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This year, we looked at ways in which we could further establish the highly regarded reputation of the CLR and we are delighted that all submissions are available on City, University of London's Online Research Database (CRO) as well as the British Library. This allows for the online publication of pieces onto a research database to be used, and referenced, by students for years to come. We hope that this will allow future Volumes to continue growing, reputation and reach.

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Editor's Note

Dear Readers,

It is my greatest pleasure to welcome you to the latest volume of the City Law Review.

We are proud to present a collection of articles that reflect the best of legal scholarship of the City Law School. Our journal aims to provide a platform for the exchange of ideas, insights and knowledge across a broad range of legal topics.

We are committed to promoting the highest quality of legal writing and to the advancement of conversation within the legal field. It is with the strict implementation of our double-blind peer review that we have been able to ensure complete impartiality in the editorial process.

Our authors have approached their research with academic rigour; drawing on a wide range of disciplines to offer fresh perspectives and valuable commentary. Each article reflects the passion and expertise of its author, and we are confident that readers will find them to be informative, engaging, and thought-provoking.

Our aim is to be a valuable resource for legal scholars, practitioners, and students alike. We are grateful for your continued support, and we look forward to your feedback and engagement as we continue to explore the marvels of legal academia.

Finally, I would like to extend my sincerest gratitude to our Team of Editors, who have dedicated countless hours to the development, production and perfection of this Volume. It has been a privilege to work amongst such an exceptional Team, whose devotion and professionalism has been awe-inspiring.

Sincerest Regards,

Monica Kiosseva
Editor in Chief
City Law Review

Foreword

It is with great pleasure that I have been invited to write a foreword to the latest volume of the City Law Review.

I have been fortunate to have served as the faculty member with the responsibility for liaising with the Editorial Teams since the Review's first volume in 2019. Over the ensuing years, I have been struck by the dedication and professionalism of the students who have taken up the challenge of producing a law journal of the highest quality. This current volume carries on this tradition.

The Review provides a wonderful opportunity 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, the seemingly never-ending work of editing according to the highest standards of legal writing, and overseeing the quest for sponsorship, publication, marketing, and distribution processes. It has been a pleasure to work with this year's Editor in Chief, Monica Kiosseva. I congratulate her and her team for producing a work that continues and enhances the Review's growing academic reputation.

As in the past, this year's contributions provide a cross section from the Law School's academic and professional courses and reflects the diversity and depth of out student's legal research interests.

I offer my congratulations to everyone involved for their enthusiasm and hard work. The editors, contributors and the Law School in whose name the Review is published can be very proud of this latest issue of the City Law Review.

Dr David M. Seymour
Senior Lecturer
The Overseeing Professor of the City Law Review

Revisiting Common Law Constitutionalism in Light of Brexit: Should the Supreme Court Retain a Strike-Down Power?

Joshua Leonard Goodman

Introduction

Traditional jurisprudence holds that domestic courts have no power to challenge Parliament's sovereignty. This was challenged by *Factortame (No. 2)*,[1] where for the first time, an act of Parliament was set aside by the House of Lords. This article will argue that, whilst *Factortame* is no longer applicable, the judgement of the subsequent case of *Thoburn* remains valid precedent. Although it may appear that the *Thoburn*[2] dictum rests on the validity of *Factortame*, it is submitted that the two cases form part of a more all-encompassing grounds for a strike-down power. *Thoburn* has not been overruled – in fact quite the contrary. The Supreme Court can, in the future, give itself such power. It is submitted that the Supreme Court may have left this issue open intentionally, as the withdrawal from the EU has removed a strong mechanism for holding Parliament accountable. The possibility of a strike-down power can serve as a strong deterrent in the event of an extreme legislative agenda of a strong Parliamentary majority. Further, a strike-down power, if implemented at all, must be defined with care to avoid the politicisation of the independent judiciary or undermining Britain's democratic principles. Thus, the *Thoburn* criteria need amendment. This article evaluates previous debate on the subject, in light of contemporary post-Brexit issues. In doing so, it seeks to provide a framework for use of these powers, under which a balance can be struck between the competing interests of the legislature and the judiciary.

The traditional approach to the British Constitution

The traditional understanding of the British constitution as it existed prior to the 1970's can be most aptly described as a political one.[3] A political constitution rejects natural rights in favour of recognising the subjective and ever-changing nature of political questions. At one time, many people may hold reasonable but mutually exclusive convictions. Similarly, over time, convictions once considered to be firmly entrenched in the minds of the majority may change. Political constitutionalism, at its core, holds that such political questions are best answered by reference to the will of the majority. This is to be expressed through the transparent action of

[1] *R v Secretary of State for Transport, Ex p. Factortame Ltd (No. 2)* [1991] 1 AC 603.
[2] *Thoburn v Sunderland City Council* [2002] EWHC 195.
[3] Robert Taylor, 'The contested constitution: an analysis of the competing models of British constitutionalism' [2018] PL 500, 512.

democratically elected politicians rather than dictated by the undemocratically appointed judiciary.[4]

This is in contrast to the legal constitutionalism found in most countries. A legal constitution is a codified set of rules that enjoy a special, higher status than all other 'ordinary' law.[5] This special, or entrenched, status results in any subsequent ordinary legislation passed by parliament being invalid. It follows that there must be a process by which ordinary legislation can be reviewed to determine whether it conflicts with the constitution. This is a question of legal interpretation and therefore such a review is undertaken by the courts. If the courts determine that the ordinary legislation is in conflict with the constitution, they will hand down a judgement rendering the ordinary legislation invalid. This is known as a strike-down power and is a necessary feature of legal constitutionalism.[6]

In a system with a political constitution, this justification for a strike-down power falls away. If questions of a subjective political nature are to be reserved for politicians, then the courts have no right to interfere. The constitution must be contestable through the democratic process to enable clearing away outdated dogma of past generations that no longer represents the political beliefs of the present-day majority. This is the foundation for Dicey's statement that Parliament has "the right to make or unmake any law whatever".[7] This proposition, known as Parliamentary sovereignty, found favour in the courts. For example, in *Ellen Street Estates Ltd v Minister of Health*,[8] it was stated that "[t]he Legislature cannot, according to our constitution, bind itself as to the form of subsequent legislation". Further, in *British Railways Board v Pickin*,[9] it was stated that "the function of the court is to construe and apply the enactments of Parliament", and that "the courts in this country have no power to declare enacted law to be invalid".[10]

This last point forms the foundation of the doctrine of implied repeal. If Parliament cannot bind its future self, then it can repeal any law by the passing of ordinary legislation. The obvious means of repeal is by using express language,[11] where the older act is identified and it is stated that Parliament's intention is for this act to no longer have legal force. However, where Parliament passes legislation and does not expressly repeal a previous but conflicting act, the

[4] JAG Griffith, 'The Political Constitution' (1979) 42 MLR 1, 42.
[5] Thomas Paine, *Rights of Man: Being an Answer to Mr. Burke's Attack on the French Revolution* (2nd ed, JS Jordan, London, 1791).
[6] Taylor (n 1), 503.
[7] Albert Dicey, *Introduction to the Study of the Law of the Constitution* (8th ed, Macmillan, 1915), 3.
[8] [1934] 1 KB 590, 597.
[9] [1974] AC 765, 787.
[10] ibid, 798.
[11] See European Union (Withdrawal) Act 2018, section 1.

latter act will prevail. The old legislation is repealed,[12] in so far as it conflicts with the contemporary act.[13] The doctrine of implied repeal is a direct consequence of Parliamentary sovereignty and the political constitution.

The European Union

The traditional understanding of Parliamentary sovereignty underwent a radical shift with the accession of the United Kingdom to the European Union on 1 January 1973. A prospective Member State must voluntarily limit their sovereign power to enact domestic laws in the areas that the EU has competence. By adopting the treaty of Rome, a Member State consented to transfer real power to the EU and agreed that EU law would take primacy over any domestic law,[14] regardless of the domestic law's entrenched or constitutional status.[15]

Directly effective EU law provisions create immediately enforceable legal rights, and where a domestic court finds that a Member State's domestic law is incompatible with EU law, it is required to set aside the national legislation.[16] It is worth noting that the national legislation is not rendered non-existent, merely that the courts must refuse to apply it in favour of the EU law.[17] The basis for the primacy of EU law is functional. The aims of the EU would be undermined if EU law was implemented inconsistently across Member States.[18] This presented somewhat of a dilemma for the constitution of the United Kingdom. In the United Kingdom, international treaties are negotiated and ratified by the executive under prerogative powers, which cannot change domestic law without recourse to Parliament.[19] This results in the United Kingdom being a 'dualist' state, whereby once an international treaty is ratified, in order for it to have effect in domestic law, the treaty must be domesticated by the passing of an act of Parliament.

With regard to the Treaty of Rome, Parliament accordingly did so, with the passing of the European Communities Act 1972, which gave due domestic effect to all directly effective EU

[12] *The Dean and Chapter of Elys v Bliss* (1842) 49 ER 700.
[13] *Goodwin v Phillips* [1908] 7 CLR 1; approved in *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin) [43].
[14] Case 6/64 *Flaminio Costa v ENEL* [1964] ECR 585, 593.
[15] Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125.
[16] Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 629 [21], [24].
[17] Cases C–10–22/97 *Ministero delle Finanze v IN.CO.GE.'90 Srl* [1998] ECR I–6307, [21].
[18] *Costa* (n 12).
[19] *R (Miller) v Secretary of State* [2018] AC 61 [2017] UKSC 5 [168]; *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418.

law.[20] The conceptual problem that arose related to Parliamentary sovereignty. As noted above, Parliament is incapable of binding future iterations of itself. In theory, as with all other acts of Parliament, the ECA 1972 was a piece of ordinary legislation, and subject to both express and implied repeal. The EU principle of supremacy is incompatible with a traditional constitutional perspective. If, subsequent to the passing of the ECA 1972, Parliament enacted a law that conflicted with EU law, a domestic court theoretically had no power to render the new law inapplicable. The effect of the doctrine of implied repeal should result in the repeal of the ECA 1972 in so far as it conflicted with the new law, rendering EU law ineffective as mere international law without its domesticating statute.

In order to mitigate this issue as far as practicable, the courts employed a strong, purposive rule of construction.[21] Under the ECA 1972, courts were obliged to take notice of EU law in reaching their decisions.[22] Acts of Parliament that were *prima facie* in conflict with EU law were interpreted by the courts as far as possible to conform with the obligations of EU law. The courts developed the doctrine to include interpretations that departed from the "strict and literal application of the words"[23] in favour of the presumption that Parliament's intention could not have been to contradict EU law. This rule of construction did not, however, solve the conceptual problem of reconciling Parliamentary sovereignty with EU primacy. Instead, it had the placating effect of limiting the problem to such exceptional cases where the ingenuity of the interpretation of judges was exhausted. Inevitably, such a case would arise.

Factortame

Parliament passed the Merchant Shipping Act 1988, which altered the statutory regime under which British fishing vessels were registered. Such vessels had to re-register under the new regime, and in order to do so were required to be "British-owned" and managed and controlled from within the United Kingdom.[24] Several companies that owned between them ninety-five fishing vessels failed to qualify these vessels for re-registration under this provision due to the fact that the companies were Spanish owned and controlled from Spain. These companies brought an application for judicial review on the grounds that section 14 of the Merchant Shipping Act 1998 was incompatible with Articles 7, 52, 58 and 221 of the Treaty of Rome. This was duly referred to the European Court of Justice.

[20] European Communities Act 1972, section2(1).
[21] Paul Craig, 'Sovereignty of the United Kingdom Parliament after Factortame' (1991) 11 Yearbook of European Law 221, 241.
[22] ECA 1972, section 3(2).
[23] *Lister v Forth Dry Dock and Engineering Co Ltd* [1989] CMLR 194, 202-3.
[24] Merchant Shipping Act 1988, section 14(1).

Further, if the Merchant Shipping act was effective in the interim, the companies would suffer irreparable damage to their business. As a result, the companies sought interim measures to disapply the act pending the outcome of the substantive case before the European Court of Justice. This reached the House of Lords, where Lord Bridge noted the constitutional issue that granting this kind of relief would cause. It was accepted that there was a presumption that Parliament legislates in a manner compatible with EU law. Domestic law was accordingly presumed valid until declared incompatible. As the European Court of Justice had not yet determined whether the Merchant Shipping Act 1988 was in fact in contradiction with EU law, the Act was at the time valid domestic law. To grant interim measures would be for the courts to set aside a valid act of Parliament, which the House had no power to do.[25]

It is clear from Lord Bridge's judgement that his conclusion was subject to a determination that there was a principle of EU law that required a national court to provide interim measures.[26] Accordingly, the House referred the question of whether such remedies must be granted to the European Court of Justice, despite these remedies not being permitted by domestic law. The European Court of Justice cited the rule in *Simmenthal* (above) that EU law is immediately effective from its passing and that national courts must take every action in their power to set aside conflicting national legislation. This was to be done even if such legislation would only conflict with EU law temporarily, or until the Court reached a final determination on the substantive issue.[27] According to the European Court of Justice, the House of Lords was under an obligation to disapply the Merchant Shipping Act 1988.

When the case returned to the House of Lords, the interim relief was granted. Lord Bridge's judgement went into detail about the broader relationship between the EU and domestic law. He acknowledged the conflict between Parliamentary sovereignty and EU primacy and justified it on the contractarian basis that the United Kingdom had adopted the Treaty of Rome voluntarily and with knowledge of the supremacy of EU law. He concluded that it was "clear that it was the duty of a United Kingdom court, when delivering final judgment, to override any rule of national law found to be in conflict with any directly enforceable rule of Community law".[28] Lord Bridge's dictum is of a general character and is capable of applicability equally to interim measures as it would be to any conflicting statute.

The effect of this decision cannot be understated. By rendering inapplicable the Merchant Shipping Act 1988, the House of Lords had not only refused to apply an act of Parliament but had, by implication, protected the ECA 1972 from the doctrine of implied repeal. Under the

[25] *R v Secretary of State for Transport (Ex p. Factortame Ltd) (No. 1)* [1990] 2 AC 85, 142-3.
[26] ibid, 143.
[27] Case C-213/89 *R v Secretary of State for Transport, ex parte Factortame Ltd* [1990] ECR I-02433 [20].
[28] *R v Secretary of State for Transport, Ex p. Factortame Ltd (No. 2)* [1991] 1 AC 603, 658-9.

Factortame decision, EU law had an entrenched status, and the courts could exercise a strike-down power against any legislation contrary to it, save for in the (at that time) unlikely event that Parliament were to expressly repeal the ECA 1972. This interpretation of *Factortame* was later approved by the Supreme Court.[29]

Undoubtedly, legal constitutionalists rejoiced at this decision. The key criticism of the United Kingdom's political constitution, aside from its convolution and opaqueness,[30] is that a parliamentary majority can exercise largely unchecked legislative powers, running the risk of devolving into a tyrannical elective dictatorship.[31] Safeguards on the legislative agenda of the ruling party are weak, with the powers of the House of Lords reduced to a mere power of delay whilst the Crown has not denied a bill royal assent in centuries. Lord Hailsham noted that "the sovereignty of Parliament has increasingly become, in practice, the sovereignty of the Commons, and the sovereignty of the Commons has increasingly become the sovereignty of the government, which, in addition to its influence in Parliament, controls the party whips, the party machine and the civil service".[32] Without entrenched law, a strong majority can effect whimsical yet fundamental constitutional change, with the most effective form of accountability only exercisable by the electorate years later at the next general election. For the legal constitutionalist, the reality of Parliament being able to make or unmake any law as it sees fit is a terrifying one.

The power of the courts to disapply legislation under *Factortame* provided a strong counterweight to Parliamentary sovereignty. In matters of exclusive or shared competence, notably the increasingly central position that human rights has taken in the European Union, Parliament no longer enjoyed unchecked sovereignty. Legislation was passed in the knowledge that it could either be moderated by the purposive rule of construction or, failing this, struck down.

Brexit and *Miller*

It would be difficult to be unaware that, following a referendum in 2016, the United Kingdom chose to exit the European Union. As a part of the process, Parliament passed the European Union (Withdrawal) Act 2018. Under Section 1, the ECA 1972 was expressly repealed in its entirety. Under sections 2(1) and 3(1), any EU-derived domestic law or directly effective EU law in effect at the time of withdrawal is retained as a part of domestic law.

[29] *Miller* (n 17) [66].
[30] Robert Blackburn, 'Enacting a Written Constitution for the United Kingdom' (2015) 36(1) Stat LR 1, 3.
[31] Taylor (n 1), 504.
[32] Lord Hailsham, *Elective Dictatorship* (BBC, Richard Dimbleby Lecture 1976).

The process for leaving the European Union required notification under Article 50 TEU.[33] The government sought to provide such notice under the prerogative power under which international treaties are negotiated and ratified. This was taken on judicial review on the grounds that exiting the European Union would have significant implications on the domestic constitution, and so required an Act of Parliament. The case was *R (Miller) v Secretary of State for Exiting the European Union*,[34] and the Supreme Court determined that an Act of Parliament was indeed required. The Supreme Court identified the following constitutional implications. The status of any EU law retained by the United Kingdom under what was to become the European Union (Withdrawal) Act 2018 is downgraded to that of ordinary law. Retained EU law therefore is no longer protected from the doctrine of implied repeal,[35] and the *Factortame* strike-down power is no longer available. The effect of this is to disempower the courts by transferring that power back to Parliament. The Supreme Court restated Parliamentary sovereignty as "fundamental to the United Kingdom's constitutional arrangements".[36]

Suddenly, the legal constitutionalist's concerns of an elective dictatorship resurface. The removal of the strike-down power removed a strong mechanism for holding Parliament accountable. This was compounded by the 2019 general election, where the Conservative Party received a landslide majority of 80 seats.[37] The Conservatives promptly began asserting this majority and introduced several controversial bills, such as the Northern Ireland Protocol (NIP) Bill HL Bill 52, the Internal Market Bill (now the United Kingdom Internal Market Act 2020 (UKIMA)), and the Police, Crime, Sentencing and Courts Bill (now the Police, Crime, Sentencing and Courts Act 2022 (PCSCA)).

The PCSCA included increased powers for police to restrict protests and a new type of public spaces protection order, both of which have implications for the right to peaceful assembly and protest. The NIP Bill and UKIMA sparked controversy due to their unilateral derogation from the Northern Ireland Protocol, *prima facie* in breach of international law. The differential treatment of Northern Ireland jeopardises the Good Friday Agreement and, by extension, the tentative peace that the region has enjoyed since 1998. An in-depth analysis of these specific issues is beyond the scope of this article. However, these examples raise two questions that pose great difficulty for orthodox political constitutionalism. What happens when Parliament acts in its own interest to the detriment of the human rights of the people, and what happens

[33] Consolidated version of the Treaty on European Union [2016] OJ C202/1, Article 50.
[34] *Miller* (n 17).
[35] ibid, [80].
[36] ibid, [67].
[37] BBC News, 'Election results 2019: Boris Johnson hails 'new dawn' after historic victory' (London, 13 December 2019) < https://www.bbc.co.uk/news/election-2019-50776671> accessed 05 February 2023.

when the will of the majority leads to marginalisation of the minority? The current answer would appear to be that there is no determinative recourse. Parliament is once again sovereign.

Thoburn and common law constitutionalism

A contrarian argument would be to call for the adoption of a legal constitution in the United Kingdom. Debate on the benefits and drawbacks of a political constitution over a legal one has continued for years without a conclusive answer. I do not hold such grand designs as to be able to settle this. Instead, my aim is much more modest. Although the political will for a revolution has been steadily growing, as will have become apparent from the above, the current political constitution is, for the time being at least, a reality. In light of this, I submit that the most convenient and immediately applicable means of regaining some of the parliamentary accountability lost with Brexit is for the Supreme Court to re-bestow upon itself a strike-down power. I further submit that this is entirely possible given the present state of the law.

In early 2000, Mr Thoburn, a greengrocer, was warned by an inspector that the weighing machines he employed did not comply with current legislation as they were calibrated in pounds and ounces. He was given a twenty-eight-day notice to correct his error, which he duly ignored. Mr Thoburn was subsequently convicted of selling produce using non-metric measures contrary to the Weights and Measures Act 1985 as amended by the Units of Measurement Regulations 1994. The impetus for the Units of Measurement Regulations 1994 was directly effective EU law, which sought to impose the use of metric units of measurement across all Member States.

Mr Thoburn, along with three others convicted of similar offences, sought to appeal on the grounds that the Weights and Measures Act 1985, which originally allowed the use of imperial measurements, had impliedly repealed section 2(2) of the ECA 1972. Section 2(2) of the ECA 1972 was the provision that conferred the power to pass the Units of Measurement Regulations 1994 as delegated legislation. If section 2(2) had been repealed, then the Units of Measurement Regulations 1994 were passed *ultra vires* and incapable of amending the Weights and Measures Act 1985, resulting in the provision for imperial units remaining valid.

In delivering the judgement of the court, the late Lord Justice Laws identified an issue with the reasoning in *Factortame*.[38] The contractarian justification for the entrenchment of the ECA 1972 is not a sufficient explanation. EU law provides for entrenchment of its supremacy in its own legal order. This is irrelevant to the domestic constitution. The ECA 1972 was enacted pursuant to the powers available to Parliament, and it is outside the power of Parliament to bind

[38] *Thoburn* (n 11) [58].

its successors. The basis for entrenchment of the ECA 1972 cannot therefore be Parliament's intention. Parliament's intention was merely a coincidence.

In practice, the doctrine of implied repeal was not enforced against the ECA 1972, and the Merchant Shipping Act 1988 was set aside instead. There is no other available justification than that the courts decreed it so. It is submitted that by the courts declaring the Merchant Shipping Act 1988 as disapplied, and this having practical effect, the constitution of the United Kingdom was fundamentally altered. The reality is that the courts had the power to bestow an entrenched status on the ECA 1972. The purely international obligation of the United Kingdom to respect EU law was merely the justification for the courts to exercise their power, not the source of it.

Lord Justice Laws justified the court's power by reference to the common law. It is the common law from which the doctrine of implied repeal is born. Further, the courts can amend the common law. It follows that the courts can amend the doctrine of implied repeal.[39] Statutes to which the doctrine of implied repeal should not apply are 'constitutional' statutes. Such a statute is "one which (a) conditions the legal relationship between citizen and State in some general, overarching manner, or (b) enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights".[40] Applying this understanding, whilst the strike-down power afforded in *Factortame* was limited to legislation arising out of EU law, on the correct understanding of the doctrine, other statutes not derived from EU law can also be afforded protection. This doctrine will be referred to as common law constitutionalism.

Lord Justice Laws' view was approved by the Supreme Court in *Miller*.[41] Importantly, when discussing the effects of the withdrawal from the European Union, the judgement only refers to EU law domesticated under the ECA 1972 as being downgraded in status to ordinary law.[42] This fits with the model. The ECA 1972 was expressly repealed by the European Union (Withdrawal) Act 2018, such express repeal not being capable of protection by common law constitutionalism. As a result of the repeal, EU law no longer has the protection of a constitutional statute and is reduced to ordinary law. This does not preclude the courts from continuing to afford protection to any constitutional statutes that have not been expressly repealed. It is therefore submitted that although the *Factortame* strike-down power no longer exists, there are other constitutional statutes that can be given an entrenched status. If these constitutional statutes are protected against implied repeal, then subsequently enacted

[39] ibid, [60].
[40] ibid, [62].
[41] *Miller* (n 17) [67].
[42] ibid, [80].

inconsistent statutes can be 'disapplied' by the Supreme Court on the same logic. Accordingly, the Supreme Court retains the ability to strike-down legislation after Brexit.

Common law constitutionalism is a step away from political constitutionalism towards a more legal model. It is a half-way house between the two seeking to achieve the best of both. It preserves the value in the existing system with amendments to make it more palatable in the modern political climate. The objections to legal constitutionalism apply similarly to common law constitutionalism. That is that entrenchment is undesirable as rights are non-natural, and the judiciary is an unsuitable policy-maker as it is unelected and non-representational. It is submitted that the case for greater parliamentary accountability has been satisfactorily stated above. This necessitates a degree of entrenchment. The politicisation of the judiciary is a real concern, as judicial appointments made on a political basis instead of merit risks the independence and quality of judges. It must be recalled that the use of the strike-down power is a last resort to be used only in very exceptional cases, and so the number of political questions determined by the judiciary should remain limited. For this reason, Lord Justice Laws' formulation of the test for a constitutional statute requires refinement as it is too broad. The Supreme Court should clarify the law at the earliest opportunity. It is submitted that the following criteria should be applied in determining whether to exercise the strike-down power:

1. The parties must have exhausted their right of appeal.

This requirement ensures that all parties have had a fair opportunity to present their case and that all lower court decisions have been reviewed. This will also reduce the number of applications for the exercise of the power and assist the court in regulating the quality of the claims, as the appellant must be first granted leave to appeal. It will also accord respect to Parliament's retained sovereignty. Once a decision is handed down disapplying ordinary legislation, then subordinate courts can rely on the precedent set.

2. The two statutes in question must actually conflict.

This is a fundamental requirement for the exercise of the strike-down power, as the court can only act in cases where there is a genuine conflict between two statutes. A strong purposive rule of construction is applied. The rule applied under EU law can be transplanted here.[43] The court will take into account all the facts and circumstances of the case and the policy reasons underpinning the legislation with a view to finding an interpretation of the wordings that is mutually inclusive. The court will presume that Parliament does not seek to amend the constitution except by express means. The onus therefore lies on the claimant to rebut this

[43] *Lister* (n 21) 202-3.

presumption. This will again serve to reduce the frequency upon which the strike-down power will be used.

3. The impact of the older statute on the newer is not unsubstantial.

Further to the second criterion, regard must be had to the extent to which the ordinary statute conflicts with the constitutional one. If the conflict is unsubstantial, or trivial, then the strike-down power should not be used. This is a restatement of the *de minimis* principle that the law does not concern itself of trifling matters and is an objective test to be applied by the court.

4. The older of the two statutes must be of a constitutional character.

This requirement recognises the special status of constitutional statutes and the importance of preserving their provisions. By prioritising the constitutional statute over the ordinary statute, the court is upholding the fundamental principles of the constitution. The definition of 'constitutional character' should not be interpreted too narrowly, as it may exclude legislation deserving of protection. It is submitted that Lord Laws' definition is a good starting point, as it would include devolution legislation, the Human Rights Act 1998 and electoral legislation as examples.

5. There must be a justification for enforcing the constitutional status of the older statute over the ordinary statute.

This criterion acknowledges that the court should not arbitrarily set aside ordinary legislation, but rather that there must be a compelling reason to do so. This could include protecting fundamental rights, preserving the constitutional order, or ensuring the effective operation of government.

At this stage, it is not necessary for the court to undertake a balancing exercise. The purpose of this criterion is for the claimant to demonstrate that there is a compelling justification for the strike-down power to be considered. Over time, the doctrine can be developed gradually and by analogy to encompass categories of cases where consideration of the strike-down power would be suitable.

It was noted that in *Factortame*, the justification for exercising the strike-down power in favour of the ECA 1972 was contractarian. The court upheld the domestic legislation in order to give effect to the United Kingdom's international obligations voluntarily entered into under the Treaty of Rome. The contractarian justification would apply to Parliament's legislative agenda

with regard to Northern Ireland, allowing the strike-down power to be used to protect the Good Friday Agreement through entrenchment of the Northern Ireland Act 1998.

6. In the judgement of the court, it is in the public interest for the Court exercise the strike-down power.

If criteria one through five are satisfied, then the court may, at their discretion, exercise the strike-down power. The court has a wide discretion to exercise the power taking into account the wider potential consequences of disapplying ordinary legislation. At this stage, a balancing exercise must be undertaken. The court will take into account the interests of the claimant in the disapplication of the ordinary legislation compared to the purpose for which Parliament enacted it and the potential wider effects that either restraint or exercise may have with regard to democratic legitimacy, human rights or the rule of law.

For example, if the court were to consider the facts of *Factortame* under this model, the court would consider the interests of the Spanish fishermen, the effects on their rights and the losses they stand to incur consequent to the legislation. The court would then contrast this with Parliament's intention of protecting domestic fishermen, and finally consider any wider effects of the legislation. It is submitted that the effects of the legislation were to place the United Kingdom in breach of its international obligations with regard to EU law, and disapplication of the legislation would remedy this. This would provide sufficient reason for the court to exercise the power.

7. The ordinary statute is set aside only in so far as it conflicts with the constitutional statute.

This limits the impact of the strike-down power in order to preserve as much of the ordinary legislation as possible. This results in the least intrusive exercise of the power, affording the greatest respect to Parliamentary sovereignty possible. It also limits the potential for the court's decision to have unforeseen consequences.

Conclusion

Whilst the Supreme Court endorsed *Thoburn*, it declined to take the precedent to its logical conclusion as I have attempted to here. Instead, the question was left unresolved. It is possible that the Court is reluctant to take such a drastic step unless absolutely necessary. Unfortunately, the effects of the Northern Ireland Protocol combined with the unilateral actions of Parliament have threatened the delicate balance struck by the Good Friday Agreement. Judicial review has

already been brought by unionist representatives against the Protocol.[44] For the moment, the issue has been averted with a new deal being reached with the European Union in place of the Protocol and the resulting suspension of the NIP Bill in the House of Lords. Whether this new deal is successful remains to be seen.

It is entirely possible that the Supreme Court intentionally left the door of a strike-down power open but neglected to step through. There is mounting political will for the enactment of a legal constitution – a prospect which will likely sit uncomfortably with the currently supreme legislature. The knowledge that the Supreme Court could, if it so wished, unilaterally delineate the boundaries of Parliamentary sovereignty will act as a quiet but strong reminder not to get too drunk on their newly restored sovereign power. Despite this, further controversial bills have been recently introduced, such as the proposed anti-strike laws in response to nationwide strike action that has been slated as breaching human rights obligations.[45] Depending on how far the government believes it can push the envelope in light of its sovereignty, the Supreme Court may have little choice but to step in in order to uphold the rule of law. As Lord Woolf argued, "ultimately, there are even limits to the supremacy of Parliament which it is the courts' inalienable responsibility to identify and uphold".[46]

[44] *Allister v Secretary of State for Northern Ireland* [2021] NIQB 64.
[45] Emine Sinmaz, 'Anti-strike bill 'fails to meet UK's human rights obligations', MPs and peers say' (London, 06 March 2023) <https://www.theguardian.com/uk-news/2023/mar/06/anti-strike-bill-fails-to-meet-uks-human-rights-obligations-mps-and-peers-say> accessed 06 March 2023.
[46] Lord Woolf, 'Droit Public – English Style' [1995] PL 57, 69.

Independent Inquiry into Sexual Abuse (IICSA) Recommendation 13: Socially Utilitarian or Practically Unattainable?

Prune Recoules

Introduction

Stopping the sexual exploitation of children has been a primordial goal for all Council of Europe members ever since the 2007 Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse (also known as the 'Lanzarote' Convention). [47] According to Article 12, paragraph 2 of said Convention, "[E]ach Party shall take the necessary legislative or other measures to encourage any person who knows about or suspects, in good faith, sexual exploitation or sexual abuse of children to report these facts to the competent services".[48] The Convention leaves the implementation of this legislation open to interpretation, and it is not clear whether Article 12 creates a positive obligation on Member States to pro-actively make people report suspected child sexual abuse. Indeed, to "encourage" someone to act is not easy to define in terms of justiciability.

The recent Independent Inquiry into Sexual Abuse (IICSA) Report's recommendation to create a new criminal offence for people working in positions of trust failing to report allegations of child sexual abuse fits neatly within Article 12 of the Lanzarote Convention: creating a new offence would go further than just encouraging people to report this abuse, it would actively condemn them for failure to do so. [49] This is in line with modern government policy and public opinion, which suggest that the criminalisation of child sexual abuse should be pro-actively enforced.[50] However, there are some practical problems with such a policy, which this essay will deal with in turn. Firstly, the position of child sexual abuses cases will be contextualised within the dichotomy between Andrew Ashworth's social responsibility theory and Glanville Williams' conventional view on omission. Secondly, duty of care as a creature of the common law rather than a statutory provision will be explored. [51] Finally, this essay will assess the

[47] Lanzarote Convention (2007) Council of Europe, CETS No.201.
[48] Lanzarote Convention, Article 12(2).
[49] Independent Inquiry Child Sexual Abuse, *The Report of the Independent Inquiry into Child Sexual Abuse* (HC 2022-720) page 16 <https://www.iicsa.org.uk/key-documents/31216/view/report-independent-inquiry-into-child-sexual -abuse-october-2022_0.pdf> accessed 24 November 2022.
[50] J Pratt, 'Child sexual abuse: Purity and danger in an age of anxiety' (2005) 43 *Crime, Law & Social Change*, 266–267.
[51] Statute has sometimes solidified common law concepts of the duty of care: see, for example, the Health and Safety at Work Act 1974.

issues with establishing coincidence between the *actus reus* and *mens rea*. Putting these ideas together, it is proposed that, while the potential new offence might be socially moral and utilitarian, it is not yet viable in practice. Until these problems are solved, there can be no truly effective social utilitarianism.

The seminal academic debate

Andrew Ashworth famously argued for 'social responsibility', claiming that "the general principle in criminal law should be that omissions liability should be possible if a duty is established, because in those circumstances there is not fundamental distinction between failing to perform an act with foreseen bad consequences and performing the act with identical foreseen bad consequences".[52] Despite this, Ashworth conceded that "those who advocate 'social responsibility' bear the heavy burden of formulating defensible and workable criteria for the imposition of duties to act". [53] Glanville Williams goes further in his criticism of 'social responsibility', accusing Ashworth of "translating law into morals rather than morals into law".[54] These contrasting views have been characterised as the "seminal academic debate" concerning omission.[55] The IICSA report somewhat blurs the line between morals and law. Ashworth's view that "if a certain form of harmful wrongdoing is judged serious enough to criminalise, it follows that the state should assume responsibility for taking steps to protect people from it"[56] was clearly applied in Recommendation 13:

The Inquiry recommends that the UK government and Welsh Government introduce legislation which places certain individuals – 'mandated reporters' – under a statutory duty to report child sexual abuse where they:

- *Receive a disclosure of child sexual abuse from a child or perpetrator; or*
- *Witness a child being sexually abused; or*
- *Observe recognised indicators of child sexual abuse.*[57]

According to Ashworth, "it may be fair to place citizens under obligations to render assistance to other individuals in certain situations", and like states can be constrained by positive obligations arising from international law, people can be constrained by positive obligations

[52] A Ashworth, 'The Scope of Criminal Liability for Omissions' (1989) 105 Law Quarterly Review 424, 458.
[53] Ashworth, 'The Scope of Criminal Liability for Omissions', 431.
[54] G Williams, 'Criminal omissions – the conventional view' (1991) Law Quarterly Review 107, 88.
[55] A Reed and M Sarahne, 'Anglo-American Perspectives on Omissions Liability: Theoretical and Substantive Contours of Criminalisation and Optimal Reform Pathways' (2021) Journal of International and Comparative Law 8, 205.
[56] Ashworth and Zedner, 'Prevention and Criminalization: Justification and Limits' (2012) New Criminal Law Review, 543.
[57] IICSA Report, 234.

arising from domestic law.[58] Williams, on the other hand, fundamentally disagrees with social responsibility, defending the "orthodox" perspective in favour of individualism: should criminal law characterise a doctor killing a patient differently to letting a patient die?[59] From a practical standpoint, moreover, it is a lot easier for courts to punish everyone for a crime of commission, such as killing or sexual assault, than to punish everyone who fails to prevent those crimes.

Indeed, the general proposition in England and Wales has typically been that culpability should be attached to wilful wrongdoing rather than idleness, negligence, or indolence.[60] Further, from a Diceyan perspective, it is important for the law to be clear and foreseeable so that the rule of law may be properly upheld.[61] Despite all its social and moral merits, the IICSA report is not clear enough to meet the necessary foreseeability threshold. Indeed, the practical problems associated with creating the new offence, which will be explored subsequently, give more support to Williams' view as the formulation of "clear and workable criteria for the imposition of duties" is not adequate.

Duty of care

Recommendation 13 only established a positive obligation to report on 'mandated reporters', not the general public: these reporters, then, owe a specific duty of care to children.

