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The City Law Review

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The City Law Review

Volume VIII

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The Editorial Board

2025-2026

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VOLUME VIII

About the CLR

The City Law Review ('CLR') is the student-led academic publication of The City Law School, part of City, University of London. Established in 2015 as the City Law Society Journal and rebranded in 2019, the Review has developed into a platform for rigorous and thoughtful legal scholarship, driven by students and supported by the wider academic community.

Managed by an Editorial Board of current law students, the CLR is committed to fostering critical engagement with the law. It provides a space for emerging legal scholars to interrogate doctrine, challenge assumptions, and contribute to ongoing legal discourse across a range of fields and perspectives.

This year's volume reflects a deliberate emphasis on selectivity and editorial precision. From 26 submissions, 12 articles were chosen for publication, underscoring a commitment to quality, depth, and originality. The result is a collection of work that is both analytically robust and responsive to contemporary legal questions.

Alongside the print publication, the CLR continues to expand its digital presence. This includes the release of a Special Issue on Transnational Legal Education, published as Volume III on the CLR website, reinforcing the Review's engagement with global and interdisciplinary legal developments.

The CLR remains grounded in the strength of its academic and student community. This year's publication is generously supported by The City Law School, the City Law Society, and the Bar and Mooting Society, whose continued involvement reflects a shared commitment to student-led legal scholarship.

The 2025/2026 edition recognises outstanding contributions through three awards:

- *Excellence in Advocacy Award (sponsored by the Bar and Mooting Society)*
- *Excellence in Legal Analysis Award (sponsored by the City Law Society)*
- *Best Overall Contribution Award (awarded by the Editorial Board)*

Printed copies of the CLR and its predecessor are held in major legal collections, including the City Law School Library and the Gray's Inn Library, and are indexed in leading academic databases such as HeinOnline. As the Review approaches a decade of publication, it continues to evolve - not by expanding indiscriminately, but by refining its standards, strengthening its voice, and reinforcing its role as a serious forum for legal scholarship.

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Editor's Note

By Saif Siddiqui, GELLB2, Editor-in-Chief of The City Law Review Volume VIIIEditorial Assistant of The City Law Review VII

Legal scholarship is often presented as a system of clarity, an effort to define, explain, and organise the law. Yet, increasingly, it reveals something else: its limits. Across a range of contexts, the law is not only being applied, but tested by new technologies, shifting global frameworks, and the realities it seeks to regulate.

It is within this landscape that I am proud to present the eighth volume of The City Law Review. As Editor-in-Chief, I made a deliberate decision this year to prioritise selectivity and editorial discipline. From 26 submissions, 12 pieces were chosen for publication, each selected for its ability to engage critically with complex and, at times, unsettled areas of law. The intention was not simply to curate a collection of work, but to ensure that each contribution reflects a clear standard of depth, precision, and intellectual rigour.

The pieces in this volume collectively highlight a central tension: the gap between legal principle and practical reality. Whether examining the limits of domestic judicial authority, the challenges posed by emerging financial technologies, or questions of accountability within international legal frameworks, these contributions demonstrate that the law does not always provide clear or complete answers. At times, it adapts. At others, it hesitates. And occasionally, it falls short.

A further theme running through this volume is the balance between restraint and innovation. Several authors engage with whether legal actors, courts, institutions, or policymakers, should adhere to established frameworks or depart from them in response to contemporary pressures. This tension lies at the heart of legal development: the need to preserve stability while remaining responsive to change.

I would like to extend my sincere thanks to our Article Editors, Aqsa Khalid, Amna Qazi, and George Yong, whose professionalism and attention to detail were instrumental in developing each piece. Their ability to manage a demanding editorial process while maintaining a consistently high standard has been central to the quality of this volume.

I am equally grateful to our Editorial Assistants, Ammnah Ahmed and Darcia Bryant, whose reliability and dedication ensured the smooth running of the Review. Their work behind the scenes, from managing administrative processes to supporting sponsorship efforts, formed an essential part of bringing this publication together.

I would also like to thank our Dr Hamiisi, the CLS and our sponsors for their continued guidance, as well as our authors, whose work forms the foundation of this volume.

Leading this volume has reinforced a simple point: the law is not a finished system, but one shaped by the pressures placed upon it, and by those willing to question it. This publication is a reflection of that process.

Saif SiddiquiEditor-in-Chief*The City Law Review, Volume VIII*

Foreword

By Dr Hamiisi Junior Nsubuga,

Director, City Law Review & Open Access Lead, University of London

It is an honour to introduce the eighth volume of the City Law Review 2025 - 2026, having taken up the directorship of this prestigious student-led Review late last year.

Currently, the higher education sector faces significant challenges, particularly, the emergence of Generative Artificial Intelligence (GAI) and affordable access to higher education scholarly research especially, non-open access research. The cost of publishing research in highly reputable law journals has also sky-rocketed over the last decade. This has massively impacted students' access to research outputs, yet legal scholarship requires deep reflection on how knowledge is researched, learned, critically examined and disseminated to multiple audiences. Through platforms, such as the City Law Review, the above challenges are navigated, providing students with a platform to disseminate research, knowledge exchange and networking.

I am honoured to be part of the team that has worked tirelessly on this volume of the Review, to further the tradition of excellence that defines who we are, as The City Law School in general, and the Review in particular.

Dr Hamiisi Junior Nsubuga
Director, City Law Review & Open Access Lead, The City Law School.

ACKNOWLEDGEMENTS

We would like to extend a massive thank you to all our sponsors this year, who have facilitated the Launch of this year's volume:

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I would like to thank:

At The City Law School

Dr Hamiisi Junior Nsubuga - Director, City Law Review & Open Access Lead, The City Law School.

Melanie Goinden – Executive Assistant to Dean and COO

With A Very Special Thanks to **Humera & Fuad Siddiqui**

Reflections in the Mirror: A Doctrinal and Comparative Analysis on the Evolutionary Application of Section 2 of the Human Rights Act 1998 and the Limits of Domestic Innovation in relation to Strasbourg

This piece was awarded the 'Excellence in Legal Analysis' Award

By George Yong Tien Jie

• NTRODUCTION

Since its entry into force in October 2000, the Human Rights Act 1998 (HRA) has generated over 20 years of jurisprudence that governs and shapes the interaction between domestic courts and the European Court of Human Rights (ECtHR). Recent landmark cases such as *R (Elan-Cane) v Secretary of State for the Home*

Department, and *Jones v Birmingham City Council* decided by the UK Supreme Court (UKSC), underscore the ongoing significance of human rights in the legal sphere. At the heart of this interaction is section 2 (s.2) of the HRA, which requires UK courts to "take into account" Strasbourg jurisprudence when interpreting the European Convention on Human Rights (ECHR).

While s.2 aims to promote consistency and accessibility of rights, it has also sparked enduring debates about the boundaries of domestic innovation through judicial autonomy, the constitutional identity of the UK, and the nature of the UK's commitment to international human rights law. For instance, in 2022, the former Conservative Government introduced the Bill of Rights into Parliament to replace and repeal the HRA. While the House of Commons decided not to proceed with the Bill of Rights, the former Right Honourable Alex Chalk made it clear that, nonetheless, "the Government remain committed to a human rights framework that is up to date, fit for purpose and works for the British people". Therefore, the significance of this article is underscored by its contemporary relevance, particularly in light of the increasing politicised nature of human rights in the UK post-Brexit.

To that end, this article critically analyses the interpretation and application of s.2 HRA by the UK courts, exploring the dialogue and interplay between domestic courts asserting their legal autonomy in their development of human rights law and the ECtHR in its jurisprudence. In delivering its argument, the essay provides four main contributions. First, it will provide a brief overview of the legislative intent and development of section 2 under the HRA, drawing on parliamentary debates and various commentaries. Next, it examines the evolution of its application by UK courts, with particular emphasis on the development of the "mirror principle" and instances of divergence from ECtHR jurisprudence. The third section evaluates recent case law to determine the current judicial trend within the UK courts. It finally proposes a balanced model of the ECtHR's influence and domestic judicial independence under Section 2 and concludes with an interpretation and application of Section 2.

- **HISTORY AND DEVELOPMENT OF S.2 HRA:**

As stated above, s.2(1)(a) HRA states that (on the interpretation of Convention Rights) "a court or tribunal determining a question which has arisen in connection with a Convention right must take into account any judgement decision, declaration or advisory opinion of the European Court of Human Rights". Essentially, this section mandates the court to "take into account" Strasbourg jurisprudence but does not impose a binding status, unlike domestic judicial precedents.

The section's legislative intent is first encapsulated in the White Paper: "*Rights Brought Home: The Human Rights Bill*". The Labour Government described the HRA's purpose to ensure remedies for breaches against the European Convention of Human Rights (ECHR) were available in domestic courts – essentially "bringing rights home" and enabling British judges to make a "distinctively British contribution to the development of the jurisprudence of human rights in Europe". Lord Bingham mirrored this intent and expressed that UK courts are expected to "mould the law," where "British judges have a significant contribution to make in the development of the law of human rights." Furthermore, in response to the Conservative Party's proposal to amend s.2 HRA in imposing a binding obligation, Lord Irvine explicitly rejects such proposals. In doing so, he emphasised that treating Strasbourg jurisprudence as binding would unduly reduce judicial flexibility for UK courts to develop human rights law independently, conflict with the margin of appreciation doctrine, which allows states discretion in applying Convention rights, and risk obliging domestic courts to follow Strasbourg decisions that are shaped by materially different social and legal contexts to those of the UK. Thus, this legislative history underscores Parliament's clear intent. This intent is to create a judicial dialogue between the ECtHR and the UK courts with no statutory bar on the English judiciary to depart from the Strasbourg decisions, and to support judicial leadership, whereby British judges can make a significant and independent contribution to human rights law.

However, s.2's ambiguous language has since led to a series of diverse interpretations in practice, where judges must grapple with interpreting the provision's wording of mandating domestic courts to "take into account" ECtHR jurisprudence under HRA. Drawing on Mahoney's analysis of the interpretative relationship between domestic courts and Strasbourg, we are left with two leading questions that the next few sections will attempt to answer. First, does s.2's phrasing enable UK courts to develop through their interaction with the Convention beyond existing Strasbourg case law within the British context? Second, should Strasbourg judgments have any effect as legal precedents when UK courts are merely required to "take account" of them under s.2 HRA? We begin by examining the development of s.2's interpretation and its evolution since enactment.

• THE EARLY APPROACHES

The s.2 HRA interpretation saga began with *R (Alconbury Developments Ltd) v Secretary of State for the Environment*, where Lord Slynn held that UK courts should not be bound by ECtHR decisions but must "take into account" where clear and constant ECtHR jurisprudence should be *generally* followed unless there are special circumstances that justify such a departure. In comparison with Parliament's intent, this interpretation demonstrates an early attempt at delivering a cautious yet flexible approach towards s.2 in enabling a balance of judicial dialogue between ECtHR and domestic courts whilst respecting domestic judicial autonomy in human rights development. However, this stance was criticised for creating unnecessary deference to Strasbourg. For instance, Lord Irvine argued that this imposes an unwarranted gloss on the statutory wording where, subject to some sort of exceptionality qualification, UK courts are bound to follow Strasbourg. Moreover, he asserts that the courts here have misconstrued s.2 in restricting judicial independence and sacrificing domestic principles in favour of avoiding potential reversals in the ECtHR. This critique challenges whether such judicial adherence towards Strasbourg undermines Parliament's intent in allowing domestic courts to "bring rights home" by prioritising ECtHR views over their own. Thus, this highlights the broader tension that is to come with s.2 HRA's interpretation: does it sufficiently balance judicial deference to Strasbourg with domestic independence in human rights law?

The development from this interpretation in *Alconbury* towards stricter adherence to Strasbourg law continued under *R (Anderson) v Secretary of State for Home Department*. The Court of Appeal decided to apply the ECtHR case law even though judges questioned its correctness. Given that Strasbourg had a deeper understanding of the Convention rights and judicial comity, this revealed the domestic court's caution in interpreting areas where Strasbourg has already asserted its opinions in case law. Moreover, in *Al-Skeini and others v United Kingdom*, Lord Brown warned that domestic courts should avoid "leaping ahead" of Strasbourg due to the risks of having a too-generous interpretation in favour of an applicant that cannot be corrected, as member states cannot appeal to Strasbourg. Conversely, he also argues against having a too-narrow interpretation, as it allows an aggrieved individual to seek a remedy directly from the ECtHR, thus undermining the purpose of "bringing rights home". From these early judicial approaches (along with Irvine's critiques), the next section assesses the particularly significant mirror principle and examines how the domestic courts views have changed surrounding the application and interpretation of s.2 HRA in safeguarding consistency with Strasbourg, inadvertently compromises the independence of UK courts in shaping human rights law.

• JUDICIAL MANDATE VS INTERPRETIVE CAUTION – A CRITIQUE OF THE EARLY APPROACHES

Based on the earlier cases discussed, it can be argued that the subsequent trajectory of judicial caution, which was first apparent in *Alconbury* and subsequently crystallised in *R (Ullah) v Special Adjudicator,* constrained Parliament's core vision of domestic judicial leadership under the HRA. The cautious approach adopted by the courts, partly motivated by apprehension over potential reversals in the ECtHR (as critiqued by Lord Irvine), fundamentally undermined the political and legislative consensus of the HRA: to empower UK judges to take ownership of human rights adjudication. Thus, such adherence to the *Alconbury* approach represents not merely a judicial deference to Strasbourg, but a deeper failure to heed the express statutory direction and the constitutional identity Parliament envisaged for the domestic human rights framework. As such, this emphasises that the original interpretative saga surrounding s.2 HRA was rooted in a domestic conflict over the proper constitutional role of the domestic judiciary in a new era of human rights governance, not merely alignment with Europe.

• *R (ULLAH) V SPECIAL ADJUDICATOR* – THE MIRROR PRINCIPLE: A RIGID FRAMEWORK

Following *Alconbury* and *Anderson*, the articulation of the "mirror principle" in *Ullah* marked a more formalised and explicit turn towards judicial caution under s.2 HRA. While the earlier cases hinted at restraint, it was Lord Bingham in Ullah that added a gloss on the *Alconbury* principle by stating that the domestic courts must "keep pace with Strasbourg jurisprudence: no more, but certainly no less". As such, this formulation not merely restate earlier dicta, but aligns domestic law with the ECtHR's standards of ECHR interpretation, by tying the development of Convention rights closely to the jurisprudence of the ECtHR, enabling the domestication of Convention Rights. However, in assessing the mirror principle, this raises a critical question: does it align with the legislative intent of s.2 HRA and its intended role in fostering judicial dialogue and domestic autonomy, or does it inadvertently undermine these objectives? Academic criticism and case law suggest it leans towards the latter. The mirror principle's rigid framework marks a potential departure from the legislative intent of s.2 HRA, whereby it reduces the judicial independence of domestic courts in developing human rights law, tailored to the UK context.

First, Young challenges the mirror principle, arguing that *Ullah* has shifted judicial focus away from the independent analysis of Convention rights under UK law. Instead of fostering meaningful dialogue, she argues that the mirror principle positions the UK courts as subservient interpreters of ECtHR rulings. She further critiques that this rigidity fails "to provide a sufficiently strong protection of rights, causing the model of democratic dialogue to collapse into a predominantly parliamentary protection of rights". She asserts that s.2 HRA is supposed to fit into the broader democratic dialogue model, whereby courts act as proactive partners, whilst expanding rights interpretations in local contexts where ECtHR case law provides scope for innovation. The mirror principle, however, hinders the strength of this democratic dialogue model by mandating UK law to strictly "mirror ECtHR decisions, and suppress their judicial discretion to merely become passive interpreters".

Similarly, Lord Irvine highlighted that the mirror principle does not align with s.2 HRA's statutory language or intent. He emphasised that Parliament intended to empower UK courts to interpret ECHR rights independently, engaging constructively with Strasbourg without being bound by it. However, with the mirror principle transforming the non-binding nature of the "take into account" language of s.2 into a rigid obligation, this undermines s.2 HRA's legislative history and Parliament's vision of domestic courts shaping human rights.

Clayton builds on this critique by identifying several flaws in the mirror principle. First, *Ullah* misinterprets the HRA's statutory language and legislative intent by forcing UK courts to follow ECtHR rulings. Second, Clayton highlights how the mirror principle presents a narrow principle in revealing that the HRA was designed solely to enable Strasbourg rights to be pursued in UK courts. This narrow principle undermines the legislative debates and the *White Paper*'s articulation of the HRA's ambition to empower UK judges to contribute to human rights jurisprudence through domestic contexts.

More importantly, Clayton asserts that case law has since revealed an inconsistent application of the mirror principle. With various judges either diverging or standing in line from ECtHR jurisprudence, this thus reveals that domestic courts have demonstrated a willingness to depart from *Ullah's* interpretation. This willingness to depart is illustrated in *Manchester City Council v. Pinnock*, where Lord Phillips rejected the automatic application of the Strasbourg "sole or decisive test" derived from *Al-Khawaja and Tahery v The United Kingdom*. He held that it would not be right for the UKSC to apply that test, where the Criminal Justice Act 2003, interpreted according to its original meaning, struck an appropriate balance between trial fairness and public interest in effective prosecution. This is crucially concluded after Lord Phillips reassured that he took "careful account" of Strasbourg jurisprudence, despite departing from its reasoning. This approach supports Clayton's argument that s.2 HRA permits principled divergence and reflects a more nuanced judicial engagement with Strasbourg authority as opposed to the strict mirroring seen in *Ullah*. As such, we will discuss this in greater depth – highlighting the differences in the application of the mirror principle and providing a deeper understanding of s.2 HRA's role in the dynamic between domestic and ECtHR jurisprudence.

Ultimately, the application of the *Ullah* mirror principle introduces an analytical tension by threatening to curtail domestic judicial autonomy in the development of human rights law. This rigid framework is seen running counter to the core legislative intent of s.2 HRA, where critics assert that this approach transforms the HRA's requirement to merely "take into account" Strasbourg rulings into an unwelcome, strict obligation. For instance, Clayton notes that English courts evolved an approach that "bears little relation to language of s.2(1) HRA", which simply states a court "must take account" of decisions, and highlights Lord Irvine's argument that "the mirror principle is a gloss on the statutory language of s.2(1) [HRA]", which is inconsistent with its legislative history. By doing so, they argued that it risks reducing the role of UK courts to one of closely following ECtHR decisions, thereby limiting judicial discretion and judicial dialogue between Strasbourg and domestic courts. Consequently, the mirror principle presents a critical dilemma: the pursuit of unwavering fidelity and consistency with Strasbourg jurisprudence risks sacrificing the domestic judicial leadership and independent development of human rights law that the HRA was intended to promote.

- **DIVERGENCE AND JUDICIAL DIALOGUE BETWEEN THE UK AND ECtHR**

A notable instance of domestic divergence from Strasbourg arose in *Animal Defenders International v Secretary of State for Culture, Media, and Sport*. Here, the House of Lords (HOL) upheld the statutory ban on political advertising notwithstanding the ECtHR's earlier decision in *VgT Verein gegen Tierfabriken v Switzerland*. The HOL justified this departure on the basis that the proportionality assessment under Strasbourg's broader interpretation of Art 10 ECHR was deemed insufficient for domestic contexts. In particular, Parliament considered judgment that restrictions on paid political advertising were necessary to prevent the distortion of domestic policy arguments against money in politics. Importantly, however, the ECtHR Grand Chamber later endorsed the UK's approach in *Animal Defenders International vs the United Kingdom*. This reduces the sense of "domestic versus Strasbourg" conflict by accepting that the blanket ban fell within the UK's margin of appreciation. Thus, this subsequent alignment demonstrates the courts' willingness to prioritise domestic legislative intent under s.2 HRA when Strasbourg jurisprudence appears insufficiently tailored to UK contexts, but as part of an iterative judicial dialogue rather than a wholesale rejection of Strasbourg authority.

The case of *R v Horncastle and others* marked a pivotal moment of interpreting s.2 to foster sound judicial dialogue between domestic courts and Strasbourg. Here, the UK Supreme Court (UKSC) held that in rare occurrences where the UK courts have concerns on whether an ECtHR decision sufficiently appreciates certain aspects of the UK's democratic process, domestic courts are permitted to depart from Strasbourg. Lord Phillips, defending divergence from the ECtHR judgment in *Al-Khawaja and Tahery, argued that* the differences in approach between English criminal procedure law and civil legal systems, and the ECtHR's insufficient appreciation of these differences, justified this divergence. This case exemplifies how judicial dialogue could influence ECtHR jurisprudence by aligning with Parliament's vision of domestic leadership in human rights law, as recognised by the Grand Chamber, with its subsequent refinement by the ECtHR. Academics have also argued that this is consistent with s.2's wording, as *Horncastle* demonstrates that ECtHR cases are seen as persuasive precedents that are not to be binding on UK courts, nor to be absolutely rejected, thus enabling UK courts to enter into a judicial dialogue with Strasbourg where ECtHR jurisprudence has not considered an aspect of UK law. However, Irvine does assert that while *Horncastle* illustrates the potential for UK courts to lead by example in fostering judicial dialogue between ECtHR and UK courts, such divergence would require rigorous reasoning to still "take into account" as reflected under s.2, rather than ignore Strasbourg's jurisprudence. Thus, this case reflects a balance between the alignment and domestic independence, but we will examine whether this case presents a rare, justified departure or the beginning of a broader judicial trend in subsequent case law.

The boundaries of divergence continued to be examined in *Pinnock*. Here, the UKSC clarified that the UK courts are not bound to follow ECtHR jurisprudence, should they conflict with fundamental domestic principles that are contestable or misunderstood local cultural and legal traditions. Lord Neuberger asserted that domestic courts can discretionally diverge from Strasbourg case law in asserting their autonomy in adapting ECtHR principles into domestic contexts where necessary, whilst respecting Strasbourg in usually following their "clear and constant line of decisions" as a guiding principle under *Ullah*. By reasserting *Horncastle*, he reiterates that "this Court is not bound to follow every decision of the EurCtHR" as it is "impractical" and "sometimes inappropriate." This, he argued, "would destroy the ability of the Court to engage in the constructive dialogue with the EurCtHR which is of value to the development of Convention law". This highlights the court's move towards a balanced approach of judicial independence, where domestic courts can respect and maintain fidelity to Convention rights interpretations under ECtHR whilst ensuring that it reflects domestic values. However, Lord Irvine criticised *Pinnock*, arguing that this interpretation of having an "excessive preoccupation with this consideration" raises the question of how courts should interpret rights domestically. He states that a judge's concern for the UK's foreign policy and its standing in international relations can never justify disregarding the clear statutory direction which s.2 of the HRA provides". Nonetheless, *Pinnock* illustrates the tension within s.2 in terms of the complexity of the dynamic between UK courts and Strasbourg and underscores its role in fostering domestic judicial leadership and adherence.

To illustrate further tension, Clayton reveals several HOL decisions that have revealed the UK court's desire to go beyond Strasbourg precedents, particularly where Strasbourg has yet to address similar issues. For instance, in *Re G (A Child) (Adoption: Unmarried Couples)* (or also known as *Re P (A Child) (Adoption: Unmarried Couples),* the domestic courts have leapt ahead of Strasbourg case law in finding that there was discrimination prohibiting unmarried parents from adopting children. Thus, this approach demonstrates s.2's function in empowering domestic judicial leadership by developing human rights law more proactively rather than constraining courts to follow Strasbourg rigidly by having to wait for their interpretation.

By the 2010s, these cases had demonstrated a transition towards a flexible interpretation of s.2 that enables them to diverge from Strasbourg jurisprudence where necessary while engaging with ECtHR case law. From *Animal Defenders* to *Re G*, domestic courts have become eager to take charge of their judicial autonomy in developing their own human rights law, without being rigidly conformed towards Strasbourg case law. Academics have praised this shift within *Re G* in demonstrating that even if the HRA does not "impose a duty to give effect to Strasbourg jurisprudence," it does "force them to work out their own, independent case law". The next section then builds on from this development and explores how this interpretative flexibility has evolved by discussing the current approach of s.2 interpretation within the domestic courts throughout the 2020s.

- **MODERN APPROACHES**

Recent cases have revealed a return towards cautious adherence with ECtHR jurisprudence under s.2 HRA. In *Elan-Cane,* the UKSC addressed the UK's refusal to provide non-gendered passports under Articles 8 and 14 of the ECHR and asserted that domestic courts should align with ECtHR jurisprudence when applying a margin of appreciation. In rejecting *Re G,* Lord Reed emphasised that, despite Strasbourg not recognising a Convention obligation towards including such options in passports, we should be cautious in going beyond the interpretation of Convention rights, effectively maintaining the *Ullah* principle. From the earlier cases, this demonstrates a move towards a more restrained interpretive approach, where courts should be cautioned in innovating beyond Strasbourg.

Is this an accepted approach from *Re G*? Lord Irvine asserts that he understands this temptation. He argues that "for a judge faced with an unprincipled or aberrant decision (or line of decisions) of the ECHR, *Ullah* is the path of least resistance". However, he states that this temptation must be rejected. He argues that S.2 of the HRA means that "it is our judges' duty to decide the cases for themselves and explain clearly to the litigants, Parliament and the wider public why they are doing so," "which is their Constitutional duty." On the other hand, academics have criticised this recent decision from the UKSC, in asserting that *Elan-Cane* undermines the autonomy of UK Courts. For example, Majewski highlighted that, while *Re G* enabled the UK courts to have a "careful and cautious" and "properly principle" approach towards the margin of appreciation doctrine and s.2 HRA, *Elan-Cane* failed to address the substantive constitutional issues. He contends that this case fails to show how domestic courts can work out their independent attitude to Strasbourg jurisprudence – a key legislative intent of s.2.

As referenced in the introduction, *Jones* provides the court's most recent approach to interpreting s.2, with reference to a series of case laws that fostered the development of s.2's interpretation. In discussing whether the standard of proof should align with criminal rather than civil law principles under Article 6 rights in anti-social behaviour injunctions, the UKSC rejected this alignment by asserting that "the principle is well established that it is not the function of this court to undertake such a substantial development of Convention rights". Rather, "it is intended that the rights enforced domestically under the HRA 1998 and those enforced in Strasbourg should, in general, correspond." Thus, the case reaffirms *Ullah* in asserting a reluctance to expand on judicial innovation in ECHR rights beyond Strasbourg. Unlike *Horncastle,* where the UK courts explicitly moved away from Strasbourg jurisprudence due to a lack of applicability in domestic contexts, *Jones* avoids simply diverging by asserting a balance in reinforcing UK judicial autonomy whilst preventing itself from leaping ahead of ECtHR. By balancing judicial autonomy with adherence and respect to Strasbourg jurisprudence, this approach (taken alongside *Elan-Cane)* demonstrates that the courts have now shifted to prefer engaging with ECtHR authority more flexibly rather than challenging it.

- **PROPOSED STATUTORY REDIRECTION: THE INDEPENDENT HUMAN RIGHTS ACT REVIEW 2021 (IHRAR)**

The IHRAR was established in December 2020 to examine the operation of the HRA. It is an essential goal to ensure that the UK's human rights framework, consistent with the UK's incrementally evolving constitutional framework, develops and is refined to ensure it continues to meet the needs of the society it serves.

It was deliberately structured to be independent of the Government, Parliament, and the Judiciary, with emphasis on the inclusion of the I in IHRAR, highlighting this independence. As such, from receiving substantial information across the UK, the IHRAR delivered a review that was conducted by an independent advisory panel, with its scope strictly limited to considering the operation of the HRA, the domestic statute, and excluded examining ECHR rights.

In putting forward options for reform to be considered by Government and Parliament, the IHRAR focuses on two key thematic areas: The Relationship with the ECtHR and the Constitutional Balance.

- THEME 1: THE RELATIONSHIP WITH THE ECtHR

Under this theme, the IHRAR focused on the interaction between domestic courts and the ECtHR. In its review, it asked key questions such as how the duty to "take into account" ECtHR jurisprudence (under s.2 HRA) has been applied in practice, how domestic courts approach issues falling within the margin of appreciation, and whether the current approach to "judicial dialogue" between domestic courts and the ECtHR satisfactorily allows domestic courts to raise concerns regarding the application of ECtHR jurisprudence. The critique that emerged centred primarily on the level of deference shown to Strasbourg jurisprudence, the subsequent marginalisation of domestic law, and the impact on the proper use of institutional judicial discretion.

- THEME 2: THE CONSTITUTIONAL BALANCE

On constitutional balance, the IHRAR examined the impact of the "constitutional balance" by focusing on the impact on the HRA on the relationship between the Judiciary, the Government and Parliament. In its review, it asked key questions such as whether the HRA framework (specifically sections 3 and 4) should be changed, whether the current approach risks "over-judicialising" public administration and unduly drawing domestic courts into questions of policy, the circumstances in which the HRA applies to acts of public authorities outside the UK territory and whether that position should change, and whether the remedial order process (under section 10 and Schedule 2) should be modified.

- IHRAR CRITIQUE OF THE *ULLAH* LEGACY

The IHRAR outlined that despite the development of a more "nuanced and flexible approach" post-*Pinnock*, a "degree of uncertainty" remained regarding Section 2's application. Their critique centres on the rigidity of the original *Ullah* principle and the unintended consequences for the UK's constitutional framework and legal development. This comes despite them acknowledging that the initial rigid approach had matured into a more nuanced and flexible one following later decisions like *Pinnock*, with the *Ullah* principle being the genus of its development.

First, they argued that the supposed "gloss" set out in *Ullah* is not justified under the wording of s.2 HRA, which only requires the UK courts to "take into account" relevant ECtHR case law, not treat a clear and constant line of case law as presumptively binding. This, they argued, was an approach that went beyond Parliament's intention, which expected courts to achieve "broad consistency," not uniformity with ECtHR case law. Thus, this created a rigidity that was not entirely consistent with the aim of ensuring UK courts make a distinctive contribution to ECtHR case law.

Additionally, the presumption that UK courts must follow ECtHR case law is inconsistent with the underlying principle of subsidiarity. Subsidiarity holds that the primary responsibility for rights protection lies with the domestic legal system, with the ECtHR acting as a secondary "backstop". On the other hand, *Ullah* inadvertently gave the impression that the Convention and the ECtHR case law are the primary form of rights protection in the UK, which goes against the structure of the Convention system. As such, they argued that this primary focus on Strasbourg case law leads the UK courts to undermine subsidiarity and primacy of domestic law. It undermines the ability of UK authorities, including the Judiciary, to fully utilise the margin of appreciation (the latitude afforded to the State in applying Convention principles).

