is demonstrated by the fact that stalking behavior has been found to be present in 94% of domestic-violence-related homicides.[26] In acknowledging this in the drafting of a new domestic violence bill, the Sentencing Council have alerted the Magistrates and Crown Courts of the potential for further harm in such cases due to the perpetrator's ability to present a "continuing threat to the victim's safety".[27] Given the prevalence of the use of SSOs in relation to sexual offences which fall under the bracket of assault, it has to be questioned whether current sentencing guidelines disincentivise reporting amongst those who fear that an SSO will simply leave them at the mercy of an enraged abuser. Due to the ambiguities and discrepancies in legal terminology regarding sexual violence, GSM survivors are particularly vulnerable to this reality. The lack of statistical evidence available in relation to this topic is itself a signal that true equality under the law for the GSM community has not yet been achieved. Unless the police, local authorities and government statisticians collect and process data in a manner which is designed to reveal the experiences of GSM survivors, they will continue to be subject to statistical, ideological and legislative erasure.

Whose Boundaries? The Sexual Offences Act 2003

The Sexual Offences Act 2003, the outcome of the much-anticipated White Paper *Setting the Boundaries*, has been generally considered in positive terms due to its progressive approach to gender transgressive sexual violence. Setting out one of its main principles, section 1.3.2 of the paper states that "the criminal law should not discriminate unnecessarily between men and women nor between those of a different sexual orientation".[28] However, it is hard to square this objective with the decision to continue to retain penile penetration as the constituent element of the actus reus for rape. In separating out sexual assault by penetration from rape, the 2003 reform failed to adequately justify its decision for maintaining a distinction between penile and non-penile penetration. In doing so it continued to label non-penile penetration as sexual assault, a linguistic decision that under a critical gaze appears to simply re-establish the hierarchy that it initially set out to dismantle. Curiously, section 2.8.2 of the paper acknowledges the penetrative act as effectively constituting rape. "We decided that the essence of rape was the sexual penetration of a person by another person without consent. [...] Both men and women may perform such penetration."[29] Despite this insight, the distinction was preserved. In justifying this decision, section 2.8.4 of the paper cites the risk of pregnancy and the transmission of sexually transmitted diseases inherent within gender paradigmatic rapes.[30] However, the Sexual Offences Act 2003 expanded the actus reus of rape to include oral-penile penetration.[31] Pregnancy is not a risk in such instances, nor is it in cases of anal rape. Furthermore, the Act in its expansion also recognises the genitalia of those who have undergone gender reassignment surgery.[32] In such cases once again there is little to no risk of pregnancy. Equally, sexually transmitted diseases can be transmitted by non-penile penetration. The NHS's own published guidance on safe sex states that hepatitis A and B, as well as chlamydia, syphilis, herpes and bacterial vaginosis, can be transmitted during

[25] Ibid.
[26] National Stalking Helpline, 'Stalking Statistics' [2017].
[27] Sentencing Council, 'Sentencing Guidelines on Domestic Abuse: overarching Principles'(3) [2018].
[28] Setting the Boundaries 2000 s 1.3 (1.3.2).
[29] Ibid s 22.8 (2.8.2).
[30] Ibid s 22.8 (2.8.4).
[31] Sexual Offences Act 2003 s 1(a) (42).
[32] Ibid s79(3).

intercourse which occurs without penile penetration. [33] This is not to in any way dismiss the experiences of any survivors who have been impacted by the complications that are undoubtedly present within gender paradigmatic rapes. However, in order to procure a fairer statutory framework, these additional risks could be regarded as "aggravating factors" rather than implicit elements of the offence.[34] This would ensure survivors of gender paradigmatic rapes continue to be protected whilst GSM survivors receive due acknowledgment in cases where they might also be exposed to analogous risks.

Setting the Boundaries set out one further and markedly more obscure reason for its preservation of the penile/non-penile dichotomy. It cited the Criminal Law Revision's 1980 working paper on sexual violence, which was quoted as asserting that "rape was clearly understood by the public as an act which was committed by men on women and on men."[35] The paper uncritically accepts gender paradigmatic rape as the convention, based upon a public perception which was at the time thirty-three years old. Forty-eight years on, the influence of the views of a 1980s general public still enshrines gender paradigmatic rape within the law. Rights for the GSM community have been fought for and won many times over since 1980, and indeed since 2003. The protection provided to trans* people under the Equality Act 2010 and marriage equality, which was only cemented into the law under reforms to the Marriage Act in 2013, are just two examples. Given the fast-growing changes in attitudes towards GSM identifiers, the Sexual Offences Act 2003 was doomed to outdate quickly. Indeed, the Gender Recognition Act 2004 is currently being reviewed in light of this reality. One wonders whether the legal definition of rape as it stands now will be able to sustain itself in a post-GRA UK in any event. Aside from the length of time passed since its formation, the question remains whether the law on rape should be influenced by wider public opinion. The recent use of a pair of lacy knickers as evidence of an alleged victim's promiscuous nature in an Irish Court of Appeal case demonstrates that regressive rape myths continue to permeate the criminal justice system, even in cases which do not involve GSM identities.[36] If statute is the highest form of law, surely it should serve an educative function and seek to dismantle, not promote, misconceptions and prejudices.

The Sexual Offences Act 2003 did well at extending the protection of the law much further than it had previously reached. It now must be recognised that there is further still to go. The outdated category of assault by penetration should now be dispensed with completely and the definition of rape should be expanded to include those penetrative acts that were previously accounted for under the category of assault by penetration. Both Washington and Michigan have adopted state law that allows for a more inclusive definition of rape. In Michigan, penetration as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body" constitutes the actus reus of rape.[37] Similarly, in France, the definition of rape is inclusive of "any act of sexual penetration, whatever its nature, committed against another person by violence, constraint, threat or surprise".[38] Such definitions do not take away from anybody else's right to legal recourse or expression but do allow the law to functionally account for the possibility of gender transgressive rape. Historically, legal and social feminists have campaigned upon platforms of both pragmatic and symbolic legal function. By successfully arguing that the law as it stood served to reinforce gendered dichotomies which culturally entrenched the notion of male

[33] NHS , ' Common Health Questions' (NHS.co.uk 2014) < https://www.nhs.uk/common-health-questions/sexual-health/> accessed 03/12/2018.
[34] Philip N.S Rumney. The Review of Sexual Offences and Rape Law Reform: Another False Dawn? [2003] MLR 890, 900.
[35] Setting the Boundaries 2000 s 2.8 (2.8.4).
[36] BBC News, 'Irish outcry over teenager's underwear used in rape trial' (2018) <https://www.bbc.co.uk/news/world-europe-46207304> accessed 15/11/2018.
[37] Michigan Penal Code 1975 s750 (520).
[38] French Penal Code (Translated) 2005 s 222 (23).

ownership of female bodies, they were able to bring about significant law reform.[39] Similarly, I argue that a gender paradigmatic legal definition of rape serves to erase the experiences of GSM survivors, undermine their confidence in the criminal justice system, reinforce ignorance about the realities of gender transgressive rape and ultimately discourage survivors from accessing the justice they are due. In failing to name the raped, the law has also failed to name those who rape, allowing perpetrators to commit heinous acts without ever having to bear the label that such a crime undoubtedly warrants.

Conclusion

The current legal definition of rape does not adequately protect GSM survivors of sexual violence. Its anchorage to the actus reus of penile penetration undermines and erases the experiences of far more people than are being revealed through statistical data gathering. The terms gender paradigmatic and gender transgressive can aid us in appreciating expansive experiences of sexual violence, and importantly give us a language which we can use to make intangible concepts tangible. The violence of rape in all its forms should not be understated in any circumstances, the act always brutally causing the victim severe trauma and suffering. That is perhaps the only element in relation to this subject that all agree on; it would be fitting if legislation were guided primarily by this point, rather than the mechanical details of the offence. The new millennium saw a wave of rights and recognition for the GSM community within the UK. The sentiment expressed within the Sexual Offences Act 2003 can certainly be commended for being part of this movement. However, legal equality does not simply come from having access to the same legal system. True legal equality can only exist where disenfranchised groups are properly considered in the drafting of legislation. Where there are gaps in our understanding, we must not lazily assume that crimes are not taking place, but rather ask ourselves why these cases are not making It to the courts. Sexual violence and rape are simply not offences to which we can turn a blind eye. GSM identifiers are due the same legal protection and recognition as all other survivors of sexual violence.

[39] Cassia Spohn, Julie Horney Springer, ' Rape Law Reform: A Grassroots Revolution and Its Impact Science & Business Media' [1996] JCLC 861, 863.

Crossing a Thin Line: Issues of Human Rights, Religious Liberty, and Modern Ecclesiastical Law Revealed in *Lee v Ashers Baking Company Ltd and others*

Owen Sparkes*

Abstract

On 10 October 2018, the United Kingdom Supreme Court ruled unanimously that the refusal by a Christian bakery to bake a cake with the slogan 'Support Gay Marriage', due to inconsistencies with their religious convictions, was not discriminatory. The bakery's winning argument was that they refused to bake the cake not due to the customer's sexuality, which would constitute direct discrimination, but because it was their freedom of religion and expression to do so. This article will explore the implications of the judgement through the perspective of ecclesiastical law, which governs the jurisdiction of the Church of England. Despite appearing to be a case entirely separate to the law of the established Church, this article will demonstrate that Lee v Ashers Baking Company and others was fought on a foundation of legal discourse laid down by ecclesiastical law, and reveals the statutory issues the Church faces in today's society.

Introductory Remarks

In his powerful book, *The Rule of Law*, Lord Bingham describes an interesting dichotomy in the application of fundamental human rights to a modern diverse society. What he calls the 'community exception' has the role of enshrining private individual liberties whilst ensuring these never undermine the interests of society at large. This is the foundation of attitudes to religious liberty in the European Convention on Human Rights and subsequently the Human Rights Act 1998. Lord Bingham writes that in Article 9, on the freedom of thought, conscience, and religion, the 'community exception' manifests itself in the following way:

> Thus you may believe what you like, provided you keep your beliefs to yourself or share them with like-minded people, but when you put your beliefs into practice in a way that impinges on others, limits may be imposed, if prescribed by law, necessary in a democratic society and directed to one of the specified purposes.[1]

Surely to no sane person is this specification unreasonable or controversial. In the present day everyone ought to be able to practice whatever faith they choose unless it detracts from the interests of their fellow citizens or society itself. If a person's thought, conscience, or religion does begin to impinge on others, then the law should hasten to stop them in their tracks. However, as is so often the case with such clearly-defined rules, they are rarely black and white in practice: it was in

* The author is currently a GDL student at City, University of London. The piece was written out of interest is ecclesiastical law and in response to the Supreme Court's recent decision in Lee v Ashers Baking Company & Others. Special thanks to be given to Very Revd. Nicola Sullivan for initiating interest in ecclesiastical law, and to Mark Hill QC for advising on the subject.

[1] Tom Bingham, *The Rule of Law* (London, 2010), pp. 68, 74-78.

this arena of Bingham's 'community exception' that the case *Lee v Ashers Baking Company Ltd and others* was fought.

On 29 April 2014 the Northern Ireland Assembly rejected a motion enabling same-sex marriage. In light of this, an organisation representing the LGBT community called QueerSpace held a private event to which Mr. Lee was invited. He decided to take a cake to this event which, in May 2014, he ordered from Ashers bakery in Belfast: a bakery run by a Christian family who believed that the only form of marriage acceptable to God is between a man and a woman. Ashers offered a 'Build-a-Cake' service to customers and Mr. Lee ordered a design with the headline 'Support Gay Marriage'. The order was taken with no objection but later cancelled by the bakery on the ground that they could not print the slogan requested.[2] Here, revealed in all its glory, is Bingham's dilemma of 'community exception'. In the case of *Lee v Ashers* the freedom of one party to run their business according to their religious beliefs was pitted against the freedom of another party to express their personal political belief. The District Judge, the Court of Appeal, and the Supreme Court had to decide whether the action of Ashers Bakery constituted direct discrimination against Mr. Lee on grounds of sexual orientation or if it was within their rights to refuse to provide their service for a message with which they did not agree. The presiding District Judge held that it was direct discrimination for Ashers to do so and the Court of Appeal dismissed the bakery's appeal. The Supreme Court, however, overruled: there was no direct discrimination on the part of Ashers. The Court found that the bakery did not give less favourable treatment in refusing to bake the cake because of Mr. Lee's own sexual orientation, but due to the slogan written on the cake. As Lady Hale said in the leading judgment: "the objection was to the message, not the messenger."[3] Recognising the potential argument that man and message could be "indissociable" from one another for the purpose of direct discrimination of political opinion, the Court turned to Article 9 of the European Convention on Human Rights, relating to freedom of thought, conscience, and religion: obliging someone to express a belief with which they do not agree is a limitation on their Article 9 rights.[4] The Supreme Court upheld the rights of the owners of Ashers bakery to not have to produce a message with which they did not agree.[5] Malcolm Evans has argued that "religion and human rights demonstrably exist as forces within the shared space of human governance."[6] Although religion and human rights do exist in this shared space, encouraging equality and neighbourliness through similarly codified authorities, cases like *Lee v Ashers* reveal how in issues of ancient doctrine Evans is optimistic: religious authority and human rights do not yet easily co-exist.

It can be suggested that the United Kingdom exists in a halfway house between this religious authority and human rights. With the Church of England as the primary established religious organisation in the country, this jurisdiction presents a unique version of Bingham's 'community exception'. The legal power of the Church in the United Kingdom is considerable and there is an "inextricable link between Church and State."[7] In his encyclopaedic work on the law of the Church of England, *Ecclesiastical Law*, Mark Hill QC outlines the authority that the Church enjoys: a Measure of the General Synod (governing body) of the Church of England "has the full force and effect of an Act of Parliament and may relate to any matter concerning the Church of England."[8] The Church of England exists in a legally remarkable sphere as an organisation with broad law-making powers, and yet it is not answerable to an electorate in the same sense that Parliament is:

[2] *Lee v Ashers Baking Company and others* [2018] UKSC 49, paragraph 1.
[3] Ibid, paragraph 22.
[4] Ibid, paragraphs 32-35.
[5] Ibid, paragraph 25.
[6] Malcolm D. Evans, 'And Should the First be Last?' *Brigham Young University Law Review*, 3 (London, 2014), p. 537.
[7] Mark Hill QC, *Ecclesiastical Law* (Oxford, 2001), p. 10.
[8] Ibid., pp. 10-11.

the Church is both within the *trias politica* and outside it. In *R v Archbishops of Canterbury and York, ex parte Williamson*, the Master of the Rolls clarified that a Measure "enjoys the invulnerability of an Act of Parliament and is not open to the courts to question *vires* or the procedure by which it was passed, or to do anything other than interpret it."[9] Such a unique position is fortified by the fact that, as Hill identified, English courts have developed a principle wherein "the judiciary decline to enter into questions concerning the internal affairs of religious organisations."[10] The Church of England, as an ancient organisation, enjoys a level of discretion when it comes to the application of judicial review; yet it stands in a position of oversight as a public body. This is not to say that the Church as a body is not subject to intervention and expectation: in *Williamson v Archbishops of Canterbury and York and others* Lord Justice Morrit noted that, the due to the Church's established position, "its doctrines and government were and are susceptible to change by the due process of law."[11] This case, however, found that the merits of a religious controversy are not a matter on which the court is entitled to hold any position. The inherently religious nature of the Church of England, despite its public role, allows it a certain level of independence from judicial intervention. One can imagine that there are many government Ministers and departments that would deeply envy such a status relating to doctrine or policy.

At first glance *Lee v Ashers* seems to have no relation to ecclesiastical law: the former presents a contemporary debate about the relationship between religious liberty and human rights; the latter is an apparently antiquated system of law dealing with the specifics of a religious organisation. This, however, is not the case. As this article will explore, the issues on which *Lee v Ashers* was fought are very present in ecclesiastical law, as the axiom of human rights collides with the established creed of the Church of England. Looking first at the structure of ecclesiastical law and human rights, and second at doctrines at play in ecclesiastical law and human rights, this article will argue that Bingham's 'community exception' dilemma is alive in this somewhat obscure legal jurisdiction.

Bread alone? Human Rights and Religious Liberty in Ecclesiastical Law

Following the Human Rights Act 1998 the Church of England, like every public or private body, must adhere to the European Convention on Human Rights. As Hill writes, regardless of when a Measure was enacted, when interpreting ecclesiastical statute "a court must strive to find a reading which is compatible with Convention rights."[12] This means that a sixteenth-century decision of the Church of England, codified into ecclesiastical law, must be brought into conformity with contemporary legal conceptions.[13] Measures and Canons of the Church are the ecclesiastical equivalent of primary and secondary legislation respectively and, as such, must meet the requirements of the European Convention on Human Rights. What this discussion primarily concerns is how, with the passing of the Human Rights Act 1998, the freedoms of thought, conscience, and religion became, as Hill notes, "directly justiciable in domestic courts."[14]

The Church is organised by a medieval structure of parish, diocese, and archdiocese, which at every level is subject to ecclesiastical law that, in turn, provides legal requirements. As Lord Justice Laws outlined in his address, 'A Judicial Perspective on the Sacred in Society', the foundation and face of the Church – a parish priest – is under the law with requirements to baptise, marry, and bury his parishioners according to the rites of the Church. He has no option to refuse, and if he does, "he betrays the virtue as well as the law of the established Church. In this there is

[9] Ibid., p. 12.
[10] Ibid., pp. 21-22.
[11] *Williamson v Archbishops of Canterbury and York* [1996] EWCA Civ 600 in Hill *supra*, p. 12.
[12] Hill, *supra*, p. 11.
[13] Ibid., p. 11.
[14] Mark Hill QC, 'Judicial Approaches to Religious Disputes', in O'Dair, R., and Lewis, A. (eds.), *Law and Religion: Current Legal Issues*, 4 (Oxford, 2001), p. 409.

no room for the notion that conscience might justify disobedience to the law."[15] This rather strict view suggests that in the relationship between the Church and human rights legislation there is a clear 'community exception': the Church, according to Laws, has a role clearly defined in the history and constitution of the country from which extremities of the personal conviction should not detract. In order for there to be stability and the continuation of an established Church, which an increasingly secular society might perceive as an antiquated belief system, the decisions of the Anglican Church must be mediated by the assertion of human rights. Such a rigid view can be seen expressed in the judgment of Lillian Ladele, a Christian marriage registrar who, following the change in law to register both marriage and civil partnerships, resigned and brought a claim for constructive dismissal against the borough council for which she worked.[16] She lost on the basis of the Equality Act 2010, which outlawed discrimination on the rounds of 'protected characteristics', such as gender, race, and sexual orientation.[17] Although not part of ecclesiastical law, this case highlights the extent to which human rights in the name of equality can be put above personal religious beliefs. This is not the limit, however, as it goes further up the chain of hierarchy. The nature of judicial intervention in public bodies stems from a 'government interest' test: that there must be a public and potentially a government interest in the decision in question. This means that the Church of England, fundamentally a part of the legal establishment of the United Kingdom, is open to judicial review.[18] The law of the Church is "the law of the land," Hill writes, as "Ecclesiastical law is part of English law."[19] The public role of the Church means that it is under scrutiny as if it were a government body; human rights, therefore, ought to play a prominent role in judgements. However, as Hill has explored, the courts in the United Kingdom have often outlined how unwilling they are to "trespass" into the matters of the creed of the Church, but are prepared to do so if it proves necessary.[20] When only the structure of ecclesiastical law is considered, it appears that the options for expression outside of doctrinal norms are limited: one could argue from the outside that it appears that the judicial oversight and influence of the Human Rights Act act as a preventives to extreme beliefs when religious institutions contrive to protect the latter. Why then, in a near-secular society, did the Supreme Court decide in favour of the proprietors of Ashers Bakery and not Mr. Lee? To answer this one must turn to judicial attitudes surrounding the religious doctrine of the Church of England and its perceived social role.