The following persons should be designated 'mandated reporters':

- *Any person working in regulated activity in relation to children (under the Safeguarding and Vulnerable Groups Act 2006, as amended);*
- *Any person working in a position of trust (as defined by the Sexual Offences Act 2003, as amended); and*
- *Police officers.*[62]

Negligence can be described as "conduct that falls below the standard to be expected of a reasonable person in the relevant circumstances".[63] It involves a failure to comply with an objective standard of behaviour set by law. Ormerod and Laird have argued that "the courts

[58] A Ashworth, *Positive Obligations in Criminal Law* (Hart Publishing 2013), 563.
[59] G Williams, 'Criminal omission', 86-87.
[60] G Williams, 'Criminal omissions', 87-88, c.f. Reed and Sarahne, 'Anglo-American Perspectives on Omissions Liability', 229.
[61] G Williams, 'Criminal omissions', 92-95.
[62] IICSA Report, 234.
[63] D Ormerod and K Laird, *Smith, Hogan and Ormerod's Criminal Law* (16th edn, Oxford University Press 2021), 136.

have […] at least made abundantly clear that negligence is not a form of 'knowledge'".[64] In their view, there is a distinction between wilful blindness and constructive knowledge.[65] Historically, the duty of care has evolved through the common law, not statutory provisions. There are, of course, some exceptions to this general trend, with the state growing increasingly interventionist in the twenty-first century.[66] However, such modern 'regulatory' offences have not affected the general common law attitude to the duty of care.[67] Indeed, as the law currently stands, incremental developments have led to what Reed and Sarahne call a "deleterious outcome" wherein individuals are left to "speculate over the criminality (or otherwise) of their possible responsibility obligations, without a proper ability to evaluate whether they might be straddling the criminality boundary threshold or not".[68]

In the criminal context, the line between commission and omission has been at the heart of findings of guilt: as Alan Norrie posited, "a criminal act already designates a criminal actor, while a failure to act fails to differentiate immediately the one the state wishes to criminalise from the many it does not".[69] To establish that a crime has been committed by omission, it is necessary to show that there was a duty of care, that it was breached, and that there is a causal connection between the breach of duty and the harm suffered; in this way, the law draws a line by means of what Norrie called "narrow individualism".[70]

For example, the court held in *R v Stone and Dobinson* that both defendants had a duty of care towards the victim through familial obligations and cohabitation, meaning they were liable to act to keep her healthy.[71] Here, gross negligence manslaughter was based on an Ashworthian 'good Samaritan' conceptualisation; this represented a "radical point of departure between conventional and social responsibility perspectives on omission" according to Reed and Sarahne.[72] In *Stone and Dobinson*, GR Sullivan claims, "there was not a vestige of agency in

[64] Ormerod and Laird, *Smith, Hogan and Ormerod's Criminal Law*, 138.
[65] *Taylor's Central Garages (Exeter) Ltd v Roper* [1951] 2 TLR 284, Devlin J at [288].
[66] A Ashworth, *Principles of Criminal Law* (Oxford University Press, 1999). For an example of state interventionism, see how, of 165 new criminal offences created in 2005, 66% were offences of strict liability and 26% criminalised omissions (A Ashworth, *Principles of Criminal Law* (6th edn, Oxford University Press 2009a), 89).
[67] A Norrie, 'Acts and Omissions', *Crime, Reason and History: A Critical Introduction to Criminal Law* (3rd edn, Cambridge University Press 2014), 159.
[68] Reed and Sarahne, 'Anglo-American Perspectives on Omissions Liability', 229.
[69] Norrie, 'Acts and omissions', 140.
[70] Norrie, 'Acts and omissions', 140.
[71] *R v Stone and Robinson* [1977] 1 QB 345.
[72] Reed and Sarahne, 'Anglo-American Perspectives on Omissions Liability', 230.

relation of the death in question, merely social and constitutive inadequacy for the most basic requirements of life".[73]

This conceptualisation of gross negligence manslaughter has not been followed since, suggesting that the judiciary favours a more Williamsian approach (at least regarding homicide).[74] However, the 'juridicalisation' of omissions, Feinberg and Norrie suggest, is inherently political, and the 'duty line' should therefore not be left to common law alone.[75] Nevertheless, Parliament's statutory interventions on failures to act(for example, the Domestic Violence, Crime and Victims Act 2004), are also highly contingent on socio-economic conceptions of free choice.[76] This must be borne in mind when examining criminal liability, as law does not act in a political vacuum. Helena Kennedy, for example, has addressed the issues surrounding the (mis)characterisation of women in child sexual abuses cases.[77]

Questions about free choice can also arise when assessing the proposed duty of care in light of Article 9 of the European Convention on Human Rights.[78] The inquiry rejected the suggestion that mandatory reporting should provide exemptions for faith-based settings or personal confessions, concluding that "neither the freedom of religion or belief, nor the rights of parents with regard to the education of their children can ever justify the ill-treatment of children or prevent governmental authorities from taking measures necessary to protect children from harm".[22] This reflects the statutory provisions in section 76 of the Police and Criminal Evidence Act 1984, which provides that a disputed confession cannot be used in evidence unless the prosecution proves that it was not obtained by oppression or through unreliable means.[79] This is curtailed by section 78, which can exclude such evidence on grounds of unfairness.[80]

However, there is arguably an inconsistency of case law and the absence of an unequivocal Supreme Court or Court of Appeal judgment on the issue. Despite this criticism, the recent

[73] GR Sullivan, 'Cause and the contemporaneity of *actus reus* and *mens rea*' (1993), Cambridge Law Journal 52, 494.
[74] For example, in *Airedale NHS Trust v Bland* [1993] AC 789, the appeal was dismissed on the grounds that, while it was not lawful to accelerate the death of a patient, it was lawful to withhold life-extending treatment.
[75] Norrie, 'Acts and omissions', 165.
[76] Norrie, 'Acts and omissions', 166.
[77] H Kennedy, *Eve Was Framed: Women and British Justice* (2nd edn, Vintage 2005), 107-111.
[78] ECHR, Article 9: "1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others".
[79] s.76 PACE 1984.
[80] See also *Scott v R*, *Barnes v R* [1989] AC 1242 and s.82(3) PACE 1984.

case of *Lancashire County Council v E & F and Others* suggests that confidentiality is a duty rather than a privilege; Lieven LJ concluded that "it could not be more obvious that a freedom to manifest ones [*sic*] religious beliefs must give way to the need to protect a child from sexual abuse".[23] Perhaps, then, the common law is shifting towards the 'social responsibility' view. Any laws imposing mandatory reporting, however, need to be accompanied by sufficient training: it would not be 'fair, just, and reasonable' to impose a tortious duty where the potential person liable has not been informed about how to spot such abuse, much less a criminal one.[81]

Coincidence between *actus reus* and *mens rea*

It is a well-established principle of criminal law that, with the exception of strict liability, conviction for a crime requires a conduct element (*actus reus*) and a fault element (*mens rea*). This is both foundational and underappreciated. The proposed offence would arguably not work in practice because, first, it cannot be classed as a crime of strict liability, and second, the coincidence between the *actus reus* and *mens rea* would be very difficult to establish. It is acknowledged that the crime of constructive (or 'unlawful act') manslaughter does not necessarily require a fault element, only the act of creating a dangerous situation, and that there has been debate over whether an omission can form the basis of such a conduct element. [82] However, this debate cannot be transferred to the omission of failing to report due to the issue of contemporaneity.

Offences of strict liability are those crimes that do not require *mens rea* or even negligence as to one or more elements in the *actus reus*. These include statutory rape, traffic offences, or even selling alcohol to minors. Failure to report, however, cannot be classified as such because there is no fixed point in time for the conduct element, regardless of the *mens rea*. This is as much a problem of contemporaneity as an issue of causation. In *Attorney General's Reference (No.4 of 1980)*, the prosecution could not prove which act in a series caused the death of the victim, but the appellate court held that the defendant could still be guilty of manslaughter provided that the prosecution showed that each of the acts were performed with the *mens rea* for manslaughter.[24] This applied the *Thabo Meli* principle of a more flexible approach in holding the *actus reus* as a continuing act.[25] This would not necessarily work for reporting child sexual assault, however, since it is a lot more difficult to establish that a failure to act can 'cause' a

[81] See also B Mathews, 'Mandatory Reporting Laws and Identification of Child Abuse and Neglect: Consideration of Differential Maltreatment Types, and a Cross-Jurisdictional Analysis of Child Sexual Abuse Report' (2014) Social Sciences 3, 465.

[82] *R v Senior* [1899] 1 QB 59 suggests that it can be unlawful not to perform an act and this can lead to a constructive manslaughter conviction, while *R v Lowe* [1973] suggests that there needs to be "wilful neglect" for such a conviction.

result as legal causation requires more than 'but for'.[26] Is it realistic, then, to create a new offence on such unstable causal foundations?

As argued by GR Sullivan, "the undiscriminating approach of English law" when it comes to contemporaneity "does not necessarily work injustice in cases of significant, clearly defined responsibilities voluntarily undertaken".[83] The problem with IICSA's recommendation, therefore, is not mandatory reporting itself: it is the criminalisation of not doing so. In the American context of *State of North Carolina v Ainsworth*, a mother was charged and convicted of aiding and abetting a first-degree rape of her son: this idea of 'aiding and abetting' rather than 'duty of care' may provide a solution for establishing contemporaneity, as aiding and abetting is more commissive than omissive.[84]

Liability arising from secondary participation might therefore be more appropriate to impose to cases of child sexual abuse. However, there have been varying interpretations of Section 8 of the Accessories and Abettors Act 1861, which states that "whoever shall aid, abet, counsel or procure the commission of any indictable offence whether the same be an offence at common law or by virtue of any Act passed or to be passed shall be liable to be tried, indicted and punished as a principal offender". As Ashworth correctly pointed out, secondary participation "is an example of the common law running wild […] which means that judicial developments of the law do not always conduce to coherence".[85] Surprisingly, Williams was in agreement with Ashworth on this. Although he set out the key definition that "principals cause, accomplices encourage (or otherwise influence or help)", he also pointed out that the courts have used terms such as 'aiding', 'abetting', and 'counselling' interchangeably without a precise definition.[86] Secondary liability is therefore not a solution to the problems of legal uncertainty and contemporaneity.

Conclusion

The moral and ethical advantages behind Recommendation 13 are indisputable. Such a provision would undeniably help to put an end to child sexual exploitation earlier on. Indeed, similar laws in Australia have yielded encouraging results.[87] Over a 20-year period, the number

[83] GR Sullivan, 'Cause and the contemporaneity of *actus reus* and *mens rea*' (1993) 52 Cambridge Law Journal, 494.

[84] *State of Carolina v Ainsworth* 109 NC App 136 (1993) (North Carolina CA).

[85] A Ashworth, *Principles of Criminal Law* (4th edn, Oxford Univesity Press, 2003), 441.

[86] G Williams 'Finis For Novus Actus' (1989) 48 Cambridge Law Journal, 391.

[87] In 1993, the State of Victoria introduced mandatory reporting for incidents of suspected child sexual abuse and physical abuse. At the time of enactment, doctors, nurses and the police were subject to the duty, and in 1994 it was broadened to include teachers. Analysis of subsequent trends in reporting of child sexual abuse found that between 1993 and 2012 there was a six-fold increase in the rate of children identified as in need of

of substantiated reports of child sexual abuse in Victoria alone was 4.73 times as high as in the Republic of Ireland, a comparable jurisdiction without mandatory reporting.[88] However, in order to be implemented, the statutory provision for the new offence would need to offer a higher degree of certainty about the boundaries of the crime. These issues must be solved before the Ashworthian view can truly prevail in practice. Although the 'bystander effect' is very important to social conceptions of criminalisation, this has not yet been fully crystallised in legal terms (common law or statute). Crimes of sexual assault are very sensitive by nature, and victims often wait years before reporting if they choose to do so at all. Should a duty be imposed to report *all* suspected sexual abuse? And, if so, to what extent does that deprive victims from a choice to disclose?[89] There is no simple answer to these questions. The IICSA report, while an encouraging milestone, does not detail the practicalities of the potential statutory provisions for criminalising failure to report child sexual abuse. The common law does not provide clarity, and it is for Parliament to legislate further on these questions – whether they will do so adequately is another matter.

protection. Similarly, in 2009, the State of Western Australia introduced legislation giving doctors, nurses, midwives, teachers, the police and boarding supervisors a statutory duty to report any reasonable belief of child sexual abuse. Analysis of reporting trends in the three years prior and the four years following enactment found that, on average, following the introduction of mandatory reporting the number of children identified as in need of protection from sexual abuse doubled. This means that the law enabled children's services to provide help to more of those children who needed it. See also IICSA Report, p222, section 73.

[88] See also IICSA Report, 223, section 75.

[89] The IICSA Report does consider this briefly at 233, sections 80-85.

Debunking the Want of Authority Myth – Agency Cases in Unjust Enrichment

Alexander Clevewood

Introduction

From a claim consigned to the bottom pile of alternative arguments employed by desperate counsels, to a structured doctrine experiencing recent, rapid expansion since its formal recognition in English jurisprudence,[90] unjust enrichment is becoming more significant in commercial circles. This augments the importance of rendering its current framework into a more doctrinally coherent form. This is especially true for unjust factors. Contrary to continental and Canadian jurisprudence,[91] in English law, to found an unjust enrichment claim, an unjust factor must be proven. Instead of demanding restitution where the underlying transfer lacks a legal basis, the unjust factor describes why the nature of the transaction attracts such legal effect.[92]

Increasingly common in the commercial world are agency arrangements.[93] This is often the case because the principal lacks requisite expertise in a novel field, or that the principal's own involvement in a transaction might prejudice their bargaining power owing to their reputation and status. Occasionally, agents execute transactions unauthorised by their principals. This article attempts to discuss the relevance of unjust enrichment in such scenarios. More importantly, it wishes to argue that recognising the unjust factor of "want of authority"[94] is ultimately not ideal, on both doctrinal and practical grounds. The paradigmatic ground of mistake should be extended to fill any normative lacunae therein. This is made possible by engaging in an analysis of (1) the nature of agency, and (2) the outsourcing of autonomy.[95]

[90] *Lipkin Gorman v Karpnale* [1991] 2 AC 548.

[91] For continental jurisprudence, see the Leistungskondiktion in German law, per Bürgerliches Gesetzbuch (BGB) §812; for Canadian jurisprudence, see *Garland v Consumers' Gas Co.* [2004] 1 SCR 629. In Canada, restitution is effectuated if the underlying transaction is carried out in absence of a juristic reason. This mirrors the continental approach.

[92] Mindy Chen-Wishart, 'In defence of unjust factors: a study of rescission for duress, fraud and exploitation' (2000) Oxford U Comparative L Forum 2 at ouclf.law.ox.ac.uk.

[93] Doctrinal considerations concerning trustees and beneficiaries are, in some ways, significantly different from agency cases. They are therefore excluded from consideration in this article.

[94] For instance, in *Relfo v Varsani* [2014] EWCA Civ 360. This is to be elucidated in Part I.

[95] T Nagel, 'Ch.5 The Value of Inviolability', in P Bloomfield (ed), 'Morality and Self-Interest' (OUP 2007), 102-114.

Want of Authority

Agency arrangements can be complex. Only a subset of which involve the application of unjust enrichment. Let us commence with a brief example. A contracts with B to implement transaction X. B is A's agent. Therefore, B is to perform such work on behalf of A's best interests. Transaction X involves an intricate series of telegraphic transfers. B, in breach of fiduciary duty, arranges the transfers strategically to procure a benefit for B themselves. Does the law compel B to return said assets (assuming B's position has not changed since receipt) to A?

This factual matrix is analogous to that in *FHR European Ventures LLP v Cedar Capital Partners LLC*.[96] It concerned an inside deal between Cedar Capital (the agent) and the vendor of the subject matter of the transaction, whereby Cedar Capital would be paid a commission pursuant to its efforts in procuring FHR (the principal) to the completion of the venture. This inside deal was not authorised by the agency agreement between FHR and Cedar Capital. Although Cedar Capital did not gain a direct benefit from the original pool of assets owned by FHR through mishandling, the secret commission was held to be the principal's property.[97] The secret commission was therefore held on constructive trust in favour of FHR. The same applies to cases where the agent has committed bribery.[98] Unjust enrichment was not mentioned, nor discussed, as the doctrinal underpinning of the remedy.

Notwithstanding so, it is reasonable to assert that personal claims based on unjust enrichment may arise therein as well. After all, Cedar Capital and the corrupt Hong Kong official had acquired benefits at the expense of their principals, since the benefits were either their principals' property ab initio, or property destined eventually for their principals.[99] Some authors, such as Goff and Jones,[100] contend that the unjustness of the agent's retention of the principal's benefit can be explained by the "want of authority" analysis. This means such retention lies outside the ambit of the course of agency. A major difficulty of this argument is that contract law and unjust enrichment are complementary.[101] Any mishandling of assets is likely to contribute to a breach of contract by the agent, giving rise to secondary obligations to

[96] *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45.
[97] ibid, [42].
[98] *Attorney General of Hong Kong v Reid* [1994] 1 AC 324.
[99] This is also known as interceptive subtraction. Examples of such cases include usurpation of office, exemplified by *Arris v Stukely* (1677) 2 Mod. 660; and interception of the rent owed to a landlord by a tenant, exemplified by *Lyell v Kennedy* (1889) 14 App. Cas. 437.
[100] Chapter 8: Lack of Consent and Want of Authority, in Mitchell, Mitchell and Watterson (eds), Goff & Jones on Unjust Enrichment (10th ed, Sweet & Maxwell 2022).
[101] *Dargamo Holdings Ltd v Avonwick Holdings Ltd* [2022] 1 All ER (Comm) 1244, [77]. This is endorsed in *Bank of New York Mellon (International) Ltd v Cine-UK Ltd* [2022] EWCA Civ 1021, [144]-[147].

pay damages to the principal.[102] As the matter is governed by contract, unjust enrichment normally has no role to play. Its involvement potentially only obfuscates any normative exploration therein.

Let us slightly alter the facts of the above example. Assuming that the strategic manipulation of assets by B has resulted in C receiving a portion of the original assets of A designated for transaction X. B is later insolvent. Therefore, for A to recover anything at all, A should only sue C. Could A do so, provided that C has not changed their position after the receipt (and other defences do not apply)?

This is analogous to *Lipkin Gorman v Karpnale*.[103] As the leading case in unjust enrichment, the factual matrix is reasonably well-known. Cass, a partner of a law firm, unlawfully appropriated money from the firm's bank account. He proceeded to apply the money to finance his gambling ventures at a casino owned by Karpnale.[104] Cass was declared insolvent. The firm proceeded to sue the casino on the basis of a claim in money had and received. A proprietary claim was not discussed. The House of Lords ruled in favour of the firm of solicitors, ordering the casino to repay any sums received from Cass.[105] Given that the gambling contract between Cass and the casino was void for illegality, and that the exchange of money for chips did not constitute a valid contract, the casino's retention of moneys where the firm had a subsisting legal interest would constitute unjust enrichment. It is not clear, however, what the unjust factor was. Goff and Jones argued that the unjust factor in *Lipkin* was "want of authority".[106] Cass, as an agent of the firm, obtained the firm's assets for a personal purpose which is outside the ambit of authorisation of the firm.

However, characterising such cases as "want of authority" is not ideal. Doctrinally speaking, "want of authority" puts the emphasis on the agent, which lies outside the traditional transferor-transferee paradigm. Furthermore, it cannot be easily analogised with other unjust factors, which contravenes the piecemeal approach adopted by the English common law. These criticisms are elaborated as follows.

[102] See, for instance, *Photo Productions v Securicor* [1980] AC 827.
[103] n.1.
[104] It was highly possible that Cass mixed his own money with the firm's money. Per Millett LJ (as he then was) in *Agip (Africa) Ltd v Jackson* [1990] EWCA Civ 2, common law tracing could not be done in mixtures. However, this point was conceded by the defendants in *Lipkin Gorman*. This position would therefore not be debated in detail in this article.
[105] The claim 'money had and received' is a predecessor to the modern law of unjust enrichment. Although formally abolished, this terminology is still often found in modern-day judgments. See *Sempra Metals v IRC* [2008] AC 561, [105].
[106] n.11, 8-92.

Absence of Analogy

It is against the general tide of development of the English common law to effectuate major doctrinal changes. Judges have traditionally been observant of constitutional boundaries, and respected parliamentary sovereignty. Concerning the law of unjust enrichment specifically, Lord Walker held: "It is of the nature of the common law to develop slowly, and attempts at dramatic simplification may turn out to have been premature and indeed mistaken".[107]

Analogous to the unjust factor approach in unjust enrichment is the categorical approach adopted by the tort of negligence. Inspiration as to how the former should develop can be sought from the latter. Moreover, the differences between unjust enrichment and negligence are not significant to the extent that preclude the applicability of such analogy. This is justified as we are comparing their similarities and operations in form, not in substance. Per *Caparo Industries v Dickman*,[108] although Lord Bridge proffered the tripartite test for determining the duty of care question,[109] he stressed that this should not be interpreted as a broad-brush principle to be applied prospectively, with scant regard to previous case law. Novel categories should be developed incrementally, by analogy with established categories.[110] The continuing relevance of this principle is exhibited by *Robinson v Chief Constable of West Yorkshire Police*.[111]

It is therefore suggested that unjust enrichment should follow this framework. Indeed, most unjust factors can be subject to seamless categorisation. Potential unjust factors should only be added if they are analogisable with existing ones, i.e., can be placed in existing categories. If we adopt the Birksian scheme,[112] there are two major categories. The first is associated with personal autonomy, characterised by degrees of impairment of one's intention to implement the transfer. For instance, mistake can be conceptualised as an aberrant exercise of autonomy owing to, inter alia, misapprehension of the factual matrix and miscomprehension of underlying assumptions. Ignorance, on the other hand, is the 'most fundamental mistake'.[113] This is conceivable, since it concerns the absence of any knowledge, as opposed to wrong knowledge. The resultant exercise of personal autonomy is still erroneous, since it fails to

[107] *Deutsche Morgan Grenfell v IRC* [2007] 1 AC 558, [156].
[108] *Caparo Industries v Dickman* [1990] 2 AC 605.
[109] ibid, 617-618. The three requirements are: (1) proximity; (2) reasonable foreseeability of harm; and (3) fair, just and reasonable to impose a duty of care.
[110] ibid.
[111] *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4, [27].
[112] Changing Direction' in P Birks (ed), 'Unjust Enrichment' (OUP 2005), 114-115.
[113] P Birks, 'An Introduction to the Law of Restitution' (Clarendon Press, Oxford 1985), 141.

reflect the actual intention of the transferor. According to Chambers and Penner,[114] failure of consideration may also be included in this category. Although the transferor's intention to effectuate the transfer is not vitiated initially, such intention is qualified ab initio. Where the condition is not satisfied, such performance of obligations is not supported by the obligor's valid intention. Such performance should hence be undone. Other unjust factors, such as duress, and undue influence, all cause varying degrees of impairment to the claimant's intention, thereby impugning personal autonomy to an extent which demands restitution.[115]

The second category comprises policy-based factors. A notable example is the doctrine in *Woolwich Equitable Building Society v IRC*.[116] That case concerns the restitution of tax paid by a building society to the Inland Revenue pursuant to a tax law that was subsequently ruled to be ultra vires. The House of Lords ruled in the building society's favour, citing the Bill of Rights 1688 in support of the notion that no tax shall be validly levied without parliamentary approval. In other words, the levying of tax should, for instance, either (1) have complied with the statutory language of primary legislation, or (2) be pursuant to secondary legislation enacted within the *vires* of primary legislation.

As "want of authority" is a potential unjust factor, to stay faithful to the piecemeal approach of development in the common law, we should analyse whether it could be placed in either category. It is submitted that it cannot.

To commence, the basis as to why it is rejected from the first category is explored. Want of authority is a descriptive label. In agency cases, it describes the plain fact that a transfer has been effectuated without authorisation by the principal. Said authorisation has a formal – not necessarily in addition to a substantive – dimension. This implies that the transfer is treated as unauthorised if it were made contrary to the terms of the agency agreement. It does not necessarily concern the subjective intention (and therefore exercise of personal autonomy) of the principal, since although reasonably so in the vast majority of cases, the agency agreement is a contractual product flowing from negotiations between both the principal and the agent.[117] Only the principal's qualified objective intention lies therein. This is in stark contrast to, for

[114] R Chambers and J Penner, 'Ignorance' in S Degeling and J Edelman (eds), 'Unjust Enrichment in Commercial Law' (Lawbook Co, Pyrmont NSW 2008), 256.

[115] n.23, 106. Note that Birks used the term 'illegitimate pressure' instead of duress. However, no conceptual difficulties are reasonably envisaged here, since he could be taken to be referring to the duress requirement which concerns an impairment of the claimant's autonomy.

[116] *Woolwich Equitable Building Society v IRC* [1993] AC 70.

[117] There is a subset of cases whereby transactions made between an agent and a third party, though prima facie unauthorised, are affirmed by the principal afterwards since, for instance, such transactions are financially lucrative. This is analogous to the trustee-beneficiary scenario. However, these cases lie beyond the ambit of this article.

instance, *Kelly v Solari*,[118] where the state of mind (therefore a subjective factor) of the transferor was interrogated.

Some may assert that even in the first category, unjust factors operating on objective intentions are found. Failure of consideration usually concerns terminated contracts,[119] thereby involving objective intentions. However, this criticism is unfortunately beside the point. Firstly, failure of consideration is implicitly recognised as the appropriate unjust factor even in cases where there is no valid contract.[120] Secondly, the normative crux of failure of consideration is '*why exactly*' the claimant performed the transfer. It is ultimately an interrogation of the thought processes occurring in the claimant's mind. Similar to the generic unjust factor of mistake, it would apply if the claimant were mistaken that the qualifying condition of the intention to transfer would eventually be met. Objective intentions deduced from, for example, contractual documents, only assist to *divine* their subjective intentions. This is reasonably co-interpreted with other strands of evidence. Thus, objective intentions are not procured on their own merits. Subjective intentions are hence a mandatory – not merely optional – component herein.[121]

As for the second category, it could be argued that want of authority allows greater judicial recognition of the importance of fiduciary obligations. This is coherent with the overarching principles evinced in *Cedar Capital* and *Reid*. It also potentially improves commercial certainty, as the sanctity of agency agreements is observed more strongly. Notwithstanding

[118] *Kelly v Solari* (1841) 9 M & W 54.

[119] This encompasses situations such as frustration and contractual breach, exemplified by *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32, and *Planché v Colburn* [1831] EWHC KB J56, respectively.

[120] *Spencer v S Franses Ltd* [2011] EWHC 1269 (QB), [231]-[238]. This case concerns a purported joint venture between the claimant, who had a valid title over a number of antique embroideries, and the defendant, who dealt in art and antiques. The claimant transferred ownership of said embroideries to the defendant, where the defendant would sell them. The defendant would receive a percentage of the proceeds of sale. The defendant therefore performed services in accordance with the joint venture, including historical research. It was discovered later, and held by the High Court, that there was no valid contract governing the joint venture. The reasons behind are immaterial to the argument here. One of the actions discussed in the judgment was the defendant's counterclaim in quantum meruit for any services performed therein.

[121] *Giedo van der Garde BV v Force India Formula One Team Ltd* [2010] EWHC 2373 (QB). Although it was held that as a general principle, an objective approach should be adopted, subjective intentions are potentially admissible if they have been communicated before to the other contracting party and thus forms part of the bargain. Per Stadlen J, 'that is not to say that evidence of the payer's subjective motive or purpose for entering the agreement is inadmissible if those intentions or motives were communicated to the payee before the contract was entered into' ([286]). This general principle does not imply that objective intentions are all that matter. Indeed, if so, subjective intentions would be rejected *in toto*. It is in place reasonably because of the need for evidential certainty, i.e., the prevention of excessive reliance on the claimant's evidence alone. This coheres with the crux of unjust enrichment, where restitution is performed to attain an equilibrium of interests on both sides.

such policy arguments, we must observe the threshold of entry into this category. Birks' comments were made to the effect that, if limits were not observed, this category would risk excessive heterogeneity.[122] The *Woolwich* principle does not only appeal to coherence with *merely some* established doctrines in English law and bring forth commercial benefits. It goes deep into the heart of the constitutional arrangements of the United Kingdom. It reinforces the constitutional limits between the Executive and the Legislature. Indeed, in Canada, the further step of omitting an unjust enrichment analysis altogether in favour of pure constitutional arguments has been taken.[123] Viewed under this light, it is therefore highly doubtful that want of authority should be admitted to this category.

Given that "want of authority" cannot be placed in either category of existing unjust factors, it is unknown whether English common law should reject its long-standing piecemeal approach, in favour of a single doctrinal principle. This also potentially impugns doctrinal neatness and increases commercial uncertainty as the strict threshold for admitting unjust factors is compromised.

Corrective Justice

Even if "want of authority" could not be accepted into any existing categories of unjust factors, some might suggest that it is intricately linked to the doctrinal basis of unjust enrichment and that it should be admitted anyway. Taxonomy should follow, not dictate, the essence of an area of law. While this broad notion is not disagreed, this argument must still fail.

To start with, we identify the theoretical basis of unjust enrichment. This area has generated considerable debate. However, since our focus is whether a potential unjust factor should be recognised and incorporated formally into the English common law, in contrast to whether it coheres with existing academic conceptualisations of unjust enrichment, reference could be made to judicial dicta which attempt such definition. In *Investment Trust Companies v Commissioners of HMRC*,[124] Lord Reed held that the underlying principle of unjust enrichment is corrective justice, which strives to restore parties to their pre-transfer positions. With respect, this position is not entirely congruent with "want of authority".

The main focus of corrective justice is to reverse the injustice inflicted by the defendant towards the claimant. According to Weinrib,[125] the relationship between the two parties is correlative in nature. Applying this to unjust enrichment, the remedy adopted should augment the financial

[122] n.23, 106.
[123] *Kingstreet Investment Ltd v New Brunswick* [2007] 1 SCR 3.
[124] Investment Trust Companies v Commissioners of HMRC [2017] UKSC 29, [42]-[43].
[125] EJ Weinrib, 'Corrective Justice in a Nutshell' (2002) 4 The University of Toronto Law Journal 52.

position of the claimant to its original level, with a corresponding decrease in the defendant's. This in turn protects the equality of parties in the transfer.[126] Want of authority inadvertently draws our attention away from this dynamic. As mentioned in Part II, it merely serves to describe the agent's action in relation to the requirements stipulated in the index agency agreement. It fails to explain why the principal and third party are linked by the 'injustice' element. More significantly, it fails to divine why there is injustice in the first place. After all, it is unclear why, in the normal course of commercial transactions, a third party should be concerned with the relationship between the agency and the principal. In *Morris v Kanssen*, the foundation of the indoor management rule is laid out:

"…persons contracting with a company and dealing in good faith may assume that acts within its constitution and powers have been properly and duly performed and are not bound to inquire whether acts of internal management have been regular."[127]

This indicates that, unless the third party is in actual notice, or affixed with constructive notice, of the agent's lack of authorisation in entering the transaction, they should not be easily held to account by the rigour of strict liability.[128] This is because the injustice arises from the third party's retention of benefits procured from a transfer in defiance of an agreement whose execution constitutes a valid exercise of the principal's autonomy. This would smoothly correspond to the idea of corrective justice. However, simply because a subset of cases contains compatible doctrinal substance, it does not automatically follow that "want of authority" should be transposed into unjust enrichment *in toto*. Indeed, if we fail to respect the crux of unjust enrichment, any future doctrinal development is highly likely to be unprincipled and detrimental to the rule of law.

Extension of Mistake

However, one crucial question remains. What is the aftermath? How can we rationalise cases such as *Lipkin Gorman*, which involved the appropriation of the claimant's property by an intermediary, expressly used the language of unjust enrichment, but failed to explicitly state the unjust factor involved? It is submitted that such cases should be analysed on the basis of mistake.

[126] ibid, 349.

[127] *Morris v Kanssen* [1946] AC 459, 474.

[128] This may mirror the situation in knowing receipt. See, for instance, *BCCI v Akindele* [2001] Ch 437. This therefore has the potential of exacerbating the urgency of another debate, which is whether knowing receipt in equity should be replaced by a strict liability claim, mirroring common law. To avoid doctrinal confusion, this is best avoided.

Mistake is the paradigmatic ground of unjust enrichment. As mentioned in Part II, it concerns the vitiation of one's consent, thereby leading to an erroneous exercise of personal autonomy. Some might be apt to point out that the definition of 'personal' is strict – it only concerns the transferor. In typical cases of restitution owing to mistake, such as *Barclays Bank v WJ Simms*,[129] the mistake lies in the transferor. Therefore, strictly speaking, it is merely applicable to two-party cases. This must be rejected since it misunderstands the nature of agency. It is outside the ambit of this article to commence an elaborate discourse in agency law. However, the nature of agency in unjust enrichment cases could be gleaned from recent juridical literature.

As mentioned in Part I, an agent is responsible for representing the principal in certain dealings. The ambit of such representation is mainly, though not definitively, stipulated in agreements signed by both the principal and agent. However, the agent is not merely a contractor, or a 'free spirit'. If we accede to Nagel's argument that all individuals contain within inviolable 'right' which includes our personal autonomy,[130] agency is akin to outsourcing said 'right' by the principal to the agent for areas agreed beforehand. Every resultant decision taken by the agent is tantamount to as if the principal made the decision themselves. We therefore see the 'state of mind' or the subjective component of decision-making transferred from the principal to the agent. This is supported by Lord Reed in *Investment Trust Companies v HMRC*:

"One such situation is where the agent of one of the parties is interposed between them. In that situation, the agent is the proxy of his principal, by virtue of the law of agency. The series of transactions between the claimant and the agent, and between the agent and the defendant, is therefore legally equivalent to a transaction directly between the claimant and the defendant."[131]

This is indirectly endorsed in *Prudential Assurance v HMRC*,[132] which states that the only true exception to the direct transfer rule is subrogation. This indicates that for agency cases, although they are nominally tripartite, they are legally treated as involving only two entities. That is why, in cases where the agent does not act in accordance with the principal's best interests, it could be construed as that the principal themselves made a mistake. In the general run of cases, while purporting to act for the principal, the agent has misapprehended circumstantial realities. Eventually, this fails to reflect the intentions of the principal, thereby inadequately giving effect to the principal's autonomy. This is slightly difficult in cases

[129] *Barclays Bank Ltd v WJ Simms, Son and Cooke (Southern) Ltd* [1980] 1 QB 677.
[130] n.6. Whether this notion should be extended to non-natural persons (e.g., corporate entities) lies outside the ambit of this article.
[131] n.35, [48].
[132] *Prudential Assurance v HMRC* [2018] UKSC 39, [68].

involving *mala fide*, whereby such agents act in their own capacity, on behalf of their own interests. However, mistake is still applicable, since the principal mistakenly believes the agent acts on their behalf only, i.e., makes decisions with respect to the principal's autonomy only. This is neither risk-taking, nor a misprediction, but a 'tacit assumption'.[133] This is because given prevailing circumstantial factors, including the principal's ownership of the assets, and the terms of the agency agreement, it can be 'tacitly assumed' to be true that the agent deals said assets on behalf of the principal. There is also a direct causal link between this mistake and the performance of the transfer. Restitution is therefore not barred.[134]

At this juncture, the facts of *Trustee of FC Jones & Son v Jones*[135] should be considered, in order to illustrate the application of this theory. A firm of potato growers got into financial difficulties. The partners of the firm subsequently committed an act of bankruptcy. However, before the moment of adjudication, the defendant wife of one of the partners paid the proceeds of cheques totalling to £11,700 into her account to deal in potato shares. These cheques were drawn by her husband on the joint account of himself and another partner. The main legal issue is whether the trustee in bankruptcy could claim back the money from the defendant's investment account. To commence, a partnership differs from a corporation in that it is not a legal person. However, a partner is an agent and fiduciary. Their decisions regarding the assets of the partnership are binding on all other partners.[136] Since the defendant's husband was a partner, when handling partnership assets, he was taken to act on behalf of the best interests of all partners. Drawing cheques from the joint account could reasonably be seen as handling partnership assets. If we reconstruct the latter half of the chronology using the husband's narrative instead of the defendant's,[137] the husband misapprehended prevailing circumstances, such as the likelihood of the defendant's appropriation of the assets, and the optimal treatment of the assets which would fulfil the principal's (all other partners') intention. Such misapprehension was causally linked to both (1) the actions performed by the defendant, and (2) the husband's failure to prevent (1) from occurring. The unjust factor involved should thus be mistake.

[133] 'Tacit assumption' is a 'fixed' term in the doctrine of mistake. No synonyms for 'tacit' can be used to convey the same meaning. It is fixed in virtue of the prevailing academic and judicial analysis in this area. See n.44 for details.

[134] For the current juridical position on mispredictions, see *Futter v Futter; Pitt v Holt* [2013] UKSC 26, [104], [108]-[109]. Although the conjoined appeal concerns the doctrine of mistake in equity, the cited dicta cannot be easily distinguished since they are reasonably intended for general application. *Kleinwort Benson v Lincoln City Council* [1999] 2 AC 349, a leading case in unjust enrichment, was also cited to support the inapplicability of restitution in cases involving mispredictions. Per *Deutsche Morgan Grenfell* (n.18; [26]), risk-takers cannot claim their money back.

[135] *Trustee of FC Jones & Son v Jones* [1996] EWCA Civ 1324.

[136] See, for instance, *Lipkin Gorman* (n.1).