There is also the issue of the inhibition of domestic jurisprudence and common law under the *Ullah* principle, as it implied a single correct interpretation of the Convention by creating an interpretive lens that exclusively focuses on ECtHR case law. This resulted in there being "little room" left for the UK courts to primarily consider other material, such as the common law, when interpreting Convention rights as domestic rights. It also prevented the UK courts from "leaping ahead" of ECtHR case law under the "no more" approach, limiting the effectiveness of the UK courts to act as leaders and make a distinctive UK contribution in their own domestic jurisprudence. This critique was echoed by Sir John Laws, who suggested that this rigid approach contributed to a "wrong turning" in the law and may have undermined the autonomous development of human rights by common law courts.

Lastly, the IHRAR asserted that the approach has contributed to a sense of antipathy to and a lack of public ownership of human rights law in the UK. They argued that by prioritising ECtHR interpretation, the scope to portray Convention rights as foreign or imposed outside the UK becomes more pertinent. In particular, Lord Rodger's assertion in *AF* that "Strasbourg has spoken, the case is closed" was cited as particularly unhelpful in this regard. Even after maturation, the differing interpretations of when the UK courts may depart from ECtHR case law (e.g., the *AF* high-water mark versus the later, more flexible approaches in *Pinnock*) created an "unhelpful continued level of clarity" for the UK courts and public authorities seeking to ensure compliance. Overall, this perception, they argued, fuelled anti-HRA sentiment by portraying Convention rights as something "foreign to the UK's legal tradition and imposed from outside".

- PRIORITISATION AND RECOMMENDED REFORM

To remedy the effects of the *Ullah* legacy, the IHRAR Panel recommended amending s.2 HRA to clarify the priority of rights protection by giving statutory effect to the position developed in cases like *Osborn v Parole Board* and *Kennedy v Charity Commission*.

This approach, known as Option Five, mandates UK courts to "first apply relevant UK statutory provisions, common law and UK case law generally and then, if proceeding to consider the interpretation of a Convention right, must take into account ECtHR case law". This, they asserted, would help clarify the interpretive hierarchy and reinforce the centrality of domestic law. As part of its Option Five, this amendment mandates a structured judicial approach to human rights questions. First, apply relevant UK domestic statute, common law, and UK case law generally. Then, if proceeding to interpret a Convention right, take into account ECtHR case law. In doing so, they have provided a draft amendment to include this clear priority structure under s.2(1) HRA for clarification:

"A court or tribunal determining a question which has arisen in connection with a Convention right ***must first apply relevant UK statutory provisions, common law and UK case law generally and then, if proceeding to consider the interpretation of a Convention right, must take into account****... [as per the original text of s.2(1)]".*

This proposal acts as a deliberate move to effectively "nudge" the UK Courts. The goal is to enforce the principle of subsidiarity by ensuring that the domestic rights regime is the starting point of rights protection.

On the issue of subsidiarity, it was previously asserted that the *Ullah* approach undermined this principle by creating a presumption that UK courts must follow ECtHR case law. By having this recommended amendment, this would promote the effective implementation of subsidiarity. By requiring UK courts to start with domestic statute and common law, it ensures the domestic rights regime is the starting point of rights protection. This clarifies that UK national authorities, the Government, Parliament and the Judiciary, have the primary responsibility for rights protection.

Additionally, the IHRAR provided that this amended framework would address the issue of the rigid *Ullah* approach, stifling the unique contributions of UK domestic law, including common law, to human rights jurisprudence by providing a deliberate impetus to the development of common law rights. They outlined that, by forcing the courts to apply the common law method in light of the HRA, this approach would encourage greater "cross-fertilisation of the common law and the Convention," allowing the latter to more effectively "inform and enrich" the former. Furthermore, developing rights through the common law ensures the judicial developments are subject to the safety valve of Parliamentary Sovereignty.

The IHRAR's new framework also addresses the issue of the lack of public ownership and acceptability of the HRA in the UK, given that the *Ullah* Principle has created the perception that human rights jurisprudence was externally imposed, thus creating antipathy towards the HRA. By giving greater prominence to UK law, they argued that the new amended framework helps to foster a greater sense of political and public ownership and acceptance of human rights. The IHRAR emphasises that the framework is a "shared endeavour" involving all three branches of state, with the increased role for the common law counters the notion that the HRA is an alien imposition on UK law.

Lastly, the IHRAR also provided that by codifying the more flexible approach developed in *Osborn* and *Kennedy* as statutory law, this offers greater clarity and certainty for the UK courts. By increasing predictability, it structurally guides the court through the process, ensuring consistent application, especially since, after two decades, there still remained a degree of uncertainty in the approach to s.2 HRA as to when the courts could depart from ECtHR case law.

Overall, the IHRAR's proposed reform is designed to improve the operation of the HRA by ensuring that the UK courts use domestic legal traditions as their starting point. This promotes a more distinctly "British" rights framework, while maintaining the strong judicial dialogue and consistency needed to adhere to the UK's international obligations under the Convention.

- **TOWARDS A DYNAMIC MODEL: INTEGRATING COMPARATIVE JURISPRUDENCE, STATUTORY PRIORITY AND DOMESTIC FLEXIBILITY**

The evolution of s.2's application reveals a persistent tension between safeguarding domestic judicial independence in developing human rights law and maintaining adherence to Strasbourg jurisprudence. From its genesis in *Alconbury*, the courts have adopted a cautious stance by strictly adhering to Strasbourg principles as mandated under the HRA. This cautiousness solidified under the development of the mirror principle, where Lord Bingham asserted the need for domestic courts to "keep pace" with Strasbourg at a rate that is "no more, but certainly no less". However, academics have revealed that later cases like *Horncastle* and *Pinnock* have demonstrated the potential in heading towards a more productive judicial dialogue between Strasbourg and domestic courts. For instance, Clayton highlighted that the relationship between the UK courts and the ECtHR has evolved into a continuing dialogue. He revealed that, with *Horncastle* as a catalyst, the UK courts can challenge ECtHR decisions and diverge from them, while the ECtHR Grand Chamber would eventually modify its own approach after considering the UKSC's reasoning, when appropriate. Similarly, he identified *Pinnock* as a case where the domestic court asserted its independence from being "actually bound" by the Grand Chamber. Thus, these cases suggest that domestic courts are given the freedom to assert authority (with robust reasoning) and adapt ECtHR principles into the UK's distinctive legal and cultural framework, thus enabling a more meaningful dialogue.

Yet recent cases like *Elan-Cane* and *Jones* illustrate a re-shift towards cautious adherence, maintaining the *Ullah* principle and asserting that domestic courts do not leap beyond Strasbourg. This conflicts with Parliament's intention to assert leadership in developing human rights law and "bringing rights home." For instance, Lord Irvine asserted that the rigid "no more, certainly no less" approach would place the UK judiciary in a "straitjacket", thus preventing them from fulfilling the leadership role Parliament envisioned. This is reaffirmed by the UKSC in *Jones*, whereby domestic courts should not substantially develop Convention Rights, as it is "not the function of domestic courts to establish new principles of Convention law" and it is one that "should not be anticipated" by the UKSC. From this, various academics have offered different approaches to achieve the balance that Parliament intended and reconcile these tensions by delivering a sound balance between judicial autonomy and strict adherence, which this paper draws from.

Clayton interestingly included a comparative analysis of French and German jurisdictions in handling ECtHR jurisprudence. In France, judges historically resisted ECtHR jurisprudence, since the Convention itself is binding and judgments against other Member States are not obligatory for French Courts. However, the French domestic courts have developed a shift towards a more progressive interpretation, by pre-empting defeats in Strasbourg by aligning domestic law with evolving human rights norms. For instance, in cases like *Boussouar* and *Planchenault*, the Council of State allowed judicial reviews of administrative decisions concerning alleged violations of prisoners' rights. As such, French judges foster domestic autonomy in interpreting ECHR rights independently. By frequently exceeding ECtHR requirements, this proactive alignment with Strasbourg prompts constructive dialogue with ECtHR on human rights norms, enabling them to shape domestic human rights law whilst maintaining constructive alignment with Strasbourg.

Conversely, the role of the ECtHR in German constitutional jurisprudence is that if an ECtHR decision is relevant, domestic courts must consider the ECtHR's reasoning, especially during proportionality analysis. The *Görgülü* Decision revealed that the courts must weigh the findings of the ECtHR when assessing rights conflicts. Furthermore, Clayton asserts that, as ECtHR decisions should not be enforced automatically, there are also limitations on automatic enforcement. Additionally, he states that German institutions are afforded latitude in deciding how to implement Strasbourg judgments, which balances compliance with the ECtHR and the discretion of national courts. Thus, this model reveals that Strasbourg jurisprudence is used as interpretative guidance for defining the scope of fundamental rights and rule-of-law guarantees under the Basic Law/Grundgesetz.

Clayton argues that since "there is no reason in principle why the domestic courts should regard the ECtHR jurisprudence as a ceiling when interpreting Convention rights", he proposes an alternative approach that "would entitle the domestic courts to consider human rights jurisprudence from sources other than Strasbourg (such as Canada, New Zealand and South Africa)" by looking upon the "rich jurisprudence of the Privy Council". He asserts that this approach would bring many benefits such as that it will (1) enable judges to shape Convention law under the HRA to reflect our distinctive cultural and historical practices, (2) promote an indigenous human rights jurisprudence, as the architects of the HRA originally envisaged - thereby contributing to the development of European law in this field, and (3) ensures that the domestic courts adopted a broader, more teleological analysis which more closely resembled that employed by the ECtHR.

• A PROPOSED FINAL TEST

To reconcile the long-standing tensions surrounding s.2 HRA, this article proposes a structured three-stage approach designed to ensure judicial autonomy of the UK domestic courts while maintaining fidelity to ECtHR jurisprudence. In combining key insights from the IHRAR, academic critiques of the *Ullah* mirror principle, the evolutionary development of s.2 HRA, and comparative models from Germany and France, as discussed by Clayton, this enables a comprehensive outlook on the interpretation of s.2, addressing the potholes outlined so far. This tripartite framework can be separated into three stages: Domestic Primacy and Contextual Grounding, Informed Engagement with Strasbourg, and Broader Comparative Persuasion.

• <u>STAGE 1: DOMESTIC PRIMACY AND CONTEXTUAL GROUNDING</u>

Prior to any interpretation, the court must first anchor its analysis in domestic law, with reference to its own statutes, common law principles, and, overall, UK human rights jurisprudence, before turning to ECtHR decisions.

This stage acts in line with the IHRAR's "Option Five" proposal in upholding judicial autonomy and mirrors Germany's *Görgülü* decision, which revealed that the courts must weigh the findings of the ECtHR to utilise them as interpretative guidance, rather than act as a binding authority.

• <u>STAGE 2: INFORMED ENGAGEMENT WITH STRASBOURG</u>

Where domestic jurisprudence cannot offer an interpretive solution, the court must then "take into account" the ECtHR jurisprudence as persuasive, context-sensitive guidance. In this stage, engagement with Strasbourg's jurisprudence must be reasoned, logical, and dialogic, whereby the domestic courts should effectively assess whether Strasbourg's interpretation sufficiently reflects domestic principles, institutional design, and democratic traditions.

By borrowing the French model in *Boussouar* and *Planchenault*, incorporating this stage will ensure that the UK judiciary would aim for constructive alignment with Strasbourg jurisprudence. Instead of merely mirroring or resisting its application, this framework enables domestic courts to anticipate Strasbourg developments and adapt them proactively to fit within their domestic contexts.

• <u>STAGE 3: BROADER COMPARATIVE PERSUASION</u>

Lastly, the court may draw upon international and comparative human rights jurisprudence to inform its reasoning, where necessary. As Clayton provides, such an international approach would help liberate UK human rights law from a binary relationship with Strasbourg, cultivating an indigenous human rights jurisprudence that remains compatible with, but not subservient to, the ECtHR. By focusing on Privy Council and Commonwealth decisions from jurisdictions like Canada, New Zealand and South Africa as persuasive precedents, this stage institutionalises a teleological, globally informed interpretive method that enhances the domestic and international legitimacy of human rights jurisprudence in the UK.

- **CONCLUDING REMARKS**

Over time, s.2 HRA's evolving interpretation has shown the tense, dynamic nature of ECtHR and the UK courts – underscored by the complexity of balancing adherence to Strasbourg rulings with domestic judicial autonomy.

From these insights, this paper proposes that the UK courts could adopt a more dynamic approach that fosters a constructive partnership between UK courts and the ECtHR. In combining Germany's flexibility in utilising ECtHR jurisprudence as interpretative guidance and France's proactive alignment, the UK can construct a model that would encourage the judiciary to adapt Strasbourg principles contextually, whilst reserving domestic autonomy. As the tripartite framework shows, this would not only dismantle the grounded flaws of the interpretive gloss applied *Ullah* principle but also achieve Parliament's original intention: to ensure that the UK courts remain active contributors to the development of their own jurisprudence rather than passive recipients of the European human rights order. By creating a distinctively British yet internationally coherent model of human rights adjudication with a codified, flexible interpretive structure, this article provides a test that strikes a fair balance in judicial independence and dialogic reasoning, while being grounded in subsidiarity.

Drawing from these approaches, the UK courts can be left with a nuanced approach that balances strict adherence to Strasbourg whilst maintaining context-sensitive interpretation and judicial dialogue, problems that have appeared in former case law. Such an approach would offer a pathway forward for stronger protection of human rights, with an adequate balance of UK judicial independence, while maintaining fidelity to the ECtHR's jurisprudence.

The Legal Duty to Warn: Constructive Knowledge and UN Liability for Failing to Publicise Atrocity Risks

This piece was awarded the 'Best Overall Contribution' Award

By Gurnoor Singh Mand

Abstract

The English law of unjust enrichment deals with situations where it is unjust for someone to receive a benefit without paying for it. Duress is one of the unjust factors that allows for restitution.

The recent approach of the court assumes the same test for duress in contract and unjust enrichment as in *CTN Cash and Carry*. This is problematic in cases where there are no valid contracts in play. First, this obscures the normative foundation of unjust enrichment. The higher threshold for establishing duress in contract law is justified by its own principles and aims which are not present in unjust enrichment. Second, the existing grounds of recovery that centre on the application of pressure to the claimant and third-party cases in duress show that duress in unjust enrichment is primarily claimant-sided. It is not concerned with the reprehensible conduct of the defendant.

This article argues for a lower threshold to establish duress in unjust enrichment. The distinction between recovery of contractual and non-contractual payments on grounds of duress should be reinstated, as in earlier authorities such as *Skeate v Beale*. The rigid and overly complicated categorisation of duress in contract law should not be followed in unjust enrichment. Instead, this article argues for a unifying principle that centres on the question of whether the claimant made the payment under illegitimate pressure, but not the degree of the defendant's reprehensibility. This claimant-sided approach is able to be reasoned by analogy to existing unjust factors, including the archetypal unjust factor of mistake, and the other few grounds of recovery that centre on the application of pressure to the claimant.

- ## Introduction

Despite being formally recognised as a unified body of law and a foundational pillar in private law, the law of unjust enrichment remains subject to much debate regarding its doctrinal coherence and normative foundation. Duress is one of the few grounds of recovery that centres on the exertion of pressure on the claimant. Yet, limited attention is paid to its scope in unjust enrichment despite increasing reliance on it in the commercial context.

This article aims to determine the appropriate restitutionary response where the transaction under duress is not justified by contractual obligations. Some vitiating factors, such as mistake, are harder to establish in contract law than when they act as a reason for restitution in unjust enrichment. However, the court has assumed the same ambit of duress for both contractual and non-contractual payments in recent cases like *CTN Cash and Carry*. This article argues for a more lenient claimant-sided test for granting restitutionary remedies on grounds of duress where there are no contracts in play. This approach can be justified by 1) the normative differences between unjust enrichment and contract law and 2) the nature of duress in unjust enrichment, which is primarily claimant-sided and is not concerned with the reprehensible conduct of the defendant.

- **Development of Duress in Unjust Enrichment**

The recent approach of the court assumes the same test for establishing duress in contract and in unjust enrichment, even when a payment is made without a contract. In contract law, the classical paradigm of duress consists of two elements: 1) pressure amounting to compulsion of the will of the victim; and 2) the illegitimacy of the pressure exerted. Lord Justice Steyn in *CTN Cash and Carry* held that there was no difference between contractual and non-contractual payments in claiming restitution for duress:

It seems to me not to matter whether the correct analysis of the facts is that an agreement was made that the plaintiffs would pay the sum in question or whether payment is to be regarded simply as a unilateral act of the plaintiff. In either event the claim must succeed if the case of duress is made out; if that case is not made out, the case must fail.

This has brought the test for duress together in two different contexts. Yet, theoretically, why should parties not be allowed to recover their money more easily in cases of non-contractual payments? This is especially when the non-contractual payments do not raise concerns of upholding contractual aims such as security of transactions and contractual allocation of risks.

For such reasons, it is worth investigating why such a distinction had existed in earlier lines of authority such as *Skeate v Beale*.

Skeate is a puzzling authority that shows there is a distinction between contracts and money payments. A landlord threatened to levy distress and seize the property unless the tenant agreed to pay. The tenant sought to recover the payment based on duress of goods. Lord Denman CJ held that the agreement would not be rendered void under duress of goods, which does not deprive 'anyone of his free agency who possesses that ordinary degree of firmness which the law requires'.

In *Skeate*, a 'curious distinction' was made between money payments and contracts, though there was no clear judicial discussion of such a distinction. The counsel for the plaintiff explicitly referred to the distinction by arguing that 'if there had not been a contract, the surplus might have been recovered by an action for money had and received'. Lord Denman's dictum also presupposed that agreement to pay and money payment would be treated differently: 'even if the money had been paid in this case, instead of the agreement to pay it entered into, no action for money had and received could have been sustained by the now defendant'. This distinction is made apparent when comparing *Skeate* with its predecessor, *Astley v Reynolds*. In *Astley*, where there is no contract, an excess payment was found to be a payment under compulsion. In contrast, there was a contract in *Skeate* but duress was not found.

Nevertheless, after *Skeate*, the distinction between contracts and money payments has not been followed. There was no direct judicial discussion of whether the ambit of duress alters if there is a contract. In *Tamvaco v*

Simpson, despite the presence of a contract, the plaintiff was allowed to recover what had not been due under the negotiable instrument on grounds of duress to the goods. *Skeate* was not even referred to, though Blackburn J emphasised the fact that the plaintiff had been given a negotiable instrument. In *Maskell v Horner*, although there was an existing contract, unlawful demand of several excessive tolls was found to be payments 'under the pressure of seizure or detention of goods'. There was no consideration of a higher threshold for duress where there was a contract. Similarly, in *The Siboen and The Sibotre*, Kerr J only discussed whether the agreement had to be voluntary but did not pay attention to the distinction made in *Skeate*. In *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd,* the judge found that it was 'interesting' that Beatson suggested that there was no distinction between actual payments and agreements to pay. But no further elaboration was given. The general judicial trend reflects a departure from the position of *Skeate* in relation to such a distinction. While obiter dicta rejected *Skeate* as good law, it remains important to consider why such a distinction was drawn in the past.

- **The Differing Normative Foundations**

This article considers that the different normative foundations of contract and unjust enrichment are, prima facie, good reasons to treat duress differently in the two contexts.

On one hand, contract law aims to uphold contractual allocation of risks and the reasonable expectations of contracting parties. These considerations are within the realm of contract law, but not unjust enrichment. On the other hand, the law of unjust enrichment aims to restore parties to their original position to achieve fairness, though it does not mean 'judicial discretion'. It allows recovery of payments when one of the unjust factors exists. Fundamentally, its purpose is remedial rather than punitive, which is to remedy a problem until the injustice is cured.

Mistake in unjust enrichment is illustrative of the distinctive aims of unjust enrichment, which seems to justify the special treatment of mistake in the context of unjust enrichment. The test for mistake is substantially more liberal in unjust enrichment. Regarding contract law, the mistake must be bilateral to find a common mistake. The claimant's subjective impaired consent alone is not sufficient to invalidate the contract. Although a unilateral mistake can serve as the basis of contractual rescission, the mistake must be so fundamental that contractual performance is rendered impossible. This high bar reflects contract law's proper concerns of transactional security and protection of parties' reasonable expectations. Consequently, contract law prioritises the objective principle (protection of security of contract) over the claimant's impaired intention (protection of personal autonomy). In contrast, in unjust enrichment, a simple causative mistake suffices. The approach to restitution of mistaken payments is further relaxed in *Kleinwort Benson v Lincoln City Council*, which extends recovery for payments made under mistake of law.

The broader scope of mistake in unjust enrichment is appropriate if we conceive unjust enrichment as a distinct body of law with the central aim of reversing a defective transfer of value. In case of mistake, where the mistaken transfer of payment is defective, she has failed to act in a way in accordance with her wishes. The act does not give full effect to her autonomy. Restitution is required to reverse the transaction made under the claimant's impaired intention. The question of whether a transaction should be undone to allow restitution of a mistaken payment is different from the question of whether the contract's validity is affected by a mistake. In the latter question, the imperative of transactional security is a strong one.

The restitution of a mistaken payment is a paradigm example of restitution in unjust enrichment. As shown by the model of mistake, contract and unjust enrichment are closely connected. In both contexts, a bilateral relationship arises from the very transactional nature of the dealing. Yet, unjust enrichment has emerged as a distinct category of law with its own jurisprudence and rationales. To facilitate the coherent development of unjust enrichment, it is vital to maintain its separation from contract law without distractions of contractual concerns. Prima facie, their different aims and concerns are viable reasons for why restitutionary remedies can be granted more generously in unjust enrichment.

As a note of caution, this article is not arguing that the exact same approach towards mistake should be adopted when it comes to establishing duress in unjust enrichment. Mistake and duress are normatively distinct. For mistake, the reason for granting restitution is entirely claimant-sided: the claimant has made a mistake unilaterally and restitution responds to reverse this very transaction that is tainted by her impaired intention. However, duress does not exclusively focus on the conduct of the payer; it also looks to the character and position of the payee. The reason for granting restitution is that the defendant's illegitimate imposition of pressure has rendered the claimant's intention impaired. In both contract and unjust enrichment law, it is not enough to solely refer to impaired intention such that the claimant can subjectively establish duress regardless of how slight the degree of pressure exerted by the defendant is. Such a wholly subjective approach would be to use the defendant as a means to an end by demanding the defendant to 'correct an injustice that was not of their doing'. Thus, whether there is illegitimate pressure is a question that engages both the claimant-sided and the defendant-sided factors. This is reflected in the two-staged test for duress in contract law, which aims to strike a balance between protecting the claimant's autonomy and the defendant's reasonable expectations of the claimant's ability to withstand threat. However, it shall be argued that the primarily claimant-sided nature of duress in unjust enrichment justified a lower threshold when compared to duress in contract law.

Instead of adopting a general, single-ground approach towards unjust enrichment, this essay endorses Chen Wishart's proposition that 'the details of the restitution response should be closely tailored to the initial reasons for granting restitution'. To achieve greater clarity of the unjust factors, there must be a proper understanding of the reasons why a particular transfer, invalidated by duress, could bring itself within the realm of unjust enrichment. The initial reasons for restitution, independent of contractual concerns, could form the basis of the answer to how much weight unjust enrichment should give to concerns beyond the claimant's impaired intention. It will be argued that these reasons signal the need to treat duress differently in unjust enrichment and contract law.

- **Where a Contract Falls Short**

The call for a more lenient approach to establish duress in unjust enrichment is premised on the assumption an unjust enrichment claim cannot be brought whilst the contract is still subsisting. It is assumed that this principle has adequately protected parties' agreement and contractual allocation of risk. This prevents contractual parties from escaping a bad bargain by relying on a more generous test for duress in unjust enrichment.

Admittedly, there are exceptional cases where a claim for unjust enrichment is allowed despite the existence of a valid contract. Yet, this section will show that the underlying *rationale* that unjust enrichment should respect parties' contractual agreement is still upheld. Based on this analytical framework, this article will proceed with the proposal for a more generous, distinct test for establishing duress in unjust enrichment under the presumption that this principle has sufficiently protected parties' agreement.

In *Roxborough v Rothmans of Pall Mall Australia Ltd*, although there was a valid contract, the restitution claim for the licence fee as a separate element from the total price was allowed. It was found that the basis of this specific payment has failed: the buyer paid on the basis that the tobacco retailer was required by legislation to pay tax, but the legislation was subsequently declared unconstitutional. Although there had been a subsisting contract, the parties' *objective*, shared understanding of the contractual obligation had totally failed from the perspective of unjust enrichment. Subsequently, the contractual risk allocation which appertains the tax component must have also failed. This position is succinctly summarised by Edelman and Bant: 'the contract may have provided a juristic reason to receive the benefit, but it does not provide a juristic reason to retain the enrichment after the failure of basis'. On this understanding, allowing restitution in unjust enrichment does not necessarily subvert contract law despite the existence of a valid contract.

CTN is another exceptional case that treads the boundary between unjust enrichment and contract law. On its face, there seems to be a valid contract which precludes a claim in unjust enrichment. Under the supplier's lawful demand of payment, the buyer responded to the offer. This amounted to a contract supported by consideration in the contractual sense, or alternatively, the practical benefit of retaining its loss of credit facilities.

However, restitution is not theoretically precluded. From the perspective of unjust enrichment, the specific payment was not justified by a contractual obligation. The contract asked the supplier to deliver cigarettes to the buyer, but they were not delivered. Given the non-performance of the contract, the supplier had no legal entitlement to claim the payment under the contract. Thus, while there has been at some stage a valid contract, it no longer subsisted : the benefit under the contract had not been discharged by performance. The buyer's payment can be characterised as being made against the background of a valid contract, but not within. Different from contractual remedies, the award in unjust enrichment relates to a distinct cause of action, which is aimed at reversing a transfer of benefit. On the facts of *CTN*, what an unjust enrichment claim entails is the reversal of the single transfer of value in which the defendant had no legal entitlement. Since there is no counter-performance under the contract and to that extent, restitution would not subvert the parties' contractual bargain.

This is perhaps what led the Vice-Chancellor in *CTN* to suggest that a potential cause of action would be wrongful retention of goods, 'with the end result the defendant may be said to have been unjustly enriched. Nevertheless, such a claim in unjust enrichment was not pursued in *CTN*. No conclusion was reached on whether this case belongs to the domain of unjust enrichment either. Ignorance of such a distinction between contractual and non-contractual payments often resulted in a mechanical application of the more stringent contractual test for duress even if the factual matrix is found in an unjust enrichment context, as in *CTN*. This muddles the normative boundary between contract law and unjust enrichment, whereby the latter aims to restore any rights which the claimant has unjustly lost regardless of contractual considerations such as security and certainty of contracts.

- **The Nature of Duress in Unjust Enrichment**

It is argued that the primarily claimant-sided nature of duress in unjust enrichment reflects its primary concern to protect the claimant's autonomy. Adopting the same approach in contract by requiring 'illegitimate pressure' on the part of the defendant is an aberration in the unifying law of unjust enrichment. The core case of mistake, and several unjust factors that focus on application of pressure on the claimant, illustrate unjust enrichment's primary concern with impaired intention. In mistake, impaired intention is sufficient for granting restitution in unjust enrichment. A mere unilateral mistake would suffice.

Wrongdoing is not required to establish duress *colore officii*. Duress *colore officii*, also termed as 'under the colour of duty', is found when the public officer refuses to perform the duty he is bound to perform unless a payment is made. The mere fact that the public body acted ultra vires – for example, a policeman who asks for payment by mistake – is enough to be treated as sufficient pressure. It is the implicit pressure that the public body exerts when demanding payment which they have no entitlement to, due to the legal authority they possess, that justifies restitution.

Similarly, necessitous circumstances can ground restitution. These old lines of authority tend to be overlooked today. They do not involve any wrongdoing. Yet, it is the necessary circumstances that deprive the claimant of voluntariness in making the payment. The most relevant type of necessitous case is when the claimant pays off another's debt under necessitous circumstances. In these cases, necessity is not the ground for restitution in its own right, but also encompasses an aspect of legal compulsion.

The unjust factor 'necessity' resembles duress, particularly where the claimant faces a lack of practical alternatives in the circumstance. In *Great Northern Railway Co v Swaffield*, the defendants sent a horse by the plaintiff's railway. On arrival, the plaintiff found that there was no one to meet and took the horse to a livery stable. The defendants refused to pay the livery charges and demanded payment for the costs of the undelivered horse. The livery charges were recoverable since the plaintiff had no choice but to place the horse in the stable, as allowing it to stand at the station would be 'improper and dangerous'. The crucial question considered in the judgment was primarily the constraints of the claimant's freedom of choice given the circumstances faced by the defendants. The necessitous circumstance is what *forces* the claimant to act in order to prevent harm from being inflicted. This is not the same kind of pressure whereby if the claimant did not act, 'some detrimental consequence would inevitably result at the hands of a person who had made threats'. However, the claimant can be said to be in a situation where he has to make 'a choice between the evils' in response to the circumstances he faced. Thus, Virgo rightly argues that the justifications for the existence of necessity as a ground of restitution are 'virtually identical' to the justification for those grounds of restitution which are founded on compulsion.

Compulsion, in this sense, involves pressure impugning the claimant's voluntariness. Yet, restitution is not granted because of reasons that involve the defendant's illegitimate conduct. The requirement of 'lack of practical alternatives' in duress is arguably responding to the aspect of compulsion in the necessity line of cases. Yet, that does not mean that factors beyond the claimant-sided concerns are entirely irrelevant. Just like duress in restitution, the principle of necessity bears in mind the claimant's responsibility to act reasonably. Thus, restitution will be denied when the claimant's voluntariness is not undermined. Examples of which include situations where the claimant acted out of motives of self-interest rather than benevolently for the defendant, or where the claimant is not legally obliged to intervene in the circumstances. The comparison with necessity as an unjust factor shed light on the nature of duress in unjust enrichment. Restitution is granted primarily because the claimant's consent to pay is not freely given under the constraints of the necessitous circumstances. It does not matter whether there is wrongdoing on the part of the defendant.

Ample authority illustrates how duress can be found solely because of impaired intention alone, even in the absence of illegitimate pressure. In *CTN*, the supplier threatened to withdraw future credit facilities in the bona fide belief that the sum was owed without realising that the tobacco was not delivered. It seems that even though the supplier was in good faith, the buyer's intention could still be impaired. In *Williams v Roffey Bros & Nicholls Ltd*, the defendant agreed to carry out carpentry work on 27 flats for an agreed price. The plaintiff experienced financial difficulty since the agreed price was not sufficient for a profit to be made. Anxious that the refurbishment would not be completed on time, the defendant agreed to pay the plaintiff extra if they continued to refurbish the flats. The Court of Appeal found that there was no economic duress after considering the under-price in the original contract. While lack of consideration instead of economic duress was claimed in that case, this would be a case of economic duress in modern days, as acknowledged by the counsel for the defendant. However, the pressure was not illegitimate. The pressure came from the circumstance of a lack of practical alternatives since the carpentry work was half finished, and the only reasonable choice was to continue the carpentry work carried out by the same builders. The builders were only demanding extra payment as it was originally under-priced. It appears that beyond finding illegitimate pressure, there was the concern of fairness - the extra payment demanded was fair compared to the market price – hence, there was no duress.