As has been referenced earlier in this article, judges are on the whole highly apprehensive about becoming embroiled in disputes around Church doctrine. In *R v Ecclesiastical Committee of the Houses of Parliament, ex parte the Church Society*, Lord Justice McCowan demonstrated this apprehension concerning involvement whilst recognising its possibility, saying that:

> I have every confidence that if this task were thrust upon the courts they would find it possible to form a view on what was fundamental, though with very great reluctance, particularly in the area of doctrine.[21]

This demonstrates the great dichotomy in the legal scope of ecclesiastical law. Structurally it is more than feasible for the Church to be subject to judicial review, as it has been most famously

[15]John Laws, 'A Judicial Perspective on the Sacred in Society', *Ecclesiastical Law Journal*, 7:34 (Cambridge, 2003), pp. 324-325.
[16] *Eweida v United Kingdom* [2013] Eur. Ct. H.R. 36.
[17] Mark Hill QC, 'Tensions and Synergies in Religious Liberty: An Evaluation of the Interrelation of Freedom of Belief with Other Human Rights; Parallel Equality and Anti-discrimination Provisions; Enforcement in Competing European Courts; and Mediated Dispute Resolution', *Brigham Young University Law Review*, 3 (London, 2014), p. 548.
[18] Hill, 'Judicial Approaches to Religious Disputes', p. 410.
[19] Ibid., p. 411.
[20] Hill, 'Ecclesiastical Law', p. 22.
[21] *R v Ecclesiastical Committee of the Houses of Parliament, ex parte the Church Society* [1994] 6 Admin LR 670.

shown in *Williamson v Archbishops of Canterbury and York and others*, when Mr. Williamson claimed unsuccessfully that the permission of female priests into the Church of England caused the Queen to break her coronation vows. For judges to intervene in the centuries-old creed upon which ecclesiastical law is founded is on the whole, at least for the time being, too much to stomach. The concern that human rights would impinge upon doctrine is present in contemporary debate. This was seen in the introduction of section 13 to the Human Rights Act 1998 which reads that:

> (1) If a court's determination of any question arising under this Act might affect the exercise by a religious organisation (itself or its members collectively) of the Convention right to freedom of thought, conscience and religion, it must have particular regard to the importance of that right.[22]

It is in this environment that the judgement in *Lee v Ashers* must be considered. As Hill wrote, although the Human Rights Act 1998 "places a positive duty on the judiciary" to regard Convention rights, section 13 of the Act "requires the judiciary to have particular regard to the importance to the right to freedom of thought, conscience, and religion."[23] Therefore, the freedom to have, or not have, a belief is emphasised; this allows religious organisations, thoughts, and beliefs to be somewhat extricated from other Convention constraints. The breadth of section 13 places prevalence on the protection of religious thought for judicial consideration. Not only are the rights of Article 9 of the Convention protected: they are emphasised as being of particular importance in court decisions. In *Lee v Ashers* the right of the bakery owners to refuse to make the cake with the words saying 'Support Gay Marriage' was underpinned by section 13 of the 1998 Act. Lady Hale judged that, in her view, Ashers "would be entitled to refuse to do that whatever the message conveyed by the icing on the cake."[24] The emphasis on freedom of thought, conscience, and religion in judicial decisions, which was encouraged by the protection of Church doctrine in ecclesiastical law, created an environment in which the Supreme Court's judgment in *Lee v Ashers* is no surprise. In *Lee v Ashers*, Bingham's 'community exception' was expressed as limits placed not on religious beliefs, but instead on a political message for social reform.

In speaking to the Ecclesiastic Law Society on the legal and social values of the established Church in the country, Laws declared that it has "two immeasurable virtues."[25] The first is that "religion is no tyrant" in forcing anyone to worship a particular religion; the second is that "the Church's ministration is available to everyone" from wherever they come.[26] When this is borne in mind, the decisions in judgments are much less surprising. In the 1997 case of *Gill v Davies*, the court did intervene in what might be considered more religious matters, when the High Court granted an injunction to prevent the ordination of an individual into the priesthood without the correct agreement and sanction of the acting bishop.[27] However, this involvement in somewhat more purely religious affairs should not be seen as an intrusion into doctrine: the decision emphasised, like Laws, that the temporal matters of the Church of England mean that priests are employees of that particular organisation.[28] This case, therefore, was a matter of employment law affected by the religious environment in which it was played out; it was not an example of the law impacting upon spiritual matters. The law has to maintain a level of stability in a dynamic discourse around personal faith, religious liberty, the established Church, and human rights: all religious

[22] Human Rights Act 1998, section 13(1).
[23] Hill, 'Judicial Approaches to Religious Disputes', p. 419.
[24] *Lee v Ashers Baking Company and others*, paragraph 55.
[25] Laws, 'A Judicial Perspective on the Sacred in Society', p. 317.
[26] Ibid., p. 317.
[27] Hill, *Ecclesiastical Law*, p. 22.
[28] *Gill v Davies* [1997] 5 Ecc. L.J. 131.

convictions must be judged fairly and accurately in the light of human rights policies but without disturbing the still-valuable position of the Church.

Conclusion

As explored in this article, although seemingly separate issues, the scope of ecclesiastical law and the case of *Lee v Ashers* are intrinsically linked: the judgment of the Supreme Court inherits an attitude that stems from the law of the Church of England and attempts in an increasingly egalitarian society to protect it. The debate about religious liberty and human rights on which *Lee v Ashers* was fought comes with baggage from the established Church in the country. It is for this reason that an apparently obscure and ancient area of English law is just as important today, revealing much about the dynamic between ancient legal systems and modern doctrines of human rights. Internationally, too, this debate has been recently prevalent. Somewhat fortuitously for this discussion, *Lee v Ashers* was not the only case heard in 2018 by a supreme national court on baked goods, free speech, and gay rights: in June, the United States Supreme Court handed down the judgement of *Masterpiece Cakeshop Ltd v Colorado Civil Rights Commission*. In this case, the Christian proprietor of a bakery refused to bake a wedding cake for a gay couple, due to his opposing views on same sex marriage. It was his First Amendment right to freedom of speech, the baker claimed, to refuse the service to the couple with whose marriage he did not agree. The majority in the American Supreme Court held that this case dealt with "the delicate question of when the free exercise of his religion must yield to an otherwise valid exercise of state power."[29] Masterpiece Cakeshop, like Ashers Bakery, won the case. Bingham's 'community exception' is not, therefore, limited to the United Kingdom; although the structure of established religion is markedly different in the United States, the case of *Masterpiece* also demonstrates how, for cosmopolitan and secular societies, the law must decide on which side of the line to fall. Lady Hale addressed the importance of the *Masterpiece* judgement, noting the "clear distinction" between refusing to provide a good or service with a certain message, and refusing to provide said good or service due to the characteristics of the person requesting it.[30] Within the 'community exception,' if there is to be an imposition of civil liability, there must be a justification for the compelling of the idea or policy in question.[31] Currently there is no such justification for limiting freedom of expression.

Religion will always be a contentious area of discussion but, as Hill argued, the apparent division of understanding between legally-established religion and human rights is not necessary: "Properly nurtured," he writes, "the principle of equality need not result in a retreat into secularism, but can actively promote religious liberty."[32] Public perception, seen with the case of *Lee v Ashers*, may view protection of religious conviction as fusty at a time when equality is growing from strength to strength; the words of the judge of the European Court of Human Rights, Justice Bonello in *Lautsi v Italy*, do answer these concerns:

> A court of human rights cannot allow itself to suffer from historical Alzheimer's. It has no right to disregard the cultural continuum of a nation's flow through time, nor to ignore what, over the centuries, has served to mould and define the profile of a people. No supranational court has any business substituting its own ethical mock-ups for those qualities that history has imprinted on the national identity.[33]

[29] *Masterpiece Cakeshop v Colorado Civil Rights Commission*, 584 U.S. S.C. (2018) 16-111.
[30] *Lee v Ashers Baking Company and others*, paragraph 59.
[31] Ibid.
[32] Hill, 'Tensions and Synergies in Religious Liberty', p. 550.
[33] *Lautsi v Italy* [2011] Eur. Cr. H.R. 18.

The codification and emphasis of human rights brings into conflict traditional law and contemporary moral standards. Far from being antiquated, ecclesiastical law tells us much about contemporary human rights debates, and brims with exciting discussions. To paraphrase Psalm 23: our cup runneth over.

Forgotten Everywhere or Forgotten Nowhere
Exploring the Scope of EU Data Protection Law

Sam Sykes*

Abstract

Google Spain SL v Agencia Española de Protección de Datos (Case C-131/12, 2014) established the principle of a 'right to be forgotten' (RTBF) applying to search engines in European Union law. The principle is a controversial instance of a wider 'right to erasure', under Article 12(b) of Directive 95/46 EC (now under Article 17 GDPR). Under the ruling (para 93), an individual has a right to request the removal ('de-listing') of links to personal information where that information is "inadequate, irrelevant or no longer relevant, or excessive in relation to [the] purposes [of processing]".

The French data regulator (CNIL) issued an order in 2015 for Google to implement RTBF requests globally, followed by a €100,000 fine for non-compliance. After an appeal by Google, the matter went to the Conseil d'État, who referred four questions to the CJEU. The case was heard on September 11, 2018; following an Advocate-General Opinion released on January 10, 2019, judgement is expected in April 2019. CNIL have been heavily criticised for undermining free expression and for exorbitant jurisdiction. This article will argue that those criticisms are excessive: CNIL's actions are justifiable from the perspective of both policy and international law. It will also briefly discuss the issues of internet governance which this case raises.

Introduction

"The Court of Justice of the European Union (CJEU) will determine the future of the internet", announces an eminent scholar of internet law.[1] "Bad for Google, bad for everyone", says a New York Times op-ed.[2] In the words of activists, the current state of affairs "poses a grave threat to fundamental rights and freedom everywhere"[3]; the CJEU is about to "set a global precedent for

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[1] Dan Svantesson, 'In 2018, The CJEU Will Determine The Future Of The Internet | Oupblog' (2018) https://blog.oup.com/2018/03/2018-cjeu-determine-future-internet/ accessed 21 January 2019.
[2] Daphne Keller and Bruce Brown, 'Opinion | Europe's Web Privacy Rules: Bad For Google, Bad For Everyone' *New York Times* (New York 25 April 2016) https://www.nytimes.com/2016/04/25/opinion/europes-web-privacy-rules-bad-for-google-bad-for-everyone.html?_r=0 accessed 21 January 2019.
[3] Reporters Committee for Freedom of the Press, 'Statement To The CJEU in Case C-507/17' (2017) https://www.rcfp.org/sites/default/files/2017-11-29-Googe-v-CNIL.pdf> accessed 21 January 2019.

censorship"[4]. These are doom-laden pronouncements, and one could be forgiven for thinking that some kind of cyber-apocalypse was coming…

The source of this furore is a high-profile case currently before the CJEU. It is a case about data protection, in particular about the scope of Google's data protection obligations. Google is obliged to remove links to third-party content arising from a search for an EU citizen's name, when an EU citizen makes a 'right to be forgotten' (RTBF) request, and it judges that the content in question is "inadequate, irrelevant or no longer relevant, or excessive in relation to [the] purposes [of processing]"[5]. This process is called 'delisting'; the legal authority for the practice is Articles 12(b) and 14(a) of Directive 95/46/EC (the DPD), as interpreted in a case called *Google Spain* (Case C-131/12).

According to the French data regulator, the Commission Nationale pour l'Informatique et les Libertés (CNIL), the proper interpretation of *Google Spain* is that compliance with a RTBF request requires delisting on *all* domain names, whereas Google had interpreted the ruling as requiring only delisting of EU domain names. As a result, CNIL issued an order to Google France in 2015[6] to delist on all domain extensions. Google did not comply, leading to a €100,000 fine in 2016, and subsequently an appeal before the Conseil d'État in 2017, which has referred four questions about the scope of the RTBF to the CJEU. This case, *Google v CNIL* (Case C-507/17) could have major implications for the future of EU data protection law.

Popular opinion has been overwhelmingly in favour of Google, as the gloomy quotations above suggest. The case was overloaded with conscientious interveners in defence of Google, and the CJEU has been under considerable pressure from the media and activists not to uphold CNIL's decision and to restrict delisting to domestic websites. There has been minimal effort to defend CNIL's view, with the notable exception of the Electronic Privacy Information Centre (EPIC). CNIL is being depicted as an enemy of free speech, and an example of a troubling tendency by European regulators to exceed the legitimate limits of their jurisdiction.

This article will defend the CNIL position. It will be argued that there are good reasons on the basis of policy and of international law to enforce the RTBF extraterritorially.

Background - *Google Spain* and the RTBF

As a preliminary, it is very important to be clear about what de-listing is, and what it is not. It is not *censorship*. It is not *deleting* web content which contravenes EU data protection law. It is not even making content *inaccessible* from a Google search. De-listing, in the context of the RTBF, means removing *specific URLs* from the Google search results which appear upon a search for an

[4] Article 19, 'New hearing into EU's 'right to be forgotten' ruling could restrict access to information online' (2018). https://www.article19.org/resources/new-hearing-into-eus-right-to-be-forgotten-ruling-could-restrict-access-to-information-online/ accessed 21 January 2019.
[5] Case C-131/12 *Google Spain SL v Agencia Española de Protección de Datos* [2014] CMLR 50, at paragraph 93.
[6] Commission Nationale d'Informatique et des Libertés, 'CNIL orders Google to apply delisting on all domain names of the search engine' (2015) https://www.cnil.fr/fr/node/15790 accessed 21 January 2019.

individual's *name*[7]. It is a very narrow remedy. The content to be delisted may be stumbled upon from other search queries; it may be shared on other platforms; and it may be directly accessed. The remedy exists for the particular case where a person, such as a prospective employer or business partner, googles a person's name, and discovers information which is unfairly prejudicial or irrelevant to that person – as is illustrated by *Google Spain,* the case in which the RTBF originates. Nevertheless, the RTBF has had considerable impact: Google has considered more than 750,000 requests since 2014 regarding over 2.5 million URLs and publishes transparency information on its procedure for handling these requests.[8]

Google Spain was a case brought by a Spanish national, Mario Costeja Gonzalez, against a Spanish newspaper called *La Vanguardia,* Google Spain, and Google Inc., concerning the listing of an article about the recovery of his social security debts. The article was now completely irrelevant and out of date, Gonzalez submitted, but would nevertheless come up when his name was searched. The Spanish data protection authority quashed his complaint against the newspaper, which had lawfully published the article, but referred questions to the CJEU under the preliminary ruling process of Article 267 TFEU. The questions concerned the status of Google, in particular under the interpretation of Articles 4(1)(a) and 4(1)(c) (applicable laws), 2(b) and 2(d) (status as data processor and/or controller) 12(b) (right to erasure), and 14 (right of a data subject to object) of the DPD.

The court in *Google Spain* gave a clear and unequivocal judgement, which determined the status of Google in data protection law. Firstly, Google qualifies as a data processor (Article 2(b)): the use of data by automatic systems of search meets the definition of processing in the DPD. More controversially, Google *also* qualifies as a data controller (Article 2(d)): it determines the "purposes and means"[9] of such processing through manipulation of its search algorithms. The court elaborated that "[the] activity of search engines plays a decisive role in the overall dissemination of those data."[10]; it does not matter that the user also contributes to the purpose of processing, as Article 2(d) allows for such determination to be "alone or jointly with others."[11] Ultimately, though, the crucial consideration was a pragmatic one: it will be difficult to regulate Google if it is not treated as a data controller[12]. It is clear that Google is both (a) important to regulate, from the perspective of data protection, and (b) capable of managing data protection compliance obligations, as a massive multinational corporation.

Since Google is a data controller, EU data subjects benefit from the 'right to erasure' under Article 12(b) of the DPD:
Member States shall guarantee every data subject the right to obtain from the controller: [….]

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[7] As stated on Google's 'Transparency Report' about the RTBF – "Pages are only delisted from results in response to queries that relate to an individual's name". The report is available at: https://transparencyreport.google.com/eu-privacy/overview?hl=en.
[8] *Ibid.*
[9] Case C-131/12 *Google Spain SL v Agencia Española de Protección de Datos* [2014] CMLR 50, at paragraph 33.
[10] *Ibid.* at paragraph 35.
[11] *Ibid.* at paragraph 40.
[12] *Ibid.* at paragraph 34, citing "effective and complete protection".

(b) as appropriate the rectification, erasure or blocking of data the processing of which does not comply with the provisions of this Directive, in particular because of the incomplete or inaccurate nature of the data;

They are likewise entitled to the 'right to object' to processing under Article 14(a) of the DPD:
Member States shall grant the data subject the right:

(a) at least in the cases referred to in Article 7 (e) and (f), to object at any time on compelling legitimate grounds relating to his particular situation to the processing of data relating to him, save where otherwise provided by national legislation. Where there is a justified objection, the processing instigated by the controller may no longer involve those data;

As the data must be personal, i.e. they must relate to the data subject, the data subject will only be able to apply for delisting of links which appear upon a search for their name. With that caveat, the question is when it will be 'appropriate' and 'justified' for the citizen to request delisting. The court held that Articles 12(b) and 14(a) of the DPD would be satisfied, thus justifying a right to seek delisting from Google, where the data listed on a Google search were "inadequate, irrelevant or no longer relevant, or excessive in relation to the purposes of processing."[13]

There were two controversial corollaries of this position in the judgement. First, it is not necessary that the information listed be prejudicial to the data subject[14]. Second, there is a "presumption of privacy": the rights of the data subject in this regard "override, as a rule, not only the economic interest of the operator of the search engine but also the interest of the general public in having access to that information upon a search relating to the data subject's name"[15]; this presumption will only be rebutted by a "preponderant interest of the public".[16]

At a general level, the court justifies its conclusions through an interpretation of the Directive as requiring "effective and complete protection" of the rights of the data subject[17]. This is applied in particular to the issue of jurisdiction, which is crucial to the CNIL case.

Article 4(1)(a) of the DPD states (emphasis added):
1. Each Member State shall apply the national provisions it adopts pursuant to this Directive to the processing of personal data where:

(a) the processing is carried out in the context of the activities of an establishment of the controller on the territory of the Member State; when the same controller is established on the territory of several Member States, he must take the necessary measures to ensure that each of these establishments complies with the obligations laid down by the national law applicable.

The Audiencia Nacional queried the application of this Article to the use of a Spanish subsidiary to promote and sell advertising space offered by the search engine as a whole. In particular, the

[13] *Ibid.* paragraph 93.
[14] *Ibid.* paragraph 96.
[15] *Ibid.* paragraphs 97 and 99.
[16] *Ibid.* paragraph 98-99.
[17] *Ibid.* paragraphs 34, 38, 53, 58, and 84.

court noted in its reference that Google Inc's subsidiary, Google Spain, was a means by which Google "orientates its activity towards the inhabitants of"[18] Spain, and was linked to Google Inc via shared filing systems[19] and procedures for forwarding information[20].

The CJEU ruled that these factors gave the Spanish regulator jurisdiction over Google Spain. In so doing, it cited the rationale of "effective and complete protection"[21], noting that "these words cannot be interpreted restrictively"[22]. Further, it cited in comparison a copyright case where a wide jurisdictional claim was made on the basis of any targeting of EU citizens, even by internet sites located in non-Member States – Case C-324/09 *L'Oreal and Others*. This rather vague indication of extraterritoriality in the *Google Spain* judgement is the basis for the disagreement between CNIL and Google which this article seeks to resolve.

Interpreting *Google Spain*

As soon as the *Google Spain* judgement was published, there was a rush to interpret it. Two different interpretations were developed by the Google Advisory Council, a small committee of academics, politicians, lawyers, civil servants, and journalists; and by the Article 29 Working Party (the Working Party), a body set up under the DPD and reporting to the European Commission.
The Working Party reported in November 2014. In their report, they focus on the phrase which has come to epitomise the EU's position: the court justifies its conclusions through an interpretation of the Directive as requiring "effective and complete protection"[23] of the rights of the data subject. In light of this, they conclude that "de-listing should also be effective on all relevant domains, including .com."[24]

In contrast, the Google Advisory Council ignored this detail of the jurisprudence, and developed an analysis instead in terms of "practical effectiveness"[25]. They therefore reasoned that delisting on all EU domains would be sufficient to comply with the ruling. It is interesting to note that the one voice on the Council with substantial insider experience of EU law, Sabine Leutheusser-Schnarrenberger (a former German Justice Minister), dissented on this point of geographical scope. Her dissent was based on the phrase which motivated the Working Party's decision – "effective and complete protection".

The Working Party interpretation seems to be a more accurate analysis of the *ratio decidendi* in *Google Spain*. Their report is attentive to the detail of the judgement, and one would think that a

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[18] *Ibid.* paragraph 20, question 1(a), bullet point 1.
[19] *Ibid.* bullet point 2.
[20] *Ibid.* bullet point 3.
[21] *Ibid.* paragraph 53.
[22] *Ibid.*
[23] As cited above, n.17.
[24] Article 29 Working Party, 'Guidelines on the Implementation of the Court of Justice of the European Union Judgement on "Google Spain and Inc v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González" C-131/12"' (2014) https://www.dataprotection.ro/servlet/ViewDocument?id=1080 accessed 21st January 2019. Page 9.
[25] Google, 'The Advisory Council of Google on the Right to be Forgotten' (2015) https://static.googleusercontent.com/media/archive.google.com/en//advisorycouncil/advisement/advisory-report.pdf accessed 21st January 2019. Page 20.

body appointed by the European Commission is more likely than Google to understand what the CJEU means. Indeed, their broader interpretation is supported by academic analysis: Van Alsenoy and Koekkoek noted the far-reaching extra-territorial implications of the judgement in a 2015 paper[26]. There is a good case, as such, for thinking that the objectives of the Directive probably *do* require global implementation – but the Advocate-General's Opinion indicates that the CJEU may in fact decide the case in the other direction.

The Case Under Consideration - The Questions before the CJEU

In Case C-507/17 *Google v CNIL*[27], the Conseil d'État has referred four questions. They may be arrayed in two clusters. Questions 1-3 concern Google's 'right to be forgotten' obligations as regards domain names. They amount to one question: must delisting be employed for (1) all domain names, (2) only the originating Member State's domain name, or (3) all EU Member States' domain names? On the recommendation of the Advisory Council in 2015, Google's practice has been to apply 'right to be forgotten' requests to all EU domain names, but not to non-EU domain names[28].

Question 4 raises a different question about the technology of 'geo-blocking': this refers to a range of technologies used to detect an internet user's geographical location, and limit their internet access in accordance with this. This may be done 'server-side', via the use of technologies tracking Internet Protocol (IP) address locations, or 'client-side', via GPS technologies attached to devices. Individuals who attempt to stream video services such as BBC iPlayer or the UK version of Netflix when they're on holiday abroad will have likely experienced geo-blocking. These limits can be circumvented, for example by using Virtual Private Networks (VPNs).