[137] There is no need to discuss the possibility of mala fide in this case.

Some might argue that this position is contradictory to the analysis in Part II, which has rejected the incorporation of cases, concerning the mishandling of principal's assets by agents, into the first category of unjust factors. However, this counterargument must be rejected. The focus there is whether the *label* "want of authority" could be analogised with mistake. Simply because certain authorities could be rationalised as "want of authority" cases, it does not mean they could not be simultaneously explained by the doctrine of 'mistake'. It therefore does not automatically entail their exclusion from the general framework of unjust enrichment.
Therefore, the doctrine of mistake in unjust enrichment should and could be extended to cover agency cases.

Conclusion

Unjust enrichment remains a hotly debated topic. Due to its novelty, observing its framework is vital. This echoes Lord Reed's position in *Investment Trust Companies v HMRC*.[138] This emphasises the importance of strictly observing the need for categorisation of unjust factors, and their conceptual limits. Potential unjust factors should only be admitted if they are readily analogisable with existing unjust factors, i.e., they could be placed in existing categories.

In cases concerning the mishandling of principal's assets by an agent, some academics have proposed "want of authority" as an unjust factor. In spite of its superficial normative attraction, it should be rejected. It cannot be analogised easily with existing unjust factors. Firstly, it employs a quintessentially objective test of the claimant's state of mind, which differs from the subjective test used in relation to other unjust factors in the first category, e.g., mistake. Secondly, concerning the second category, the public policy reasons in favour of its incorporation do not reasonably meet the threshold set by *Woolwich*.

Moreover, it is doctrinally incompatible with the law of unjust enrichment. Corrective justice is the foundation of unjust enrichment. However, "want of authority" fails to provide normative justifications regarding (1) why there is injustice for a third party to retain the principal's property; and (2) how said injustice links said third party and the principal (i.e., the correlativity element).

The doctrine of mistake should be extended to cover such cases. This reasonably resolves aforementioned issues. This is also possible since the nature and normative substance of agency allows for principals to be 'deemed' as having mistaken even if it is their agent who performs the unauthorised transaction.

[138] n.35, [39]-[42].

Letter to the Editor: Prosecution Usage of 'Gang Association' is Still the Master Key to Securing Joint Enterprise Murder Convictions Post *R v Jogee*

Will Baylis-Allen

The doctrine of 'joint enterprise' is now inseparable from the words 'wrong turn'. This of course refers to the UKSC case of *R v Jogee*[139] righting "a wrong turn"[140] taken in the case of *R v Chang Win Siu.*[141] This letter is stimulated by this author's recent work on a criminal appeal case involving a multi-handed murder. It is also inspired by a relevant *New York Times* (NYT)[142] investigation, revealing figures which prompted a flurry of press articles citing the investigation.[143] The *Jogee* judgment was and still is widely misinterpreted, most notably in the press, as a watershed moment for constraining Prosecutors in their bringing of 'joint enterprise' cases when that was never the intended effect. Rather than reinventing the *Jogee* ruling, the press should be targeting Prosecution usage of 'gang-association' evidence, which is the real issue behind rising joint enterprise-related conviction rates (most notably the adducing of bad character evidence citing drill rap music).[144]

The actual 'wrong turn'

The *Chang* case resulted in a 'secondary's' mere foresight of the primary's crime being equated with intent to assist in the offence.[145] In *Jogee,* the UKSC diluted the effect of foresight to make it just one of many possible elements contributing towards a secondary's intent. Lords Hughes and Toulson believed that establishing foresight had the "illegitimate"[146] effect of elevating foresight into an "inevitable yardstick"[147] for intent. In other words, finding foresight effectively entailed an automatic finding of intent to assist the primary which was too low of a threshold. The UKSC did not say anywhere that the change was enacted because there were

[139] [2016] UKSC 8.
[140] ibid [87].
[141] [1985] AC 168.
[142] Jane Bradley, 'U.K. Doubles Down on a Tactic Disproportionately Targeting Black People*' The New York Times* (New York,12th November 2022).
[143] Zoe Williams, 'The UK should be ashamed of 'joint enterprise' convictions. America has put us on notice' *The Guardian* (London,15th November 2022). & Tony Dowson, 'The NYT versus Britain' *The Critic* (London, 26th November 2022).
[144] Jane Bradley, 'U.K. Doubles Down on a Tactic Disproportionately Targeting Black People*' The New York Times* (New York, 12th November 2022).
[145] *R v Jogee* [2016] UKSC 8 [87].
[146] ibid.
[147] ibid.

'too many' convictions arising from the doctrine of joint enterprise. In fact, the judgment mentions that previous convictions applying *Chang* would not be rendered invalid and that in the majority of prior cases the return to the pre-*Chang* position would still have resulted in conviction.[148]

The misinterpretation of *Jogee* in the press

A well-publicised narrative at the time of the *Jogee* judgment was that an avalanche of appeals would ensue,[149] accompanied by fewer first instance convictions in joint enterprise cases. Neither of these two outcomes came to fruition. The NYT calculate that joint enterprise cases increased by 42% and convictions in the same cases are now nearly 50% higher than pre-*Jogee* levels,[150] with only one successful appeal. These statistics were interpreted in both the NYT article itself and a response article in *The Guardian*[151] as the *Jogee* ruling "changing nothing".[152] Both articles misinterpreted *Jogee* as intending to limit future joint enterprise convictions. The *Guardian* article expressed that the UK legal system should feel shame at the lack of slowdown in joint enterprise convictions, because they wrongly believed that the *Jogee* ruling had concluded that joint enterprise convictions were "racially biased".[153] This was subsequently corrected in the 'small print'.

Gang association evidence

From a purely statistical standpoint, expecting fewer first instance joint enterprise convictions is a logical conclusion to arrive at given the higher threshold. But the apparent increase in convictions and lack of successful appeals passing the "substantial injustice"[154] test outlined in *Jogee* should really be looked at from the perspective of the 'ingredients' that go into finding a secondary's intent. The culprit behind the higher convictions could well be the increasingly common utilisation of gang-association evidence to infer intent. The potential prejudicial effect on the jury of adducing gang association evidence, including rap evidence, cannot be

[148] ibid [100] & Tony Dowson, 'The NYT versus Britain' *The Critic* (London, 26th November 2022).
[149] Tom Edwards, 'Joint Enterprise and the Real Impact of Jogee' (*Mountford Chambers*, 19th August 2021)<https://www.mountfordchambers.com/blog-joint-enterprise-and-the-real-impact-of-jogee/>. Access verified on 11th March 2023.
[150] Jane Bradley, 'U.K. Doubles Down on a Tactic Disproportionately Targeting Black People*' The New York Times* (New York,12th November 2022).
[151] Zoe Williams, 'The UK should be ashamed of 'joint enterprise' convictions. America has put us on notice' *The Guardian* (London,15th November 2022).
[152] Tony Dowson, 'The NYT versus Britain' *The Critic* (London, 26th November 2022).
[153] Zoe Williams, 'The UK should be ashamed of 'joint enterprise' convictions. America has put us on notice' *The Guardian* (London,15th November 2022).
[154] UKSC 8 [100].

underestimated. Even with careful bad character directions, preconceived notions of drill rap music may lead jurors to place far too much weight on the bad character as evidence of guilt than is intended.[155]

There is no evidence about whether the number of bad character applications to adduce gang association has increased post *Jogee.* However, Lady Justice Hallet in *R v Awoyemi*[156] acknowledged that, if applications are in fact rising, then this can be put down to more offences being gang related.[157] This is a rational argument, but courts also appear to be far too indulgent of these applications for drill rap evidence to be adduced. This is especially the case given the s.101(1)(d) gateway of the CJA 2003, whereby evidence is admitted due it being relevant to an important matter in issue between the defendant and the prosecution.

In an appeal borne out of a joint enterprise case worked on by this author, a bad character application was admitted, adducing drill rap evidence, against our client. This was used to link him to a gang and to prove evidence of gang tension which was said to be a motive for the offences. The evidence used lyrics sourced from a drill music video which our client featured in as an artist. However, the specific lyrics drawn on were not written or even rapped by the defendant himself, nor were his co-defendants in the music video. The application was allowed on the basis that the client's participation in the video constituted support for its contents, even though the link to the client and the lyrics was weak. Nevertheless, it appears unlikely that any press articles will criticise or associate this apparent ease of bad character applications with rising joint enterprise convictions. Rap music has long since been conflated by the press with criminality,[158] especially recently given the popularity of anti-drill music sentiment. As such, it would be contradictory and unmarketable for the press to simultaneously criticise the easy use of drill rap evidence in joint enterprise cases whilst maintaining a purported linkage between drill rap and crime rates.

[155] Abenaa Owusu-Bempah, 'The irrelevance of rap' [2022] Criminal Law Review 2, 130-51.
[156] [2016] EWCA Crim 668.
[157] ibid [36].
[158] ibid.

Facing the Virtual Reality: The Culture of Sexual Harassment and Abuse in the Digital Age

Lucy Stock

Introduction: a world of online activity

It is no longer the case that sexual harassment and assault occurs only in physical spaces. With the unabating development of technology, there is now an epidemic of sexual abuse taking place on a multitude of digital platforms. The rise of revenge porn, up-skirting, and down-blousing mark just a few of the practices which have been facilitated by a growth in the use of digital devices and online activity. The question remains, however, as to whether the law and the justice system is keeping pace with society. What positive changes have been made? How successful have these been? What is still left to be done?

By exploring recent legislation, including the Voyeurism Act 2019 and the draft proposals and discussions of the Online Safety Bill, it is possible to see a committed response to increased online harassment and abuse. There are, however, many legal and societal shortcomings yet to be addressed. The rise of alternative forms of image-based sexual abuse ("IBSA") threatens to subvert attempts at tighter regulation, and prosecuting existing offences is often hampered by disproportionate standards of proof.[159] It is also key to compare the efficacy of the response to different forms of online abuse. There is a need for practical and legislative changes to ensure greater protection for victims of IBSA, especially in relation to 'revenge porn' and 'deepfake' pornography. Legislation must also better reflect the extent of harm resulting from IBSA over an extended period, and its use in the perpetration of other crimes.[160]

There is a delicate balance to be maintained between protecting and maintaining freedom of expression and speech in digital spaces and protecting individuals' rights to privacy and integrity. There must, however, be greater accountability for those forums where sexual harassment, hate speech and crimes inciting assault and abuse is tolerated or even promoted, especially in instances where this content is available to a younger audience. As we move further into an age of technology with the onset of the metaverse and AI, it is crucial to realise that many safety provisions in the online domain have come too late and at too great a cost.

[159] Clare McGlynn, 'Cyberflashing: consent, reform and the criminal law' (2022) 86(5) J. Crim. L 336.
[160] Henry A Powell & A Flynn, 'Image-based sexual abuse', in W DeKeseredy and M Dragiewicz (eds), *Routledge Handbook of Critical Criminology* (Routledge 2018) 305.

There is still much to be done to improve the justice system to accurately reflect the realities of digital activity.

Legislative and cultural changes: positive steps toward progress?

The prevalence of sexual abuse and harassment facilitated by means of technology has begun to garner greater exposure both in the media and throughout political forums. These open discussions mark a significant change towards better victim-centred justice. The seminal debates in this area have focused on the intersection between the physical and the digital: specifically, the facilitation of 'street-based harassment' and 'public sexual harassment' by means of technology.

Legislative developments have been enacted primarily on account of the tireless work individuals and charitable organisations have done to bring such conversations to the attention of political and legal forums. In 2018, Gina Martin introduced a well-publicised Private Members' Bill following her own experience of an up-skirting offence, where a fellow festival goer attempted to take an intimate photograph from under her skirt.[161] Up-skirting occurs when a person operates observational equipment, or takes a picture, beneath a person's clothing in order to observe, or record an image, of the person's genitals, buttocks or underwear without the person's consent.[162] Gina Martin was unable to prosecute the offender and was offered no support when reporting the incident; a police officer merely encouraged the offender to delete the image. The challenge she faced was due to the limitations of s.67 of the Sexual Offences Act 2003, which did not consider up-skirting to be a sexual offence.[163] To constitute a sexual offence the legislation required an offender to have witnessed a person doing a private act for sexual gratification without consent.[164]

The issue for up-skirting crimes was thus two-fold: the nature of the act occurring in a 'public space', and the ambiguity surrounding the intention of the use of up-skirting images. The Court of Appeal decision in *R v B* held that a person is doing a private act if they are in a place which in the circumstances would reasonably be expected to provide privacy.[165] The test was extended to cover public toilets, changing cubicles at public swimming pools or enclosed gardens. The decision was a culmination of a line of case law ruling in favour of locating privacy in all its varied forms. *R v Bassett*, specified that places where privacy was expected

[161] Richard Ford, 'Call to add "up-skirting" to Sexual Offences Act' *The Times* (6 September 2017) 11.
[162] Justice (Sexual Offences and Trafficking Victims) Act (Northern Ireland) 2022, section 1 (71A).
[163] Sexual Offences Act 2003, s 67(1), [repealed].
[164] Emily Allbon & Sanmeet Kaur Dua, *Elliot & Quinn's English Legal System* (Pearson 2020) 164.
[165] [2012] EWCA Crim 770 (CA).

included swimming pool bathrooms and showers.[166] The Court of Appeal developed this reasoning in *R v Swyer (Christopher)*, which established that the expectation of privacy was not necessarily contingent upon being wholly enclosed or sheltered from the possibility of sight.[167] The application of this rational to cases of sexual harassment, despite its more expansive definition of privacy, inevitably excluded the public spaces in which up-skirting acts were most often perpetrated. A report by the All-Party Parliament Group for UN Women revealed the pervading nature of sexual harassment in public spaces: around 71% of women in the UK have experienced some form of sexual harassment of this type.[168] 95% of incidents are not reported to the police, reflecting a lack of faith in prosecutions and victim welfare.[169]

Emily Allbon highlights how England fell behind devolved nations in this respect: Scotland had already taken steps to address this technicality and its legislation was amended in 2010 to the Sexual Offences Act 2009 which included the offence of up-skirting.[170] Gina Martin's bill in England garnered support and resulted in the Voyeurism (Offences) Act 2019 which came into force on 12 April 2019. This change not only made up-skirting a criminal offence but also ensured the offence carried with it up to two years' imprisonment.[171] The question remains, however, as to why such a substantial period elapsed between both nations' legislative amendments.

The terminology regarding intention in the statute also remains ambiguous. The purpose of an act must still be to obtain sexual gratification or cause humiliation, distress, or alarm. It is likely that the latter three qualifications will be drawn upon by victims who are unable to prove an intent of sexual gratification. Issues with enforcement are manifested in the statistically low prosecution of voyeurism crimes. Data obtained by the Scottish Liberal Democrats shows that, of the 547 voyeurism crimes reported in 2022, only twenty-nine were passed on to prosecutors (slightly more than 5 per cent).[172] The lack of prosecution is attributed to the statutory wording which specifies the 'purpose' of obtaining such images.[173] In England, the CPS reports that up-

[166] [2009] 1 W.L.R. 1032 (CA).
[167] [2007] EWCA Crim 204.
[168] All-Party Parliamentary Group, 'Prevalence and Reporting of sexual harassment in UK public spaces: A report by the APPG for UN Women' (March 2021) <https://www.unwomenuk.org/site/wp-content/uploads/2021/03/APPG-UN-Women-Sexual-Harassment-Report_Updated.pdf> accessed 20 December 2022, 6.
[169] ibid, 17.
[170] Emily Allbon & Sanmeet Kaur Dua, *Elliot & Quinn's English Legal System* (Pearson 2020), 164.
[171] The Crown Prosecution Service, 'Legal Guidance: Voyeurism' (*CPS* 12 April 2019) <https://www.cps.gov.uk/legal-guidance/voyeurism> accessed 10 January 2023.
[172] Andrew Learmonth, 'Just five per cent of up-skirting crimes in Scotland prosecuted' *The Herald* (17 July 2022) <https://www.heraldscotland.com/politics/20284716.just-five-per-cent-upskirting-crimes-scotland-prosecuted/> accessed 17 December 2022.
[173] ibid.

skirting prosecutions have more than doubled over the second year of the legislation being in force.[174] In total, 46 men and one teenage boy were prosecuted for 128 offences under the Voyeurism (Offences) Act between 1 April 2020 and 30 June 2021, with many jointly convicted of other sexual offences.[175] The statistics indicate that more still needs to be done to ensure that individuals are brought to justice. Many offenders are proceeding to commit sexual offences of a more aggravated nature. Harsher sentencing, especially in instances of repeated offences, and better rehabilitation programmes for first-time offenders could help reduce future crimes.

The legislative developments in response to up-skirting crimes are mirrored in the attempts to manage rising incidences of 'cyber-flashing'. This offence sees perpetrators sending unwanted sexual images to strangers on social media or dating apps, or on data sharing services such as Bluetooth and Airdrop in public spaces.[176] Research by Professor Jessica Ringrose from 2020 found that 76 percent of girls aged 12-18 had been sent unsolicited nude images of boys or men.[177] Following recommendations in the Law Commission's 2021 report, 'cyber-flashing' is set to be criminalised by the Online Safety Bill.[178] However, the crime will be prosecuted on malicious intent rather than on the grounds of lack of consent, giving rise to similar issues experienced in prosecuting up-skirting crimes.[179] It is no use introducing the possibility of a two-year sentence if the likelihood of successful prosecution remains hampered by statutory construction.

Clare McGlynn, Erika Rackley and Ruth Houghton proposed the term "image-based abuse" with reference to Liz Kelly's influential notion of the continuum of related experiences

[174] The Crown Prosecution Service, 'UPSKIRTING: Public urged to report offenders as prosecutions double' (*CPS* 03 December 2021) <https://www.cps.gov.uk/cps/news/upskirting-public-urged-report-offenders-prosecutions-double> accessed 02 January 2023.
[175] ibid.
[176] The Law Commission, *Modernising Communications Offences* (Law Com No 399, 2021); The Crown Prosecution Service, 'Legal Guidance: Public Order Offences incorporating the Charging Standard' (*CPS*, 8 August 2022) <https://www.cps.gov.uk/legal-guidance/public-order-offences-incorporating-charging-standard> accessed 14 January 2023.
[177] Jessica Ringrose, 'Is there hidden sexual abuse going on in your school?' (*tes* magazine, 29 October 2020) <https://www.tes.com/magazine/teaching-learning/general/there-hidden-sexual-abuse-going-your-school> accessed 20 January 2023.
[178] The Law Commission, *Modernising Communications Offences* (Law Com No 399, 2021); The Crown Prosecution Service, 'Legal Guidance: Public Order Offences incorporating the Charging Standard' (*CPS*, 8 August 2022) <https://www.cps.gov.uk/legal-guidance/public-order-offences-incorporating-charging-standard> accessed 14 January 2023.
[179] The Rt Hon Nadine Dorries MP, The Rt Hon Dominic Raab MP, and Victoria Atkins MP, ''Cyber-flashing' to become a criminal offence' (*Gov.uk,* 13 March 2022). <https://www.gov.uk/government/news/cyberflashing-to-become-a-criminal-offence> accessed 20 January 2023.

concerning sexual violence.[180] Their article "'Beyond 'Revenge Porn': The Continuum of Image Based Sexual Abuse" suggests that the idea of a continuum "enables connections to be revealed between different forms of abuse with important discursive, policy and legal implications".[181] This approach reveals the interplay between perpetrators of various sexual crimes. There has been a reluctance to acknowledge the potential for escalation in sexual offending in both digital and physical life. Scotland Yard have faced backlash following revelations that they failed to investigate several incidents of indecent exposure committed by the predatory ex-police officer Wayne Couzens. One incident where he flashed a server at a McDonald's drive-through occurred just three days before his abduction and attack of Sarah Everard.[182] Couzens, already serving a whole life sentence for his attack on Everard, was sentenced to 19 months in prison for three incidents of indecent exposure. Understanding the connection between different sexual offences and their perpetrators would provide a better direction for policy and legislation, moving away from the current fragmented method.

Moving with the times: keeping pace with technological advances

Ultimately, the law is failing to keep pace with the constant progression of technology. Since its inception the proposed Online Safety Bill has already faced extensive criticism. By November 2022 alterations were required to include clauses criminalising 'down-blousing' and the sharing of altered intimate images of people without their consent such as pornographic deepfakes or "nudified" images.[183] Deepfake activity has grown considerably in recent years. Despite government recognition of the criminality of the use of deepfake technology in sexual offences, the historic struggles with prosecuting these crimes have not been explicitly addressed.

The term deepfake is a portmanteau of 'deep learning' and 'fake'. A deepfake is a form of synthetic media. It uses a sophisticated type of artificial intelligence (AI) in order to synthesise existing media, such as video clips and photographs, into realistic but fake videos.[184] The

[180] Karen Boydle, 'What's in a name? Theorising the Inter-relationships of gender and violence' (2019) 20(1) *Feminist Theory* 3.

[181] Clare McGlynn, Erika Rackley & Ruth Houghton, 'Beyond 'Revenge Porn': The Continuum of Image based Sexual Abuse' (2017) 25(1) *Feminist Legal Studies* 25.

[182] Fiona Hamilton, 'Wayne Couzens sentencing: officer gets 19 months after admitting indecent exposure' (*The Times,* 06 March 2022).

[183] Amelia Hill, 'Criminal reforms target 'deepfake' and non-consensual pornographic imagery' *The Guardian* (7 July 2022) <https://www.theguardian.com/law/2022/jul/07/criminal-reforms-target-deepfake-and-nonconsenual-pornographic-imagery#:~:text=The%20reforms%20broaden%20the%20scope,and%20circulated%20without%20their%20agreement> accessed 31 December 2022.

[184] Kelsey Farish, 'Practice Note: Deepfakes', (*Lexisnexis*) <https://www.lexisnexis.co.uk/legal/guidance/deepfakes> accessed 26 January 2023.

introduction of generative adversarial network (GAN) in 2014 allowed individuals outside the domain of film studios and special effects departments to utilise such technology.[185] 2017 saw the first use of the technology for the purpose of IBSA, when it was released on the online forum Reddit.[186] This technology can give rise to offences relating to harassment, defamation, reputational harm and exhortation. Some have turned to it as a substitute for "revenge pornography" when they do not have access to real-life indecent images of their victims.

When responding to deepfake offences, prosecutors may utilise the offences of harassment or stalking, contrary to sections 2, 2A, 4 or 4A Protection from Harassment Act 1997.[187] They may also employ section 33 of the Criminal Justice and Courts Act 2015, which criminalises disclosing private sexual photographs or films without the consent of an individual who appears in them. The offence requires an intent to cause the victim distress and is colloquially referred to as "revenge pornography".[188] The legislation, however, specifies the offence as "photographs or films which show a person engaged in sexual activity or depicted in a sexual way where part or all of their genitals or pubic area is exposed, and where what is shown would not usually be seen in public".[189] The complication with deepfakes is that, although they often form devastatingly realistic depictions of a victim, they are, by nature, not real images. The avenues for challenging or removing an unwanted deepfake have thus been limited and were often of a tortious and not criminal nature. The UK has not directly established an 'image right'- also referred to as rights of publicity. The causes of action available are rooted in laws concerning privacy and data protection, publicity and brand protection, intellectual property, reputation, and dignity. Similarly, a case might be brought on grounds of a breach of contract pertaining to a platform's terms of use. There has thus far been little application of UK data protection law (GPDR) in relation to the form of 'personal data' seen in deepfakes.

More effective approaches to prosecution have utilised specific laws related to misuse of private information, underlined by the concept of privacy. The two components of tort of misuse of private information are: (i) 'confidentiality' concerning the actual misuse of the private information; and (ii) 'intrusion' which depends upon whether the victim had a

[185] ibid.
[186] ibid.
[187] Protection from Harassment Act 1997, s 2, 2(A), 4, 4(A); Criminal Justice and Courts Act 2015, s 33.
[188] Criminal Justice and Courts Act 2015, s 33: Again, here again we see the necessity of proving intent is expressed within the statute.
[189] The Crown Prosecution Service, 'Legal Guidance: Revenge Pornography - Guidelines on prosecuting the offence of disclosing private sexual photographs and films' (*CPS,* 24 January 2017) <https://www.cps.gov.uk/legal-guidance/revenge-pornography-guidelines-prosecuting-offence-disclosing-private-sexual#:~:text=2%20years'%20imprisonment.-,Section%2033%20of%20the%20Criminal%20Justice%20and%20Courts%20Act%202015,to%20cause%20that%20individual%20distress> accessed 19 December 2022.

'reasonable expectation of privacy' in the information. The Supreme Court, in *Bloomberg v ZXC,* reiterated the requirements for establishing tortious liability. The claimant must first have had a reasonable expectation of privacy in the relevant information, and this privacy must not be outweighed by countervailing interests such as the defendant's freedom of expression.[190] Cases are thus confronted with two challenges. The first difficulty is differentiating between whether an image was captured in public, or whether the subject had a reasonable expectation of privacy at the time. Given that deepfakes are often a composition of multiple images and videos, tracing the specific source of the digital double can be particularly challenging. The second challenge in cases involving deepfake technology is balancing the claimant's right to privacy with the defendant's right to freedom of expression. The former is enshrined in Article 8 of Part I of Schedule I of the European Convention on Human Rights, and the latter in Article 10(1).

Convention rights are incorporated in domestic British law by The Human Rights Act 1998. English courts thus recognise the right to privacy more broadly. This approach was demonstrated in the infamous case of *Campbell v MGN Ltd*., where international supermodel Naomi Campbell sued the *Daily Mirror* for its publication of photos of her leaving a drug rehabilitation clinic.[191] There is, however, a balancing act to be conducted and there is an argument for freedom of artistic expression, as deepfakes are fictional compositions requiring skill and creativity. The uncertainty surrounding which avenue to pursue in litigation has undoubtedly alienated victims from pressing charges. For many, compensation and removal of the image may represent adequate redress. For others however, there is the feeling that such an intrusive act ought to fall within the realms of criminal activity. Thus, legislation must address the imbalance between the unfettered publishing of content and the rights of individuals victimised by such activity.

Given the fast-moving pace of digital development it is inevitable that legislation cannot always keep up. However, there must be better communication between tech companies and government bodies so that research stays up to date and legislation can pre-empt emerging technology. There are even instances where certain digital platforms have been widely publicised before reaching fruition. The meta-verse is one such example. The platform owned by Facebook has the potential to become a space which we regularly inhabit, and English law must adapt to correctly govern activity in the virtual world.

The reports of sexual abuse and harassment suffered in virtual reality are rising. The research and activist group SumOfUS published a damning report outlining Facebook's failure to

[190] [2020] EWCA Civ 611 (SC).
[191] [2004] 2 AC 457 (HoL).

address the clear danger of sexual harassment and abuse in virtual reality.[192] Entitled "Metaverse: another cesspool of toxic content", it documented several distressing instances of abuse experienced online.[193] In June 2021, a woman was playing the sports game Echo VR when another player said he'd recorded her speaking in order to "jerk off" to it later. [194] In February of 2022, a VR researcher Nine Jane Patel reported that she was gang raped by four male avatars in Horizon Worlds within sixty seconds of entering the simulation: "They crowded around her, capturing screencaps as they groped her character while saying, among other lewd comments, 'don't pretend you didn't love it'".[195] Virtual reality is designed to simulate reality; it is intended that both the mind and body are unable to differentiate between the digital and real world. Given that offences currently governed by the Sexual Offences Act 2003 require penetration or intentional sexual touching without consent, can this be applied to instances in the virtual world?[196]

It is unlikely the drafters of this legislation envisaged the application of the statute to avatars projected by code and controlled through VR headsets. Even Facebook's chief technology officer Andrew Bosworth acknowledged that virtual reality can often be a "toxic environment", especially for women and minorities.[197] A 2019 study by researchers in Facebook's Oculus division found that more than a fifth of their 422 respondents had reported an "uncomfortable experience" in VR.[198] Major sites are currently implementing modifications in order to address these issues. Horizon Worlds has been edited to include safety precautions such as the boundary bubble feature, which protects an avatar's space against other users. Facebook's safeguards are, however, predominantly reactive. Expert warnings have highlighted the difficulty, if not outright impossibility, of monitoring the billions of interactions taking place online in real time. Preventative measures must therefore be a priority in order to curtail the rise of abuse in virtual reality.

[192] Anon, 'Metaverse: another cesspool of toxic content' (SumOfUs, May 2022) <https://www.sumofus.org/images/Metaverse_report_May_2022.pdf>.
[193] ibid.
[194] ibid.
[195] Maya Oppenheim, 'Woman reveals 'nightmare' of being 'gang raped' in virtual reality' *The Independent* (03 February 2022) <https://www.independent.co.uk/news/uk/home-news/metaverse-gang-rape-virtual-world-b2005959.html> accessed 02 January 2023.
[196] Sexual Offences Act 2003, part I s 1, s 3.
[197] Hannah Murphy, 'How will Facebook keep its metaverse safe for users?' *Financial Times* (12 November 2021) <https://www.ft.com/content/d72145b7-5e44-446a-819c-51d67c5471cf?accessToken=zwAAAYX92E5UkdPXIUW3XkREatOBnFHWfFRxzw.MEYCIQDa_rishvO_OOw8mYQIAON6v4U0CjQb58pt6S_H4MWxtAIhAIDj8KQ9cSU5jCoiTKRjNkXTXMJVeehuxVDZ6dzZC9Ml&sharetype=gift&token=b764dd0a-332c-42fe-8add-b0e382fd9bfb> accessed 20 January 2023.
[198] ibid.

Catching water with a sieve: what is being overlooked?

The influence of technology and the internet over our lives is unprecedented. This has given rise to many positive advancements, including the wider dissemination of news and information and a greater capacity for social connection. There are, however, many groups of individuals who are vulnerable to the misuse of technology whose plight has yet to be properly addressed. 1 in 5 women have been subject to online harassment or abuse.[199] Neither parliament's Joint Committee for the Online Safety Bill or the Digital, Culture, Media, and Sport (DCMS) Committee have recommended that Violence Against Women and Girls ("VAWG") be included as a specific harm in the Online Safety Bill. Both organisations have proffered their support in response to calls by the Law Commission for an offence of "stirring up hatred against women".[200] Their response, however, has consisted of only indirectly targeting VAWG perpetrated online, such as anonymous trolls and inciting hatred.[201]

In the summer of 2020, amidst the storm of the pandemic, Soma Sara founded the anti-rape movement Everyone's Invited. The site revealed a systemic issue within schools nationwide, shining a light on a culture of rape, sexual harassment, and abuse. The anonymous testimonies shared online in solidarity with the movement recounted acts which had been perpetrated everywhere from parties to parks. They also detailed abuse suffered through IBSA, blackmail, and harassing sexual texting. As of September 2022, 50,000 teenagers have posted on Everyone's Invited. One story relayed a 15-year-old's nightmare as they watched nude pictures of themselves being shared at parties and projected onto walls.[202] Digital platforms have lent a new dimension to VAWG. The use of the internet, social media platforms, telecommunications, smartphone apps (such as WhatsApp and Snapchat), spyware and Global Positioning System tracking software to commit VAWG offences is rising. Online activity is used to humiliate, control, and threaten victims, as well as to plan and orchestrate acts of violence. It is therefore no surprise that the End Violence Against Women Coalition has called for a major overhaul of the Online Safety Bill and its approach to VAWG. Their recommendations include: (i) amending the Bill to include the Istanbul Convention definition of VAWG on the face of Bill, within an overarching human rights and equalities framework; (ii) amending clause 37 of the Bill to introduce a VAWG Code of Practice; (iii) introducing

[199] Anon, 'New figures real four in five victims of online grooming crimes are girls' (NSPCC, 10 June 2021) <https://www.nspcc.org.uk/about-us/news-opinion/2021/online-grooming-crimes-girls/> accessed 13 January 2023.

[200] Sheila Amedodah, 'Government urged to do more to protect women and girls from online abuse' (*The House*, 28 February 2022) <https://www.politicshome.com/thehouse/article/government-urged-to-do-more-to-protect-women-from-online-abuse> accessed 13 January 2023.

[201] ibid.

[202] Alice Thomson, 'Soma Sara: Extreme porn is rewiring boys' brains to sanction rape culture' *The Times* (London, 02 September 2022).

greater media literacy requirements; and (iv) providing that 10% of the Digital Services Tax are directed to funding for specialist support services.[203] Many of the issues they have identified in relation to a lack of protection for VAWG extend to other vulnerable groups, including children and minority groups.

Current legislation does not effectively hold tech companies accountable for the ways in which the design and operation of their platforms can engender VAWG in all its forms. A YouGov and EVAW survey last October found that of a sample group of 1699 UK adults, 74 per cent believed that the government should do more to ensure social media companies address online harassment and violence against women and girls.[204] Anna McMorrin's powerful speech to the House in the debate on the Online Safety Bill depicted VAWG as "an ever-growing epidemic".[205] She called out the Government's "piecemeal actions" in response to the issue, including their failure to address the "loophole" in the statutes criminalising cyber-flashing which requires proving a perpetrator's intent to cause harm.[206] In the same debate, Dame Diana Johnson highlighted the paucity of protection, not only in response to VAWG, but also in tackling the historic failure of legislation to prevent underaged sexual abuse online. In her opinion, the addition of clause 7, and amendments 33 and 34 to the bill (which focused on protecting under-age individuals) were "minimum safety measures" only.[207] They therefore fell short of the sturdier protections necessary in the current climate. Leading anti-sexual exploitation organisations including CEASE—the Centre to End All Sexual Exploitation—UK Feminista and the Traffickinghub movement, have supported legislation requiring online platforms to verify the age and consent of all individuals featured in pornographic content.[208] These campaigns have also helped expose the abuses committed by prominent sites including Pornhub.[209]

[203] End Violence Against Women Coalition, 'Written evidence submitted by End Violence Against Women Coalition (OSB63) to the Online Safety Bill Public Bill Committee' (*UK Parliament*, 10 June 2022)<https://publications.parliament.uk/pa/cm5803/cmpublic/OnlineSafetyBill/memo/OSB63.htm> accessed 20 December 2022.

[204] Sheila Amedodah, 'Government urged to do more to protect women and girls from online abuse' (*The House*, 28 February 2022) <https://www.politicshome.com/thehouse/article/government-urged-to-do-more-to-protect-women-from-online-abuse> accessed 13 January 2023.

[205] HC Deb 12 July 2022, vol 718, col 192.

[206] ibid.

[207] ibid col 246.

[208] ibid.

[209] Kari Paul, 'Pornhub removes millions of videos after investigation finds child abuse content', <https://www.theguardian.com/technology/2020/dec/14/pornhub-purge-removes-unverified-videos-investigation-child-abuse > accessed 06 March 2023.

The Government have pledged that if major platforms don't fulfil their own standards to keep people safe and address abuse quickly and effectively, they will face the consequences.[210] Potential repercussions include huge fines or even banning a site by disabling its URL. There is little confidence in such threats, however, given both the flagrant disregard for safety standards already shown by major sites such as TikTok, and the limited consequences which such platforms have faced in the aftermath. The companies under scrutiny are grossing around $12 billion annually and a governmental fine is unlikely to dissuade them from profiting off underaged users.[211] There must be more stringent regulation. Toxic content is proliferated by influencers across social media. One such figure is the infamous Andrew Tate who was recently banned from Facebook and TikTok for his glorification of rape culture and abuse of women, including his suggestion that rape victims must "bear responsibility for their attacks".[212] His ban has, however, merely served to increase his notoriety, and there has been little evidence of any effective policing of his content. Members of his online academy, Hustler's University, are encouraged to continue posting videos of him to generate referrals. These videos of misogynistic content are pushed by social media algorithms, often to younger male audiences.[213]

The most successful sanctions on sites thus far have been those imposed by major corporations rather than government departments. In 2020, *The New York Times* documented the presence of child abuse videos on Pornhub, one of the most popular pornography websites in the world, prompting Mastercard, Visa and Discover to block the use of their cards for purchases on the site.[214] Similarly, in the preceding year PayPal took the decision to stop processing payments for Pornhub after an investigation by *The Sunday Times* revealed that the site contained child

[210] Department for Digital, Culture, Media & Sport, 'Online Safety Bill: factsheet' (*GOV.UK*, 18 January 2023) <https://www.gov.uk/government/publications/online-safety-bill-supporting-documents/online-safety-bill-factsheet> accessed 20 January 2023.

[211] Zheping Huang, 'Tik Tok Turns on the Money Machine' (*Bloomberg UK,* 23 June 2022) <https://www.bloomberg.com/news/features/2022-06-23/tiktok-becomes-cash-machine-with-revenue-tripling-to-12-billion?leadSource=uverify%20wall> accessed 10 December 2022.

[212] Shanti Das, 'TikTok 'still hosting toxic posts' of banned influencer Andrew Tate' *The Guardian* (06 November 2022) < https://www.theguardian.com/technology/2022/nov/06/tiktok-still-hosting-toxic-posts-of-banned-influencer-andrew-tate#:~:text=TikTok%20is%20failing%20to%20crack,so%2C%20according%20to%20new%20research > accessed 21 January 2023.