Three-party duress cases further highlighted that duress is not concerned with the reprehensible conduct of the defendant. Although there are no relevant reported cases, theoretically, duress can be evoked against the third party. Even if it is a third party that places pressure upon the claimant to pay the defendant, there are no theoretical objections to allowing the claimant to recover the payment from the defendant on grounds of duress in unjust enrichment. This strongly suggests that restitution should be possible despite the defendant not acting illegitimately in unjust enrichment.

The comparison with similar unjust factors and duress *colore officii* suggests that impaired intention alone might be a sufficient normative reason for restitution in unjust enrichment. It may be argued that duress *colore officii* is only a policy-motivated category that should be considered separately. Yet, leading cases like *Great Western Railway Co v Sutton* analysed duress *colore officii* in terms of voluntariness and the existence of unjust factors. In *Steele v Williams*, the parish clerk, who was statutorily authorised to charge people for certified copies made from the parish register, unlawfully demanded the same payment to the plaintiff who did not want the certificates. The recovery of the payment was allowed. Baron Parke held that it was not a voluntary payment, as the plaintiff was told that he would have been banned from searching the register if the payment was not made. He then considered the defendant's conduct as 'That species of duress, viz. the refusal to allow the party to exercise his legal right, but *colore officii*'. As shown, duress *colore officii* is not entirely policy motivated. A lower threshold is imposed for the degree of illegitimacy due to the implicit pressure from a public authority.

Duress *colore officii* may seem to function narrowly as it operates in the specific circumstance where the payment demanded was made without authority. Nevertheless, a broader view of duress should be taken as the basis of restitution. *Duress colore officii* functions in the same way as duress, which can be rationalised through both the claimant-sided and the defendant-sided views. The bilateral nature of duress *colore officii* is reflected in Lord Goff's discussion in *Woolwich*. Lord Goff considered the ultra vires demand of payment by a public authority as an isolated category of compulsion, distinct from *colore officii* cases. It is not enough to argue that the combination of breach of duty and the inherent coercion in a public official's demand would render the payment involuntary and provide the basis for restitution. A taxpayer may submit to an ultra vires demand of tax payment with knowledge of all relevant facts but remains indifferent to whether or not he would be liable in law. In this case, it is not the involuntariness of the payment caused by compulsion that warrants restitution. Rather, *Woolwich* claims are based on constitutional grounds. Thus, the majority in *Woolwich* held that the fact that an ultra vires demand for payment made by a public authority is itself a good ground for restitution. In Lord Goff's words, money paid under the public authority's ultra vires demand is recoverable by the citizen 'as of right'.

To bring the claim to the door of *colore officii* cases, something beyond the implicit pressure of a demand made by persons in authority is required. There must be an element of involuntariness when the claimant made the payment: indifference or ignorance of all relevant facts would not be sufficient. In other words, there seems to be a requirement to at least meet the threshold of 'lack of practical alternatives' when the claimant is making the payment. Such a distinction between some *Woolwich* claims and duress *colore officii* reinforces the bilateral nature of duress cases. Yet, the task of meeting the threshold of illegitimate pressure required to characterise the payment as involuntary is not an onerous one. Similar to the unjust factor of necessity, involuntariness can be shown by the fact that the claimant was under pressure *in the particular circumstances*, regardless of the defendant's conduct.

- **Reforming Duress in Unjust Enrichment**

- Bringing back *Skeate*

One approach to establishing distinct tests for duress is to reinstate a similar position in *Skeate* regarding the distinction between money payments and contracts. Where there is a contract, the payment would not be readily recovered even if the transaction is entered into under illegitimate pressure. Where there is no contract, the surplus beyond the defendant's just claim will be more easily recovered in unjust enrichment. The distinction in *Skeate* is a useful starting point to determine the two different approaches to unjust enrichment and contract.

Beatson argued that such a distinction is logically flawed: in *Astley v Reynolds*, although there was no contract for the extra payment, there must have been an agreement to comply with the demand at some point in time, *scintilla temporis* (a notional instant in time). Yet, it is submitted that 'agreements to pay and payments' are not the same as 'money payments and contract'. Contracts are supported by consideration, whereas mere agreements are not. It seems that Beatson has conflated 'agreements to pay' with contracts.

- Assimilating the categories of duress in unjust enrichment

Lord Goff in *Woolwich Equitable Building Society v IRC* stressed that the categories of compulsion are open when stating the five main heads, namely duress to the person, duress of goods, illegitimate threats made to support a demand for payment beyond what is statutorily allowed, economic duress and illegitimate threats to persecute or publish information. Lawful act duress is recognised by *CTN Cash and Carry Ltd* but remains contested.

However, this article agrees with Beatson that there is no principled reason for making a distinction between the effect of different categories of duress, at least in unjust enrichment. The subcategorisation of duress is unnecessarily complicated and arbitrary for the purpose of unjust enrichment. While most claim that the threats of duress to the person are clearly wrongful, whereas non-physical threats may not be, non-physical coercion can be of similar gravity as physical coercion. A wrongful seizure of property can be as imminent as blackmailing a person. Lord Simon in *Lynch v DPP* accepted that an arbitrary line is drawn between threats to property and threats to the person as a result of 'experience and human valuation', which is 'far less acceptable in practice and far less justifiable in juristic theory'. He considered it just as arbitrary as drawing a line between murder as a principal in the first degree and murder as a principal in the second degree, which cannot be justified either morally or juridically.

As aforementioned, the differing normative foundations of contract law and unjust enrichment warrant differing treatments to duress in both contexts. It is argued that unjust enrichment demands a broader approach to serve its presumed functions. The law of unjust enrichment itself has developed from a narrow basis to a wide general principle that applies in all categories. The general principle of unjust enrichment was first recognised in *Lipkin Gorman v Karpnale Ltd*, and in light of the general principle of unjust enrichment, the unjust factors have been gradually broadened. The generous approach towards mistake shows that the law is willing to allow mistakes in broad circumstances by removing the classifications within mistake. This approach should be consistently applied in duress as a reflection of the general attitude of unjust enrichment law favouring a broad, unifying approach.

However, as noted, duress and mistake are normatively distinct and must be formulated to be kept distinct. In formulating a new unifying principle for duress, the threshold to establish duress should not be as low as that of mistake in unjust enrichment.

- A unifying principle

It is proposed to dissolve the arbitrary distinction between the different categories of duress in unjust enrichment, which aligns with the broader approach it favours. This article considers in both contract law and unjust enrichment, impaired intention and wrongful pressure are required to establish duress. The evaluation of consent is rooted in the law's expectation of a person's firmness in withstanding a threat, which is what Lord Denman termed as an 'ordinary degree of firmness'. The degree of the expected firmness depends on the degree or type of pressure applied to the claimant, suggesting the interconnectivity of the claimant-sided and defendant-sided principles. However, what is an 'ordinary degree of firmness' and what would go beyond? Contract law requires a higher degree of firmness which goes beyond the normal commercial pressure experienced in a free market. This is to accommodate the need for stability and finality in commercial transactions. Yet, where there is not a subsisting contract in play, a lower degree of firmness should be sufficient, given that contractual aims and relevant business needs are no longer the central concerns.

In unjust enrichment, duress should be conceived in broad terms. It is not about whether the pressure is lawful or not, or whether it is duress to the goods or to the person. As argued, such categorisations are arbitrary and incoherent. In Lord Devlin's terms in *Rookes v Barnard*, what matters to the plaintiff is not 'whether it is a physical club or an economic club, a tortious club or an otherwise illegal club', but the fact that a club has been used. The relevant question is whether the pressure is sufficient to induce the claimant to enter the transaction. It follows that the different approaches to causation depending on the different categories of duress should be rejected. In contract law, duress to the person is recognised as the most severe category of duress as it is concerned with human lives. Thus, 'a reason' causation would suffice. Economic duress has a higher threshold of causation since financial threats are understood as less severe than life-threatening situations. The test of 'significant cause' would be required. For duress in contract law, the definition of consent and pressure depends on the context and the circumstances. To achieve a more lenient approach, unjust enrichment should be regarded as a different context which demands a lower threshold of causation. It is submitted that the illegitimate pressure should at least be a 'but for' cause in inducing the claimant to enter into the contract. The 'but for' test strikes an appropriate balance between the defendant and the claimant's interests. It also brings the causative test for duress in unjust enrichment in line with that for mistake, which has adopted the 'but for' test.

While the two-stage test in *The Evia Luck* is appropriate in unjust enrichment, the threshold required for the claimant's consent should be adjusted. Given that duress in unjust enrichment is primarily claimant-sided, impaired intention should be highlighted as the more significant reasons for restitution. As such the subjective aspect of the test, i.e., whether the illegitimate pressure induces the claimant to enter into the contract, should be the primary focus of the test. The objective aspect, i.e., whether a reasonable person in society would consider it to be an unacceptable pressure, is less of a concern. In contract law, the objective aspect requires a higher degree of firmness which goes beyond the normal commercial pressure experienced in a free market. It has been argued that in unjust enrichment, this degree of firmness that is expected of the claimant is unnecessary and inappropriate. Nevertheless, some degree of objectivity is still necessary in evaluating the reasonableness of the claimant's claim of the existence of unacceptable pressure. It is posited that a standard of objective 'reasonableness' should be sufficient. This prevents the claimant from relying upon trivial and unreasonable pressure in making a restitution claim under duress.

Further, it is posited that the 'change of position' defence would sufficiently offset any injustices arising from the widened ambit of duress. The defence can plead the change of position defence if he can prove that his 'position is so changed that he will suffer an injustice if called upon to repay or repay in full'. In deciding the scope of the defence, the court has presently adopted a flexible approach in striking a fair balance between 'the claimant's interest in restitution', and 'the defendant's interest in being able to spend money as he wishes without having to worry about a claim being brought against him'. The defence even extends protection to nonpecuniary changes that caused the defendant to be in a worse off position. Given English law's flexible and broad approach towards change of position defence, in any event, any injustices arising from the broadened doctrine of duress will be sufficiently curbed.

The comparative insights from mistake, necessity and duress colore officii prove that circumstantial pressure that vitiates the claimant's consent would be a sufficient ground for restitution. As such, even though the pressure does not amount to one that is considered evil or morally reprehensible, restitution could be granted on grounds of duress in unjust enrichment. The proposed two-staged test has an intense focus on the initial reasons why the transfer of value is defective and warrants restitution: being under duress, the claimant's conferral of the enrichment does not give full effect to her autonomy. This claimant-sided approach brings the normative foundation of duress closer to that of mistake in unjust enrichment, which aims to vindicate the value of autonomy and choice-making.

- **CONCLUSION**

The default contract law position aims to strike a balance between upholding contracts and preventing improvident conduct where duress exists. Its stricter limits are justified by the need to preserve transactional security and reasonable expectations of contracting parties. Yet, founded on a different normative basis, duress in unjust enrichment warrants a more lenient approach in granting restitutionary relief. The law's ignorance of the differences of duress in unjust enrichment from its contract form has led to confusion and doctrinal incoherency, glossing over fundamental principles of unjust enrichment.

To award a restitutionary remedy on grounds of duress, the main task for the courts is to determine whether the claimant made the payment under illegitimate pressure, but not delving into the minutiae of the degree of defendant's reprehensibility. This claimant-sided approach is able to be reasoned by analogy to existing unjust factors, including the archetypal unjust factor of mistake, and the other few grounds of recovery that centres on the application of pressure to the claimant.

The emerging, unified body of the law of unjust enrichment favours a broad doctrine of duress. Redefining the ambit of duress in unjust enrichment will bring duress together with the other existing unjust factors, which clarifies the doctrinal relationship between the unjust factors and the normative foundation of unjust enrichment.

An Iterative Rabbit out of a Hat: Reflections on the Supreme Court's Decision in *Sara & Hossein v Blacks Outdoor Retail Ltd* [2023] UKSC 2

This piece was awarded the 'Excellence in Advocacy' Award

Akshat Pranesh and William Sanders

ABSTRACT

This case comment will examine the 2023 Supreme Court decision in *Sara & Hossein v Blacks*, which has considerable implications for the often-litigated area of contractual interpretation. *Sara* concerned a service charge clause in a commercial lease, with both parties advancing different interpretations. Unusually, the majority decision of the Supreme Court, delivered by Lord Hamblen JSC, rejected the interpretations advanced by both parties in favour of an entirely novel interpretation conceived by the court. This case comment will argue that this decision was wrongly made for three reasons: first, that the decision undermines the foundational principles of freedom of contract; second, that the language of the contract was erroneously disregarded; and finally, that the decision represents a problematic shift away from textualism and towards a focus on commercial contexts which derives from the decision in *Wood v Capita*. This creates significant legal uncertainty as to the approach adopted by the English courts when considering the construction of contracts. Ultimately, this paper will conclude that a conscious return to a focus on textualism is required to shore up the reliability of English contract interpretation and, through the provision of clarity, to stymie the marked trend of cases on this matter reaching courts of high authority.

Keywords: contract interpretation, textualism, commercial contexts

- INTRODUCTION

The decision in *Sara & Hossein Asset Holdings Ltd (a company incorporated in the British Virgin Islands) v Blacks Outdoor Retail Ltd* [2023] UKSC 2 is one of many cases concerning contractual interpretation to come before the courts in recent years. It will be argued here that, respectfully, the majority took a wrong turn in providing a solution which retrospectively rectified the parties' bargain. It will further be argued that the number of cases concerning contractual interpretation which come before the courts of high authority is attributable to the decision in *Wood v Capita Insurance Services Limited* [2017] UKSC 24, which, in our submission, marks a significant, and, with respect, problematic departure from the textual clarity offered by *Arnold v Britton and Others* [2015] UKSC 36 and the corpus of leading cases preceding it. When the next high-authority case inevitably arrives on this topic, the Supreme Court should take the opportunity to clarify the process of contractual interpretation and provide both lay parties and practitioners alike much needed clarity as to the process the court will adopt in construing a contract rather than simply the factors which will be taken into account; *Sara* demonstrates that the latter approach can yield dramatic and unpredictable outcomes.

- BACKGROUND FACTS

Sara concerns the interpretation of a clause in a lease regarding a service charge sum payable by a tenant, which reads as follows:

The landlord shall on each occasion furnish to the tenant as soon as practicable after such total cost and the sum payable by the tenant shall have been ascertained a certificate as to the amount of the total cost and the sum payable by the tenant and in the absence of manifest or mathematical error or fraud such certificate shall be conclusive.

The interpretation contended for on behalf of the landlord focused on understanding the language of the provision in its commercial context. It was argued that commercial reality favoured an interpretation which would allow the landlord to receive funds immediately, thereby alleviating cash flow, and, considering this purpose, it was unsurprising that, save for "manifest or mathematical error or fraud" (the permitted defences), the landlord's determination of the sums payable would be conclusive. This interpretation was described by the court as being "pay now, argue never," subject to the permitted defences.

In contrast, the interpretation argued for by the tenant focused on the factual matrix of the contract. It was contended that it would lack commercial sense to interpret the contract in such a way that allowed the landlord unilaterally to determine the sums payable by the tenant, becoming, as the Master in the High Court put it, "judge in his own cause". It focused on the context of other provisions within the contract too, notably a clause which provided for expert determination of any disputes concerned with the proportion of the landlord's costs payable by the tenant. The court characterised the tenant's interpretation as "argue now, pay later."

Unusually, the Supreme Court, with the lead judgment given by Lord Hamblen, favoured neither the 'pay now, argue never' interpretation of the landlord, nor the 'argue now, pay later' interpretation contended for by the tenant. Instead, they chose an interpretation that had been advanced by neither party in any of the courts below: a "pay now, argue later" interpretation which preserved the right of the landlord to receive funds immediately, alleviating cash flow pressures, but which simultaneously preserved the right to dispute the quantum and reasonableness of the sums payable after they had been paid, on grounds beyond the permitted defences. This so-called "iterative approach" is a tool used by the majority to fashion an outcome that it deems more satisfactory than the conclusion reached by a strict interpretation of the terms of the contract. In other words, the judgment champions the commercial context of contracts at the expense of the doctrine of textualism. In our contention, the Supreme Court is wrong to do so. This is for three reasons:

1. The decision in *Sara* represents a judicial excursion to rectify the parties' bargain, contravening the fundamental and commercially important principle of freedom of contract;
2. the majority judgment undervalues the decisive importance of the language chosen by the parties to contract; and
3. the court fails to clarify the process by which it construes commercial contracts, thereby undermining legal certainty.

• FREEDOM OF CONTRACT

It is a fundamental principle of the English Law of Contract that parties are free to agree (subject to specific legislation) whatever they wish. The courts should be slow to interfere with this bargain and historically have always been so. In the words of Lord Bingham, “legal policy favours the furtherance of international trade. Commercial men must be given the utmost liberty of contracting.” Wherever the courts are tasked with interpreting a contract, they must do so respecting the autonomy of the parties, and this is particularly the case when the parties are sophisticated commercial entities who engaged professional solicitors. We readily accept that whenever the courts favour a particular interpretation, they will per se confer a benefit to one side or the other; one party must win, and one party must lose. However, this process of interpretation must be guided by the intention to ascertain the objective nature of the parties’ agreement, not to speculate as to what might have made more sense in an inferential commercial context. In the case of *Sara*, that the parties’ contract produced in the view of the majority “surprising and uncommercial consequences” is irrelevant if that is what the parties have agreed; this is no justification to seek to mend the parties’ bargain. This principled grounding, notably promoted by the compelling dictum of Lord Neuberger PSC in *Arnold*, now appears to have been forgotten: “the mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language.”

In short, the interpretation of contracts is principally a process that must give effect to both the commercial reality and parties’ liberties, to “identify what the parties have agreed, not what the court thinks that they should have agreed.” Yet, the decision in *Sara* seems to forego these axioms, interpreting the contract in a way that was not advanced by the parties in any of the four courts in which the case was heard. Although this point alone is not conclusive, it is, in our contention, telling that the approach adopted by the Supreme Court was one that was entirely novel in the context of the litigation. In our submission, this makes it unlikely, even impossible, that this is what the parties objectively intended to agree. Furthermore, under “relevant background knowledge”, Lord Hamblen caveats that in *Sara*, the “parties are sophisticated commercial entities. The leases... prepared by solicitors.” However, it is respectfully submitted that this is of no moment; if the parties are sophisticated and legally represented, then this is all the more reason for the court to refrain from holding their hands.

Moreover, the language of the majority judgment, especially when rejecting the arguments advanced by both parties has a tone that is altogether mediatory, as if the court is attempting to reach a settlement or equitable solution which suits the parties rather than a decision as to the correct interpretation of the contract: “There is, however, an alternative interpretation that avoids all these difficulties.” The judgment goes on to note that by the court’s interpretation, “The landlord’s cashflow position is therefore protected, whilst the tenant is not deprived of the possibility of pursuing arguable claims.” It is difficult to reconcile these dicta with those in *Arnold*; just because a particular clause of a contract works out badly for a party, this is no reason to depart from the contractual language. Although it is a well-worn adage, we respectfully suggest that if something sounds too good to be true, it probably is. The presentation of an unexpected panacea, an interpretative deus ex machina that delivers a settlement unlooked for by the parties, instinctively inspires scepticism.

• THE IMPORTANCE OF LANGUAGE

The language of the contract represents, concretely, the terms in which both sides have agreed to be bound. Indeed, as Lord Neuberger writes in *Arnold*: “unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract.” In our contention, the Supreme Court in *Sara* fails to give due weight to the importance of the parties’ language, a point persuasively taken by Lord Briggs JSC in his dissent:

It is well-settled that the uncommerciality of the prima facie meaning of contractual words only yields to a more commercial alternative if there is some basis in the language of the contract as a peg upon which that alternative can properly be hung.

In our view, the majority judgment fails to provide such a "peg"; the words "shall be conclusive" mean exactly that. Respectfully, it was a mistake for the majority to be concerned that the contract "does not state how it is to be conclusive." Conclusiveness as a concept is, by its very nature, definite, and does not allow grounds for dispute unless they are explicitly stated, as indeed the permitted defences are. Moreover, in our contention the statement that the contract "does not state how it is to be conclusive" is, with respect, incorrect; the certificate in the clause is expressly described to be "as to the amount of the total cost and the sum payable by the tenant." It stands to reason that the conclusiveness relates to these factors, too; again, interpretation is not a tool to rescue parties from a bad bargain. Lord Sumption JSC, delivering the Harris Society Annual Lecture on 7 May 2017, rightly suggested that "we have truly reached the ultimate point which the flexibility of language can attain, when we find that in a court of law it means precisely the opposite of what it says." In our contention, such an interpretation of the word "conclusive" veers close to this nadir. The conclusion taken by the majority, that the certificate was 'conclusive' solely to payment, but not to liability, finds no basis in the language of the clause, and implying such a term is out of the question.

- THE PROCESS OF CONTRACTUAL INTERPRETATION

Sara, like *Wood* and *The Ocean Neptune* [2018] EWHC 163 (Comm), states the list of authorities relevant to contractual interpretation, but glosses over important points of distinction between these cases. In particular, our contention is that *Wood* marks a line in the sand, containing within it influential dicta that have continued to spawn uncertainty, at the highest levels of court, about the process of contractual interpretation. Giving the lead judgment in *Wood*, Lord Hodge JSC writes:

To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.

In his recent address to the Universiti Islam Sultan Shariff Ali on 27 February 2025, Lord Hodge stated that he hoped *Wood*, in succession from *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50 and *Arnold*, has provided "clarity to the modern approach to contractual interpretation in English law." However, in our contention the above dictum in *Wood*, innocuous enough from the perspective of theoretical principle, causes, and has caused, issues when applied in practice.

The reasoning for this is simple enough. Whichever element one considers first, be that the language of the contract or the commercial context, this leads to a presumption which then must be balanced by the consideration of the other factor at hand: see *passim* references to *Arnold* throughout. In our view, in contrast to that of Lord Hodge and the majority judgment in *Sara*, these two factors are not created equal: the parties have agreed to be bound by the language, whereas the commercial context ought to be inferred as an aid to interpretation, not to govern it. This point, which is unambiguous in *Arnold*, seems to have been obscured in the slew of more recent authorities.

In *Sara*, it is evident that, influenced by *Wood*, the majority took the approach of first considering an interpretation which would make commercial sense, and then attempted to fit this with the language of the contract. Lord Hamblen writes: "Adopting an iterative approach, this interpretation is consistent with the contractual wording, it enables all the provisions of the leases to fit and work together satisfactorily, and it avoids surprising implications and uncommercial consequences." We disagree, for the reasons above, that such an interpretation is consistent with the contractual wording, but this passage, we submit, demonstrates that His Lordship's primary concern is the commercial viability of the interpretation, not the language used by the parties. Instead, we agree with Lord Briggs, dissenting, that the majority's interpretation is "not to be derived by any process of construction of the terms of Schedule 6 actually agreed"; the majority view is an invention which prioritises the inference of commercial context over the reality of contractual language. A return to textualism is a reacknowledgement of the truth that that which is under the parties' control must be the critical factor.

The Supreme Court's failure in *Sara* to recognise that *Wood* signals a deviation from the language-focused principles established in *Arnold* is not without consequence. The difference in approach between the majority judgment and the dissent is, we submit, attributable to whether the first consideration when construing the contract is the language used or the commercial context. The outcomes are diametrically opposite. In our view, it would contravene the principles set out in *Arnold* to commence the process of construction with a consideration of the commercial context and latterly manipulate the language accordingly, especially given that it is the only element wholly within the control of the parties.

Moreover, if the approach of the English Courts going forward is to start by inferring the commercial context and dealing with the language of the clause afterwards, it seems unprincipled that pre-contractual negotiations remain excluded; surely the courts, when making such an inference, should consider all the information available, regardless of its subjectivity? Should the courts seek to maintain the appearance of attempting to ascertain the objective intention of the contracting parties, the starting point must always be the language; it is only upon this certain foundation that hypotheses can be built.

- CONCLUSION

Ultimately, a reiteration of the strength of textualism is required to ensure that the certainty which makes English law so attractive is preserved. Parties trust the English Law of Contract in the knowledge that their bargain will be adjudicated upon but not interfered with; decisions such as *Sara* undermine the foundations of this certainty considerably. One way or another, the question of how contracts ought to be interpreted appears to be repeated, but, the courts of highest authority seemingly fail to find a definitive answer. *Arnold*, *Wood*, *Sara*: the succession of these cases may ostensibly appear to chart a consistent approach that values certainty, but this appearance is deceptive. We suggest that the very fact that these cases retread virtually the same issues so close to one another is a symptom not of new strains of interpretative difficulty—which in factual terms are rarely novel—but of a misdiagnosis on the part of the courts to identify a conclusive and certain procedure for treating contract interpretation and to then hold to it.

We advocate for the courts to provide certainty in this regard sooner rather than later, not least because of the importance that contractual interpretation has for wider commercial litigation; it is the central maypole around which connected issues dance. The aforementioned misdiagnosis is perhaps rooted in a jurisprudential shift, emblematic in *Sara*, that increasingly obscures the focus of the hunt for certainty with a search to provide satisfactory outcomes for both parties and the courts alike. Steering towards a solution that prioritises satisfaction is to aim for a false light that sees as the basis of the words and meanings of contracts the uncertainties of vague commercial contexts. We predict that the courts will forever need to revisit this issue so long as interpretation is to be guided by contextualism, and it is only a matter of time before cases such as *Sara* reappear before the courts of highest authority. Practically, as more authority and precedent moves in this direction, the judgments of lower courts will need to be increasingly supervised if parties may always challenge them on the basis that the context of the contract *might* lend itself to a different outcome, and this other outcome *might* be construed as more satisfactory.

Sudan v United Arab Emirates – Exploring Reservations to the Genocide Convention

By Mohammad Armanur Rahman

Introduction:

In March 2025, Sudan instituted proceedings against the United Arab Emirates under the Genocide Convention, accusing them of state responsibility for genocide in Darfur through their alleged funding and support of the Rapid Support Forces (RSF). The Court heard the case in April 2025.

The contentious issue in this case was the UAE's reservation to Article IX of the Genocide Convention, (hereinafter "the Convention"), which read: *"The Government of the State of the United Arab Emirates (…) makes a reservation with respect to article 9 thereof concerning the submission of disputes arising between the Contracting Parties relating to the interpretation, application or fulfilment of this Convention, to the International Court of Justice, at the request of any of the parties to the dispute"*.

In its Order for Provisional Measures in May 2025, the International Court of Justice (ICJ) held that it lacked jurisdiction in this case due to this reservation appended by the UAE to Article IX. As a result, it found it does not have *prima facie* jurisdiction to indicate provisional measures and, due to the manifest absence of jurisdiction, it could not hear the case, therefore removing it from the General List.

At the time of writing, the RSF has seized control of the city of El Fasher in Darfur, where reports of mass atrocities against the civilian population are coming out. This is taking place more than 6 months after the judgment reached by the ICJ.

This has sparked debates on whether reservations to the Convention, with its "purely humanitarian and civilising purpose", which seeks to prevent and punish a heinous atrocity crime such as genocide, are acceptable. This article will explore the law and guidelines around reservation governing treaty reservations, focusing on the Court's treatment of reservations to Article IX of the Convention, and examining their operation in the *Sudan Genocide* case. It will ultimately argue that, given the unparalleled, sensitive nature of the subject matter and with declining confidence for international law, there needs to be reform in the current approach.

Reservations in International Law

According to Article 19 of the Vienna Convention on the Law of Treaties, a State may, when concluding a treaty, formulate a reservation to a treaty unless (a) the reservation is prohibited by the treaty or; (b) the treaty provides that only specific reservations be made, which do not include the reservation in question or; (c) the reservation is incompatible with the object and purpose of the treaty. In the case of the Genocide Convention, Article 19(c) is often invoked to determine whether a reservation is valid or not.

The ICJ in *Reservations to the Convention of the Prevention and Punishment of Genocide* [1951] found that reservations appended to the Genocide Convention are valid, provided they do not undermine the 'raison d'être' of the Convention (the object and purpose). Article IX of the Convention is a compromissory clause by which States can access the court to adjudicate on matters concerning the crime of genocide. The question emerges whether Article IX is considered to be part of the raison d'être of the Convention.

The Court has given legal effect to reservations to Article IX in the past. In *Legality of Use of Force (Spain)* and *Legality of Use of Force (United States)*, it held that the reservations of Spain and the United States, respectively, exclude the Court from its jurisdiction. Similarly, the Court in *Armed Activities on the Territory of the Congo (DRC v Rwanda)* [2006] held that Rwanda's reservation, where it stated "The Rwandese Republic does not consider itself as bound by Article IX", had the effect of excluding the Court from jurisdiction and, when considering questions of whether the reservation goes against the object and purpose of the Convention, was not invalid as it merely "bears on the jurisdiction" of the Court and does not affect "substantive obligations relating to acts of genocide themselves" under the Convention.

It is worth noting that reservations to Article IX are not confined to a single context but have been formulated in varying terms by several States, including through requirements of specific consent, with the practical consequence of insulating questions of genocide from compulsory adjudication.

The Court has, from these cases and its jurisprudence, considered Article IX not to go against the raison d'être of the Convention, essentially meaning that States can, and are well within their rights, to exclude themselves from accountability over matters relating to Genocide. This is a conundrum addressed in the Joint Separate Opinion by Judges Higgins, Kooijmans, Elaraby, Owada and Simma, appended to the *Rwanda* Judgment, where the fact that States may choose whether to consent to the Court adjudicating claims of genocide was considered a "matter for serious concern". The judges further noted that a State doing so shows the world "scant confidence" that it would "never ever" commit such a crime. This harsh conclusion, reached by the Judges, echoes legitimate concerns expressed from and since the 1951 Advisory Opinion as reservations, *prima facie* at least, exclude a State from its state responsibility for the crime of genocide and its accountability for such a crime. States, in appending such a reservation to the Convention, would not have any purpose for doing so but to escape accountability. This is especially problematic as seen from the above cases, and when the case concerns an active situation, as we will see in *Sudan*.

Sudan Genocide Case

Since *Rwanda,* the International Law Commission (ILC) introduced its Guidelines on Reservations. According to guideline 4.2.6, a reservation is interpreted in good faith, taking into account the "intention of its author" as reflected primarily in the "text of the reservation, as well as the object and purpose of the treaty and the circumstances" in which the reservation was formulated.