The French court has asked whether Google is obliged to use geo-blocking (a) where the user's IP address is based in the originating Member State, or (b) where the user's IP address is based in any EU Member State. Google's practice is currently the former only. The court has ignored the third possibility, that Google could be forced to geo-block users outside the EU, presumably on the basis that this is manifestly beyond the EU's jurisdiction. That would mean targeting individuals who are neither on territory belonging to, nor a citizen of, an EU member state, and thus cannot be justified on orthodox principles of jurisdiction in international law, as will be discussed later in this article: the RTBF operates on the principle that it is Google, either through a national subsidiary (e.g. Google Spain) or as a global 'internet intermediary'[29], that is being targeted.

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[26] Van Alsenoy and Koekkoek, 'Internet and jurisdiction after Google Spain: the extraterritorial reach of the 'right to be delisted' (2015) *International Data Privacy Law* 5(2) – at page 111.

[27] There is another case currently under consideration – case C-136/17 *GC and Others v CNIL*. This case was brought by citizens aggrieved with CNIL for not pursuing Google for not enforcing certain RTBF requests. The questions there involve the relationship of the RTBF to *sensitive* personal data. Although interesting and important, this is a separate point from the wider international law issues of *Google v CNIL,* so it will not be discussed in this article.

[28] Google, 'The Advisory Council of Google on the Right to be Forgotten' (2015) https://static.googleusercontent.com/media/archive.google.com/en//advisorycouncil/advisement/advisory-report.pdf accessed 21st January 2019.

[29] The term has been common currency for a while: for more detail, compare the 2010 OECD report on internet intermediaries: https://www.oecd.org/internet/ieconomy/44949023.pdf accessed 11th February 2019.

The Advocate-General's Opinion

Advocate-General Maciej Szpunar's Opinion was released on 10th January, 2019[30]. His opinion is partly pro-Google, and partly pro-CNIL. On the one hand, his answer to question (4) is that Google should geo-block across all EU member-states, not merely the state from which the RTBF request originates[31]. On the other hand, his answer to questions (1)-(3) is the *status quo* – Google should continue to delist on EU domains, but not on non-EU domains[32] (although he does not rule out the possibility that delisting might in some circumstances be necessary across all domains[33]). The CJEU is likely to follow this, as the Advocate-General's Opinion is followed in a majority of cases.

Two arguments in Szpunar's Opinion are especially salient. Firstly, in noting the parallels for extraterritoriality in competition and copyright law, he distinguishes the data protection case: extraterritoriality can only be justified in 'exceptional' cases which affect the internal market, where that internal market is a clearly defined territory within the Treaties – which is not the case for the internet in itself, of course[34]. Secondly, Szpunar rehearses the "race to the bottom" argument which has dominated discussion of this case[35]: the worry is that if the CJEU upholds CNIL's ruling against Google, then this will open the floodgates for other countries to make extraterritorial demands against Google, leading to damage to global freedom of expression on the internet, and excessive compliance requirements for internet intermediaries like Google. Both arguments are misplaced, as will be argued below.

Arguments for Policy

Four points are important regarding the policy issues raised by this case. Firstly, citizens need an effective right to privacy in an international world. Secondly, public interest objections to the RTBF are largely misguided. Thirdly, the Advocate-General's principled distinction of this case from cases affecting the internal market protects corporations and harms individuals. Lastly, the 'race to the bottom' argument embraced by the Advocate-General is paranoid and excessive.

I. The Right to Privacy

Google's Advisory Council report based the Google RTBF implementation policy on a principle of pragmatic effectiveness: the RTBF system does a good enough job through application to EU

[30] Case C-507/17 *Google v CNIL,* Opinion of AG Maciej Szpunar http://curia.europa.eu/juris/celex.jsf?celex=62017CC0507&lang1=en&type=TXT&ancre= accessed 21st January 2019.
[31] *Ibid*. paragraph 78.
[32] *Ibid*. paragraph 63.
[33] *Ibid*. paragraph 62.
[34] *Ibid*. paragraph 53.
[35] *Ibid*. paragraph 61.

domains alone. The same argument has been made online by Professor Luciano Floridi[36], Professor of Philosophy and Ethics of Information at the University of Oxford, and a member of the Council, and by Google Global Privacy Counsel Peter Fleischer in a Google blog post[37]. As they observe, 95% of Google searches are made on a local version[38]: therefore, if the relevant links are blocked on local domains and also on EU domains, the issuer of a RTBF request will get a reasonable measure of privacy, and their rights under EU data protection law will therefore be sufficiently respected.

This flies in the face of EU jurisprudence and common sense. 'Good enough' or 'qualified' privacy is not worth the name. Imagine a house with no obvious access points or intrusive lines of sight, but with a hidden camera in the adjacent street: this is an approximation to what EU-specific privacy gives us. As soon as someone stumbles upon the camera, the owner's right to privacy has been not just partly but *completely* violated. Analogously, the RTBF rights of an EU citizen are made redundant where a single colleague or friend using Google.com sees content tagged to their name in a Google search – as CNIL envisioned in a colourful infographic[39] which they produced in 2016 to explain their ruling against Google.

In general terms, we live in a world where people and capital are globally mobile, and where reputation and social capital exist at an international, not merely national, level, and effective digital boundaries are constantly being erased. As such, a right to privacy merely within the digital world of one's own nation will cease, if it has not already ceased, to be a right to privacy worth the name. The CJEU's rationale of "effective and complete protection" for EU data subjects therefore cannot be satisfied except by delisting across all domains. To put it another way, if it is appropriate to delist at all, it is appropriate to delist globally.

II. The Public Interest

The second justification deployed by the drafters of the Advisory Council report,[40] is that of 'competing interests', which are taken to outweigh EU citizens' right to privacy. In particular, they point to the competing interests of (i) users outside Europe to access information by search under their country's laws, and (ii) users within Europe to access other versions of search. In other words, they want to allow for these points of access in case the information delisted has a public interest value.

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[36] Luciano Floridi, 'Should You Have The Right To Be Forgotten On Google? Nationally, Yes. Globally, No.' *Huffington Post* (2nd May 2015). <https://www.huffingtonpost.com/luciano-floridi/google-right-to-be-forgotten_b_6624626.html?guccounter=1>accessed 21st January 2019.

[37] Peter Fleischer, 'Implementing a European, not global, right to be forgotten' (2015), https://europe.googleblog.com/2015/07/implementing-european-not-global-right.html accessed 21st January 2019.

[38] Cited in the Advisory Council Report; Peter Fleischer cites the figure of 97% for French users in the blog post cited above.

[39] In that scenario, a French citizen, Jean-Michel Plaignant ("Mr Plaintiff") has a misleading or irrelevant listing attached to his name on "cupidonsnous.fr" advertising "naughty hook-ups". His American colleague "Steve" sees this on Google.com and his "geeky adventurous friend" sees it via a VPN; we are invited to imagine the ensuing damage to reputation and private life.

[40] Section 5.4 of the Report on 'Geographic Scope for Delisting'.

This misconstrues the issue. Although *Google Spain* imposed a "presumption of privacy" for RTBF requests, the court expressly specified that this was subject to an exception in cases where there was a 'preponderant public interest'. As Google handles RTBF requests at first instance, it has discretion to consider whether the public interest value of the information should preclude delisting. Google's decisions may be subject to appeal, but for the most part they are likely to go unchallenged.[41] It is, as such, important not to understate the level of discretion available to them here; it has led some to suggest that they are acting as a 'privatised judiciary'[42].

Therefore, the public interest decision, i.e. the balancing act between freedom of expression and privacy, has already been made in deciding whether to implement the RTBF or not in a given case. Some would argue that the public interest varies from jurisdiction to jurisdiction, but this seems a rather implausible claim in the context of the RTBF. Why is information about a French citizen, say, likely to be of more public interest in e.g. the USA than in France? If the individual plays a role in public life of any kind, Google would be expected to take that into account. But insofar as they do not, it is difficult to see why the public interest in search results tagged to their name would be greater *outside* the state of which they are a citizen.

In any case, as stressed earlier, it is important to keep the issue of the RTBF in perspective. Delisting is a matter of limiting the prominence of content, not limiting the rights of content-providers. Content-providers may in fact be notified of RTBF requests, and may then appeal to Google and/or the relevant data protection regulator, and may also make the content available through other means if it is deemed sufficiently important to do so, or if they judge that the request has been wrongly adjudicated.

Thus, where Google or a court get the public interest decision wrong, or where a public interest subsequently emerges, there is ample scope for the information delisted to be re-posted and re-shared, on new URLs. Given that the RTBF only covers the specific URLs which the EU citizen sought to have delisted, these measures will effectively override it, as the new URLs may appear upon a search of the individual's name without violating the RTBF. To get the new content delisted, the citizen would have to file a new RTBF request. This underlines how weak and indirect the 'jurisdiction' being asserted over citizens from other jurisdictions really is.

III. The Importance of the Internal Market

Nevertheless, the Advocate-General tells us that extraterritorial enforcement of the RTBF cannot be justified, because unlike copyright and competition law, it does not have effects on the internal market, which corresponds to a clearly defined territory within the Treaties. This is seriously wrong. Firstly, as will be discussed when we come to international law, this is the wrong principle

[41] Consider the sheer volume: over 750,000 requests in a mere four years of RTBF requests (as stated on Google's Transparency Report, https://transparencyreport.google.com/eu-privacy/overview?hl=en, accessed 11th February 2019). Given their limited resources, national data regulators and courts would be unlikely to review challenges for any but the most seriously unjust.

[42] David Meyer, 'The 'Right to be Forgotten', Globally? How Google is Fighting to Limit the Scope of Europe's Privacy Law' *Fortune* (9th September 2018) <http://fortune.com/2018/09/10/google-eu-court-justice-right-to-be-forgotten/> accessed 21st January 2019.

of jurisdiction for dealing with the internet: in asserting jurisdiction over the internet, the point has to be what affects citizens, not territory, and this is confirmed by the case law.

Secondly, and more importantly, this amounts to saying that corporations should benefit from extraterritorial rules, but individuals should not. A corporation should be entitled to enjoy the benefits of fair competitive practices and intellectual property protection at the international level, but a private individual should not enjoy the right to their privacy at the international level, under Szpunar's reasoning.[43] It is difficult to see a principled reason in law why this should be so. The point about effects on the internal market merely sidesteps the issue: the rights of EU corporations to enjoy the internal market are on a par with the rights of EU data subjects to enjoy their privacy. Perhaps the point would be that corporations necessarily operate on the international stage, to a greater extent than private individuals – but as already discussed, this is becoming less and less true as individuals become more and more internationally mobile. Alternatively, perhaps the reasoning is simply this: copyright and competition infringements hit EU corporations' bottom line, whereas data protection infringements like this do not – but if the reasoning is so nakedly economic, it should not be dressed up as jurisprudence.

IV. A 'race to the bottom'?

Finally, and most hyperbolically, it has been argued that imposing a global scope on RTBF requests will set us on a slippery slope, or a "race to the bottom", as Google Global Privacy Counsel Peter Fleischer put it in his 2015 blog post[44]. "In the end", Fleischer tells us, "the Internet would only be as free as the world's least free place." Jimmy Wales, the founder of Wikipedia, has echoed Fleischer, adding that "Governments all around the world will immediately say, "Great, we'll ask for things to be deleted worldwide""[45] – appearing to reveal a basic misunderstanding of what the RTBF is (delisting, not deletion). In a less hyperbolic tone, Professor Dan Svantesson makes the same point: "where the EU seeks to require a global internet intermediary to delist content globally, based on the violation of local law, other countries like North Korea, China, and Russia may also seek to make such orders."[46]

However, RTBF requests are not censorship as we would ordinarily understand it: a RTBF request is typically a request by a private individual (88.5% of the time[47]); the result is lower prominence, not inaccessibility; the information must be inadequate, irrelevant, or excessive; and requests are administered firstly by the internet intermediary in question (typically Google), and then if

[43] Case C-507/17 *Google v CNIL,* Opinion of AG Maciej Szpunar <http://curia.europa.eu/juris/celex.jsf?celex=62017CC0507&lang1=en&type=TXT&ancre=> accessed 21st January 2019, at paragraphs 50-53.
[44] Peter Fleischer, 'Implementing a European, not global, right to be forgotten' (2015), <https://europe.googleblog.com/2015/07/implementing-european-not-global-right.html> accessed 21st January 2019.
[45] Quoted in Farhad Manjoo, ''Right to be Forgotten' Online Could Spread', *New York Times* (New York 6th August 2015) <https://www.nytimes.com/2015/08/06/technology/personaltech/right-to-be-forgotten-online-is-poised-to-spread.html> accessed 21st January 2019.
[46] Dan Svantesson, 'In 2018, The CJEU Will Determine The Future Of The Internet | Oupblog' (2018) <https://blog.oup.com/2018/03/2018-cjeu-determine-future-internet/> accessed 21st January 2019.
[47] Google report, 'Search Removals under European privacy law' <https://transparencyreport.google.com/eu-privacy/overview?hl=en> accessed 21st January 2019.

necessary appealed to a national data protection regulator. This is completely unlike a demand for permanent removal of information by a government, which is not instigated by citizens, and not reviewable. The worry about copycat action is thus misplaced; bad actors will censor regardless of the behaviour of other nations. Furthermore, insofar as the actions of North Korea, China, and Russia were genuinely intended to protect their own citizens, like this EU case, they might be justified. Each case of an extraterritorial ruling should be judged on its own merits.

This case is disanalogous, in any case, to the content of any other kind of content-provider. Google is a large multi-national corporation, operating through multiple national subsidiaries, and profiting from their data, as the CJEU emphasized in *Google Spain,* and as Marc Rotenberg, the President of the Electronic Privacy Information Centre, argued in the wake of that ruling[48]. Insofar as Google Inc. profits from the data of French, Spanish, or other EU citizens through its various national subsidiaries, it incurs compliance obligations in those countries, *in respect of the data of those citizens.* In effect, we may imagine France, or the French courts, saying to Google: "Your use of our citizens' data, through Google France, is authorised subject to full compliance with *our* law, including where that has extraterritorial implications. It would be within our powers to deauthorise Google within its jurisdiction for serious violations of such national law, even where perpetrated internationally." Although the actual scenario is unlikely, there is an evident rationale for asserting this kind of extraterritorial jurisdiction over Google.

In fact, there is already a precedent involving Google. In 2017, the Supreme Court of Canada heard a case now known as '*Google Canada*'[49]. In this case, a Canadian company (Equustek) facing intellectual property violations obtained an interlocutory injunction requiring Google to implement de-listing globally, to ensure its effectiveness. Upon appeal to the Supreme Court of Canada, the court upheld the injunction. Although it was subsequently held to be unenforceable in the USA by a District Court in California, this suggests that what CNIL are proposing – imposing EU data protection law outside the EU – is far from unthinkable.

Arguments of Public International Law

It is not clear whether RTBF requests should always be imposed with global scope. It might be that there are good reasons to adjudicate the geographical reach of delisting on a case-by-case basis[50], if we take points about different public interest considerations in different jurisdictions, or 'race to the bottom' arguments, seriously. However, many of CNIL's opponents seem to be opposed to the idea that the RTBF should *ever* be available as a globally enforceable remedy against Google. CNIL's assertion of extraterritorial jurisdiction is justifiable from the perspective of international law, for two reasons. Firstly, the principle of jurisdiction which works best for the internet is the 'nationality principle'; the other principles are not workable, and this principle best reflects the case law. Secondly, Google takes on a unique set of obligations in its role as an 'internet intermediary'.

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[48] Marc Rotenberg, 'The Right to Privacy is Global', *US News* (5th December 2014) <https://www.usnews.com/debate-club/should-there-be-a-right-to-be-forgotten-on-the-internet/the-right-to-privacy-is-global> accessed 21st January 2019.

[49] *Google Inc v Equustek Solutions Inc* [2017] 1 SCR 824.

[50] As argued for instance in Dan Svantesson, 'Limitless Borderless Forgetfulness' (2015), *Oslo Law Review* 2 pp116-138.

I. Jurisdiction: nationality or territoriality?

For a long time, international law was founded on the principle of territoriality, which goes back to the Peace of Westphalia in 1648, which ended the Thirty Years' War. Under the principles of that Treaty, each nation-state has sovereignty over its own territory, and nations are bound not to interfere with the territorial sovereignty of other nations. Non-EU cyberspace, it could be argued, is non-EU territory, and the EU should not be able to interfere with it.

This principle is more than 350 years old, and it is no longer either workable or desirable for the internet[51]. How are we to apply it – that is, what counts as 'cyber-territory'? If cyber-territory is to be defined by domain names, then we will have the enforcement problems which have led CNIL to pursue this litigation – especially where the principle mandates that jurisdiction cannot be applied to the most 'international' domains, such as '.com'. Alternatively, if cyber-territory is to be defined by geo-blocking, then we are effectively "re-territorialising the internet", creating "splinternets" [52], as the *New York Times* editorial on *Google v CNIL* memorably put it. A Professor at Geneva observed in 2008 the extent to which this is already happening[53]. Some scholars might consider this the best available option for the future of internet regulation[54] – but to most it would seem a retrograde step, nullifying the benefits the internet has brought in breaking down information borders.

It is more appropriate to apply what has been called the 'nationality' principle. On this principle, we may say that a state has jurisdiction over the actions of its citizens, and sometimes over actions which cause harm to its citizens. This view makes sense for a space where citizens of any given state can, for the most part, move freely through cyberspace. It also leaves room for negotiations and productive international treaties for the regulation of cyberspace as a unified whole, building on the various conventions already in place on intellectual property, cybercrime, and e-commerce. In contrast, principles of territoriality applied to the internet will either fragment the internet or render its policing incomplete and inept.

This nationality principle, in particular the 'objective' version of it, which attributes jurisdiction over actions causing harm to a nation's citizens, is the most consistent thread running through a series of cases concerning extraterritoriality in internet law. The principle has been developed in the jurisprudence of multiple countries with regard to defamation, hate speech, and copyright law.

The defamation and hate speech cases are notorious. In 2002, an Australian businessman sued Dow Jones (an American company) for the publication of a defamatory article about him on the

[51] Cf Dan Svantesson, *Solving the Internet Jurisdiction Puzzle* (OUP, Oxford 2017), which presents a case for jettisoning the concept.
[52] Daphne Keller and Bruce Brown, 'Opinion | Europe's Web Privacy Rules: Bad For Google, Bad For Everyone' *New York Times* (New York 25 April 2016) https://www.nytimes.com/2016/04/25/opinion/europes-web-privacy-rules-bad-for-google-bad-for-everyone.html?_r=0 accessed 21 January 2019.
[53] Schultz, 'Carving up the Internet: Jurisdiction, Legal Orders, and the Private/Public International Law Interface' (2008), *The European Journal of International Law* 19 (4)
[54] For instance Svantesson prefers geo-location to global blocking – Svantesson 2017 (n.39), p211.

internet (*Dow Jones & Co v Gutnick*[55]). The High Court of Australia allowed him to sue the company in the Australian courts. Although the case proceeded on the fiction that the article was published in Australia, it is clear that the decisive consideration was the effect of the content on an Australian citizen: Callinan J notes that at most a minimal penalty would apply to a publisher releasing defamatory content "in a jurisdiction in which a person defamed neither lives, has any interest, nor in which he has any reputation to vindicate".[56]

In 2000, French activists against anti-Semitism successfully sued Yahoo! for allowing an auction of Nazi memorabilia to be targeted at users of its French-language site (*LICRA v Yahoo!*). The Tribunal de Grande Instance found that there was sufficient targeting of and harm to French citizens to justify a French court exercising jurisdiction over Yahoo!.

Perhaps the most influential case on extraterritorial jurisdiction over the internet in the USA is a copyright case: *Zippo Manufacturing Co. v Zippo Dot Com, Inc*[57], a copyright dispute between a Pennsylvania-based manufacturer of 'Zippo' lighters and a Californian internet news service, 'Zippo.com'. The court held that they had jurisdiction over the California company on the basis that their conduct constituted 'purposeful availment of doing business in Pennsylvania'[58], since their business had involved 3,000 individuals and multiple internet service providers in Pennsylvania – i.e. because they had been involved with Pennsylvanian citizens, and harmed a Pennsylvanian company. The principle of 'targeting', in company with the 'effects doctrine', is applied throughout US jurisprudence on extraterritoriality in copyright and competition law.

Although it is difficult to draw an analogy with such different areas of law, it is submitted that this objective nationality principle would be a good norm for data protection also.
In any case, extraterritoriality is already a component of many national data protection regimes[59], on this exact jurisdictional basis. In Australia, section 5B of the Privacy Act 1988 provides for extraterritorial application including for "acts or practices relating to information about an Australian citizen", as well as "organisations that carry on business in Australia". The Singaporean Data Protection Act 2012 specifies that it will apply not only to organisations in Singapore, but also to "those that are engaged in data collection, processing or disclosure of data of individuals". Likewise, the Philippines' Cybercrime Prevention Act 2012 declares that its jurisdiction covers any violation causing "damage…to a natural or juridical person who, at the time the offense was committed, was in the Philippines." CNIL is not alone in thinking that exorbitant jurisdiction may be required to protect its citizens' data.