[213] ibid.

[214] Gillian Friedman, 'Mastercard and Visa stop allowing their cards to be used on Pornhub' *New York Times* (10 December 2020) <https://www.nytimes.com/2020/12/10/business/visa-mastercard-block-pornhub.html> accessed 28 December 2022.

abuse videos and other illegal content.[215] If this commercial power could be harnessed in a more cohesive manner there is the opportunity to clamp down on the exploitation of vulnerable groups online.

Inciting sexual abuse online: freedom of expression and the right to privacy

There is a concern that balancing competing rights on digital platforms will result in either an overzealous policing of speech and content or haphazard and ineffective safeguards which fail to protect the vulnerable members of the digital community. Many offences currently require proof of intention which, as previously established, is a difficult evidentiary hurdle to clear, often to the extent that it precludes prosecution. These issues not only occur in IBSA, up-skirting or cyber-flashing, but extend to the primary source of digital harassment and abuse: communication.

Communications sent via social media may involve the commission of a range of existing offences against the person or public justice and may also constitute a sexual or public order offence. These may fall under "communications offences" contrary to section 1 Malicious Communications Act 1988 or section 127 Communications Act 2003. The former is far more stringent in terms of the standards necessary to prosecute; a message must be intended to cause distress or anxiety to the recipient or to any other person to whom it is intended that the message or its contents or nature should be communicated. The nature of the communication is also subject to more scrutiny. Section 1 requires the sending of a letter, electronic communication, or article of any description to another person. Therefore, depending on the facts of a case, a social media communication which is merely a blog or a comment posted on a website may not suffice. The guidance on section 1 requires prosecutors to consider the evidence that the communication was addressed to a specific recipient, and how likely that the specific recipient was to receive it.[216] In contrast, section 127 requires only that the message or other matter is sent; this covers the posting or sharing of a communication.

As established in *Chambers v DPP*, section 127 serves as the starting point for allegations concerning a public electronic communications network.[217] *Chambers* confirmed that a section 127 offence requires proof of an intention that the message should be of a menacing character. Alternatively, a claimant must prove the defendant's awareness of the risk of creating fear or

[215] Shanti Das, 'PayPal cuts off porn site that ran child abuse videos' *The Times* (17 November 2019) <https://www.thetimes.co.uk/article/paypal-cuts-off-porn-site-that-ran-child-abuse-videos-98j2bdnjt> accessed 28 December 2022.

[216] The Crown Prosecution Service, 'Legal Guidance: Social Media and other Electronic Communications' (*CPS*, published 19 December 2022; revised 9 January 2023) <https://www.cps.gov.uk/legal-guidance/social-media-guidelines-prosecuting-cases-involving-communications-sent-social-media> accessed 02 January 2023.

[217] [2012] EWHC 2157 (Admin).

apprehension in any reasonable individual who would read or see the impugned communication. This *mens rea* applies equally to the other elements of the offence. The *actus reus* of the section 127 offence entails the message must be grossly offensive, or of an indecent, obscene or menacing character. *Connolly v DPP* established that words "indecent or grossly offensive" are to be determined in their ordinary English sense.[218] Worryingly, guidance to prosecutors includes only proceeding if they are satisfied that there is sufficient evidence that the communication in question crosses the high threshold necessary to protect freedom of expression, even unwelcome freedom of expression.[219] This includes disregarding communication which could be described as merely "offensive, shocking or disturbing" or "rude".[220] Unwelcome freedom of expression allows for communication which is "banter or humour, even if distasteful to some or painful to those subjected to it".[221] Defendants could qualify their communications as one of these options and avoid prosecution.

Claimants are thus subjected to insurmountable hurdles when challenging online sexual harassment or digital communications which incite sexual violence or abuse. The Online Safety Bill has, self-purportedly, attempted to redress this balance in two main ways. The first is by promising 'user empowerment', which provides women with greater control over who can communicate with them and what content they are exposed to. The second concerns 'user redress', which helps women to report abuse more effectively and establishes expectations for more appropriate responses from platforms. Only time will tell whether these will be sufficient to provide viable protection against online sexual harassment and hate speech.

No more excuses: the time for change is now

In 2016, the United Nations declared that it considers access to the internet to be a human right. An addition was made to Article 19 of the Universal Declaration of Human Rights stating, "everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers".[222] The importance of access to, and use of, the internet cannot be doubted. A balance must be struck. We cannot impose a totalitarian state in our digital spheres whilst claiming democratic freedom in the physical. There are, however, legislative safeguards which, if implemented, could mitigate the spread of IBSA and

[218] [2007] 1 ALL ER 1012.
[219] The Crown Prosecution Service, 'Legal Guidance: Social Media and other Electronic Communications' (*CPS*, published 19 December 2022; revised 9 January 2023) <https://www.cps.gov.uk/legal-guidance/social-media-guidelines-prosecuting-cases-involving-communications-sent-social-media> accessed 02 January 2023.
[220] ibid.
[221] ibid.
[222] UNHRC, *The promotion, protection and enjoyment of human rights on the Internet* (07 July 2021) 47.

harassment on digital platforms. If the law does not keep pace with technology, then it will surely overtake us. We must master the digital or be slaves to it.

This essay has not touched on the plethora of issues concerning the treatment of victims suffering from sexual abuse and harassment online. Preventive measures must be addressed but there is also much room for improvement in reactionary procedures. Practically, better police and safeguard training is required to understand sensitive victim handling. There is a lack of judicial training and diversity, leaving many victims feeling isolated and unheard in court. One need only look at the devastating failure to properly support victims of physical sexual abuse and harassment to gain some idea of where we are falling short in protecting and supporting victims of crimes committed on digital platforms. The Victims' Commissioner, Dame Vera Baird KC documented the wide-spread, overwhelming feeling of isolation and helplessness of both male and female victims of online sexual abuse and harassment.[223]

Ironically, it has been the internet itself which has proved the most instrumental tool in enacting change to combat sexual abuse and harassment facilitated by technology. The sharing of experiences, information and guidance has allowed victims to find a voice and to search for support. It has provided a platform for campaigns and enabled people to call for political and social accountability for the systemic failure to deal with the prevalence of sexual crimes, both physical and virtual. These efforts, however, have not been enough. There must be more stringent legislative safeguards which do not preclude prosecution through unnecessarily high evidentiary hurdles. Most importantly, it must be recognised that the wheels of change will continue to turn, and we must become more proactive in order to protect future generations from online sexual harassment and abuse.

[223] Dame Vera Baird QC, Dr Madeleine Storry & Dr Sarah Poppleton, 'The Impact of Online Abuse: Hearing the Victims' Voice' (*Victims Commissioner,* 01 June 2022) < https://s3-eu-west-2.amazonaws.com/jotwpublic-prod-storage-1cxo1dnrmkg14/uploads/sites/6/2022/05/Hearing-the-Victims-Voice.pdf> accessed 21 January 2023.

As It Should: A Defence of the Definitional Width of Mental Disorder in the Mental Health Act 1983

Zhen Qi Wong

Introduction

The Care Quality Commission ("CQC")[224] recently reported an increase in mental health detentions, as clinicians attribute the issue to the widened definition of mental disorder in 2007.[225] There have since been calls for "mental disorder"[226] to be reformed.[227] Nonetheless, a closer evaluation reveals that the proposition to reform the definition is unwarranted, nor as feasible as one might assume.

To this end, the paper begins with a brief outline of the present detention framework (Section II), which lays a path for a threefold analysis. Section III debates the general rationale of definitional width, arguing against the narrowing of the present definition vis-à-vis the abstention from classifications**.** With acknowledgment as to how "mental disorder" may theoretically result in inappropriate detentions, Section IV exemplifies how its extent does not warrant concern. The contemporary question regarding untreatable disorders[228] shall be addressed in Section V, from which issues pertaining to benefit in the detention of untreatable patients will be identified. Nonetheless, a reverse analysis will outline how a reform in definition does not reinstate the purported benefits due to practical limitations. Section VI concludes that, therefore, a reform in definition is gratuitous.

"Mental disorder" and the Law

Detention powers can only be exercised within its legal framework–that is, the Mental Health Act 1983 ("MHA"). The criterion most pertinent for the purposes of this paper and generally

[224] Care Quality Commission, *Mental Health Act: The Rise in the Use of MHA to detain people in England* (2018).
[225] The Mental Health Act 1983 received a reform in 2007. See generally, Paul Bowen, *Blackstone's Guide to the Mental Health Act 2007* (Oxford University Press 2007).
[226] For the purposes of this paper, "mental disorder" in double quotation marks refers specifically to the definition of mental disorder in S.1(2) of the Mental Health Act 1983 (as amended in 2007).
[227] Sheila Hollins and others, 'The Case for Removing Intellectual Disability and Autism from the Mental Health Act' (2019) 215 The British Journal of Psychiatry 633-635.
[228] Though not untreatable *per se*, for the purposes of this paper, "untreatable disorders" shall refer to learning disabilities and autism specifically.

the most prominent in discussion of the Act is S.1(2).[229] As a general starting point, it delineates how a diagnosis of a mental disorder forms the basis of a lawful detention.[230] "Mental disorder" is statutorily defined to be 'any disorder or disability of the mind'.[231] Save for the non-exhaustive list of several disorders outlined in the guideline,[232] mental disorder appears a somewhat open-ended construct**.** Though, it is worth nothing that the Act's definition is consistent with the position of 'person of unsound minds' in the European Convention of Human Rights, as enshrined in art. 5(1)(e).[233]

The Case for Keeping Definitional Width

Insofar as the legality of detentions is concerned, a wide definition is warranted for two reasons. First, from a medical view, the adoption of a narrow definition can create an unnecessary barrier to therapeutic intervention. It must be recognised that psychiatric conditions are inherently 'messy, and defy non-arbitrary categorization',[234] whereby a confluence of factors[235] distort a straightforward diagnosis to each mental disorder at hand. Frances and Widiger,[236] through their familiarity with formulating definitions of mental disorders, have argued that 'the concept of mental disorder is so amorphous, protean, and heterogeneous',[237] such that a definition (let alone a narrow definition) is unwarranted. Given the complexities of mental disorders, adopting over-prescriptive and categorical language appears counterproductive for 'qualitative, discrete, all-or-none class distinctions'[238] are hardly achievable in medical practice.

Take a patient who lacks one symptom for example, if he shows five other clear manifestations, should this render their diagnosis invalid? It follows that a narrow definition's emphasis on the question of *kind* overlooks the crucial differences in *degree*. This is clearly concerning because diagnosis of disorders may predicate upon normative and valuational concepts. To illustrate,

[229] Mental Health Act 1983, Section 1(2).
[230]The additional criteria are discussed in Section IV of this paper. ibid, Section 3.
[231] ibid, Section 1(2).
[232] See Department of Health, Code of Practice Mental Health Act 1983 (The Stationary Office, London 2008) para 2.5.
[233] See further, *Winterwerp v Netherlands* (1979) E.H.R.R. 387 at [37].
[234] Frances and others, 'An A to Z Guide to DSM-IV Conundrums' (1991) 100 Journal of Abnormal Psychology 407, 408.
[235] Ian B Hickie and others, 'Clinical Classification in Mental Health at the Cross-Roads: Which Directions Next?' (2013) 11 BMC Medicine, 1-14.
[236] Contributors to the DSM-IV definition of mental disorder.
[237] Allen J Frances and Thomas Widiger, 'Psychiatric Diagnosis: Lessons from the DSM-IV pas and cautions for the DSM-5 Future' (2012) 8 Annual Review of Clinical Psychology 109, 111.
[238] Theodore Millon, 'Classifications in Psychopathology: Rationale, Alternatives, and Standards' (1991) 100(3) Journal of Abnormal Psychology 245, 254.

the test for intellectual disabilities entails an IQ test and assessment on 'adaptive functioning',[239] which are arguably 'quantitative gradations among persons'.[240] Adopting stringent parameters in examining intellectual disability would only stray away from medical consensus,[241] resulting in inaccurate diagnoses. The discord between complex psychiatric concepts and definitional prescription thereby renders a narrow legal definition futile.

On the contrary, a wide definition reduces bureaucratic challenges in administering legal therapeutic intervention. Indeed, past precedent has exemplified the dangers of adopting narrow definitions. Baroness Hale expressly acknowledged this issue prior to the 2007 reforms,[242] in noting how 'psychiatry is not an exact science', whereby '[d]iagnosis is not easy or clear cut'.[243] In that case, a comorbid patient argued against the lawfulness of his treatment in personality disorder on grounds that he was legally classified under schizophrenia, despite clear symptoms of both disorders. Owing to pragmatism, Lady Hale disapplied his stringent classification to ensure his lawful therapeutic intervention.[244]

This surely must be correct, since two clinicians' inability to agree on *a* diagnosis on the basis of comorbidity[245] should not impede the patient's lawful treatment, particularly when the disorder in question constitutes evident seriousness warranting admission. Despite the importance of medical classifications in achieving optimum therapy,[246] adopting narrow legal classifications in light of the disjunction between the two concepts[247] would be detrimental to the notion of administering treatment. On this note, the retention of an inclusive definition mirrored in "mental disorder" is warranted for therapeutic purposes. Fortunately, the broadened, all-encompassing nature of "mental disorder" today as included in the Act circumvents such procedural issues.

[239] Division of Clinical Psychology, *Guidance on the Assessment and Diagnosis of the Intellectual Disabilities in Adulthood* (The British Psychological Society 2015) 28.
[240] Millon (n 15).
[241]. Though, see *R (on the application of Khela v Brandon Mental Health Unit)* [2010] EWHC 3313 at [6]. Thornton J: 'there is no remedy currently available that enables the court to order that the diagnosis of a doctor should be changed and corrected'.
[242] (n 2).
[243] *R (B) v Ashworth Hospital Authority* [2005] UKHL 20 at [31].
[244] ibid.
[245] Studies have even found that more than half of all people with a DSM disorder have at least one additional disorder. Lee Anna Clark and others, 'Diagnosis and Classification of Psychopathology: Challenges to the Current System and Future Directions' (1995) 46 Annu. Rev. Psychol. 121, 127.
[246] Jamie Walvisch, 'Defining "Mental Disorder" in Legal Contexts' (2017) 52 International Journal of Law and Psychiatry 7, 15.
[247] David Pilgrim, 'Defining Mental Disorder: Tautology in the Service of Sanity in British Mental Health Legislation' (2005) 14:5 Journal of Mental Health 435, 439.

Further, and perhaps most importantly, the fluidity of definition is mandated to accommodate practical difficulties. Clinical challenges often arise in identifying mental disorders as clinicians are mostly left with mere physical representations by patients.[248] To that end, a legal (on top of medical) mechanism in place that accounts for the non-exhaustive aetiological factors[249] is pertinent in pinpointing the domain of a disorder. Indeed, aetiological factors such as physical health, mental health, and social factors are inherently within the equation of medical practice. It would seem counterintuitive to adopt a constrained definition in view of clinicians' constant exposure to rare, complex conditions beyond their clinical expertise.

In Dr Eleanor Feldman's experience, she recalled her encounter of the relatively unknown limbic encephalitis, whereby her patient's disturbed behaviour mandated 'strong and prolonged measures over a matter of up to two weeks'.[250] Fortunately, it was the presence of symptoms (rather than a classification) that qualified the symptoms a "mental disorder". Just as it 'cannot be said that something that is not in any classification is not a mental disorder',[251] a less-known disorder should not deter lawful confinements for exceeding a clinician's understanding of stagnant definitions. It follows that a wide definition allows for requisitely flexible approaches to treatment administration under practical complexities.

Having discussed the importance of a broad definition, it must be underlined that diagnosis of mental disorder in itself is insufficient to warrant lawful detentions. Two further criteria in S.3 of the MHA–the risk assessment and appropriate treatment test–need satisfaction to license a compulsory legal confinement. As these criteria are commonly applied conjunctively with "mental disorder", two issues arise. For one, to what extent does "mental disorder" influence the decision-making in these criteria? The other is whether a change in definition would shift the perceived issues of over-detention away, to which we now turn.

Inappropriate Detentions – "Mental Disorder" as a Causal Factor?

Before an analysis on whether the definition causes inappropriate detentions, the scope of what constitutes an inappropriate detention should first be ascertained. An empirical understanding of what amounts as an appropriate detention predicates upon contemporary social policy[252]–

[248] Reliable and consistent biomarkers for major mental disorders have yet to be identified. See generally, I Hickie and others, 'Biomarkers and Clinical Staging in Psychiatry' (2014) 13(3) World Psychiatry 211-233.
[249] Ken Courtenay, 'The Case for Removing Intellectual Disability and Autism from the Mental Health Act' (2020) Br J Psychiatry 2020 64, 64.
[250] E Feldman, 'The Use of Mental Health Act and Common Law in Non-Consenting Patients in the General Hospital' (2006) 5(3) Psychiatry 107, 109.
[251] Mental Health Bill (2006) cl 16.
[252] Mental health law is inherently a construct of social policy: Whilst protection of self is paternalistic in nature, protection of others is largely a state policing role, see further Peter Bartlett, 'A Mental Disorder of a Kind or
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the concept of risk. Present policies[253] can be said to be accentuated by high profile incidents and the stigmatisation of dangers associated with mental disorders.[254] By corollary, an "appropriate detention"[255] would be one which mandates patients who might otherwise be a danger to themselves or others to comply with the treatment they need[256]– as enshrined in S. 3(2)(c) of the MHA**.**[257] In this connection, the 'nature and degree' test[258] is employed to justify the intrusion of personal autonomy on grounds of public safety and paternalism**.** Further under this test, risk is qualified in a balance between the specific mental disorder suffered (nature) and the present manifestations of the disorder (degree).[259]

The limited guidelines outlined aside,[260] proponents have argued that the undefined nor delimited scope of risk assessment exposes its application to heavy clinical discretion. Indeed, without clarification to the factors and thresholds to risk, applying the open-ended criteria necessitates subjective interpretation – an invitation to clinicians' recourse to professional judgement. Alas, the blurring between nature and degree is also reflected in today's practice. As Bartlett argues, clinicians 'operate on a personal and ad hoc system … based on their own experience'.[261] Albeit pragmatic,[262] such non-universal application contributes to the possibility of clinicians' self-authored methodology in exercising risk evaluation. Taken together, the lack of an institutionalised criteria thereby leaves open the *possibility* to maltreatment in attributing unjustified prominence towards "mental disorder" (nature) in determining appropriate detentions.

Nonetheless, it is argued that the extent to which "mental disorder" encroaches into risk assessments (thereby inappropriate detentions) is questionable for two reasons.

Degree Warranting Confinement: Examining Justifications for Psychiatric Detention' (2012) 16:6 The International Journal of Human Rights 831, 837.

[253] Present policies are taken to mean the present policies *per se*, without reference to the current proposed reforms.

[254] See generally, Jeremy Laurance, 'Pure Madness: How Fear Drives the Mental Health System' (Faculty of Public Health Medicine Annual Scientific Conference, King's Fund Lecture, 2003).

[255] For the purposes of this paper, "appropriate detentions" and "inappropriate detentions" shall hold the meaning as prescribed in the sentence, i.e., the detentions on justified grounds of risk.

[256] Richard Jones, *Mental Health Act Manual* (Sweet & Maxwell, 23rd edn, 2020) 41.

[257] Mental Health Act 1983, Section 3(2)(c).

[258] ibid, Section 3(2)(a).

[259] See *R v Mental Health Review Tribunal for the South Thames Region Ex p. Smith* [1999] B.M.L.R. 104. Currently codified in Mental Health Act 2007 Explanatory Notes.

[260] Code of Practice 14.9.

[261] Peter Bartlett, 'Civil Confinement' in J McHale and others (eds), *Principles of Mental Health Law* (Oxford University Press Oxford 2010) para 12.19.

[262] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders (DSM-5)* (American Psychiatric Association, Arlington, 5th edn, 2013) 5-6.

First, despite the acknowledged pervasive intrusion of clinical discretion, present practice has evinced that extra-legal factors, rather than the qualification of "mental disorder", are at the root of risk assessments. Glover-Thomas's report regarding clinicians' risk evaluation process lends credence to this proposition.[263] Notably, it was found that such assessments are predominantly based on an appeal to surrounding features of mental disorders, such as clinical history[264] and a risk of relapse.[265] Indeed, risk assessment in practice appears to be an inquiry into the 'zone of confluence'[266] between the patient and their manifestations of symptoms. In other words, risk does not predicate upon the presence of a specific disorder *per se* but rather *exclusive* individual internal characteristics that complement their disorder, which is a completely separate question.

Take psychopathy as an example, a disorder of which aggression and violence (core features of disorder) intersect with individual characteristics on many levels.[267] On a conceptual level, it may seem reasonable to suggest that all psychopathic patients pose a physical risk to the wider society. But importantly, because aggression exhibited varies by degree and individual,[268] it cannot be said that *all* psychopaths pose an intrinsic risk. It thereby suggests that risk assessments are conceptually dependent on one's degree of psychopathic manifestations, which is inherently an underlying individual characteristic distinct from the type of mental disorders s/he suffers from. A conceptual disconnection between discretion and the qualification of a disorder, albeit its theoretical possibility, renders the liability of "mental disorder" in inappropriate detentions minimal.

Second, and in any event, despite *possible* shortcomings in "mental disorder", pinpointing the exact root to its definition despite the acknowledged arbitrary nature of risk assessments may also seem counterintuitive. "Mental disorder" and the loose application of risk *co-exist* in the process of qualifying "appropriate detentions". Just as it could be argued that clinical discretion in risk assessment should have never existed, it could equally be argued that the "mental disorder" should never have held such width in the first place. Due to the many factors at play,

[263] See generally, Nicola Glover-Thomas, 'The Age of Risk: Risk Perception and Determination Following the Mental Health Act 2007 (2011) 19 Medical Law Review 581-605.
[264] ibid. See further, Royal college of Psychiatrists, *Assessment and Management of Risk to Others: Good Practice Guide* (2016). It was explicitly mentioned that '[a] history of violence or risk to others is vitally important.'
[265] *R v MHRT for South Thames Region, ex p Smith* [1999] 47 BMLR 112.
[266] Bernadette Dallaire and others, 'Civil Commitment due to Mental Illness and Dangerousness: The Union of Law and Psychiatry within a Treatment Control System' (2000) 22(5) Society of Health & Illness 679, 690.
[267] See generally, Nathaniel E Anderson and Kent Keihl, 'Psychopathy & Aggression: When Paralimbic Dysfunction Leads to Violence' (2014) 17 Curr Top Behav Neurosci 369-393.
[268] ibid 384.

the wide definition could at best provide indirect grounds for inappropriate detentions which ultimately stem from the arbitrary risk framework, rather than being its *de facto* causation.

Removal of Untreatable Disorders from "Mental Disorder" – Benefit Reinstated?

One may then reasonably question the inclusion of untreatable disorders in "mental disorder". As will be seen, the present detention criteria resulting from the inclusion of untreatable disorders do not appear to "benefit"[269] untreatable patients in either way.

(i) The Paradox

As it stands, "mental disorder" includes untreatable disorders. This is attributable to S.3(2)(d),[270] which renders a detention lawful should there be an 'appropriate medical treatment' available. Controversially, what constitutes an appropriate medical treatment has been interpreted broadly to merely require the low threshold of a 'secure therapeutic environment'[271]– a gross difference from the administering of therapeutic benefit.[272] Resulting from uncurable symptoms,[273] repeated satisfaction of the appropriate treatment test would lead to a never-ending spiral of detentions so long as untreatable disorders remain qualified within "mental disorder".

The easy compulsory detention aside (a contradiction to patient autonomy), it is equally unfortunate that such confinement warrants zero therapeutic benefit– an issue acknowledged by both the House of Commons[274] and CQC.[275] Specifically with autism, compulsion was reported to contrive the worsening of autistic symptoms as inpatient settings often fail to meet patients' sensory and communication needs.[276] Paradoxically, an autistic patient's distress reactions to sensory overload can be displayed as challenging behaviour, leading to further

[269] For the purposes of this paper, 'benefit' or 'patient benefit' shall broadly mean the balance between therapeutic benefit and patient autonomy for the balance of interests between all stakeholders.
[270] Mental Health Act 1983, Section 3(2)(d).
[271] *MD v Nottinghamshire Health Care NHS Trust* [2010] UKUT 59 at [6.16].
[272] See *Rooman v Belgium* [2019] ECHR 048.
[273] Joseph S Alpert, 'Autism: A Spectrum Disorder' (2021) 134(6) The American Journal of Medicine 701, 702.
[274] Lord Addington: 'The treatment of many people with autism [have] undergone is probably the best way to induce poor mental health in many of them'. HC Deb 5 Nov 2019, vol 800, col 1158.
[275] See generally, Care Quality Commission, **'**CQC demands national system change to prevent future generations of autistic people and/or people with a learning disability from "falling through the gaps"' (2020).
[276] UK Secretary of State for Health and Social Care Lord Chancellor and UK Secretary of State for Justice Reforming the Mental Health Act, Reforming the Mental Health Act (Department of Health & Social Care 2021) 60.

deteriorating confinements[277] and subjected to being 'warehoused'.[278] Thence, with both therapeutic benefit and patient autonomy forgone, one could understand the impetus for a narrowing of definition, specifically for the removal of untreatable disorders[279] from "mental disorder".

(ii) A Practical Pitfall

Nonetheless, the simplistic idea of removing autism (and all other untreatable disorders for this matter) from "mental disorder" does not guarantee benefit and is thus redundant for two reasons.

First, a blanket removal of autism and learning disabilities would risk overlooking critical cases warranting therapeutic intervention– reflected in the hesitant stance to remove untreatable disorders in the Wessely Review.[280] Per reports, autistic disorders are statistically seven times more subject to criminal compulsion[281] owing to the extra-aggressive behavioural nature.[282] In this connection, it seems counterintuitive to remove detention as a form of treatment for it only subjects patients to no alternative but imprisonment. Indeed, the present proposed reforms are only confined to civil admissions,[283] and removal of such disorders from the definition could mirror the outcome in New Zealand (the sole jurisdiction to have removed intellectual disability from its mental health legislation)[284] which saw a sharp increase in imprisonment and decrease in clinical expertise. Therefore, patient benefit can hardly be reinstated when the removal of a therapeutic route diverts patients into the criminal justice system.

[277] HC Deb 28 October 2021, vol 815, col 228 GC (People with Learning Difficulties and Autism: Detention in Secure Settings).
[278] Simon Wessely, *Modernising the Mental Health Act: Final Report on the Independent Review of the Mental Health Act 1983* (2018) 8.
[279] Although one may argue that autism and learning disabilities are not mental disorders medically, but rather developmental disorders, see C Lord and R Jones, 'Re-Thinking the Classification of Autism Spectrum Orders' (2012) 53(5) J Child Psychol Psychiatry 490, 503.
[280] Wessely (n 55).
[281] Colleen Berryessa, 'Judiciary Views on Criminal Behaviour and Intention of Offenders with High-Functioning Autism' (2014) 5 J Intellect Disability Offending Behaviour 97–106.
[282] Monique Chiacchia, 'Autism Spectrum and the Criminal Justice System' (2016) <https://www.purdueglobal.edu/blog/criminal-justice/autism-and-the-criminal-justice-system/> accessed 20 November 2021.
[283] UK Secretary of State for Health and Social Care Lord Chancellor and UK Secretary of State for Justice Reforming the Mental Health Act (n 53) 61.
[284] See generally, Jane McCarthy and Mhairi Duff, 'Services for Adults with Intellectual Disability in Aotearoa New Zealand' (2009) 16 BJ Psych Int 71–3.

Secondly, legislative changes alone will not transform the quality of care in today's stark reality. As an alternative to compulsory detention, the White Paper[285] has suggested a shift to the NHS and local communities to spearhead therapeutic efforts. With respect, this commendable initiative is practically unachievable at the time of writing of this paper, at least. As was highlighted in *Dorset Council*,[286] the lack of suitable placements is at the forefront of issues faced by learning disabilities and/or autistic patients. HHJ Dancey emphasised the gravity of this issue, noting how the procedural difficulties in locating alternative placements has broken trust in the present system.[287] The failure of the Transforming Care Programme[288] would further contextualise his Lordship's judgment. By corollary, it appears somewhat ironic to trust a flawed system which has failed to reduce detention figures[289] in accordance with its set baseline. With the lack of incentives to support discharge[290] and insufficiently compensated care workers[291] as underlying concerns, the optimality of a definitional reform alone is highly questionable.

(iii) A Possible Way Forward

As seen, the tensions between taking positive and negative action are evident. On the one hand, removing untreatable disorders from the "mental disorder" (in the present circumstances) appears an overpromise with zero practical deliberations; whereas leaving the present definition intact has proven to further detriment untreatable patients.[292]

Thence, against the backdrop of definitional *removal*, the writer advocates for *change* through systemic means. After all, radical legislative changes in the past across the globe have not been truly effective. Studies from Canada, USA,[293] and Belgium[294] have shown that legislation introduced to decrease the use of psychiatric detention resulted in increased rates of involuntary

[285] UK Secretary of State for Health and Social Care Lord Chancellor and UK Secretary of State for Justice Reforming the Mental Health Act (n 53) 9.
[286] *Dorset Council v A (Residential Placement: Lack of Resources*) [2019] EWFC 62.
[287] ibid at [40].
[288] See generally, J Taylor, 'Delivering the Transforming Care Programme: A Case of Smoke and Mirrors?' (2019) 43 BJPsych Bulletin 201-203.
[289] Rebecca Thomas, '"Yet Another Failure" on Flagship Programme for Learning Disabilities' (2020) <https://www.hsj.co.uk/patient-safety/yet-another-failure-on-flagship-programme-for-learning-disabilities/7027424.article> Accessed 14 November 2021.
[290] ibid.
[291] ibid.
[292] See Section V(i).
[293] Judith S Thompson and others, 'Decision Making in Psychiatric Civil Commitment: An Experimental Analysis' (1991) 148 Am J Psychiatry 28–33.
[294] Diane Lecompte. 'Paradoxical increase in involuntary admissions after the revision of the Civil Commitment Law in Belgium' (1995) 14 Med Law 53.

hospitalisation. Rather, a piecemeal and reactive approach in breaking down monetary and systemic barriers would not only reinstate patient benefit gradually, but retain the wide definitional functions as discussed in Section III.

Conclusion

The push for a definitional reform for "mental disorder" appears a storm in a teacup. The paper began on medical grounds to advance the preference of a wide definition to ensure the administration of lawful therapeutic interventions, whereas factors leading to inappropriate detentions were demonstrated to be independent of "mental disorder". The inadvertent unbeneficial confinements from adopting a wide definition regarding untreatable disorders is acknowledged. Yet, without accompanying changes to the mental health system, a standalone legislative change of definition would not be worthwhile. Without accompanying systemic changes of any form, a definitional reform would only be futile.

The Defamation Act 2013: Failing to re-balance the right to reputation and the right to freedom of expression in the era of SLAPPs

Bradley King-Martin

Introduction

Russia's invasion of Ukraine in February 2022 prompted a media inquiry into how Russian oligarchs have pervaded British society over recent decades. A spotlight was shone on Moscow-born newspaper proprietor Evgeny Lebedev and concerns were raised over money linked to the Kremlin entering "Londongrad".[295] Perhaps the most significant coverage, however, concerned defamation law.[296] Freedom of speech campaigners drew attention to a high-profile libel claim brought by oligarch Roman Abramovich and Russian state oil company Rosneft against journalist Catherine Belton, which was heard by the High Court in 2021.[297] The case was cited as evidence that the rich and powerful have been exploiting English libel law to shut down legitimate scrutiny of their activities.[298] In the same year, Yevgeny Prigozhin, a prominent businessman and close associate of President Vladimir Putin, commenced proceedings against Eliot Higgins, whose investigative journalism website *Bellingcat* had reported on Prigozhin's business affairs.[299] Both of these cases have been considered quintessential 'Strategic Lawsuits Against Public Participation' (SLAPPs) by lawyers and journalists.[300] Amid growing calls for reform in March 2022, Dominic Raab, the UK Justice Secretary, announced a review of defamation law: "The Government will not tolerate Russian oligarchs and other corrupt elites abusing British courts to muzzle those who shine a light on

[295] Bagehot, 'The rise and fall of Londongrad', *The Economist* (London, 5 March 2022) <https://www.economist.com/britain/2022/03/05/the-rise-and-fall-of-londongrad> accessed 7 April 2022.
[296] David Segal, 'Do Russian Oligarchs Have a Secret Weapon in London's Libel Lawyers?', *The New York Times* (New York, 29 March 2022) <https://www.nytimes.com/2022/03/29/business/oligarchs-london-putin-russia.html> accessed 7 April 2022.
[297] *Abramovich v HarperCollins Publishers Ltd and Catherine Belton* [2021] EWHC 3154 (QB).
[298] *Article 19*, 'UK: 19 organisations condemn the lawsuits against Catherine Belton and HarperCollins, deeming them "SLAPPs"', *Article 19* (24 November 2021) <https://www.article19.org/resources/uk-19-organisations-condemn-the-lawsuits-against-catherine-belton-and-harpercollins-deeming-them-slapps/> accessed 29 March 2022.
[299] Tom Ball, 'Head of Wagner Group mercenaries sues Bellingcat founder Eliot Higgins', *The Times* (London, 24 March 2022) <https://www.thetimes.co.uk/article/head-of-wagner-group-mercenaries-sues-bellingcat-founder-eliot-higgins-f8l5cmg5b> accessed 29 March 2022.
[300] Haroon Siddique, 'What are Slapps and how are they connected to Russian oligarchs?', *The Guardian* (London, 4 March 2022) <https://www.theguardian.com/law/2022/mar/04/what-are-slapps-and-how-are-they-connected-to-russian-oligarchs> accessed 25 March 2022.

their wrongdoing. We're taking action to put an end to this bullying and protect our free press".[301]

A public consultation was conducted, to which the government responded in July 2022 by setting out plans for a host of measures. These included a new cost capping regime and an "early-dismissal mechanism", targeted at ending SLAPPs.[302] Less than a decade since the Defamation Act 2013 entered the statute book, these policy reforms almost represent an admission of failure regarding the 2013 Act's aim of ensuring that a fair balance is struck between the right to freedom of expression and the right to protection of reputation.

This essay initially examines the Defamation Act 2013, focusing on the changes the legislation made to English defamation law. Alongside the reform of defences to a claim, the most striking development is the addition of the requirement to show serious harm caused to the claimant's reputation,[303] which will be evaluated in detail. In order to fully appreciate the significance of these changes, a brief overview of the history of English defamation law is first required in order to put these reforms into context. An empirical analysis of how the courts have interpreted and applied the changes effected to defamation law by the 2013 Act is then provided, calling upon a wide range of litigation case studies. A critical assessment of the statute's impact on the balancing act between the competing fundamental rights engaged in defamation cases will be reported in the appropriate places throughout.

Background to English Defamation Law

First, it is advantageous to identify the historic meaning of 'defamation' in English law. Whilst a single comprehensive definition of a defamatory statement has eluded the courts, Lord Atkin laid out the following test in 1936: "Would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally?".[304] This evaluation method has subsequently been amplified by leading academics.[305] Defamation includes both libel and slander, protecting against untrue statements damaging an individual's reputation. Under the common law, defamation was a strict liability tort generally actionable *per se*.

[301] Ministry of Justice, 'Government clampdown on the abuse of British courts to protect free speech' (2022) <https://www.gov.uk/government/news/government-clampdown-on-the-abuse-of-british-courts-to-protect-free-speech> accessed 23 March 2022.
[302] Ministry of Justice, 'Strategic Lawsuits Against Public Participation (SLAPPs): Government response to call for evidence' (2022) <https://www.gov.uk/government/consultations/strategic-lawsuits-against-public-participation-slapps/> accessed 24 July 2022.
[303] Defamation Act 2013, s 1.
[304] *Sim v Stretch* [1936] 2 All ER 1237, [1240] (Lord Atkin).
[305] James Goudkamp and Donal Nolan, *Winfield and Jolowicz on Tort* (20th edn, UK: Sweet & Maxwell, 2020) 486.