In the proceedings, Sudan argued that the UAE's reservation was formulated in a vague and ambiguous way that it is capable, at least *prima facie*, of being interpreted other than a statement that the UAE does not consider itself bound by Article IX with respect to the issue of state responsibility. It draws comparison to the reservations the Court held in the past has excluded jurisdiction, such as Spain, the United States and Rwanda, arguing that these reservations were unambiguous and clear in its wording compared to the UAE. It noted the omission of the key wording on "the responsibility of a State for genocide" arguing that the UAE, in the circumstances when appending their reservation in 2005, could have looked at state practice and borrowed these examples, but instead they chose to write it in an ambiguous, vague manner and seek to rewrite their reservation "20 years later." However, it was clear that the UAE's reservation has not been appended in any way other than to exclude the Court's jurisdiction and its state responsibility despite the seemingly vague statement.

Moreover, if accepted that the reservation, *prima facie*, had the effect of excluding jurisdiction, Sudan argued that the Court must consider that the reservation goes against the object and purpose of the Convention and is therefore incompatible. They argue through the fact that the Court plays a "pivotal role" in giving effect to the object and purposes of the Convention to "safeguard the existence of certain human groups". Article IX, in allowing States to access, or depend upon, the Court, in fulfilling the Convention, is considered a "unique feature" among compromissory clauses in "conventions concerning human rights" such that it should be considered to form part of the raison d'être of the Treaty. Furthermore, Sudan pointed to state practice showing that 12 States since *Rwanda* had withdrawn their reservations and a several States had objected to such reservations, characterising them as incompatible with the object and purpose. Moreover, they argued that Sudan's lack of objection to the UAE's reservation is irrelevant, especially considering that no other State has objected to that reservation. This was a test for the Court to determine whether things had changed since *Rwanda* and, subsequently, the approach taken towards reservations to the Convention.

The Court held that the UAE's reservation is formulated in clear terms as it concerns "the submission of disputes . . . relating to the interpretation, application and fulfilment of [the] Convention, to the International Court of Justice". It further held that the omission of the key wording on 'the responsibility of a State for genocide' does not "result in any uncertainty as to the effects of that reservation".

In respect to the incompatibility of the reservation, the Court held, owing to the finding that reservations are not prohibited and it having legal effect in its jurisprudence, the UAE's reservation was not incompatible with the object and purpose of the Convention as, in identical reasoning to *Rwanda*, it merely "bears on the jurisdiction of the Court" and does not affect "substantive obligations" relating to genocide.

Almost 20 years after *Rwanda*, using identical words from that Judgment indicates that the Court feels that the status quo should be maintained, despite developments in legal doctrine and state practice. This Judgment has reignited a crucial debate on the compatibility of reservations to Article IX of the Convention. Although the Court emphasised that regardless of jurisdiction, States are required to comply with their obligations and remain responsible for acts attributable to them, the order to refuse Provisional Measures and to strike the case out of the General List severely risks protecting the plausible rights of a group and to hold a State responsible for its commission or aid and abetting of an alleged genocide in Sudan.

This is a sentiment shared in the Opinions appended to the Judgment, almost all are dissenting. In the Joint Opinion, Judges Bhandari, Robeldo, Cleveland, Tladi and Judge *ad hoc* Simma opined that the Court essentially made a preliminary objections judgment in a provisional measures judgment, and it was 'inappropriate' to rule definitively on jurisdiction because "the urgency and seriousness of a situation compel an applicant to make a request for the indication of provisional measures."

Judge *ad hoc* Simma comes out strongly on the matter of reservations as a whole in his Separate Opinion, considering that the UAE's reservation goes to the "very 'raison d'être' of the Convention", opining that "Article IX of the Genocide Convention has entrusted the Court with a task that ought to be supported to the greatest measure", adding that reservations must be regarded as "serious obstacles on this path" and a "disgrace to the States parties concerned." It also opines that there is "much more law and legal policy to consider than at the time of *Rwanda*" and points to the ILC's commentary on guideline 3.5.7 which "leaves a door open" to the argument that reservations to Article IX can be contrary to an "essential provision of the Convention." By virtue of developments in law since *Rwanda*, according to Simma, the status quo cannot be maintained, and the matter must be examined to reach a different conclusion.

Reflections - Where do we go from here?

As established above, it is becoming evidently clear that reservations to Article IX are a problem in contemporary international law and may go as far as hindering the credibility of the Genocide Convention if States are allowed to bypass accountability.

For an outside observer, there is no compelling reason why a State may choose to exclude accountability for genocide and, to borrow the words of the *Rwanda* Joint Opinion, doing so gives 'scant confidence' that the State would never ever commit the heinous crime of genocide. This therefore begs the question, whether the Court should revisit its approach and consider Article IX as a provision from which States cannot derogate.

Indeed, the Convention is not just any internationally agreed legal instrument but one that seeks to safeguard the existence of human groups, protecting them from threats to their existence. Signed after the world had just seen the horrors of the Holocaust, the Convention intended to prevent something like this happening again, whether it succeeded or not however is a matter of debate. Further to the Convention's purpose, it introduced a clause by which States can be held to account over alleged genocide and where the rights of a group can be protected.

The Convention concerns a peremptory norm (*jus cogens*) which is defined in Article 53 VCLT as a "norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted". Indeed, the Court has recognised in *The Gambia v Myanmar* [2020] and affirmed in the more recent *South Africa v Israel* [2024], there is a "correlation" between the rights of groups protected under the Convention, "the obligations incumbent on States parties thereto", and the right of any State party to "seek compliance therewith by another State party". This recognition of correlation supports the view of Article IX constituting the raison d'être of the Convention. Article IX was formulated to ensure States remain compliant with their obligations under the Convention and not to go near committing an atrocity crime as heinous as the crime of genocide.

As the Convention concerns a peremptory norm as big as the crime of genocide, from which no State can derogate from, reservations to any provision of the Convention including Article IX should be considered incompatible. Such reservations may as well be interpreted as the State considering itself exempt from their own obligations to 'prevent and punish' the crime of genocide by rejecting, what is in many ways, an accountability mechanism.

As expressed by the Joint Opinion in *Rwanda*, this is a matter for the courts to revisit, who had the opportunity to revisit this matter in *Sudan*. However, unfortunately it, in the words of Judge *ad hoc* Simma, missed a “significant opportunity” to give this matter the “judicial attention” deserved.

To ensure that international law is effective in preventing and punishing violations of a peremptory norm like genocide, this issue must be revisited, and actions must be taken by States and international bodies. Ever since *The Gambia v Myanmar* affirmed that any State Party can bring a case against another State for breaches of obligations, *erga omnes partes,* under the Convention, an increasing number of States are bringing cases before the ICJ to hold States accountable for their breach of obligations *erga omnes* under the Convention.

Things have changed since *Rwanda*. In recent years, an increasing number of States have sought to engage the ICJ in relation to alleged breaches of the Convention, including through reliance on Article IX and the *erga omnes partes* character of the obligations it establishes. In this context, the issue of reservations becomes a vital one and it raises a question, according to Gupta, whether “procedural technicalities” such as jurisdiction should be permitted to obstruct the “universal and foundational international commitment to prevent and punish genocide”. Where the Court declines jurisdiction on such grounds, there is a real risk that allegations of genocide, present or future, may escape judicial scrutiny, leaving accountability absent until such time as it becomes too late.

Concerns about the ICJ exercising jurisdiction without a State’s consent are often framed in terms of sovereignty, a principle that is reflected in international law through the permissibility of treaty reservations, including on compromissory clauses. These mechanisms are intended to preserve sovereign authority, yet they also illuminate the structural limits of international adjudication when applied to obligations *erga omnes partes* under the Convention.

The Court does not have any way of enforcing its rulings, except potentially through the UN Security Council. The closest form of enforcement is indirect, when the Court finds a State to be in breach of international law. If a State is found to have committed genocide by the Court, the finding will politically compel the international community to act, even if the State in question does not comply with the ruling and measures ordered. This operates through the accountability mechanism provided by Article IX, which enables the Court to adjudicate over grave matters such as genocide.

Confidence in international law is arguably declining; the operation of the Court’s jurisdiction alongside the permissibility of reservations to the Convention illustrates a broader erosion of confidence in international law, within which faith in international legal accountability is progressively diminishing.

This issue must be revisited to ensure the efficacy of the Genocide Convention by considering Article IX to form part of the object and purpose of this vital legal instrument, looking at the ILC Guidelines and state practice, and ultimately stop States from bypassing accountability for their breach of *erga omnes* obligations under the Convention to protect and safeguard the rights and existences of certain human groups.

Conclusion

This article has explored reservations in international law, how the Court has approached it and how the Court approached this matter in *Sudan*. Through this exploration, this article has concluded that the current position, unchanged almost 20 years after *Rwanda*, is problematic and it risks impeding the efficacy of the Genocide

Convention designed to stop and hold States to account over their commission, support, aid, and so on of the crime of Genocide. This matter must therefore be revisited and given adequate 'judicial attention' to ensure that States cannot escape responsibility for acts under the Convention.

VOLUME VIII

Crypto, Custody, and Collapse: What FTX Teaches Us About Cross-Border Insolvency

Lucy Heap

Abstract

The collapse of FTX exposed deep structural gaps in how insolvency regimes handle digital assets, custodial arrangements, and cross-border coordination. This article examines the FTX proceedings as a case study in the intersection between cryptocurrency markets and transnational insolvency law. It explores the jurisdictional fragmentation across the Bahamas, the United States, and other creditor jurisdictions; the challenges of asset tracing and recovery in a blockchain context; and the inadequacy of current international insolvency frameworks, including the UNCITRAL Model Law, to address crypto-specific realities. The article argues that the FTX collapse underscores the urgent need for legal harmonisation, improved recognition mechanisms for digital assets, and bespoke rules for custodial insolvencies in the digital economy. To address these deficiencies, this article proposes a Lex Cryptographica Insolvency Framework (LCIF), centred on the concept of the Centre of Cryptographic Control (CCC), which aligns jurisdictional authority with the technical locus of power over digital assets. The framework offers a pathway for harmonising cross-border insolvency law with the realities of decentralised digital finance.

Introduction

The collapse of cryptocurrency exchange FTX in late 2022 precipitated overlapping insolvency proceedings across multiple jurisdictions, most notably the United States and the Bahamas, raising profound questions for cross-border insolvency law. FTX, formerly a major crypto trading platform valued at $32 billion at its peak, filed for Chapter 11 in Delaware on 11 November 2022, while its Bahamian-incorporated affiliate, FTX Digital Markets Ltd., went into provisional liquidation in Nassau almost simultaneously. This unprecedented global footprint of a crypto-exchange insolvency has underscored issues of jurisdiction, asset custody, and international cooperation. As one commentator observes, FTX's fall has stoked conversation regarding the administration of cross-border cryptocurrency insolvencies and may therefore serve as a roadmap for future coordination among courts and regulators around the world.

The insolvency revealed systemic failures operating at three distinct levels: the legal architecture of cross-border insolvency itself; the conceptual inadequacy of traditional property law categories when applied to digital assets; and the institutional capacity of national courts to assert control over deterritorialised financial systems. Whereas prior cryptocurrency insolvencies including Mt. Gox (2014), QuadrigaCX (2019), and Celsius Network (2022) were characterised as isolated incidents or market failures, the FTX collapse appeared to implicate entire frameworks of international cooperation. The competing claims of jurisdiction, the impossibility of segregating customer assets from proprietary holdings, and the transnational distribution of both operators and creditors created a perfect storm for traditional insolvency law.

This article proceeds through eight parts. Part I examines the architecture of FTX and the origins of jurisdictional fragmentation. Part II develops the argument that the concept of centre of main interests (COMI) has collapsed under technological and operational strain, necessitating a functional alternative: the Centre of Cryptographic Control. Part III addresses the problem of custodial indeterminacy and the inadequacy of traditional property law concepts. Part IV analyses the failure of cooperation between the Bahamian and United States proceedings, with particular reference to recognition mechanisms under Chapter 15 of the United States Bankruptcy Code. Part V examines asset tracing, forensic analysis, and the limits of blockchain transparency. Part VI proposes a comprehensive alternative: the Lex Cryptographica Insolvency Framework (LCIF). Part VII explores the normative, institutional, and sovereignty implications of such a framework. Part VIII concludes by outlining a roadmap for international reform and the codification of digital asset insolvency principles.

Part I: The Architecture of FTX and the Cross-Border Problem

A. The Structure of the Insolvency Proceedings

The insolvency of FTX Trading Ltd represents one of the most complex corporate failures in modern financial history. On 11 November 2022, FTX Trading Ltd and approximately 130 affiliated entities filed voluntary petitions for relief under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware. On the same day, the Securities Commission of The Bahamas placed FTX Digital Markets Ltd, a Bahamian-incorporated subsidiary, into provisional liquidation before the Supreme Court of The Bahamas. These simultaneous proceedings immediately produced competing claims to jurisdictional control.

The United States court, guided by the principles of the UNCITRAL Model Law on Cross-Border Insolvency (MLCBI), treated the Delaware proceedings as the primary forum for global asset administration. The court reasoned that FTX Trading Ltd, as the parent entity and primary operating company, possessed the centre of main interests (COMI) within the United States, given that its operational headquarters, strategic decision-making, and creditor engagement occurred primarily in Miami and the District of Delaware. The Bahamian liquidators, by contrast, asserted that all digital assets held by FTX Digital Markets Ltd, the entity that directly maintained customer wallets and exchange infrastructure, were situated within The Bahamas and subject to its domestic law. They further contended that as the licensed regulated entity, FTX Digital Markets possessed a stronger claim to COMI, having been incorporated and regulated under the Digital Assets and Registered Exchanges Act 2020.

These dual filings created what Janis Sarra has termed "the perfect jurisdictional storm," where the absence of a clear situs for digital assets rendered both courts simultaneously competent yet practically powerless. The

Delaware court's insolvency estate encompassed more than one million creditors located in over 100 jurisdictions, while the Bahamian liquidators sought Chapter 15 recognition to enforce their claims in the United States. Yet neither forum possessed adequate conceptual or technical tools to coordinate its respective powers or to allocate control over the digital assets at the heart of the dispute.

B. Corporate Structure and Regulatory Arbitrage

The structure of the FTX Group amplified the jurisdictional conflict. The corporate web comprised entities registered across the Bahamas, Antigua, Hong Kong, Singapore, Switzerland, and the United States, many of which had overlapping operational functions. Scholarly analysis has described FTX as a "jurisdictional labyrinth" in which the legal personhood of each subsidiary was deliberately fragmented to exploit regulatory asymmetries. FTX Trading Ltd operated as a cryptocurrency derivatives platform and market-maker; FTX Digital Markets Ltd held customer deposits and functioned as a regulated exchange; Alameda Research Ltd, nominally a proprietary trading firm, was in fact a shadow subsidiary that misappropriated customer funds; and multiple shell entities distributed operational risk across favourable tax and regulatory regimes.

This architectural choice was not merely a matter of tax optimisation, though that played a role. More fundamentally, it represented an exploitation of the absence of harmonised cross-border regulation of digital asset custodians. By segmenting operations across jurisdictions with different regulatory requirements, FTX was able to operate without the compliance infrastructure that would have been necessary in a single jurisdiction. The Bahamas, in particular, had enacted a permissive regulatory regime for digital assets through the Digital Assets and Registered Exchanges Act 2020, which provided limited prudential oversight and allowed the commingling of customer and proprietary funds.

C. The Problem of Asset Control

At the centre of the contest lay the problem of asset control. FTX's internal structure blurred the line between exchange, custodian, and proprietary trader. Customer funds were pooled into omnibus wallets rather than segregated accounts, and private keys were managed through a small circle of executives with discretionary access. The UK Law Commission, in its Final Report on Digital Assets, has observed that such arrangements produce "custodial indeterminacy," where neither title nor possession can be clearly allocated among participants. In the FTX case, this indeterminacy had catastrophic legal implications. Once insolvency commenced, there was no definitive mechanism to identify which assets were held on trust for customers, which belonged to the debtor estate, or which were already dissipated through related entities such as Alameda Research Ltd in this instance with FTX.

The problem was not simply evidentiary but conceptual. As Primavera De Filippi and Aaron Wright explain, blockchain transactions do not map neatly onto traditional notions of ownership and possession because control is exercised through private keys rather than legal documentation. The ability to transfer or freeze assets depends on cryptographic access rather than judicial order. Consequently, both the Bahamian and American courts were attempting to assert control over assets that were, in a technical sense, self-governing and globally distributed.

Dirk A. Zetzsche, Johannes Sinnig, and Aleksandra Nikolakopoulou note that such situations challenge the very foundation of insolvency law, which presupposes the existence of an identifiable debtor estate and a territorial nexus for judicial administration. The FTX collapse thus exposed a gap between the law's territorial assumptions and the deterritorial logic of blockchain networks. While Chapter 11 proceedings sought to consolidate control through centralised administration, the digital assets remained dispersed across multiple blockchains, some hosted by validators in non-cooperative jurisdictions. Efforts to repatriate or freeze assets depended on cooperation from third-party exchanges, many of which were unregulated or beyond the effective reach of the courts. As Matthias Lehmann concludes, FTX demonstrated that digital assets "resist judicial consolidation" and that cross-border insolvency in this field cannot rely solely on comity or recognition.

This Part therefore sets the stage for the article's central argument: the FTX proceedings reveal that control of digital assets does not correspond to incorporation, registration, or place of management, but to the locus of cryptographic control.

The subsequent section will show how this insight destabilises the traditional concept of the centre of main interests and demands the introduction of a new analytical category: the Centre of Cryptographic Control.

Part II: Custody, Control, and the Centre of Cryptographic Control

A. The Collapse of COMI as an Organising Principle

The FTX insolvency proceedings exposed the limits of the traditional concept of the Centre of Main Interests, or COMI, as the organising principle of cross-border insolvency law. Under Article 2(b) of the UNCITRAL Model Law on Cross-Border Insolvency, COMI refers to "the place where the debtor conducts the administration of its interests on a regular basis and is therefore ascertainable by third parties." In conventional cases involving tangible assets or centralised management, COMI functions as a proxy for the debtor's operational headquarters and the locus of creditor expectations. Yet in the context of decentralisd digital enterprises such as FTX, this concept collapses under the weight of technological deterritoriality.

The firm's operational, technological, and custodial infrastructures were dispersed across continents and blockchains, rendering any attempt to assign a single COMI both artificial and legally incoherent. Neither the Delaware court nor the Bahamian Supreme Court could claim a principled basis for its jurisdictional assertion. The former relied on management and creditor engagement; the latter on incorporation and regulatory licensing. Yet neither of these traditional proxies accurately captured where control over the debtor's digital estate actually resided.

As Janis Sarra notes, the assumption that COMI must be geographically fixed is untenable when key decision-making and asset custody are mediated by distributed ledgers rather than physical offices. The problem is not merely one of jurisdictional competition but of conceptual mismatch. COMI presupposes a territorial centre; yet cryptocurrency exchanges operate as globally distributed systems where "headquarters" exist largely as a legal fiction.

B. Implications for Judicial Cooperation and Recognition

The collapse of COMI in the FTX proceedings also underscores the inadequacy of current judicial cooperation mechanisms. Chapter 15 of the United States Bankruptcy Code, which implements the Model Law, presupposes the existence of a foreign main proceeding capable of recognition. In the absence of a definable COMI, the process of recognition becomes indeterminate, as demonstrated by the competing petitions filed by FTX Trading Ltd and FTX Digital Markets Ltd in 2022. This legal vacuum risks duplicative administration and inconsistent treatment of creditors.

Roy Goode warns that such fragmentation erodes the fundamental objective of insolvency law, which is the collective and equitable distribution of assets. The universalist principle, which has guided cross-border insolvency since at least the 19th century, presupposes a rational allocation of jurisdiction and cooperation among courts. The FTX case threatened to undermine this principle precisely because no coherent criterion existed for allocating primary jurisdiction among competing forums.

C. Comparative Precedent

Comparative experience reinforces these concerns. The liquidation of Mt. Gox Co. Ltd in Japan in 2014 and the subsequent proceedings in the United States revealed similar conflicts over COMI and asset situs. The collapse of QuadrigaCX in Canada in 2019 likewise illustrated the difficulty of asserting jurisdiction over assets held on foreign exchanges. The bankruptcy of Celsius Network in 2022 similarly fragmented across the United States and various state courts, with disagreement over whether customer deposits constituted property of the estate. Each case demonstrates that digital asset insolvencies are inherently multi-sovereign phenomena that challenge the territorial assumptions embedded in existing legal frameworks.

Therefore, this Part contends that the persistence of COMI as the organising principle of cross-border insolvency is unsustainable in the digital economy. CCC provides a more accurate and functional nexus for jurisdictional determination by focusing on the technical and operational locus of power rather than on formal incorporation. The framework would align cross-border insolvency law with the realities of how digital assets are actually controlled and transferred.

D. Toward the Centre of Cryptographic Control (CCC)

To address this theoretical impasse, scholars have proposed alternative jurisdictional anchors for digital asset insolvency. Nicolais Remolina, Ángela Gurrea Martinez, and David Liu argue for a functional approach based on the "centre of control"where access to private keys and exchange infrastructure is exercised. Similarly, Zetzsche, Sinnig, and Nikolakopoulou contend that authority over digital assets should follow the locus of key management rather than incorporation.

Building on this scholarship, the present article introduces the concept of the Centre of Cryptographic Control (CCC) as a doctrinal successor to COMI. The CCC identifies the jurisdiction in which cryptographic authority over digital assets is substantively exercised, that is, where multi-signature access, smart contract governance, or oracle verification is controlled. This reframing aligns jurisdiction with technological reality and offers a coherent foundation for determining the main proceedings in digital insolvencies.

Under the CCC framework, priority attaches to the jurisdiction where the infrastructure necessary to initiate or prevent on-chain transfers is located or operated. This may include the location where private key management systems are maintained, where validator nodes are hosted, where multi-signature custody protocols are administered, or where oracle services that govern asset transfers are provided. The CCC is thus a functionalist criterion that privileges effective control over formal status.

The advantage of the CCC over COMI lies in its alignment with the technical reality of digital asset systems. In traditional corporate insolvency, the "centre of management" could be identified through reference to board meetings, executive offices, and administrative records. These markers remain visible and verifiable. In digital asset markets, by contrast, operational decisions often occur through code, automated protocols, and distributed consensus mechanisms. The CCC reorients legal doctrine to account for these technological realities.

Part III: Custodial Indeterminacy and the Limits of Traditional Property Law

A. The Breakdown of Custody and Possession

Besides the aforementioned issue of Custody, Control with the COMI concept, at the core of the FTX collapse lies another problem: digital asset custody and the extent to which existing legal categories can accommodate cryptographically controlled property. Traditional insolvency frameworks rely on clear delineations between ownership, possession, and custody, yet these concepts lose coherence in the context of blockchain-based systems. In FTX, customer assets were held in omnibus wallets without segregation, private keys were distributed among a small set of insiders, and internal records did not correspond to on-chain transactions. The result was a breakdown of the legal categories that underpin insolvency law, most notably the distinction between property belonging to customers and property forming part of the debtor's estate.

The UK Law Commission, in its Final Report on Digital Assets, has identified this issue as the "custodial illusion." The Commission observes that the language of custody and safekeeping, inherited from traditional financial markets, is conceptually inadequate for crypto-asset exchanges because the operative form of control is not physical possession but cryptographic access. In this sense, the term "custodian" functions metaphorically rather than legally. FTX did not hold customer property in the manner of a trustee or a depositary institution; instead, it operated as a digital intermediary that exercised control through private key management.

The apparent existence of segregated accounts was an artefact of internal record-keeping rather than a reflection of distinct blockchain wallets. Customer assets were commingled at the protocol level, even if the exchange's internal databases represented them as segregated. This distinction is not merely technical; it has profound legal consequences. In traditional banking, a custodian's segregation of accounts has legal significance because it corresponds to distinct titles and traceable assets. In FTX, segregation was purely informational and could be overridden by those with access to the master keys. This gap between the appearance of segregation and the underlying technical reality is precisely what undermines conventional custody doctrines and sets the stage for the further problems examined in the following section.

B. Trust, Bailment, and the Problem of Identification

This structural opacity created profound difficulties when insolvency proceedings began. Creditors sought to argue that their digital assets were held on trust and should therefore be excluded from the debtor's estate. However, as Roy Goode makes clear, trust property must be both identifiable and segregated to fall outside the insolvency pool. In the case of FTX, neither condition was satisfied. The commingling of assets across wallets and the absence of transparent tracing mechanisms prevented the recognition of a proprietary interest in favour of customers.

Courts therefore, faced an analytical impasse: to treat customers as beneficiaries would contradict established property law principles, yet to classify them as unsecured creditors would disregard the technological and commercial reality of digital custody. A similar challenge has appeared in other crypto insolvencies. In *Re Quadriga*, the Nova Scotia Supreme Court held that commingled digital assets could not be traced to individual customers due to the lack of wallet-level segregation. Likewise, in R*e Celsius Network LLC*, the court ruled that digital assets deposited into interest-bearing accounts became property of the estate, notwithstanding the customers' expectation of continued ownership.

C. Doctrinal Responses and Their Limitations

Scholars have attempted to reconstruct these relationships using analogies drawn from trust and bailment. Graham Cone, Nell S. Bjorklund, and Garrett C. Dyekman argue that exchange operators should be regarded as constructive trustees, given their de facto control over customer property. Yet this approach assumes a degree of segregation and intention that rarely exists in practice. Others, such as Matthias Lehmann, propose statutory interventions recognising a sui generis category of "digital asset custodian”. The Law Commission's recommendation that digital assets be treated as a third category of personal property, distinct from choses in possession and choses in action, further supports this evolution.

Nevertheless, these doctrinal innovations remain reactive rather than structural. They attempt to retrofit existing categories onto systems that are fundamentally non-custodial by design. As De Filippi and Wright explain, blockchain networks operate through decentralised verification where control derives from consensus protocols and key possession rather than legal documentation. The FTX collapse illustrates that without statutory recognition of cryptographic control as a legally relevant form of possession, insolvency courts cannot accurately identify or protect property rights in digital assets.

D. A Functionalist Redefinition of Custody

To move beyond this impasse, the concept of custody must be redefined in functional terms. This article proposes that legal custody in digital contexts should be understood as the power to unilaterally initiate or prevent on-chain transfers. Under this definition, possession corresponds to cryptographic capacity rather than physical control. This reconceptualition aligns with the technical reality of blockchain systems and provides a clearer foundation for determining proprietary rights in insolvency. This definition can be construed as follows:

Legal custody in digital contexts shall be understood as the power to unilaterally initiate or prevent on-chain transfers. Under this definition, possession corresponds to cryptographic capacity rather than physical control. This reconceptualisation aligns with the technical reality of blockchain systems and provides a clearer foundation for determining proprietary rights in insolvency.

Where such cryptographic capacity is shared through multi-signature arrangements or smart contracts, custody should be allocated proportionally according to the voting thresholds built into the protocol. This redefinition would permit courts to identify the true custodian of digital assets and to determine whether segregation has been meaningfully achieved. It also forms the basis for the following section's proposal of a Lex Cryptographica Insolvency Framework, in which the mechanisms of recognition, asset segregation, and tracing are embedded directly within blockchain protocols rather than imposed ex post by judicial decree.

Part IV: Asset Tracing and the Limits of Blockchain Transparency

A. The Off-Chain Opacity Problem

The promise of blockchain technology has long been associated with transparency and auditability, yet the FTX proceedings reveal how illusory this transparency can be in practice. In theory, every transaction recorded on a public blockchain is verifiable and immutable. In practice, the complexity of wallet structures, the use of intermediated custody, and the layering of off-chain transactions obscure rather than illuminate the true flow of assets. The ability of forensic experts to trace digital assets depends not only on blockchain data but also on the cooperation of exchanges, custodians, and other intermediaries who hold the keys to decode pseudonymous transactions.

The FTX estate demonstrated the limits of blockchain forensics when court-appointed liquidators and analytics firms, including Chainalysis and Kroll, attempted to reconstruct the flow of billions of dollars in customer assets. Although public blockchains provided partial transaction histories, internal transfers within the FTX ecosystem were often recorded only in proprietary databases, disconnected from on-chain data. This created what Shaanan Cohney, David A. Hoffman, Jeremy Sklaroff, and Darryl Siry call the "off-chain opacity problem." The result was that while certain movements of assets could be seen, their legal characterisation ”whether as misappropriated funds, internal rebalancing, or customer withdrawals” remained indeterminate.

B. Privacy-Enhancing Techniques and Cross-Chain Complexity

The challenge of tracing crypto assets through multiple blockchains and privacy-enhancing mechanisms further undermines asset recovery. Techniques such as tumblers, mixers, and cross-chain bridges render linear tracing methodologies ineffective. As Michael Bryans first observed, the pseudonymity inherent in blockchain systems is sufficient to frustrate traditional evidentiary standards. This difficulty is amplified when insolvency law demands not only factual tracing but also equitable tracing, that is, the identification of a continuing proprietary interest through a series of substitutions and commingled accounts.

In the context of FTX, assets that had been deposited by customers were often transferred through multiple wallets and cross-chain bridges before being deployed in trading positions or transferred to external addresses. The forensic challenge was not merely to identify where tokens had gone but to reconstruct their ownership chain and to identify which losses were attributable to particular customers. The complexity was amplified by the fact that Alameda Research, a related entity with preferential access to FTX's reserves, had engaged in complex derivative transactions that created additional layers of obfuscation.

C. Recent Case Law and Emerging Remedies

Recent case law has begun to address these challenges in a piecemeal fashion. In *Tulip Trading Ltd v Van Der Laa*n, the Court of Appeal of England and Wales recognised the potential for developers to owe fiduciary duties to coin owners in certain circumstances, suggesting a path toward enforceable control mechanisms within code-based environments. Similarly, in *Osbourne v Persons Unknown*, the High Court confirmed that non-fungible tokens (NFTs) constitute property capable of being subject to proprietary injunctions. Yet these decisions, while groundbreaking, stop short of establishing a systematic methodology for tracing in insolvency. They rely on discretionary remedies rather than a coherent statutory framework.

D. Hybrid Forensic-Legal Models

To fill this gap, some commentators advocate for the use of hybrid forensic-legal models that combine algorithmic verification with judicial oversight. Ejan Mackaay and Luciano Remeikis propose embedding automated audit trails within smart contracts to enable real-time asset verification during insolvency. This approach would transform tracing from a retrospective exercise into a continuous compliance function, reducing the reliance on post-hoc forensic reconstruction. The Bank for International Settlements similarly urges regulators to require exchanges and custodians to maintain verifiable proof-of-reserve structures, thus enhancing the evidentiary basis for tracing in future collapses.