This analysis must now be applied to the case under consideration. If the opponents of CNIL are adverting to the principle of subjective territoriality, then they have a point: forcing Google to delist globally does have an effect on non-EU cyberspace. However, as argued above, principles for allocating jurisdiction over the internet have leaned overwhelmingly towards an objective

[55] *Dow Jones & Co v Gutnick* [2002] HCA 56.
[56] At paragraph 184 of the judgement.
[57] *Zippo Manufacturing Co. v Zippo Dot Com, Inc* 952 F. Supp. 1119 (W.D. Pa. 1997).
[58] *Ibid.* p1126.
[59] These are canvassed in Dan Svantesson, 'Extraterritoriality in Data Privacy Regulation' (2013) *Masaryk University Journal of Law & Technology* 7 pp87-96.

nationality principle – the language is usually of 'targeting' or 'effects', and concentrated on the effects on citizens. The approach is strikingly similar across multiple jurisdictions[60].

Under this 'nationality' principle, the logic of CNIL's position is clear. CNIL owes a duty to provide "effective and complete protection" of its citizens' data insofar as is provided by EU data protection regulation in the EU Data Protection Directive (and now the General Data Protection Regulation). From the perspective of CNIL, the only way to protect the interests of EU citizens adequately is to require global delisting on the part of Google – i.e. delisting across all domains. It may be argued that the effect of failing to implement global delisting will only really be felt by French citizens who are globally mobile[61] - but as discussed earlier, every citizen is potentially a globally mobile one. CNIL is entitled to exercise its jurisdiction accordingly. Unless the substantive law of other nations makes it seriously unjust for an EU data regulator to apply its rules extraterritorially, this should be open to them – and this is not a case where such a reason exists. As Van Alsenoy and Koekkoek put it, "preventing states from effectively enforcing their legislation is as much an infringement of sovereignty as applying domestic regulation extraterritorially".[62] Sometimes, a nation's protection of its citizen's rights depends on the compliance of other state actors: refusing to comply without serious and substantial reasons may infringe that nation's sovereignty, just as much as a ruling with extraterritorial effect may itself infringe on other nations' rights.

The picture is, or should be, one of compromise. In this respect, it is important to note the wide scope of extraterritorial requirements under American law. The USA requires extensive extraterritorial compliance for business transactions that come anywhere near dealing in dollars – for instance, under the Foreign Corrupt Practices Act 1977 (FCPA), and under the Foreign Account Tax Compliance Act 2010 (FATCA)[63]. For the purposes of money laundering and anti-corruption compliance, these US statutes are crucial for businesses worldwide. Yet primarily US-based interveners have objected to this much less stringent demand imposed by EU data privacy law, in the interests of EU data subjects. That is not in the spirit of international compromise; why does the USA consider itself entitled to such extraterritorial asymmetry?

II. Google as 'internet intermediary'

Google belongs to a unique class of organisations called 'internet intermediaries', which includes not only search engines but also internet service providers, internet payment providers, social media platforms, and other publishing and broadcasting platforms. Internet intermediaries filter people's access to the vast quantities of information which exists online: they are the gatekeepers. As by far the most-used search engine, Google is something like the king of the gatekeepers.

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[60] As observed in Dan Svantesson, 'The holy trinity of legal fictions undermining the application of law to the global internet' (2015), *International Journal of Law and Information Technology* 23 p232.

[61] Cf Svantesson's criterion in his 2015 paper (n.38) a RTBF violation, he argues, "may only legitimately trouble a reasonable person where it is accessed by either a person who knows the data subject or may enter into dealings or contact with the data subject".

[62] Van Alsenoy and Koekkoek (n.17), p 120.

[63] Cf 'America's legal forays against foreign firms vex other countries', *The Economist* (London, 17th January 2019) – available at https://www.economist.com/business/2019/01/19/americas-legal-forays-against-foreign-firms-vex-other-countries accessed 11th February 2019.

This unique status imposes unique obligations on Google, which include international compliance obligations. Some commentators on this case appear to be arguing on the assumption that CNIL is trying to impose its jurisdiction on the citizens of non-EU states (perhaps most obviously Americans), insofar as it is limiting what is available, or at least easily accessible, to them over the internet. This is inaccurate. CNIL is imposing its jurisdiction on Google in its capacity as an internet intermediary, insofar as its actions infringe the rights of EU data subjects, and only indirectly on non-EU citizens.

The case therefore raises important questions about how nation-states should regulate internet intermediaries. In this light, the 'race to the bottom' idea discussed earlier takes on a different colouring. Allowing global blocking against internet intermediaries will lead to a world where multiple state operators exercise their rights of global blocking; the internet will end up being regulated into oblivion. As Svantesson puts it, "what would be left online if anything that may be unlawful somewhere in the world was removed globally?" [64] Alternatively, he worries about undoing the progress that has been made so far – this kind of approach will be "a backwards step […] or a downwards spiral in international legal cooperation"[65]. This may be a more legitimate worry – but it should not mean that nation-states are expected not to defend the rights of their citizens.

The Future – Data Protection & Internet Governance

This case points us to fundamental questions in the young but emerging field of study known as "internet governance", explored most notably in book-length studies by Professor Uta Kohl[66] and Professor Dan Svantesson[67]. The quest of internet governance is to develop international norms for the internet, and for allocating jurisdiction over cyberspace.

Currently, international cooperation with regard to the internet is very limited, and only really covers e-commerce, intellectual property, and cybercrime. Nations need to work to develop a much more coherent international framework for internet governance – and it needs to include an international convention on data protection. Eventually, the world should aspire to create a framework where the application of laws from any given jurisdiction in any other will be clear on the basis of international convention – what Professor Dan Svantesson has referred to as 'jurisdictional inter-operability'[68].

While we do not have this framework, internet intermediaries are the closest thing we have to a structure of internet governance and regulation. This is reflected in the various quasi-regulatory and quasi-judicial roles which they have begun to take on, such as Google's RTBF obligations –

[64] Svantesson 2015 (n.38), p130.
[65] Dan Svantesson, 'Jurisdiction in 3D', *Journal of Private International Law*, 12:1 pp60-76,
[66] Uta Kohl, *Jurisdiction and the Internet* (CUP, Cambridge 2007).
[67] Svantesson 2017 (n.39).
[68] A concept formulated in Svantesson 2015 (n.38).]

but also consider Facebook, Twitter, or YouTube's obligations to review offensive content. Indeed, discussions of this case have concentrated on Google's role in this respect[69], noting how it has been required to become a "privatized judiciary" or a "court of philosopher-kings"[70].

Internet intermediaries have a great deal of power in shaping the landscape of the internet, through determining the accessibility, availability, and relative prominence of information on the web. This puts much of the onus of internet governance effectively on them, through dialogue with national regulators. If there is to be a "cyberlaw" for "cyberspace", as was envisioned more than 20 years ago by Professors Johnson and Post[71], organisations like Google, Facebook, Twitter, and the like will have to play a considerable role in developing and implementing it.

There are two broad ways this could happen, in this author's view. In the first scenario, these companies remain private, and international internet jurisdiction protocols are established through interstate dialogue, and applied by some independent international internet regulator, with which these organisations passively comply. In the alternative scenario, internet intermediaries themselves continue to take on regulatory responsibilities, and it will become progressively more difficult to establish the extent to which they are private companies or public bodies. Perhaps Google could, over time, become an international regulator, or a partly public international corporation.

Time will tell. In the meantime, cases like *Google v CNIL* continue to reveal the inadequacy of internet governance and the problems it creates for cases which require the extraterritorial application of national law to the internet.

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[69] For instance Michele Finck, 'Google v CNIL: Defining the Territorial Scope of EU Data Protection Law' (2018) Oxford law blog https://www.law.ox.ac.uk/business-law-blog/blog/2018/11/google-v-cnil-defining-territorial-scope-european-data-protection-law accessed 21st January 2019.

[70] Jules Polonetsky, executive director of the Future Privacy Forum, a Washington think tank – quoted in Jeffrey Toobin, 'The Solace of Oblivion', *The New Yorker* (New York, 29th September 2014) https://www.newyorker.com/magazine/2014/09/29/solace-oblivion accessed 21st January 2019.

[71] David Johnson and David Post, 'Laws and Borders: The Rise of Law in Cyberspace' (1996), 48 *Stanford Law Review* 1367.

Go for the gangsters? – Assessing whether targeted prosecutions under the Modern Slavery Act 2015 will protect vulnerable children from exploitation by County Lines criminal enterprises

Blessing Park*

Abstract

A recent uptake in the number of 'County Lines' criminal enterprises, through which criminal gangs courier drugs from an urban metropolitan base to users in rural markets, has led to a corresponding rise in the numbers of vulnerable children exploited and groomed by gangs to work these lines. In his review into the treatment of, and outcomes for, Black, Asian and Minority Ethnic individuals in the Criminal Justice System – David Lammy MP acknowledged the issue of parents feeling helpless as their children are 'exploited and drawn into criminality'.[1] Lammy asserted the need for there to be a focus upon targeting adults high up in the 'food chain' of criminal enterprises through the use of Modern Slavery Legislation. This article assesses the targeted prosecutions strategy, arguing that merely 'going for the gangsters' will fail to effectively decrease the numbers of vulnerable children exploited by these criminal enterprises and drawn into crime and youth violence. This article seeks to argue that an appropriately reworded form of the statutory defence against criminal liability under section 45 (4) of the Act will achieve this aim.

Introduction and background - The County Lines business model

Any successful business both understands its target market and knows how to meet the market's demands quickly, efficiently and at a competitive price. The drug market in England and Wales has been capitalised upon by organised criminal enterprises who, through the use of sophisticated networks running 'lines' of product out of larger urban areas (such as London) to counties across the nation, quickly serve users' demands.

These types of criminal enterprises are referred to as 'County Lines' by police forces and other agencies. In 2017, the National Crime Agency ("NCA") asked all 43 police forces across England and Wales about County Lines activity in their territorial area. 88% reported evidence

*The author is currently undertaking the BPTC at City, University of London with a interest in public law and crime. This piece was written in response to the rising numbers of county line criminal enterprises around the country deliberately targeting and exploiting vulnerable children.

[1] David Lammy MP, 'The Lammy Review: An Independent Review into The Treatment Of, And Outcomes For, Black, Asian And Minority Ethnic Individuals In The Criminal Justice System' (Gov UK 2017) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/643001/lammy-review-final-report.pdf> accessed 4 December 2018.

of County Lines.[2] The NCA recognized that County Lines operations can appear as an effective business model for 'huge profits, reduced competition from other drugs OCG's, receptive customer bases, less intimidation or resistance from local dealers and a lesser risk of being known by local police'.[3]

These enterprises are, by nature, violent and competitive. 85% of forces reported the use of knives by members of these enterprises and 74% reported the use of firearms.[4] Acid attacks are also commonly used in combination with other forms of violence such as stabbings.[5]

The County Lines workforce and vulnerable children

Essential to the success of the County Line criminal enterprise is its workforce. They move the product (predominantly Class A drugs such as crack cocaine and heroin) between the 'urban hub' where wholesale quantities of product are prepared and the 'rural marketplace' where it is sold.[6] Workers at varying levels of seniority act as 'street dealers or runners, arranging accommodation, hiring cars, booking train tickets and so on.[7] These individuals are often coerced into working the line and are then exploited by the criminal enterprise. The exploitation takes different forms, including threats or actual violence and debt enforcement/debt bondage.[8] 58% of police forces reported vulnerable people dealing drugs as part of these enterprises.[9]

Vulnerable children in particular are seen as ideal recruits. 65% of forces reported the exploitation of children as part of County Line operations and the youngest children were 12 years old.[10] Children are targeted and groomed into the drug network, particularly when they come from 'chaotic and risky' homes or are in the care of the State.[11] Nonetheless, exploited children can come from a range of backgrounds as the recruitment pattern used is broad. This is a sophisticated recruitment strategy, designed to ensure the County Line workforce is both relatable to their consumer base and sufficiently inconspicuous so as not to risk alerting the attention of authorities.[12]

These criminal enterprises groom children by intentionally exploiting their wants, needs and fears. Some come from deprived areas so find the promise of the chance to make some money alluring. As Jo Hudek observed in a Scoping Report into County Lines commissioned by the Home Office in 2018, 'There are also examples of children from families living in poverty regarding the income that County Lines can provide as a way of "helping to provide for my family"'.[13] Others may desperately seek a sense of identity and belonging and so are attracted by the acceptance they are led to believe exists within criminal gangs.[14] Exacerbating matters further are high rates of permanent school exclusions. Exclusions in England and Wales have

[2] National Crime Agency, 'County Lines Violence, Exploitation & Drug Supply 2017: National Briefing Report' (Govuk 2017) <http://www.nationalcrimeagency.gov.uk/publications/832-county-lines-violence-exploitation-and-drug-supply-2017/file> accessed 4 December 2018, pg.8.
[3] ibid, pg 10.
[4] ibid, pg 10, para 5.1.
[5] ibid, pg. 11, para 5.3.
[6] ibid, pg 6, para 1.1.
[7] ibid, pg14, para 7.2.
[8] ibid, pg. 13, para 7.2.
[9] ibid, pg. 13, para 7.2.
[10] ibid, pg 15, para 8.1.
[11] Jo Hudek, 'County Lines Scoping Report' (St Giles Trust, Missing People 2018), pg. 4.
[12] ibid, pg. 10.
[13] ibid, pg. 11.
[14] ibid, pg. 11.

increased in recent years, creating a large population of children who have either fallen out of education completely or attend over-subscribed and inadequate Pupil Referral Units (PRUs).[15] PRUs are fertile recruitment grounds and permanent school exclusion has been found to be a trigger point for a child's involvement in a County Line. [16]

Further exploitation takes place once the child begins working for the enterprise. It is not uncommon for children working lines to be (unbeknownst to them) mugged by other line runners on one of their first trips as a mule, reprimanded by senior members of the enterprise with violence and then 'forgiven' and given a second chance to complete another run or make more sales.[17] County Lines enterprises are also targeting local children in rural areas and sending them to travel to the central 'export area' (for example London) in order to make quick and discreet trips to collect and distribute their product. The benefits are that a child will not be flagged as missing and therefore is less likely to be detected by law enforcement agencies or any other intervening organisation. Further, the workforce is less expensive and time consuming to maintain and coerce.[18]

Opportunities for law enforcement under The Modern Slavery Act 2015

Speaking one year after its enactment, Theresa May MP, then Home Secretary, described The Modern Slavery Act 2015 as 'deliver[ing] tough new penalties to put slave masters behind bars where they belong, with life sentences for the worst offenders.'[19] The Act intended to both penalise human traffickers and protect victims, and in its first year of being in force, 289 modern slavery offences were prosecuted and there was a 40% rise in the number of modern slavery victims identified by statutory authorities.[20]

In October 2018 a West Midlands drug dealer became the first to be convicted under the Act for trafficking children as part of a wider County Lines operation.[21] The 21 year-old defendant ("M"), was understood to have used three children between the ages of 14 and 15 to deal crack cocaine and heroin. The children (who had been reported missing) were found with drugs, money and weapons.[22] The CPS described M's case as a 'landmark' decision[23], confirming

[15] Department for Education, 'Permanent And Fixed Period Exclusions In England: 2016 To 2017' (Govuk 2017) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/726741/text_exc1617.pdf> accessed 4 December 2018.
[16] Hudek, 'County Lines Scoping Report', pg. 20.
[17] National Crime Agency, 'County Lines Violence, Exploitation & Drug Supply 2017, pg. 15, para 8.2.
[18] Hudek, 'County Lines Scoping Report', pg. 9.
[19] Theresa May MP, 'Defeating Modern Slavery: Article By Theresa May' (*GOV.UK*, 2016) <https://www.gov.uk/government/speeches/defeating-modern-slavery-theresa-may-article> accessed 4 December 2018.
[20] ibid
[21] 'County Lines Drug-Dealer Jailed Under Modern Slavery Laws | The Crown Prosecution Service' (*Cps.gov.uk*, 2018) <https://www.cps.gov.uk/west-midlands/news/county-lines-drug-dealer-jailed-under-modern-slavery-laws> accessed 4 December 2018.
[22] 'County Lines Drug Boss Jailed For Trafficking Children In UK Policing First' (2018) < https://www.west-midlands.police.uk/news/6699/county-lines-drug-boss-jailed-trafficking-children-uk-policing-first> accessed 4 December 2018.
[23] 'County Lines Drug-Dealer Jailed Under Modern Slavery Laws | The Crown Prosecution Service' (*Cps.gov.uk*, 2018) <https://www.cps.gov.uk/west-midlands/news/county-lines-drug-dealer-jailed-under-modern-slavery-laws>

that further prosecutions under the Act were awaiting trial.[24] M was charged with 5 counts of 'arranging or facilitating the travel of another person with a view to exploitation' under section 2 of the MSA 2015.

M eventually admitted to four counts of possession with intent to supply and five counts of human trafficking receiving a 14-year sentence (including 8 years for the human trafficking offences).[25] For West Midlands Police, the successful conviction was a major development in their campaign against criminal gangs running County Lines.[26]The response to this conviction demonstrates that, as David Lammy MP suggested, police and prosecutors aim to utilise the MSA 2015 as a means to go after the leaders of County Lines criminal enterprises that exploit vulnerable children.

The deficiencies within the targeted prosecution approach

Targeted prosecutions of figures such as M make use of an Act which, as described by the Prime Minister, intends to 'put slave masters behind bars where they belong'. However, under this strategy children are still open to exploitation by criminal enterprises. This is because at their core these gangs are businesses. So long as they have access to the two key ingredients of a successful enterprise – an accessible consumer market and the means to serve their market's demands - aggressive prosecutions under the MSA 2015 will bear no meaningful deterrent effect against them. What will deter these enterprises is permanently depriving them of their valuable workforce through a combination of early identification of exploitation as a result of a child's involvement in a criminal enterprise and properly structured interventions. Through combined effort between statutory agencies and community support providers, children would be directed away from custodial sentences in the courts and towards long-term support to break ties and start afresh.

The statutory defence under section 45 (4) MSA 2015

The statutory defence against criminal liability under section 45 of the Act provides an opportunity to directly tackle the exploitation of vulnerable children by criminal enterprises. Intended to provide statutory protection for victims of human trafficking, section 45(4) of the Act provides a three-limb defence against criminal liability for acts conducted by children whilst enslaved or under 'relevant exploitation'. Schedule 4 of the Act clarifies the offences for which the accused cannot plead the defence. Section 45 (4) sets out:

(4) A person is not guilty of an offence if—

(a) the person is under the age of 18 when the person does the act which constitutes the offence,
(b) the person does that act as a direct consequence of the person being, or having been, a victim of slavery or a victim of relevant exploitation, and

[24] 'County Lines Drug-Dealer Jailed Under Modern Slavery Laws | The Crown Prosecution Service' (*Cps.gov.uk*, 2018) <https://www.cps.gov.uk/west-midlands/news/county-lines-drug-dealer-jailed-under-modern-slavery-laws> accessed 4 December 2018.
[25] Nigel Stone, 'Child Criminal Exploitation: 'County Lines', Trafficking and Cuckooing' [2018] Youth Justice, pg. 1.
[26] 'County Lines Drug Boss Jailed For Trafficking Children In UK Policing First' (2018) < https://www.west-midlands.police.uk/news/6699/county-lines-drug-boss-jailed-trafficking-children-uk-policing-first> accessed 4 December 2018.

(c) a reasonable person in the same situation as the person and having the person's relevant characteristics would do that act.

The Court of Appeal in *R v MK* [2018] EWCA Crim 667 clarified the burden of proof when raising this defence is evidential, setting out at paragraph 45:

> It is for the defendant to raise evidence of each of those elements and for the prosecution to disprove one or more of them to the criminal standard in the usual way.[27]

According to the explanatory notes that accompany the MSA 2015, the s 45 defence was drafted with the intention of enabling trafficking victims to come forward and give evidence without fear of prosecution for offences committed as a result of their slavery or trafficking situation.[28] In the author's view, this defence should be reformulated to absolve criminal liability for a child who has committed a crime in connection to their involvement in a County Line enterprise.

Reformulating the s45 (4) defence

Firstly, the third limb of the test should be removed. It should not be necessary for a child to prove that they acted as a 'reasonable person' would have. This places an unnecessary burden on the child and undermines the purpose of the reformulated defence. All that should be required is that the child committed the act as a result of their exploitation.

Secondly, 'relevant exploitation' in the second limb should be taken to include involvement in a County Line enterprise. It should not be necessary that the child prove that they were aware of their exploitation. Similarly, the defence should still be available for a child who had seemingly returned to the County Line voluntarily. The emphasis is upon protecting vulnerable children from exploitation by directing them away from crime, thus making them significantly less valuable to County Lines enterprises.

Further, due to the challenges faced by exploited children who wish to raise the defence in its current form it should be mandatory for the CPS to consider the defence before deciding to prosecute. Where the police investigation has uncovered evidence that the child was involved within a County Line criminal enterprise the CPS should be required to consider the defence. If the test is satisfied, the child should be absolved from criminal liability.