The UK has had a long-standing reputation as a claimant-friendly jurisdiction for bringing defamation claims. The journalist Geoffrey Wheatcroft coined the concept of 'libel tourism' whereby claimants, often non-nationals, bring cases to English courts encouraged by favourable judicial and legal conditions. As he commented in a 2008 article, "Our libel law has always been heavily weighted in favour of the plaintiff".[306] Critics have invoked comparisons with other jurisdictions, such as the United States, whose defamation laws are heavily predicated on strong, constitutionally-protected rights to freedom of expression.[307] In 2009, an authoritative report by a coalition of human rights and press freedom campaigners was released, illustrating the "chilling effect"[308] libel laws had on freedom of expression in Britain. The inquiry recommended a rebalancing harmonious with the Human Rights Act 1998,[309] which expressly includes freedom of expression rights, as protected by Article 10 of the ECHR.[310] However, it is widely recognised that the right to reputation is encompassed within the right to a private and family life,[311] thereby falling under Article 8,[312] and this view has been supported by judicial decisions.[313]

By the time of Lord Lester's reforming private member's bill in 2010,[314] defamation law had largely developed through common law principles in the courts, with occasional parliamentary tinkering. Media law practitioner Romana Canneti, who represented the defendant in the landmark *Lachaux* case,[315] listed the problems plaguing libel law as it existed: "Change was sorely needed: an end to forum shopping by overseas litigants who'd cherry-pick jurisdictions...; to 'reputation managers' stopping whistle-blowers and investigative journalists in their tracks with threats of easily-issued libel actions; to the gagging effect of the cost of litigation, no matter how spurious the claim; to the silencing of scientific debate for fear of

[306] Geoffrey Wheatcroft, 'The worst case scenario', *The Guardian* (London, 28 February 2008) <https://www.theguardian.com/commentisfree/2008/feb/28/pressandpublishing.law> accessed 20 April 2022.
[307] ibid.
[308] Jo Glanville and Jonathan Heawood, 'The Impact of English Libel Law on Freedom of Expression', *Inforrm: The International Forum for Responsible Media Blog* (2009) <https://inforrm.org/wp-content/uploads/2010/03/libeldoc_lowres.pdf> accessed 14 March 2022.
[309] ibid.
[310] Human Rights Act 1998 (HRA), Schedule 1, Part 1, Article 10: Freedom of expression.
[311] Matthiew Foster and Jeremy Letwin, 'The Right to Reputation: a European human right?', *King's Student Law Review Blog (*28 April 2014) <https://blogs.kcl.ac.uk/kslr/2014/04/28/the-right-to-reputation-a-european-human-right/> accessed 14 April 2022.
[312] HRA, Article 8: Right to respect for private and family life.
[313] For example: *AG's Reference (No 3 of 1999)* [2009] UKHL 34; Flood v Times Newspapers Ltd [2009] EWHC 2375 (QB) [197].
[314] Ministry of Justice, 'Draft Defamation Bill: Annex A – The draft Bill' 2011 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/228694/8020.pdf> accessed 08 March 2022.
[315] *Lachaux v Independent Print Ltd and another* [2019] UKSC 27 [2019] All ER (D) 42 (Jun).

being sued".[316] Lord Lester's draft Bill nobly sought to remedy many of these ills,[317] and much of what he proposed was co-opted by Coalition government ministers in the Defamation Act 2013,[318] which will now be explored.

Defamation Act 2013: Serious Harm Requirement

Section 1(1) of the Defamation Act 2013 introduces a statutory test for the requirement of serious harm: "A statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant".[319] In an early case considering its application, the provision was described by a High Court judge as having, "made a major change to the substantive law of defamation".[320] The transformative effect of Section 1(1) is that claimants would now be required to prove serious harm has occurred, or the likelihood thereof, as a matter of fact: "The existence of serious harm must be ascertained by reference to its impact and not solely in view of the meaning of the words".[321] In the decade prior to the 2013 Act, the courts established certain minimum requirements for a defamation claim by introducing a threshold of "seriousness",[322] and an "abuse of process" test.[323] The latter mechanism is referenced in the statute's Explanatory Notes: "There is also currently potential for trivial cases to be struck out on the basis that they are an abuse of process because so little is at stake … The section raises the bar for bringing a claim so that only cases involving serious harm to the claimant's reputation can be brought".[324] Plainly, Section 1(1) was intended by legislators to go above and beyond mere codification of the common law principles developed in *Thornton* and *Jameel (Yousef)*. However, it took until 2019 for the Supreme Court to confirm the full extent of its scope.[325] The case concerned Mr. Lachaux, the subject of several articles published in British newspapers alleging conduct of a criminal nature. In giving judgment, Lord Sumption clarified the test of actionability: "Section 1 necessarily means that a statement which would previously have been regarded as defamatory, because of its inherent tendency to cause some harm to reputation, is not to be so regarded unless it 'has caused or is likely to cause" harm which is "serious'".[326]

[316] Romana Canneti, 'Rewriting the Defamation Act?' (2019) 7845 New Law Journal 7.
[317] Guardian Legal Network, 'What does Lord Lester's defamation bill propose?' *The Guardian* (London, 27 May 2010) <https://www.theguardian.com/law/2010/may/27/lord-lester-defamation-bill-analysis> accessed 08 March 2022.
[318] Defamation Act 2013.
[319] ibid s 1(1).
[320] *Theedom v Nourish Training (t/a Recruitment Colin Sewell)* [2015] EWHC 3769 (QB) [14].
[321] Goudkamp and Nolan (n11) 488.
[322] *Thornton v Telegraph Media Group Ltd* [2010] EWHC 1414, [2011] 1 WLR 1985.
[323] *Jameel (Yousef) v Dow Jones & Co. Inc.* [2005] EWCA Civ 75.
[324] Defamation Act 2013, Explanatory Notes [11].
[325] *Lachaux (*n21).
[326] ibid [14].

This was hailed as an important and progressive ruling for freedom of expression. Mr. Lachaux's lawyer celebrated the overturning of the Court of Appeal's "claimant-friendly interpretation of s1",[327] where the defendant's words were evaluated in isolation. Writing in the *Journal of Media Law*, Charlie Sewell characterises the now-defunct Court of Appeal application of the serious harm requirement as "*Thornton*-plus".[328] Sewell criticises its ineffectiveness for, "failing to lift the bar to a sufficient extent and establishing the statutory test as a mere cosmetic overhaul of the law, instead of genuinely rebalancing the rights of the parties".[329] The operation of the Court of Appeal's '*Thornton*-plus' approach to Section 1(1) preceded an annual rise of 70% in defamation claims being brought to the High Court, jumping from 156 in 2017 to 265 in 2018.[330] It is likely that claimant lawyers were encouraged by the watering down of the serious harm requirement, leading to this opening of the floodgates. In fact, before the Court of Appeal's *Lachaux* judgment, figures show that 34.4% of claims failed to overcome the Section 1(1) hurdle. Under '*Thornton*-plus', this figure fell to 21.1%, demonstrating the more fertile grounds enjoyed by claimants prior to the Supreme Court's bar-raising intervention.[331]

Interestingly, the Supreme Court's 2019 assessment accepted that serious harm could be established by the inference of fact, in the absence of direct, tangible evidence.[332] Lord Sumption agreed with Warby J's finding of serious harm to the claimant's reputation in *Lachaux* based on the following grounds: the scale of the publications; that the statements had come to the attention of people connected to the claimant and were likely to do so again in the future; and the gravity of the statements themselves.[333] In this sense, the role of inference appears to service this clause in the s1(1) provision: "…or is likely to cause…", enabling courts to take pre-emptive action against a defamatory statement perceived as having suitably damaging implications for the claimant's reputation in the future.

There remains some degree of uncertainty about the exact circumstances required for a successful defamation claim based on inferences of serious harm. Academic commentary on this issue has put forward the idea that it provides an easier route for claimants to satisfy the serious harm test.[334] This suggestion is supported by inferences being found in *Lachaux*,[335]

[327] Canneti (n22).
[328] Charlie Sewell, 'More serious harm than good? An empirical observation and analysis of the effects of the serious harm requirement in section 1(1) of the Defamation Act 2013' (2020) 12(1) Journal of Media Law 47.
[329] ibid.
[330] Ministry of Justice, 'Royal Courts of Justice Annual Tables - 2018' (6 June 2019).
[331] Sewell (n34).
[332] *Lachaux* (n21) 21.
[333] ibid.
[334] Sewell (n34).
[335] *Lachaux* (n21).

despite the claimant's limited connections to the UK and the small audience exposed to the allegations, as well as in the *Theedom* case,[336] in which the statement in question was not widely published and the allegations were only moderately serious.[337] Sewell suggests that these two cases reveal a willingness from the courts to infer serious harm, meeting the Section 1(1) requirement, based on the seriousness of the defamatory statement, coupled with the nature and extent of publication.[338] In an early appraisal of the Defamation Act 2013, Mathilde Groppo declared, "that the serious harm requirement may be satisfied by an inference does not represent an impossibly high threshold for defamation claims".[339] In this respect, she concurs with Sewell's analysis of case law that, "such inferences were drawn on the basis of the litigious statement and of the nature and extent of publication".[340] The publication aspect spells bad news for national newspapers whose circulations mean anything they publish will almost certainly meet the threshold for potential liability. This feasibly re-opens the door to the chilling restrictions on freedom of expression. It also deviates from the fact-based interpretation of Section 1(1), where evidence of harm to reputation is required. This could undermine the meaningful test of actionability that parliament had intended to overturn the historical legal presumption of damage in defamation law.

The issue of costs and legal fees is one not yet considered. Nonetheless it plays a sensitive role in the dynamic of defamation law, with implications for the fundamental rights of litigants involved. Strategic lawsuits against public participation (SLAPPs) "describe the misuse of the litigation process for the purpose of minimising or eliminating public and media scrutiny".[341] Media lawyer Catrin Evans KC recently discussed their insidious censoring impact, referencing journalists' tendency to "run away from a story completely" upon receiving threats of protracted litigation battles and ruinous legal costs.[342] As such, SLAPPs have been linked to the 'chilling effect on press freedom, a weapon in the "lawfare"[343] arsenal of the powerful. Their use can have profound and adverse consequences for freedom of expression, silencing whistle-blowers and investigative journalists who are intimidated by the inequality in resources.

[336] *Theedom* (n26).
[337] Sewell (n34).
[338] ibid.
[339] Mathilde Groppo, 'Serious harm: A case law retrospective and early assessment' (2016) 8(1) Journal of Media Law 1.
[340] ibid.
[341] David Allen Green, 'What is a SLAPP?', *The Law and Policy Blog* (22 March 2022) <https://davidallengreen.com/2022/03/what-is-slapp/> accessed 28 March 2022.
[342] BBC Radio 4, 'Law in Action: Libel tourism' (15 March 2022) <https://www.bbc.co.uk/programmes/m00159zt> accessed 16 March 2022.
[343] ibid.

With that in mind, one of the objectives of the Defamation Act 2013 was to reduce the cost of libel proceedings and, to that endeavour, the Section 1(1) serious harm requirement was to be decided at a preliminary issue trial.[344] The reasoning behind this is that the actionability test would stop trivial claims in their tracks, before lengthy, full hearing proceedings are underway, minimising the costs incurred. In practice, this must have worked successfully for many defendants: research shows 31.8% of all cases fail the Section 1(1) test.[345] Therefore nearly a third of publishers of an alleged defamatory statement have their freedom of expression rights vindicated at this juncture, without having to stump up further expensive legal costs. The effect of the actionability test on legal fees is that "where the serious harm requirement is not satisfied, the resolving of the issue at an early stage prevents an unnecessary accumulation of costs".[346] Manifestly this gives a boost to freedom of expression by reducing the threat of SLAPPs as the potential consequences for the defendant appear less burdensome and the issue is resolved in a shorter time. Clearly there is further reform needed on reducing costs and tackling SLAPPs, but Section 1(1) provides an effective hurdle for limiting fees for parties in itself.

To conclude, the Supreme Court's clarification of Section 1(1) in *Lachaux* goes some way to reducing the 'chilling effect' defamation laws were having on freedom of expression, by acting as an important safeguard against the misuse of trivial or unmeritorious claims. It markedly raises the bar from the '*Thornton*-plus' Court of Appeal interpretation based on old common law tests, requiring its application to be determined by actual facts and not merely the meaning of material words.[347] In holding preliminary issue trials to determine whether the serious harm requirement has been met, the costs burden is eased on innocent defendants and the threat of SLAPPs made less intimidating. Doubts have been raised about the *Lachaux* interpretation of 'inference' in strengthening press freedom by Groppo,[348] and Sewell.[349] The size of national newspaper readerships would appear to ensure that aspect of the hurdle is automatically cleared, "so for claims which are brought against those media giants, the new interpretation of section 1(1) [of the Supreme Court] will not significantly change the position".[350] This is perhaps an outstanding issue with clear boundaries needed to give predictability to courts' application of this provision.

[344] Groppo (n45).
[345] Sewell (n34).
[346] Groppo (n45).
[347] Nicholas Dobson, 'Defamation & serious harm post *Lachaux*' (2019) 7848 New Law Journal 13.
[348] Groppo (n45).
[349] Sewell (n34).
[350] Mathilde Groppo, 'Free speech victory or charter for higher costs?' (Law Society Gazette, 8 July 2019) <https://www.lawgazette.co.uk/legal-updates/free-speech-victory-or-charter-for-higher-costs/5070863.article> accessed 15 April 2022.

If, as this essay has asserted, defamation law is about balancing two competing societal interests, Section 1(1) is virtuous in that it strengthens freedom of expression without unduly infringing on an individual's right to reputation. Put in other words, one fundamental right is not necessarily enhanced at the expense of the other. The serious harm requirement does not weaken reputation rights in the sense that, if no serious harm is established by the court, the claimant's reputation stands untarnished, and the defendant's free speech goes unrestricted. In the event that demonstrable damage to their reputation has occurred, an effective and proportionate remedy is forthcoming. Fundamentally, publishers may feel more confident to freely impart information and ideas with little fear of legal action, as the meaningful hurdle protects Article 10 freedom of expression rights.[351] It is important to note that if courts are too eager to establish inferences of serious harm from the facts, the test of actionability will become dysfunctional and the pendulum will swing back to putting reputation rights firmly in the ascendancy once more. As it stands, Section 1(1)'s focus on the precise impact of the publication undoubtedly shifts the balance towards the protection of freedom of expression.[352]

Defamation Act 2013: Reform of Defences

Following Section 1 of the Defamation Act 2013 come the statutory defences to a defamation claim. While the Act states that the three major common law defences are abolished,[353] "in reality it did no more than repackaging each of them",[354] slightly amending the defences to varying degrees. As the burden of proof in this tort remains largely on the part of the defendant, the defences are an integral part of the Act and the wider law.

Firstly, the defence of truth is provided for by Section 2.[355] This serves as a complete defence against a claim if the defendant can, "show that the imputation conveyed by the statement complained of is substantially true".[356] It has been argued that this was a missed opportunity by legislators, amounting to a mere codification of the common law defence of 'justification' in broad terms. Instead, critics of libel law lament the failure to reverse the burden of proof, a move that would significantly shift the balance between rights in keeping with the Act's stated objectives. "Why not require that the defamation claimant prove that the statement complained of is false? Surely the claimant would be best placed to prove this".[357] It is a convincing

[351] Sewell (n34).
[352] Tom Rudkin, 'Things Getting Serious: Defining Defamation' (2014) 25(6) Entertainment Law Review 204.
[353] Defamation Act 2013 s 2, s 3, s 4.
[354] Mariette Jones, 'The Defamation Act 2013: A Free Speech Retrospective' (2019) 24(3) Communications Law 117.
[355] Defamation Act 2013, s 2.
[356] ibid s 2(1).
[357] Jones (n59).

argument, and such a change would seemingly curtail parties' legal costs, while also acting as a deterrent effect to claimants bringing improper cases.

A libel claim was brought to the High Court in 2005 against a tabloid newspaper for publishing an article alleging that the claimant was involved in a plot to kidnap Victoria Beckham.[358] The court accepted the defendant's 'justification' defence on which the case hinged, with Eady J generously reasoning that, "journalists need to be permitted a degree of exaggeration even in the context of factual assertions".[359] To the detriment of free speech and press freedom rights, a related provision or reference is absent from Section 2. However, one recent case did emphasise the scope of the statutory defence of truth, indicating it may have wider boundaries than its predecessor, the 'justification' defence at common law.[360] One passage of Warby J's judgment[361] was understood by academics Goudkamp and Nolan to signal that the defendant is entitled to rely on facts unknown to him at the time of publication and even facts occurring after the publication.[362]

Section 3's 'honest opinion' provision replaced the common law defence of 'fair comment' (later rebranded as 'honest comment').[363] This measure is in place to encourage vigorous public debate, as a free democratic society requires. Application of the defence was clarified by the Supreme Court in a 2019 case.[364] For the defence to succeed, there are three necessary ingredients that must be present: the statement in question must be presented as an opinion rather than an assertion of fact; the statement must indicate, either generally or specifically, the basis of the opinion; and it must be shown that an honest person could have held the opinion based on any fact objectively existing at the time of publication.[365]. The transition from 'fair/honest comment' to Section 3 has been described by academic Mariette Jones as a "significant liberalisation of the defence".[366] Significantly, in contrast to the common law position, defendants are no longer required to show that their opinion concerns a matter of public interest. This widens access to the defence by making it easier to argue, thus enhancing freedom of expression rights.

[358] *Turcu v News Group Newspapers Ltd* [2005] EWHC 799 (QB).
[359] ibid [108].
[360] *Doyle v Smith* [2018] EWHC 2935 (QB).
[361] ibid [75].
[362] Goudkamp and Nolan (n11) 494.
[363] *Joseph v Spiller* [2010] UKSC 53; [2011] 1 A.C. 852 [117].
[364] *R (on the application of Salman Butt) v Secretary of State for the Home Department* [2019] EWCA Civ 256.
[365] Goudkamp and Nolan (n11) 507.
[366] Jones (n59).

The common law 'responsible journalism' defence, known as the '*Reynolds* defence',[367] is abolished by Section 4 and replaced by the statutory defence of "publication on matter of public interest".[368] The Supreme Court recently considered the new defence and established its three elements: that the statement in question was on a matter of public interest; that the defendant believed that publication of the statement was in the public interest; and that the defendant's belief was reasonably held.[369] On the final point, Section 4(4) states: "In determining whether it was reasonable for the defendant to believe that publishing the statement complained of was in the public interest, the court must make such allowance for editorial judgement as it considers appropriate".[370]

Analysis of early case law determining whether this represents a noticeable departure from the non-exhaustive, ten-factor criterion of *Reynolds* shows a mixed picture.[371] Initially, judicial opinion was of the view that Section 4 substantially restates and shares the same objectives as the old common law defence.[372] Nevertheless a recent Supreme Court case elaborated on the relationship between the *Reynolds* defence and the new statutory defence.[373] In *Serafin*, Lord Wilson conceded that, "the principles that underpinned the Reynolds defence are … relevant when interpreting the public interest defence".[374] However, he dismissed the notion that it amounted to a codification of the previous defence,[375] and added that, "it is wrong to consider that the elements of the statutory defence can be equiparated with those of the Reynolds defence".[376]

The new 'public interest' defence offers a welcome development in that it is not able to be accessed solely by media defendants in the same way that limited the use of its common law predecessor, the *Reynolds* defence. Nicklin J confirmed in a 2019 case: "The defence is available to anyone who publishes material of public interest in any medium".[377] As such, Section 4 has been recognised by commentators as a progressive step forward, "an attempt to widen the scope of the 'responsible journalism' defence which focused mainly on traditional media, to encompass the reality of citizen-journalists".[378] Given the proliferation of online,

[367] *Reynolds v Times Newspapers* Ltd [1999] UKHL 45, [1999] 4 All ER 609, [2001] 2 AC 127.
[368] Defamation Act 2013, s 4.
[369] *Serafin v Malkiewicz* [2020] UKSC 23; [2020] 1 W.L.R. 2455 [74].
[370] Defamation Act 2013, s 4(4).
[371] Eric Barendt, 'Reynolds revived and replaced' (2017) 9(1) Journal of Media Law 1.
[372] *Economou v de Freitas* [2018] EWCA Civ 2591 [86].
[373] *Serafin* (n74).
[374] ibid [68].
[375] ibid [66].
[376] ibid [72].
[377] *Turley v Unite the Union* [2019] EWHC 3547 (QB) [138].
[378] Jones (n59).

independent media and publishing platforms in the modern world, it is only right that freedom of expression rights are enforceable across the board. On this basis, the statutory defence was successfully argued in the *Economou*[379] case, where the defendant was a non-journalist who had been interviewed by journalists in the incident in question. It was held that mere contributors to publications need not reach the standard of conduct required of professional journalists to qualify for the public interest defence – a "significant precedent to give certainty to amateur journalists, bloggers and freelancers".[380]

Another way in which the Section 4 defence has been expanded is through its application to both statements of fact and comment.[381] Previously, the *Reynolds* defence countered only statements of facts,[382] and so the statutory defence has become more readily available to defendants wishing to exercise their free speech rights. Law academics Alaistair Mullis and Andrew Scott present the view that this tweak muddies the waters somewhat by mingling the public interest defence with honest opinion.[383] In agreement with Mullis and Scott, Jones says, "it can be argued to be a clear nod in the direction of freedom of expression and particularly of the press and non-journalist commentators",[384] but notes that it is an issue far from resolved in case law.

In terms of similarities between the two defences, Jones highlights that, "it is clear that the criteria from *Reynolds* remain firmly entrenched in the courts' methodology in applying the section".[385] The continuing relevance of the *Reynolds* factors are evidenced by the attention they are given in *Serafin*,[386] and *Doyle*.[387] Therefore, perhaps at least on the substance of issues, Section 4 is no more helpful to defendants than its common law predecessor. More fundamentally, the judiciary continues to expect that the defendant carries the burden of proof in relation to these matters.[388] Reversing the onus onto the claimant would be a radical shift towards levelling the playing field between the expression and reputation rights.

[379] *Economou (n74).*
[380] Jones (n59).
[381] Defamation Act 2013, s 4(5).
[382] *Reynolds* (n72) [201].
[383] Alastair Mullis and Andrew Scott, 'Tilting at Windmills: The Defamation Act 2013' (2014) 77(1) Media Law Review 87.
[384] Jones (n59).
[385] ibid.
[386] *Serafin* (n74) [76].
[387] *Doyle* (n65) [82].
[388] *Hourani v Thomson* [2017] EWHC 432 (QB) [167].

Finally, the defence contained within Section 6 – "Peer-reviewed statement in scientific or academic journal etc" – provides that statements published in scientific or academic journals enjoy qualified privilege.[389] Jones writes, "one of the most serious points of criticism against the common law of defamation was that it stifled academic and scientific debate".[390] The chilling effect was on display in *British Chiropractic Association v Singh*.[391] Dr Singh was found at first instance to have defamed the claimant in a scientific opinion piece he had published in *The Guardian*. The decision was overturned on appeal. Dr Singh felt compelled to report his experience of the censoring effects of libel claims, due to the costly and protracted process it entailed.[392]

The case attracted widespread political attention and illustrated the urgent need for reform of defamation law. To date, no major cases relying on the Section 6 statutory defence have been reported, a fact which is open to interpretation regarding its success. Goudkamp and Nolan discuss the defence's shortcomings: that it offers protection to statements published in peer-reviewed journals only and not academic speech more generally.[393] As such, the defence would not apply to Dr Singh's *Guardian* article, which is symbolic of its limitations. Despite the lack of case law thus far, it is of course possible that Section 6 is having a deterrent effect on claimants taking action against academic works.

Conclusions

Defamation law is currently attracting an unusually high amount of attention in the UK. The 'Wagatha Christie' case,[394] coupled with an increased awareness of vexatious SLAPPs used by oligarchs[395] and kleptocrats[396] motivated by an intention to censor British journalists, have brought it to the fore. Government ministers have announced provisional plans for reform and there is a recognition in Whitehall of the necessary direction of travel.

The government's response to its public consultation has focused on procedural tinkering rather than substantive change. To comprehensively rectify the claimant's favouritism in libel law, a legislative amendment could be made to Section 1 of the Defamation Act 2013, removing the possibility of serious harm being found by inference, an avenue undermining the actionability

[389] Defamation Act 2013, s 6.
[390] Jones (n59).
[391] [2009] EWHC Civ 350.
[392] Simon Singh, 'The Libel Survivor' (2011) Legal Week 13(32) 20.
[393] Goudkamp and Nolan (n11) 502.
[394] *Vardy v Rooney* [2021] EWHC 1888 (QB).
[395] *Abramovich* (n3).
[396] *Eurasian Natural Resources Corporation Limited v Tom Burgis and HarperCollins Publishers Ltd* [2022] EWHC 487 (QB).

test at present. Furthermore, the harm threshold could be raised to requiring "serious and substantial harm",[397] as the parliamentary Joint Committee recommended in its pre-legislative scrutiny of the draft Bill. It is, of course, crucial not to go too far the other way, and overly infringe reputation rights.

The Defamation Act 2013 has failed to adequately redress the historical imbalance between the conflicting rights engaged in defamation cases. The scales are still tilted in favour of the right to protection of reputation, disproportionately outweighing the right to expression. While many of the Act's new provisions are well-intentioned, the statute simply does not go far enough. The Act's positive influence on press freedom is negligible. National newspapers are susceptible to meeting Section 1 on inference alone, and the changes to defences do little for them, either (it seems likely that the press suffered from the bill's legislative journey through parliament coinciding with the Leveson Inquiry). Instead, greater protection is given to non-traditional sources, perhaps reflecting patterns in the contemporary media landscape. Further legislation is needed to purposely rebalance the power away from reputation rights towards freedom of expression, away from the claimant and towards the defendant in defamation cases. At present the law is not fit for purpose.

[397] Ministry of Justice, 'The Government's Response to the Report of the Joint Committee on the Draft Defamation Bill' (2012) <https://www.parliament.uk/globalassets/documents/joint-committees/draft-defamation-bill/government-response-cm-8295.pdf> accessed 08 March 2022.

Digital Services Tax and the Inclusive Framework: The Journey So Far

Nafia Haque

Introduction

Harmonisation is one of the biggest issues facing international taxation, having been a key objective of many countries throughout the world for numerous years. Despite this fact, however, this goal has moved further and further out of reach as the years have progressed and nations have failed to bring their tax systems into accordance. One reason for this is the tax competition which exists between governments. Though, in theory, the harmonisation of taxation seems quite organised, it has proven to be catastrophic in practice. It seems that some countries have concluded that they would benefit more by regulating taxation at a regional or national level than they are likely to by attempting to harmonise tax internationally.

The comparative benefits of unilateral vs harmonised taxation will be discussed throughout this analysis. First, however, this essay addresses the existence of tax competition between states in order to explore whether it is a hindrance to harmonisation. Analysis focuses on the Inclusive Framework proposed by the Organisation for Economic Co-operation and Development (OECD). This will primarily be contrasted with the Digital Services Tax (DST), which may be seen as a measure encouraging tax competition. This is because DSTs enable states to compete for foreign investment, using low tax rates to attract investors. Given that harmonisation is not a recent goal, there have been many previous attempts to produce complete tax harmonization. However, these attempts have met with partial success at best, with no concrete reason for their failure having ever been formally identified. Although tax competition is not the only (or even the main) reason for hindrance to tax harmonisation, this essay suggests that it has nonetheless consistently hampered the process.

The Inclusive Framework concerns corporate taxation. Currently, corporate taxation has been facing issues due to increased digitalisation. DSTs are service taxes imposed on digital businesses at a national level which reflect the value derived from consumers within that jurisdiction. DSTs were primarily adopted by the UK as well as certain European countries (which will be discussed in more detail below) as an alternative to the Inclusive Framework. However, the implementation of DSTs has raised several questions regarding the potential success of the Inclusive Framework, as countries have now found a suitable Plan B. The Inclusive Framework has also faced issues regarding implementation, which begs the question: have these issues arisen due to the DST? A brief discussion on the concept of tax competition will follow.

Tax Competition and the Impact on Harmonisation

A central message of the tax competition literature is that independent governments engage in wasteful competition for scarce capital through reduction in tax rates and public expenditure levels.[398] Countries can compete in various ways, one of which is through competitive tax cutting. Broadly speaking, there are four methods of competitive tax cutting: (a) reduce the statutory tax rate, (b) narrow the tax base, (c) relax tax enforcement and (d) improve national secrecy legislation.[399] This is recurrent in Germany, where allegedly the rich states use relaxed tax enforcement policies in order to effectively reduce federally mandated tax rates and poach tax base from poorer states.[400]

One example of tax competition being a hindrance to tax harmonisation concerns the EU's attempt to harmonise Value Added Tax (VAT) in 2016. This attempt has been described as "harmonisation by uniformity of the tax base, the obligation to fit the rate between minimum and maximum thresholds, the abolition of tax frontiers for the intra-community movement of goods and services, generalisation of the destination principle (which refers to taxing sales where the buyer takes possession of the goods rather than where the seller is located), actions to reduce fraud and evasion in the field".[401] While the plan was quite efficient in theory, it failed to be implemented in the Member States, who could not agree upon a uniform tax rate. This failure made fiscal competition inevitable. This is merely one example of tax competition being harmful to harmonisation.[402] A similar situation was seen regarding the Neumark Committee's report in the 1960s, which recommended the harmonisation of EU sales taxes into VAT.[403] Member States retained discretion regarding which goods and services would be subject to the tax and which would be exempted from it.[404] In the end, Member States could not agree on most provisions, and so the attempt was abandoned. It is noteworthy that nothing has changed in the five decades since this report.

The Inclusive Framework

In order to tackle tax evasion in a developing and digitalised world, the OECD introduced a new global tax governance network. Known as the Inclusivity Framework, it was designed to

[398] Wilson JD, 'Theories of tax competition' (1999), 52 National Tax Journal, 269.
[399] Genschel P and Schwarz P, 'Tax Competition: A Literature Review' (2011) 9 Socio-Economic Review, 339.
[400] ibid, 352.
[401] Pițu IC, Ciocanea BC, and Luca M, 'The Impact of Tax Competition and Harmonisation in the EU in Relation to Fiscal Optimisation', 28 Annals of the University of Oradea: Economic Science, 113.
[402] ibid.
[403] 'EEC Commissioner Report of the Fiscal and Financial Committee on Tax Harmonization in the Common Market' (Neumark Report) (*EEC* 1962), Report 21, Doc SD-32.
[404] Williams DW, *EC Tax Law* (Longman, 1998), 82.

engage participating states in "an inclusive dialogue on an equal footing to directly shape standard setting and monitoring processes".[405] The framework has two pillars, which are explained below.

Pillar One consists of a new taxing right for market jurisdictions. This right can apply irrespective of the existence of physical presence. It established a fixed return for certain baseline marketing and distribution activities taking place physically in a market jurisdiction, in line with the arm's length principle (ALP).[406] ALP means that the price agreed in a transaction between two related parties must be the same as the price agreed in a comparable transaction between two unrelated parties. In simple words, Pillar One means that the tax base is reallocated to make sure that market jurisdictions are gaining tax revenue from digital enterprises by focusing on where the consumer is rather than upon where the enterprise itself is located. This is a real step towards tackling the issue of digitalisation as it does not matter if a company does not have any sort of physical presence within the jurisdiction in question. The scope of Pillar One includes Multinational Enterprises with a global turnover exceeding 20 billion euros and a profitability rate of above 10%. Basically, there will be a new special purpose nexus rule permitting allocation of Amount A to a market jurisdiction when the in-scope Multinational Entities (MNE) derives at least 1 million euros in revenue from that jurisdiction. However, for countries with a GDP which is lower than 40 billion euros, the nexus is set at 250,000 euros.[407] This is because enterprises could operate in hundreds of countries but only be taxed by the country in which they are based, regardless of where their consumers are located.

Pillar Two contains two interlocking domestic rules (i.e., the Global anti-Base Erosion Rules (GloBE) rules). Base erosion profit shifting refers to tax planning strategies used by multinational enterprises, which are employed as a means to avoid paying tax, chiefly by exploiting gaps in tax rules.[408] The domestic rules are:

[405] 'All Interested Countries and Jurisdictions to Be Invited to Join Global Efforts Led by the by the OECD and G20 to Close International Tax Loopholes (*OECD*) <https://www.oecd.org/ctp/all-interested-countries-and-jurisdictions-to-be-invited-to-join-global-efforts-led-by-the-oecd-and-g20-to-close-international-tax-loopholes.htm> access verified March 13, 2023.

[406] 'Tax Challenges Arising from Digitalisation – Report on Pillar One Blueprint: Inclusive Framework on BEPS" (OECD) <https://www.oecd.org/tax/beps/tax-challenges-arising-from-digitalisation-report-on-pillar-one-blueprint-beba0634-en.htm> access verified March 14, 2023.

[407] 'Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy' (*OECD*), <https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.pdf> access verified March 14, 2023.

[408] 'About – OECD' (*About – OECD BEPS*) <https://www.oecd.org/tax/beps/about/> access verified March 13, 2023.

- (i) an Income Inclusion Rule (IIR), which imposes top-up tax on a parent entity in respect of the low taxed income of a constituent entity; and (ii) an Undertaxed Payment Rule (UTPR), which denies deductions or requires an equivalent adjustment to the extent the low tax income of a constituent entity is not subject to tax under an IIR]; and

- a treaty-based rule (the Subject to Tax Rule (STTR)) that allows source jurisdictions to impose limited source taxation on certain related party payments subject to tax below a minimum rate.[409]

In other words, Pillar Two seeks to implement a global minimum level of effective taxation (i.e., 15%) on income derived from large MNEs, which includes reallocation and apportionment of income between jurisdictions. It is to be noted that the GloBE rules will only apply to MNEs that meet the 750 million euros threshold. However, countries are free to apply the IIR to MNEs headquartered in their country even if they do not meet the threshold. In my opinion, this threshold seems to be only targeting the biggest multinationals in the world and excusing the rest.

"The model rules released today are a significant building-block in the development of a two-pillar solution, converting the foundations of a political agreement reached in October into enforceable rules",[410] said Pascal Saint-Amans, Director of the OECD Centre for Tax Policy and Administration. "The fact that Inclusive Framework members have managed to reach a consensus on this detailed and comprehensive set of technical rules demonstrates their commitment to a co-ordinated solution to addressing the challenges raised by an increasingly digitalised and globalised economy".[411] Although this statement reads as a hopeful anecdote, it does not guarantee implementation of the Framework itself. It is true that, in theory, the rules represent a significant step forward, as they address the challenges of a digitalised economy. However, theory and practice are rarely the same.

Tax Competition: A Hindrance to Harmonisation

The main example of tax harmonisation is that of the Digital Services Tax (DST). DSTs are taxes on digital services provided by companies. Much like the Inclusive Framework, they also

[409] 'Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy' (*OECD*), <https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.pdf> access verified March 14, 2023.
[410] 'OECD Releases Pillar Two Model Rules for Domestic Implementation of 15% Global Minimum Tax' (*OECD*), <https://www.oecd.org/tax/beps/oecd-releases-pillar-two-model-rules-for-domestic-implementation-of-15-percent-global-minimum-tax.htm> access verified March 14, 2023.
[411] ibid.

focus on where the user is located. However, the difference between the two is that DSTs are not aimed only at giant multinationals. Their threshold for a global turnover is much lower and differs from country to country. This essay approaches DSTs from the UK perspective. From 1 April 2020, the UK has imposed a 2% tax on the revenues of search engines, social media services and online marketplaces which derive value from UK users.[412] According to the government, before the emergence of DSTs, the previous tax system resulted in a misalignment between the place where profits are taxed and the place where value is created. Many digital businesses derive value from their interaction and engagement with a user base.[413] Therefore, DSTs ensure fair taxation of entities by taking the value derived by digital businesses into account. DSTs have not had any direct resistance from the OECD or elsewhere. Rather, countries have responded quite positively to the idea of DSTs, as such a system gives them sovereignty.

DSTs have been referred to as a double-edged sword by Lynne Oats. She contends that the adoption of these measures by different countries may "provide more impetus to reaching a global compromise".[414] However, she equally acknowledges that it is also possible that the "proliferation of new taxes may diminish the chances of such compromise".[415] Although I agree with her second point, I cannot say the same of the first. It is difficult to believe that adoption of a unilateral tax system is likely to lead to a global compromise, as countries have now found a potential alternative to such global compromise. The unilateral alternative is much simpler and allows countries the opportunity to uphold their sovereignty and territoriality.

The main elements of UK DSTs are provided within sections 39-72 of the Finance Act 2020. Under section 46, DSTs apply to companies with a) a total digital services revenue exceeding £500 million; and b) £25 million of that revenue derived from UK users. However, if the duration of the accounting period is less than a year, the above amounts are proportionately reduced. This is quite a fall from the high threshold of 20 billion euros, under the Inclusive Framework. However, the tax rate (i.e., 2%) is also quite low compared to that of 15%. Hence, it is clear that a larger number of entities will be 'caught' by the threshold of the DST. In my opinion, this is quite sensible. While it may be argued that 2% is perhaps too low of a rate, I believe it is a suitable rate in order to 'test out the waters.' Since this is quite a recent form of taxation, the UK is correct to be cautious.

[412] 'Digital Services Tax Policy Paper' (*GOV.UK),* <https://www.gov.uk/government/publications/introduction-of-the-digital-services-tax/digital-services-tax> Access verified March 14, 2023.
[413] ibid.
[414] Oats L, *Principles of International Taxation* (Bloomsbury Professional, 2021), 385.
[415] ibid.