Nevertheless, the reliance on technological solutions alone cannot overcome the fundamental legal indeterminacy of tracing in digital environments. As Roger Nolan observes, tracing presupposes a stable conception of ownership, yet digital assets lack the tangible qualities that make ownership ascertainable in law. In FTX, this instability meant that even when blockchain analytics could identify where tokens had gone, the court could not always determine who had a legal claim to them.

E. Toward a Dual Framework

This Part therefore concludes that tracing in crypto insolvencies requires a dual framework of technological verification and legal reconstruction. Blockchain forensics must be supplemented by statutory rules defining proprietary continuity in digital assets, including explicit recognition of algorithmic substitution and cryptographic control as equivalents to possession and transfer. Without such reform, asset recovery in cross-border crypto insolvencies will remain an exercise in probabilistic attribution rather than legal certainty.

The next Part turns to international coordination and the failure of existing cross-border insolvency mechanisms to accommodate these technological realities.

Part V: Jurisdictional Fragmentation and the UNCITRAL Model Law

A. The Model Law's Assumptions and Their Breakdown

The UNCITRAL Model Law on Cross-Border Insolvency, adopted in 1997 and implemented in over fifty jurisdictions, rests on several foundational assumptions about the nature of insolvency, property, and international cooperation. It presupposes that the debtor's estate consists of identified, locatable assets; that creditors share common expectations about the forum for administration based on the debtor's centre of main interests; and that states can cooperate through principles of comity and mutual recognition to enforce judgments and orders across borders.

These assumptions, sound for conventional corporate insolvencies, become untenable in the context of digital asset enterprises. The FTX case exposed this misalignment in acute form. The Delaware court's Chapter 11 proceeding sought to gather and liquidate FTX's global assets according to United States bankruptcy law, while the Bahamian liquidators claimed priority over assets within their territorial jurisdiction. Neither proceeding had adequate mechanisms to cooperate on questions that transcended both jurisdictional and doctrinal boundaries. Thus, this leaves open numerous unanswered questions: How should commingled digital assets be segregated among creditors? Which law should govern the treatment of smart contracts and algorithmic transactions? How could recognition and enforcement occur when the assets themselves were globally dispersed and not subject to territorial attachment?

B. Recognition Mechanisms and Their Failure

Chapter 15 of the United States Bankruptcy Code, the statutory implementation of the Model Law in the United States, provides for the recognition of foreign main and non-main proceedings. Recognition confers significant procedural benefits: the foreign representative can access United States courts, can seek recognition of foreign judgments, and can seek cooperation from United States bankruptcy courts. Yet the recognition process presupposes that a "foreign main proceeding" exists and that it can be identified with reference to COMI.

In the FTX case, the Bahamian liquidators sought Chapter 15 recognition of their provisional liquidation proceeding. However, the Delaware bankruptcy court had simultaneously been operating on the assumption that the United States was the primary forum. This created a profound coordination problem. If both proceedings were main proceedings under the Model Law “which seemed plausible given the ambiguity of COMI” then neither had priority, and the Model Law's core mechanism for ensuring universalist administration broke down.

The conflict was resolved partially through pragmatic settlement and negotiations between the court-appointed representatives, but no principled legal mechanism existed to determine which proceeding had legitimate priority. This gap illustrates a critical limitation of the Model Law when applied to deterritorialised enterprises: the assumption that a single main proceeding exists and can be identified ex ante becomes incoherent when the debtor's assets, operations, and creditors are globally distributed.

C. The Case for a Digital Asset Insolvency Model Law

The UNCITRAL Working Group V on Insolvency Law, in collaboration with the Financial Stability Board and other international organisations, has begun preliminary discussions about the necessity of a Model Law on Digital Asset Insolvency. This section argues that such an instrument should not merely fill existing gaps, but should also serve as the primary vehicle for implementing the article's proposed framework, by codifying several principles that go beyond the existing Model Law.

First, it would establish jurisdiction based on the Centre of Cryptographic Control rather than COMI, providing a more coherent criterion for determining the main proceeding in digital asset cases.

Second, it would include specific provisions governing the treatment of smart contracts, automated transactions, and algorithmic asset transfers, recognising that traditional insolvency procedures for manual disposition of assets may not be adequate for code-based systems.

Third, it would establish minimum standards for digital asset custodians, including mandatory segregation of customer assets, regular proof-of-reserve verification, and participation in a global registry of insolvency notices.

Fourth, it would create a Transnational Digital Insolvency Network (TDIN), discussed in greater detail in Part VI, to enable coordinated administration across jurisdictions and blockchains.

The precedent for such an instrument exists. The UNCITRAL Model Law on Enterprise Group Insolvency, adopted in 2019, extended the principles of universalism and cooperation to complex corporate structures. A similar evolution in response to digital assets would represent the next logical step in the maturation of international insolvency law, and the natural institutional home for the Lex Cryptographica Insolvency Framework developed in this article.

Part VI: The Lex Cryptographica Insolvency Framework (LCIF)

A. The Three Pillars of the Framework

The inadequacies revealed by FTX demand not incremental reform but a structural reimagining of cross border insolvency law for the digital era. The proposal advanced here, the Lex Cryptographica Insolvency Framework (LCIF), is intended as that overarching response, drawing together the earlier analysis of COMI, custody, tracing, and recognition into a single, coherent model. Framed around three interlocking pillars, technological integration, jurisdictional redefinition, and transnational governance, the LCIF sets out the final framework this article advances to address the systemic weaknesses exposed by digital asset insolvencies.border insolvency law for the digital era. The proposal advanced here, the Lex asset insolvencies.

B. Pillar One: Technological Integration and Code-Based Enforcement

First, technological integration requires embedding insolvency mechanisms directly within blockchain infrastructure. Rather than relying on post-hoc judicial orders to identify and recover assets, the LCIF would mandate the inclusion of on-chain compliance modules in exchange and custodian smart contracts. These modules would automatically trigger asset freezes, transfer restrictions, and proof-of-reserve disclosures upon the initiation of insolvency proceedings.

As Ejan Mackaay and Luciano Remeikis argue, code-based enforcement transforms insolvency from a reactive legal process into a continuous operational function. When insolvency is initiated, the automated module would: (1) identify the insolvency event through reference to a global blockchain-based registry; (2) freeze the ability to transfer or withdraw customer assets; (3) generate cryptographic proofs of asset holdings; and (4) coordinate with custodians to segregate the debtor's proprietary holdings from customer assets.

This automation would not displace courts but rather empower them, providing verifiable, tamper-resistant data that enhances evidentiary certainty. Courts would retain full discretion over the distribution of assets and the treatment of competing claims. Still, they would operate on a foundation of accurate, auditable information about the estate's composition. The result would be a substantial reduction in litigation over the characterisation of assets and a more efficient and equitable distribution process.

Such on-chain compliance modules would be implemented through standardised templates established by international organisations such as the Financial Stability Board or UNCITRAL. Jurisdictions would retain flexibility to customise these templates to their specific insolvency laws, but the core functionality “asset freezing, proof-of-reserve verification, and notice to the global registry” would be uniform across participating blockchains and exchanges.

C. Pillar Two: Jurisdictional Redefinition Through the CCC

Second, the LCIF would replace the concept of the centre of main interests with the Centre of Cryptographic Control (CCC) introduced in Part II. Jurisdiction under this model would attach to the location of cryptographic authority, that is, the entity or consortium with control over the private keys, validator nodes, or oracle systems governing the debtor's digital estate. This shift aligns with the functional reality that digital assets are controlled through code rather than through territorial sovereignty.

The CCC would serve as the principal nexus for determining the main proceeding, while secondary jurisdictions could coordinate through recognised nodes of operational or regulatory relevance. For example, if an exchange's private keys were held in Singapore, multisig custody was administered through Switzerland, and customer deposits were regulated in the Bahamas, a conflict-of-laws analysis would prioritise Singapore's courts as the forum for the main proceeding, while Switzerland and the Bahamas would be recognised as secondary forums with coordinated powers.

The determination of CCC would occur through a preliminary assessment that precedes or accompanies the initial filing in any jurisdiction. The petitioner would be required to identify the locus of cryptographic control through reference to technical documentation, including the location of key management systems, validator node operations, and oracle service providers. This information would be verified through independent technical auditors and registered in the global insolvency registry.

D. Pillar Three: Transnational Governance Through the TDIN

Third, the LCIF envisions a Transnational Digital Insolvency Network (TDIN), modelled on the Judicial Insolvency Network (JIN) and the Cross-Border Insolvency Protocols pioneered in cases such as Re Nortel Networks Inc. The TDIN would standardise communication channels, data formats, and verification protocols among courts and administrators handling digital asset cases. Critically, it would provide a set of "smart protocols", automated templates for asset freezes, reporting, and recognition, to be deployed across blockchain ecosystems.

The TDIN would operate through a distributed governance model. Central coordination would be provided by UNCITRAL or a subsidiary body composed of senior insolvency judges, practitioners, and technical experts from major jurisdictions. This body would establish standards and protocols, but implementation would remain decentralised, with each participating court and jurisdiction retaining autonomy over its own proceedings.

A central feature of the TDIN would be a blockchain-based registry of insolvency notices, accessible to all participating jurisdictions and integrated with exchange and custodian smart contracts. When a court declares an insolvency event, the declaration would be automatically registered on this distributed ledger within minutes, triggering corresponding on-chain compliance modules. This "computational comity," as Richard Parry terms it, would eliminate jurisdictional duplication and reduce the latency between legal determination and technical enforcement.

E. Integration with Existing Frameworks

Importantly, the LCIF does not replace the UNCITRAL Model Law but extends it. Just as the UNCITRAL Model Law on Enterprise Group Insolvency updated cross-border insolvency to reflect corporate group realities, A Model Law on Digital Asset Insolvency could codify the LCIF principles, offering states a harmonised blueprint for recognition, tracing, and administration of crypto assets.

The Financial Stability Board, in its "Global Regulatory Framework for Crypto-Asset Activities" (2023), and the Bank for International Settlements, in its "Bulletin on Cryptoasset Recoveries in Insolvency" (2024), both underscore the necessity of embedding such mechanisms at the international level. A coordinated policy initiative bringing together UNCITRAL, the FSB, the IMF, and regional judicial networks could begin the process of codification and international adoption.

Part VII: Normative Implications and Institutional Challenges

A. The Transformation of Legal Authority

The Lex Cryptographica Insolvency Framework proposed in the preceding section carries profound implications for the future architecture of international insolvency law and for the conceptual relationship between law, technology, and sovereignty. At its core, the framework challenges the long-standing assumption that insolvency is a territorially administered process. By embedding enforcement mechanisms within blockchain protocols, the LCIF shifts the locus of legal authority from national courts to transnational technological infrastructures.

On one hand, the integration of legal norms into code promises a new era of procedural certainty. Smart contracts can enforce judicial orders without delay or manipulation, and blockchain-based registries can provide transparent, immutable records of creditor claims. As Nick Szabo first envisioned, such code-based mechanisms transform legal obligations into self-executing logic. In the context of insolvency, this means that creditor hierarchies, asset freezes, and distribution schemes could operate autonomously, reducing the scope for jurisdictional conflict or opportunistic behaviour.

However, as Kevin Werbach cautions, replacing legal discretion with code risks hardwiring rigidity into complex systems. Insolvency law often requires equitable balancing between secured and unsecured creditors, between domestic and foreign claimants, and between public and private interests. Translating these principles into algorithmic rules raises profound jurisprudential questions about accountability, interpretation, and human oversight. The LCIF must therefore be designed not as a replacement for judicial authority but as an augmentative infrastructure that enhances transparency while preserving normative judgment.

B. Sovereignty and Networked Legality

From a sovereignty perspective, the LCIF also challenges the Westphalian paradigm of jurisdictional exclusivity. If recognition and enforcement are automated through global blockchain protocols, the practical role of national courts in cross-border insolvency may shift from adjudication to supervision. As Ralf Michaels notes, such a transformation signals the rise of "networked legality," in which states share regulatory space with technological and transnational actors. This development could democratise access to justice but also risk marginalising weaker jurisdictions whose regulatory frameworks are not technologically interoperable.

The challenge is therefore to design the LCIF in a manner that preserves national authority while enabling transnational coordination. One approach would be to establish "opt-in" rather than mandatory participation in the TDIN. States that lack the technical capacity or that prefer to maintain isolated insolvency regimes could remain outside the network, retaining their traditional cross-border mechanisms under the Model Law. However, their digital asset insolvencies might be subject to less efficient coordination and higher transaction costs.

Alternatively, capacity-building initiatives funded by international organisations could facilitate participation by developing jurisdictions. The United Nations' technical assistance programs, implemented through UNCITRAL, have successfully promoted the adoption of the Model Law across diverse legal systems. A similar initiative could support the development of TDIN infrastructure and training for judges and administrators in participating jurisdictions.

C. Governance Structures and Institutional Design

Furthermore, the governance of a transnational insolvency infrastructure raises pressing institutional questions. Who would administer the blockchain-based registry of insolvency notices? What standards of data integrity, cybersecurity, and due process would apply? Lessons can be drawn from existing models, such as the Financial Market Infrastructure Principles (CPMI-IOSCO, 2012) and the Basel Committee's Guidelines on Crypto asset Exposure (2023), which illustrate how international organisations can set functional standards while preserving national autonomy.

A similar hybrid governance model could underpin the LCIF, with oversight shared between UNCITRAL, the Financial Stability Board, and regional insolvency networks such as INSOL International and the Judicial Insolvency Network. A central secretariat, potentially housed at the United Nations office in New York or Vienna, would coordinate policy and technical development. Regional bodies would implement local protocols and provide capacity building. Individual courts would maintain operational autonomy while adhering to common standards.

The blockchain infrastructure supporting the registry would be managed through a distributed consensus model, similar to the governance of public blockchains. However, unlike purely decentralised systems, the TDIN registry would incorporate legal authority and judicial oversight. Disputes over the accuracy or validity of insolvency notices would be resolved through arbitration or through reference to a panel of senior judges from participating jurisdictions.

D. Private Power and Regulatory Capture

Critics may contend that embedding insolvency governance in blockchain systems risks entrenching private technological power. Philipp Hacker and Luc Thomale warn that reliance on private protocols may shift control from public regulators to code developers and exchange operators. This risk underscores the necessity of open-source standards, public audits, and procedural safeguards within the LCIF to ensure transparency and accountability.

The LCIF should therefore mandate that all on-chain compliance modules be implemented through open-source code, subject to public review and periodic independent audit. Technical standards would be established by UNCITRAL and the FSB, not by private consortia. The blockchain infrastructure supporting the registry would be operated by a public utility or international organisation, not by private entities with commercial interests in insolvency outcomes.

Additionally, the LCIF would include safeguards against regulatory capture through a multi-stakeholder governance model that includes representatives from not only creditor nations and financial institutions but also developing countries, civil society, and consumer advocates. This diversity would reduce the risk that the framework would be designed to benefit powerful creditors or multinational corporations at the expense of small investors or developing-country claimants.

E. Law, Technology, and Normativity

At a normative level, the proposed framework also invites reflection on the nature of law itself. If legal obligations can be operationalised within code, the boundary between law and technology becomes porous. As Roger Brownsword observes, the challenge of the digital age lies not in resisting technological change but in ensuring that human values remain encoded within it. The Lex Cryptographica Insolvency Framework thus represents both a practical and philosophical evolution: it redefines the medium through which insolvency law operates while reaffirming its foundational purpose - the equitable and collective resolution of financial distress.

The operationalisation of insolvency law through code does not diminish its normative character. Instead, it externalises and makes visible the values that have always been embedded in legal rules. By requiring insolvency frameworks to be expressed in code, we force greater clarity about what we value: the priority of creditor classes, the treatment of employees and environmental claims, the balance between efficiency and equity, the respect for human rights and dignity in financial proceedings.

Part VIII: Conclusions and the Roadmap for Reform

A. Lessons of the FTX Collapse

In sum, the FTX collapse serves as a critical inflexion point for cross-border insolvency law. It reveals that traditional doctrines such as COMI, territorial recognition, and custodial property rights cannot survive in their current form when confronted with the decentralised, cryptographic, and borderless nature of digital assets. The Lex Cryptographica Insolvency Framework offers a path forward, a synthesis of legal principle and technological architecture capable of preserving fairness and efficiency in an era where assets, control, and risk transcend national boundaries.

The analysis undertaken in this article has demonstrated that the core principles of cross-border insolvency” recognition, cooperation, and universality” remain valid and essential. Yet their implementation requires a new conceptual infrastructure. The traditional reliance on the centre of main interests has collapsed under the weight of deterritorialised enterprise models, demanding its replacement with a functional equivalent: the Centre of Cryptographic Control. Custody and possession, long the bedrock of property classification in insolvency, have lost meaning in systems governed by cryptographic access rather than physical control. And while blockchain technology promises transparency, its practical opacity in cases such as FTX reveals the need for hybrid mechanisms of forensic accountability that unite technological verification with legal interpretation.

B. The Three Components of Reform

The proposed Lex Cryptographica Insolvency Framework (LCIF) responds to these challenges through three interlocking reforms:

First, it embeds legal functions within code, ensuring that tracing, freezing, and recognition occur natively on chain. This technological integration transforms insolvency from a process requiring ex-post court intervention into a system that operationalises legal norms continuously and automatically.

Second, it aligns jurisdictional competence with cryptographic authority through the CCC, transforming the basis of judicial coordination from geography to control. This shift acknowledges the technical reality that power over digital assets derives from cryptographic capacity, not territorial sovereignty.

Third, it institutionalises global cooperation through a Transnational Digital Insolvency Network (TDIN) that harmonises procedures, data standards, and recognition protocols across jurisdictions. Together, these reforms translate the universalist ethos of cross-border insolvency into a technologically executable form.

C. Pathways to International Adoption

Implementing such a framework will not be straightforward. It demands legislative innovation, international consensus, and a fundamental rethinking of sovereignty in the digital age. Yet the precedents for such transformation exist. The UNCITRAL Model Law on Cross-Border Insolvency, once a radical experiment, now underpins insolvency cooperation across more than fifty jurisdictions. The Model Law on Enterprise Group Insolvency similarly extended the principle of universality to complex corporate groups. A Model Law on Digital Asset Insolvency, codifying the principles of the LCIF, would therefore represent the next logical step in the evolution of transnational insolvency governance.

The institutional pathway toward such codification could begin with UNCITRAL's Working Group V on Insolvency Law, in collaboration with the Financial Stability Board, the International Monetary Fund, and regional judicial networks. Initial steps could include:

1. A scoping study (2025-2026) examining the FTX proceedings and other crypto insolvency cases to identify common problems and best practices.

2. A working paper (2026-2027) proposing draft model law provisions on digital asset insolvency, Centre of Cryptographic Control, and the Transnational Digital Insolvency Network.

3. Consultation and refinement (2027-2028) with stakeholders, including judges, insolvency practitioners, digital asset industry participants, creditor advocates, and developing-country representatives.

4. A pilot project (2028-2029) implementing prototype TDIN protocols and on-chain compliance modules in sandbox environments coordinated through the Bank for International Settlements Innovation Hub.

5. Formal adoption and implementation (2029 onwards), with national legislative amendments and technical deployment across major blockchain ecosystems.

This timeline is ambitious but realistic. The urgency is underscored by the continued emergence of digital asset insolvencies - Celsius Network, BlockFi, and others have created pressing practical needs - and by the window of opportunity for international coordination before digital asset markets mature and institutional interests crystallise.

D. A Broader Jurisprudential Shift

At a deeper level, however, the adoption of a Lex Cryptographica regime would signify a jurisprudential shift. It would acknowledge that law must not only regulate technological systems but also inhabit them. As Primavera De Filippi and Aaron Wright remind us, code is not merely a technical medium but a normative one; it expresses power, governance, and accountability. The future of insolvency law lies in ensuring that these norms remain anchored in the principles of fairness, universality, and transparency that have long guided collective remedies.

The FTX saga is likely to continue shaping litigation and regulatory reform for years to come. Yet its ultimate legacy may be conceptual rather than procedural: the recognition that the architecture of cross-border insolvency must evolve from one of fragmented territorial sovereignty to one of integrated digital universality. The Lex Cryptographica Insolvency Framework offers a blueprint for that transformation," a vision of an insolvency system that operates at the same speed, scale, and transparency as the markets it governs. In this sense, FTX's collapse is not merely an ending but a beginning: the catalyst for a new era in which law, technology, and global coordination converge to restore order in the digital economy.

Planning Control v Statutory Duties: A Deeper Look into Epping Forest DC v Somani Hotels Ltd (SSHD intervening at CoA)

By Sammam Junaid Efti , Kazi Habiba Alam Alisha & Shah Mohammad Rafi

Abstract

As the UK grapples with its evolving insolvency landscape, the spotlight falls on the intricate dance between HMRC's Crown Preference and Part 26A's Cross Class Cram Down ('CCCD') feature.

The Finance Act 2020 granted HMRC with 'secondary preferential status', emphasising the importance of taxes being used for public spending. The CIG Act 2020 notably introduced the CCCD feature, vesting judges with the discretion to endorse a restructuring plan and compel all dissenting creditors to adhere to it, provided two pivotal conditions are met. The first, Condition A or the 'No Creditor Worse Off' test, insists that the restructuring plan should not leave any creditor in a worse position than the relevant alternative. The second, Condition B, often termed the 'Genuine Economic Interest' test, ensures that at least one class of creditors, poised to benefit in the alternative scenario, endorses the plan.

While Condition B is ostensibly a safeguard, Part 26A introduces a quandary for HMRC. The very essence of restructuring plans within this framework challenges the time-honoured creditor hierarchy. The inevitable consequence: The freshly minted stature of HMRC as a 'secondary preferential creditor' is threatened. Moreover, subsequent case law starkly indicates that when deemed necessary, courts will not waver in overriding HMRC's objections, compromising its Crown Preference.

INTRODUCTION

The Finance Act 2020 decisively restored HMRC's 'Crown Preference', otherwise referred to as 'secondary preferential creditor' status, marking a pivotal shift two decades after its abolition by the Enterprise Act 2002. Yet, in a compelling legal twist, the CIG Act's introduction of Part 26A restructuring seemingly counteracts this newly regained secondary preferential status. This presents a potential challenge to HMRC's strengthened position. In particular, tensions have arisen between the two enactments' underlying policies; the public policy of protecting taxpayer money and ensuring it is used for funding public services, and the economic policy of enabling businesses impacted by the COVID-19 pandemic to continue trading. This article seeks to establish whether HMRC's Crown Preference has been strengthened or weakened by the introduction of Part 26A restructuring. In doing so, this article will argue that, while the courts give HMRC's debts serious consideration, ultimately, the judge will side with the economic policy of preserving business, thereby weakening HMRC's status as a secondary preferential creditor.

This article will begin by briefly discussing the significance of the Finance Act 2020 and the CIG Act, before introducing the Cross Class Cram Down ('CCCD') feature of Part 26A restructuring, its conditions, and how it serves against the interests of the Crown. It will then explore ensuing case law, which attempts to balance the interests of HMRC and struggling companies, before concluding that HMRC's 'secondary preferential creditor' status is not as strong as it was intended to be.

THE FINANCE ACT 2020

The Finance Act 2020 reintroduced HMRC's secondary preferential status, almost twenty years after the elimination of its original Crown Preference under the Enterprise Act 2002, which aimed to bolster the entrepreneurial landscape in the UK. The reinstatement of preferential status arises from HMRC's position as 'the leading creditor… winding up companies for them to be placed into compulsory liquidation'. Before the return of its Crown Preference, HMRC's formal avenues for debt recovery were often restricted to those available to other unsecured creditors, specifically set-off and winding-up petitions. Unfortunately for HMRC and the taxpayer, these options were often ineffective and frequently led to concessions on HMRC debts due to the limited funds remaining after payments to secured creditors. To put things further into perspective, 'around £1.9 billion paid by employees and customers each year' failed to reach the government for public services spending as intended. It was this considerable figure which prompted the government to explore reforms to the insolvency process, culminating in the introduction of the Finance Bill 2019-2020 and the subsequent enactment of the Finance Act 2020. Under the Act, certain tax debts - specifically VAT, PAYE, employee's NICs, student loans, and construction industry scheme deductions (together referred to as 'preferential tax debts') – receive priority repayment before debts owed to floating charge holders and unsecured creditors.

The new secondary preferential status differs from the Original Crown Preference, as preferential tax debts now qualify for preferential status regardless of when they were incurred, rather than only those arising in the 12 months prior to insolvency commencement. Significantly, the 'secondary preferential status' only applies to insolvencies initiated after December 2020. This means that while tax debts accrued before this date are granted preferential status and consequently rank above floating charges, this is only applicable if the company entered insolvency proceedings after December 2020.

As a result of these changes, asset realisations in insolvency are now paid out to creditors in the following order [the 'Hierarchy']:

1. Secured creditors with a fixed charge;
2. Insolvency practitioners' expenses;
3. Preferential creditors (generally relating to unpaid wages, unpaid pension contributions, and holiday pay);
4. Secondary preferential creditors (HMRC's claims to preferential tax debts);
5. Prescribed part up to £800k (includes other HMRC claims ranking as 'unsecured');
6. Secured creditors with a floating charge;
7. Non-preferential or 'unsecured' creditors;
8. Shareholders.

CHALLENGES AND RESPONSES

The UK business community greeted the reintroduction of the Crown Preference policy with scepticism, fearing it would make it more difficult for businesses to secure working capital finance. The reasons for this apprehension are two-fold. First, the UK's financial sector voiced concerns that this policy would place additional burdens on lenders and businesses, forcing them to incorporate tax debts into their lending assessments in a way that was not previously necessary. In response, HMRC asserted that tax liabilities should always be factored into lending decisions, arguing that:

It is right that taxes paid in good faith by employees and customers, and held temporarily by a business, should go to fund public services as intended, rather than being distributed to other creditors, such as financial institutions.

Second, asset-based lenders expressed unease that the 'secondary preferential status' would discourage lenders from extending credit to SMEs, as HMRC could now circumvent 'floating charge' holders, potentially leaving them with a diminished share of the proceeds or even empty-handed. This poses a significant challenge for companies already struggling financially but who could improve their situation with an infusion of new funding. This article acknowledges that these concerns have some merit, noting that the removal of HMRC's 'Crown Preference' after the Enterprise Act 2002 played a role in spurring the growth of floating charge lending. Nevertheless, HMRC has countered that financial institutions with fixed charges over assets still take precedence over HMRC in the Hierarchy, and the debts these institutions might fail to recover represent a minuscule portion of overall lending in the UK.

THE CIG ACT 2020

The CIG Act 2020, enacted on 26 June 2020, was brought in amidst the COVID-19 pandemic and the resulting economic upheaval brought about by lockdown measures, offering a glimpse into the dire circumstances of its conception. Indeed, there was a mere eight-week window between its announcement and presentation to Parliament, underscoring the urgency of the situation. The CIG Act 2020 has been hailed as 'potentially the most significant change to insolvency and restructuring law since the seminal Insolvency Act 1986', a testament to its profound implications. Nonetheless, some of its reforms were not entirely unforeseen, as they were rooted in the Government's 2018 response to the consultation on Insolvency and Corporate Governance, demonstrating a continuity of thought even amidst crisis.

One of the most impactful changes was the introduction of the Part 26A Restructuring Plan, a lifeline modelled closely on the pre-existing 'Scheme of Arrangement'. In schemes of arrangement, creditors and members are grouped into 'classes' based on the similarity of their rights. Each class must vote on the proposed scheme, requiring at least 75% by value and a majority by number for approval. Part 26A Restructuring closely resembles this process, but notably includes an important feature – the ability for the applicant to enforce a restructuring plan on dissenting classes of creditors. This mechanism, known as the CCCD feature, requires specific conditions to be met, namely:

- Condition A [the 'No Creditor Worse Off' test]: Here, the court must be convinced that, should the proposed compromise or arrangement be sanctioned, *no member of the dissenting class will fare worse than they would under the relevant alternative scenario*; and
- Condition B [the 'Genuine Economic Interest' test]: The restructuring plan must have garnered the support of at least 75% in value of a class of creditors, *who would stand to gain payment or maintain a genuine economic interest in the company under the relevant alternative scenario*.

The CCCD provision, despite the substantial power it confers, is not without constraints to ensure equitable treatment of creditors. A crucial safeguard requires that at least one class of impaired creditors (i.e. those who will not attain full debt recovery under the restructuring plan) must have voted in favour of the plan for the courts to sanction its implementation under the CCCD provisions. This check on the CCCD mechanism reflects an awareness of the balance that must be struck between facilitating corporate rescue and ensuring fair treatment of all stakeholders, including HMRC. Another crucial safeguard is the requirement of court sanction. The restructuring plan must be approved by the judge who retains absolute discretion to not sanction a plan despite the conditions being satisfied on the basis of it not being 'just and equitable'.

HMRC'S DILEMMA

The introduction of the Part 26A Restructuring Plan, though a lifeline for businesses grappling with the aftershocks of the COVID-19 pandemic, presents a thorny issue for HMRC; it permits restructuring plans that deviate from the above established Hierarchy of asset realisation. With HMRC having only recently reclaimed their 'secondary preferential status' after nearly two decades without it, it is only natural that they would want to protect this privileged position.

This then raises a critical question of what happens when HMRC opposes a restructuring plan based on not wanting to depart from the established Hierarchy. Theoretically, despite HMRC's objections, the court could still sanction the restructuring plan using the powerful CCCD provisions if it deems the plan to be in the overall best interests of the creditors. This potential for judicial discretion underscores the tension between legal formalism and the pragmatism necessary to adapt to changing socioeconomic conditions, especially in times of crisis.

Re Houst Ltd [2022] EWHC 1941 (Ch)

In the world of corporate restructuring, *Re Houst* was the first case to approve a cram-down of HMRC's preferential tax debt. This plan, bolstered by an influx of new capital from existing shareholders, set forth the following arrangements:

- As a secondary preferential creditor, HMRC would see a return of 20p per pound, as opposed to the 15p per pound proposed under the relevant alternative.
- The secured creditor stood to benefit significantly more, with a return of 27p per pound compared to a mere 7p per pound under the relevant alternative.
- The unsecured creditor, under the restructuring plan, was slated to receive 5p per pound, in contrast to receiving nothing at all under the relevant alternative.