Under the current law, where exploited children come before the courts having been arrested whilst working a County Line, the court is only permitted to mitigate the order made. Unless invited to apply statutory protection under s45 (4) of the MSA 2015, the court will not consider its relevance. Such was the case in *R v Limby* which was reported as *R v Ajayi* [2017] EWCA Crim 1011. The defendant in *Limby* was 17-years old at the time of arrest. He was discovered by police within a cuckoo in Portsmouth in possession of wholesale quantities of Class A drugs (cocaine and heroin), knives and cash. The applicant had no ties to the Portsmouth area and was from London. Their basis of plea was as follows:

> "I was driven to the area. I had never been to Portsmouth. I was only there as I owed money to an older person. He said I had to do this and he is not someone I could say

[27] *R v MK* [2018] EWCA Crim 667, at paragraph 45.
[28] Explanatory notes to Modern Slavery Act 2015 at 211. Accessed via Westlaw.

no to. He left me in the house. I would not have expected to receive any money for doing it, just reducing my debt."[29]

Their pre-sentence report explained the applicant's affiliation with gang activity, including their loss of sight in one eye in a gang-related acid attack as a result of which they suffered PTSD and attended regular counselling. He had been in Portsmouth attempting to work off a debt of £2,000 owed to a senior member of the gang. He'd been intimidated and driven to Portsmouth with instructions to hold the drugs and cash (proceeds from drug sales from the cuckoo). The author of the pre-sentence report expressed concern that the applicant's mental health had declined.[30] The Defendant's 24-month detention and training order was upheld.

The court recognised that the defendant was operating under coercion, but this was merely considered as a factor to mitigate sentence.[31]The court stated that as the 17-year old defendant had engaged in conduct which he 'clearly knew was unlawful and harmful' and had an extensive list of prior offences (18 recorded convictions at the time of trial), the trial judge was 'wholly justified in passing an immediate custodial sentence.'[32] *Limby* demonstrates how easily the fates of children found guilty of crimes committed as a direct consequence of their exploitation by criminal gangs are sealed. Rather than being diverted away from the criminal justice system, vulnerable and exploited children are treated as offenders and not victims.

Challenges to the alternative approach

However, even if the s45(4) defence had been raised in *Limby*, there is no firm guarantee that the applicant would have successfully discharged the evidential burden. One issue with the current form of s45(4) is that it is not possible for all exploited children to successfully raise it. This is particularly problematic where the child is nearly an adult and considered to have voluntarily affiliated themselves with a criminal gang, as was the case in *Limby*. As Stone highlights, the defence is difficult to prove 'where the child is 'very nearly an adult'…,has a significant criminal history, where their handler is not in the frame and where the child declines to name him or her'.[33]

It is possible that similar problems could occur under the reformulated version of the defence proposed in this article. Were a child to raise the defence, proving that their act was a direct consequence of involvement in a County Line enterprise could be extremely difficult. *Limby* showed that children are unwilling to reveal the names and details of relevant figures within the enterprise. In response to this potential issue, guidance for police and prosecutors should make clear that the onus is not on the child alone to raise evidence of relevant exploitation. The police and prosecutors would also have a duty to be vigilant towards suspected involvement in a County Line in order to ensure that children are not incorrectly prosecuted. This duty would not be sufficiently discharged by merely relying upon the child's own testimony.

This radical reformulation of criminal liability will require a dedicated and collaborative approach to recognising exploitation and coercion of children by criminal County Lines enterprises. This should be followed by structured interventions designed to ensure that the child does not once again fall victim. The scale of this task is not to be taken lightly. An

[29] *R v Ajayi* [2017] EWCA Crim 1011, at paragraph 25.
[30] ibid, at paragraphs 28-29.
[31] ibid, at paragraph 9.
[32] ibid, at paragraph 32.
[33]Stone, 'Child Criminal Exploitation', pg. 6.

estimated minimum of 12-months dedicated casework for exploited children and their families is required to ensure that the children do not fall back in with the criminal gangs that once controlled them.[34] This will require a dedicated focusing of resources into community support and policing, education and youth mental health services. Reformulating s 45 (4) alone will not be sufficient.

Conclusion

Children convicted of offences due to their involvement in County Lines enterprises will find no respite from their cycle of exploitation if, instead of receiving intervention and support, they are convicted and enter into the criminal justice system. Further, exploitation can continue from within detention, as children can make contact with gangs from inside and almost immediately upon release.[35] Recognising, understanding and appropriately responding to exploited children both before after arrest is crucial. Unless exploited children are diverted away from crime they will likely go on to reoffend, repeating the cycle.

Any approach to dealing with children and young people exploited by criminal enterprises needs to be nuanced and victim-centred. The MSA 2015 was designed to be a strong legislative tool against some of the most extreme forms of exploitation faced by victims of human trafficking. Merely pursuing convictions of the heads of County Lines criminal enterprises that exploit children and young people under the MSA 2015 is inadequate. Going for the gangsters will do little to tangibly change the lives and outcomes for vulnerable children drawn into or at risk of being drawn into criminality.

[34] Hudek, 'County Lines Scoping Report', pg. 31.
[35] Hudek, 'County Lines Scoping Report', pg. 15.

Bermuda's Paradise Status Lost, Found, Missing and Found Again: A Review on Bermuda's Path to Legalisation of Same-Sex Marriage

Izabella Arnold*

Abstract

Since my Letter to the Editor published by the City Law Society Journal in February 2018 ("Bermuda's Paradise (Status) Lost"), the contentious atmosphere surrounding the legal position of same-sex marriage in Bermuda has persisted. On 23 November 2018, the Court of Appeal upheld a Supreme Court decision declaring sections of newly implemented legislation to be invalid on the basis of constitutional incompatibilities in AG v Ferguson.[1] This is the first court in the world to find in favour of same-sex marriage on the grounds of freedom of conscience.[2] However, this victory has been tainted by a series of court judgments and political compromises that must be outlined to understand their impacts locally and internationally. The Bermuda Government has appealed to the Privy Council for an opinion on the matter which if found in favour of same-sex marriage could have substantial impacts throughout the Commonwealth.

FACTS AND POLITICS

Bermuda has become the first country in the world to legalise same-sex marriage ("SSM") (*Godwin*[3]), ban it through legislation (the Domestic Partnership Act (the "DPA")), and to then have sections of the Act deemed invalid by the Supreme Court on the basis of constitutional incompatibilities (*Ferguson*[4]) – all within a period of twelve months. The Government appealed the *Ferguson* decision and on 23 November 2018 the Court of Appeal upheld the ruling, declaring SSM legal in the British Overseas Territory. These events are a result of the tension between the legislature and judiciary that has left many LGBTQ+ couples in a painful state of uncertainty. The lack of support from the UK Government in protecting their rights as British citizens has been exceedingly distressing. However, the Bermuda Constitution Order 1968 (the "Bermuda Constitution") leaves the island self-governing on domestic matters with the right of appeal to the Judicial Committee of the Privy Council on complex legal questions. The Government has since exercised this right of appeal following the November 2018 ruling and we await the Council's decision to hear.[6]

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[1] *Attorney General v Ferguson et al* [2018] CA (Bda) 32 Civ.
[2] The Bermuda Constitution Order 1968, s. 8.
[3] *W Godwin et al v Registrar General* [2017] SC (Bda) 36 Civ (5 May 2017).
[4] *Roderick Ferguson et al v Attorney General* [2018] SC (Bda) 45 Civ (6 June 2018).
[6] Fiona McWhirter, 'Government set for a run at the Privy Council' (*The Royal Gazette, 14 December 2018*) <http://www.royalgazette.com/same-sex-marriage/article/20181214/government-set-for-run-at-privy-council> [accessed 14 December 2018].

As a whistle-stop overview of the political scene: a 2013 amendment to Bermuda's Human Rights Act 1981 introduced 'sexual orientation' into its language, leading to the aforementioned cases.[7] Shortly afterwards, a non-binding referendum failed to represent public opinion on SSM and civil unions with 46.8% voter turnout leaving the Government without a firm public consensus. In 2016, backbencher Progressive Labour Party ("PLP") MP Wayne Furbert introduced a controversial Private Member's Bill[8] attempting to prevent same-sex couples benefiting from the Human Rights Act 'sexual orientation' provision. The Bill introduced a clause into the Human Rights Act giving the privileging section 15(c) of the Matrimonial Clauses Act, which deems a marriage void unless between members of the opposite sex.[9] *Godwin* in 2017 challenged the 'sexual orientation' amendment and section 15(c) in the Supreme Court succeeding on the grounds that denying the service of marriage to same-sex couples is a breach of their human rights and it declared the amendment inoperative.

The Domestic Partnership Act

Midsummer of 2017 saw Bermuda elect the PLP Party, a party that is known to be lobbied by religious factions on socially conservative matters, such as maintaining that the institution of marriage should be preserved to be between a man and a woman. Its election platform addressed same-sex relationships directly (italics are for emphasis):

> "The issue of same sex marriage *remains a matter of conscience for our members.* We accept that same sex couples should have similar legal benefits as heterosexual couples, save and except for marriage, and will introduce legislation to achieve this aim… Our position takes into account the divisive nature of the issue and strikes the right balance."[10]

This promise produced the DPA in December of that year, replacing SSM with domestic partnerships for same-sex couples and other-sex couples alike. Arguably, the DPA is considered one of the most progressive pieces of legislation produced in Bermuda, creating added security for committed couples and families. The DPA as a whole is consistent with the opinion of the European Court of Human Rights ("ECtHR") which has maintained a positive obligation on Member States to provide legal recognition to same-sex couples, but not to impose a positive obligation for same-sex marriages.[11] However, the *Ferguson* case law would go on to challenge one provision in particular, section 53 (the "revocation provision"):

> "Notwithstanding anything in the Human Rights Act 1981, and any other provision of law or the judgement of the Supreme Court in Godwin and DeRoche and others v The Registrar General and others delivered on 5 May 2017, a marriage is void unless the parties are respectively male and female."[12]

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[7] Human Rights Amendment Act 2013, s. 2(b).
[8] Human Rights Amendment Bill 2016.
[9] Sam Strangeways, 'Furbert: same-sex Bill looks hopeful' (*The Royal Gazette, 28 July 2017)* <http://www.royalgazette.com/same-sex-marriage/article/20170728/furbert-same-sex-bill-looks-hopeful> [accessed 15 November 2018].
[10] The Progressive Labour Party, 'Platform' (2017) <https://www.plp.bm/creating_a_fairer_bermuda> [accessed 15 November 2018].
[11] *Oliari v Italy and others* [2015] ECHR 716.
[12] The Domestic Partnership Act 2018, s. 53.

Upon Royal Ascent, the UK Government appropriately responded to criticism of inaction to protect LGBTQ rights. Sir Alan Duncan, an openly gay Conservative MP, concluded that while this was a disappointing situation for the British Overseas Territory, the island remained freely self-governing.[13]

Ferguson v Attorney General (Supreme Court)

The validity of the revocation provision of the DPA was challenged by First Applicant Rod Ferguson, supported by further Applicants representing LGBTQ rights groups and church congregations. Kawaley C.J. held on 6 June 2018 in the Supreme Court that section 53 was *not* passed wholly or mainly for a religious purpose but that it does contravene sections 8 (Protection of Freedom of Conscience) and 12 (Protection from Discrimination on the Grounds of Race, etc) of the Bermuda Constitution.[15]

Firstly, the court held that the revocation provisions were made for dual or mixed purposes. These included the election platform mentioned above and the mitigation of adverse publicity for Bermuda flowing from what would understandably be a controversial reversal of this court's decision in *Godwin*.[16]

Secondly, in interpreting the effects of section 8, the court summarised the rights protected in the following terms: freedom to hold religious and non-religious beliefs; freedom to change such beliefs; freedom to manifest and propagate such beliefs in "*worship, teaching or practice*".[17] Counsel for the respondents in *Ferguson v AG* illustrated how a similar provision of the Bahamian Constitution affected an objection by a Muslim soldier required to remain present when Christian prayers were read aloud.[18] He claimed that he had been hindered in the enjoyment of his freedom of conscience guaranteed by article 22(1). It was held by the Privy Council that the oppressive nature and interference of the Bahamian Constitution [article 22] embodied the same concepts as article 9 of the European Convention and should be broadly interpreted.[19] Comparing section 8 of the Bermuda Constitution with section 22 of the Bahamian Constitution was deemed appropriate by the Supreme Court of Bermuda.[20] The Privy Council in *Laramore* also considered a landmark decision in the Supreme Court of Canada in a challenge by a company charged with unlawfully carrying on the sale of goods on a Sunday contrary to the Lord's Day Act 1906. Dickson J stated in the Canadian case: "Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free."[21]

When qualifying the Canadian case above and the effects of section 8 on the revocation provision, the Supreme Court directly considered the platform of Preserve Marriage Bermuda ("PMB"), the

[13] HC Deb 29 January 2018, vol 635, col 652.
[15] *Ferguson v AG,* 70.
[16] *Ferguson v AG,* 69.
[17] Ibid, 72.
[18] Ibid, 73.
[19] *Royal Bahamas Defence Force and others v Laramore* [2017] UKPC 13.
[20] *Ferguson v AG,* 74.
[21] *The Queen v Big M Drug Mart Ltd* [1985] 1 RCS 295, 336.

lead campaigners against same-sex marriage. Their campaign was "primarily about seeking to persuade the State not to extend legal protection to marriages which contravened PMB's beliefs. Just as PMB and its members genuinely believe that same-sex marriages should not be legally recognized, the Applicants and many others equally sincerely hold opposing beliefs. It is not for secular institutions of Government, without constitutionally valid justification, to direct the way in which a citizen manifests their beliefs."[22] The relationship is reciprocal such that in return for protecting the supporters of traditional marriage, PMB cannot require the law to deprive persons who believe in same-sex marriage of respect and legal protection for their opposing beliefs.[23] Furthermore, section 8(5)(b) of the Bermuda Constitution makes it clear that each group of believers is entitled to defend their right to practice their own beliefs and not to force them on others. Thus, the revocation provisions of the DPA contravened the rights conferred in section 8(1), directly depriving access to SSM.[24]

Thirdly, considering section 12 of the Constitution and discrimination on the grounds of "creed", the Applicants argued that "creed" should be defined broadly to include non-religious beliefs, while the Respondent submitted that it has a narrower, religion-based definition.[25] It was ultimately found that "maintaining or restoring a definition of marriage which favoured those who believed in traditional marriage and disadvantaged those who believed in same-sex marriage, discriminated against the latter group on the grounds of their "creed" contrary to section 12 of the Constitution."[26]

Notably, Kawaley C.J. dismissed the effects of Article 12 of the European Convention on Human Rights ("ECHR"), the right to marry, citing *Oliari v Italy and others*:[27] "ECHR cases are only relevant and highly persuasive in terms of construing fundamental rights and freedoms under the Bermuda Constitution when the relevant ECHR provisions have been incorporated into Bermuda's Constitution."[28] For example, the Cayman Islands Constitution expressly defines marriage as between a man and a woman, which would make the effects of the ECtHR on the present case more relevant.[29]

The Attorney General appealed the decision on sections 8 and 12, and the Respondents sought to uphold this decision and strike down section 53 of the DPA.

Attorney General v Ferguson (Court Of Appeal)

Sir Scott Baker, President of the Bermuda Court of Appeal, opens the judgment of *AG v Ferguson* by clarifying that the strong opinions in favour of or opposing SSM are not in question, nor is political correctness in issue. Rather at stake is whether section 53 of the DPA (not the entirety of the DPA) was passed for a religious purpose and whether it offends section 8 and/or 12 of the Bermuda Constitution.[30]

[22] Ibid, 89.
[23] Ibid, 90.
[24] Ibid, 94 and 95.
[25] Ibid, 97.
[26] *The Queen v Big M Drug Mart Ltd*, 5.
[27] [2015] ECHR 716.
[28] *Ferguson v AG*, 85.
[29] The Cayman Islands Constitution Order 2009 s. 14(1).
[30] *AG v Ferguson,* 1.

The sovereignty of the Bermuda Parliament, among other things, was first considered by the court. Bermuda has a written constitution (unlike Britain), a UK Order in Council which has "created an independent judiciary based on the separation of powers and general governance structure which was explicitly secular" thus completing a separation of Church and State.[31] This is unfortunately misunderstood by some politicians on the Island who equate Bermuda's Parliament to have the same position of sovereignty as the UK Parliament. This is simply not the case.[33] Legislation may not pass if it is inconsistent with the Bermuda Constitution or passed for a religious purpose; if found to do so it is considered unconstitutional and may be deemed invalid by the courts.[34] While Kawaley C.J. in the Supreme Court did not find the provision to exist 'solely' or substantially for a religious purpose, section 53 highlights one of the main purposes of the DPA: satisfying the religious demands of the opponents of same-sex couples.[35]

In order to decide whether the revocation provision was enacted for a religious purpose it is necessary to establish how to determine the purpose of the legislation.[36] Appropriately, the Respondents in the Court of Appeal heavily quoted Laws L.J. from *McFarlane v Relate Avon Limited*:

> "The promulgation of law for the protection of a position held purely on religious grounds cannot therefore be justified. It is irrational, as preferring the subjective over the objective. But it is also divisive, capricious and arbitrary. We do not live in a society where all the people share uniform religious beliefs."[37]

The court went further into the more recent case of *Saguenay* in the Supreme Court of Canada in which, Mr. Saguenay, an atheist challenged the City Council bye-laws requiring the Mayor to pronounce a prayer at meetings. It was held that the prayer infringed upon the freedom of conscience and freedom of religion, and the primary purpose of the bye-law was religious even though its secondary purpose was secular.[38] Baker P held that these "authorities accordingly lead us to the conclusion that it is the primary purpose of the impugned legislation that matters. If that was religious, it is ineffective and must be struck down, even if it was not the only purpose."[39] The Respondents submitted that *The Queen v Big M Drug Mart Ltd* represents the practical application of the *McFarlane* principle in the context of jurisdictions with a written constitution.[40] Lord Mance was also cited from *Laramore*: "The conferral or guarantee of freedom of conscience or religion constitutes a promise that such freedom will be protected, and not interfered with by, the state."[41] Once the court was satisfied that the revocation provision had been the product of satisfying a religious purpose, encroachment upon sections 8 and 12 of the Constitution continued to be deliberated.

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[31] Ibid*,* 7.
[33] Sam Strangeways, 'Furbert: same-sex Bill looks hopeful': "Mr Furbert said if his Bill passed for a second time it would send a clear message to the judiciary as to Parliament's intentions. "Parliament has always been supreme," he said. "The parliament represents the people, not the judges. They interpret the law."
[34] The Bermuda Constitution Order para 34: "Subject to the provisions of this Constitution, the Legislature make laws for the peace order and good governance of Bermuda."
[35] *AG v Ferguson*, 42.
[36] Ibid*,* 8.
[37] [2010] EWCA Civ 880, para 24.
[38] *Mouvement laique Québécois v Saguenay* (City), 2015 SCC 16.
[39] *AG v Ferguson*, 20.
[40] Ibid, 23.
[41] *Royal Bahamas Defence Force and others v Laramore* [2017] UKPC 13, 11.

The turning-point of the Respondents case was the submission that a conscientiously held belief has no strict definition of what is or is not caught by the term and should be considered by the court on merit and fact.[42] The Respondents relied on the House of Lords case of *Williamson,* which, although it concerns article 9 of the ECHR, assists in the approach to take in this context.[43] A parents' belief in corporal punishment for their children in school was held sufficiently deep to qualify protection under freedom of conscience (which later conflicted with the rights of the children). However, Lord Nichols noted that article 9 embraced freedom of thought, conscience and religion, and it was argued, so does section 8 of the Bermuda Constitution. Lord Nichols went on to state: "In particular, for its manifestation to be protected by article 9 a non-religious belief must relate to an aspect of human life or behaviour of comparable importance to that normally found within religious beliefs."[44] The belief would also need to be more than merely trivial and must possess an adequate degree of seriousness and importance.

The Bermuda Court of Appeal found that the Constitution was drafted with "sufficient flexibility to protect everyone's freedom of conscience in a changing world. Interference with that freedom can be by both positive and negative acts, in this instance by the negative act of preventing same-sex couples having the right to marry."[45] The court dismissed the appeal and held the "revocation provisions in section 53 of the DPA were passed for a mainly religious purpose to meet the wishes of PMB." [46] It further upheld the decision of the Chief Justice declaring a breach of section 8 of the Constitution, but not section 12.

Conclusion

Considerable time in this essay has been placed on the ground of freedom of conscience as this has the potential to have the most impact in similar jurisdictions. The most immediate effects of the Bermuda courts, and possibly the Privy Council, remain to be seen in the Cayman Island courts, which will hear a case in February on same-sex marriage.[48] Sodomy laws and gross indecency laws are relics of British colonialism that have roots in the penal codes of many former British colonies.[49] For the Privy Council to strike down the Bermuda Government's appeal, would be paradoxical. However, a constitutional challenge of this magnitude does warrant the opinion of the highest court in the Commonwealth. Its impact has the potential to reach every corner of the world where a country's Constitution is a direct product of the UK legislature such as an Order in Council.