It is to be noted that the UK government has stated that it plans to disapply the DST once an international solution is reached.[416] Therefore, this shows that the DST is just a temporary alternative being used until Pillars One and Two are implemented. However, the question is, is the DST really only temporary? DSTs "catch" a lot more entities than the Inclusive Framework, which may be said to be quite attractive to different nations. This is arguably one of the reasons why the Inclusive Framework is not being implemented quite as urgently, as a practicable alternative has presented itself. DSTs provide nations with the opportunity to tax digital services by implementing a more user-based approach while also engaging in tax competition with other states. Hence, can it be said to be more attractive compared to Pillars One and Two?

The current countries with an implemented DST are Austria (5%), France (3%), Hungary (7.5%), Italy (3%), Poland (1.5%), Spain (3%), Turkey (7.5%) and the UK (2%). Proposals have been published to enact a DST in Belgium (3%), the Czech Republic (5%) and Slovakia (3%), whereas Latvia, Norway and Slovenia have also voiced their intentions to implement DSTs.[417] While the countries mentioned above have stated that they will disapply or repeal DSTs once Pillar One is implemented, it is arguable that this is acting as a hindrance to that implementation. Pillar One had a deadline of the end of 2022. However, this timeline has now been extended to 2024. Further, the UK plans to review the implementation of the DST in 2025 to see whether it has raised enough revenue. This seems quite strange as Pillars One and Two are planned to be implemented by that time, which would mean disapplying the DST in the first place. However, as the review is scheduled for 2025, it seems the UK may not be planning to disapply the DST after all. This may also provide an explanation for the constant lag in implementing the Inclusive Framework, not just for the UK, but for other countries as well.

Mason and Parada summarise the many criticisms that DSTs have incited: "Commentators claim that digital taxes would inefficiently discriminate against particular sectors and countries, operate as a tariff, result in double taxation, be passed on to consumers, and invite retaliation".[418] In this respect, they conclude that the European Union's version of DST "was designed as an unapologetic stopgap, a less-than ideal proposal that would apply until the EU can work out a better solution to the challenges of taxing an increasingly digitized economy. Such a stopgap could inhibit lasting reform".[419] Hannam comments that this assessment recognises the mixture of legal objections and economic problems that introducing a DST

[416] 'Digital Services Tax Policy Paper' (*GOV.UK),* <https://www.gov.uk/government/publications/introduction-of-the-digital-services-tax/digital-services-tax> Access verified March 14, 2023.
[417] Bunn D and Asen E, 'What European OECD Countries Are Doing about Digital Services Taxes' (*Tax Foundation*, 22 November, 2021) <https://taxfoundation.org/digital-tax-europe-2020/> access verified March 13, 2023.
[418] Mason R and Parada L, 'Digital Battlefront in the Tax Wars' (*SSRN*, November 14, 2018) <https://papers.ssrn.com/so13/papers.cfm?abstracxt_id=3279639> access verified March 14, 2023.
[419] ibid.

entails.[420] However, it is to be noted that this analysis focuses on what the reality is rather than how commentators feel about the proposal of DSTs. Therefore, the question is whether tax competition measures make harmonisation difficult rather than the opinion about said measures. The introduction of DSTs does indeed hinder harmonisation attempts internationally or at least has the potential to hinder them, given that countries find the aspect of retaining control and sovereignty much more appealing than adhering to a uniform system. DSTs can therefore be said to be a competitive measure as countries have the freedom to decide how it operates in their own respective jurisdictions and can decide the tax rates and base.

National Regulation of Tax: A Better Approach?

National systems of regulation such as DSTs are very attractive to countries as they are unilateral, which gives nations the power to set their own thresholds and rates. Critically analysing the UK DST, it is clear that a large number of entities will be caught by this threshold compared to the Inclusivity Framework, which will likely only be applicable to industrial giants. Furthermore, as both tax systems focus on the consumer's location, it seems a lot simpler to have individual countries tax the consumers within their regions rather than having an international system try to harmonise everything. It has been suggested that countries, especially in the EU, must agree on common tax rates if they are to avoid a "race to the bottom"[421] that will undermine their relatively generous welfare states. The logic behind this is quite clear: companies will usually move to whichever country has the lowest tax rates, and in turn, this will lead to a competition that drives tax rates ever lower.[422]

There have been multiple attempts to harmonise taxation, especially within the European Community. It began in the early 1960s, when a committee suggested a split-rate corporate tax system, with distributed profits being taxed at a lower rate.[423] In 1967, a single corporate tax system was suggested. In 1971, a classical corporate tax system was proposed, and so forth. These are only some of the examples of attempts at harmonising tax, which have not been entirely successful.

Hannam explains that, when proposing an interim Digital Services Tax at the European Commission, the European Union focused on two main types of digital services.[424] These concerned placing advertising on digital interfaces or marketplaces whose main purpose is to

[420] Hannam J, 'What Everyone Needs to Know About Tax: An Introduction to the UK Tax System' (2017), 308.
[421] Baldwin RE and Krugman P, 'Agglomeration, Integration and Tax Harmonisation' (2004) 48 European Economic Review, 1.
[422] ibid.
[423] 'EEC Commissioner Report of the Fiscal and Financial Committee on Tax Harmonization in the Common Market' (Neumark Report) (*EEC* 1962), Report 21, Doc SD-32.
[424] Hannam J, 'What Everyone Needs to Know About Tax: An Introduction to the UK Tax System' (2017), 98.

facilitate the direct interaction between users. The Commission stated that these services mostly rely on exploiting data obtained about users to generate revenue.[425] On the other hand, the UK Government focused on user participation by examining social media networks and online marketplaces. It was held that the success of these businesses is "reliant on the activities, decisions and participation of users with whom the business forms a more sophisticated and sustained relationship".[426]

While the decisions made by the parties are similar, they still have the freedom to decide which types of services they want to tax, depending on their specific country's needs. Having a national regulation of taxation may be seen to be much more desirable than having an international system. It upholds the 'territorial' system of taxation. It is basically the practice of taxing a company's profits that arise within a country's own borders. It seems to support the sovereignty of each country. It also aims to make the taxation of digitalised services much simpler. Another reason for a nationalised system of regulation is perhaps urgency. The Covid-19 pandemic has surely set countries back in a significant way. Countries have multiple loans to repay and have lost revenue as well. Most countries are still hoping to recover from the debt that they have built up, and one way to do that is through taxation and, more importantly, taxing large companies. As we reel from the effects of the pandemic, countries are trying to get ahead of this issue as fast as they possibly can. Perhaps, this is why most countries have opted to implement a digital service tax themselves rather than waiting for the implementation of the Inclusive Framework.

From everything that has been discussed so far, it appears that there is no clear indication as to when the Framework will be implemented, with aspects of it being halted at every turn. As a result, it would not seem wrong for countries to attempt to fix this issue on their own. After being gripped with the pandemic, many businesses have gone virtual. Most people have now become more reliant on social media, remote and online shopping, streamed entertainment, online education, and many other forms of technology enabled connection. Even though the pandemic is over, consumers continue to use these applications such as Zoom, Microsoft Teams, Netflix and so on.

[425] 'Time to Establish a Modern, Fair and Efficient Taxation Standard for the Digital Economy'/ 'Lex-52018DC0146 – En – EUR-Lex' (*EUR,* 21 March 2018) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018DC0146> access verified March 14, 2023.

[426] Treasury HM, 'Corporate Tax and the Digital Economy: Position Paper' (*GOV.UK*, March 13, 2018) <https://www.gov.uk/government/consultations/corporate-tax-and-the-digital-economy-position-paper> access verified March 14, 2023.

The EU has taken quite a unique position vis-à-vis the Inclusive Framework.[427] Whilst they intend for the Framework to be implemented within EU law, this is to be achieved by adopting different strategies for Pillar One and Pillar Two.[428] The legal implementation of Pillar One is to be mandatory "in order to ensure its consistent implementation in all EU Member States, including those that are not Members of the OECD and do not participate in the Inclusive Framework".[429] With regard to Pillar Two, it has been made clear that there may not be full uniformity regarding the tax rate. Rather, the aim is to allow Member States to judge their own economic and societal needs, with national level action complementing progress at EU level. This approach would also leave corporate income tax as a national competence, with the rate to be set above the minimum level agreed internationally. As a result, even if the Inclusive Framework is implemented, it is very possible that some countries may still elect not to fully comply with it. Therefore, a national touch will always remain within the Framework. This may be desirable, as nations' differing economic and societal needs could feasibly render uniformity unworkable. It is arguable that, in such a situation, harmonising taxes may not be prudent. Therefore, it seems national regulation of tax may indeed be a better approach.

Conclusion

Upon analysis, it is evident that tax harmonisation has witnessed its fair share of issues and continues to do so. It can also be understood that one of the main reasons for this is tax competition between the states, who insist on retaining their sovereignty and territoriality regarding taxation. This is established through a comparison of the Inclusive Framework and DSTs. The Inclusive Framework was proposed to tackle problems imposed by digitalisation of economies and has been lagging behind for quite some time. DSTs were introduced for the same reasons as the Inclusive Framework and have been successfully implemented in many countries. Although it is still too early to understand whether the results are favourable, many countries appear to be quite satisfied with the idea of DSTs as it gives them sovereignty. Most countries have clearly stated their intention to disapply the DST once the Inclusive Framework is fully operational. Nonetheless, one cannot help but wonder whether their implementation of the DST has played a part in preventing the Framework from coming into full operation.

[427] 'Communication from The Commission to The European Parliament and The Council: Business Taxation in the 21st Century'/ 'Lex – 52021DC0251 – En – EUR- Lex' (*EUR*, May 18, 2023) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021DC0251> access verified March 14, 2023.

[428] See Kendrick M, 'The Legal (Im)possibilities of the EU Implementing the OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting' (2022) 17 Global Trade and Customs Journal, 23.

[429] 'Communication from The Commission to The European Parliament and The Council: Business Taxation in the 21st Century'/ 'Lex – 52021DC0251 – En – EUR- Lex' (*EUR*, May 18, 2023) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021DC0251> access verified March 14, 2023.

Tax harmonisation could be an excellent idea. However, as of now, it has begun to seem like an impossible dream. This is because all proposals for achieving harmonisation seem overly complicated and impossible to implement in practice. The first goal was implementation by the end of 2022; however, this has now been extended to 2024. On the other hand, DSTs have been implemented with little to no issues and at a much quicker pace than the Inclusive Framework. By comparing the two, it seems that there is a clear winner and a fan favourite, and that is the DST. However, even without giving in to favouritism, it seems that a national system of regulating taxation may be the best solution after all.

New Rights, Old Rules: Finding a Practical Midway to Intellectual Property Regulation

Selin Cavdar

Introduction

Evidence of intellectual property (IP) frameworks can be found all around, ranging from the lengthy privacy notice that people agree to reflexively on a website to the music that is streamed by millions on Spotify. As used in this paper, the term intellectual property frameworks encompasses both the private controls used by individuals and the government regulations that complement these, forming a framework of protection and regulation for different ideas and insignia.[430] These frameworks are arguably still in their formative stages because most IP creation and protection is done through the digital medium, a novel concept compared to, for instance, the law of land ownership that has been developing since the Roman Empire. This definition elucidates one important challenge IP frameworks face, which is that different areas of law (i.e., contract law and property law) use different methods of enforcement with varying degrees of government control. As a cluster of legal doctrines, there remains uncertainty as to whether IP frameworks should function as a private ordering system based on contract law or be centrally regulated through a certain level of government intervention. Although this problem manifests itself as an operational one, it requires an inquiry into ideological debates about why IP frameworks exist as well.

This paper tries to provide an answer to the operational challenge that IP frameworks face in the cyberspace, by engaging in a philosophical discussion of intellectual property rights. In doing so, the main aim is to determine what balance should be struck between private and government controls to achieve an effective system. To be able suggest a solution on this issue, the first step is to identify the problem in clear terms with reference to its theoretical roots and how existence of IP rights has been conceptually justified so far. Next, the extreme suggestion that IP should only be protected by self-regulation will be dismissed. This will be done with reference to economical and philosophical points showing legal IP protection is necessary to a certain extent. Analysis will reveal that, due to emerging technologies, self-regulation in cyberspace (i.e., using private parties like coders to build virtual controls on access to the information) can lead to over protection of information and risks price gauging and unjust enrichment. In turn, private ordering systems lack the coherence that law can provide. It is

[430] William Fisher, 'Theory of Intellectual Property' in Stephen Munzer (ed), *New Essays in the Legal and Political Theory of Property* (Cambridge University Press, 2001), 168-199.

argued that a good line of action against the shortcomings of these regulatory frameworks is a complementary approach, in which the government sets guidelines as to the appropriate degree of regulation while the rest is left to private coding parties.

Identification of the Challenge

(i) The Theoretical Basis

If it is accepted that, like other areas of law, IP frameworks exist to protect rights, then the next step is to try and sort IP rights into one of the established categories: personal rights or property rights. It is important to conceptually place IP rights somewhere because arguments made for appropriate forms of protection of IP would risk being fallacious without a theoretical understanding of what is being protected. One possible approach is put forward by Professor Charlie Webb.[431] He argues that IP rights can be taken to form a new category of rights where "personal and proprietary rights are mutually exclusive but not exhaustive sub-classes of a single class of legal rights, resulting in a third class of rights".[432] IP rights are not identified by reference to a tangible object like property rights or a relationship between persons like personal rights. Instead, IP rights are explained through the reasoning that motivates their recognition. An example of this is how patents work. Patents are not made to be enforced against an identifiable person, yet they do not protect a locatable, physical object. They protect the right to exclude others from using the patented idea and this right can be explained by reasons behind its recognition. One example reason is that patenting incentivises further IP creation by allowing monetary gain to the creator through exclusive rights to the work.

One objection to Webb's third class of rights can be made if Birk's orthodox view of rights is accepted. In his view, rights are limited to those which are directly "realizable in court",[433] thus leaving out the third class suggested by Webb. However, Webb successfully dismisses this point of view by showing that the assertion of property rights in courts is the result of claims coming from a personal right. *Ergo*, if property rights are recognised as a class, then the superstructural third class of rights should also be recognised. One example is an artist creating a digital image and obtaining a copyright for their work. Within the period of copyright, if another digital creator decides to put this image in a part of a video that they make, the artist can make a claim based on the infringement of their IP rights. In this case, assertion of their IP rights is grounded in their personal right to control and profit from their creative work. If the claim is brought before a court, the court will also recognise digital artists' ability to enforce

[431] Charlie Webb, 'Three Concepts of Rights, Two of Property' (2018) 38 OJLS 246.
[432] ibid.
[433] ibid.

their property rights over their creative work on the same basis. Following these considerations, Webb's line of reasoning for IP will be used in this paper.

The ideological basis of the challenge becomes more apparent once Webb's argument is accepted. Whilst most personal rights are protected by private ordering systems, property rights protections are of a centralised nature. This difference can be explained on the grounds that personal rights are asserted individually while property rights are valid against the whole world. As a 'superstructural' third class, it becomes hard to apply any one of the justifications used for personal or property rights to IP. This theoretical ambiguity is at the core of the question regarding the appropriate protection regime for IP and will be addressed in the following sections.

(ii) Justifications

The second consideration up for discussion concerns the numerous arguments regarding how the existence of IP frameworks is/should be justified. These justifications are then used as criteria to evaluate which IP protection framework is the best solution. Arguably, the overarching purpose of IP protection is to encourage the production of new intellectual property, whilst maintaining a certain level of access to the said information or service. This situation is described as ideal because it contributes to the goal of achieving maximum social welfare. Although there is no single definition of social welfare, this paper refers to the "prefenterist approach"[434] common amongst economists.[435] The definition of the prefenterist approach is that social welfare is the degree to which individuals in a society are able to satisfy their preferences, either through fully informed and rational preferences or through simple expressed preferences.[436]

One justification based on the social welfare benefits of IP creation is the "desert-for-labour"[437] (initially termed the "labour-desert" by Locke) or the "reap/sow"[438] argument. This represents the idea that everyone deserves to be rewarded for the products of their own intellectual labour, entitling people to "anything that their labour touches".[439] If this were not the case then IP creators would have a reduced incentive to create, causing society to move away from

[434] Christopher Buccafusco, Jonathan Masur, 'Intellectual Property Law and the Promotion of Welfare' (2017) 607 U of Chicago Public Law Working Paper 1.
[435] See Leonard Wayne Sumner, *Welfare, Happiness, and Ethics* (Oxford Clarendon Press, 1996).
[436] Christopher Buccafusco, Jonathan Masur, 'Intellectual Property Law and the Promotion of Welfare' (2017) 607 U of Chicago Public Law Working Paper 1.
[437] Lawrence C Becker, 'Deserving to Own Intellectual Property' (1993) 68 Chicago-Kent LR 609.
[438] William John Gordon, 'On Owning Information: Intellectual Property and the Restitutionary Impulse' (1992) 78 Virginia LR 149.
[439] ibid.

achieving maximum social welfare. If this justification is accepted, then the answer to the question of which IP framework is ideal would be inclined towards a private ordering system without government intervention. This is because every creator would be justified in having automatic full ownership of their product and protection would be done through private ordering systems under the control of the owner. Creators would be free to choose the level of protection that they wish to have and would achieve it by making a contract with each individual user of their product. This is a theoretically sound approach. However, the question of how enforcement would operate on a large scale remains unclear. The issue is that the private contract that such systems employ is a default one that is unilateral. Once the user accesses the information, they agree to the terms, if they have been made aware of them. With regards to the enforcement of these rights, the courts are unlikely to be an effective resource on such a large scale. The only solution would be for creators to build in their own system of compensation (i.e., lifelong ban from a website if the articles there are illegally sold to students). The effectiveness and legitimacy of this hypothetical solution remains an issue.

The problem with the desert-for-labour justification is that it is not compatible with the unjust enrichment doctrine, which states that an individual who receives a benefit at another's expense should not be allowed to retain a benefit that he or she has received unjustly.[440] Due to constantly developing technologies, IP creators now have the ability to use code in order to completely restrict access to their digital product. They are even able to build customised digital fences in order to regulate who can access their website or change the price point for access to information depending on the user profile, leading to overcompensation and unjust enrichment. This approach to IP protection also contradicts one of the fundamental principles of IP: fair use. This doctrine is a defense to copyright infringement developed in US law and is based on the idea that the law should not be used for overprotection as access to intellectual property fosters public wellbeing.[441] As the goal of IP frameworks is to create a balance between protection and accessibility, following the "reap/sow" justification does not yield the desired outcome alone. Therefore, a more balanced approach, such as economic justification, is also used for justifying IP frameworks.

The economic justification for IP protection is based on a preferential understanding of social welfare. It is argued that innovation should be incentivised through IP systems because, in a straightforward logic, intellectual property creation and use contribute to social welfare by allowing more individual desires to be satisfied, which makes the individuals in question better off. When individuals are better off, the overall welfare of society is also increased. If this justification is accepted, then the search for a practical and theoretically sound path to IP

[440] James Steven Becker, *The Law of Unjust Enrichment* (Oxford University Press 2016) 3-4.
[441] Patricia Aufderheide, Peter Jaszi, *Reclaiming Fair Use: How to Put Balance Back in Copyright* (2nd edn, University of Chicago Press 2018).

protection may lead towards a system of government regulation which ensures that incentives to create are maintained. With private ordering systems offering stricter protections than the government, less information is available for public usage, which in turn leads to a decline in social welfare. For instance, although copyright law merely prevents the unlicensed reproduction of a literary work, a contract may restrict any unlicensed use of that work.[442] This demonstrates the potential for private protections to excessively limit access to IP.

However, there are also several issues with the economic justification for IP protections. The first and most prominent of these is that it is based heavily on economic theory and the assumptions that surround it. For instance, it is assumed that the more information the public consumes then the better social welfare will be, which is the same assumption that the prefenterist account of social welfare relies upon. This assumption fails to recognise the negative creative products that would become available to the public under this system, such as a song or literary work that promotes, for example, racism. This would cause harm by hindering social cohesion and possibly decreasing creation and innovation by those who have different backgrounds, leading to a decrease in social welfare.

Objections based on these assumptions are largely subjective. Nonetheless, an economic approach to social welfare can provide a clearer way of measuring the impact IP protection regimes have on society. In addition, the fact that it is a broad and generalised account leaves room for flexibility and consideration of other legal factors when deciding on appropriate protections. Therefore, although not without its flaws, social welfare based economic justification is more suitable as a criterion for evaluating different IP protection regimes from a philosophical perspective, which brings the argument closer to finding a solution to the problem of IP regulation.

Evaluation of Self-Regulation Suggestions

Based on the justifications presented in the previous section, different suggestions for IP protections will be evaluated by reference to empirical facts. Ultimately, the suggestion that self-regulation is the appropriate system of protection will be dismissed. To avoid confusion, it should be stated that self-regulation is a different concept of IP protection than private ordering. "When an industry self-regulates, it promulgates its own standard rules that apply to all parties (companies, consumers). Private ordering defines specific rules for each individual situation".[443] Supporters of self-regulation argue that it is the most efficient method,[444] on the

[442] Niva Elkin-Koren, 'Copyrights in Cyberspace – Rights Without Laws?' (1998) 73 Chicago-Kent LR 1155.

[443] Michael Levin, 'What is Private Ordering?' (*The Activist Investor Blog*, 29 September 2015).

[444] This could be achieved in cyberspace via coding. However, it would undoubtedly prove more difficult to set such systems in place in the physical world and probably would require individual contracts.

grounds that it offers optimal protection at the lowest cost.[445] The evidential support for this statement is that coding (i.e., a firewall) offers the same (if not more) protection at almost no cost, whilst legal enforcement uses up resources and time. A potential model for how such systems would operate was put forward by Stefik. Labelled the "trusted systems",[446] these use the information provided by cyberspace users in order to build protections. These protections are then integrated into the digital mediums where the protected IP is hosted, like a website or a digital trading platform, bypassing the need for any legal enforcement of the right by the courts. Advocates of this idea believe that the market can regulate trusted systems without legal intervention. They argue that this will eventually lead to an equilibrium where information is accessible to the necessary degree and creators are still rewarded for their work, similar to how a free market theoretically reaches equilibrium.

There are, however, certain deficiencies within these arguments. The first and most crucial of these is that a system based solely on self-regulation is not reflective of how current IP frameworks are constituted. In most IP protection regimes today, law is the main source of legal protection, while code is used for limited individual needs. For example, when a book is published in cyberspace, although copyright law provides certain legal protections for that book, coding materially prevents users from copying and pasting parts from that book onto other websites. Whilst this may represent a form of market generated equilibrium, it remains far from the private-protection heavy scenario advocates of self-regulation envision. Rather, it is arguable that the combination of code and legal regulation is the system finding an equilibrium and adapting to the current circumstances. However, the practical reality is not in-keeping with this argument, as the marginal cost of producing most IP is zero. Zero cost here refers to the dissemination of IP in the cyberspace. For instance, once a movie or literary work is published, the cost of there being an additional digital copy of that work is zero. In this case, it becomes undesirable to equate the price to marginal cost.[447]

In addition, there are also problems with the "trusted systems" approach. Namely, it does not align with the justification of increasing public well-being. Without any legal limits on the protection of IP, the risk increases from overprotection to completely disregarding the fair use doctrine. If the fair use doctrine is accepted as an exception to the trusted systems approach, then the regulatory framework would be very similar to a legal system of protection. However, it would still lack both the benefit of an established system of enforcement (the courts) and the promise of certainty that comes from codified legislation. Another reason for the failure of self-regulation systems has been identified by JP Barlow: "Humans have not inhabited the

[445] Lawrence Lessig, *Code v. 2.0* (Perseus Books, 2006) ch 10.
[446] ibid 13.
[447] Richard Allen Posner, 'The Law and Economics of Intellectual Property' (2002) 131 Daedalus 5.

Cyberspace long enough or in sufficient diversity to have developed a Social Contract which conforms to the strange new conditions of that world".[448]

Upon analysis, it becomes evident that a protection system based solely on self-regulation is unsustainable and unreasoned. Therefore, the answer to the challenge is to decide which form of available legal protection is the most appropriate for IP protection: private or centralised regulation.

The Issue of Private Ordering Systems

Analysis turns first to private ordering systems, to consider whether they may constitute the most appropriate form of protection. Niva-Elkin Koren debated whether such systems should be immune from government intervention extensively in her paper, 'Copyrights in Cyberspace-Rights Without Laws?'.[449] Although her focus was mostly on copyright law, her arguments will be evaluated in the broader context of IP protections (which also involve concepts such as patents and trademarks). This discussion is split into two parts: (a) evaluation based on economic justifications (b) reflections on real world situations. This discussion will eventually lead to the conclusion that private ordering systems need government regulation, in line with Koren's suggestions.

(a) Evaluation based on Economic Justifications

The current evaluation will expand on the economic justification discussed in subsection (i). If we accept that the object of IP frameworks is to enable maximum social welfare, then a utilitarian counterargument is that private regulation systems not only offer this at the lowest cost but have a greater capacity to adapt to the needs of individual creators and users. This theoretically allows them to ensure maximum benefit. Expanding on the social welfare point, government regulatory bodies lack the necessary knowledge and resources to provide the same level of individualised protection that private IP frameworks offer. This assumption is made on the basis that government bodies can only operate on a large scale, in contrast to individuals who can lay out the specifics of how they want to protect their work.

On the other hand, issues with such economic justifications may feasibly arise if private ordering systems are used without government intervention, not least of which would be the risk of monopolies emerging. Despite being dismissed as insufficient in (i), perhaps the desert-

[448] John Perry Barlow, 'The Economy of Ideas: Selling Wine Without Bottles on the Global Net' (*Electronic Frontier Foundation,* 12 February 2018) <https://www.eff.org/pages/selling-wine-without-bottles-economy-mind-global-net> accessed 15 September 2021.
[449] ibid 13.

for-labour approach would therefore be more suitable for the support of private ordering systems. Nonetheless, real life examples force us to include private ordering systems in our calculations. As an example, Microsoft is the founder and the only supplier of Microsoft Office programs (such as Word, Excel, Power Point). If there was no government regulation at all in the licensing and distribution of this IP, then Microsoft would be able to set the price point as high as desired, because companies which rely on these programs would have no access to alternate products which met their requirements. They would therefore have no choice but to pay the high price point, damaging their profitability and, on a larger scale, inhibiting wider economic growth. This could lead to the emergence of 'fake' versions of such programs. However, unlike regular market commodities, switching to these alternatives would cause a decrease in social welfare, as the fake versions would be unable to satisfy user needs on the same level as the original product. Therefore, in all potential scenarios, monopolisation of IP would feasibly be damaging to the economy.

The point made about the capability of the government to accurately predict the needs of IP holders is also flawed. If private ordering systems are used for the protection of intellectual property rights, this will be achieved through contracts which will subsequently depend on legal institutions for their enforcement. In this scenario, territorial governments are called to function as enforcement agencies for rules which they, and their citizenry, had no say in adopting and which may even contradict public interest.[450] Therefore, the entire IP protection framework of a state and its functionality will be worse off than if the government regulates in an area that it is not completely familiar with. In addition, private ordering advocates make the empirically faulty assumption that both parties who enter into contracts for IP protection have equal knowledge of circumstances and terms of use. The creators know everything about the system and are also the ones who present the contracts to end users. Without the voluntary consent of all parties, the private ordering regime merely reflects an exercise of power by information providers and enjoys no supremacy.[451] This unequal bargaining power once again leads society away from social welfare, contradicting the economic justifications for IP protection.

(b) Real World Reflections.

The next question to be considered is which system would operate better in real market conditions. One argument in support of private ordering systems is that they are easier to tailor to the individual needs of IP rights owners, who seek to benefit in different ways from the rights that they hold. In addition, they are flexible enough to adapt to the rapid changes of today's cyberspace. This flexibility benefits both information providers and receivers, as it

[450] ibid.
[451] ibid.

facilitates access to information for receivers whilst simultaneously allowing providers to engage with a wider net of end users. The receivers/consumers benefit further by having a variety of choices available to them. This variety also allows the market to adjust the price level and present consumers with economic incentives.

However, allowing private ordering systems to monopolise IP regulation comes with its own set of empirical problems. The first is that the propertisation of information can also occur via private ordering systems. If the rights that contracts create are effective at the moment the information is accessed (*ProCD, Inc. v Zeidenberg*),[452] then they are effective against people from all around the globe at the time of their access. However, this argument is limited in scope to national IP protection frameworks, due to the fact that it would be incredibly difficult to enforce such a provision for IP that is available internationally (for example, for an article that is published on the general web). This is where it becomes even more necessary to have government regulation and internationally recognised treaties to establish internationally available IP accountability. If this is the case then, by analogy to regular property regimes, it appears that a general framework of rules provided by the government is necessary to create order and equality.

A further issue with using only private ordering systems is that it has the potential to lead to operational blocks. This occurs because many people may have a claim to the same IP, especially in the common scenario of plural authorship.[453] In a situation where all the authors use private ordering systems in order to exclude others from using the same information, the system becomes clogged with no one author having a better claim than another. The government addressed these concerns to a certain extent in the Digital Millennium Copyright Act 1998 (DMCA), reestablishing that there will be government regulations in place. More importantly, it restricted hackers' ability to bypass such regulations to an extent. One of the main ways the DMCA sought to achieve this was through the anti-circumvention provisions,[454] which makes it illegal to circumvent technological measures used to protect copyrighted material. This means that it is illegal to bypass any technological measures that are designed to prevent unauthorised access to copyrighted material, such as encryption or digital rights management (DRM) systems. The anti-circumvention provision of the DMCA also made it illegal to manufacture or distribute tools or technologies that are primarily designed to circumvent these technological measures. This serves to reassure IP creators who fear that centralised law does not provide enough protections and contributes to the point that government regulations have a greater potential to be effective.

[452] *ProCD Incorporated v Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996).
[453] Lawrence C Becker, 'Deserving to Own Intellectual Property' (1993) 68 Chicago-Kent LR 609.
[454] Digital Millennium Copyright Act 1998 ss 1201(a), 1201(b).

The final point to consider is the autonomy argument advanced in favour of private ordering systems. In keeping with liberalist schools of thought, it could be claimed that, according to the autonomy principle,[455] individuals should be able to regulate their own affairs in areas that do not cause negative effects to others. This argument can be taken further by pointing to the fact that the freedom of contract principle should allow individuals to contract on terms that they want without government intervention through regulation.

Although sensible, these arguments based on the autonomy principle can be refuted. The first argument, regarding the autonomy to self-regulate, overlooks potential justifications on the grounds of social contribution. The second point about freedom of contract principles is also faulty, because private IP protection systems differ majorly from regular contracts. In regular contracts there is a defined and limited group of contracting parties. That is not the case for IP because the second it leaves the mind of the creator it cannot be restituted or physically located. In addition, the contracts in private ordering systems are made between the creator and each of the numerous users of the product, without pre-contractual negotiations. IP protection frameworks should therefore not enjoy the immunity that a negotiated two-party agreement enjoys[456] and arguments based on autonomy are not enough to counter this.

Conclusion

Upon evaluation, based on economic and social welfare justifications for the existence of IP systems, it can be observed that self-regulation risks overprotection and decreased social welfare, due to the endless information protection and monetisation options that cyberspace presents to creators. The other alternative, private ordering systems, also proves to be insufficient to achieve a balance between public welfare and creative encouragement on its own. The most theoretically reasonable solution at this point appears to be for the government to get more involved and legislate further, especially on the topic of cyberspace where there are very few controls at this time. DMCA 1998 provides a good blueprint for how the government can proceed, namely by legislating in broad terms to accommodate the constant changes that occur in technology. However, the government should balance their involvement by allowing a degree of necessary private order systems use to prevent a decrease in production. It is important that the government codifies these solutions in legislation, so that there is certainty. However, due to the dynamic nature of the sector, legislation will be outdated quickly. In order to prevent a resort to private solutions, constant amending and work will therefore be necessary to keep social welfare at the desired, optimal level.

[455] Melina Contantine Bell, 'John Stuart Mill's Harm Principle and Free Speech: Expanding the Notion of Harm' (2021) 33 Utilitas 162.
[456] ibid 13.

Does the use of private dispute resolution services like arbitration and private FDRs create a two-tier family justice system?

William Dobbs

Introduction

Since Lord Woolf's report and the promulgation of the Civil Procedure Rules 1998, alternative dispute resolution (ADR) has gained increasing popularity amongst lawyers and litigants alike. In family law, private Financial Dispute Resolution Appointments (private FDRs) have become steadily more common in finance cases and have enjoyed the approval of the judiciary. As for arbitration, it is anticipated that the ruling in *Haley* will quash any residual doubts as to the finality of awards in family cases.[457] But Woolf's recommendations were rooted in a desire to improve the experience of all litigants; the recent increase in the use of out-of-court resolution has occurred because that has not happened. The courts are in crisis after the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) gutted legal aid provision for all but the most serious cases and left many litigants facing the bench unrepresented.[458] Family courts are struggling with high case volume and low judicial availability. Those who can afford it are going private; those who cannot must fend for themselves.

The state of play

It is not a coincidence that lawyers are keener than ever to encourage their clients to resolve their differences in private. Courts are overused and underfunded. The average family case in the period from April 2022 to June 2023 ran 45 weeks from petition to final order, almost double the mean figure from the same period in 2017.[459] Meanwhile, those lucky enough to be able to fund a private evaluator can have their case heard swiftly and without fear of a last-minute adjournment**.** They can start life after litigation before their less wealthy counterparts are offered even a first directions appointment. Private FDR appointments were, until recently, an exceptional tool used only in particularly complex or high-value finance cases. They are now much more popular. So popular that some conduct the majority of their FDRs outside the courtroom. In one sense, they are not necessarily the more expensive option. Solicitors' fees for a private FDR are generally much lower because the appointment can be held at short notice and there is no risk of wasting more money on briefing counsel if the court adjourns at the last

[457] *Haley v Haley* [2020] EWCA Civ 1369 [5f.].

[458] Between April and June 2022 both sides went unrepresented in 39% of disposals (Family Court Statistics Quarterly 2022 No. 1).

[459] HMCTS Management Information July 2022.

minute. There are practitioners at the more junior end offering their services for under £2,000, which can easily be spent in the time between FDA and FDR. However, it can be difficult to persuade a lower-income client, already indignant at having to waste valuable matrimonial assets on huge legal fees, to spend more on a service provided to them, nominally, by the state; even though it might prove less expensive in the long run.

The success of private dispute resolution

In private proceedings the parties have the benefit of being able to pick a judge who is suited to the case and who will have had time to read the evidence. This luxury is not afforded to judges sitting in heavily listed courtrooms, presiding over four FDRs in one day. As Mr Justice Mostyn observed in *AS v CS,* the 'higher success rate' of private FDRs 'may be a result of more time being available to the judge both for preparation and in the hearing itself'.[460] There is also the comfort and privacy offered by proceedings conducted in chambers, far away from a cold and dilapidated court building. For sensitive disputes such as private FDRs and family arbitration, surroundings matter. Judges sitting in private are careful to maintain a strict, formal procedure. In contrast, the nature of private resolution encourages a more conciliatory tone than that which is created by the atmosphere of court. There is more time, space, and willingness to negotiate. Therefore, settle more often when held in private than in court. It is obvious that, for those who can afford it, private resolution is the option of convenience and expedience.

But it is not solely lawyers and their clients who are widening the gap between public and private resolution services. Judges and recorders who choose to sit in private are depriving the courts of their services. The latest government report on judicial recruitment states that there is a serious shortage of district judges in general, and on the civil bench in particular. It makes the obvious point: 'this is likely to be because of the difference in remuneration in the external market for civil and criminal legal practitioners'. One-third of district vacancies were filled in the year leading to April 2021.[461] Pay is not the only issue – would-be judges are discouraged by the prospect of stacked rolls and the concomitant long sitting days. Judges want to be able to do their jobs properly and would prefer to hear cases when they have had time fully to understand the bundle. It is no wonder that so many senior family practitioners would rather take their MCIArb exams than sit as part-time recorders.

Conclusion

So, clients, their lawyers, and judges are voting with their feet. But are they not entitled to do so? Are they not, as Lord Woolf intended, helping the public system, by creating space for

[460] *AS v CS (Private FDR)* [2021] EWFC 34 [14].
[461] Review Body on Senior Salaries Report 2022 p105.

more complex matters in need of the courts' attention, such as those involving domestic violence or serious child abuse? On the basis of our observations above, a two-tier system is now inevitable in some form. We should therefore be encouraging anyone who could resolve out of court to do so. A lack of data means that it is hard objectively to quantify the extent to which private resolution services help to alleviate the courts' caseload. And 2022 saw a 14% increase in the number of cases going through the family courts. A pandemic-induced spike was widely anticipated, however, and the number would have been much higher if it weren't for the availability of a private alternative. Mediation will be an option for some couples, but not all. It is intuitive that by driving protracted financial disputes away from the courts we can ease the load on a creaking system.[462] This trend will only be exacerbated in the near future if, as is likely, the reporting restrictions on matrimonial finance proceedings are lifted. Private alternatives will become even more attractive to richer litigants, as they will be able to buy confidentiality, and leave the rest to fight it out in front of story-chasing journalists from their local paper. Many will argue that this further entrenches the divide between the haves and the have-nots. This need not be the case, however. If two-speed justice is here to stay, we must make it a more equitable solution. The use of alternative remedies – whether that be private arbitrations and FDRs, or publicly funded mediation – is not the cause of the problem. It can instead be part of the solution. This rebalancing was caused by cuts to public funding. It was not caused by barristers offering to sit as private judges. The private sector must take up the slack.