It is noteworthy that, under the relevant alternative, the secured creditor would fare worse in terms of recovery compared to the secondary preferential creditor. This situation is attributable to the diminished value of fixed charge assets and the fact that HMRC's claims over floating charge assets held precedence over those of the secured creditors. Manifestly, the restructuring plan was at odds with the relative returns established by the relevant alternative and flagrantly violated the 'absolute priority' rule – a bankruptcy principle mandating that senior creditor claims be settled in full before addressing more junior claims.

HMRC, upon the introduction of the restructuring plan, remained largely disengaged from the process. It refrained from contesting the plan at both the convening and sanction hearings, only to ultimately cast a vote against it. HMRC justified its stance, declaring: 'HMRC will not relinquish [their secondary preferential status]... [even if] our dividend is likely to be less in liquidation... this is a position we are not willing to compromise on and will insist this be honoured in all circumstances, regardless of whether this disadvantages unsecured creditors'. Evidently, HMRC took a hard-line approach against any plan necessitating the relinquishment of their returns.

Given that the restructuring plan was more favourable to HMRC than the relevant alternative and considering that all other creditor classes had endorsed the plan, the CCCD conditions were satisfied. This endowed the court with the discretion to sanction the restructuring plan, which it ultimately did, citing three primary reasons. Firstly, the court underscored that deviation from the 'absolute priority' rule or the Hierarchy, delineated in above in this article, was not inherently 'fatal' to a restructuring plan. Thus, the discrepancy of HMRC receiving less than the secured creditor in the restructuring plan as opposed to more under the relevant alternative did not warrant the plan's dismissal. Secondly, the court regarded this deviation as defensible, given that the funds under the restructuring plan stemmed from the new capital injected by shareholders, rather than assets that would have been available under the relevant alternative. Thirdly, the court perceived HMRC as a 'sophisticated creditor able to look after their own interests', and responded unfavourably to HMRC's failure to prepare any evidence to substantiate its opposition to the restructuring plan or its absence from the sanction hearing. This perspective was underscored in *Smile Telecoms Holdings Ltd*, where the court asserted that 'if a creditor or member wishes to oppose a scheme or plan... they must stop shouting from the spectators' seats and step up to the plate'.

Nasmyth Group Ltd [2023] EWHC 988 (Ch)

In *Nasmyth Group Ltd*, the court made the unprecedented decision to reject a restructuring plan, even though both CCCD conditions had been met. Notably, HMRC was the sole dissenting creditor in this case.

The restructuring plan proposed that both senior and junior creditors be repaid in full, compared to 100p per pound and 55p per pound respectively in the relevant alternative. By contrast, HMRC would only receive 5p per pound, as opposed to nothing in the relevant alternative. HMRC conceded that it was better off under the restructuring plan than the relevant alternative, but contended that it was fundamentally unfair to allocate the entire restructuring surplus solely to the senior and junior creditors.

In its deliberations on this case, the court recognised the heightened significance of HMRC's debt, noting how Parliament had legislated for the reinstatement of its secondary preferential creditor status. The court also observed that HMRC is an involuntary creditor since it cannot opt to trade or not trade with taxpayers; it simply must, so its dissent must be given importance. Moreover, the court underscored the approach to be taken when deciding whether to sanction a restructuring plan by stating that 'the Court should scrutinise the Plan with care and should not cram down the HMRC unless there are good reasons to do so'. However, the court also noted that it should not refuse to sanction a restructuring plan 'as a matter of principle [that] HMRC will be crammed down'. From an economic perspective, this makes sense – although HMRC's claims must be given importance, it needs to be balanced against the wider public policy of preserving business.

The court's rationale for not sanctioning the proposed restructuring plan in *Nasmyth Group Ltd* was based on the fact that HMRC had a genuine interest in the relevant alternative, despite being 'out of the money', as it would remain one of the group's largest creditors. The success of the restructuring plan was contingent on HMRC agreeing to Time To Pay ('TTP') arrangements with subsidiary companies, which the court viewed as a 'roadblock' to the plan's success. Additionally, the court noted that HMRC's share of the restructuring surplus was minuscule compared to that of the junior creditor, and in absolute terms. Crucially, the court perceived the purposes of the proposed restructuring plan as being incompatible with Part 26A, as it appeared to be 'a convenient opportunity to eliminate debts which the Company owed to HMRC for a nominal figure and to use the Plan to put pressure on HMRC to agree new TTP terms'.

The court's stance on HMRC debts is now evident – it is willing to cram down HMRC, but not without exercising caution or for the improper purpose that the company evading the debt owed. In terms of practical implications, it is entirely plausible that the court may begin to consider the views of 'out of the money' creditors in certain situations alongside those of 'in the money' creditors. Furthermore, this case emphasises that the court's CCCD power is discretionary and that meeting the two CCCD conditions does not automatically create the presumption that the restructuring plan will be sanctioned.

Great Annual Savings Company Ltd [2023] EWHC 1141 (Ch)

Great Annual Savings Ltd offers crucial insight into how the court approaches HMRC's debt in the context of a Part 26A restructuring plan. In this case, the dissenting creditors comprised HMRC and a class of energy suppliers. Significantly, the court did not accept that HMRC was no worse off under the restructuring plan compared to the relevant alternative (insolvency in this case) and, as a result, declined to sanction the restructuring plan. In cases where the relevant alternative is an immediate insolvency process, the typical focus of disputes among stakeholders tends to be 'the appropriate value to ascribe to assets and liabilities in that insolvency process'.

This principle remained at the forefront in *Great Annual Savings Ltd*. In this case, the company's restructuring plan proposed that HMRC would receive 9.1p per pound compared to 4.7p per pound under the relevant alternative, suggesting on the surface that HMRC would not be worse off under the restructuring plan. However, HMRC closely examined the anticipated realisation of the company's book debts under the relevant alternative, despite it being detailed in an independent valuation report. Specifically, HMRC's dispute revolved around the independent valuers' failure to critically assess the company management's conservative perspectives on the realisable value of the book debts. In considering this, the court deviated from previous scheme and restructuring plan case law, interpreting its role in examining a restructuring plan as encompassing the power to scrutinise the valuation figures presented in the company's proposal. The court further highlighted that the onus of proof for CCCD condition A – that the dissenting creditor would not be worse off in the relevant alternative – falls on the company presenting the restructuring plan.

Importantly, the court stated that *even if* it had been convinced that HMRC was not worse off under the restructuring plan, it would still have opted not to exercise its discretion to sanction the plan. This decision stemmed largely from the fact that, under the restructuring plan, numerous creditors who would have been 'out of the money' in the relevant alternative would have received a return under the restructuring plan to HMRC's detriment. The court perceived that the restructuring plan 'operates unfairly' in the distribution of benefits and its reservations were not 'assuaged by the fact ... that the Company had sought to communicate openly with HMRC about the Plan, but that HMRC had declined to engage'.

This case underscores salient points in how the court will handle HMRC's debt. Specifically, it will meticulously scrutinise the restructuring plan, including any valuation figures within it, and it will evaluate the fairness of the restructuring plan with respect to how benefits are allocated to otherwise 'out of the money' creditors in the relevant alternative.

Prezzo Investco Ltd [2023] EWHC 1679 (Ch)

In the preceding cases of *Nasmyth* and *Great Annual Savings Ltd*, the courts gave significant weight to HMRC's dissenting views and chose not to exercise their discretion to sanction the restructuring plans. However, in the in *Prezzo Investco Ltd* case, the court decided to override HMRC's objections and exercised its discretion to cram down the Crown.

Despite being no worse off under the relevant alternative, HMRC vehemently opposed the restructuring plan, arguing that its secondary preferential status had been inadequately respected and that its debts should be considered 'critical'. To provide some background, the company had been trading at the expense of HMRC when formulating the restructuring plan. Specifically, the company had continued to collect PAYE, NICs, and VAT during the planning phase of the restructuring plan but had ceased payments to HMRC. Simultaneously, the company had chosen to pay other creditors that it deemed 'critical'. Prezzo Investco Ltd had tried to appease HMRC by amending the restructuring plan to increase HMRC's return by £2m, but HMRC remained unsatisfied as its debt was still subject to a substantial write-off while secured lenders were receiving their money in full. HMRC feared that the sanctioning of this restructuring plan would set a precedent for other companies to exploit the Part 26A restructuring plan mechanism to evade HMRC debts.

The court, in sanctioning the restructuring plan, highlighted that HMRC was receiving the majority of the restructuring surplus and was scheduled to receive a significant payment within 30 days of the sanction. This differed from *Nasmyth*, where the proposed restructuring plan payment was not substantial and was a factor the court considered when deciding not to exercise its discretion and sanction the restructuring plan. The court also noted how the company had acted appropriately in communicating with HMRC and how HMRC had not actively engaged in negotiations. This stood in stark contrast to *Great Annual Savings Ltd*, where HMRC's lack of engagement had not resulted in the court sanctioning the restructuring plan. Moreover, the court held that the company had reasonably selected its 'critical creditors' and that the decision not to classify HMRC's claim as 'critical' to the preservation of the business was appropriate.

This viewpoint from the court is indeed thought-provoking, yet comprehensible, considering the overarching objective of Part 26A is to facilitate businesses to continue operating despite encountering financial hardships caused by the COVID-19 pandemic. Nevertheless, this article posits that HMRC's concerns may have merit, as the decision in *Prezzo Investco Ltd* could potentially set a precedent for other companies to adopt a similar course of action. From a taxpayer's standpoint, it appears unreasonable to permit a company to halt payments to HMRC while collecting PAYE, NICs, and VAT from employees and diverting those funds to settle debts with creditors deemed 'critical'. However, only the passage of time will reveal how courts will handle analogous situations and whether there will be a reversion to the principle set out in *Great Annual Savings Ltd*.

CONCLUSION

This article discussed how the judiciary struggles to balance the interests of HMRC with broader economic concerns in restructuring cases. While the courts are mindful of HMRC's unique status, they are also hesitant to stifle restructuring based solely on HMRC's disapproval. The article proposes that deviations from the 'absolute priority' rule should be limited to scenarios where distinctive funding sources are available for restructuring. *Prezzo Investco Ltd* poses a conundrum and highlights a socio-legal fissure, as the decision seemingly minimised HMRC's concerns. The article concludes by underscoring the fluid, case-specific interplay between the judiciary, HMRC, and the corporate realm, while hinting at the diminishing nature of HMRC's 'secondary preferential' position in the Part 26A restructuring arena.

Henry VIII, Human Rights, and Red Lights: Automated Decision-Making Reform and Public Law.

By Saul Agar-Ward

Introduction

Earlier this year, the King gave Royal Assent to the Data (Use and Access) Bill ("the DUAA 2025"). The Act was designed to streamline the UK's data protection laws, particularly the United Kingdom General Data Protection Regulation (UK GDPR). Section 80 of the Act deals with Automated Decision-Making "ADM") and broadens the circumstances in which automated systems may make decisions using personal data. The ADM provisions are worth discussing in their own right: they fail to provide certainty to an increasingly complex field, water down protections for data subjects from discrimination and procedural fairness, and leave the door open for dubious uses of the technology by state actors. However, they are also useful as a prism through which to analyse several worrying trends in British public law. Firstly, these reforms highlight the increased use of so-called 'Henry VIII' powers and their harmful effects on legal certainty and Parliamentary Sovereignty. Secondly, they showcase the limited horizontal effect of the Human Rights Act 1998 and the problems precipitated by this. Finally, they provide examples of the issues with non-reviewability of already opaque decision-making, and the wide latitude afforded to governmental bodies such as the police, in a reversal of traditional 'red light' principles governing state action. The judiciary can mitigate much of the damage for the time being, but Parliament should revisit this legislation. Hopefully, it might use the opportunity to rethink its approach to lawmaking more broadly.

Purpose and Historical Development of section 80 Data (Use and Access) Act and Article 22 UK GDPR

It is worth setting out, briefly, the relevant parts of the section. Readers might benefit from opening it up on the Government's legislation website to read alongside this essay. Section 80 revises Article 22 of UK GDPR, which is a piece of EU legislation retained following Brexit. The former Article 22 prevented ADM where it would produce legal or similar significant effects on the subject. This was so unless: 1) the ADM was necessary pursuant to a contract between data subject and data controller, 2) it was required or authorised by law, "which also lays down suitable measures to safeguard the data subject's rights and freedoms and legitimate interests", or 3) the data subject had given explicit consent. The new Article 22A prescribed by section 80 establishes that a decision is ADM if there is no 'meaningful human involvement' in the decision, and reiterates the former definition of 'significant'. This diverges from the former position, whereby the subject had "the right not to be subject to a decision based solely on automated processing". Article 22B modifies the prohibition, limiting it to significant decisions "based entirely or partly on ... processing of special categories of personal data". Special category data includes things such as racial or ethnic origin, religious beliefs, sexual orientation, and trade union membership. Article 22C sets out safeguards, informing the subject of information regarding decisions, enabling them to make representations, to obtain human intervention, and to contest ADM. Article 22D allows the Secretary of State to make regulations clarifying when there is or is not meaningful human involvement or when a decision has a 'similarly significant effect' for the subject.

Further legislative modification

This section of the DUAA 2025 also modifies the Data Protection Act 2018. Relevantly, it provides exceptions to safeguards (the same as under the new Article 22C) for ADM required or authorised by law. The exceptions are: avoiding obstruction to official investigations, avoiding prejudice to the prevention of crime and punishment of offences, protecting public security, safeguarding national security, and protecting the rights and freedoms of others.

Anatomy of s.80: summary

Section 80 then does a number of things. It narrows the prohibition on ADM, sets out safeguards for data subjects, allows the Secretary of State to clarify key terms, and provides exceptions to prohibitions on ADM required or authorised by law. The clarificatory power, the watering down of protections, and the wide exceptions for law enforcement all are emblematic of wider legislative trends.

Article 22D: the Henry VIII power

Under this sub-article, the Secretary of State is granted the power to clarify what 'meaningful human involvement' and 'similarly significant effect' mean under the revised UK GDPR. This is a power to modify primary legislation (here UK GDPR as retained by the Retained EU Law (Revocation and Reform) Act 2023) by use of secondary legislation (Regulations). Colloquially, these are known as 'Henry VIII powers'.

Henry VIII powers are controversial, since they allow someone other than Parliament to change, repeal, or add to primary legislation. They therefore concentrate legislative power in the executive (and increasingly so, as I shall detail below). Given this controversy, the DUAA 2025 plays out a familiar pattern. Parliament has delegated definitional responsibility to a government minister to draw the boundaries around ADM: how much human involvement is meaningful, what sort of an impact is of similar significance to a legal effect. It is asserted that these powers should be tightly controlled. If the wording of these types of clauses is construed too broadly, Parliamentary Sovereignty risks being infringed, since ministers will be acting outside of the scope of power afforded to them. Indeed, the broad response of the judiciary has been to draw strict lines around these powers. The Supreme Court in *PLP v Lord Chancellor* cited with approval the maxim that "if there is any doubt about the scope of the power conferred upon the Executive or upon whether it has been exercised, it should be resolved by a restrictive approach", and noted that the more general the words used, the less likely a use of the power according to their literal meaning would be within the contemplation of Parliament. Applied to the Henry VIII power under the DUAA 2025, the courts will err on the side of caution. Should the Secretary of State make Regulations which manifestly went beyond a tenable construction of 'meaningful human involvement' (under Article 22D(1)), such as in cases where human involvement is a mere rubber stamp, the courts should find no hesitation in striking the provision down. The same should be true where the Regulations latch on to a merely possible interpretation, such as where '*taken* to be meaningful' or '*taken* to have a similarly significant effect' are interpreted as conferring an absolute discretion. Under the principle set out above, and as applied by the Court of Appeal in *R (on the application of National Council for Civil Liberties) v Secretary of State for the Home Department* [2025] EWCA Civ 571; [2025] HRLR 10, if there is room to argue between two interpretations, the court will find that the narrower one accords with the will of Parliament. In the example above, this would mean that the view that 'taken' would not be interpreted as bestowing an absolute discretion on the Secretary of State.

However, these controls on executive overreach are only ex post facto. Until the Secretary of State makes regulations, the definition of meaningful human involvement remains skeletal, as does that of a similarly significant to legal effect. Likewise, any regulations that are made are potentially challengeable for exceeding the narrow bounds imposed by the judiciary. The combined effect of these is that the state of the law on important questions – when is ADM permissible – remains unclear. The courts can prevent improper use of the Henry VIII power and preserve Parliament's sovereignty, but the reliance on the power by the DUAA 2025 still muddies the waters of legal certainty.

Despite this, even if the courts can control the exercise of a power in a way that preserves the will of Parliament, the clause still permits the Secretary of State a latitude to tinker with the meaning of primary legislation. The drafters of the DUAA 2025 argue in the explanatory notes that this allows for 'legal clarity' in the face of emerging technologies. There is of course some force in these arguments. It will be argued below that a major problem with new technologies is that a lack of regulation amounts to permission to use and abuse, and so the ability to respond quickly to innovations and new situations is useful. For example, as LLMs continue to evolve, there may be a question of what level of prompting counts as 'meaningful human involvement'. Direct clarification would be useful in this scenario.

However, this is not the only way the power might be used. In the absence of a decision to the contrary, a Secretary of State may well use the power to limit the definitions of meaningful human involvement or a similarly significant impact regarding *existing* technologies and situations. Here, an argument on judicial review might be that, according to the interpretative principles concerning Henry VIII clauses, the power should be read as only applicable to situations developing after the passage of the DUAA 2025. This would accord with the explanatory notes of the Act, but leads to new difficulties: when should a technology or situation be taken to arise after 19 June 2025? It therefore seems dubious to assert that the power will lead to greater legal clarity. In many cases, it will be the intervention of the courts, as in *R (on the application of National Council for Civil Liberties) v Secretary of State for the Home Department* [2025] EWCA Civ 571; [2025] HRLR 10, that settle the lawfulness of Regulations and, therefore, clarify the law. In some of those cases, the 'clarification' will lead to further difficulties down the line, as set out. Nonetheless, it must be recognised that the DUAA 2025 was passed in a modern context, where grappling with an ever-changing world leads to passing these clauses almost as reflex.

The increasing commonality of these powers, of which this provision is a good example, therefore bears examination. It is unclear exactly how many Henry VIII clauses there are in modern Parliamentary legislation – itself a little worrying. The number of statutory instruments (secondary legislation and regulations) hasincreased drastically since the mid-20th century. The high-water mark, 4,200 on average per year in the 2000s, now sits around 3,000 – but is on the rise again. What is particularly worrying, from a separation of powers perspective, is how the increase is inversely correlated to a fall in the amount of new primary legislation over the same period. For many intents and purposes, it is ministers who legislate, not Parliament. There are obvious efficiency arguments, and clarity arguments like those made above. Clearly it is faster for a minister to decide on regulations, and for Parliament to simply reject or accept them, than for the whole torturous process of a Bill. There is also a countervailing democratic argument: ministers are part of a government elected under a manifesto, and so are accountable to the electorate to that extent. But looking at section 80 of the DUAA 2025 shows how these can fall short from a principled perspective. Is it really right that Parliament should be repeatedly, habitually, ceding the ability to legislate to ministers, not chosen *qua* ministers by the electorate, and who may use the delegated power for decisions beyond the mandate of an election? It cannot be. The argument for efficiency is its own undoing: it is more efficient precisely because it takes power away from Parliament, and limits its ability to exert control over the lawmaking process. The democratic argument fails: the very nature of Henry VIII powers kicks the can down the road. The minister who exercises a power to redefine the acceptable boundaries of ADM may very well be part of a government elected without a whisper of automation regulation. Primary legislation requires a Parliamentary majority, ministerial legislation only the process delineated in the Act. This sort of thinking results in the legislature handing the executive immense amounts of power – in this case, deciding what sort of ADM will even be subject to safeguards – and hoping the judiciary will pick up the slack with the tools outlined above.

Limited horizontal effect

It is obvious that the relaxation of prohibitions surrounding ADM will lead to more decisions being made by machines, as the Government acknowledged. Concerned parties noted during the passage of the DUAA 2025 that data outside of the 'special category' may nonetheless be used to discover those characteristics – postcode data, class data, data on socio-economic status. This obviously raises privacy concerns, since people may be subject to decisions based, by inference, on private data. ADM is a particularly worrying use case, since complex algorithms are 'black boxes', which means that their reasoning cannot be interrogated. Overseers therefore cannot prevent Automated Decision Makers from making, for example, racist decisions, except by carefully curating the data they are allowed to access. For example, in the automated A-Level grading which took place during the pandemic, despite precautions taken to prevent bias "the profiles of those attending different schools inevitably led to outcomes being different based on their protected characteristics, including race and sex" . It is difficult to be assured of procedural fairness when the process is inherently and unavoidably opaque. This is problematic in itself, but it also makes it trickier than ever to review these decisions on procedural fairness grounds. This undermines the ability of data subjects to challenge decisions with similarly significant effects to legal ones. This is especially pronounced when the issue at hand is indirect discrimination, as it weakens rights protection even further to hinder the review of these decisions.

The Government countered these concerns at the bill stage by noting that while an increase in ADM was anticipated, most of these would be from private actors, which "he additional processing by private bodies will generally not raise ECHR concerns, because Article 8 ECHR will not be engaged because the controller is not an emanation of the State". This argument, as noted by Big Brother Watch, merely exploits the laissez-faire state of the law regarding the horizontal effect of human rights. Courts are still unwilling to make private bodies subject to human rights obligations, even if they are performing what would otherwise be public functions. This was exemplified by the majority decision in *YL v Birmingham City Council and Ors* [2007] UKHL 27. YL, an elderly woman suffering from Alzheimer's disease, was evicted from her care home. The care home was run by Southern Cross, a private company, and many of their residents were placed there by Birmingham City Council in the exercise of its statutory care powers. The majority found that YL could not rely on her ECHR rights against Southern Cross because it was not exercising a public function in housing those sent to it by Birmingham. Of particular relevance was the fact that Southern Cross was a for-profit business. The view taken of the functional test for public function was therefore narrow, and so out of line with public sentiment that Parliament saw fit to define care subject to local authority placement as the exercise of a public function. The minority took a broader view, one which was perfectly consistent with the previous case law on the functional test and the contracting out context of the Human Rights Act.

Nonetheless, the impact of *YL* is still being felt. This is particularly pressing at a time when state agencies are continually being gutted, sold, or having their functions contracted out. As these contractors are driven by economic efficiency, they will no doubt embrace ADM whole-heartedly as a cheap and easy way of making decisions with huge and unwieldy data sets. The types of decision for which ADM is most attractive are those, therefore, that are likely to touch on what the minority in *YL* would have considered public functions. That subjects will not be able to rely on their privacy rights in such circumstances is rather worrying. The safeguards of section 80 only come into play when significant category data is directly being processed, but private companies are largely given free reign otherwise, with data that is still personal, private, and should be protected. Even when the safeguards do bite, they only will do so to the extent the Secretary of State decides they should, under the Henry VIII powers above.

The legitimate interest exception and EU divergence

Article 6(1)(f) (lawfulness of data processing) does provide that data controllers must consider if their legitimate interests are outweighed by the fundamental rights of the subject requiring protection of data, but it is worth noting two things. Firstly, this is one of six situations in which data processing is equal, and the others, such as data processed pursuant to a contract, do not require a balancing exercise. Secondly, in the balancing situation, the ball is placed entirely in the controller's court, and decisions made by them may take years to come under scrutiny, especially when there are so many controllers, dealing with so much data. These provisions therefore do not offer adequate privacy protection to data subjects when compared with the previous position under UK GDPR. This also means that British data protection standards have further diverged from the EU's, with those in the United Kingdom worse protected.

<u>Police use</u>

Section 80(3) of the DUAA 2025 replaces the former sections 49 and 50 of the Data Protection Act 2018. The effect of the subsection is to repeal the former blanket prohibition on the use of ADM by law enforcement, allowing it where either the subject consents or the "decision is required or authorised by law". Onlookers noted that the interpretation taken by police forces of 'authorised by law' is likely to be very broad. The example of live facial recognition is instructive, since the technology is currently used by a number of police forces, including the Metropolitan Police. While legislation does not specifically ban the use of this technology, it has been found to be inconsistent with GDPR in European supermarkets. If the argument is that the technology, not being banned, is authorised by law, police forces will no doubt use the same arguments to justify the use of ADM. This goes contrary to traditional 'red light' theories of governmental action, and to the root of what 'authorised by law' means. If, as suspected, police forces use the broad view, more unexaminable, un-interrogable ADM will be used to make decisions which may well be racist, classist, or otherwise reprehensibly discriminatory in effect. The DUAA fails adequately to anticipate this, or protect against it, and leaving the door open for such broad interpretations of legal authorisation contravenes essential public law principles requiring a positive legal basis for state action. The courts, one hopes, will be able to rein any potential abuses in, but in the meantime the door is wide open for invasions of privacy justified by an absence of regulation.

However, even the limited safeguards can be circumvented for the reasons outlined above. This means that where, for example, ADM is used to protect public or national security, the subject cannot make representations about the decision, nor obtain human intervention, nor contest the outcome of the decision. They need not even be told that the decision-making process was automated. This is of particular concern when, again, controllers may be incentivised to take a very broad view of what 'public security' entails. Senior police officials approved, and were instrumental in developing, the controversial changes made by the then-Home Secretary to the definition of 'serious disruption' as disruption which was 'more than minor', which were subsequently found to be *ultra vires*. Because, when these safeguards are circumvented, subjects may not have the right to even know that ADM has been used, much less contest the decision, it seems likely that many justifications on public security or other grounds will be difficult or impossible to contest, and the ramifications in the interim will be drastic. This contravenes the basic natural justice principle, that *audiatur et altera pars* (let the other side also be heard). Parties should know the case against them and be able to make representations. In the sorts of cases where these exceptions would apply, where the decision would have a similarly significant effect to a legal one, these natural justice concerns are likely engaged. By removing the ability of data subjects to even know that ADM has been used, they have been prevented from having a fair hearing, and have not been informed of the nature of the case against them, including that the decision was made by a machine. It is clear then that these circumventions are not only bad because they will prevent scrutiny of state decisions, but because they contravene fundamental principles of natural justice.

<u>Conclusion:</u>

In conclusion, this essay has used the Data (Use and Access) Act 2025 as a prism through which to examine many of the most pressing issues in public law today. Section 80 of the DUAA 2025 fails to address many of the concerns with regard to ADM in particular, and perpetrates a number of worrying tendencies. The use of a

Henry VIII power undercuts, rather than bolsters, legal certainty regarding ADM, and contributes to a wider undermining of Parliamentary Sovereignty. The narrowing of prohibitions regarding ADM generally is concerning in a context of limited horizontal effect for human rights, especially when so many public functions are contracted out. Continued broad interpretation of 'authorised by law' may allow significant decisions based on sensitive data to be undertaken entirely by ADM by state agencies in inappropriate circumstances, while a broad construction of the public security exception, in particular, will prevent data subjects from exacting any scrutiny whatsoever over the process. The next few years will see substantial litigation surrounding these provisions. The judiciary will use the tools it has developed to rein in executive overreach, which is increasingly likely, and should use the opportunity to right the course of the horizontality case law and prevent police exploitation of incomplete regulation. Parliament could prevent much injustice in the meantime by correcting this unfortunate provision of law.

Reforming Unfair Dismissal: The Employment Rights Bill and the Six-Month Qualifying Period

By Bora Durak

I. INTRODUCTION

The right not to be unfairly dismissed has long been a central pillar of UK employment protection. Yet under the Employment Rights Act 1996 (ERA 1996), most employees currently need two years' continuous service before they can bring an ordinary unfair dismissal claim. This extended qualifying period has been criticised for leaving millions of workers without recourse against arbitrary dismissal, save where they can shoehorn their case into limited "automatically unfair" categories or frame it as discrimination.

The Employment Rights Bill 2025 (ERB) seeks to recalibrate that balance. As introduced, the Bill would have abolished the qualifying period entirely and created "day one" unfair dismissal protection, paired with a new statutory probationary regime. During its passage, however, the House of Lords forced a compromise. Following intense "ping-pong" and tripartite talks with unions and business groups, the Government agreed instead to reduce the qualifying period to six months and to abandon the probationary scheme.

This essay argues that the reform, even in its compromised six-month form, is normatively and doctrinally justified. By closing the critical access-to-justice gap for short-service employees, the reform better aligns UK law with the underlying rationale of unfair dismissal protection and international practice, while still leaving employers a reasonable trial period. Section II of this essay outlines the existing framework under the ERA 1996. Section III summarises the ERB reforms and the legislative history leading to the six-month compromise. Section IV analyses doctrinal implications, particularly for tribunal access, redundancy, and discrimination. Section V considers stakeholder perspectives. Section VI concludes that the six-month threshold represents a defensible and desirable rebalancing of the employment relationship.

II. CURRENT LAW: UNFAIR DISMISSAL AND THE TWO-YEAR GATEKEEPER

Section 94(1) ERA 1996 confers on employees "the right not to be unfairly dismissed". To bring an ordinary unfair dismissal claim, an individual must show that they are an "employee" within the statute and that they have the requisite period of continuous employment. At present, section 108(1) requires two years' continuous service in most cases. Employees who fall short of that period are barred from bringing an ordinary unfair dismissal claim, irrespective of how capricious or harsh the dismissal may appear.

Where the qualifying period is met, the employer must show a potentially fair reason for dismissal, usually falling within one of five statutory categories: capability, conduct, redundancy, breach of statutory restriction or "some other substantial reason". The employment tribunal then asks whether, in all the circumstances, the employer acted reasonably in treating that reason as sufficient for dismissal. The familiar "range of reasonable responses" test, developed in cases such as *Iceland Frozen Foods* and *Polkey*, underpins this evaluative inquiry.

The two-year threshold is subject to important exceptions. For specific reasons, a dismissal is "automatically unfair" regardless of service, including dismissals connected with pregnancy or maternity, family leave, trade union activity, whistleblowing, and the assertion of specified statutory rights. Claims under the Equality Act 2010 for discriminatory dismissal likewise require no qualifying period. In practice, this has encouraged some short-service employees to frame their grievances as discrimination or whistleblowing to gain access to the tribunal. Many others, whose dismissal is unjust but not linked to a protected ground, remain without remedy.

The qualifying period has always been a policy choice rather than a constitutional given. Since unfair dismissal protection was first introduced in 1971, it has fluctuated between six months, one year, and two years as governments alternated between enhancing and diluting protection. The current two-year rule, re-introduced in 2012, sits at the restrictive end of the spectrum by international standards. Comparative data suggest that most countries in the Organisation for Economic Co-operation and Development (OECD) use probation or qualifying periods of three to six months before general dismissal protection applies. The UK, therefore, combines a broadly liberal labour market with an unusually prolonged period in which employers may dismiss ordinary employees with minimal legal risk.