An appeal to the Privy Council is not something that the Government can afford while the cost of living on the Island is unattainable for much of the population and the education system is strained. Further, for the current Government to have stated that their decision maintaining marriage to be

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[42] *AG v Ferguson*, 66.
[43] *R (Williamson) v Secretary of State for Education and Employment* [2005] 2AC 246.
[44] Ibid, 24.
[45] *AG v Ferguson*, 72.
[46] Ibid, 77.
[48] James Whittaker, 'UK will not step in on same-sex marriage' (*The Cayman Compass,* 23 December 2018) <https://www.caymancompass.com/2018/12/23/uk-will-not-step-in-on-same-sex-marriage/> [accessed 10 January 2019].
[49] Alok Gupta, 'This Alien Legacy: The Origins of "Sodomy" Laws in British Colonialism' (*Human Rights Watch*, 17 December 2018) < https://www.hrw.org/report/2008/12/17/alien-legacy/origins-sodomy-laws-british-colonialism> [accessed 20 January 2019].

between a man and woman will be a *matter of conscience*, creates little doubt that obstructing the conscience of others was precisely their aim, rather than marriage equality for all.

Islamophobia in the Criminal Justice System: Prevent and Stop and Search Powers

Maaha Elahi*

Abstract

The 'real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these.' When Lord Hoffman wrote these words, he was referring to the discriminatory laws targeting suspected foreign, international terrorists. The same could be said of the current counter-terrorism legislation and policies which, unjustifiably, target Muslims because they are believed to be susceptible to terrorism.

The 'Prevent' legislation requires schools and universities to have 'due regard to the need to prevent people from being drawn into terrorism'. Muslims are disproportionately targeted; 61% of referrals under this duty were related to Islamist extremism. Less than 5% of those referred on the basis of Islamist extremism were actually a threat.

Stop and Search powers are disproportionately used against those who appear to be Muslim. Asians are 3 times more likely than White people to be stopped and searched on the street and 80 times more likely to be detained in an airport. The situation is likely to worsen as the Home Secretary recently announced his plans to lessen restrictions on the police's use of Stop and Search powers[1]. The measures have detrimental effects on the Muslim community and therefore are Islamophobic.

Introduction

Recent changes in the criminal justice system, in response to catastrophic terrorist attacks, have given rise to changes in law, policy and practise. Many terrorists claim they are acting in the name of Islam, giving this religion an affiliation with terrorism. I will demonstrate that current counter-terrorism laws and practises disproportionately target Muslims, marginalising this community significantly. The measures, or the way in which they are used, may be Islamophobic. Issues surrounding Prevent and Stop and Search powers must be addressed and the law must be reformed.

There are many limbs to the criminal justice system (CJS) so it has been necessary to narrow my analysis. I have narrowed my analysis to Prevent and Stop and Search powers (S&S) for two reasons. Firstly, these topics relate to different areas of the CJS, which will provide an indication of whether Islamophobia is widespread or limited to one area. Secondly, as investigative powers, these measures draw individuals into the CJS. A large proportion of these individuals will not have

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[1] Charles Hymas (2019). *Police should stop and search suspects irrespective of race, says Sajid Javid*. [online] The Telegraph. Available at: https://www.telegraph.co.uk/news/2018/11/12/police-should-stop-search-suspects-irrespective-race-says-sajid/.

committed a criminal offence. This is an inherent risk with all investigative powers and, as a result, this power must be limited and used in a legitimate way. If used in a discriminatory and illegitimate way, this can lead to serious inequalities within the CJS.

I will begin by way of introduction, by defining "Islamophobia". I will then discuss some areas within the current CJS, which raise concerns of Islamophobia. The first is the use of the Stop and Search powers. The second is the "Prevent" legislation. I then consider the effects of these measures on the Muslim community.

I have included this final section for several reasons. Firstly, such considerations are key elements to answering the thesis question. As I will explain in section II, Islamophobia is a social pathology; it can be defined by its impairment or negative effects on a Muslim's public life[2]. Therefore, in order to determine whether the CJS is Islamophobic, its effects must be considered. Secondly, considering the effects is important in order to provide a complete account of the measures and the CJS's treatment of Muslims. Thirdly, the effects demonstrate how these measures give rise to concerns. This will strengthen the case for addressing this issue and reforming the law and policies.

I. What is Islamophobia?

In order to establish whether Islamophobia is present in the criminal justice system, the concept of Islamophobia must be defined. Put simply, it is the;

'*dread or hatred of Islam and therefore the fear or dislike of all or most Muslims'* [3].

This definition is elementary and in order to understand the term to a greater extent, the core elements of "phobia" and "Islam" should be deconstructed.

a. Defining "Phobia" in Islamophobia

Islamophobia is not an individual pathology, but a social pathology. Phobias are typically the former, involving a fear of a threat perceived as objective, such as agoraphobia[4]. Social pathologies, such as homophobia, are not fears of a certain community but discrimination against them[5]. Islamophobia is a social pathology[6]. It is defined by its negative effects on the exercise of public life, as shown by the following definition:

> *'Islamophobia is any distinction, exclusion or restriction towards, or preference against, Muslims (or those perceived to be Muslim) that has the* ***purpose or effect*** *of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life'* [7] [emphasis added]

A distinction must be drawn between legitimate criticism or disagreement and unfounded prejudice or hostility against Muslims. The term "phobia" in this context refers to the latter. We live in a liberal democracy, which demands pluralism, tolerance and broadmindedness. All humans have a freedom of expression which is:

[2] Runneymede Trust (2017). Islamophobia - still a challenge for us all
[3] Runneymede Trust (1997). Islamophobia - a challenge for us all, p.1
[4] Ramberg, I. (2004). Islamophobia and its consequences on young people. Council of Europe Publishing.
[5] Runneymede Trust (2017). Islamophobia - still a challenge for us all
[6] Abdelkrim, F. (2004) In Ramberg, I. Islamophobia and its consequences on young people. Council of Europe Publishing.
[7] see note 3 above

applicable not only to 'information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population' [8].

Islam as a system of beliefs can and should be subject to criticism[9], especially considering the governments of several Islamic States disregard fundamental human rights and democratic procedures[10]. Such discourse is not Islamophobic and both Muslims and non-Muslims engage in these discussions[11]. Combatting Islamophobia does not involve stifling legitimate criticism of Islam and demonising anyone who engages in its criticism. It is the resulting discrimination and its limitations on a Muslim's public life, which must be combatted.

b. Defining "Islam" in Islamophobia

The "Islam" aspect encompasses some sort of feelings towards *Islam or Muslims*. Many academics argue that Islamophobia largely concerns the latter. While in the past the "enemy" was the religion of Islam, which was attacked by the Crusades and Reconquista, the target has now changed. The 'attack now is not against Islam as a faith, but Muslims as a people'[12]. This reinforces the idea, referred to above, that the effect on Muslims is central to the notion of Islamophobia.

c. Does Islamophobia exist?

Many propose that Islamophobia does not exist and that what many class as Islamophobic incidents are in fact racist[13]. As Islam is an ideology, it is difficult to identify its followers. The Muslim community cannot be homogenised. There are differences in ethnicity, nationality, migrant history, socioeconomic positioning, religious practice, location and so on[14]. Race, however, can be perceived objectively. For this reason, many argue that Muslims cannot be subject to discrimination, and Islamophobia does not exist.

I undermine this argument by demonstrating that Muslims, or the "stereotypical Muslim" can be identified. I then argue that whilst Islamophobia encompasses racism, critics may be wrong to assume that this overlap means Islamophobia does not exist.

i. Identifying Muslims

A concept of the "stereotypical Muslim" has been created, despite the Islamic community not being a homogenous one. Those who fit a certain profile may be subjected to discrimination. Race, in particular South Asian ethnicity, is generally used as a 'proxy trait' for identifying Muslims[15]. This is not surprising as 60% of British Muslims are of South Asian heritage[16].

Muslims can also be stereotyped on the basis of religious features[17]. Many adhere to the unique Islamic requirements of clothing and appearance, such as wearing a headscarf or growing a beard.

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[8] *Handyside v UK* (Application no 5493/72) [1976] ECHR 5, p.18
[9] see note 3 above
[10] see note 1 above
[11] *Ibid.*
[12] Halliday, F. (1999). 'Islamophobia' reconsidered. *Ethnic and Racial Studies,* 22(5), pp. 892-902.
[13] Malik, K. (2005). Islamophobia myth. *Prospect Magazine,* [online] Available at: https://www.prospectmagazine.co.uk/magazine/islamophobiamyth
[14] Warsi, S. (2017) *The Enemy Within: A Tale of Muslim Britain*. Penguin Books: London.
[15] Moeckli, D. (2007). Stop and Search Under the Terrorism Act 2000: A Comment on R (Gillan) v Commissioner of Police for the Metropolis. Modern Law Review. 654-679
[16] National Census (2011) National Census of Population for England and Wales. Office for National Statistics
[17] Marranci, G. (2006). Multiculturalism, Islam and the clash of civilisations theory: rethinking Islamophobia. *Culture and Religion: An Interdisciplinary Journal,* 5(1), pp. 105-117.

ii. Is it Racism?

By claiming Islamophobia does not exist and it is racism instead, one is implying that religion is a more legitimate basis for discrimination and oppression than race[18]. Many believe this because being a Muslim is chosen identity, unlike ethnicity[19]. While this may be true, it does not follow that Muslims should be removed from the status of victim[20].

Islamophobia can overlap with racism. It is plausible for an individual to discriminate against another on both bases. Furthermore, Islamophobia has always overlapped with racism. Islamophobia 'builds on, feeds off, transforms and adds to a store of racial, ethnic and religious stereotypes'[21]. Islamophobic discourse derives from racist and orientalist discourse emerging from colonialism and mass post-war migration. Those who identify as Muslim were seen as 'coloured', then 'black', then 'Asian', then 'Pakistani' and 'Bangladeshi' before they were seen as 'Muslims' in post-war Britain[22].

This overlap shows there is no clear definitional limit to Islamophobia. Racism itself is a 'multifaceted and malleable force of discrimination'[23]. This is why it has been termed a scavenger ideology[24]. It is a social construct, created when certain ethnic or cultural practices are identified as distinct and unusual[25]. Race is not a biological reality[26]. It is important to note that defining racism as a social construct is not intended to undermine it. Just because something is a social construct does not mean it does not explain real outcomes[27]. If racism in itself is a social construct with no definitional limit, then the same can apply to Islamophobia. Thus, definitional issues and correlations with racism do not undermine the concept of Islamophobia.

I. Stop and Search

The police have the power to stop, question and search an individual under different legislation including, but not limited to: section 43 of the Terrorism Act 2000, section 60 of the Criminal Justice and Police Order Act 1994, Schedule 7 of the Terrorism Act and section 1 Police and Criminal Evidence Act 1984.

Data shows South Asians and Arab people are disproportionately stopped and searched under several powers held by the police. Unfortunately, the statistics regarding these powers are based on ethnicity rather than religious background. However, I provide support for inferring that that the majority of these individuals are stopped and searched because the police assume they are Muslim rather than on the basis of their ethnicity.

The fact that these ethnic groups are a minority in the UK must be kept in mind when considering the following data. White people make up 87% of the population whereas Asians make up just

[18] Massoumi, N., Mills, T. and Miller, D. (eds.) (2017) *What is Islamophobia? Racism, Social Movements and the State*. London: Pluto Press
[19] see note 12 above
[20] see note 17 above
[21] see note 4 above, p.15
[22] Alexander, C. (1998) 'Re-imagining the Muslim community'. *Innovation*, 11(4): 439–450.
[23] see note 4 above, p.15
[24] Solomos, J., and Back, L. (1996) *Racism and Society*. Basingstoke: Macmillan.
[25] see note 17 above
[26] Considine, C. (2016). Muslims Aren't A Race, So I Can't Be Racist, Right? Wrong. *Huffington Post,* (online) (Last updated 14:27 on 19 November 2015). Available at: https://www.huffingtonpost.com/craig-considine/muslims-are-not-a-race_b_8591660.html
[27] see note 4 above

under 6.9% of the population[28]. Those falling under the "other ethnicity" category (which includes Arabs) make up 0.9% of the population[29]. Significantly more Asian and Arab individuals are stopped and searched despite the fact that they make up a much smaller proportion of the population.

It is important to highlight that the majority of the data I refer to is regarding Asian people, not Arabs. The majority of the studies record the latter under "other ethnicity". Consequently, not much can be drawn from this data regarding the treatment of Arabs specifically.

a. Stop and Search powers under different provisions

(i) Section 43 Terrorism Act 2000 (s43 TA)

Under this provision,

> *'a constable may stop and search a person whom he reasonably suspects to be a terrorist to discover whether he has in his possession anything which may constitute evidence that he is a terrorist.'*

Asians are almost three times more likely than White people to be stopped and searched[30]. The ethnic category of "Chinese or other" (which includes people of Arab origin) are stopped and searched almost four times more than White people[31].

(ii) Section 44 Terrorism Act 2000 (s44 TA)

Disproportionate treatment could also be seen under this, now repealed, provision. Under this section,

> *individuals could be stopped and searched without reasonable suspicion within a specific area in which this power has been authorised by a senior police officer.*

Asians were seven times more likely to be stopped and searched[32]. While thousands of people were stopped under this power, not one was convicted of a terrorism offence[33].

This section was repealed following *Gillan and Quinton v UK*[34]. The European Court of Human Rights (ECtHR) held that s44 violated the right to private and family life (Article 8 ECHR). The power was not sufficiently circumscribed and was not subject to adequate legal safeguards against abuse and therefore was too broad. There was an evident risk of arbitrariness and discrimination. The ECtHR also said it would be likely to be difficult, if not impossible to prove the power had been improperly exercised by a police officer. In response to this case, Parliament enacted the Protection of Freedoms Act 2012. This imposed a lesser time limit and other safeguards to ensure the power is only used in genuine emergencies. It is to be used only when a senior officer reasonably suspects an act of terrorism will take place and S&S powers are necessary to prevent this.

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[28] see note 14 above
[29] *Ibid*.
[30] Faith Matters (2016). In numbers: counter-terrorism powers disproportionately affect ethnic and religious minorities in Britain. [online] Available at: https://www.faith-matters.org/2016/05/18/numbers-counter-terrorism-powers-disproportionately-affect-ethnic-religious-minorities-britain/
[31] *Ibid*.
[32] Liberty (2018). Section 44 Terrorism Act. [online] Available at: https://www.libertyhumanrights.org.uk/human-rights/justice-and-fair-trials/stop-and-search/section-44-terrorism-act
[33] *Ibid*.
[34] *Gillan and Quinton v UK* (Application no 4158/05) [2010] ECHR 28

It is important to still consider s44 for many reasons. Firstly, the provision which replaced it may still provide considerable scope for discriminatory treatment. Once this authorisation has been granted by a senior officer, any police officer can stop and search anyone in a particular area, whether or not they reasonably suspect they are likely to commit an act of terrorism[35]. Secondly, though repealed, it has had a lasting impact on individuals and the groups of which they belong to[36]. It has contributed to the generation of the concept of Muslims as a suspect community, a consideration I will return to in section V. Thirdly, there are other sections which mirror the S&S powers under s44. I will refer to these in the following two sections. The same objections to s44 made by the ECtHR apply to these. For such a risk of discrimination to be truly eliminated, these powers must be significantly changed.

(iii) Section 60 Criminal Justice and Police Order Act 1994 (s60 CJPOA)

Under this provision,

> *A policeman is not required to have reasonable suspicion to stop and search any pedestrians or vehicles for offensive weapons or dangerous instruments within a specified area and during a specified period of time.*

This is power is almost identical to the power under s44 TA. Originally introduced to tackle football hooliganism and the threat of violence at football games, it is now used for a wider range of purposes[37]. In 2010-11, Asians were 9.8 times more likely to be stopped and searched under this power[38].

(iv) Schedule 7 Terrorism Act 2000 (Schedule 7 TA)

Under this provision,

> *Police immigration or customs officers at border crossings (such as airports, seaports and rail stations) can stop, question and detain individuals travelling in and out of the UK.*

The purpose of this provision is to determine if the individual is concerned in the commission, preparation or instigation of acts of terrorism. It can be used whether or not the officer reasonably suspects that person is a terrorist. This is a wide power, mirroring that under s44 TA.

It has been used to disproportionately target Asians. Asians are 23 times more likely that a White person to be examined (stopped, searched and questioned)[39]. Asians are 80 times more likely than White people to be detained. In particular, Pakistani people experience the highest level of race disproportionality. In 2010-11 they were 53 times more likely to be examined, 136 times more likely to be examined for more than an hour and 155 more likely to be detained[40]. The group, which is second most likely to be examined and detained, is 'other ethnicity' (under which Arabs fall). Such ethnic groups are more likely than any other ethnic group to be subject to Schedule 7 TA powers despite being a minority of travellers. Data shows 94% of travellers at Gatwick airport were White whereas only 2% of travellers were Asian[41].

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[35] Parmar, A. (2011). Stop and Search in London: counter-terrorist or counter-productive?. Policing and Society: An International Journal of Research and Policy.
[36] *Ibid*.
[37] Equality and Human Rights Commission (2012). Race disproportionality in stops and searches under Section 60 of the Criminal Justice and Public Order Act 1994.
[38] *Ibid*.
[39] see note 18 above
[40] Hurrell, K. (2013). An Experimental Analysis of Examinations and Detentions under Schedule 7 of the Terrorism Act 2000.
[41] Civil Aviation Authority (2015). CAA Passenger Survey Report 2015.

Use of these powers could give rise to an extensive period of examination and detention and a severe sentence. The maximum time for examination and detention is nine hours. It is also an automatic offence to wilfully fail to comply with an officer's request under this power, such as by refusing to answer an officer's questions. The sentence for this conviction is imprisonment for a maximum term of three months and/or a maximum fee of £2,500. If this power is used illegitimately and on a discriminatory basis, this could be a significant violation of the right to liberty (Article 5 ECHR), right to fair trial (Article 6) and right to privacy (Article 8). Such a complaint is currently being made to the ECtHR following the Supreme Court decision of the case in *Beghal v DPP*[42].

(v) Section 1 Police and Criminal Evidence Act 1984 (s1 PACE)

Under this provision,

> *A police officer can stop and search a person or vehicle if he has reasonable grounds for suspecting he will find stolen or prohibited articles.*

Asians are twice as likely to be stopped and searched compared to their White counterparts[43].

b. Policing Guidance

This disproportionate use of S&S powers is not solely due to the individual biases of police officers. Policing Guidance has legitimised and even encouraged the use of the powers in this way. For example, in their Stop & Search Action Guidance, the Home Office, instructed the police force that there

> *'may be circumstances where it is appropriate for officers to take account of a person's ethnic background when they decide who to stop in response to a specific terrorist threat (for example, some international terrorist groups are associated with particular ethnic groups, such as Muslims).*[44]*'*

While this is no longer the current general guidance for all S&S powers, this stereotype is still present in other guidelines. For example, in the Schedule 7 Code of Practice, the Home Office states that selection should not be based solely on ethnic background or religion[45]. As Lord Kerr stated in *Beghal*[46], this statement contemplates that, while ethnic or religious identity cannot be the sole reason for exercising this power, it can be one of the reasons. This legitimises and encourages targeting certain ethnic groups.

c. Islamophobia or Racism?

Asian and Arabs are not necessarily disproportionately stopped and searched on the basis of their race. They are more likely to be stopped and searched on the basis of what the police perceive their religious identity to be. A concept of the "stereotypical Muslim" exists in the UK as I have demonstrated above, which generally includes people of Asian ethnicity. Therefore, in order to target suspected terrorists, many police officers target this ethnic group. This inference can be made for the following reasons;

First~~ly~~, underpinning the concept of Islamophobia is the idea that Muslims are terrorists[47]. Asians are stopped and searched at a higher rate under the counter-terrorism legislation (under TA) than

[42] [2015] UKSC 49; [2016] A.C. 88
[43] Equality and Human Rights Commission (EHRC) (2013). Stop and think again.
[44] Home Office (2004). Stop & Search Action Team Interim Guidance, p.12.
[45] Home Office (2014). Examining Officers and Review Officers under Schedule 7 to the Terrorism Act 2000
[46] see note 30 above
[47] see note 10 above

other S&S powers (such as s1 PACE). An exception to this is s60 CJPOA. This could be explained by the fact that s44 TA was abolished, which may have caused police officers to use s60 to S&S Muslims without needing reasonable suspicion. The fact that Asians are stopped and searched at a higher rate under the TA indicates that they are stopped because they are perceived to be Muslim and therefore terrorists. There still remains an element of racism in these powers, as there is disproportionate treatment outside of the TA. Nevertheless, there does seem to be elements of Islamophobia.

To support this argument, the following are examples of individuals in the CJS who have associated terrorism, Asian identity and Muslim identity in the context of S&S. Lord Kerr stated;

> *'if examining officers exercise Schedule 7 powers… on the basis of an "intuition" that a person "looks like" a terrorist, it is predictable that those of Asian or a Muslim appearance will be disproportionately targeted[48]'.*

Lord Brown has stated;

> *It is 'inevitable… that so long as the principal terrorist risk against which use of the section 44 power has been authorised is that from al Qaeda, a disproportionate number of those stopped and searched will be of Asian appearance. [49]'.*

By making this link between Islamist extremism and Asians, it is clear that a significantly high number of Asians are perceived to be Muslim. In addition, the Home Office in their S&S Guidance (referred to in part (b) above), label Muslims as an ethnic group. While this is incorrect, this could indicate that Muslims and certain ethnic groups are viewed as synonymous.