[462] *AS v CS (Private FDR)* [2021] EWFC 34 [14].

Harmonisation and Competition in International Taxation

Jeremy Schnetzler

"Harmonisation in international taxation is hard to achieve and maintain because of tax competition between State governments. Regulation of taxation should therefore take place at a national or regional level and not be internationally harmonised. Critically discuss this statement with reference to at least one example of a recent proposal on international tax law"

Introduction

"Raising revenue is a cherished aspect of national sovereignty. Transfer of this power to the Community is a very visible and, to some, alarming manifestation of diminution in national sovereign."[463]

In carrying out this essay, we will assume that international tax harmonisation is difficult to achieve and maintain because of tax competition between different governments, even if there are other reasons for this such as the simple fact that it is difficult to agree at global level on a subject as sensitive as taxation. The difficulty of establishing global consensus has led some to favour another avenue for advancing tax cooperation: regionalism.[464] Indeed, if fewer actors are involved, this facilitates the approximation of views, and, insofar as the objective is to integrate economic areas, it can be thought that the countries concerned have everything to gain from fiscal convergence. There are at least two main models of regionalism: the community model and the contractual model. Both models involve the integration of economic areas, but only the former has the potential to bring about institutional convergence if three conditions are met: the area must be of regional competence, specific mechanisms must exist to operationalise it and there must be no possibility of blockage.[465] At first sight, the European Union is an interesting case to study, but as we shall see, taxation remains an explosive subject. This paper will argue that it is not easier to harmonise tax law regionally, at least as far as the EU is concerned. Tax competition is still present. To this end, the notions of harmonisation and competition will first be addressed in order to lay the foundations of the problem. Secondly, this paper will discuss tax harmonisation in the European Union, and challenges posed through both continued integration and differentiated integration in the context of the Financial Transaction Tax.

[463] Stephen Weatherill and Paul Beaumont, *EC Law* (2nd edn, Penguin 1995), 42.
[464] Christian Deblock and Michèle Rioux, 'L'Impossible Coopération Fiscale Internationale' (2008) 10(1) Étique Publique 1, 53. (The Impossible International Tax Cooperation)
[465] ibid.

Tax Harmonisation

Defining tax harmonisation is not an easy task given the large number of possible definitions and degrees of harmonisation. On the one hand, the notion of tax harmonisation can refer to the complete standardisation of forms of taxation, tax rates and tax bases between states. On the other hand, it can refer to smaller-scale arrangements whereby the tax system of one State takes account of other tax systems in the form of double taxation agreements and bilateral tariff reductions.[466] There are more open and more closed definitions. For example, Dosser reduces tax harmonisation to "tax co-ordination among nations in the process of integration in a customs union or economic union".[467] But as Prest points out the only coordination is a low level of harmonisation as it can be interpreted as a mere consultation process on a similar organisation of tax systems.[468] Musgrave gave a more open definition based on the purposes of the measures, namely: "Fiscal harmonisation may be viewed as the process of adjusting national fiscal systems to conform with a set of common economic aims".[469] However, as Simon and Oats highlight, not all states have the same economic aims and that although it is often argued that harmonisation is essential to ensure free trade, it is also important to remember that not all states are willing to let the market decide all economic issues.[470] For the purposes of this paper, a broad definition will be used stating that "harmonisation means that countries align their tax systems and/or rates so that they are similar or even identical".[471] Although there are differences, it is possible in this essay for the terms harmonisation, uniformity, convergence and approximation to be interchanged, because basically they all mean the eradication of difference and the replacement by a single set of rules, principles and practices. It is also important to note that supranational legislative harmonisation is intended to have an impact on the differences between states, and thus on the sovereignty of the latter to legislate on their own territory.[472]

Simon and Oats distinguish three reasons for promoting tax harmonisation. These are economic efficiency, administrative considerations and tax competition.[473] Since tax competition will be dealt with separately in the next chapter, we will quickly return to the first two arguments. One

[466] James Simon and Lynne Oats, 'Tax Harmonisation and the Case of Corporate Taxation' (1998) 8 Revenue Law Journal 36, 37-38.
[467] Douglas Dosser, *British Taxation and the Common Market* (Charles Knight 1973).
[468] Arthur Prest, 'Fiscal Policy' in P. COFFEY (ed.), *Economic Policies of the Common Market* (Macmillan 1979), 76.
[469] Peter Musgrave, 'Harmonisation of Direct Business Taxes: A Case Study' in CS SHOUP (ed.) *Fiscal Harmonization in Common Market*, Vol II, *Practice* (Columbia University Press 1967), 210.
[470]Simon and Oats, *supra* note 4, 38.
[471] Lynne Oats, *Principles of International Taxation* (8th edn, Bloomsbury Professional Tax Series 2021), 31.
[472] Maria Kendrick, 'The Future of Differentiated Integration: The Tax Microcosm' (2020) 7:2 JICL 371, 373.
[473] Simon and Oats, *supra* note 4, 43.

of the main arguments for tax harmonisation is that of economic efficiency, in the sense that the production and distribution of goods and services should not be distorted by tax considerations.[474] Indeed, if there are different tax provisions in different regions, the economy is less likely to prosper. For example, if taxes are excessively high in one region, capital and labour will tend to migrate to regions with lower taxes for valid economic reasons. This argument is linked to the principle of tax neutrality, according to which tax systems are not supposed to distort the choices people make about how to live their lives.[475] The second argument for tax harmonisation is administrative considerations. One of the biggest developments in this area has been the emergence of double taxation treaties. Although these agreements reduce the negative effects of a lack of tax harmonisation by preventing double taxation of individuals, this is not enough.[476] Tax differences can also have administrative consequences, especially with regard to tax evasion. These include techniques for shifting profits between different tax regimes to avoid taxation. Various technological advances make all this even more difficult and put additional pressure on the tax administration.[477]

Tax competition

Originally, the tax policies of states were shaped by the fact that the economy was closed. This allowed states to have the exclusive power to establish and enforce mandatory rules, including the power to set and impose taxes according to their needs. However, in the context of global competition, the relationship between the state and its citizens has moved from a compulsory regime to an increasingly elective market, in which states are often forced to offer competitive bids for public goods and services.[478] Initially, it was straightforward to consider taxes as a mechanism for financing public goods and services provided by the state, but nowadays taxes are increasingly seen as a price for the right to establish oneself subject to competition between states.[479]

The decentralised nature of international taxation places states in competition for residents and investments.[480] Tax competition may be defined as the "competition between different tax jurisdictions to encourage businesses and individuals to locate in their areas".[481] It can take the

[474] ibid.
[475] Sheila Killian 'Where's the Harm in Tax Competition? Lessons from US Multinational in Ireland' (2006) 17 Critical Perspectives on Accounting 1067, 1069.
[476] Simon and Oats, *supra* note 4, 47.
[477] ibid.
[478] Tsilly Dagan, *International Tax Policy: Between Competition and Cooperation* (Cambridge University Press 2018), 23.
[479] ibid.
[480] ibid.
[481] James Simon, *A Dictionary of Taxation* (Edward Elgar 1998).

form of a general reduction in tax rates or more specific measures such as tax holidays, which allow companies meeting specific criteria to benefit from favourable tax treatment for a limited period of time after moving to a new jurisdiction.[482] In doing so, states try to attract two types of investment. The first being portfolio investment, investments which do not involve the management of a business. These include bank deposits, minority stakes in company shares and holding of government securities. Bond holding and bank deposits are highly mobile investments that can be easily transferred from one country to another.[483] Secondly, there is foreign direct investment. This is the creation of a subsidiary or branch in another country, thus creating jobs and additional tax revenue for the state.[484]

Tax competition has increased in recent years as a result of globalisation. Indeed, many taxpayers - whether companies or individuals - are increasingly mobile and can therefore choose among jurisdictions that suit them to move their residence and business activities. It has not been uncommon in recent years for many ultra-wealthy individuals to expatriate in order to avoid the high tax rates in their home countries, transferring not only their place of residence but also their citizenship to another jurisdiction.[485] This is even more evident for multinational enterprises, which are also highly mobile. They may incorporate in one jurisdiction and sometimes reincorporate in another as they choose. They may move their production, marketing and R&D activities to more favourable locations.[486] This is further accentuated by the fact that host states strongly encourage companies to incorporate or relocate to their territory. In doing so, states seek in particular to encourage job creation and the creation or migration of know-how. From a financial point of view, this also makes it possible to raise money, whether it be fees for setting up a company or tax revenues.[487]

For both individuals and companies, the tax rules and applicable tax rates are important elements to consider when deciding to settle.[488] States find themselves in an unusual position. They no longer impose tax and regulatory obligations on their taxpayers solely to promote national objectives but additionally to solicit investment and residents from around the world. By offering their goods and services to potential customers, they act as market players.[489]

[482] Oats, *supra* note 9, 43.
[483] ibid.
[484] ibid.
[485] Michael S. Kirsh, 'Taxing Citizens in a Global Economy' (2007) 82 N.Y.U. L. Rev. 443, 490.
[486] Tsilly Dagan, *supra* note 16, 25.
[487] ibid.
[488] Michael P. Devereux and Rachel GRIFFITH, 'The Impact of Corporate Taxation on the Location of Capital: A Review' (2002) 9 Swedish Econ. Pol'y Rev. 79.
[489] Tsilly Dagan, *supra* note 16, 26.

Tax competition can be seen in two ways, one positive and one negative. On the one hand we have what is called "beneficial tax competition", from this point of view, competition encourages states to be more efficient. Conversely, the concept can manifest in negative forms, called "harmful tax competition". The negative effects include the encroachment of competition on state sovereignty.[490] According to the theoretical literature, tax competition is an obstacle in the European Union to achieving a common market. Where it could also force states into a "race to the bottom" of tax rates on portfolio investments and create a risk for growth and social cohesion.[491] For years now, the OECD and the EU have been campaigning to eliminate harmful tax competition with a particular focus on tax havens and preferential tax regimes. The OECD's BEPS project has changed the debate on harmful tax competition by making it more difficult for countries to deviate from global standards, moving towards higher harmonisation.[492] However, the delineation between beneficial and harmful competition is still subject to debate and appears to lack a simple answer.[493]

Harmonisation in the European Union

The European Union's aim of integration leads it to adopt harmonisation programmes in many areas of Community law, of which tax law is one.[494] The EU has its own tax agenda.[495] However, as discussed above, tax law is an important aspect of Member States' state sovereignty and tax harmonisation programmes are difficult, if not impossible, to achieve. The desire to maintain state sovereignty is at odds with the seemingly opposite desire for EU harmonisation, but this is not the only reason preventing harmonisation. Firstly, it will be shown that EU law does not have the necessary tools to pursue the path of continuous integration. In a second step, the solution of differentiated integration through enhanced cooperation will be studied to see if it responds to this to this legal vacuum. The Financial Transaction Tax provides a strong example of the failure of the European Union to harmonise tax law because, as Cédelle and Vella said: “it is the most difficult case that has ‘clearly illustrated the tension between uniformity and divergence within the Internal market’”.[496]

[490] Oats, *supra* note 9, 31.
[491] ibid.
[492] ibid.
[493] ibid, see also Killian, *supra* note 13.
[494] Kendrick, *supra* note 10, 371.
[495] Commission, ‘Communication from the Commission to the European Parliament and the Council: A Fair and Efficient Tax System in the European Union for the Digital Single Market’ COM (2017) 547 Final.
[496] Anzhela Cédelle and John Vella, ‘Differentiated integration in the EU: Lessons from the Financial Transaction Tax’ in Panos Koutrakos and Jukka Snell (eds), R*esearch Handbook on the Law of the EU’s Internal Market* (Edward Elgard Publishing 2017), 351.

A) Continued integration

The EU is aiming at a continuous integration process through the creation of a "new legal order"[497] leading to an "ever closer union",[498] the objective of which is to achieve a uniform application of Community law.[499] Uniformity supports harmonisation, convergence and approximation of the law with the aim of achieving a homogeneous application of the law but this is not easy in the tax sector.[500] The competences of the European Union are governed by the principle of conferral, meaning that the Union acts only within the limits of the competences that the Member States have attributed to it in the treaties and with the aim of achieving the goals set by these treaties. The corollary of this rule is that any competence not attributed to the Union belongs to the Member States.[501] Based on this principle, there is no common system of direct taxation within the EU, and each Member State is entitled to have its own laws on income and corporation tax and other direct taxes. Direct taxation remains a competence closely linked to the sovereignty of the Member States.[502] As there is no explicit legislative basis for the harmonisation of direct taxes, the general legislative bases under Articles 115 and 352 TFEU have been used for direct tax legislation. However, these legislative bases are geared towards the completion of the internal market and their use is strictly controlled by the Court of Justice. Both legislative bases require unanimity of the Member States. To address the above shortcomings, it could be argued that the European Union has the competence to harmonise indirect taxation to ensure the establishment and functioning of the internal market and to avoid distortions of competition through Article 113 TFEU. It is true and this has even been done for VAT. Indeed, VAT is part of the *acquis communautaire* and two directives (1997[503] and 2006[504]) closely codify the VAT regime in the MS, with a minimum standard rate of 15% and a restricted list of reduced rates. However, the Commission, by its own admission, does not

[497] Case C-26/62 *Van Gend en Loos* v Nederlandse Administratie der Belastingen (1963) ECR 1, para. 3.
[498] Consolidated Version of the Treaty on European Union (2008) OJ C115/13 (TEU), Art. 1.
[499] Kendrick, *supra* note 10, 373.
[500] ibid.
[501] TEU, *supra* note 36, Art. 5.
[502] Maria Kendrick, 'The Legal (Im)possibilities of the UE to implementing the OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting' (2022) 17(1) Global Trade and Customs Journal 19, 20; *see also* Oats, *supra* note 9, 486; See for example Case C-524/04 *Test Claimants in the Thin Cap Grp. Litigation v. Commissioners of the Inland Revenue* (2007) E.C. R. 1-2157, 25.
[503] Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment [1977] OJ L145/1.
[504] Council Directive 2006/112/EC of 28 November 2006 on the common system of value added Tax [2006] OJ L347/1.

consider the EU VAT system to be definitive and fully harmonised.[505] Another recent failed attempt at harmonisation across the EU is the Common Consolidated Corporate Tax Base.[506]

B) Differentiated Integration

i. Enhanced cooperation

It is possible for a sub-group of Member States to establish cooperation between themselves, making use of the EU institutions and applying the relevant provisions of the EU Treaties.[507] This system is called enhanced cooperation and is governed by Article 20 of the Treaty on European Union (TEU) and specified in Articles 326 to 334 of the Treaty on the Functioning of the European Union (TFEU). Although the rules are detailed, it is not yet clear how enhanced cooperation is to be used and what its role in EU governance is. Disagreement over its application remains high and generates a wide range of divergent interpretations. After the first application of enhanced cooperation, several questions were raised before the Court[508], instead of finding a solution, the judgments seemed to fuel the debate.[509] At present, the enhanced cooperation procedure has been successful twice, in the context of divorce and legal separation (2010)[510] and unitary patent protection (2011).[511]

It is clear in the EU Treaties that enhanced cooperation is to be applied narrowly and is only an auxiliary instrument. It can only be employed as a 'last resort', when the Council has "established that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole".[512] Article 329 TFEU provides for a special procedure to move from an unsuccessful attempt to adopt a uniform legislative measure to a differentiated mode. A minimum of nine Member States must submit a request to the Commission, identifying the

[505] Commission, 'Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee: On the Follow-up to the Action Plan on VAT, towards a Single EU VAT Area — Time to Act' COM (2017) 566 final.
[506] Oats, *supra* note 9, 511.
[507] Cédelle and Vella, *supra* note 34, 361.
[508] Joined Cases C-274 and 295/11 *Spain and Italy v Council* ECLI:EU:C: 2012:782 ; Case C-209/13 *UK v Council* ECLI:EU:C:2014:283 ; Case C-146/13 *Spain v Parliament and Council* ECLI:EU:C:2015:298 ; Case C-147/13 *Spain v Council* ECLI:EU:C:2015:299.
[509] Cédelle and Vella, *supra* note 34, 361.
[510] Council Decision 2010/405/UE of 12 July 2010 authorising enhanced cooperation in the area of the law applicable to divorce and legal separation [2010] OJ L189/12.
[511] Council Decision 2011/167/EU of 10 March 2011 authorising enhanced cooperation in the area of the creation of unitary patent protection [2011] OJ L76/53.
[512] TUE, *supra* note 36, Art. 20(2).

scope and objectives of the proposed cooperation.[513] Thereafter, the Commission has the discretion to decide whether such a proposal is presented to the Council. Then the approval of the European Parliament is requested. Finally, the Council authorises the establishment of enhanced cooperation by qualified majority.[514] Once the authorisation is granted, only members of the Council representing the participating Member States can vote.[515] Although the acts produced in the framework of enhanced cooperation are binding only on the participating Member States and are not considered part of the *acquis*, cooperation does not take place entirely without the non-participating Member States.[516] Indeed, the EU Treaties ensure that all members of the Council can participate in its deliberations.[517] In addition, non-participating Members may join enhanced cooperation at any time, subject to the conditions laid down in Article 328 TFEU.[518] There is also specific procedure for member states wishing to join ongoing enhanced cooperation, contributing to the complex nature of its governing framework.

ii. Financial Transaction Tax

In the wake of the financial crisis, the Financial Transaction Tax (FTT) has entered the political agendas of the world and the European Union.[519] In September 2011, the European Commission proposed to introduce an EU-wide FTT in order to strengthen tax integration between Member States and "avoid a fragmentation of the internal market that might be caused by uncoordinated tax measures of Member States.[520] The draft provided for a tax of up to 0.1% on transactions in securities (shares and bonds) and a small tax of 0.01% on other retained financial products. The aim was twofold: firstly, to generate additional revenue, which was essential from a budgetary perspective, and secondly, to discourage risky transactions.[521] However, as it has been seen before, unanimity is difficult to achieve, and this proposal became another failed attempt at tax harmonisation within the Union. In October 2012, 11 Member

[513] Consolidated version of the Treaty on the Functioning of the European Union (2007) 2008/C 115/01 (hereinafter: TFEU), Art. 329.
[514] ibid.
[515] TEU, *supra* note 36, Art. 20(3).
[516] TEU, *supra* note 36, Art. 20(4).
[517] TEU, *supra* note 36, Art. 20(3); *see also* TFEU, *supra* note 51, Art. 330.
[518] TEU, *supra* note 36, Art. 20(1) and (2).
[519] International Monetary Fund, 'A Fair and Substantial Contribution by the Financial Sector: Final Report to the G20' (June 2010); *see also* European Commission, 'Taxation of the Financial Sector' COM (2010) 549 final; *see also* European Commission, 'Taxation of the Financial Sector' (Staff Working Document), SEC(2010)1166.
[520] European Commission, 'Proposal for a Council Directive on a common system of financial transaction tax and amending Directive' 2008/7/EC, COM (2011) 594 final (2011 Proposal).
[521] ibid.

States[522] submitted a request for enhanced cooperation to the Commission with the aim of establishing an FTT.[523] After a proposal by the Commission and approval by the Parliament,[524] the authorisation to proceed with enhanced cooperation was granted by the Council in January 2013.[525] The participating Member States indicated in their official request to the Commission that the tax should have the same objectives as the 2011 proposal, but they also requested some modifications. The most important one being the introduction of the "emission principle", which goes further than the original proposal which provided for the "residence principle".[526] The new proposal greatly extended the already considerable territorial scope of the tax.[527] This means that transactions in financial instruments or structured products issued in the territory of a participating Member State are subject to tax even if the transaction is between parties not from a participating state.[528] This proposal only accentuated the disagreements of the non-participating states, with the UK going so far as to ask the Court to annul the Council decision.[529] The Court's judgment dismissed the UK's appeal, stating that the Council decision did authorise the establishment of enhanced cooperation. However, the decision did not contain any response to the contested elements of the TFF.[530] This example is used to demonstrate that from the outset, setting the tax will not be an easy task.

The task has been so difficult that now, almost 10 years after the 2013 proposal, the Member States have still not come to an agreement. According to the 2013 proposal, the deadline for the start of the application of the tax was 1 January 2014.[531] The deadline passed, and the participating Member States were not able to agree on the exact structure of the tax. Despite several official updates indicating that participating MS remain committed to the introduction of the tax and that work on its design is progressing, various official documents reveal the

[522] Austria, Belgium, France, Estonia, Italy, Germany, Greece, Portugal, Slovakia, Slovenia and Spain.
[523] 'Financial Transaction Tax through Enhanced Cooperation: Questions and Answers' (*European Law Monitor*, 15 February 2013), https://www.europeanlawmonitor.org/latest-eu-news/financial-transaction-tax-through-enhanced-cooperation-questions-and-answers.html (Accessed 10 May 2022).
[524] European Parliament legislative resolution of 12 December 2012 on the proposal for a Council decision authorising enhanced cooperation in the area of the creation of financial transaction tax (COM (2012)0631 – C7-0396/2012 – 2012/0298(APP)).
[525] Council Decision 2013/52/EU of 22 January 2013 authorising enhanced cooperation in the area of financial transaction tax [2013] OJ L22/11.
[526] European Commission, 'Proposal for a Council Directive implementing enhanced cooperation in the area of financial transaction tax', COM (2013) 71 final (2013 Proposal), Art. 4(1)(g).
[527] Cédelle and Vella, *supra* note 34, 355.
[528] ibid.
[529] *UK v Council*, supra note 46.
[530] ibid.
[531] 2013 Proposal, *supra* note 65.

difficulties in reaching agreement on the exact design of the tax.[532] Support for enhanced cooperation is becoming increasingly rare, and Estonia has even withdrawn from the procedure.[533] Today, the enhanced cooperation project on FTT is at a standstill.

The failure of the FTT raises several questions, both legal and political. However, for the purposes of this essay, we will only consider the issue of tax competition. It is clear that some states did not want to participate in the enhanced cooperation or in the initial proposal of the European Commission for tax competition reasons. Indeed, the European Commission's 2013 Impact Assessment recognises that foreign investments in participating Member States will have an incentive to move their headquarters to non-participating states.[534] Financial centres located outside the participating Member States therefore have everything to gain in terms of relocation of entities or activities. This increases their ability to attract capital which, without the FTT, might have arrived in entities in participating states.[535] Although this relates to the European Commission's original proposal, UK MP Kay Swinburne argued against the tax, warning of "putting the EU financial centre in jeopardy" as firms leave to other parts of the world which would not be imposing such a tax.[536] According to the French newspaper Le Monde, even France is beginning to show reluctance towards FTT. Although it initially wanted to use the money collected to finance ecological policy aims, the tax would not be in the plans of the Minister of Ecology because it would penalise Paris in terms of attractiveness at a time when it is seeking to take advantage of the Brexit and attract companies based in the City of

[532] E.g., The Presidency of the Council of the EU, Note of 26 November 2015 on Proposal for a Council Directive implementing enhanced cooperation in the area of Financial Transaction Tax – State of play (14415/15, FISC 168, ECOFIN 912).
[533] Outcome of the 3435th Council Meeting, Economic and Financial Affairs, 8 December 2015.
[534] European Commission, 'Impact Assessment accompanying the document Proposal for a Council Directive implementing enhanced cooperation in the area of financial transaction tax: analysis of policy options and impacts', SWD (2013) 28 final (2013 IA), 42.
[535] Cédelle and Vella, *supra* note 34, 360.
[536] Press Releases from the European Parliament, 'Semeta: Financial Transaction Tax for More Revenue and Changed Trading Practices', 6 June 2011, https://www.europarl.europa.eu/news/en/press-room/20111006IPR28494/semeta-financial-transaction-tax-for-more-revenue-and-changed-trading-practices (Accessed 3 May 2022).

London.[537] The prime ministers of several Member States including Malta,[538] Bulgaria,[539] Latvia[540] and Czech Republic[541] have expressed concern that the tax will damage the competitiveness of their country's financial sector. The issue here is not whether these fears are justified or not but to realise that states orient their tax choices in order to remain competitive. This is done on a global scale but this problem (if it is one) still exists on a regional scale and the EU is a perfect example. It can therefore be said that tax competition prevents or slows down international tax harmonisation.

Conclusion

This essay has shown that international tax harmonisation is difficult, if not impossible, to achieve. There are several reasons for this, but one of the most important is tax competition between states. The question of whether tax harmonisation is easier to achieve through regionalism was raised. To answer this question, the European Union was used as an example and it was shown, at least in the case of the EU, that it is also complicated to implement tax regulations at regional level because the EU does not have the necessary tools. The only power the EU has to act is enhanced cooperation, but this has not yet borne fruit in tax matters. This was demonstrated by the failure of the financial transaction tax. One of the reasons for this failure is that non-participating states wanted to remain competitive in the financial sector and the imposition of a new tax was a hindrance, the most obvious example being the United Kingdom with the financial centre in London.

[537] Mathilde Damgé, 'La taxe sur les transactions financières, une balle dans le pied de la place de Paris ?' *Le Monde* (Paris, 20 October 2016), (The tax on financial transactions: A bullet in the foot of the Paris market?) (Translated from French) https://www.lemonde.fr/les-decodeurs/article/2016/10/20/la-ttf-une-balle-dans-le-pied-de-la-place-de-paris_5017662_4355770.html (Accessed 3 May 2022).

[538] Karl Stagno-Navarra, 'Gonzi Insists on 'no' to Transaction Tax, UE Leaders Discuss Greece, Spain Crisis' *Maltatoday* (San Gwann, 24 May 2012), https://www.maltatoday.com.mt/news/national/18414/gonzi-insists-with-a-no-to-transaction-tax-as-eu-leaders-discuss-greece-spain-crisis-20120524#.YnJXepPMIcg (Accessed 3 May 2022).

[539] Elizabeth Konstantinova, 'Bulgaria Opposes Introduction of New Taxes Across the UE' *Bloomberg* (New York, 4 April 2013), https://www.bloomberg.com/news/2011-09-21/bulgaria-opposes-introduction-of-new-taxes-across-the-eu.html (Accessed 3 May 2022).

[540] 'FM: Finanšu darījumu nodoklis tikai ES veicinās kapitāla aizplūšanu' *Latvian* (Riga, 17 October 2012), https://www.tvnet.lv/5549012/fm-finansu-darijumu-nodoklis-tikai-es-veicinas-kapitala-aizplusanu (Accessed 3 May 2022). (Financial transaction tax only in the EU will promote capital outflow') (Translated from Latvian)

[541] 'Daň z finančních transakcí nás může poškodit, myslí si Nečas' *Parlamentni* (Prague, 3 April 2013), https://www.parlamentnilisty.cz/zpravy/Dan-z-financnich-transakci-nas-muze-poskodit-mysli-si-Necas-267819 (Accessed 4 May 2022). (A tax on financial transactions can harm us, thinks Nečas) (Translated from Czech)

Professor Kendrick suggests that the best solution is probably differentiated integration in the UE, for example by setting transition periods or minimum harmonisation bases. This would set a floor above which Member States would be free to differentiate by applying more or less advanced standards.[542] To conclude, it is important to recall that harmonisation is not an end in itself and that tax competition and tax harmonisation are not necessarily in conflict.[543] As the OECD report recalls, the aim is not to promote harmonisation of income taxes or tax structures in general, but rather "the work is about reducing the distortionary influence of taxation on the location of mobile financial and service activities, thereby encouraging an environment in which free and fair tax competition can take place".[544]

[542] Kendrick, *supra* note 10, 383.
[543] Taryn A. Rounds, 'Tax Harmonization and Tax Competition: Contrasting Views and Policy Issues in three Federal Countries' (1992) 22(4) Publius 91.
[544] OECD, 'Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance, Action 5 – 2015 Final Report' (2015) OECD/G20 Base Erosion and Profit Shifting Project 23.

On the Role and Responsibility of Social Media and Why Self-Regulation is an Illegitimate and Ineffective Strategy

Oskar Luong

Introduction

Social media platforms have played a key role in transforming our daily lives and the news sector by changing the way we spread, receive and share information. Although they facilitate communication with people around the world, this development has also raised numerous legal concerns. The cross-border nature of social media channels has simultaneously led to threats to security (cybersecurity and terrorist propaganda), to privacy (big data and targeted ads) and ultimately to democracy (fake news and illegal hate speech).

Although social media corporations act transnationally, national regulation of social media is implemented through divergent approaches. On the one hand, this leads to fragmented State practice. On the other hand, however, the extremely different cultural, political and legal traditions in various countries make a one-size-fits-all-approach to social media regulation seemingly impossible. This article addresses these issues from an international law and EU law perspective with a focus on human rights, fundamental rights and data protection law. It scrutinizes the role and responsibility of social media and whether its current self-regulation model is a legitimate and effective strategy. This question is tackled by assessing recent examples of self-regulation against other regulation models, including statutory regulation and co-regulation. Ultimately, it is about whether 'global players' like Facebook, Google and other transnational corporations are suitable and legitimized to adopt their own codes of conduct instead of national and supranational legislators like the EU.

First, this article introduces the different regulation models of social media (Part 2). Second, it discusses whether self-regulation is a legitimate strategy by, *inter alia*, exploring the dangers of pure State regulation (Part 3). Third, it is determined whether self-regulation is an effective strategy by analyzing recent examples of self-regulation against four big problematic areas: big data, fake news, hate speech and terrorist propaganda (Part 4). It is concluded that self-regulation is only a legitimate and effective strategy in certain areas, while its weaknesses must be complemented with co-regulation or, if necessary, statutory regulation.

Different regulation models: statutory regulation, self-regulation, or co-regulation?

Definition of social media and relevant terms

Social media is the umbrella term for internet websites and applications that allow users to communicate with each other and the public by exchanging and sharing information, data, opinions etc. This data is collectively referred to as user-generated content (UGC).[545] If social media platforms delete or disable access to UGC and temporarily block or permanently delete user accounts, it is referred to as 'content moderation'.[546] Contrary to the regulation of traditional media, content moderation is problematic because social media self-regulation targets their users' posts instead of their own ones. In this way, they serve as intermediaries by providing communication channels to the public.

Current legal framework under international law and EU law *de lege lata*

This article focuses on the international human rights framework and the EU legal framework of fundamental rights and data protection. For reasons of space, jurisdictional issues as to which law is applicable in the cyberspace of social media platforms will not be discussed.[547]

For the purposes of this paper, the freedom of expression and the right to privacy, including data privacy, are the most relevant rights. Under international law, the freedom of expression is enshrined, *inter alia*, in Art. 19 International Covenant on Civil and Political Rights (ICCPR)[548] and Art. 19 Universal Declaration of Human Rights (UDHR).[549] Both are similarly phrased. Under EU law, the freedom of expression and information is protected, *inter alia*, in the EU multi-level fundamental rights system.[550] This includes Art. 10(1) European

[545] Böker/Demuth/Thannheiser/Werner, 2013, p. 9.
[546] Kate Klonik, 'The New Governors: The People, Rules, and Processes Governing Online Speech' (2018) 131(6) *Harvard Law Review*, 1598, 1630–1658.
[547] For a comprehensive overview of which law is applicable to cross-border defamation on social media and free speech see generally Alex Mills, 'The law applicable to cross-border defamation on social media: whose law governs free speech in "Facebookistan"?' (2015) 7(1) *Journal of Media Law*, 1–35.
[548] The International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) is a legally binding Covenant/international treaty. Art. 19(2) ICCPR ensures the freedom of expression. Art. 19(1) ICCPR protects the right to hold opinions without interference.
[549] Despite the legal status of the Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) is that of a legally non-binding Declaration, and notwithstanding the differences of opinion whether it had already formed part of customary international law before States became parties to it, it can be used for treaty interpretation under Articles 31, 32 of the Vienna Convention on the Law of Treaties 1969 (adopted on 23 May 1969, entered into force on 27 January 1980) (VCLT).
[550] As explained by Wolfgang Schulz 'Regulating Intermediaries to Protect Privacy Online – The Case of the German NetzDG' in Marion Albers and Sarlet Ingo (eds), *Personality and Data Protection Rights on the*

Convention on Human Rights (ECHR) and Art. 11(1) Charter of Fundamental Rights of the European Union (ChFR). Data protection law was recently revolutionized through the General Data Protection Regulation of the EU (GDPR),[551] but is influenced by implications from fundamental rights. These include the right to respect for private and family life under Art. 8 ECHR, the right to respect for private and family life, home and communications under Art. 7 ChFR and the right to protection of personal data under Art. 8 ChFR.

Under EU internal market law since the establishment of the digital single market, social networks are Information Society Services,[552] which makes Art. 14 E-Commerce Directive and the GDPR applicable. The GDPR has established important rights of the "data subject"[553] - i.e., private users - and obligations for controllers and processors resulting from processing data.[554] Under Art. 15 GDPR, data subjects have a right to access their data, meaning that they have the right to know which parts of their data are being processed. They also have a right to erase that data (the "right to be forgotten") under Art. 17 GDPR.

Explaining the three models of social media regulation

There are three regulation models of social media.[555] First, the statutory regulation model. This relies on the State to adopt the legislation and policy for governing the conduct of social media. This includes most prominently matters of data protection, intermediary liability provisions and competition/antitrust law, in conformity with the above[556] legal framework. In contrast, the second model - the self-regulation model - sees social media actors as the main driving force for identifying and promoting their own values and ethical standards, as well as adhering to them. On this model, platforms voluntarily subject themselves to a non-binding self-regulatory framework. Laws do not enforce compliance with these standards. Instead, social media companies can be put under public pressure from their users and the wider public.[557] Examples of self-regulation include social media adopting codes of conduct, community standards, guidelines etc. Third, the co-regulation model, occasionally called 'regulated self-regulation', can be designed in various forms. However, the cooperation of social media is

Internet (forthcoming; NB: In this article, citations refer to the preprint published by the Alexander von Humboldt Institut für Internet und Gesellschaft in January 2018, https://www.hiig.de/wp-content/uploads/2018/07/SSRN-id3216572.pdf (accessed on 8 June 2019), 2018) p. 7.

[551] EU Regulation 2016/679 on the protection of personal data entered into force on 24 May 2016.

[552] Article 29 Data protection working party, Opinion 5/2009 on online social networking, [illegible]01189/09/EN WP 163, 12 June 2009, para. 2, pp. 4–5.

[553] E.g., in Chapter III and VII of the GDPR, *inter alia*, Arts. 15-18, 20-21, 77-80, 82 GDPR.

[554] E.g., in Chapter IV and V of the GDPR.

[555] ARTICLE 19, 'Self-regulation and 'hate speech' on social media platforms', 2018, p. 9.

[556] See above in section 2.2.

[557] ARTICLE 19, 'Self-regulation and 'hate speech' on social media platforms', 2018, p. 9.

required to reveal and solve current or arising problems, in the sense that the State(s) and social media are working together while sharing responsibility in drafting and enforcing a regulatory framework.[558]

Is self-regulation of social media a legitimate strategy?

The legitimacy crisis of the self-regulatory approaches of social media

In order to compare the three regulation models with each other, it is important to define what makes a strategy legitimate in the first place. Legitimacy in the legal sense means that self-regulation of social media is in conformity with the law (namely, with the aforementioned legal framework). If one understands legitimacy in the Cambridge dictionary definition, it is 'the quality of being reasonable and acceptable' or a 'state of being fair or honest'.[559] Drawing on these definitions, more and more doubts about the legitimacy of self-regulation of social media have been raised in the public. Notably, the asymmetry of information is criticized between social media providers, on the one hand, and their users and public authorities on the other hand. The cause is the lack of transparency and credibility of self-regulatory approaches of social media platforms.

Extreme asymmetry of information and lack of transparency

An extremely good and recent example of *co-regulation* is the French Mission Report on the regulation of social networks, which creates a framework to make social media platforms more accountable.[560] The authors are members of French governmental authorities and worked together with Facebook staff for two months in 2019 on addressing the legitimacy crisis impacting social media.[561] The French Mission drew attention to the 'extreme asymmetry of information'[562] which exists between social media platforms, States and civil society. The self-regulatory approaches of social media were also criticized due to its 'logic of opacity'.[563] This means that platforms deliberately make their practices and internal policies concerning content moderation seem vague to the public to prevent society from holding them accountable.[564] Due to the scarce or imprecise nature of information available, users cannot adequately check

[558] ARTICLE 19, 'Self-regulation and 'hate speech' on social media platforms', 2018, p. 9; Hirsch, *Seattle University Law Review*, 2011, 441. NB: there is no uniform definition of self-regulation and co-regulation, so they could be interchangeably used in the literature and other documents, but this article sticks to the definitions above.