Critics argue that this architecture undermines the purpose of the unfair dismissal law. The stated rationale of the right is to require employers to act with substantive and procedural fairness when ending employment, not merely to curb the most egregious automatically unfair or discriminatory dismissals. A two-year gatekeeper means this rationale applies only to longer-serving employees, leaving a substantial proportion of the workforce without any general protection at all. The ERB must be understood against that background.

III. THE EMPLOYMENT RIGHTS BILL: FROM DAY ONE RIGHTS TO SIX MONTHS

A. The Original Proposal

The ERB forms part of the Government's "New Deal for Working People" package. As introduced, the Bill proposed to abolish the qualifying period for ordinary unfair dismissal entirely. Clause 23 would have repealed the two-year requirement in section 108 ERA 1996 and established unfair dismissal as a day-one right for all employees. Ministers presented this as fulfilling a manifesto pledge to extend protection "from day one" and to end the practice of employers dismissing staff shortly before the two-year mark.

To temper concerns about day-one rights, the Bill also envisaged a statutory "initial period of employment". Within that initial period, envisaged in policy statements as up to nine months, a modified unfair dismissal regime would apply for dismissals based on individual conduct, capability, or similar reasons. Employers would have to follow a lighter procedure, typically an informal meeting and an opportunity to respond, rather than the full panoply of warnings and formal hearings. Redundancy dismissals were expressly excluded from this light-touch regime, so that fair consultation and selection duties would apply from the outset.

The Bill also created powers to adjust the compensation cap for unfair dismissal claims arising within the initial period and signalled an intention to lift or relax the general cap in section 124 ERA 1996. This would strengthen remedies in meritorious cases, particularly for higher-earning claimants who are currently constrained by the statutory ceiling.

The effect of the original proposal would have been radical. Approximately one-third of UK employees have less than two years' service at any given time. Day-one rights would therefore have brought millions of additional workers within the scope of unfair dismissal protection, albeit subject to a lighter process and potentially lower awards during the initial months. The UK would have moved from one of the most extended qualifying periods in the OECD to effectively none.

B. Lords' Resistance and the Six-month Compromise

From an early stage, employer organisations and many parliamentarians expressed unease about the day-one model. Business groups argued that immediate unfair dismissal rights would deter hiring, particularly among small and medium-sized enterprises (SMEs), and increase the risk of speculative claims. In the House of Lords, peers from across parties opposed the complete removal of the qualifying period. They accepted that the current two-year rule was excessively long but contended that day-one protection over-corrected and risked chilling recruitment.

In July 2025, the Lords amended the ERB to reinstate a six-month qualifying period. This would scrap the two-year gatekeeper but still provide employers with a clear, limited period to assess new hires. The amendment also removed the complex statutory initial period scheme in favour of a single, simple threshold. The Lords' rationale was that six months aligns with typical probationary periods and with international norms, and that most employers ought to be able to judge suitability within that time.

The Government initially sought to overturn the amendments, and the Commons repeatedly rejected the six-month clause during parliamentary "ping-pong". Ministers emphasised the symbolic importance of day-one protection and argued that any qualifying period left early-months employees exposed. The stalemate threatened to delay the entire Bill, including unrelated reforms such as day-one sick pay and enhanced redundancy protection.

In November 2025, following intensive tripartite talks with the Trades Union Congress (TUC) and major business organisations, the Government announced a compromise. It agreed to accept a six-month qualifying period in place of day-one rights and to abandon the statutory probationary scheme. In return, it secured union support for the swift passage of the Bill and obtained business endorsement that the new threshold would be manageable. As part of the deal, the ERB was amended to require any future change to the qualifying period to be made by primary legislation rather than secondary regulations, making it harder for a future government to raise the threshold by ministerial order.

By December 2025, both Houses had approved the amended Bill. The six-month qualifying period is expected to be brought into force, alongside related reforms, during 2026. At that point, section 108 ERA 1996 will be amended so that the general qualifying period for ordinary unfair dismissal is six months rather than two years.

~~IV. DOCTRINAL IMPLICATIONS OF A SIX-MONTH THRESHOLD~~

A. Tribunal Access and Caseload

The most immediate doctrinal effect of the reform is that employees with between six and 24 months' service will be able to bring unfair dismissal claims. That cohort includes a large proportion of workers in sectors characterised by short tenure and high turnover. Allowing those employees to challenge the fairness of dismissals will inevitably increase the number of claims issued in employment tribunals.

The tribunal system is already under strain, with significant backlogs and multi-year delays in some jurisdictions. A rise in unfair dismissal claims, therefore, creates a risk that justice will be delayed. This, however, does not argue against the reform itself. Instead, it underscores the need for parallel investment in tribunal capacity and for effective use of early conciliation and alternative dispute resolution. Access to justice should not be rationed by maintaining an anomalously long qualifying period.

There is also a qualitative shift. Under the two-year rule, short-service employees with grievances sometimes pleaded discrimination or whistleblowing, not because those were the genuine issues, but because they were the only routes around the service bar. With a six-month threshold, many more disputes can be litigated straightforwardly as unfair dismissal. This should reduce pressure to stretch the equality and whistleblowing law to cover cases of simple unfair treatment. In doctrinal terms, unfair dismissal can resume its proper role as the primary remedy for unjust termination, rather than leaving tribunals to police ordinary unfairness via specialised causes of action.

B. Redundancy and Dismissal Practices

The reform also affects redundancy law and dismissal practices. An employee with more than six months' service who is dismissed on grounds of redundancy will be able to challenge the fairness of the redundancy process, for example, if the selection was arbitrary or the consultation inadequate. Under the old regime, many such employees were outside the scope. Statutory redundancy pay will remain linked to two years' service, but the procedural fairness obligations of unfair dismissal law will protect far more workers in redundancy situations.

Employers will also need to rethink how they use probationary periods. Many already operate contractual probation, often of three or six months. Under the new law, any dismissal after six months will be subject to unfair dismissal scrutiny, so employers who wish to avoid potential liability will need to address serious suitability concerns before the threshold is reached. This is not an undue burden. It encourages employers to manage performance proactively, provide feedback and make prompt decisions, rather than relying on a long statutory buffer of two years within which to dismiss at will.

Some worry that employers may respond by systematically dismissing staff just before their six-month anniversary. Such behaviour would be possible, but several factors limit it. First, dismissing people at five months imposes real recruitment and training costs. Secondly, employees may still have contractual claims, and automatic unfair dismissal and discrimination protections apply from day one. Thirdly, reputational concerns and labour market competition constrain overtly exploitative practices. Empirically, the existence of a much shorter qualifying period in many other jurisdictions has not produced widespread "five-month churn".

C. Interaction with Discrimination and Automatically Unfair Dismissal

The six-month reform does not affect day-one protections against automatically unfair dismissal or discrimination. An employee dismissed for, say, union activity or pregnancy remains protected regardless of service. In doctrinal terms, there will now be a clearer layering of rights:

- from day one, protection against discriminatory and automatically unfair dismissals;
- after six months, general protection against unfair dismissal for any reason.

This structure is coherent. The most egregious grounds for dismissal, which offend wider public policy, are prohibited immediately. For other types of unfairness, the law requires a short period of service as a proxy for the employer's opportunity to assess suitability. The earlier two-year gap between these layers had little principled justification. Reducing it to six months produces a more proportionate and principled framework.

V. STAKEHOLDER PERSPECTIVES

A. Trade Unions and Worker Advocates

Trade unions have consistently criticised the two-year qualifying period as excessive and unjust. The TUC estimates that millions of workers currently lack protection against unfair dismissal due to the service requirement. From the union perspective, the two-year gatekeeper undermines job security, suppresses whistleblowing, and dissuades workers from raising concerns about health and safety or unlawful practices.

Unions, therefore, welcomed the original day-one proposal as implementing a long-standing demand for "day one rights". When the Government shifted to a six-month compromise, the reaction was mixed. The TUC publicly accepted the deal as a "workable package" that would deliver substantial improvements while ensuring that the wider ERB was not lost in legislative deadlock. Some unions, notably Unite, criticised the retreat from day one, arguing that it weakened the New Deal agenda and risked disappointing workers' expectations. Nevertheless, the movement recognises that cutting the qualifying period from 24 months to six months is a significant advance, and unions are likely to focus on ensuring that workers know and can exercise their new rights.

From an analytical standpoint, the union critique of the two-year rule is compelling. It highlighted a genuine injustice in the law. The six-month reform does not fully realise the unions' ideal of day-one protection, but it alleviates the problem that motivated their campaign.

B. Employer Organisations and Business Groups

Employer organisations have been more sympathetic to the principle of a qualifying period. They emphasise that businesses, particularly smaller ones, need some flexibility in the early months of employment and fear that immediate unfair dismissal rights could increase legal risk and deter hiring. These concerns were central to the Lords' resistance to day-one rights and to the eventual compromise.

Business groups welcomed the six-month threshold as a pragmatic outcome. In a joint statement, six major employer bodies described the compromise as "crucial for business confidence to hire" while still improving protection for workers. They also welcomed the scrapping of the statutory probationary scheme, which many regarded as complex and ill-defined. From their standpoint, a single clear six-month rule is easier to administer than a novel initial-period code.

There is still apprehension about increased tribunal claims and about the Government's parallel plan to relax the unfair dismissal compensation cap. Some employers fear that these changes, taken together, could encourage more litigation. That concern is not trivial. However, it can be mitigated by clear guidance, early conciliation, and managerial training. It is also worth recalling that employers who act with fundamental fairness and keep contemporaneous records have little to fear from tribunals applying an objective standard of reasonableness.

C. Policy Experts and Comparative Perspective

Independent policy institutes have supported reducing the qualifying period. The Resolution Foundation, for example, has argued that the two-year threshold is out of step with international norms and leaves too many workers unprotected, but that day-one rights might overshoot and risk a "lurch from one extreme to the other". The Foundation welcomed a three-to-six-month period as a better balance that would bring the UK more into line with other developed economies.

Academic commentary has similarly criticised the two years as inconsistent with the normative foundation of unfair dismissal law. Where the law recognises a right not to be dismissed unfairly, it is challenging to justify deferring that right for two whole years, particularly in a labour market where job tenure is often shorter. From this perspective, the six-month reform is a step toward restoring coherence between doctrine and policy.

VI. CONCLUSION: A JUSTIFIED REBALANCING

The reduction of the unfair dismissal qualifying period from two years to six months is a significant and welcome reform. It enlarges the scope of protection to cover a far broader swathe of employees, particularly those in insecure or lower-paid roles who are more likely to change jobs frequently and who are most exposed to arbitrary treatment. It restores a measure of justice to the preliminary stages of employment, while leaving employers a reasonable but not excessive window to assess new hires.

Doctrinally, the six-month threshold produces a more principled layering of rights. Automatically unfair dismissal and discrimination protections continue to apply from day one, reflecting a firm public policy. General unfair dismissal protection now attaches after a brief period, consistent with the idea that fairness is an inherent aspect of the employment relationship rather than a privilege earned only after lengthy service. The earlier two-year gap was both internationally anomalous and hard to defend normatively.

The compromise also proves that strengthening worker protection need not be incompatible with economic pragmatism. By abandoning the more complex statutory probationary regime and settling on a simple six-month rule, the ERB avoids unnecessary procedural complexity. Employer concerns about hiring chills and speculative litigation deserve attention, but they can be addressed through tribunal resourcing, early conciliation, and guidance rather than by maintaining an overly long qualifying period.

From a UK-centric legal perspective, the reform can therefore be defended on three grounds. First, it enhances substantive justice by ensuring that short-service employees are not deprived of recourse when treated unfairly. Secondly, it improves systemic coherence, aligning unfair dismissal with both domestic policy rationales and international practice. Thirdly, it preserves manageable flexibility for employers, who keep six months to identify poor fits and act, provided they do so fairly.

In sum, while the six-month compromise falls short of the original day-one ambition, it nevertheless stands for a progressive and necessary recalibration of unfair dismissal law. It moves the UK away from an outlier position and toward a more balanced model in which both parties to the employment relationship share rights and responsibilities from an earlier stage. On any fair assessment, that rebalancing is to be welcomed.

Looking ahead, particularly given the abandonment of the statutory probationary regime, litigation will likely shift to the substantive content of fairness in the early months. Tribunals must now fill the legislative void by delineating a "sliding scale" of reasonableness appropriate for short-service employees. How the judiciary strikes this balance will ultimately determine whether the reform delivers genuine security or merely procedural formalism.

Genocide and the Limits of International Law

By Kathryn Ravey

Entering its 77th year in force in 2025, the Convention on the Prevention and Punishment of the Crime of Genocide (hereafter "the Convention") continues to mark an important threshold of legal distinction within international law. Article II of the Convention defines genocide as a crime with the *dolus specialis* to destroy, 'in whole or in part, a national, ethnic, racial, or religious group'. This *dolus specialis*, or special intent, is distinct from simply the intent to commit the crimes enumerated in Article II, requiring instead the use those acts to bring about the destruction of a protected group of people. For the parties that have ratified the Convention, a genocide triggers an *erga omnes* obligation, where such a breach of *jus cogens* norms gives rise to obligations owed by that state to the international community as a whole. States, including the United Kingdom, must 'provide effective penalties for persons guilty of genocide' or complicity or incitement to conduct genocide, to 'liberate mankind from such an odious scourge'. Yet, is the definition of genocide under the Convention fit for its purpose to identify the crime of genocide before the international community? This essay contends the true obstacle to genocide prevention and accountability lies not in the law itself but in states' political refusal to give it effect.

Is the definition fit for purpose?

The Convention's definition of genocide serves to identify the crime in order to assess state parties' obligations to prevent and punish genocide. The definition itself does not give rise to the form of prevention or punishment for the crimes in the Convention. That must be found in its application. Yet, the definition of genocide has received much criticism for a variety of reasons. First, that the clause 'in whole or in part' implies the existence of a minimum scope that must be reached for acts to be considered genocide; second, that the listed protected groups do not include political or cultural groups; and third, that the threshold of *dolus specialis* imposes too high an evidentiary standard of proof upon prosecutors. Taken together, these critiques suggest that the definition is too narrow to encompass the scale and character of contemporary mass atrocities.

However, the Convention does not itself impose an inherently prohibitive evidentiary burden, the jurisprudential practice that has developed around meeting the *dolus specialis* threshold has become been a difficult, 'even impossible', undertaking. This high threshold has come about as perpetrators rarely declare genocidal intent openly or explicitly. Accordingly, the ICJ has held that genocidal intent may be inferred where a pattern of conduct admits of no reasonable explanation other than genocidal intent, commonly referred to as the only reasonable inference test. It is not the definition of genocide that renders genocidal intent elusive, but the manner in which courts have operationalised *dolus specialis*. By insisting that genocidal intent be the sole reasonable inference from a pattern of conduct, international jurisprudence has transformed a theoretically workable definition into a practically prohibitive standard.

These concerns point to a deeper problem; the persistent failure to acknowledge, prevent, and punish genocide cannot be explained solely by defects in the legal definition, but reflects a broader unwillingness to give effect to the obligations that a finding of genocide would entail. This argument is evidenced by a history of unacknowledged genocides for which many of its victims have been denied meaningful accountability and justice. I argue that the failures to punish and prevent perpetrators of genocide, both by states and, under the Rome Statute, individual actors, have little to do with the definition of genocide itself, but with the lack of political will to enact preventative or consequential action against perpetrators. To understand this, one need not look further than Israel's ongoing actions, widely acknowledged to be genocide, against the Palestinian people of Gaza.

The Application of the Genocide Convention in Gaza

As early as 26 January 2024, over three months after the events of October 7th, 2023, and the beginning of Israel's most recent military campaign in Gaza, the International Court of Justice (ICJ) issued its first provisional measures in response to the case brought by South Africa alleging that Israel is committing genocide against the protected Palestinian group in Gaza. The Court found Israel's *actus reus* were 'sufficient to conclude that [...] (the right of the Palestinians in Gaza to be protected from acts of genocide) claimed by South Africa and for which it is seeking protection are plausible,' ordering Israel to prevent the commission of genocidal acts and incitement.

Subsequently, several United Nations (UN) Committees, Special Rapporteurs, and human rights experts warned that Israel's actions in Gaza amounted to, or gave rise to a serious risk of genocide and condemned international inaction. Crucially, on 16 September 2025, the UN Independent International Commission of Inquiry found that Israel has committed genocide in Gaza, determining that Israeli authorities and forces carried out four of the five genocidal acts under the Convention with the intent to destroy Palestinians as a group.

Despite these clear findings and wide acknowledgment by the international community, such prevention and punishment of genocide have not been rendered. States, such as the United States of America, have consistently undermined actions to hold Israel to account, in direct contradiction to its international obligations under the Convention. Despite its responsibility to safeguard international peace and security, the UN Security Council has been unable to act after the United States vetoed six resolutions calling for an immediate and permanent ceasefire in Gaza. It is likely that, even upon a decision from the ICJ affirming that Israel has committed genocide, very little would change in the actions of the international community, as both the Court's recent Advisory Opinion and preliminary measures have not brought about Israel's compliance or concrete action by third states with the Court's decisions.

The power of today's international order to uphold international peace and security is on a knife's-edge. The international legal system, entrenched in impunity and colonialism, has found itself unable to rise to its mandate during blatant warnings of genocide. The foundational doctrines of genocide, however, are not the culprit. Instead, we must look at institutional reluctance to embed the application of genocide within state legal and political ethos.

Domestic Limits on Enforcement: The Al-Haq Judgment

Whilst the International Criminal Court and ICJ are considered the primary actors of genocide jurisprudence, domestic jurisdictions also play a key role in understanding how the definition of genocide is operationalisation, such as recent High Court case of *R (Al-Haq) v Secretary of State for Business and Trade*. *Al-Haq* concerned challenges to the government's decision to suspend most arms export licences to Israel, while retaining a 'carve-out' for UK components supplied to the multinational F-35 programme, which the Claimant argued was incompatible with the UK's obligations under Article I of the Genocide Convention in light of the situation in Gaza. Both parties acknowledged the legal standard governing the duty to prevent genocide, accepting that the obligation arises where a State 'learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed'. While the Respondent argued that no such breach of this duty has occurred unless genocide has actually been committed, the Claimant argued this point to be irrelevant, arguing that the ICJ's Provisional Measures in the South Africa case, properly interpreted, established the existence of a serious risk that genocide would be committed by Israel.

The Court acknowledged the relevance of the Genocide Convention and accepted that the duty to prevent genocide is engaged at the stage of serious risk but ultimately confined its role to reviewing the constitutional limits of judicial intervention. The Court held that determining whether the UK should withdraw from the F-35 programme involved questions of foreign policy, national security, and participation in a multilateral defence collaboration regarded by Ministers as vital to both UK defence and international peace and security. Such questions were characterised as acutely sensitive and political, lying within the constitutional competence of the executive and Parliament rather than the courts. The Court further held that there was no domestic legal foothold allowing it to assess whether the UK's continued participation in the F-35 programme complied with its unincorporated international obligations, because neither the Export Control Act 2002, nor the Strategic Export Licensing Criteria incorporate those obligations into domestic law, and the decision concerned matters of national security and foreign relations reserved to the executive.

Crucially, the Court held that the question of whether to withdraw from the F-35 programme was not a justiciable matter, but one lying within the constitutional competence of Parliament and, ultimately, the electorate. Although the existence of a duty to prevent genocide was acknowledged, its enforcement was effectively treated as a political judgment rather than a justiciable legal obligation. In *Al-Haq*, the definition of genocide was not deficient in identifying the risk or nature of the crime, but the Court's capacity to apply that definition domestically was constrained by the doctrine of parliamentary sovereignty, which placed ultimate responsibility with the political branches of the state. Where the application of the genocide definition is treated as a matter of state policy rather than legal adjudication, courts risk functioning as a procedural formality rather than as an effective check on the prevention of the gravest international crimes. Absent meaningful judicial scrutiny, even in cases where courts ultimately defer to the executive, equality before the law is undermined and executive discretion risks operating beyond effective legal constraint.

In both domestic and international adjudication, courts acknowledge the gravity of genocidal harm, but structure legal responsibility in ways that ultimately insulate states from accountability by treating core questions of intent, attribution, or enforcement as beyond judicial reach. In the case of *Bosnia and Herzegovina v Serbia and Montenegro,* for example, the ICJ found that while genocide had occurred in Srebrenica, the Federal Republic of Yugoslavia lacked the effective control to legally be attributed with the crime. The Court concluded that the absence of demonstrable genocidal intent or direct state responsibility insulated states from accountability under the Convention, despite the eventual application of individual criminal responsibility.

The Legal Conception of Genocide

The reluctance of courts, both domestic and international, to impose meaningful legal consequences on states in the face of genocide is not merely a product of contemporary judicial caution but reflects the political foundations of the Genocide Convention itself. The creation of the definition of genocide, spearheaded by Raphael Lemkin, arose from the belief in the need to address a gap in the newly created international legal framework that did not yet account for such a crime. The definition, and indeed political concept, of genocide was situated in the context of the then-ongoing Holocaust. It had been decided by the International Military Tribunal in Nuremberg that crimes against humanity, codified in the London Charter, are only punishable if they are committed during a war of aggression. Lemkin saw that this restrictive interpretation of crimes against humanity would not encompass the nature of the atrocities that had recently been committed in Europe.

This interpretation likely gave way to the success and adoption of the concept of genocide in international law. But the decision to enact genocide into international law had less to do with major powers believing that the legal framework needed more to ensure such crimes could never again occur, and more to do with the need for the great powers to honour the UN General Assembly's appeal to international conscience. As Moses asserts, the major powers at the UN intended to define genocide in a way that would not constrain their own practices of warfare, colonial repression, or management of dissent. Mass deportation, for example, was not to be restrained or associated in any way with genocide, as it was an ongoing state practice during the conception of the Convention. International law was created to regulate the actions between states, not to mitigate their imperialist ambitions.

The Holocaust created the conceptual archetype of genocide and has since been placed at the top in a hierarchy of evil among other genocides, one that became detached from its legal application into something against to compare other genocides. This framing of genocide, a rhetorically weightier legal concept than crimes against humanity, came at the cost of tightening its political scope, anchored to the archetype of the Holocaust. Thus, the definition of genocide became narrow enough to decouple the crime of genocide from its roots in politically embedded practices of group destruction, transforming it into a concept that posed little challenge to state sovereignty. In short, the Holocaust's moral dominance over how we understand genocide has tied it to one historical extreme, making it difficult to apply to the contemporary means through which states and actors destroy groups.

The Limits of Law

The exceptionally high threshold for establishing genocide is not merely doctrinal, but reflects the crime's unique political and moral weight and the *erga omnes* obligations that flow from a formal finding of genocide, all of which incentivise states to resist its legal application. This has produced a structural accountability gap, whereby mass atrocities that do not meet the stringent requirements of genocidal intent fall outside the preventive and responsibility framework of the Genocide Convention, despite clearly engaging the conscience of the international community.

Considering the object and purpose of the Convention, the definition of genocide should be interpreted in a way that gives rise to effective and responsive prevention and punishment of genocide. Yet, it is unlikely that a change in the definition of genocide would improve its application. The political and legal structures, as well as actors, in place to prevent such a crime have proven their reluctance to apply any such interpretation on a procedural and institutional level. Such an interpretation would threaten to infringe upon states' sovereignty, undermining state power and profitability, and perhaps the ability to ensure permanent security from potential threats that might arise within their effective control. Ultimately, international law is determined by what states wish to be bound by. One need not look further than what is occurring in Gaza to see that for powerful states, no legal conception of genocide will curtail their power or hold them to account. The future of genocide prevention lies not in reforming Article II of the Convention, but in determining whether international law can bind states and uphold the rule of law in the face of power.

HUDA AMMORI V SSHD: A BROAD ANALYSIS THROUGH THE LENS OF PUBLIC LAW

By Sammam Junaid Efti, Kazi Habiba & Shah Mohammed Rafi

Abstract

This essay concerns public and administrative law, constitutional law and human rights law. The authors wrote this essay in light of the constitutional significance of *Huda Ammori v Secretary of State for the Home Department*. Both the High Court and the Court of Appeal have given judgments on interim relief and permission to apply for judicial review (four judgments in total). The High Court finally handed down a landmark judgment on the substantive judicial review application on 13 February 2026 on this case, finding that the Home Secretary acted unlawfully by proscribing Palestine Action under the *Terrorism Act 2000*.

The case concerns a significant constitutional challenge to the proscription of Palestine Action under the Terrorism Act 2000. The preliminary question, before questions of law for the purposes of judicial review could be determined, was whether the statutory route via the Proscribed Organisations Appeal Commission (POAC) served as an adequate alternative to judicial review. Both the Court of Appeal and the High Court made substantial findings in relation to the proportionality of proscription against *Article 10 and 11 ECHR*, and on other grounds of public law principles. This essay analyses the judgments of the High Court and Court of Appeal in respect of the interim relief application, the application for permission to apply for judicial review, the substantive judicial review application and aims to provide a critique of significant elements of those judgments.

Summary of facts

The Claimant, Huda Ammori, co-founded Palestine Action in 2020 to campaign against UK-based companies supplying military equipment to Israel, which she states is to *"prevent serious violations of international law by Israel…against Palestinian people…and to expose and target property and premises connected to such crimes and violations."*

On 20 June 2025, activists linked to Palestine Action damaged two RAF aircraft with red paint at RAF Brize Norton, which the Claimant describes as *"a key site of British military support for Israel's genocide in Gaza."* Citing a *'nationwide campaign of direct criminal action'*, the Home Secretary announced her intention to proscribe Palestine Action on 23 June 2025 under the *Terrorism Act 2000* ("the 2000 Act"). Ms Ammori filed for judicial review on 27 June 2025. The proscription order ("the order") was approved by Parliament and came into force on 5 July 2025. The legal effects of the order, described by Raza Hussain KC in his submissions as *"chilling"*, would be such that any person who is a member of or shows support for Palestine Action after the making of the order would be liable for offence(s) under Section 11-13 of the *Terrorism Act 2000*.

Litigation commenced with an urgent application for interim relief to suspend the order. On 4 July 2025, Chamberlain J refused relief, ruling that while the claim raised a serious issue regarding *Articles 10 and 11 ECHR*, the public interest in national security outweighed the immediate impact on the Claimant. The Court of Appeal upheld this decision later that evening, finding no error in the High Court's balancing exercise under the *American Cyanamid* principles (recently considered by Singh LJ and Chamberlain J in the public law context in *R (FTDI Holding Ltd) v Chancellor of the Duchy of Lancaster*).

The proceedings then moved to the permission to apply for judicial review stage at the Administrative Court. On 30 July 2025, Chamberlain J ruled on the preliminary issue, finding that the statutory appeal via POAC was not a suitable alternative remedy, which would otherwise have been a bar to judicial review proceedings. He granted permission on grounds that it was arguable that the order was disproportionate to the *Article 10 and 11 ECHR* rights of the Claimant (and many others) and that there was a failure to consult prior to making the order. The six other grounds pleaded were all refused permission by Chamberlain J. The Secretary of State appealed the preliminary issue at the Court of Appeal, while the Claimant cross-appealed the refusal of permission on the six other grounds.

On 17 October 2025, the Court of Appeal dismissed the Secretary of State's appeal. It held that POAC is designed for deproscription rather than challenging the initial order. The Court also allowed the Claimant to proceed on two additional grounds: taking into account irrelevant considerations / failure to take into account relevant considerations, and failure to follow the Secretary of State's published policy.

On 13 February 2025, the High Court considered the Claimant's case on the four grounds on which permission was granted. The High Court held that the Secretary of State's decision was unlawful because it breached its own policy and its decision was disproportionate against *Article 10 and 11 ECHR* rights of the Claimant.

<u>Alternative remedy – preliminary issue</u>

The preliminary issue of alternative remedy in R *(Ammori) v SSHD was* determinative: had the Secretary of State's argument succeeded, this would have been *"fatal"* to the judicial review challenge. The High Court, through a very meticulous analysis of the factors in the individual case of *Ammori*, held that POAC was not a *"convenient and effectively available"* alternative remedy (as defined in *R (Watch Tower Bible & Tract Society of Britain and others) v Charity Commission*). The Court of Appeal upheld Chamberlain J's finding, focussing on the statutory interpretation of relevant sections of the *Terrorism Act 2000*, *Boddington* case analysis and *Kurdistan Workers' Party* case analysis.

In the judgment on the application for permission to apply for judicial review, Chamberlain J's five-factor analysis was a compelling exercise of judicial discretion. The profound and immediate *"chilling effect"* on the *Article 10 and 11 ECHR* rights of the Claimant and others had to be weighed against the proposed alternative route POAC. The stark difference in timelines – a High Court judicial review in the autumn/winter of 2025 versus a potential POAC hearing in *"the middle of 2026"* – meant that justice delayed would be justice denied. This harm to freedom of expression was irreparable by a future deproscription order.

Chamberlain J's most powerful practical observation was on the *"recipe for chaos"* that would result from barring judicial review. This would open the spectre of multiple, collateral *Boddington*-style challenges to the order's validity in Magistrates' Courts and Crown Courts across the country, leading to *"different and possibly conflicting decisions"*. Hence, Chamberlain J held that there was a *"strong public interest in allowing the legality of the order to be determined authoritatively as soon as possible."*

The Court of Appeal moved beyond the fact-sensitive analysis by Chamberlain J in the High Court on the issue of alternative remedy to the more fundamental question of statutory interpretation: was the deproscription process under *sections 4 and 5 of the 2000 Act* intended by Parliament to be the means of challenging the lawfulness of the initial order made under *section 3(3)(a)*?

In answering this question, the Court of Appeal analysed the distinction between the Secretary of State's statutory powers under *Section 3(3)(a)* and *Section 3(3)(b). Section 3(3)(a)* confers a power to *"add an organisation to Schedule 2,"* while *section 3(3)(b)* confers a separate power to *"remove an organisation from that Schedule."* An application under section 4(1) is explicitly an application for an order *"removing an organisation from Schedule 2,"* not an appeal against the act of adding it. Consequently, the right of appeal to the Proscribed Organisations Appeal Commission (POAC) under *section 5 of the 2000 Act* is an appeal against a refusal decision by the Secretary of State to deproscribe from *Schedule 2*, not against the initial order.