Another example is Blears' (the Home Office Minister responsible for counter-terrorism in 2005) claim that Muslims should accept the 'reality' that they would be stopped and searched more often than others[50]. The Metropolitan Police Commissioner in 2005, Blair, agreed with Blears and claimed people of Asian appearance are 'going to get stopped'[51] . This shows that religious affiliation is the main driving factor behind many stops. The perception that Asians are more likely to be Muslims and so more likely to be terrorists, has been judicially and politically recognised.

Secondly, it is important to also consider the views of those who have been stopped and searched. Parmar, a Research Associate at the Oxford Law Faculty, interviewed such people and found a resounding claim that they were stopped because they 'looked Muslim'[52]. Thirdly, many Muslims report being stopped while wearing traditional clothes or if they had a beard[53]. Such individuals are more likely to be discriminated against on the basis of their perceived religious background rather than their race.

d. Consequences

The profiling of Muslims may be understandable if these S&S powers led to a greater number of arrests and following this, convictions, but this is not the case. In regards to the use of s44, out of

[48] see note 30 above, p.96
[49] see note 22 above, at [80]
[50] Dodd, V. and Travis, A. (2005). Muslims face increased Stop and Search. [online] Available at: https://www.theguardian.com/politics/2005/mar/02/terrorism.immigrationpolicy1
[51] Beattie, J. (2005). Met chief: we will Stop and Search Muslims. [online] Available at: https://www.standard.co.uk/news/met-chief-we-will-stop-and-search-muslims-7238392.html
[52] see note 23 above, p.375
[53] Tarafder (2004). In Cowan, R. and Travis, A. (2004). Muslims: we are the new victims of Stop and Search. [online] Available at: https://www.theguardian.com/uk/2004/mar/29/politics.humanrights

1,217 Asians arrested, only 319 were charged and 214 were eventually convicted[54]. Conviction rates for terrorist offences are virtually the same for Asian and White people[55]. In fact, in their report of the London Bombings in July 2005, the House of Commons stated there is no 'consistent profile to help identify who may be vulnerable to radicalisation'[56]. Thus, racial profiling is ineffective in crime prevention and causes a significant waste of valuable time.

By focusing on religion and race, the police's attention is shifted away from more plausible evidence of terrorism such as behavioural and psychological characteristics[57]. The importance of such characteristics can be seen from a study in which custom officers were instructed to rely on behavioural analysis and observational technique, rather than racial and gender profiling, in their S&S powers for drug use[58]. This policy change lead to a 300% rise in the number of searches leading to a finding of drugs. Furthermore, terrorist groups have proven their ability to be discrete. For example, female and child suicide bombers are often used to avoid arrest because there is a common perception that most terrorists are male[59]. Terrorist groups are likely also to use individuals of a different ethnic background to avoid suspicion. Police officers who disproportionately target Asians are failing to protect society.

These measures may also have detrimental effects on Muslims. In particular, the public nature of the search could result in humiliation and embarrassment was acknowledge in by the ECtHR in *Gillan and Quinton* [60], making it a violation of the human right to private life (Article 8 ECHR). Muslims have reported S&S as 'embarrassing situations,' which are 'demeaning to their character'[61].

e. Concluding Remarks

This evidence suggests that Muslims are targeted under the S&S powers and so such powers are being used in an Islamophobic way. There may be alternative explanations such as the locality of the S&S. London is also more ethnically diverse than other areas of the UK[62]. It is under the greatest threat of terrorist attacks because it is the capital and is constantly busy with commuters[63]. Therefore, a high number of Asians are stopped and searched by virtue of being in that particular location.

Despite this, it is very plausible that many Asians are stopped and searched on the basis of their perceived religious identity. This prompts better recording and further study in this area. The current method does not adequately monitor the number of Muslims stopped and searched[64]. Physical qualities, such as the wearing of a hijab or growing of a beard should be recorded. Though made prior to the introduction of the majority of S&S powers which exist today, Fair UK's statement is an accurate representation of the current situation in the UK;

> *by focussing on Asians the police 'is disguising the enormity of the criminalising and victimisation of the Muslim community'*[65]

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[54] see 18 above
[55] *Ibid.*
[56] House of Commons (2006). Report of the Official Account of the Bombings in London on 7th July 2005, p.31
[57] see note 13 above
[58] US General Accounting Office (2000). U.S. Customs Service: Better Targeting of Airline Passengers for Personal Searches Could Produce Better Results
[59] Zedalis, D. (2004) *Female Suicide Bombers*. University Press of the Pacific: Hawaii.
[60] see 22 above
[61] Fair UK (2004). COUNTER-TERRORISM POWERS Reconciling Security and Liberty in an Open Society: Discussion Paper. at [63]
[62] see note 34 above
[63] Ibid.
[64] see note 60 above
[65] Ibid, p.16 at [60]

II. Prevent

a. What is Prevent?

Section 26 Counter-Terrorism and Security Act 2015 places a "Prevent duty" on certain bodies to have;

> *'due regard to the need to prevent people from being drawn into terrorism' in the exercise of their day-to-day functions.*

This duty is placed on schools and universities because education is identified as a priority area for tackling radicalisation[66]. Radicalisation is

> *'the process by which a person comes to support terrorism and forms of extremism leading to terrorism'*[67].

Extremism, according to Theresa May, is

> *'the vocal or active opposition to fundamental British values, including democracy, the rule of law, individual liberty and the mutual respect and tolerance of different faiths and beliefs'*[68].

This duty allows these bodies and individuals to make a "Prevent referral". This leads to an assessment of whether there is a genuine vulnerability by the police ("Prevent Case Management"). If the vulnerability is related to extremism, then a "Channel referral" is made. If it is decided to be necessary and proportionate, support may be provided to those who are "vulnerable of being drawn into terrorism" (Channel Panel Stage)[69]. Overall, if a Prevent referral leads to a Channel Referral, then this person is a threat.

b. Problems with Prevent

Research shows 95% of all Prevent referrals are unnecessary[70]. Out of the 6,093 Prevent referrals that were made from 2016 to 2017, only 332 led to support under Channel[71]. The Prevent mechanism is considerably overused.

Muslims are disproportionately targeted under Prevent. Data shows 61% of referrals were related to Islamist extremism[72] whereas 16% of referrals were related to right-wing extremism[73]. Less than 5% of those referred on the basis of Islamist extremism received Channel support and therefore were actually a threat[74]. In addition, only 24% of those discussed at the Channel Panel Stage with Islamist related concerns, were given Channel support[75]. The rest of these individuals

[66] It is also placed on health bodies, local authorities, prisons, police and probation services. Even members of the public can raise concerns with their local authority. I will focus on its use in schools.
[67] Department for Education (2015). The Prevent duty: Departmental advice for schools and childcare providers, p.4
[68] May, T. (2015). A Stronger Britain, Built On Our Values. [online] Available at: https://www.gov.uk/government/speeches/a-stronger-britain-built-on-our-values
[69] Home Office (2018). Individuals referred to and supported through the Prevent Programme, April 2016 to March 2017, p. 5-6
[70] CAGE (2018b). PREVENT stats: 95% referrals unnecessary and Muslims remain targets. [online] Available at: https://www.cage.ngo/prevent-stats-95-referrals-unnecessary-and-muslims-remain-targets
[71] see note 53 above
[72] It can be assumed that those referred under Islamist extremism are, or are presumed to be, Muslim.
[73] see note 53 above
[74] *Ibid.*
[75] *Ibid.*

were not a terrorist threat. This is disproportionately lower compared to individuals with extreme right-wing related concerns (46%).

c. Explaining this data

The focus on Muslims is made possible in many ways. A distinction can be drawn between the policy itself and the way it is used.

(i) The policy

There was a lack of effective scrutiny of the policy in its conception. The scrutiny of Prevent was not undertaken by the government's previous Independent Reviewer of Terrorism Legislation, Anderson QC, but done by a "Prevent Oversight Board". The government has failed to publish its minutes and confirm its membership[76]. As MEND (Muslim Engagement and Development), a not-for-profit organisation which aims to combat Islamophobia, stated;

> *'there is an irony in praising democracy as a fundamental British value while riding roughshod over it by passing legislation at breakneck speed with no legitimate room for debate and challenge'*[77].

The lack of transparency in the conception of Prevent is concerning. The government claims that Prevent addresses all forms of terrorism. Counter-terrorism legislation combats 'the promotion of ideology that leads to criminal behaviour, which might be hate crime, violence against women or girls or terrorist activity—the crime itself.'[78]. However, Prevent is generally 'seen through the prism of Islamic extremism leading to terrorism'[79]. This can be shown by the fact Prevent funding is allocated to local authorities on the basis of the number of Muslims residing in the area[80]. In addition, the Prevent training, which all teachers must undergo, appears to targets Muslims. Becoming more religious (as a Muslim) is seen as warning signs of extremism.[81]

(ii) The way it is used

Teachers have the opportunity to target and discriminate against Muslim students because the power of referral under Prevent is wide. The existence of this wide power can be explained by the broad and vague definitions used. The 'attempts to date to define "extremism" with legal precision have so far failed'[82]. The definition provided by Theresa May[83] is general, making it unworkable as a legislative definition[84]. Clarity as to the meaning of extremism is vital if it is to be combatted through legal mechanisms[85]. As Rivers states;

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[76] Thomas, P. (2017). Changing experiences of responsibilisation and contestation within counter-terrorism policies: the British Prevent experience. *Policy & Politics,* 45(3), pp. 305-321.
[77] MEND (2015). Home Secretary announces new counter-extremism strategy. [online] Available at: https://mend.org.uk/news/home-secretary-announces-new-counter-extremism-strategy/
[78] Bradley, K. (2016) In Joint Committee on Human Rights (2016). Counter-Extremism, p.27
[79] *Ibid, p.27*
[80] Qurashi, F. (2016). Prevent gives people permission to hate Muslims – it has no place in schools. *The Guardian,* [online] (Last updated 11:44 on 04 April 2016). Available at: https://www.theguardian.com/commentisfree/2016/apr/04/prevent-hate-muslims-schools-terrorism-teachers-reject
[81] Stone, J. (2016). British Muslims 'should be allowed to bypass police' when reporting hate crime, Andy Burnham says. *Independent,* Available at: https://www.independent.co.uk/news/uk/politics/prevent-anti-extremism-strategy-legitimising-islamophobic-hate-attacks-andy-burnham-warns-a7330951.html
[82] Walker, C. (2016). In Joint Committee on Human Rights (JCHR) (2016). Counter-Extremism, p.24
[83] see Part (III)(a) above
[84] Joint Committee on Human Rights (JCHR) (2016). Counter-Extremism.
[85] *Ibid.*

> *'if people do not have an instinctive understanding of what we are getting at in our law, it is very difficult to get the law to work. People know instinctively what terrorism is and what it looks like, but that is not at all the case for extremism'*[86].

Leaving individuals to define these terms grants them 'a wide discretion to prohibit any loosely defined speech which they find unacceptable'[87].

The concept of radicalisation is flawed due to its prospective nature. It is difficult, if not impossible for individual journeys towards violent extremism to be predicted, monitored and prevented[88]. There is no stereotypical journey to radicalisation. Furthermore, children are targeted before they have actively planned a crime[89]. Terrorism is one of the most serious crimes someone can commit. More must be required to suspect someone of this serious crime than just an affiliation with Islam.

Thirdly, Prevent may be overused in relation to Muslims, because pressure is place on teachers. An example of this overuse, is a teacher who asked her student 'which mosque he went to and whether he prayed a lot[90]. They may fear that 'if they do not report something, which is now a duty, they will somehow fall foul of the law'[91]

d. Consequences

While evidence shows Muslims are disproportionately referred to Prevent, some may not see this as problematic. They are not arrested nor do they enter the CJS. However, a study conducted by National Union of Students (NUS) reported that a third of Muslim students had been negatively affected by Prevent[92].

The counter-terrorism strategy, including Prevent, has;

> *'spread from its traditional home in the police and intelligence services, to occupy almost every branch of the state, from schools and universities to GP surgeries… It has meanwhile become increasingly difficult for Muslims to participate in politics and public life'*[93].

The Prevent duty creates a culture of surveillance in school. This undermines the valuable relationship of trust and confidence, which exists between teachers and students[94]. Muslim students receive a different standard of treatment[95].

This undermines the freedom of expression (Article 10 ECHR). As was predicted by 350 academics who protested against the implementation of Prevent, it has 'a chilling effect on open debate, free speech and political dissent'[96]. Out of fear of being reported, Muslims disengage from debate and discussion[97], reduce their political activity and involvement in a range of student

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[86] *Ibid, p.25*
[87] *Ibid, p.26*
[88] see note 60 above
[89] *Ibid.*
[90] Tell MAMA (2016). Over-Reactions on Prevent Are Causing Fears Within Muslim Students. [online] Available at: https://tellmamauk.org/over-reactions-on-prevent-are-causing-fears-within-muslim-students/
[91] McCarthy, K. (2016) In Joint Committee on Human Rights (2016). Counter-Extremism, p.16
[92] National Union of Students (2018). The experience of Muslim students in 2017-18
[93] Massoumi, N., Mills, T. and Miller, D. (eds.) (2017) *What is Islamophobia? Racism, Social Movements and the State*. London: Pluto Press, p.12
[94] Qureshi, A (2018). NUS Report confirms PREVENT's chilling effect on education. *CAGE,* [online] Available at: https://www.cage.ngo/nus-report-confirms-prevents-chilling-effect-on-education
[95] see note 73 above
[96] The Independent (2015). Prevent, it has 'a chilling effect on open debate, free speech and political dissent. [online] Available at: https://www.independent.co.uk/voices/letters/prevent-will-have-a-chilling-effect-on-open-debate-free-speech-and-political-dissent-10381491.html
[97] see note 77 above

activities and do not run for elected positions[98]. These fears become reality when events organised by Muslims are cancelled, restricted or reported through Prevent[99] . An example of this is the University of Cambridge's prevention of Dr Salih from chairing a Palestinian Society and Middle Eastern Society talk on "Boycott, Divestment, Sanctions and the struggle for Palestinian Human Rights". This decision was made during the University Prevent Referral Meeting following the opposition to the event of a pro-Israeli group 'StandWithUs'[100]. These implications of Prevent seem to contravene section 43 of the Education Act 1986, which imposes a duty to ensure the freedom of speech on every individual concerned in the government of universities and colleges.

Furthermore, fundamental British values such as democracy (which extremists oppose) have been challenged in the education setting for centuries. As Professor Richardson, the Vice Chancellor of the University of Oxford, stated;

> *'if our university were to refer everyone [under Prevent], we would have to burn all our books by Plato and refer half our philosophy department who question these matters'*[101].

Ironically legislation which aims to combat opposition to British values undermines one of these values: democracy. As Qurashi states, the state is complicit in undermining British values rather than upholding them[102].

Prevent also makes teachers feel inhibited from discussing extremism in an educational context[103] . This is incompatible with the need to ensure that academic staff have freedom within the law to;

> *'question and test received wisdom and put forward new ideas and controversial or unpopular opinions, without placing themselves in jeopardy of losing their jobs or privileges they may have at their institutions'* (Section 202 Education Reform Act 1988).

It is difficult to combat radicalisation without speaking about it. Stifling conversation could lead students to be more intrigued. They could research it themselves and easily come across the many online sources which promote terrorism. Extremist views are better tackled via debate in a rational academic setting[104].

Prevent also interferes with the fundamental human right to private and family life (Article 8, ECHR). Muslim parents have complained that they are fearful of speaking about extremism and radicalisation at home, including merely discussing the negative effects of it[105]. They are worried that if their child gave an inaccurate or colourful account of what was said, which children can often do, a teacher might misunderstand or misrepresent this and make a Prevent referral[106]. An example of this is a four-year-old nursery pupil who was referred under Prevent after what was described by the nursery as a "cooker bomb" but which turned out to be a cucumber[107].

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[98] CAGE (2018a). NUS Report confirms PREVENT's chilling effect on education. [online] Available at: https://www.cage.ngo/nus-report-confirms-prevents-chilling-effect-on-education

[99] see note 75 above

[100] Varsity (2017). Open letter condemns University's 'threat to academic freedom'. [online] (Last updated 20:45 on 08 November 2017). Available at: https://www.varsity.co.uk/news/14023

[101] Richardson, L. (2016) In Joint Committee on Human Rights (2016). Counter-Extremism, p.26

[102] see note 64 above

[103] Anderson, D. (2016) In Joint Committee on Human Rights (2016). Counter-Extremism.

[104] Abbot, C. (2016) In Joint Committee on Human Rights (2016). Counter-Extremism.

[105] Human Rights Council (2017). Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association on his follow-up mission to the United Kingdom of Great Britain and Northern Ireland.

[106] see note 86 above

[107] Fox, T. (2016). Four-year-old who mispronounced 'cucumber' as 'cooker bomb' faced terror warnings, family say. Independent, [online] (Last updated 12:06 on 12 March 2016). Available at:

e. Concluding Remarks

It is important to note that as Prevent has only been recently created, there is limited research regarding the efficiency of the measure and its effects on Muslims. It is difficult to make definitive conclusions about it. Furthermore, Prevent can be unfairly represented in the media. For example, a Prevent referral was made following a child writing 'I live in a terrorist house' in his homework[108]. Media reports failed to mention the child also wrote 'I don't like it when my uncle beats me.' This safeguarding intervention was made to look like something it was not through 'sloppy journalism'[109]. Dangerous myths about Prevent can easily be created and circulated[110]. These rumours will cause Muslims to perceive themselves as being targeted to a greater extent than they actually are. Nevertheless, the data outlined above does show Muslims are unjustifiably targeted under Prevent. There are significant concerns regarding its creation, use and effect. This problem must be addressed through further research, reformation of the law and better training for those who hold a Prevent duty. This will also help dispel any false information[111] (JCHR, 2016).

III. Effects on the Muslim Community

In this section I explain how these measures impact the lives of Muslims. First, I claim that Muslims are unjustifiably labelled as a "suspect community" by the CJS. This is the core argument of this section. Secondly, I consider the background history of Islamophobia and how the CJS contributes to this. Thirdly, turning to the consequences of this labelling, I consider its effect on a Muslims' personal identity. Fourthly and fifthly and sixthly, I consider the mental health and socio-economic implications of labelling Muslims as a suspect community. The latter includes causing Muslims to turn to crime, which links to the final section in which I argue that these measures can cause Muslims to turn to terrorism.

a. Suspect Community

The measures discussed above are examples of ways in which the CJS has labelled Muslims as a suspect community[112]. It is important to note that Islamophobia is not restricted to the CJS. The media has fuelled hostility towards Muslims in Britain[113]. Political discourse has also prompted Islamophobia[114]. The CJS measures may not be solely responsible for creating any bias against Muslims. Media and political discourse may create bias in individuals in the CJS, when exercising their powers; however, they are known to be unreliable. Many British people feel the news is "too biased" or "controlled by hidden agendas"[115]. Only 17% of the public trust politicians to tell the truth[116]. The CJS, on the other hand is the main voice of the state on issues of national security and

https://www.independent.co.uk/news/uk/home-news/four-year-old-raises-concerns-of-radicalisation-after-pronouncing-cucumber-as-cooker-bomb-a6927341.html

[108] BBC (2016). Lancashire 'terrorist house' row 'not a spelling mistake.' *BBC* [online] 20 January 2016. Available at: http://www.bbc.co.uk/news/uk-england-lancashire-35354061
[109] see note 102 above
[110] see note 83 above
[111] Ibid.
[112] Pantazis, C. and Pemberton, S. (2009). From the 'old' to the 'new' suspect community: Examining the Impacts of Recent UK Counter-Terrorist Legislation.
[113] University of Cambridge (2016). Media fuelling rising hostility towards Muslims in Britain. [online] Available at: http://www.cam.ac.uk/research/news/media-fuelling-rising-hostility-towards-muslims-in-britain
[114] Ameli, S. and Merali, A. (2015). Environment of hate: the new normal for Muslims in the UK. Islamic Human Rights Commission.
[115] Edelman Trust (2018). Edelman Trust Barometer Findings - 2018. [online] Available at: https://www.edelman.co.uk/magazine/posts/edelman-trust-barometer-2018/
[116] Ipsos MORI (2017). Veracity Index 2017

safety. The percentage of the public who think the CJS is fair is 64%[117]. It carries a reputation of legitimacy. If the CJS is targeting Muslims, people will believe that there is a cause for concern. This in turn legitimises and reinforces Islamophobia[118].

As Qurashi argues,

> *Prevent 'sends out a strong signal to the wider society about the nature of Muslims in Britain and is influential in shaping people's assumption about Muslims and Islam – forming a basis of Islamophobia.'*[119]

The same can be said of the use of the Stop and Search measures.

Many Muslims feel that their communities have become more suspicious of them and see them as accountable for the acts of the minority who commit terrorism[120]. They sense increased incivility from others[121]. There has also been an increase in hate crime against Muslims, as previously stated. Muslims are a marginalised community, seen as the "Other" and "the enemy within"[122]. It can be argued that CJS measures have negatively influenced relations between Muslims and the rest of British society.

The CJS is not justified in labelling Muslims as suspects for several reasons. Firstly, despite the fact that Islamist extremists claim they are acting in the name of Islam, Islam does not condone terrorism. The sanctity of life is a fundamental tenet of Islam. It is written in the Qur'an that 'whoever kills a person, it is as if he has killed all of humanity'[123]. Terrorists cannot be called Muslim; 'terrorism in its very essence symbolises disbelief and is a rejection of what Islam stands for'[124]. Secondly, the CJS allows the minority of extremists to represent the majority. As Warsi stated, British "Muslim" terrorists are in the hundreds yet British Muslim doctors are in the thousands[125]. Despite this, 'the ad hoc life-takers are used to define British Muslims, not the daily lifesavers'.