[559] Cambridge Dictionary, https://dictionary.cambridge.org/de/worterbuch/englisch/legitimacy.

[560] French Mission Report, May 2019, pp. 1–26.

[561] French Mission Report, May 2019, pp. 31–32.

[562] French Mission Report, May 2019, pp. 2, 12.

[563] See generally Roberts, *First Monday*, 2018, https://firstmonday.org/ojs/index.php/fm/article/view/8283/6649.

[564] ibid.

whether platforms have adhered to their internal policies (which often remain undisclosed). Potential critics are therefore limited to several individual cases of not moderated or badly moderated content and are not in the position to give comprehensive evidence on systemic failures of content moderation by social media providers.[565] Hence, only social media companies themselves can provide such an analysis on a global scale.

Lack of credibility of own statements by social media platforms

A complicating factor is that neither State authorities nor the civil society know how much credibility they can give to social media companies' own descriptions regarding their practices and policies. After all, not even users of these platforms can provide more insight into their doings. Since the social media companies gather, process and collect data themselves, affected parties need to rely on the reports issued by said social media companies, and have no ability to double-check them against objective evidence or facts.[566] In particular, the enormous number of users (e.g. 2.3 billion monthly users on Facebook)[567] suggests that social media companies implement content moderation through the help of software, artificial intelligence (AI) and other automated systems to handle the enormous amount of data.[568] Once again, however, affected parties do not know how social media companies process their data. Furthermore, outside of the EU, there is no comprehensive data protection regulation like the GDPR in place. There is also a fear among users and States regarding the potential for developers/engineers to program errors or even built-in human bias into AI tools.[569] This would be hard to identify without knowing how AI is used. For example, YouTube gave some supplementary explanations on the enforcement of their community guidelines on their blog.[570] However, the provided information is minimal at best. It only tells us that YouTube relies on 'advanced machine learning technology' and 'smart detection technology', something already known to most users. It does not disclose how that technology is used or how it avoids the impacts of bias.

[565] French Mission Report, May 2019, p. 12.
[566] French Mission Report, May 2019, p. 12.
[567] See the statistics of monthly users of social networks below in section 4.1.
[568] On the legal challenges of new technology see Benvenisti, *EJIL*, 2018, 2018, 72–75; Casini, *EJIL*, 2018, 1072–1075.
[569] Osoba/Welser, 1–26; Tufekci, 'Algorithmic Harms beyond Facebook and Google: Emergent Challenges of Computational Agency', *Colorado Technology Law Journal,* 2015, 207–209; Diakopoulos, 'Algorithmic Accountability', *Digital Journalism*, 2015, 410.
[570] https://youtube.googleblog.com/2018/12/faster-removals-and-tackling-comments.html. access date?

The solution to the legitimacy crisis by the French Mission Report

In order to solve the legitimacy crisis surrounding data management in social media, the French report proposed the regulation of social media based around five pillars. The second of these is the most interesting, as it introduces 'An independent regulatory body charged with implementing a new prescriptive regulation that focuses on the accountability of social networks, based around three obligations: (1) algorithmic transparency; (2) transparency of Terms of Service and content moderation systems; and (3) an obligation to "defend the integrity of users," analogous to a "duty of care" to protect users from abuse by attempts to manipulate the platform'.[571]

Advantages of self-regulation: analysis of codes of conduct by social media

In order to determine whether self-regulation of social media has a valid *raison d'être* and can thus be viewed as a legitimate strategy, it is crucial to discuss its benefits.[572] First, Facebook, for example, revealed that it deletes around 100,000 posts per month in its German version of the app.[573] It would be structurally and practically impossible to let German courts handle all of these cases. Second, self-regulation leaves problem-solving to social media companies, which have the best understanding of their own services and the strongest incentive to satisfy their users. They can adapt fast, flexible and individually tailored measures, combining the services of human personnel, software and artificial intelligence (AI) to prove to the public that they adhere to the ethical standards they set for themselves. Having problems solved internally within the social media platform avoids the need for users to resort to external legal remedies. Users therefore save legal costs whilst also reducing the workload of the judiciary, as only allegations regarding serious violations will require litigation before the courts.[574]

Dangers of statutory regulation by States

Until recently, the less restrictive nature of self-regulation of social media has led legislators around the world to favor it over statutory forms of regulation. However, scandals such as Cambridge Analytica have cast doubt on the legitimacy and effectiveness of such methods. The following analysis of the dangers of government regulation of social media sheds light on why self-regulation, at least in some cases, may be legitimate.

[571] French Mission Report, May 2019, p. 3 with a detailed visualization of the plan.
[572] For an overview of advantages and challenges of self-regulation see Dehmel, 2013, 135–142.
[573] Schulz, 2018, p. 3; Zeit Online, 26 September 2016, https://www.zeit.de/digital/2016-09/hasskommentare-facebook-heiko-maas-richard-allan.
[574] ARTICLE 19, 'Self-regulation and 'hate speech' on social media platforms', 2018, p. 10.

a) Countering censorship with international human rights law

International human rights standards benefit from the involvement of far more State parties than their equivalent at EU level. If States force social media copanies to censor certain detrimental content to their governments, it is submitted that social media can invoke international human rights standards to protect their users' freedom of expression and their platforms from being taken over by State arbitrariness. Similarly, in the first-ever report on the regulation of UGC, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye held that companies can resort to human rights law to 'counter authoritarian demands'.[575] He recommended that Internet communications technology companies adopt approaches in line with the UN Guiding Principles on Business and Human Rights.[576] These approaches are self-regulatory in nature, so it can be argued that self-regulation of social media is not completely illegitimate.

b) Over-regulation of social media: the chilling effect on freedom of expression

The second danger regarding the statutory regulation of social media is the risk of over-regulation. Too many divergent, national level approaches to regulating social media results in fragmented State practice and *opinio juris*, with there being little chance that a more uniform customary international law (CIL) approach will be accepted over time. The European Court of Human Rights (ECtHR) held that forcing a news platform to browse through user comments to find violations of defamation law would result in a 'chilling effect on the freedom of expression on the Internet'.[577] Similarly, the Court of Justice of the European Union (CJEU) rejected such monitoring duties due to their inherent conflict with the fundamental rights of individuals, including the freedom of expression and right to privacy.[578] Both findings by the ECtHR and CJEU can be applied to the regulation of social media, which is also a news platform and obliged to remove IP infringing content.

[575] UNGA/HRC, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, para. 70.
[576] UNGA/HRC, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, para. 70.
[577] ECtHR Judgment, *MTE v. Hungary*, 2 May 2016, Application no. 22947/13, para. 86.
[578] CJEU Judgment, *Scarlet Extended v. SABAM*, 24 November 2011, C-70/10, ECLI:EU:C:2011:771, paras, 47, 54; CJEU Judgment, *SABAM v. Netlog,* 16 February 2012, C-360/10, ECLI:EU:C:2012:85, paras. 45, 52; for the distinction between the case law of the ECtHR and the CJEU see Kokott/Sobotta, 'The distinction between privacy and data protection in the jurisprudence of the CJEU and the ECtHR', *International Data Privacy Law*, 2013, 222–228.

c) A recent example of over-regulation: Germany's NetzDG on hate speech

The German Federal Constitutional Court (*Bundesverfassungsgericht*, abbreviated as BVerfG) adopted an interim measure (*Antrag auf Erlass einer einstweiligen Anordnung*, § 32 BVerfGG) allowing the interlocutory application of a small political party whose account was blocked by Facebook. It had published a post that could amount to incitement of the people, which is a crime under the German Penal Code (§ 130 StGB).[579] The *NetzDG* entered into force in Germany in 2017. It obliges social networks with more than two million users to delete or block access to content that is 'evidently unlawful'[580] within 24 hours. Which acts amount to being 'evidently unlawful' is non-exhaustively listed in the catalogue of crimes in the *NetzDG*.[581] The BVerfG consequently ordered Facebook to restore access to the account and the post, both of which the platform had blocked pending the publication of the official election results for the European Parliament.

Contrary to the decisions of the civil courts (court in the first instance and the court of appeal), the BVerfG held that Facebook has a paramount importance when it comes to political opinion-forming. Blocking users from posting on Facebook severely restricts their ability to reach an audience, as they cannot hope to achieve the same impact by spreading their political messages on other, less subscribed to social media platforms.[582] This judgement would seem to be correct. The case proves that the punitive approach of imposing stricter penalties does not automatically result in the more effective regulation of social media. If there are right-wing or left-wing extremist parties, their views should still be shown to the public, so long as they do not reach the threshold of inciting violence. The public has a right to know and, more importantly, to judge for itself whether it rejects such propaganda.

At the time, the political party in question had only a few hundred members and was under observation by the domestic intelligence services in *Baden-Württemberg* (one of the 16 German federal States).[583] *De facto* it had almost no influence over public opinion. Social media should not be used to become the State's censorship instrument, especially with regards to moderating politically unpopular statements. While it is understandable that Germany and, indeed, States in general, would want to avoid the incitement of the people as far as reasonably possible, such criminal law provisions should not be abused as they have a high threshold. Nor,

[579] BVerfG, Beschluss der 2. Kammer des Ersten Senats vom 22. Mai 2019, 1 BvQ 42/19, Rn. 13.
[580] § 1 III NetzDG.
[581] §§ 3 II Nr. 2, 1 III *NetzDG* i.V.m. § 130 StGB. NB: The BVerfG has not cited the most relevant provision in the NetzDG, § 3 II Nr. 2, which obliges social networks to delete or to block access.
[582] BVerfG, Beschluss der 2. Kammer des Ersten Senats vom 22. Mai 2019, 1 BvQ 42/19, Rn. 19; NB: This interim measure can be overruled in the main proceedings (*Hauptverfahren*).
[583] Baden-Württemberg Ministerium des Inneren, für Digitalisierung und Kommunen, Verfassungsschutzbericht Baden-Württemberg, pp. 179-183.

in turn, should they be used in order to give effect to a general suspicion against minority parties. If such views are censored before publication, there is an even bigger danger that these extremist political parties will go "underground" where no public authority can watch them. They may then get out of control in much more violent ways.

Certain areas in which self-regulation is legitimate and effective

a) Copyright and other intellectual property (IP) law infringements

Social media platforms are intermediaries comparable to Internet service providers (ISPs). In and of themselves, such platforms do not infringe upon copyright laws. Instead, their users violate IP laws. However, social media companies remain liable under most copyright law regimes because their role as intermediaries makes them responsible for users' conduct on their platforms. Intermediary liability and website-blocking injunction regimes are statutory regulation; community standards and guidelines of social media are self-regulation.

b) Sexually explicit content

Pornography is also protected under copyright laws, so the terms regarding its regulation do not need to be reiterated. However, most community guidelines underlying most social media platforms require them to delete or disable access to sexually explicit content from being freely viewable without restrictions. Facebook is very strict. Sometimes one cannot even send links to pornography websites in instant messages. Facebook issued self-regulatory reports and statistics on how they handle content concerning adult nudity and sexual activity,[584] as well as child nudity and sexual exploitation.[585]

Self-regulation of 'revenge pornography' may be more problematic because the uploader typically does have a copyright subsisting in the video. This is not a crime in every jurisdiction and, this topic is not discussed within the scope of this article for reasons of space.[586] Whilst Facebook is restrictive, however, Twitter is the exact opposite. Many pornography actors can post their sexually explicit images and videos, which are freely available for any Internet user to access, even if they do not have a Twitter account. However, those images and videos are mostly 'hidden' with a warning of sexually explicit content. After having been informed in that way, it is up to users to decide for themselves whether they still want to view the content.

[584] Facebook, Community Standards Enforcement Report on adult nudity and sexual activity, https://transparency.facebook.com/community-standards-enforcement#adult-nudity-and-sexual-activity.
[585] Facebook, Community Standards Enforcement Report on child nudity and sexual exploitation, https://transparency.facebook.com/community-standards-enforcement#child-nudity-and-sexual-exploitation.
[586] E.g., under section 33 Criminal Justice and Courts Act 2015 revenge porn is a crime in the UK.

However, there are also measures in place to allow Twitter users to restrict who can view their content. This works by allowing the person in control of the account to approve or deny access for those asking to follow their posts, enabling them to screen individual users (for example, by age) before permitting them to see their Tweets.

Social media platforms serve as intermediaries and thus have the responsibility of helping States to realize some public policy goals, *inter alia*, the protection of minors or the copyright protection of third parties. This serves both their own self-interest and the interests of their users. By providing a pleasant atmosphere on their platforms, they enable their users to browse without being bothered by copyright infringing content and sexually explicit content. This is not only more user-friendly but avoids user-related fines for violations.

Analysis of the Code of Conduct on Countering Illegal Hate Speech Online

An example of recent joint self-regulation is the Code of Conduct on Countering Illegal Hate Speech Online, which the European Commission (EC) agreed with Facebook, Microsoft, Twitter and YouTube in 2016.[587] There are two notification procedures to these companies: The first concerns private users, whilst the second is for NGOs and similar organizations ('trusted reporters') which can flag content that could violate the hate speech standard. Since 2016, the EC has reviewed the Code of Conduct annually to analyze the progress, effectiveness and shortcomings in countering illegal hate speech online. Several problems were identified in the 2016 report. First, for YouTube and Twitter, the statistics show that it was at least twice as likely that they removed posted content following notifications by trusted reporters compared to notifications by private users, suggesting a gap in the trust.[588] Instagram, Google+, Snapchat, Dailymotion and jeuxvideo.com subsequently declared that they wish to join the Code of Conduct.[589]

Own evaluation of the methodology of the EC under the Code of Conduct

The EC criticized the social media signatories for the low removal rate of posts following notifications.[590] From that statement it can be deduced that the EC bases its assessment of whether social media companies have adhered to the Code of Conduct in *quantitative* analysis.

[587] EC, Code of Conduct on Countering Illegal Hate Speech Online, May 2016, text available at: https://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=54300.
[588] YouTube removed 68% of notified content by trusted reporters, but only 29% from normal users; Twitter removed 33% of notified content by trusted flaggers compared to only 5% by private users, EC Commissioner for Justice, Consumers and Gender Equality, Factsheet, 2016, p. 4.
[589] EC, 'Countering illegal hate speech online #Noplace4hate', https://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=54300.
[590] EC, https://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=54300.

It seems that, the higher the number of removed notified content, the more successful the EC claims will consider such self-regulation to be. However, this approach is extremely problematic since the EC encouraged social media to delete more content from private users. This delegation of censorship responsibilities, normally monopolized by the State, should not be given away that easily to private social media actors, especially when they can invoke their own fundamental rights in a complaint or suit against the social media company in question.

The four IT companies were heavily criticized for only having agreed to the Code of Conduct, which is not legally binding, in order to avoid further statutory regulation by public authorities.[591] They resorted to 'backroom negotiations', isolating themselves from the public eye.[592] Thus, these IT companies avoided public accountability and democratic processes, which was an illegitimate strategy. The EC should not have agreed to such secretive meetings, which excluded the four main companies' social media competitors. Rather, the EC preferred to give them the chance to be the first social networks to establish a 'best-practice code of conduct' with the 'EC-approved-stamp', so to speak.

Interim result on the legitimacy of self-regulation of social media

The self-regulation of social media is deficient due to its legitimacy crisis and social media's successful attempt of staving off further statutory regulation. While acknowledging the weaknesses in the self-regulation model, there are still advantages to it, as can be seen in recent government reforms such as the *NetzDG* in Germany. However, the imminent dangers of stricter over-regulation remain prevalent across all jurisdictions today. They potentially have a chilling effect on the freedom of expression and, in the worst-case scenario, could amount to censorship, as has been seen under totalitarian regimes. Self-regulation of social media is, for instance, legitimate in relation to removing IP infringing and sexually explicit content, since the providers act in accordance with laws regarding the IP protection and the protection of minors. Some social media platforms, like Facebook, even go beyond the minimum imposed requirements imposed by law in order to protect third party rights, especially in relation to sexually explicit content. This supports the States, reflecting the responsibility and liability social media companies bear as providers of private and public communication channels.

As suggested in the French Mission Report, the consensus is to expand upon the self-regulatory approach. This not only includes the removal of evidently unlawful content, but its active prevention. This can be achieved through the use of online tools which are designed to enable

[591] Deutsche Welle, 'EU: Social media companies accelerate hate speech removals in self-regulation push', 19 January 2018, https://p.dw.com/p/2rA1d; Keller, 2018, p. 8.
[592] Angepoulos et al, 2015, Institute for Information Law, University of Amsterdam, 61.

the effective quarantining, decelerating and demonetizing of harmful content, as well as by educating users on community standards and through targeted education.[593]

Problems and dangers of effective self-regulation of social media

Despite the advantages of self-regulation of social media, there are numerous issues questioning its effectiveness as a strategy. This article approaches such issues in three main ways. First, by analyzing the effectiveness from a competition law perspective. Second, by addressing the conflict of interests of social media companies when implementing their self-regulatory approaches. Third, by assessing four big problem areas casting doubts on the effectiveness of self-regulation by social media actors (big data, fake news, illegal hate speech and terrorist propaganda).

Social media and competition/antitrust law – the problems' starting point?

As detailed in the statistics (Appendix A), most social media users are on US-American and Chinese platforms. Facebook has acquired its competitors WhatsApp and Instagram. Although the EC cleared the acquisition of WhatsApp,[594] it has subsequently fined Facebook for providing misleading information about the transaction.[595] Although Chinese social media platforms have many users, the majority consists of Chinese-speaking users. This means that its global impact is less far-reaching than Facebook's influence, for instance. If one compares the enormous difference in users between Facebook and Twitter, it becomes evident that Facebook is the strongest market player by far. However, being the largest provider goes hand in hand with a heavy responsibility to its users.

The dominance of certain platforms raises the question of whether self-regulation of the biggest social media companies can even be effective, given that users do not have an alternative social media competitor to turn to if they do not like the business practices of the bigger providers. This is largely caused by users' preferences, as well as the social media preferences of those they seek to communicate with. After all, they cannot easily leave behind a given social media application in favor of another if their friends, family, colleagues and acquaintances do not use other services. Arguably, users do utilize different applications for communication. Although one can use Facebook to share photos and videos, it is now more 'trendy' and 'cool' to do so via Instagram instead. After acquiring Instagram, Facebook has included a function into the

[593] French Mission Report, May 2019, p. 11.
[594] EC, Case No COMP/M.7217 – Facebook/WhatsApp, Commission decision of 3 October 2014, C (2014) 7239 final, para. 191.
[595] EC, Case M.8228 – Facebook/WhatsApp, Commission decision of 18 May 2017, C (2017) 3192 final, para. 28

Instagram app, so that users can share the same post on various channels at the same time, linking their posts to Instagram, Facebook, Twitter, and Tumblr. Although Facebook does not own Twitter and Tumblr, they are not major competitors for the site, as they primarily operate in their own specific market of blogs/micro-blogs. In other words, Facebook's acquisition of its competitors makes it much easier for users to share the same post simultaneously. The problematic aspects of Facebook's integration of competitor services are discussed below in relation to self-regulatory approaches to big data.

Problematic targets of self-regulation divided by subject area

The following section addresses four areas, big data, fake news, hate speech, and terrorist propaganda, in order to explore whether self-regulatory approaches to social media are still equipped to face the challenges of today's digital age.

Big data in social media: a conflict of interest between online privacy, data protection and the business model of social media companies

Big data and data protection pose different challenges than the other topics addressed later in this section. Unlike cases involving the dissemination of fake news, hate speech, or the spread of terrorism, social media companies do not violate their users' freedom of expression through big data analysis, since no posts or accounts are deleted or blocked. The question of which regulation model to choose is scrutinized from a different perspective here.

In the case of big data, the conflict of interests is wider since the social media companies have a commercial interest in using their users' data (e.g., for targeted advertisement). Their entire business model depends on the use of UGC. Otherwise, their services could probably not be offered for free anymore. Users accept the user agreements of various social media platforms before registering. However, they are mostly drafted in a manner that most users will be unable to easily understand, especially those unacquainted with technical terms used in the information technology (IT) and the legal sectors.[596] Thus self-regulation of social media needs to be improved by raising the level of consumer protection. The UN Special Rapporteur criticized the lack of transparency of ICT companies.[597]

[596] See questions of US Senator Kennedy in Mark Zuckerberg's testimony before the Senate Judiciary and Commerce committees of the US, https://www.youtube.com/watch?v=u-FlWZ1BOcA.
[597] UNGA/HRC, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, para. 66.

a) Facebook's proposed integration of its subsidiaries into its services

Facebook has announced its plan to integrate other social media platforms which it owns, *inter alia*, into its services (including WhatsApp and Instagram). The good side of this merger would be that there would be more parties to the self-regulation of Facebook. However, that can be also achieved without the integration of other social media companies. For example, WhatsApp and Instagram could adopt their own self-regulatory approaches. The danger of the current dominant position of Facebook under antitrust law could inevitably turn into a monopolist-like position in the social media market. These concerns impact upon data protection law as well as fundamental and human rights, especially if UGC is concentrated in one place.

Self-regulation has already proven ineffective in light of the Cambridge Analytica scandal. These incidents were possible because Facebook does not disclose the details of its business model[598] to States, specifically regarding the collection of users' data for use in targeted advertisement. In order to fight these data protection issues, the EU has adopted the GDPR, which is currently the most comprehensive data protection framework in the world. This has shown a shift from leaving self-regulation in the hands of conflicted social media companies to statutory regulation by States.

b) Reaction by public authorities to the proposed integration

Facebook's proposed integration of its subsidiary social media platforms represents an imminent danger for the protection of users' data. This is in large part because Facebook established its non-US headquarters in Dublin.[599] In response to Facebook's proposed integration, the Irish Data Protection Commission (DPC) ordered the company to attend 'an urgent briefing' to explain the details of its plans, because previous proposals had already raised 'significant data protection concerns' regarding Facebook's current self-regulatory practices. The DPC emphasized that the integration will only be implemented in the EU if it fulfills 'all of the requirements of the GDPR'.[600] The GDPR requires data controllers and data processors to adopt their own codes of conduct and to explicitly reference the GDPR to the data suppliers (private individuals and companies) in order to prove their compliance to the GDPR. The German competition authority (*Bundeskartellamt*) similarly rejected Facebook's proposed integration of WhatsApp, Instagram, Oculus and Masquerade into its services in Germany without users' consent.[601]

[598] For a valuation of Facebook's services see Sunstein, *Behavioural Public Policy*, 2018, 1–10.
[599] https://www.facebook.com/careers/locations/dublin/?locations[0]=Dublin%2C%20Ireland.
[600] Irish Data Protection Commission, Statement, 28 January 2019, https://www.dataprotection.ie/en/news-media/press-releases/data-protection-commission-statement-proposed-integration-facebook.
[601] Bundeskartellamt, Fallbericht: 'Facebook; Konditionenmissbrauch gemäß § 19 Abs. 1 GWB wegen

The dangers inherent in the business practices of the largest social media platforms become apparent from a competition law perspective. This is especially true in regard to the potential impact such practices may have on data protection, fundamental rights and human rights law such as the right to privacy, which is protected both offline and online. The acquisition of competitors and subsequent proposed integration of their services leads to merging the UGC from different platforms. This will give the dominant global players an even greater data pool. Legislators across the world have been increasingly critical of self-regulatory approaches, with Canada and the UK proposing a tighter regulation of social media. The UK Government's Online Harms White Paper recommended reforms due to online harms,[602] and the Office of the Privacy Commissioner of Canada (OPC) called Facebook's terms and conditions 'an empty shell'.[603] The OPC warned that these terms and conditions establish a framework which will only allow further abuse of users' data in the future. The Canadian Minister of Democratic Institutions addressed potential threats from social media platforms, especially Facebook, in interfering in the upcoming federal election.[604] Consequently, self-regulation of big data is ineffective.

Fake news

It is unclear what the term 'fake news' means and how it can be distinguished from lies, conspiracy theories, or unintentional mistakes in reporting without any harmful intention. For the sake of clarity, this article uses the following definition: fake news items are lies including deliberately false factual statements, disseminated with news channels including social media.[605] Reflecting the terms use by the UN, 'Fake news' is the collective umbrella term and differentiates between false news, on the one hand, and distorted or tendentious news, on the other hand.[606] False news is "intentionally fabricated […] regardless of their author's ultimate intention",[607] whereas distorted news is not entirely invented but influences the receivers in a much more subtle manner. For example, it may present true information in a deliberately misleading way, making it likely that readers will jump to the wrong conclusions.[608]

unangemessener Datenverarbeitung', B6-22/16, 15 February 2019, pp. 13–14.

[602] Accessible via https://www.gov.uk/government/consultations/online-harms-white-paper.

[603] Interview on CBC News (Canadian State-owned public broadcasting) with the OPC (and the Canadian Minister of Democratic Institutions), https://youtu.be/aDC8bx-xygQ.

[604] Interview on CBC News (Canadian State-owned public broadcasting) with the Canadian Minister of Democratic Institutions, https://youtu.be/aDC8bx-xygQ.

[605] Verstraete/Bambauer, D./Bambauer, J., *Arizona Legal Studies Discussion Paper*, 2017, 5-9; Wissenschaftliche Dienste des Bundestags, 2017, p. 6; Baade, *EJIL* 2018, 1358.

[606] UN, GA Resolution 534 (VII), 16 December 1952, preamble.

[607] Baade, *EJIL* 2018, 1358.

[608] ibid.

The spread of fake news is also problematic, especially when it occurs via social bots (social robots), algorithms and "fake accounts" due to its sheer quantity. Fake profiles represent a person/company/organization that either does not exist in fact or was not created and is not used by the depicted entity. Another common method of dissemination is through the hacking of (influential) persons' private social media accounts due to its existing followers/subscribers and network effects through re-sharing/re-posting. Fake news is extremely dangerous as it creates doubts regarding the facts of a case, which then forms the basis for legal assessments and opinion-forming. It constitutes a major threat for democracy and the international rule of law.

The main problem occurs when a post goes viral to the point that social media cannot stop its dissemination by way of self-regulation. This happens when many actors copy the content across different social media platforms which cannot then effectively coordinate with each other to stop its spread. It remains unknown how social media can effectually self-regulate fake news. States should not delegate their immense power in regulating the freedom of expression online to private social media companies, which could result in censorship. Heavy fines, as were recently introduced by the German *NetzDG* or the Singaporean[609] law against fake news, only incentivize social media actors to over-censor content, so that they can avoid heavy financial penalties and escape intermediary liability.

Critics warn that social media's self-regulation of fake news is not effective. It is hard to distinguish fake news from lies in general, which are legally allowed on social media. The danger is that social media platforms become State-like institutions, which then proceed to act in a paternalistic way to over-protect their users from being exposed to any 'morally wrong' conduct. However, that is not the role of social media. Platforms should stay neutral regarding their users' posts, and taking down alleged fake news-posts could result in extremely strict over-regulation of online free speech. There is an increased risk of this if AI tools are used, which could remove legitimate content such as harmless prank news. Taking down posts also 'frames' the uploader as having engaged in spreading fake news, which could result in social ostracism (especially prevalent in Cyberbullying among teenagers).

Hate speech and the freedom of expression: the dangers of censorship and incitement of the people

Grasping the meaning of hate speech is no easier that ascertaining that of fake news. However, for the sake of clarity, this article approaches hate speech according to the definition: 'All conduct publicly inciting to violence or hatred directed against a group of persons or a member

[609] Criticized by https://www.theguardian.com/world/2019/may/09/singapore-fake-news-law-a-disaster-for-freedom-of-speech-says-rights-group?CMP=share_btn_tw.

of such a group defined by reference to race, color, religion, descent or national or ethnic origin'.[610] Facebook's self-regulation approach to hate speech has rapidly increased the removal of any posts which may constitute hate speech, swelling from around 1.5 million posts in 2017 to 4 million posts in 2019.[611] Again, letting social media self-regulate hate speech is very dangerous. It does not have the authority to determine what constitutes hate speech. That is up to the courts, especially to decide which statements constitute incitement of the people. Platforms may end up removing obviously illegal content. However, social media platforms have also resorted to over-regulation of online free speech as has been observed in the BVerfG case about removing the post of the extreme right-wing party, which has the potential to impact political election results. The BVerfG case is the primary example of the dangers of content moderation on social media by the State's over-regulation and its consequences on blocking the spread of politically unpopular messages and ultimately political opinion-forming.

The spread of terrorist propaganda – social media overburdened

Social media platforms are overburdened with handling terrorist propaganda. Facebook's Community Standards Enforcement Report has shown that the removal rate fluctuates extremely when it comes to terrorist propaganda by ISIS, al-Quaeda and affiliated groups.[612] It is not the role of intermediaries such as social media to protect their users from terrorist propaganda. Rather, it is solely in the competence of States to protect their citizens and the whole international community from terrorist threats.[613]

The terrorist attack on two mosques in Christchurch, NZ, was livestreamed on Facebook by the terrorist himself. It took Facebook a long time to take down the original post, which remained accessible elsewhere online for days after its deletion from the platform. In response, States and social media companies have agreed to the Christchurch Call to Action plan to eliminate terrorist and violent extremist content online.[614] This is the ultimate proof that self-regulation of social media fails in regard to eliminating terrorist propaganda. The Christchurch Call to Action is a good example of *co-regulation* by way of cooperation between social media platforms and States. Social media providers are not adequately equipped to fight terrorism. States need to intervene and co-regulate and help social media to accomplish their common goals.

[610] Petreska-Kamenjarova/Todorović/Tafarshiku/Stafa, 'Media Regulatory Authorities and Hate Speech', 2017, p. 17.
[611] https://transparency.facebook.com/community-standards-enforcement#hate-speech.
[612] https://transparency.facebook.com/community-standards-enforcement#terrorist-propaganda.
[613] Wu, *Chicago Journal of International Law*, 2015, 310-311.
[614] https://www.christchurchcall.com/christchurch-call.pdf.

Interim result on the effectiveness of self-regulation of social media

The use of big data must be more strictly regulated by informing users about what they are actually consenting to. The GDPR is an important milestone in achieving that, and it serves as a role model for legislative reforms across the world. States should not entirely delegate the extremely dangerous power of censorship to private social media companies. However, content moderation needs to involve the participation of the users and the civil society in identifying breaches fast and reporting them to social media and governmental authorities. In the latter case, more diverse organizations, not just limited to racial discrimination, should be encouraged to participate in the moderation of illegal hate speech. States should not just rely on enforcing social media regulation by imposing draconic financial penalties. As the case before the German BVerfG has shown, such strict legislation could force social media platforms to make hasty decisions and overly exert their power, restricting freedom of expression.

Conclusion and Solutions

Taking recent State practice around the world into consideration, the age of pure self-regulation has come to an end. At the EU level, the adoption of the GDPR requires stricter data protection by companies including social media platforms to protect its users. At the national level, tighter regulation of social media is proposed or implemented across nearly all jurisdictions, for example in Canada and the UK.

Self-regulation has proved to be an ineffective and illegitimate strategy, at least as a stand-alone tool. States have increasingly sought to regulate social media in order to protect their residents from any harm. Government regulation, which had only established minimum standards leaving enough discretion for social media platforms to implement their obligations, has failed to safeguard public and private interests. This includes the protection of user data in light of scandals like Big Data and Facebook's allowing Cambridge Analytica to unlawfully access users' private information. Ultimately, allowing pure self-regulation not only risks further violations of individuals' rights, but ultimately constitutes a threat to democracy itself.

The GDPR provides a comprehensive framework for data protection, especially *vis-à-vis* requiring user consent for the storage and processing of data, and imposing fines in case of non-compliance. In contrast, States without such wide protections, like Canada, are more at risk. However, States are becoming increasingly aware of these dangers, leading to reform proposals called for by the Canadian OPC and the UK Government, which is necessary for the latter post-Brexit. In our digital age, pure self-regulation is not a viable option anymore. Instead, States need to adopt, enforce and review national laws to protect private and public

interests, whilst striking still safeguarding freedom of speech. This will ideally occur by way of co-regulation instead of simple statutory regulation.

This article therefore endorses what Facebook founder and CEO Mark Zuckerberg said in his testimony to the Senate Judiciary and Commerce committees of the US. When asked whether Facebook would embrace regulation, Zuckerberg replied that it is not about whether social media should be regulated, but rather that Facebook embraces 'the right type of regulation'.[615] It is concluded that this 'right type' of regulation must be found by involving all affected parties – States, supranational institutions, NGOs, social media platforms, and users alike.

Self-regulation is a legitimate and effective regulation strategy when it comes to removing sexually explicit content and content, which infringes IP laws. However, self-regulation is illegitimate and ineffective when it comes to big data, fake news, hate speech and terrorist propaganda. For these areas, self-regulation should be complemented by co-regulation. Statutory regulation should only be resorted to if co-regulation fails. The French Mission Report has proven a great collaboration between France and Facebook, but more social media platforms and States need to work together by way of co-regulation instead of regarding each other as enemies.

Self-regulation is illegitimate because not every social media signs up for self-regulation, which creates a fragmented self-regulatory landscape. While some social media platforms would have more comprehensive self-regulatory approaches, others lack comparable ones. This imbalance would shift the burden on the users to do comprehensive research as to which social media companies have the best self-regulation. This is not consumer friendly. Although the efforts of large social media companies like Facebook are praised for joining self-regulation such as the EC's Code of Conduct, the problem remains that not all social media companies are obliged to join such self-regulatory models. Indeed, even if they do, the codes of conduct are extremely short and vague. Mostly, they only tackle one specific problematic area, such as illegal hate speech in the EC's Code of Conduct. The scope of the protection offered through self-regulation is therefore small.

It may be commendable that Zuckerberg and Jack Dorsey (the former CEO of Twitter) have testified before the US Congress and the European Parliament. Nonetheless, it is not feasible for all social media platforms, nor, indeed, all State institutions, to be involved in such processes. Social media companies do not tell governments in great detail how they process users' data because they have a conflicting commercial interest. Neither stronger self-

[615] https://www.cnet.com/news/politics/congress-to-grill-facebook-zuckerberg-over-data-mining-election-meddling-cambridge-analytica/ (full video of Zuckerberg's testimony available at: https://www.youtube.com/live/mZaec_mlq9M?feature=share).

regulation nor stricter State regulation will automatically result in solving these problems. Rather social media and States need to work even more closely together through co-regulation, to identify current urgent challenges and how to tackle them.

A legitimate self-regulation of social media requires the participation of all affected stakeholders including civil society, users, public authorities, social media companies, journalists, and so forth. Good reform proposals were submitted in the Report of the UN Special Rapporteurs David Kaye and John Ruggie. In turn, reports by expert groups like the High Level Expert Group on Fake News and Online Disinformation[616] and ARTICLE 19[617], *inter alia*, have called on social media companies to refer to international human rights standards when drafting their policies. The establishment of an independent body (which will incorporate all affected stakeholders) to monitor the effective implementation of a self-regulatory approach to content moderation has also been proposed. The proposals of ARTICLE 19 and UN Special Rapporteur Kaye have also been supported by the Oxford-Stanford Report, which suggested nine ways of making Facebook 'a better forum for free speech and democracy'.[618] States are heavily criticized for not listening to these comprehensive expert reports, and it is hoped that they develop these suggestions into a legitimate and effective strategy in the long run.

[616] https://ec.europa.eu/digital-single-market/en/news/final-report-high-level-expert-group-fake-news-and-online-disinformation.

[617] https://www.article19.org/wp-content/uploads/2018/03/Self-regulation-and-'hate-speech'-on-social-media-platforms_March2018.pdf.

[618] Oxford-Stanford Report, pp. 8, 21.

Afterword

As the pages of this law journal come to a close, it is important to reflect on the significance of the research and insights contained within its covers. The legal field is a constantly evolving and sophisticated system, shaped by the unique circumstances of each case and the changing landscape of society. The articles and analyses presented in this journal reflect the dedication and hard work of students who have devoted their time and energy to exploring the intricacies of the law and its impact on individuals and communities.

Through the lens of various legal disciplines, from contract law to intellectual property, the authors of this journal have explored the nuances of various legal debates, the law itself and its implications on the wider community. Their research and analysis provide valuable insights and guidance for legal professionals and policymakers alike, as they navigate the complexities of the legal system and work to promote justice and equality.

As we move forward, it is essential that we continue to engage in rigorous and thoughtful legal scholarship, building upon the foundation laid by the contributors to this journal. By striving for a deeper understanding of the law and its impact on the world, we can work towards a more just and equitable legal system that operates in the best interests of wider society.

We would like to extend our thanks to the authors who have contributed to this journal, as well as the editors, professors, and support staff who have worked tirelessly to bring their work into fruition. We hope that the insights and ideas presented in these pages will continue to inspire and inform legal scholarship and practice for years to come.

Kindest regards,

Petr Rostokin
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