The Court of Appeal analysed *section 7 of the 2000 Act*, which governs the effect of a successful deproscription appeal on criminal convictions. *Section 7(1)(d)* and *7(1A)(d)* effectively limit the effects of a POAC appeal: it only creates a right of appeal to the Court of Appeal against a criminal conviction for activities that took place *"on or after the date of the refusal to deproscribe"* against which the deproscription appeal was brought. A person convicted of an offence (e.g., membership under *section 11*) committed in the period *between* the initial order and the later refusal to deproscribe has *no* remedy via the POAC route. As the Court of Appeal put it, *"… the process for deproscribing was not intended as a means to remedy any of the consequences of an unlawful initial proscription."* Criminal convictions during the period between the date of making the Order and the date of the refusal by the Secretary of State to deproscribe are *"unaffected and remain in existence."*

The Court of Appeal's statutory construction was fatal to the Secretary of State's position on the issue of alternative remedy. Judicial review, if successful, leads to a quashing order, which generally renders the order a nullity ab initio (although the court retains remedial discretion as to the form and effect of relief) and vitiates any conviction based upon it from the moment it was made. On the other hand, the POAC route, as held by the Court of Appeal, deals with the situation where an organisation was correctly included within *Schedule 2 of the 2000 Act,* but circumstances changed, and the organisation was no longer involved in terrorism. The Court of Appeal agreed with Chamberlain J's analysis that the Home Secretary's decision on whether to proscribe an organisation is legally distinct from the Home Secretary's decision whether to grant an application to deproscribe an organisation. That, we say, is plainly correct given the wording of *section 4(1) of the 2000 Act*.

The ultra vires and improper purpose ground

In the interim relief judgment of the High Court, Chamberlain J explained five difficulties faced by the Claimant in advancing this ground. Firstly, Chamberlain J held that *section 1(1)(b) and (c)* constitute terrorism *"if it involves serious damage to property even if it does not involve violence against any person or endanger life or create a risk to health or safety."* Secondly, he did not interpret the statute any more narrowly than what was stated expressly, as the principle of legality or the principle that statutes ought to be interpreted in accordance with unincorporated international law did not allow the court to interpret the statute contrary to its express language. Thirdly, Chamberlain J held that *section 6 of the Human Rights Act 1998* was the only constraint on the scope of the Secretary of State's power (hence, he ultimately allowed permission on the ECHR proportionality ground). Fourthly, Hansards could not be used to inform the meaning of provisions of the *2000 Act* as the criteria under *Pepper v Hart* could not be satisfied. Fifthly, little weight could be attached to the fact that Palestine Action could be described as a *"civil society or dissent group"* when it was *"concerned in terrorism"*, such that exercising the power could not have been for an improper purpose.

The Claimant did not pursue the ultra vires ground in the permission application but pleaded the improper purpose ground. Chamberlain J refused permission on the improper purpose ground on the basis that even if Palestine Action did not advocate violence against persons, it did engage in other conduct that satisfied the statutory definition of terrorism. The Court of Appeal also refused permission on this ground.

With respect, our view is that both Chamberlain J and the Court of Appeal panel of judges were wrong in relation to the ultra vires ground.

The courts' *"plain meaning"* approach to section 1(2)(b) is, with respect, constitutionally inappropriate. The phrase, *"serious damage to property",* is ambiguous and open to wider interpretation when applied to a non-violent (in the sense of non-life-threatening) direct-action protest group. This is because the term *"serious"* is not defined anywhere in the statute. On an ordinary reading, Nour Haidar argues that seriousness must relate to "*the gravity of the harm which results (or is likely to result).*" Terrorism has historically been understood as conduct that threatens or causes serious harm to life or safety, producing terror as a psychological state (as can be seen from the list of organisations in *Schedule 2 of the 2000 Act*, which includes the likes of Boko Haram and Al Qaeda). By contrast, the Home Secretary's approach treats the financial cost of property damage as sufficient to meet the seriousness threshold, even where there is no risk to life. This, Haidar argues, "*attempts to lower the threshold of what amounts to 'serious' harm*" and introduces "*a subtle but significant shifting of the legal understanding of terrorism.*"

The ambiguity within *section 1(1)(b)* is precisely where the principle of legality should apply. This common law constitutional principle was articulated by Lord Hoffmann in *R v SSHD, ex p Simms*: *"Fundamental rights cannot be overridden by general or ambiguous words … In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual."*

The courts in *Ammori* inverted this principle. Chamberlain J's reasoning that *"If Parliament had intended such a restriction [to protect dissent groups], it would have included it expressly,"* is precisely *"the opposite of how the principle of legality works."* The principle requires courts to construe statutory powers consistently with common law rights unless Parliament has authorised their restriction in clear and express terms or by necessary implication. The principle is triggered precisely in such circumstances where the statutory wording is ambiguous.

The fact that national security is involved does not diminish the importance of the application of the principle of legality. The principle of legality applies equally in national security cases. As the High Court held in *Privacy International*, *"The national security context makes no difference as otherwise the courts would sanction wide powers to override fundamental rights."* If the Supreme Court in the cases of *Privacy International* and *UNISON* read statutory powers narrowly to protect constitutional fundamentals, there is no good reason why the courts could not do the same in *Ammori*.

By refusing to apply the principle of legality, the courts failed to ask the correct constitutional question: did Parliament, in passing the 2000 Act, *"squarely confront"* (in the words of Lord Hoffmann in *ex p Simms*) the political cost of allowing the Secretary of State to proscribe a non-violent civil disobedience movement as a terrorist organisation, thereby criminalising all its members and supporters? It was the most important constitutional question in the case. We say the answer is clearly no. The courts have, in effect, sanctioned a significant widening of the legal definition of terrorism, a move that Parliament itself never appears to have contemplated.

Article 10 and 11 ECHR proportionality ground

In the interim relief hearing at the High Court, Chamberlain J agreed at §91 of his judgment that the claim brought up at least one serious issue to be tried, that is, disproportionate interference with ECHR Articles 10 and 11. The chilling effect on human rights was at the heart of the argument, indicating that the ban stops not only group activity but also a whole range of political speech. A 'democratic society' is marked by plurality, tolerance, and an open mind. Similarly, as per the principles in *Steel v UK*, peaceful protests are necessary for plurality in a democratic society, and restrictions on such protests require strict justification. Chamberlain J, however, did not grant interim relief to the Claimant due to the difficulty in assessing their ultimate prospects at that stage, and the Court of Appeal did not find any error of law in Chamberlain J's interim relief judgment in accordance with the *PCSU* principles.

However, permission to apply for judicial review was ultimately granted by Chamberlain J on this ground, relying on his reasoning in the interim relief judgment without any further analysis. This was not in issue before the Court of Appeal, as Underhill LJ had only granted permission to appeal to the Secretary of State on the issue of alternative remedy. Chamberlain J's analysis on this ground is correct indeed, although he could have granted interim relief to the Claimant solely on this ground in the first instance, notwithstanding the fact that evidence of the Secretary of State was not filed then.

In the High Court's judgment on the substantive judicial review application, Dame Victoria Sharp DBE, with whom Swift J and Steyn J agreed, found that there were significant interferences with the Convention rights consequent on the offences in the *2000 Act*. They found that proscription was disproportionate as it caused significant interferences with the *Article 10 and 11 ECHR*. The Claimant's evidence in this relation to this ground of challenge was significant, and this ground was rightly upheld by the High Court.

"Palestine Action is not concerned in terrorism" ground

Section 3(4) of the 2000 Act provides that the criterion for proscribing an organisation is that it must be *"concerned in terrorism"*. *Section 3(5) of the 2000 Act* defines the scope of the phrase *"concerned in terrorism"*.

The Claimant argued that Palestine Action was not concerned in terrorism in two ways:

i. Palestine Action's acts were not intended to influence the British government, an element that is required under *Section 1(1)(b) of the 2000 Act*; and
ii. Palestine Action is not a structured group for where there was *"no sufficient nexus"* between its activities and the commission of acts of terrorism.

In the interim relief decision at the High Court, Chamberlain J rejected this argument as having no merit. He found it a reasonable inference that attacks on contractors supplying the military were designed to influence government policy, particularly given the timing of the specific attack on RAF Brize Norton. Consequently, the High Court refused permission on this ground, and it was not granted on appeal by the Court of Appeal either.

Under proper application of the statute, it is clear that Palestine Action does not satisfy the definition of terrorism under *section 1 of the 2000 Act*. There was, perhaps, a better way to plead this argument before both the High Court and the Court of Appeal. In *R (O and PRCBC) v SSHD*, Lord Hodge enunciated as follows in relation to statutory interpretation: "*Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections."*

Section 1(2)(b) of the 2000 Act can, arguably, be interpreted to apply only to property damages that endanger the lives of people. The context in *section 1*, read as a whole, is that terrorism involves violence against persons and endangerment of life. It would be contrary to the ordinary principles of statutory interpretation to read *Section 1(2)(b)* in isolation. There is no case law which considers what types of serious damage to property under *section 1(2)(b)* is sufficiently serious to amount to terrorism. Hence, we say it is reasonable to construe the statute in this manner. Had this ground been pleaded this way, we say it would have been at least arguable that Palestine Action is not *"concerned in terrorism"*.

In fact, we say such an interpretation is necessary where fundamental rights under the common law and ECHR are engaged due to the principle of legality and *section 3 of the Human Rights Act 1998*. Otherwise, civil disobedience is disguised as terrorism and conflated with political violence aimed at endangering lives. As Nour Haider put it: *"The legal distinction between civil disobedience which does not cause harm to, or threaten harm to, life or safety and political violence which has the explicit aim of causing serious harm or threatening serious harm to life is critical to our participation in democratic life."*

<u>Failure to gather sufficient information ground</u>

The Claimant argued that the Secretary of State failed to gather sufficient information before proscribing Palestine Action. This was based on the *Tameside* principle, which requires the Secretary of State to take reasonable steps to acquaint themselves with relevant information before acting. The High Court found that a robust evidence-based process had taken place across government, police, and security agencies; however, none of that material appeared in the open record. As a result, the Claimant, a co-founder of the organisation, could not meaningfully challenge the factual foundation of the decision.

The Claimant did not seek permission to appeal against Chamberlain J's decision to refuse permission to apply for judicial review on this ground. Chamberlain J's decision on this ground was well-reasoned, and it was sensible for the Claimant not to seek permission to appeal on this ground. The disclosure of documents by the Secretary of State was sufficient to show that reasonable steps were taken to discharge the *Tameside* duty. It was difficult to show how taking those steps were unreasonable in the *Wednesbury* sense.

Irrelevant considerations / failure to take into account material considerations, and failure to follow published policy grounds

The Court of Appeal was correct to grant permission on Ground 5 (failure to take into account relevant consideration / taking into account irrelevant consideration) because it identified a fundamental distinction between the substantive protection of human rights and the procedural rigour required by domestic administrative law. The High Court had, with respect, erroneously collapsed this ground into the general proportionality exercise, stating that if the outcome was proportionate under the *Human Rights Act 1998*, the decision-making process was immaterial.

The core of the analysis rests on the test for *'mandatory material considerations'* established by the Supreme Court in *R (Friends of the Earth Ltd) v Secretary of State for Transport* [2021], the test for which is *Wednesbury* irrationality as confirmed by Lewis LJ in *Keep Chiswell Green v Secretary of State for Housing, Communities and Local Government* [2025]. As reflected in the Court of Appeal's decision on Ground 5, the issue is whether the Claimant's eight specific factors, such as the non-violent nature of most of the group's activities, were matters the Secretary of State was legally required to consider under the statute, either expressly or by necessary implication. This inquiry is logically prior to any human rights analysis; if a decision-maker ignores a mandatory factor, they act outside their jurisdiction, rendering the decision unlawful regardless of its subsequent proportionality.

By granting permission, the Court of Appeal has ensured that the Secretary of State's exercise of the proscription power is subject to the *Tameside* duty, requiring her to ask the right questions and acquaint herself with the relevant information before making the order. This restores the necessary separation between the *vires* of the decision-making process and the *merits* of the human rights interference.

The Court of Appeal also granted permission for Ground 6, which was that the Secretary of State failed to follow her published policy. In *R (Lumba) v SSHD* [2011], the Supreme Court held that an individual has a *"basic public law right to have his or her case considered under whatever policy the executive sees fit to adopt provided that the adopted policy is a lawful exercise of the discretion conferred by the statute."*

The Claimant argued that the Secretary of State follow her policy guidance which prescribed certain factors in to be taken into account. The High Court refused permission on this ground, not because it considered the policy challenge to be unarguable on its own terms, but because any failure to follow the published guidance would add nothing if the court eventually concluded that the proscription was a proportionate interference with

Articles 10 and 11. However, the Court of Appeal granted permission on this ground, holding that whether the Secretary of State followed her own published guidance was arguable as it involved principles of domestic public law. This finding of the Court of Appeal underscores that adherence to policy is a necessary public law constraint on the exercise of permissive discretionary powers of the Secretary of State. Departing from publicly stated criteria without explanation undermines predictability and opens the door to arbitrariness.

In the substantive judicial review application judgment, Dame Victoria Sharp DBE dismissed the ground of challenge on the basis of the Secretary of State's failure to consider relevant matters. She found that most of the arguments pleaded on this ground were repetition of arguments in support of Ground 6 (that the Secretary of State failed to apply her policy) and Ground 2 (that the proscription was contrary to *Section 6 of the HRA 1998*), concluding that each argument was only a different way of contending that the Claimant should succeed on Ground 6 and 2.

This brings us to the treatment of Ground 6 (that the decision of the Secretary of State to proscribe is contrary to her own policy) by the High Court in the substantive judicial review application. Dame Victoria Sharp DBE concluded that the Home Secretary considered the operational consequences and advantages of proscription which was not a factor consistent with her own policy. However, what we find the most pertinent in the reasoning behind this conclusion is that the purpose of the policy is clearly to constrain use of discretion of the Secretary of State. This is correct analysis because the policy is an *"additional qualitative threshold"* to the use of the Home Secretary's discretionary power to proscribe. This is apparent from the fact that the policy only prescribed five factors for which the Home Secretary could use her discretionary powers. Any *"other factors"* considered when applying the policy had to be of the same nature, i.e., ejusdem generis. Operational consequences and advantages of proscription were not of the same nature and therefore, the Home Secretary was held to have breached her own policy.

<u>Public sector equality duty ground</u>

Both the High Court and the Court of Appeal ruled that the public sector equality duty ("PSED") ground was not arguable. The Claimant argued that the Secretary of State failed to consider the specific impact on the Palestinian community as distinct from the Muslim community. The Court of Appeal refused permission on this ground, agreeing with the High Court that the Secretary of State had adequately discharged her duty under *section 149 of the Equality Act 2010*. The Court noted that the Community Impact Assessment specifically addressed the effects on those supporting the Palestinian cause, which necessarily included the Palestinian community. These rulings confirm that the substantive hearing will not re-litigate the definition of terrorism or the equality duty but will focus squarely on human rights and procedural fairness.

However, there is a strong intersection between the PSED ground and the duty of consultation ground (on which permission was granted by Chamberlain J). The Claimant argued that proscribing an organisation associated with Palestinian activism had a distinctive equality impact, particularly on British-Palestinian individuals – a protected racial and national group. The lack of any meaningful equality assessment in the open record raises concern that the Secretary of State did not adequately consider the duty to eliminate discrimination and foster equality of opportunity. Respectfully, it is our contention that if the High Court accepted that a breach of duty of consultation in this case was arguable, then surely, it should also have found that the PSED challenge was at least arguable because there was arguably a failure to consult the Palestinian community by the Secretary of State. The Court of Appeal did not overturn Chamberlain J's ruling on the Claimant's cross appeal on the permission judgment.

Duty of consultation ground

A fundamental component of natural justice is that individuals or groups affected by an adverse decision should have a fair opportunity to make representations before it is taken: *Ridge v Baldwin* [1964]. While national security considerations may justify departing from such principles, they do not extinguish the duty of fairness entirely. As set out by Lord Neuberger in *Bank Mellat v HM Treasury (No 2)* [2013], *"before a statutory power is exercised, any person who foreseeably would be significantly detrimentally affected by the exercise should be given the opportunity to make representations in advance, unless (i) the statutory provisions concerned expressly or impliedly provide otherwise or (ii) the circumstances in which the power is to be exercised would render it impossible, impractical or pointless to afford such an opportunity."*

Palestine Action was proscribed without any prior consultation with the organisation or its members. The complete absence of consultation by the Secretary of State prior to the proscription of Palestine Action intensifies the chilling effect on political participation. Criminalising a protest-based organisation without affording it an opportunity, however limited, to express its position signals that certain political viewpoints lie outside acceptable democratic discourse. Chamberlain J rightly granted permission on this ground, finding it reasonably arguable that there was no compelling reason why consultation could not be undertaken by the Secretary of State in this case.

However, Dame Victoria Sharp DBE, with whom Swift J and Steyn J agreed, dismissed this ground in her judgment on the substantive judicial review application. She distinguished the case from the case in Bank Mellat, which did not involve national security. It is clear from her analysis that she preferred the principles in *Begum v Secretary of State for Home Department* over the principles established in *Bank Mellat* because Begum concerned a threat to national security similar to this case, although in the context of deprivation of British citizenship. The analysis is very detailed, and the dismissal of this ground has been justified properly by Dame Victoria Sharp DBE.

Conclusion

Huda Ammori v SSHD establishes that the Secretary of State cannot insulate initial proscription decisions from public law scrutiny by the courts by relying on the POAC appeals process. By identifying that successful deproscription does not expunge early convictions, the courts vindicated the primacy of judicial review in this context. The High Court's judgment on the substantive judicial review application that was published on 13 February 2026 carries consequences far beyond the parties to the litigation: it determined not only the legality of the proscription itself but also the rights and criminal liability of thousands whose lives depend upon the validity of such administrative decisions. In this sense, *Ammori* is not merely a case about terrorism and national security, but a test of the rule of law itself in trying times.

To flee or not to flee: Deliberate absence under the Extradition Act 2003 and its applications

By Alex Fagan

Without a clear understanding of deliberate absence in extradition law, the courts risk doing injustice to individuals. Statutory bars to extradition in general seek to ensure that requested persons are dealt with fairly and justly by the courts. They are important common-sense mechanisms to prevent requesting nations from abusing their powers of extradition. The bar contained at s.20 Extradition Act 2003, however, has provoked some consternation. It establishes that a person may not be extradited if he was convicted in his absence, unless that person had “deliberately absented himself from his trial” per s.20(3) of the Act. What ‘deliberate absence’ actually means in context, however, is far from straightforward.

By critically analysing the Supreme Court's approach to deliberate absence in *Bertino v Public Prosecutor's Office, Italy* [2024] UKSC 9 and its interaction with cases decided by the European Court of Human Rights, this essay advises caution when seeking to impose a rigid framework upon inevitably complex and nuanced factual circumstances. An evaluation of two recent decisions taken by the Divisional Court emphasises this need for caution. Clarity on the issue of deliberate absence is critically important to maintaining an effective and fair system of extradition which upholds international co-operative obligations. Diluting the force of Supreme Court pronouncements on deliberate absence risks undermining these obligations, and for this reason, the courts must tread carefully to ensure justice for individuals.

Bertino

In *Bertino*, the Supreme Court clarified what is meant by deliberate absence in s.20(3) and what constituted knowledge of a prosecution being brought against the requested person. In the Magistrates Court and the High Court on appeal, it was found that Mr Bertino had deliberately absented himself from his trial in Italy for grooming of a minor contrary to Article 609 of the Italian Criminal Code. He was never arrested, never questioned and never charged, only told that he was being investigated. Despite this, his decision to move to England was found by the district judge at Westminster Magistrates Court to constitute a 'manifest lack of diligence' [10]. A manifest lack of diligence, however, is surely different from actual knowledge that a trial was taking place at an appointed place at an appointed time, at which he might be convicted even if absent. Was this absence deliberate?

On appeal in the High Court, Swift J found an inferred waiver of Mr Bertino's Article 6 ECHR right to a fair trial by finding that his prosecution *in absentia* was a reasonably foreseeable consequence of his absence. In other words, he should have known not to move to England. S.20(3)'s interaction with Article 6 ECHR has already been appreciated in English domestic law by Lord Bingham in *R v Jones* [2002] UKHL 5 as being of "capital importance" at [8]. That case established the principle governing Crown Courts that a trial may still proceed in the event of a defendant's voluntary absence. The concept of reasonable foreseeability in relation to deliberate absence, however, is imported from the European Court of Human Rights at Strasbourg in the case of *Sejdovic v Italy* (Application No 56581/00) on 1st March 2006. In that case, it was found that a requested person may implicitly waive his Article 6 right if it could be shown that he had reasonably foreseen the consequences of his absence.

It is submitted, in this essay and in the *Bertino* Supreme Court judgement, that this construction is erroneous. The Strasbourg Court itself departed from their decision in *Sejdovic* three years later in the case of *Pishchalnikov v Russia* (Application No 7025/04) (judgment 24 September 2009) where the waiver of one's Article 6 right "must not only be voluntary but must also constitute a knowing and intelligent relinquishment of [that] right" [77]. Three years after *Pishchalnikov*, the Strasbourg Court went further again in *Sibgatullin v Russia* (Application No 143/05) (judgment 24 April 2012). This case established that a waiver "must be a knowing, voluntary and intelligent act, done with sufficient awareness of the relevant circumstances" ([48]).

This is a question of thresholds. *Sejdovic* imposed a low threshold of reasonable foreseeability. *Pishchalnikov* imposed a higher threshold of voluntary, knowing and intelligent relinquishment. *Sibgatullin* imposed a higher threshold still, taking voluntary, knowing and intelligent and adding to it a condition of sufficient awareness of the relevant circumstances. The Strasbourg Court, therefore, was moving towards making it more difficult for requesting states to extradite requested persons by raising the threshold of what was needed to unequivocally waive one's Article 6 right. This recognises the importance of ECHR rights and their need for protection. Granted, the *Sejdovic* judgement at [99] is correct that deemed or inferred knowledge can constitute an unequivocal waiver of one's right to trial, however subsequent caselaw has rightly shown that cases are fact-specific. Hard lines of what constitutes deemed knowledge are inappropriate.

This is the central question of Bertino. To what extent did the language of s.20(3) Extradition Act 2003, a domestic statue, align with caselaw in the European Court of Human Rights? In other words, was 'deliberate absence' commensurate to an 'unequivocal waiver'? The Supreme Court established that it was. The language used in *Pishchalnikov* and *Sibgatullin* was imported into UK domestic caselaw in paragraph [54] of the *Bertino* judgement:

"It is apparent from these cases that the standard imposed by the Strasbourg Court is that for a waiver to be unequivocal and effective, knowing and intelligent, ordinarily the accused must be shown to have appreciated the consequences of his or her behaviour." [54]

The language of an 'unequivocal waiver' appears to set a higher threshold that the wording of 'deliberate absence' in the Extradition Act. In ordinary parlance, a decision can be deliberate without it being unequivocal, but if a decision is unequivocal, it is most likely deliberate. This, however, is precisely why caselaw in extradition is so important. Given the provisions are all contained in one foundational statute, the Extradition Act 2003, it is necessary and appropriate for the meanings of those provisions to be developed by the courts in caselaw. As stated by the Supreme Court in *Bertino*, the Strasbourg Court was careful "to leave open the precise boundaries of behaviour that would support a conclusion that the right to be present at trial had been unequivocally waived" [58]. Each case should be tried on its own facts. This is the essence of *Bertino*.

The worrying question, however, is how Mr Bertino's case required the Supreme Court to intervene and clarify English extradition law's alignment with the Strasbourg Court. How did the learned district judge and Swift J in the High Court decide otherwise? It appears that the answer lies in the wording of the statute. Too rigid an adherence to the statutory language of 'deliberate absence' might lead to the conclusion that Mr Bertino did not fall under the s.20(3) exception and therefore should be extradited. A 'general manifest lack of diligence' [54] was sufficient to convince the district judge that he had deliberately absented himself, but this does not meet the high threshold imposed by later Strasbourg caselaw. By failing to sufficiently acknowledge European developments in this area of extradition law, justice was not done in *Bertino* until the case reached the Supreme Court.

Thus we see that the Supreme Court in *Bertino* was anxious to align UK extradition doctrines with European approaches, while also enabling a contextual, nuanced and fact-sensitive assessment of each individual case. It provided guidance, not a prescription.

Mohammed* and *Zebracki

Two recent cases in the Divisional Court have illustrated how *Bertino* has been applied to other cases of deliberate absence pursuant to s.20(3) Extradition Act 2003. It appears, however, that the Divisional Court erred in those cases by failing to recognise *Bertino's* guidance to 'leave open the precise boundaries of behaviour' which might lead to a conclusion of deliberate absence.

Firstly, in *Mohammed & Oprea v Romania* [2025] EWHC 1671 (Admin) the Court noted that Mr Bertino's manifest lack of due diligence was insufficient to constitute deliberate absence "because Mr Bertino had not been charged with a criminal offence and whilst he was a suspect had done nothing which might permit the inference to be drawn that he was evading the criminal process" [45]. However, the Divisional Court went further in *Mohammed* by formulating the "two limbs of the para 58 test", referring to paragraph 58 of *Bertino*. This test was set out in the *Mohammed* judgement at [47]:

What is required is (1) a knowing and intelligent awareness of the criminal proceedings and the charges being faced, and (2) an unequivocal intention (usually proved inferentially) not to participate in a trial or to escape prosecution.

These are not limbs used by the Supreme Court in *Bertino*. They were imputed onto the Supreme Court's decision by the court below. This 'test' was then adopted and applied several months later in a second Divisional Court case, *Zebracki v Regional Court in Torun, Poland* [2025] EWHC 2831 (Admin). In that case, Mr Justice Dias summarised the 'test' as follows at [56]:

Limb 1: "awareness".

The awareness of the existence of

(a) criminal proceedings and

(b) the nature and cause of the accusation (the charges);

Limb 2: "intention".

An intention to evade criminal proceedings established

(often inferentially) from the whole of the surrounding facts

from the conclusion that the individual has

(a) no intention to take part in the trial or

(b) wishes to escape prosecution.

Granted, a test in this formulation has its attractions. It enables an analysis of some of the principles set out in *Bertino*, which the *Zebracki* judgement then considers. For instance, it is right that intention to evade criminal proceedings can be established inferentially, but that a failure to notify a change of address is likely insufficient on its own to reach the threshold of an unequivocal waiver in most cases.

Nonetheless, I respectfully disagree with the learned Mr Justice Dias on this discrete point. No such thing exists as a '*Bertino* test', to use his language at [55]. The force of *Bertino* was not to establish a tick-box set of principles which, when followed, produced a conclusion of deliberate absence or otherwise. Rather, the Supreme Court appears to have sought to align English domestic extradition law with developments in Europe pronounced at Strasbourg. This was the force of finding that 'deliberate absence' must be read in light of evidence of unequivocally waiving one's Article 6 right.

Moreover, in any event, seeking to construct a 'test' for applying these definitions and precedents is a wild goose chase. As the Supreme Court themselves established, "precise boundaries of behaviour" would be unhelpful in such fact-specific cases. The *Zebracki* judgement appears later to acknowledge this fact, as Mr Justice Dias explicitly notes that "each case is fact-specific" [61]. It is therefore unclear, in light of this pressing need for a contextual view to be taken, why the Divisional Court seeks to impose the same "precise boundaries" which the Supreme Court rejected as inappropriate. I respectfully suggest, therefore, that the codification of the *Bertino* judgement into a short test is to oversimplify the complexity which these cases warrant and which these defendants deserve.

Hypothetical case study

A brief hypothetical scenario illustrates the problems with the strict formulation of a *Bertino* test. Imagine a requested person A whose partner was served with notice of a prosecution against A. A was not, at that time, living in the requesting country with his partner. Can the court infer that he was aware of the prosecution against him? Must the court examine the regularity of his phone calls with his partner, or their candour in sharing sensitive information? What about if that prosecution were for domestic violence? Might this affect the partner's willingness to contact the requested person? I appreciate the limitations of posing abstract 'what if' questions, but I suggest that this brief exercise illustrates the limitations of crystallising the nuanced and complex *Bertino* judgment into a concise checklist. *Mohammed* and *Zebracki* are similarly nuanced and complex, as are all extradition cases. They therefore deserve holistic and reasoned judicial treatment.

I am not suggesting that English courts do not and have not given cases such treatment. The judgements in *Mohammed* and *Zebracki* are otherwise clear and logical, and the conclusions reached appear sound. The critique is more with judicial method. Lower courts must interpret Supreme Court decisions and apply them appropriately, but their leash is short. Imputing the creation of a *Bertino* test for deliberate absence strains at this leash. It is dangerous because it has the potential to produce unintended consequences by obfuscating the specific considerations in each individual case. A one-size-fits-all test is not the most effective mechanism for upholding the high standard to which we rightly hold our judicial process, in extradition and across the law.

Conclusion

In conclusion, s.20(3) Extradition Act 2003 is not a straightforward provision. Despite its superficially clear and uncontroversial language of 'deliberate absence', difficulties arise when unpicking that definition and applying it to the facts of individual cases. The Supreme Court in *Bertino* made important and necessary progress towards clearer guidance for the courts below. It aligned English domestic extradition law with the jurisprudence of the European Court of Human Rights at Strasbourg. It would, however, be a mistake to see *Bertino* as creating a rigid and simplistic test which should be used to evaluate all cases where deliberate absence is relevant. Recent attempts by the Divisional Court to impute such a test onto *Bertino* are, in my contention, erroneous. They appear contrary to the tenor of the *Bertino* judgement, that each case should be tried on its individual, specific and contextual facts by leaving open precise boundaries of behaviour. These cases have serious doctrinal ramifications for extradition law. Obscurity produces inconsistency, and inconsistency breeds injustice. Especially now, when politicians propose withdrawal from the ECHR, the courts should be a bastion of fairness, cross-border collaboration and contextual decision-making. This is perhaps especially prescient in an area of law such as extradition, where mutual co-operation and sensitivity underpin the dispensation of justice between nations. These principles and the protection of individuals should not be curtailed by the courts, but rather protected.

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Afterword

By Saif Siddiqui, GELLB2

Editor-In-Chief, City Law Review Volume VIII

As this volume comes to a close, what stands out is how often the law is being asked to deal with situations that don't fit neatly within it - where applying it becomes as much about judgment as it is about doctrine. Across very different areas, there's a consistent pressure on legal frameworks to provide clarity in contexts that are complex, fast-moving, and often uncertain.

The pieces in this edition reflect that reality in different ways. Some test the limits of existing doctrine. Others question whether those frameworks still hold. Taken together, they show a legal system still trying to keep pace with the challenges placed before it.

That tension runs through much of the work here. The gap between principle and outcome isn't unusual - it's something that keeps coming up. Working on this volume made that increasingly clear. Dealing with that gap is part of what makes legal scholarship meaningful in the first place.

This volume doesn't settle those questions, and it shouldn't. What it does is take them seriously - and push them forward.

—Saif SiddiquiEditor-in-Chief*The City Law Review, Volume VIII*

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