In fact, Muslims are just as likely, if not more likely to be the victims of terrorism. Muslims are vulnerable to both prominent forms of extremism today: right-wing and Islamist. A large proportion of Islamophobic hate crime is linked to right-wing activism[126]. The focus on Islamist extremism, in both S&S and Prevent contexts, means that right-wing extremism is side lined. This undermines the status of Muslims as victims and places them at greater risk.

Many Muslims are also at risk of being a victim of Islamist terrorism. In fact, in cases where the religious background of the victims of terrorist attacks could be determined, Muslims have

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[117] Ministry of Justice (2015). Public confidence in the Criminal Justice System – findings from the Crime Survey for England and Wales (2013/14).
[118] Qurashi, F. (2016). Prevent gives people permission to hate Muslims – it has no place in schools. *The Guardian,* [online] (Last updated 11:44 on 04 April 2016). Available at: https://www.theguardian.com/commentisfree/2016/apr/04/prevent-hate-muslims-schools-terrorism-teachers-reject
[119] *Ibid*
[120] Choudhury, T. and Fenwick, H. (2011). The impact of counter-terrorism measures on Muslim communities. Equality and Human Rights Commission, Research Report 72.
[121] *Ibid*
[122] see note 97 above
[123] Qur'an 5:32
[124] Tahir-ul-Qadri, M. (2011) *Fatwa on Terrorism and Suicide Bombings*. Minhaj-ul-Quran International (MQI): UK, p.7
[125] see note 12 above, p.8
[126] Copsey, N., Dack, J., Littler, M. and Feldman, M. (2013). Anti-Muslim Hate Crime and the Far Right. Centre for Fascist, Anti-Fascist and Post-Fascist Studies.

suffered between 82 to 97% of fatalities (in the period between 2006 and 2011) worldwide[127]. ISIS claim to be followers of the Sunni sect of Islam and the majority of their victims are Shia Muslims[128]. The CJS does not recognise this victim status. Their victim status is disregarded and they are unjustifiably labelled a suspect community.

b. Background History

Islamophobia has been a prevailing issue throughout history. Said used the term 'Orientalism' to describe 'a western style for dominating, restructuring and having authority over the Orient'[129]. The term 'Orient' refers to the Islamic world, encompassing the Arab countries and India which were colonised by Europe[130]. From the first period of contact with the Islamic world, it was posited as 'the Other';

> *The 'European encounter with the Orient …turned Islam into an outsider against which the whole of European civilisation from the Middle Ages on was founded'*[131].

The colonisers deemed the Orientals to be not just different, but inferior. Muslims were viewed as 'passive, non-participating… above all, non-active, non-autonomous, non-sovereign with regard to itself'. Said stated:

> *'the colonized people are "something one judges (as in a court of law), something one studies and depicts (as in curriculum), something one disciplines (as in a school or prison), something one illustrates (as in a zoological manual)*[132]*'*

Gramsci claimed this inferiority became hegemonic in Europe[133]. This abhorrent history must be prevented from repeating itself.

Symmetry may be drawn between Orientalism and the current treatment of Muslims by the CJS. The CJS illustrates and makes a generalisation or an immutable law about the Other as the orientalist did,[134] namely that Muslims are extremists. The CJS also judges and disciplines Muslims in the same way Orientalists did, using Islamophobic legislation and practices. For these reasons, it could be said that the CJS contributes to this long history and adds modern day legitimacy to it. The CJS not only reinforces these ideas but takes them a step further. Muslims are not seen as just different and inferior. They are now radicals, extremists and terrorists.

c. Implications on Personal Identity

Many British Muslims already feel as though they have dual or multiple identities,[135] especially considering British culture is very different from Islamic culture. Being treated differently by CJS based on their faith and ethnicity despite being British, may exacerbate the differences between these communities. This is particularly problematic as the majority (50%) of Muslims in the UK

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[127] National Counterterrorism Center (2011). Report on Terrorism

[128] Dearden, L. (2016). Baghdad bombing: Iraqis remind world that most of Isis' victims are Muslims after more than 160 killed. *Independent,* [online] (Last updated 07:46 on 05 July 2016). Available at: https://www.independent.co.uk/news/world/middle-east/baghdad-bombing-attack-isis-islamic-state-iraq-ramadan-shia-most-victims-muslims-killed-a7120086.html

[129] Said, E. (2014) Orientalism. Vintage Books Edition: USA, p.3

[130] *Ibid*

[131] *Ibid,* p.70

[132] *Ibid*, p.40

[133] *Ibid*

[134] *Ibid*

[135] Hopkins, N. (2011) Dual Identities and Their Recognition: Minority Group Members' Perspectives. *Political Psychology,* 32(2), pp. 251-270.

are under 25[136]. These young people are in the process of shaping their personality and identity. They are vulnerable to influences from different directions. Being constantly exposed to Islamophobia can have detrimental effects, including lack of self-esteem and sense of belonging[137].

Once 'carved out, a persons' sense of normality, of what can be expected from life, cannot easily be changed'[138].

They may begin to believe they are different from the rest of society. This can have mental health and socio-economic implications.

d. Mental Health Implications

Being perceived as different from the majority can affect an individual's confidence and self-esteem. It can cause an internalisation of negative messages, having mental health implications. Islamophobia has been reported to create crime-related anxiety, causing Muslims to curtail their daily activities[139]. Fear of racial discrimination, such as feeling unsafe or avoiding certain spaces, has been reported to have a greater cumulative effect on mental health than direct experiences[140]. It is possible that Islamophobia has the same effect.

Such mental health conditions may be criminogenic. A strong link between mental health conditions, violence and crime has been found in research studies[141]. Such a link may particular exist in cases of marginalisation, which can cause negative feelings towards the rest of the community and the state, possibly leading to retaliation through crime.

e. Employment and Socio-Economic Progression

Muslims are socio-economically disadvantaged relative to the rest of the population. Over 50% of Muslims experience household poverty[142]. Only 29% of Muslims aged 16-24 are in employment, compared to the national figure of 51%[143]. Muslim men are less likely to be in managerial or professional jobs and more likely to be in low-skilled jobs[144]. Muslims are also reported to receive the lowest hourly pay rates[145].

This unemployment rate is disproportionately high considering that a larger proportion of Muslims are in full time education and have degrees compared to the national figure[146]. They are capable of having better professions and earning a higher income. These disadvantages may be explained by the discrimination against Muslims in the labour market. Runneymede calls this the 'Muslim penalty'[147]. Muslims face discrimination regardless of their colour or geography; White Muslim workers suffer this discrimination[148] as well, this seems to be Islamophobia not racism.

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[136] Muslim Council of Britain (MCB) (2015). British Muslims in Numbers.
[137] Himmat, H. (2004) In Ramberg, I. Islamophobia and its consequences on young people. Council of Europe Publishing
[138] see note 2 above, p.10
[139] Spalek, B. (ed.) (2002) *Islam, Crime and Criminal Justice*. Willan Publishing: Oxon.
[140] *Ibid*
[141] Marzuk, P. M. (1996) Violence, crime, and mental illness: How strong a link? *Archives of General Psychiatry, 53*(6), pp. 481-486.
[142] see note 3 above
[143] Khattab, N. and Modood, T. (2015) Both Ethnic and Religious: Explaining Employment Penalties Across 14 Ethno-Religious Groups in the United Kingdom. *Journal for the Scientific Study of Religion,* 54(3), pp. 501-522.
[144] Choudhury, T. (2005). Muslims in the UK. New York: Open Society Institute, EU Monitoring and advocacy program.
[145] Equality and Human Rights Commission (EHRC) (2015). Is Britain Fairer?
[146] See note 3 above
[147] See note 3 above, p.8
[148] See note 118 above

The CJS contributes to this socio-economic disadvantage in several ways. It legitimises Islamophobic rhetoric, which may prompt employers to view Muslims with suspicion and consequently be hesitant to employ them. In addition, discrimination and marginalisation can cause lack of self-esteem and shape an entire generation's expectancy of life[149]. Many Muslims are less ambitious in their careers. Some Muslims try to minimise the risk of facing Islamophobia turning to self-employment, part-time jobs or low-skilled jobs which fail to commensurate with their real qualifications[150].

The CJS also impacts a Muslim's socio-economic progression in a more direct way. Prevent negatively effects a student's education experience because the relationship of trust and confidence between students and teachers is hindered[151]. Poor relations with teachers can inhibit academic achievement[152]. Muslim student's freedom of speech is also inhibited, causing them to participate less in the classroom. Prevent discourages students from going to university[153]. These consequences make such students less employable and therefore contributes to their socio-economic disadvantage.

Due to their low socio-economic status Muslims are more likely to turn to crime for additional income[154]. British Pakistani Muslim men who traded heroin and crack cocaine reported they committed these crimes because they found finding employment difficult[155]. In particular, this group felt that the negative image of Islam today makes employers reluctant to employ Muslims. Therefore, the CJS is counterproductive and contributes to creating a situation where Muslims may be more likely to turn to crime.

f. Counterproductive in Counter-Terrorism

As stated above, the CJS measures may cause Muslims to turn to crime. In particular, it can make them susceptible to terrorism. The CJS targets Muslims, legitimises Islamophobia, affects their mental health and contributes to their poverty. Furthermore, symmetry may be drawn between past events and the current treatment of Muslims by the CJS. As the majority of Muslims in Britain are South Asian and have lived through, or have relatives who lived through, the colonisation of India, Orientalism is something within their memory. Being treated as inferior once again could possibly generate anger against the state. Casey writes that Muslims are alienated, and this can cause them to support Islamist groups[156]. These Islamist groups use the "Otherness" of Muslims as a way to generate anger against the state. They accuse the state of persecuting Muslims. They claim this needs to be opposed at all costs including through violence. A cycle is generated in which Islamist groups commit terrorist atrocities, causing the state to panic and target Muslims through CJS measures[157]. This in turn, marginalises Muslims making some vulnerable to terrorist propaganda and recruitment. These measures are counterproductive in their efforts to counter-terrorism.

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[149] see note 2 above
[150] see note 118 above
[151] see note 64 above
[152] Rimm-Kaufman, S. and Sandilos, L. (2018). Improving Students' Relationships with Teachers to Provide Essential Supports for Learning. American Psychological Association. *APA*, [online] Available at: http://www.apa.org/education/k12/relationships.aspx

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[155] Qasim, M. (2017) Explaining young British Muslim men's involvement in heroin and crack. *Criminology & Criminal Justice,* pp. 1-15.
[156] Casey, L. (2016). The Casey Review: A review into opportunity and integration. [online] Available at: https://www.gov.uk/government/publications/the-casey-review-a-review-into-opportunity-and-integration
[157] *Ibid*.

It is important to note that the CJS is not responsible for the radicalisation of a Muslim in this way. If a Muslim chooses to commit an act of terrorism, it is their choice. The CJS does, however, contribute to this cycle. There is more that can be done to prevent radicalisation.

IV. Conclusion

The measures discussed prove that Islamophobia is present in the CJS. Islamophobia is defined by its negative effects on a Muslim's public life. Collectively, these measures depict Muslims as a suspect community. This causes significant detriment to a Muslims exercise of their public life. These measures are evidently Islamophobic.

Muslims are disproportionately targeted in the CJS because they are believed to be more susceptible to terrorism than the rest of the population. These measures are made in effort to counter-terrorism. Lord Hoffman's statement in *A v Secretary of State for the Home Department*, regarding a law which allowed suspected, foreign, international terrorists to be detained and charged without trial, can also apply to these measures. He stated that;

> *'the real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve'*[158]

By turning individuals against the state, terrorism creates bridges within society. The CJS measures discussed also generates such bridges. These measures must be discarded and there must be a greater focus on community cohesion in the CJS.

It is important to consider why this is an important issue. Some legal philosophers, such as Locke argue law is like a social contract, whereby individuals agree to give up unregulated freedom in exchange for the security of society governed by a just, binding rule of law[159]. The CJS has the most coercive powers in society allowing the detention and punishment of individuals against their will[160]. It can remove an individual's freedom of movement, such as through S&S practices, and place them under an obligation to account for their actions to others such as through Prevent.

[158] [2004] UKHL 56; [2005] 2 A.C. 68 at [97]
[159] Locke, J. (1948) *Social contract: essays by Locke, Hume and Rousseau*. Oxford: Oxford University Press.
[160] Uglow (2005) 'The criminal justice system'. In Criminology. Oxford: Oxford University Press, pp.447-470

A Plea for Prison Reform

Olivia Rawlings*

Dear Editor,

Plagued with systemic failures that date back centuries, the United Kingdom prison system is at a crisis point. The most pressing issues are overcrowding and the disparity between the representation of black, Asian and minority ethnic (BAME) groups and the wider population. Inmates' mental health problems also provide cause for alarm and there is a definite need for a more widespread use of alternatives to incarceration. The discussion that the public and policy makers need to have about prison reform is drastically dissimilar to the one that is currently being had.

One must look holistically to the root causes of crime. These lie outside our penal and correctional institutions. There must be more careful assessment of individual offenders, followed by appropriate sentences and rehabilitative programmes ordered. Reinvestment and redirection of resources to the health and welfare system, and community alternatives to custody, would better provide specialist help tailored to individual needs.

Over 60% of prisons are overcrowded[1]. Despite making up just 14% of the population, 25% of prisoners are BAME men and women[2], and over 40% of young people in custody are from BAME backgrounds.[3] If prison populations reflected the diversification of England and Wales there would be over 9,000 fewer people in prison. There is a greater disparity in the number of Black people in prison here than in the United States. Whilst there is no single explanation for this, arrest rates remain disproportionate and there is evidence of differential punishment. Furthermore, BAME defendants are more likely than white defendants to receive prison sentences for drugs offences.[4]

Overpopulation leaves rehabilitation programmes oversubscribed, and prisons unclean and hazardous. HMP Liverpool experiences a carpet of cockroaches at night. Prison cells for

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1 MoJ, Population bulletin: monthly December 2018 https://www.gov.uk/government/statistics/prison-population-figures-2018

2 MoJ, NOMS annual offender equalities report: 2015 to 2016 https://www.gov.uk/government/statistics/noms-annual-offender-equalities-report-2015-to-2016

3 The Lammy Review (8 September 2017) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/643001/lammy-review-final-report.pdf

4 MoJ, Associations between ethnic background and being sentenced to prison in the Crown Court in England and Wales in 2015 https://www.gov.uk/government/statistics/associations-between-ethnic-background-and-being-sentenced-to-prison-in-the-crown-court-in-england-and-wales-in-2015

one, with a single blocked toilet, are being occupied by three.[5] Recidivism rates increase while the Ministry of Justice (MoJ) receives more cuts than any other department: 40% in a decade.[6] Its budget, which covers prisons, probation and the legal system, will have been reduced from £9.3bn in 2010/11 to £5.6bn by 2019/20. According to the National Audit Office, reoffending costs £13 billion per year.[7] This is more than double the MoJ's entire budget, an absurd reality.

Of those children who grow up in care, a quarter will find themselves behind bars.[8] As it stands, there are more young people in the foster care system than ever before. Unless reform takes place, these worrying figures present a ticking time bomb.
Trauma in the form of child abuse, neglect, and separation from parents consistently appear to be the connecting factors for multifaceted expressions of violence. Experiencing violence and later acting violently are intrinsically linked. Trauma can lead to emotional dysregulation and lack of self-care while chronic, prolonged exposure to violence may evolve into a dysfunctional routine perpetrated in both family and community spheres.[9]

Mental health is now of current interest in society and the necessity for mindfulness and appropriate treatment is being given more recognition. The same must happen for prisoners. In Norway, the principle of normality is applied when considering sentencing: punishment is the restriction of liberty; no further rights are taken.[10] Moreover, no one serves their sentence under stricter circumstances than are necessary for the security of the community.[11] Norway has one of the lowest recidivism rates in the world at 20%, whereas in England and Wales 46% of all prisoners re-offend within a year of release.[12] Amidst a climate where the number of prisoners is steadily rising, these figures demand the need to rehabilitate people humanely.

There are frequent suicides in prison and in 2016 40,000 inmates out of 80,000 self-harmed. The most unfortunate of inmates spend more than 23 hours per day in a solitary cell, which has a compounding effect on their mental health.[13] Transfer between prisons is chaotic, and often medical records containing prisoners' vulnerabilities are not acquired by a new prison in time. There is no excuse for such lax professionalism and unnecessary bureaucracy. Additionally, there is no transition period between juvenile and adult facilities at 18, which can be jarring for an inmate's mental health.

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[5] Michael Buchanan, 'Liverpool jail: The worst conditions ever seen, says report' https://www.bbc.co.uk/news/uk-42310501

[6] Alan Travis, 'Public services face real-terms spending cuts of up to 40% in decade to 2020' https://www.theguardian.com/uk-news/2017/nov/22/public-services-face-real-terms-spending-cuts-of-up-to-40-in-decade-to-2020

[7] National Audit Office, 'A Short Guide to the Ministry of Justice' https://www.nao.org.uk/wp-content/uploads/2017/10/A-Short-Guide-to-the-Ministry-of-Justice.pdf

[8] (n 3, p47)

[9] Louis Cozolino 'The Neuroscience of Psychotherapy: Healing the Social Brain' (*Norton Series on Interpersonal Neurobiology*, Third Edition, 2017)

[10] Erwin James, 'The Norwegian prison where inmates are treated like people' https://www.theguardian.com/society/2013/feb/25/norwegian-prison-inmates-treated-like-people

[11] Kriminalomsorgen (2015). *Directorate of Norweigan Correctional Services* (information in English). Retrieved from http://www.kriminalomsorgen.no/information-in-english.265199.no.html

[12] https://www.gov.uk/government/news/prime-minister-outlines-plan-for-reform-of-prisons

13 (n3, p48)

Strict community sentences are an alternative to short sentences of incarceration that should be used increasingly. Certainly, sentences under 3 months can be counterproductive and disproportionately affect individuals and families living in poverty. A person can lose their home, job, develop drug addictions and upon release require state assistance. In many instances, 'people leave prison more dangerous than when they first entered having learnt criminal tricks of the trade in our colleges of crime'.[14] Last year 1 in 4 women were sentenced to 30 days or less. Further, 84% of women are incarcerated for non-violent offences. Incarceration should be reserved for violent, serious and persistent offenders.

Editor, until the public is willing to support the idea of prisons as an opportunity for rehabilitation rather than simply punishment, incarceration rates will continue to rise. United Nations standards and norms have been developed[15] and yet prison reform programmes adhering to these are failing to develop. A sentence of imprisonment constitutes only a deprivation of the basic right to liberty – it does not entail the restriction of other human rights, with the exception of those which are naturally limited by being in prison. Prison reform is necessary to ensure that this principle is respected. Prisoners' human rights must be protected and their prospects for social reintegration increased in compliance with relevant international standards and norms.

Yours faithfully,

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[14] Christopher Hope, 'Prison doesn't achieve anything, says Ken Clarke' https://www.telegraph.co.uk/news/uknews/law-and-order/8768492/Prison-doesnt-achieve-anything-says-Ken-Clarke.html

[15] https://www.unodc.org/unodc/en/justice-and-prison-reform/compendium.html

Afterword

Written by the Editorial Board

The creation of the City Law Review has been a wonderful adventure, which we could not have completed without a shared spirit of creativity, discipline and responsibility. In adopting its new form, the journal has aimed to provide its readers with the legal research of the highest quality and with original analysis of changes, threats and improvements within the legal sector.

The inaugural volume of the City Law Review has achieved these aims thanks to the brilliance and industry of the writers that have made their work available for publication. It has been our pleasure to work closely with writers throughout the year, and we believe that this cooperation is crucial to the quality of the final product.

Furthermore, the combined intellect, ambition and diverse experiences of the team have helped us overcome unexpected challenges and contributed to the remarkable improvements made over the course of the year. This unique experience has forged valuable and long-lasting relationships.

We would like to offer our sincere thanks to the City Law School, and especially to the Dean of the Law School, for the significant time and effort they have employed to make this year's publication and launch event possible.

Most of all, we would like to thank our Editor-in-Chief, Shabana ElShazly. Her work towards this project has been nothing short of amazing. Her complete dedication, her unfailing professionalism, her infectious positivity and her belief that the journal could and should reach great heights have been instrumental not only in galvanising us as a team but also in convincing other supporters that they should take pride in associating themselves with the City Law Review. The quality of this year's journal is a testament to her ability. She has been an inspiration to us, and we are grateful to have had the opportunity to work with her and for her exceptional service.

We hope you have enjoyed reading the City Law Review and that you will return to its pages when you wish for your curiosity to be stimulated and satisfied once more.

Yours faithfully,

The Editorial Board of the City Law Review
Names & Signatures:

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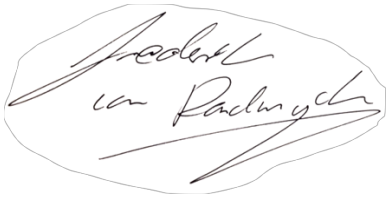
Samuel Groom

Frederik van Randwyck



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